

Sri Dwarikanath Chowdhury and Others Vs Sri Sadananda Chowdhury and Others

Court: Calcutta High Court

Date of Decision: April 25, 2002

Acts Referred: Calcutta High Court Civil Rules, 1935 " Rule 208

Civil Procedure Code, 1908 (CPC) " Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 103, Order 21 Rule 104

Constitution of India, 1950 " Article 21, 227

Citation: (2003) 1 CALLT 332 : (2003) 2 CHN 340 : (2002) 2 ILR (Cal) 65

Hon'ble Judges: Pratap Kumar Ray, J

Bench: Single Bench

Advocate: Sankar Mukherjee and Samir Kr. Datta, for the Appellant; Jyotirmoy Bhattacharya, Gurudas Mitra and Keshav Dutta, for the Respondent

Final Decision: Allowed

Judgement

P.K. Ray, J.

In this application under Article 227 of the Constitution of India, defendants/petitioners have challenged the Order dated 10th

December 2001 passed by learned 7th Court of Additional District Judge at Alipore in Civil Revision No. 398 of 2001 whereby and whereunder

Civil revisional Application was dismissed and the order dated 20th June 2001 passed by learned Civil Judge, Senior Division, 5th Court at

Alipore in title execution Case No. of 1989 was affirmed whereby learned Civil Judge, Senior Division aforesaid dismissed the application of the

judgment debtor who prayed for recalling the order of police help as was allowed in favour of the decree holder in execution of the decree upto

entertaining the application under Rule 208 of the Civil Rules and Orders of the High Court of Calcutta. Though this application in fact is a second

revisional application challenging the order of lower Revisional Court under the guise of Article 227 of the Constitution of India, which as per

settled legal position of the Court is entertainable only in rarest to rare cases, the point of law as urged before this Court, this Court has considered

the same as rarest to rare cases and accordingly this application under Article 227 is maintainable. A basic constitutional point is involved in this

matter namely principle of audi alterem partem that is the natural justice principle, which is the basic fundamental law in terms of the constitutional

mandate whether has applicability under Rule 208 aforesaid. For appreciation point of law, the factual matrix of the case in short is required to be

considered first.

2. After tooth and nail contest even up to the apex Court an eviction decree was crystallized in favour of the plaintiff opposite parties herein. It was

placed for execution under title execution Case No. 6 of 1989. Judgment debtor initially resisted such execution by filing application u/s 38 of the

Code of Civil Procedure, taking jurisdictional point, but same was rejected by the learned Executing Court below and order was passed to

execute the writ of possession through Court against which a Civil Revisional case was filed and same faced dismissal. Judgment debtor filed an

application under Rule 208 of Civil Rules and Orders of the High Court at Calcutta hereinafter refer to for brevity as Civil Rules and Orders

alleging, inter alia, that the judgment debtor since resisted. The Court beliff to take possession of the suit premises in pursuance of the order of the

Court resulting a breach of peace, necessary police help would be allowed to execute the decree for recovery of possession. This application was

heard ex-parte by the learned executing Court below and an order dated 28th February 2001 granting police help was passed for the purpose of

execution of the writ. An application for recalling the said order dated 20th August 2001 was filed by the judgment debtor, contending, inter alia,

that the said order dated 28th February, 2001 passed by learned Executing Court was an ex-parte order without even service of copy of said

application and on other ground that beliff was not examined with reference to his report in which he alleged submitted that the judgment debtor

resisted the belief under threat of dire consequences. It was further contended in that application for recalling of the ex-parte order granting police

help that the application was not maintainable as there was a specific provision under the CPC under Order 21 Rule 97 to deal with the situation as

alleged in the application by the decree holder and the said provision provides opportunity of hearing to the judgment debtor who allegedly

opposed and/or resisted the beliff to execute the writ regarding delivery of possession. This application was rejected by the learned Executing

Court, holding, inter alia, that under the aforesaid Rule 208 of Civil Rules and orders, there was no question of hearing the judgment debtor before

passing any order of police help and as such there was no illegality in the order in question. Challenging the said order dated 28th February 2001,

