

State Vs. Nityananda Mohapatra

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SooperKanoon Citation : sooperkanoon.com/526402

Court : Orissa

Decided On : Dec-18-1959

Reported in : AIR1960Ori132; 26(1960)CLT116; 1960CriLJ1120

Judge : J.K. Misra, J.

Acts : Contempt of Courts Act, 1952 - Sections 3 and 4

Appeal No. : Original Criminal Misc. Case No. 1 of 1959

Appellant : State

Respondent : Nityananda Mohapatra

Advocate for Def. : Srinivas Misra and ;C.V. Murthy, Advs.

Advocate for Pet/Ap. : Govt. Adv.

Judgement :

ORDER

J.K. Misra, J.

1. Shri Nityananda Mohapatra, who is a member of the Orissa Legislative Assembly, has been hauled up for contempt at the instance of this Court. The background which led to the said contempt proceeding may briefly be stated. In March 1958, elections were held for the Cuttack Municipality and one Shri

Mahendra Kumar Sahu was elected as the Vice-Chairman. The validity of the said Municipal elections was challenged by one Shri Bhupendra Kumar Bose and by an order dated 11-12-58 in O. J. C. No. 72 of 1958, this Court declared the elections invalid and issued a direction to the Municipal councillors restraining them from functioning as such.

Consequential thereto, under the orders of the State Government under Section 404 of the Orissa Municipal Act, the District Magistrate of Cuttack took over the administration of the Municipality and remained in charge till 15-1-59. On that date, an Ordinance was passed by the Governor of Orissa validating the said Municipal Elections, notwithstanding the decision of this Court in O. J. C. No. 72 of 1958. Following the Ordinance, the next day, the District Magistrate, Cuttack handed over charge of the Municipality to the Chairman and the Councillors.

Thereupon, on 21-1-59, Shri Bhupendra Kumar Bose (petitioner in O. J. C. No. 72 of 1958) filed a writ petition (O. J. C. No. 12 of 1959) challenging the validity of the ordinance. He also prayed for an injunction restraining the councillors from functioning as such. On 22-1-59 this application was placed before a Special Bench consisting of 3 judges and an interim order of injunction was issued. Two days thereafter, on an objection raised by the Advocate General on behalf of the State of Orissa, a supplementary and ancillary order was passed by the said Special Bench directing the Government of Orissa to carry on the municipal administration through the District Magistrate, and the State Government issued a notification that very day authorising the District Magistrate to exercise all the powers of the municipal councillors and to carry on the administration.

Thereupon Shri Mahendra Kumar Sahu, the Vice-Chairman of the municipality filed a writ petition on 29-1-59 (O. J. C. No. 15 of 1959) challenging the validity of the aforesaid notification of the State Government and praying for an interim relief. This petition was placed before a Division Bench, one of the members of which was Mr. Justice Rao and the other member was Mr. Justice Barman, the former being a member of the Special Bench, which was dealing with O. J. C. No. 12 of 1959. On 30-1-59, Mr. Justice Rao observed (in O. J. C. No. 15 of 1959) that the writ petition of Shri Mahendra Kumar Sahu should be put up before the Special

Bench which was dealing with the other writ petition, since both were interconnected.

Mr. Justice Barman recorded an order expressing his tentative opinion that the ordinance was *intra vires*, and that the petitioner (Mahendra Kumar Sahu) had a *prima facie* right to continue as the Vice-Chairman and for such an opinion he indicated certain reasons in the said order. At the same time, he thought that any such order, if issued by the Division Bench might be contradictory to the order issued by the Special Bench and might render the conflicting orders incapable of being enforced. With these observations, he agreed with Mr. Justice Rao that the petition should be placed before the Special Bench. On 3-2-59, the Special Bench confirmed the interim injunction issued earlier and indicated its disapproval of Mr. Justice Barman's observations about the validity of the ordinance, which question, it thought, did not strictly arise before Mr. Justice Barman.

