

K.J. Pathare Vs. S.J. Pathare

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Court : Mumbai

Decided On : Dec-19-1969

Reported in : (1971)73BOMLR616

Judge : Vimadalal and ;Nathwani, JJ.

Appeal No. : Criminal Application No. 130 of 1969

Appellant : K.J. Pathare

Respondent : S.J. Pathare

Judgement :

Vimadalal, J.

1. This is a matter that has been forwarded to us by the Presidency Magistrate, 5th Court, Dadar, for taking action for contempt against the alleged contemnor. The facts necessary for the purpose of this judgment are that the applicant K, J. Pathare filed a complaint in the Court of the said Magistrate against the opponent S. J. Pathare and others for offences under Sections 406 and 380 of the Indian Penal Code. After some adjournments, when that case came up for hearing before the said Magistrate, on March 5, 1968, the parties came to terms and the opponent, who is now alleged to have committed the contempt, gave an undertaking to the Court that he would deposit Rs. 4,250 with interest thereon from January 27, 1967, at the rate of 9 per cent, per annum on or before July 10, 1968,

with the Deecan Co-operative Housing Society Ltd. In view of that , the complainant stated that he did not want to proceed with the case and the learned Magistrate passed an order discharging the contemnor and his co-accused. On October .14, 1968, the applicant filed an application in the Court of the said Magistrate stating that he had ascertained from the said Society that the opponent had failed to deposit the said sum of Rs. 4, 250 with that Society by July 10, 1968 as he had undertaken to do and he, therefore, prayed for action against the opponent under the Contempt of Courts Act. The opponent filed a written statement in answer to that application on January 7, 1969, in paras. 3 and 4 of which he stated that he was doing the business of manufacturing earthen bricks and expected to be able to pay the said mm of Rs. 4,250 with interest thereon as undertaken by him, but that on account of heavy and unexpected rains his raw material for the manufacture of bricks got completely washed out and he suffered loss to the tune of Rs. 15,000, and in para. 5 of that written statement he stated that on account of that financial Joss in business 'it went beyond my capacity and control to pay the said amount as per the undertaking given to the Court.' The learned Magistrate heard the advocates on both the sides and then passed an order on January 14, 1969 in which he stated that the opponent's statements in his written statement were merely an excuse for not carrying out the undertaking given by him to the Court, and that if the opponent had really suffered any loss as alleged, he should have approached the Court and stated that fact to it, instead of keeping quiet all along till the applicant filed this application on October 14, 1968. He, therefore, held that, the opponent had disobeyed the undertaking given to that Court and referred the matter to this Court for necessary action under the Contempt of Courts Act, 1952.

2. As it appeared to us that the matter needed a full argument, we gave time to the learned advocates on both sides for that purpose and it was ultimately argued before us yesterday. The first thing that I must proceed to consider is what is 'Contempt of Court,' an expression which curiously enough, is not defined by the Contempt of Courts Act, 1952. In Oswald on Contempt (3rd edn.), p. 1, it is stated that the legal acceptation of the term ' contempt' primarily signifies 'disrespect to that which is entitled to legal regard'. Oswald then proceeds to state, 'In its origin, all legal contempt will be found to consist in an offence more or less direct against

the Sovereign himself as the fountain-head of law and justice, or against his Palace, where justice was administered.' The learned author, however, then stated that he did not propose to deal in the said work with the primary species of contempt against the King personally, but proposed to consider only contempt, in its secondary or derivative aspect, as an offence against the Courts or persons to whom the judicial functions of the Crown were delegated, or, as it commonly called, 'Contempt of Court'. After discussing the precise connotation of that expression, it is stated in Oswald (p. 6) as follows:

To speak generally, Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation.