Civil .Revision No. 398 of 2001 was preferred before the learned Court of Additional District Judge, 7th Court at Alipore, which was dismissed

and the order of learned Executing Court rejecting the application to recall the order dated 28th June 2001 was affirmed. Learned Revisional

Court below also held that under Rule 208 of the Civil Rules and Orders, there was no necessity of serving any notice to the judgment debtor and

hearing to the judgment debtor even if under identical facts, judgment debtor is entitled to have a hearing in the event of adjudication of any

application under Order 21 Rule 97 of the Civil Procedure Code. Against the order dated 10th December 2001 dismissing the civil revision case

by the learned Civil Revisional Court below, present application under Article 227 has been filed by the judgment debtor. Learned advocate for

the petitioner submitted that the application for police help as filed by the decree holder alleging resistance to the beliff and creating of a problem of

peace ,was in fact required to be filed under the provision of Order 21 Rule 97 of the Code of Civil Procedure, which provides, inter alia,

opportunity of hearing to the person concerned who resisted the beliff in executing the writ of the Court. It is further contended that there was no

materials before the learned Executing Court below to adjudicate the application under Rule 208 of the Civil Rules and Orders and the learned

Court below did not examine the beliff for his satisfaction that there was an emergent situation as would endanger the public peace unless such

Police protection was provided. It is vehemently submitted that petitioner has also the right under said Rule 208 to be heard. On the other hand,

learned advocate for the opposite parties contended, inter alia, that under Rule 208 of the said Civil Rules and Orders, there was no necessity of

hearing the judgment debtor or anybody else who would resist the execution of writ. It is contended that Order 21 Rule 97 of CPC has no

applicability in the present facts of the case. It is further submitted by the learned advocate of the opposite party that Order 21 Rule 97 of CPC

provides a situation wherein judgment debtor and/or anybody who would oppose or resist the execution of decree would be heard, but Rule 208

of Civil Rules and Orders is silent on issue of hearing to them. It provides that under emergent situation without hearing the person who resisted the

execution of writ, Police help to be provided to the decree holder for execution of the writ. It is further contended that there was no scope of

hearing to the person concerned who resisted or who would resist the execution of decree under the provision of Rule 208 of the Civil Rules and

Orders. Considering the rival contention of the parties, the relevant statutory provision namely Order 21 Rules 97, 98, 101, 105 and 106 of the

Civil Procedure Code, which provides an opportunity of hearing to the judgment debtor or any party who would resist the decree qua Rule 208 of

the Civil Rules and Orders are required to be dealt with. For effective adjudication of this case, the relevant provisions of the aforesaid two

provisions are quoted hereinbelow in extenso:

208. (1) A decree-holder praying for police help in execution shall state in his application the full reason thereof, supported, if required by an

affidavit. The Court may further examine the decree-holder of such other persons as it thinks fit touching the necessity of police help. If upon a

consideration of all the facts and circumstances, the presiding Judge is of the clear opinion that there are reasonable grounds to suppose that

execution will not be affected without serious danger to the public peace, he may, after recording his reason for so doing, make a request to the

Superintendent of Police of the District for such police aid as the letter may be able to give in the execution of the writ. It is to be understood that

the police help is to be regarded as an extreme step and it should not be recommended unless the Court is fully convinced of the existence of a

grave emergency.

(2) The requisition to the Superintendent of Police should state in brief the need for such aid, the number and rank of men required, the nature of

the process and the place where is to be executed. It will be for the Superintendent of Police to decide how best and when he will be in a position

to offer the help sought.

(a) Costs for police help shall be charged in executing decrees in cases where such help is considered necessary because of apprehensions of

violence or obstruction from the judgment debtor himself. The party concerned shall be ordered to deposit such costs for the service as the

Superintendent of Police may require under the Rules of the department.

(b) Costs for police aid shall not be levied in cases where police help is required because of conditions of a general character, such as the locality

being in a disturbed state or a class of people, similarly situated, being likely to make a common cause with the judgment debtor and resist

execution.