It is on this background, on 2-3-59, Shri Mohapatra, the contemner in the present proceeding, filed a petition before this Court asking the Court to proceed against Mr. Justice Barman and the Editor and Publisher of a particular newspaper, who had published a substantial portion of Mr. Justice Barman's order of 30-1-59, for contempt. On the very day, the contemner filed a memo stating that on second thoughts he decided not to press the petition against Mr. Justice Barman; but this memo was not taken any notice of, since it had been supported by no affidavit. Being of the view that the petition, in so far as it related to Mr. Justice Barman, was clearly misconceived, the Court passed orders calling upon Shri Mohapatra why he should not be hauled up for contempt. Shri Mohapatra filed an affidavit on 30-3-59 explaining his conduct which was not accepted by the Court and so the actual contempt proceeding was started and in answer to the said proceeding, he filed another affidavit on 22-6-59.

2. The substance of the contemner's petition for proceeding against Mr. Justice Barman in contempt is as follows: That the question of validity of the ordinance was not directly at issue before the Division Bench; that during the hearing of the admission matter (in O. J. C. No. 15 of 1959) Mr. Justice Barman observed that the Special Bench was the real opposite party in the petition, and he further

observed that 'as he has got a chance to express his views on the validity or otherwise of the ordinance he must not lose the opportunity'; that while Mr. Justice Barman agreed with Mr. Justice Rao that the petition should be placed before the Special Bench, since it was intimately connected with the other O. C. J., he passed 'a lengthy order expressing his views on the validity of the ordinance' and in doing so, Mr. Justice Barman 'went out of his way'; that had Mr. Justice Barman

'passed these remarks when, called upon to do so in discharge of his duties, there could be nothing to take objections to them, but as it is, the remarks have been made with a view to expressing an opinion on a matter which was not legally before his Lordship'; 'that the usual procedure in this Hon'ble Court is to assign no reason, far less a detailed one, in cases of admission except such short orders as are necessary in a particular case. The order passed by his Lordship Mr. Justice Barman is unusual and would in effect embarrass the Justices of the Hon'ble Court, finally hearing the matter concerning the validity of Ordinance No. 1 of 1959'; 'that these observations by his Lordship Mr. Justice Barman will tend to create a precedent where any Judge of a High Court can pass remarks both oral and in writing on matters pending before other Benches of the same Court, even though such remarks are not necessary for the disposal of the matter'; 'Of course there is no precedent of a contempt proceeding against a justice of a Court of record, so far as the petitioner is able to find out. But the petitioner submits, perhaps there is no precedent for such observations as are made by his Lordship the Hon'ble Justice Barman'; that the petitioner 'has tabled a motion in the Orissa Legislative Assembly for a resolution disapproving Ordinance No. 1 of 1959 and the petitioner feels that these observations by his Lordship Mr. Justice Barman have also a tendency to prejudice the said motion.'

3. The contemner does not plead in his defence that the conduct of Mr. Justice Barman in making the observations that he did, either orally or in writing, did amount to any contempt of Court. It was rightly observed by this Court in initiating the contempt proceeding against the contemner,

'Every Judge of this Court is free to make observations he chooses while passing judicial orders subject, of course, to such self-imposed restrictions as he may care

to follow. Similarly, the other Judges of this Court are equally entitled to give such weight, as they may choose, to those observations.'

Mr. Justice Barman referred to the Ordinance and recorded a tentative opinion about its validity, feeling that the validity of the Ordinance was intimately connected with the writ petition before the Division Bench. Different opinion may be, and has in fact really been, taken by the Special Bench on that score. But whether such a reference to the Ordinance was necessary or not, was within the sole discretion of Mr. Justice Barman, and even though the validity of the Ordinance was directly in issue before another Bench, Mr. Justice Barman could, in no way, be conceived of being guilty of contempt of that Bench, for recording his opinion. The same matter may come, directly or indirectly, for consideration before different Courts in different manners and each Court is competent to deal with that matter in the way it likes, irrespective of the fact that that matter might be pending decision elsewhere.