The decision of the Supreme Court in the case of *Debabanta v. State* : 1969 CriLJ401 was cited before us by Mr. Gambhirwala, but the actual decision in that case is of no assistance for the purpose of deciding the present case. The contempt in that case was not contempt of the nature of the contempt in the present case, but arose out of the alleged disobedience by a subordinate Court of the order of a superior Court. It is further pertinent to note that in the judgment of the Supreme Court there is, what might be called, an indirect definition of the expression 'contempt of Court'. It was stated in that judgment (para. 9) that it is only when a clear case of contumacious conduct not explainable otherwise, arises; that the contemnor must be punished. It would be a sad state of affairs, indeed, if the law of contempt obliged the Court to punish a man for an act which was beyond his control. The contempt in the present case is criminal contempt and reference to the provisions of civil law is inapposite. The principle of the law of contract that if a man chooses to answer for the voluntary act of a third person, and does not in terms limit his obligation to using his best endeavours, or the like, there is no reason in law or justice why he should not be held to warrant his ability to procure that act (*vide* Mulla's Contract Act, 8th edn., p. 350) has certainly no application to the case of a criminal offence. There are, however, certain provisions contained in the Code of Civil Procedure which are of assistance for the purpose of considering the question with which I am now dealing, viz., whether it is

only wilful or contumacious conduct that can amount to contempt. The provisions of Order XXI, Rule 32(1) of the Code of Civil Procedure which are analogous to an action for contempt might usefully be referred to. In Order XXI, Rule 32(1) it is laid down that where a decree, inter alia, for a permanent injunction has been passed, and the party against whom it has been passed has had an opportunity of obeying the decree, but has 'wilfully failed to obey it', the decree can be enforced by his detention in civil prison. It is only wilful disobedience that could justify the action contemplated by Order XXI, Rule 32(1). Even in the case of breach of a temporary injunction, it appears to be well-settled that a party cannot be punished under Order XXXIX, Rule 2(3), which is also a proceeding in the nature of contempt, if he has acted bona fide. Reference may also be made to proviso (b) of Section 51 of the Code of Civil Procedure which enacts that the Court must be satisfied, for reasons to be recorded in writing, that the judgment-debtor had the means to pay the amount of the decree and yet refused or neglected to do so, before a money decree could be executed by his arrest and detention in prison. Under these provisions of civil law, therefore, it is clear that proceedings in the nature of contempt can be adopted only in the case of wilful or contumacious disobedience of orders or decrees of Court.

3. Mr. Gambhirwala then cited the decision of a Division Bench of the Calcutta High Court in the case of Suretennessa, Bibi v. Chintaharan Das : AIR1955 Cal182 before us, but in my opinion, the said case is clearly distinguishable on facts. The facts of that case were that in an appeal from an order of ejectment which was pending before the High Court, a joint petition of compromise was filed by the parties whereby the tenant gave an undertaking to the Court which was unconditional and unqualified that he would vacate the premises on a particular date, and the appeal was disposed of in terms of the petition of compromise under the provisions of Order XXIII, Rule 3 of the Code of Civil Procedure. The tenant however failed to give vacant possession on the named date. It was his contention that he had sub-let a considerable part of the premises long before the institution of the ejectment suit itself and it was, therefore, not possible for him to give vacant possession on the named date. With regard to that contention, it was observed by the Court (para. 3) that, if that contention were correct, the alleged contemnor had fraudulently suppressed that fact from the Court when he gave the undertaking to

vacate the premises by a particular date, and held that the tenant was guilty of breach of the undertaking given to the Court which amounted to contempt of Court. Mr. Gambhirwala sought to contend that, in the said case also, though it was impossible for the tenant to carry out his undertaking, he was held liable for the contempt, and the same view should be taken in the case before Rs. The important point on which the decision of the Calcutta High Court must be distinguished however is that the existence of the sub-tenant was not a fact which supervened subsequent to the giving of the undertaking, but was a fact which existed even prior to the giving of the undertaking to the Court and had been suppressed from the Court. The position in the case before us, on the other hand, is not only that there is a subsequently supervening state of affairs, viz., substantial loss in the business alleged by the contemnor, but that, that is a matter which was beyond his own control, which was not the position before the Calcutta High Court. The decision of the Calcutta High Court in *Sure-tennessa, Bibi's* case is, therefore, not applicable to the facts of the present case.