(c) In cases where a levy of costs is ordered, such costs shall be added to the costs of execution .

Note 1: It shall be the duty of the Court to decide in each case under which category it falls, that is whether police aid should be given under

Clause (a) above in which case the party as to deposit necessary costs or under Clause (b) in which case no costs are to be charged.

Note 2: Police aid shall not be requisitioned or taken in effecting the arrest of judgment-debtors unless it is clear that no other means will possibly

achieve the required result.

Order 21 Rule 97--(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in

execution of a decree is resisted or obstructed any person in obtaining possession of the property he may make an application to the Court

complaining of such resistance or obstruction.

(2) Where an application is made under Sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions

herein contained.

Rule 98. (1) Upon the determination of the questions referred to in Rule 101, the Court shall; in accordance with such determination and subject to

the provisions of Sub-rule(2),-

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application;

or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the

judgment debtor or by some other person at his instigation or on his behalf, or by any transferee, when such transfer was made during the

pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still

resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor, or any person acting

at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

Rule 101. All question (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an

application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court

dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in

any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Rule 105(1) The Court, before which an application under any of the foregoing rules of this order is pending, may fix a day for hearing of the

application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned to the applicant does not appear when the case is called on

for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear the Court may hear the

application ex-parte and pass such order as it thinks fit.

Rule 106(1) The applicant, against whom an order is made under sub-Rule (2) or Rule 105 or the opposite party against whom an order is passed

ex-parte under Sub-rule (3) of that rule or under Sub-rule (1) of the Rule 23 may apply to the Court to set aside the order, and if he satisfies the

Court that there was sufficient cause for his non appearances when the application was called on for hearing, the Court shall set aside the order on

such terms as to costs or otherwise as it thinks fit, and shall appoint the day for the further hearing of the application.

(2) No order shall be made on an application under Sub-rule (1) unless notice of the application has been served on the party.

(3) an application under Sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex-parte order, the

notice was not duly served, within thirty days from the date when the applicant had knowledge of the order"".

3. Civil Rules and Orders of High Court, Calcutta was framed and constituted in terms of the power vested to the High Court of Calcutta u/s 122

of the Code of Civil Procedure, 1908. Section 122 of the Old Code qua the amended Code there is no substantial change after the CPC came

into effect on incorporating many amendments. Section 122 of Civil Procedure Code, 1973 hereinafter refer to as Amended Code reads as

follows:

High Courts, not being the Court of a Judicial Commissioner, may from time to time after previous publication, make rules regulating their own

procedure and the procedure of the Civil Courts subject to their Superintendence, and may by such rules annul, alter or add to all or any of the

rules in the First Schedule.

4. u/s 2(1) of Amended Code, includes rules. Under Order 21 Rules 97 to 98, 101, 105, 106 after certain amendments by amended provision of

1973 and by the judicial pronouncement on the reflection of such amendment, those have provided exhaustive procedure as the Executing Court

would follow in the event of resistance to the execution of a decree either by judgment debtor or by any stranger that is the third party. On a

combined reading of the Order 21 Rule 97 up to the Rule 106 it appears that a procedural law following the principle of natural justice has been

prescribed whereby the party who would resist the execution of decree for any reason would be entitled to have an opportunity of hearing. Further

from the aforesaid provisions it appears that mere resistance ipso-facto relating to an execution of a decree either by a judgment debtor or a third

party would not allow the decree holder to pray for police help in the matter of execution of the decree even if the beliff is resisted to serve the writ

without giving any opportunity of hearing to them who resisted the execution process under the provisions of the statute as amended and in view of

the settled judgment of the apex Court. Even a third party stranger of a suit due to such resistance disentitled to have the opportunity of hearing and

when under a statute after hearing even in respect of the resistance as made by the judgment debtor and or the third party, the Court has been

vested with the power to pass any order including the order of execution of the decree with police help, the relevant provision of Civil Rule and