So, there could be no question of Mr. Justice Barman being prosecuted for contempt for all that he said or recorded, while hearing the admissibility of the writ petition in O. J. C. No. 15 of 1959. The contemner's defence is (i) that his petition did not amount to anything else but a fair and bona fide criticism of Mr. Justice Barman's act and order; (ii) that the mere filing of a petition without any desire to condemn and attributing no improper motive to Mr. Justice Barman did not amount to any contempt; (iii) that if it amounted to contempt of Mr. Justice Barman, or for that matter of the High Court, it was too negligible to be taken notice of; (iv) that his petition referred to the past conduct of a Judge who was no longer in seisin of the case and so did not amount to any contempt; (v) that the contemner is entitled to benefit of doubt, since he had stated in his petition that he was in honest doubt as to if a Judge of the High Court could be proceeded against for contempt; and (vi) that even if the contemner's conduct amounted to contempt, the apology offered by him should be accepted.

4. The present type of contempt, if so, is one of the nature of scandalisation of Judges. In *Andre Paul v. Attorney General of Trinidad and Tobago*, AIR 1936 PC 141, their Lordships observed,

'Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which is characterised as 'scandalising a Court or a Judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. Whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrongheaded are permitted to err thereto; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune.'

The same principle has been expressed in the following words by the Supreme Court in *Brahma Prakash v. State of U. P.*, AIR 1954 SC 10:

'There are two primary considerations which should weigh with the Court when it is called upon to exercise the summary powers in cases of contempt committed by 'scandalising' the Court itself. In the first place, the reflection on the conduct or character of a Judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in Courts can be created. In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the Judge and what amounts really to contempt of court.

The fact that a statement is defamatory so far the Judge is concerned, does not necessarily make it a contempt. A defamatory attack on a Judge may be a libel so far as the Judge is concerned and it would be open to him to proceed against the libeller in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such Court, it can be punished summarily as contempt. One is a wrong done to the Judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.'

The substance of the contemner's petition has to be judged in the light of the aforesaid observations. The essence of what he has said in his petition is that Mr. Justice Barman expressed, in course of hearing of the admission matter, that he had got a chance to express his opinion on the Ordinance and he must not lose that opportunity; that though in admission matters Courts record very brief orders, Mr. Justice Barman acted unusually and recorded a lengthy order; that Mr. Justice Barman actually and deliberately went out of his way to express his opinion on the validity of the Ordinance; that such conduct of Mr. Justice Barman was unusual and unprecedented; and that Mr. Justice Barman was guilty of obstructing free flow of justice (vide para 2 of the petition). No doubt, no particular motive was attributed to Mr. Justice Barman for doing what he was alleged to have done; but the insinuations were too clear and emphatic that Mr. Justice Barman conducted himself unworthily as a Judge.

Such remarks would tend to create an apprehension in the minds of the public regarding the fairness and ability, if not integrity, of Mr. Justice Barman and would likely cause embarrassment in the mind of Mr. Justice Barman himself in the

discharge of his judicial duties. If the contemner would have merely expressed that the circumstances of the case did not call for expression of any opinion of Mr. Justice Barman on the validity of the Ordinance, that would possibly come within the ambit of fair and bona fide criticism. But to say that Mr. Justice Barman wanted to seize an opportunity for that purpose and deliberately went out of his way, and that in the most unusual manner, and thereby there was an obstruction of the flow of justice, cannot, by any means be conceived to come within the limits of a fair criticism.