4. It may, at this stage, be clarified that a breach of an undertaking given to the Court is on the same footing as disobedience of an order of the Court, as far as the question of contempt is concerned. A reference to Halsbury's Laws of England, 3rd edn., Vol. VIII, para. 54, at page 30, and Oswald on Contempt, 3rd edn. pages 117-118, shows that both the breach of an undertaking given to the Court as well as disobedience of an order of the Court have been treated by Courts of law on the same footing. In the case of *Jayantilal v. Waman* : (1932)34BOMLR1410 , a question of contempt arose in respect of disobedience of the order of the Court by the person who had been appointed Receiver of the estate in an administration suit. It was observed in the judgment by Blackwell J. in the said case (pp. 1423-34) that it was not disputed that the High Court has inherited the power of English Courts as far as the power to commit for breach of its order was concerned, and that the contention of the learned Advocate General in the said case was that no power to commit for contempt existed where the breach of the order complained was a failure to pay a sum of money, but the said principle had no application where the Court was called upon to punish, in proceedings for contempt, one of its officers for failure to comply with the Court's order, even if it did amount to failure to comply with an order to pay money. A reference to the facts of the said case

shows (p. 1419) that, in that case also, failure to pay money was sought to be explained by the respondent on the ground of temporary inability to pay.

5. The result of the discussion of the above authorities is that, in order to amount to contempt of Court and to be punishable as such, the mere breach of an undertaking given to, or disobedience of the order passed by, the Court is not enough. It must further be proved that the breach or disobedience was wilful or contumacious and the act of the contemnor, therefore, signified disrespect to the Court. It may be stated that the position in English law is somewhat complicated by the express statutory provisions in Sections 4 and 5 of the Debtors Act, 1869, as can be seen from the statement of law on the point by Oswald on Contempt and the relevant Chapter in Vol. VIII of Halsbury's Laws of England, 3rd edn. A reference to English cases is, therefore, not of assistance for the purpose of the decision of the present matter.

6. We are concerned in the present case with the breach of an undertaking to pay or deposit money, and I will, therefore, proceed to discuss in this judgment the application of law as stated above only in regard to breach of the said undertaking and do not propose to deal with the breach of undertakings which do not relate to the payment of money. In order to prove contempt of Court in respect of such undertakings, two things must be proved, viz., (1) breach of the undertaking, and (2) that the alleged contemnor had, at the time the undertaking was to be carried out the means to pay the amount in question, but has wilfully or contumaciously refused to pay the same. The application that the contemnor should be punished for contempt that has been made in the present case itself does not contain any averment that the contemnor had, at the material time, the means to pay the amount in question. In his written statement filed in answer to that application, as already stated above, the contemnor has expressly pleaded his incapacity to make payment at the material time. The learned Magistrate has, however, instead of giving directions for evidence being taken before him, either on affidavits or otherwise, and proceeding to investigate the question as to whether the contemnor had, at the time when the undertaking was to be carried out, the means to pay the amount in question, proceeded straightaway to pass the order dated January 14, 1969 forwarding the case to this Court for necessary action for contempt. The

learned Magistrate no doubt refers in his judgment to the plea of the contemnor and states that he has heard the advocates on both sides, but, in; my opinion, the arguments of advocates are, not evidence on which he could have acted without any other material being placed before him on the point mentioned above. I do not say that the material which the learned Magistrate, should have directed to be placed before him must always be in the nature of oral evidence. As was pointed out by a Division Bench of the Lahore High Court in the case of Nand Lal Bhalla v. Kishori Lal (1940) Cri. L. J. 757, it is usually in the form of affidavits. Moreover, in the present case, the most important evidence would be documentary evidence such as, the bank pass-book showing the balance in the account of the contemnor at the material time, as well as his books of account and his income-tax returns, for the purpose of determining his financial position on or about July 10, 1968, i.e. at the time when the undertaking Was to be carried out by him. It is only if the Magistrate comes to the conclusion that, in his opinion, a contempt of Court appears to have been committed that he should refer the matter to the High Court for necessary action under the Contempt of Courts Act, and I am constrained to observe that Magistrates should not act merely as post offices to forward cases of alleged contempt of Court to the High Court.