Orders under Rule 208 to be looked into the context of the amended provisions of the CPC as well as judgments on the principle of natural justice

to hear the party who would resist the execution of decree. Rule 208 aforesaid in the aforesaid context of amended provisions of the CPC read

with the judgment of the apex Court prima facie fouts the basic fibre of the principle of audi alterem partem in respect of the persons concerned

who would resist the execution of the decree who either may be a judgment debtor or a third party to the suit. Under Rule 208 of the Civil Rules

and Orders a discretion was vested to the Court to examine the decree holder or such other person would be deemed fit by the decision of the

Court to adjudicate the prayer of police help by using the word ""the Court may further examine"" , whereas under Order 21 Rule 97 there is a

specific provision by using the word ""the Court shall proceed to adjudicate upon the application in accordance with the provisions herein

contained"" which means in accordance with the provisions of Rule 101 which provides that all questions between the parties to a proceeding on an

application under Rule 97 or Rule 99 or their representative, relevant to the application, shall be determined by the Court while dealing with the

application. Further under Rule 98, on adjudication of the application file under Order 21 Rule 97 of the amended Court got the right to send the

judgment debtor and/or any person acting at his instigation and on his behalf, in civil prison, by order of detention. Under Rule 105 of Order 21, a

specific provision has been made which the hearing of the application to be made, which provides a clear opportunity of hearing the party, who

resisted the execution of the decree. Further under Order 21 of Rule 106 of the said code there is a provision of setting aside the ex-parte order.

Hence, from the amended provision of civil procedure code, it is ex facie clear that the right of a party even who resisted the execution of the

decree was fully protected by directing the Court to adjudicate the matter on hearing, the person against whom the police help to be allowed.

5. The amended provisions of CPC in the aforesaid terms, accordingly is based on principle of audi alterem partem which is the basic principle of

law. But under Rule 208 of the Civil Rules and Orders, it appears that there was no provision made providing a mandatory direction to the Court

to hear the party either the judgment debtor or a third party who resisted the execution of decree or against whom an application would be filed on

apprehending such resistance. Only a discretionary power was vested in the Court to hear the parties concerned who resisted the execution of the

decree. Hence, from analysis of both the two provisions namely Rule 208 of the Civil Rules and Orders qua Order 21 Rule 97 to 106 it is clear

that where under the Code in the first schedule a provision have been made to hear the parties even if a party may have resisted the execution of

the decree either being a judgment debtor and/or a third party by providing mandatory provisions of hearing and adjudication of the entire issue

and also providing necessary provision for setting aside such ex-parte adjudication if any, no such safeguards by way of mandatory provisions have

been made in Rule 208 of Civil Rules and Orders. Rule 208 of Civil Rules and Orders accordingly has allowed a Court of law to proceed ex-parte

against the persons concerned who resisted the execution of decree and/or on apprehension of such resistance and thereby the safeguards as have

been provided under Order 21 Rules 97 to 106 practically has been made nugatory either to the judgment debtor and/or a third party who would

resist or resisted the execution of decree. Though under Rule 208 of the Civil Rules and Orders, the same cannot be used sparingly but under

certain contingency as well as in a rarest to rare case when there would be an existence of a grave emergency, but it is quite natural that the litigant

decree holder may set up a case of such emergency for seeking an ex-parte order of police help to oust a judgment debtor and /or a third party

who would resist the execution of the decree upon making the aforesaid provisions of Order 21 Rules 97 to 106 nugatory. In the instant case, the

identical situation arose. The judgment debtor only relying upon the report of the beliff got a ex-parte order by applying the aforesaid Rule 208 of

Civil Rules and Orders and the learned Court below that is the Executing Court even did not examine the beliff for satisfaction as to whether there

was a grave emergency as would; justify the prayer of the decree holder for police help. The judgment debtor was not heard who resisted the

execution of decree as alleged in the application and beliff was not also examined and cross-examined. Hence it is clear that a decree holder may

set up and/or create a case for exercising the power under Rule 208 of the Civil Rules and Orders only for the purpose of making the procedural

law providing opportunity of hearing to the judgment debtor and/or create for the third party in the event of resistance of execution of a decree in

terms of Order 21 Rules 97 to 106, nugatory.