It was sought to be urged that the contemner acted bona fide since observations were made by the Special Bench that Mr. Justice Barman should not have passed any opinion on the validity of the Ordinance. As I have said, if the contemner would have been satisfied with that type of criticism, that would not have possibly taken any exception to; but his comments were rabid, scandalising Mr. Justice Barman in respect of his fairness and ability as a Judge. The act of the contemner in proceeding against Mr. Justice Barman in a case of contempt was a further step towards such scandalisation. So, I have no hesitation to hold that the contents of the petition and the act of filing such a petition both together could not come within the limits of any fair and bona fide criticism or action.

5. The next defence contention is that since the contemner's criticism was in the form of a petition, without any desire to contempt and attributing no improper motive to Mr. Justice Barman, it did not amount to contempt. If the intention of a man is measured by his action, then it could not legitimately be said that the contemner had no intention of contempting Mr. Justice Barman. In any case, intention of the contemner is no measure of whether an offence of contempt has really been committed. It has been observed in *Superintendent and Remembrancer of Legal Affairs, Bihar v. Murali Manohar Prasad*, AIR 1941 Pat 185:

'The question of intention is irrelevant in considering whether the offence has been committed, though of course it is a most important matter in considering the appropriate sentence to be imposed.'

It was held in *Emperor v. Khushal Chand*, AIR 1945 Lah 206:

'A person may be guilty of contempt even though there was no intention to commit contempt. The question in such cases is not what was the intention of the offender but what was the effect of the publication.'

The view taken in *State v. Editors and Publishers of Eastern Times and Prajatantra*, AIR 1952 Orissa 318, is:

'The essence of the offence of contempt lies on the tendency to interfere with the due course of justice, and motive, good faith or absence of knowledge of the tendency are immaterial'.

The same view was reiterated in *Surendra Mohanty v. Nabakrishna Choudhury*, ILR (1958) Cut 195: (AIR 1958 Orissa 168), where it was said:

'In cases of contempt, it is the effect of undermining or lowering the Court in the estimation of the public or its tendency, or likelihood to so undermine or lower the Court, that is the real test and not the intention of the alleged contemner. Mens rea is not a necessary constituent of contempt.'

Coming to the other aspect of the contemner's contention that no motive was attributed to Mr. Justice Barman, reliance was sought to be placed on the observations of the Privy Council in AIR 1936 PC 141, wherein it has been said:

'Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune.'

This dictum of the Privy Council does not imply that unless some motive is attributed to the Judge concerned, there will be no contempt, and there is no other authority cited before me for such a proposition. A Judge may be well scandalised with respect to his fairness and ability, without even attributing any motive to the Judge himself. The next aspect of the contention is that since the statements made by the contemner were in the form of a petition to the High Court for redressing grievances and were not meant for the perusal of the public generally there was no contempt. On this aspect reliance has been sought to be placed on

some observations in *Rex v. B.S. Nayyar*, AIR 1950 All 549 and *State v. Bodh Raj Munawari*, AIR 1958 J and K 19 (FB).

In the Allahabad case, their Lordships observed;

'Where the words objected to are not used in any newspaper, article, or in any other writing meant for the perusal of the public generallyBut are used in representations made to authorities which had power to redress the grievances of which the user of the words complained and if the complaint is genuine and is made in a proper manner with the object of obtaining redress, and is not made mala fide with a view either to exert pressure upon the Court in the exercise of its judicial functions or to diminish the authority of the Court by vilifying it, it is not in furtherance of justice to stifle them by means of summary action for contempt.'

The Jammu and Kashmir decision is one also on similar background. The said observations do not unqualifyingly lay down that any petition of whatsoever nature is saved from contempt. When a representation is made to a superior authority, evidently no publicity is intended and so, the question of whether the public will lose their confidence in the Judge, which is one of the positive tests for contempt, is absent. In the present case, the petition of the contemner was filed in open Court and so, there could have been no doubt to its publicity. In *State v. Brahma Prakash*, AIR 1950 All 556 (FB), the aforesaid observations of the same Court were considered and their Lordships observed:

'We think that the second of these passages (referred to in AIR 1950 All 549) may possibly be the cause of some misapprehension; for, taken by itself, it might be construed to imply that if criticism of the conduct of a judge or Magistrate takes the form of a representation to the Government it is outside the ambit of the law of contempt of Court. Such a proposition is not, in our opinion, well founded.'