7. It was next contended by Mr. Gambhirwala that if the matter is reheard mid the alleged contemnor is ultimately 'let off', it would create an awkward situation, because it was on the faith of the undertaking given by the accused that the Court passed the order dated March 5, 1968 that he should be discharged. For that situation, however, the applicant, who was the original complainant in the case, as well as the trial Magistrate, are themselves to blame. The learned Magistrate has, in his order dated March 5, 1968, stated that in view of the undertaking- given by the contemnor, the complainant did not want to proceed with the said case. The applicant (the complainant) should not have made that statement merely on an undertaking given by the contemnor which may or may not be carried out. The learned Magistrate, on the other hand, should not have proceeded to pass an order of discharge on the faith of that undertaking, but should have adjourned the case till the undertaking was carried out on the appropriate date, in order to avoid the situation which has actually arisen in this case. Magistrates should not be in a hurry to 'earn disposals' in the periodical returns submitted by them to this Court

by persuading parties to withdraw cases on mere undertakings. This is, unfortunately, what has been happening in almost every such case. A Division Bench consisting of my brothers Chitale and Apte have, in a similar case, *Navinchandra A. Shah v. Roshan Wadhera* (1969) Criminal Application No. 249 of 1969, decided by Chitale and Apte JJ., on April 22, 1969 (Unrep.), also observed that it was desirable that compounding should be allowed only after the terms arrived at between the parties were carried out, and not merely on an undertaking, as in the case before them. I fully endorse the view taken by the Division Bench in the said case.

8. In the result, in my opinion, this matter should be sent back to the learned Magistrate for the purpose of determining, on proper evidence, whether on affidavit or otherwise, whether the contemnor had, on July 10, 1968, the means to pay the sum of Rs. 4,250 with interest so as to be able to carry out the undertaking given by him to the Court.

Nathwani, J.

9. I respectfully agree with the order just now made by my brother. The facts are already referred to by my brother in his judgment but before dealing with them and giving my reasons in support of the said order, I may refer to the law and procedure relating to contempt of Court. Relevant provisions are Sections 3 and 4 of the Contempt of Courts Act, 1952 (hereinafter referred to as the Act). Section 3(1) provides that subject to the provisions of Sub-section (2) every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to it as it has and exercises in respect of contempts of itself. Sub-section (2) excludes the jurisdiction of the High Court to take cognizance of a contempt of a subordinate Court where such contempt is an offence punishable under the Indian Penal Code. Section 4 of the Act limits the punishment for contempt to simple imprisonment for six months or fine upto two thousand rupees or with both. First proviso to Section 4 empowers the Court to discharge the accused or remit the punishment on apology being made to the satisfaction of the Court.

10. It will be seen that Section 3 of the Act merely recognizes and defines the powers of the High Court to punish the contempts of itself and subordinate Courts. The Act does not define 'contempt of Court.' However, as stated in Oswald's treatise 'Contempt of Court' (1911 ed. p. 5) it may be defined or described:

to be a disobedience to the Court, an opposing or a' despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or net doing what he is commanded or required by the process, order, or decree of the Court.

As regards the object underlying contempt proceedings, the Supreme Court, in *Brahma Prakash Sharma v. The State of Utter Pradesh* : 1954 CriLJ238 , reiterated it as follows (p. 1176) :the object of contempt proceedings ... is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.