6. Hence, from the aforesaid analysis of both the procedures it appears before this Court that the Rule 208 of the Civil Rules and Orders, which

was a provision made prior to amendment of CPC in the year 1973 is to a certain extent, conflicting with the provision of the principle of natural

justice which is the basic fibre of administration of justice In terms of Order 21 Rule 97 read with other provisions therein up to Rule 106. u/s 122

of the Code of Civil Procedure, the High Court had the power to annul, alter or add to all or any of the rules in the first schedule of CPC but in the

instant case It appear that by Rule 208 of Civil Rules and Orders even the right of the resistant as required to be adjudicated by procedure of

Order 21 Rule 97 to 106 was taken away and thereby Court was vested with the uncanalised power to pass the necessary order of police help in

favour of the decree holder to oust the judgment debtor or the third party who resisted or may resist the execution of the decree. Such provision

accordingly is directly conflicts the rights as vested to the judgment debtor and/or third party in terms of Order 21 Rule 97 to 106. It is a basic

principle of law that nobody to be ousted by taking resort to arbitrary procedures and as such a safeguard was introduced by Order 21 Rules 97

to 106. Since the Rule 208 of the Civil; Rules and Orders was framed long before the amendment of the CPC protecting rights of the resistants in

execution of the decree, after amendment on interpretation of procedural under Order 21 of Civil Procedure Code, the judgment debtors and/or

the third party who are termed as resistant would not be deprived of from getting the identical treatment of hearing and adjudication of such, even if

any application is filed under Rule 208 of Civil Rules land Orders. It is a settled law that natural justice principle is imbedded in all the procedural

laws save and except where such principle is explicitly prohibited. In the instant case, there is no explicit provision under Rule 208 aforesaid

refusing the right of the judgment debtor and/or a third party who would resist the execution of decree and /or resisted execution of decree, to be

heard before facing any order of police help. On the contrary there is a provision with the language ""may"" whereby the Court was vested with the

power to hear them. Hence, taking into account of statutory rules under CPC providing the right to be heard even In the case of resistance in

execution of decree the principle of natural justice to be deemed as imbendded in Rule 208 of Civil Rules and Orders. It is settled law by the apex

Court judgment that the requirement of natural just to be read into statute unless specifically excluded explicitly or by necessary implication. In the

instant case, it appears that under Rule 208 there is no explicit exclusion of following the principle of natural justice namely hearing of affected party

in the event of passing any order of police help before such order is passed and by necessary implication also same is not appearing in the statute.

Reliance may be placed to the judgment passed in the case State Government Houseless Haryan Employees Association v. State of Karnataka &

Ors., reported in (2001)1 SCC 610 , a judgment relying upon the earlier three judgments of the apex Court in the case of Union of India (UOI)

Vs. Col. J.N. Sinha and Another, , Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, and C.B. Gautam Vs. Union of India

and Others, . In the aforesaid context, learned Court below was required to hear the judgment debtor against whom allegation was made about

resistance of execution of decree even the learned Executing Court was adjudicating the matter in terms of the application filed under Rule 208 of

the Civil Rules and Orders. Denial of such opportunity of hearing and adjudication of the objection of the Judgment debtor accordingly is ultra vires

to Article 21 of the Constitution of India which provides that nobody to be deprived of his life without any fair procedures of law. Applying the

doctrine of due process of law of American Constitution, which in fact has been borrowed and incorporated in the provisions of fundamental rights

and more particularly under Article 21 of the Constitution of India the opportunity of hearing of the judgment debtor and/or a third party who

resisted the execution of decree or against whom an application would be filed on apprehension of such resistance otherwise would be deprived of

their ""life"" without any fair procedures of law"" that is they would be ousted from the suit properties by taking the police help without adjudication of

their grievance if any which has been sanctioned to be done by Order 21 of the Civil Procedure Code. Having regard to the Constitutional

provision and principle of natural justice and also having regard to the fact that already under a statutory provision that is within the first schedule of

the Civil Procedure Code, a judgment debtor and/or a third party who would resist the decree or resisted the decree got the opportunity to have

adjudication of their such action and when they have right to pray for setting aside the ex-parte adjudication, the Rule 208 of Civil Rules and