11. Having regard to the above object of contempt proceedings it is apparent that the criminal Courts should not accept an undertaking from the accused person for payment of money to the complainant for recovery of which the latter has his remedy in a civil Court and thus allow the complainant to use the machinery of contempt proceedings for enforcing his private right to recover the amount from the accused.

12. Next, it would have been seen from the provisions of Section 3(1) of the Act that the High Court in exercising- its jurisdiction to commit contempts of subordinate Courts has to observe the same practice and procedure as it follows in dealing with its own contempts. As the jurisdiction to commit for contempt is of a special nature contempt proceedings are of a summary character and they are, generally, disposed of on affidavit evidence, though the Court may in its discretion take oral evidence when facts on which the alleged contempt is based are disputed. The procedure and practice of this Court on the Original Side, therefore, requires an aggrieved party to make an application in Court by a Notice of Motion and support it by affidavit setting out the facts constituting the alleged contempt, and, that on the Appellate Side, to file a duly declared petition. As regards the

petition, it is necessary to mention that Rule 6 of Chapter III of the Appellate Side Rules of this Court provides that a declaration on oath or solemn affirmation below the petition declaring that the facts stated in the petition are true to the best of petitioner's own knowledge or belief would be sufficient compliance of the requirement of a separate affidavit, unless otherwise ordered by the Court. Therefore, when a subordinate Court holds an enquiry into an alleged contempt of Court it requires the parties to state their respective facts on affidavit, and if it is satisfied that a prima facie case is made out against the alleged contemnor it submits to this Court a report along with the record and proceedings of the case with a request for taking appropriate action against him under the Act.

13. It is also well settled that a breach of an undertaking given to the Court by a person in pending proceedings on the faith of which the Court sanctions a particular course of action or inaction, is misconduct amounting to contempt. The Court will, however, before committing a contemnor for a breach of an undertaking take into consideration the circumstances in which it was committed; and the question whether the non-compliance of the undertaking was intentional or not is always relevant. When, therefore, a breach of an undertaking is admitted or proved it is open to the contemnor to show that he could not carry out the undertaking on account of circumstances beyond his control and the breach was, therefore, unintentional. In such a case the breach committed is a contempt in theory only.

14. Coming to the facts of the present case, the accused in his written statement, in the Court of the learned Presidency Magistrate did not dispute that he had failed to pay the money as per his undertaking given to the Court but he rather vaguely alleged financial loss in his business for not fulfilling the said undertaking. Now, he ought to have substantiated his said allegation by filing an affidavit giving the particulars of such alleged loss which supervened after he gave the undertaking and prevented him from complying with the undertaking. But he did not file any affidavit nor did he ask at the hearing of the application for an opportunity to lead evidence to prove his alleged loss in business and consequent financial difficulty. In view of these circumstances I was at one stage inclined not to remand the case but to deal with it on the , footing that by breach of his said undertaking the

accused had committed contempt of Court which deserved to be punished. The learned Presidency Magistrate, however, appears to have thought that even in the absence of any affidavit evidence by the accused, his plea of financial difficulty could be considered and, as is evident from his order, he heard the arguments of the parties in this connection without insisting upon the accused filing an affidavit setting out the facts sought to be relied upon by him and held that the excuse given by the accused was imaginary. I think that under the circumstances it is fair that the accused should be given an opportunity to substantiate his allegation of subsequent loss in business and consequent inability to pay the amount as per his undertaking. The case is, therefore, sent back to the learned Presidency Magistrate who will dispose of the same in the light of the observations made by us.

15. P.C.: The case is sent back to the learned Magistrate for the purpose of determining whether the contemnor had, on the material date, viz. July 10, 1968, the means to deposit the amount in accordance with the undertaking given by him. In the event of its appearing to the learned Magistrate that there is contempt of Court committed by the contemnor, he should forward the papers to this Court together with his Report within three months after receipt by him of this judgment.