Orders also to be harmoniously constructed in the said line protecting the interest of the judgment debtors and/or a third party. In that view of the

matter, the impugned decision granting police help is absolutely illegal as the same has taken away the right of the judgment debtor in terms of

Order 21 of the Civil Procedure Code, a statutory, right and a mandatory provision.

7. Hence, findings of the revisional Court below that there was no provision under Rule 208 of Civil Rules and Orders for giving opportunity of

hearing to the resistant is not legally sustainable and in that view of the matter, the impugned order herein is vitiated with gross illegality. Further

more, on a bare perusal of the application filed by the decree holder praying police help, it appears that the decree holder had set up a case for

such police help by alleging, inter alia, as follows in paragraphs 4 and 5 of his application:

4. That the said Court Belief as per order of the learned Court went to the suit property for delivery of khas possession to the decree holder by

evicting the judgment debtors on 15.3.2000. When the Court Belief called the judgment debtors and requested to vacate the suit premises, the

judgment debtors along with their family members assembled some outsiders and resisted the Court Belief to execute the writ of possession

forcibly. As a result a serious breach of peace will be happened.

5. That the judgment debtor are very dangerous persons for act of such illegal forcefully resistance by the judgment debtors the execution of writ

will not be performed normally.

8. On bare reading of the aforesaid contention as made In the application under Rule 208 of Civil Rules and Orders, it appears that the same was

nothing but an application in terms of Order 21 Rule 97 of Civil Procedure Code, 1973. In the application, there was no whisper about

endangering of public peace and existence of grave emergency, the application though was titled under Rule 208 of Civil Rules and Orders but in

fact the ingredients therein was for an application under Order 21 Rule 97 of Code of Civil Procedure, 1973. Furthermore, learned Executing

Court without examining the beliff and without his satisfaction as was required to be done for passing the order of police help namely satisfaction of

situation about endangering of public peace and grave emergency, passed an order directing police help. Hence, from the tenor of the application

as filed, it appears before this Court that the same was nothing but an application filed by decree holder under Order 21 Rule 97 of Civil

Procedure Code, 1973 and as such the present petitioner, the judgment debtor had the right to be heard and his case was required to be

adjudicated upon by allowing him to file objection if any. In that view of the matter the very application filed by the decree holder as an application

under Rule 208 of Civil Rules and Orders was not maintainable as there was no ingredients to satisfy the sine qua non of filing such. Learned

revisional Court below did not consider this aspect and thereby practically, a right, which is a valuable right under a statute namely Order 21 of the

Civil Procedure Code, 1973 as is available to the judgment debtor, the present petitioner, was infringed.

9. In that view of the matter and having regard to the aforesaid observation and my findings, I am of the opinion that the impugned order is

absolutely illegal and the learned Executing Court acted without jurisdiction. Hence, the impugned order passed by the lower Revisional Court

dated 10th September 2001 in Civil Revision No. 398 of 2001 as well as the order dated 20th June 2001 of the Executing Court in Title

Execution No., 6/98 whereby application for recalling of the ex-parte order was rejected and the order of the learned Executing Court dated 28th

February granting police help, all are set aside and quashed. The Court below is directed to hear the application filed by the decree holder for

police help considering the same as an application under Order 21 Rule 97 of the Civil Procedure Code, 1973 and to adjudicate the same

following the procedural law as laid down under Order 21 of the said Code. Such adjudication to be made within three months from the date of

communication of the order without granting any adjournment to any parties. Revisional application is accordingly allowed.

25.04.2002

Let urgent xerox certified copy of this order, if applied for, be given to the learned advocates appearing on behalf of the parties expeditiously.