After laying down the limits within which a Judge is not immune from criticism, their Lordships observed,

'Criticism of a judicial act which cannot reasonably be said to be within these limits will, however, be contempt and it matters not, in our opinion, through what medium

that criticism finds expression, whether it be in the press, a speech, a resolution or a representation. We do not doubt the right of a citizen to make a representation to the executive authorities in respect of a judicial act; but we know of no authority, and none was cited to us in the course of argument, which makes such representations immune from the ordinary law of contempt. In our opinion, a representation stands on the same footing as any other statement and must be judged by the same standards.'

It was held in AIR 1941 Bom 228, *In re Tulsidas Amanmal*, that scandalous allegations contained in a notice under Section 80 C. P. C. do not prevent them from being contempt of Courts. Hence I reject the defence contention that there was no contempt, because the contemner had no intention to contempt, because no motive was attributed to the Judge, and because the contemner's statement was embodied in a petition.

6. The next contention on the contemner's side was that the contempt in the present case was too slight in character and should not be taken notice of. No doubt, it was observed in *Parashuram Detaram v. Emperor*, AIR 1945 P. C. 134:

'Their Lordships would once again emphasise what has often been said before, that this summary power of punishing the contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends in the wisdom and restraint with which it is exercised.'

In the present case, the contempt could not be appropriately said to be of a slight character inasmuch as the contemner scandalised Mr. Justice Barman, in not only what he expressed, but also in prosecuting him in a contempt proceeding.

7. The next point raised is that the contemner's criticism related to the past conduct of Mr. Justice Barman, who was no longer in the seisin of the case, by the time the petition was filed, and so it did not amount to contempt. There appears to be some misapprehension in this type of contention. When a cause is pending and during its pendency, any criticism is made of the case, however fair or bona fide, that does not save one from contempt; it is only the fair and bona fide criticism of a case after the case has been over, which is permissible. But the present case of

contempt is one for scandalising the judge. It has been observed in AIR 1929 Pat 72 (FB), *Emperor v. Murli Manohar*:

'It is immaterial whether the attack on the judge is with reference to cause about to be tried, or actually under trial, or recently adjudged. The test is whether its tendency is to poison the fountain, of justice, to create distrust, and to destroy the confidence of the people in the Courts.'

It was observed in AIR 1935 Cal 419 (FB), *In re Tushar Kanti Ghosh*:

'It is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance the tendency is to poison the fountain of justice, to create distrust, and destroy the confidence of the people in the Courts, which are of prime importance to the public in the protection of their rights and liberties.'

So, this aspect of the contemner's contention deserves no notice.

8. The next point urged was that the contemner was entitled to the benefit of doubt, since he was under the honest misunderstanding as to if such a petition in contempt against Mr. Justice Barman was within the limits of law. Benefit of doubt is available to an accused when any doubt remains regarding certain facts; but no such plea of doubt is available to him in matter of law. Apart from that, the case against the contemner is not merely that he sought to prosecute Mr. Justice Barman, for what he had said or done as a Judge, in contempt, but for the greater reason that he scandalised the Judge in what was stated in the petition; the actual prosecution was a step further in that scandalisation.

9. The last point is on the apology. The contemner stated in his explanation

'that in spite of any best intentions to do my duty as a citizen by (?) this Court if anything in the nature of contempt can be spelt from the said petition, I sincerely express my regrets and tender unqualified apology for the same.'

Apology must, in order to dilute the gravity of the offence, be voluntary, unconditional and indicative of remorse and contrition and it should be tendered at

the earliest opportunity. It was observed in AIR 1940 Nag 407, Sub-Judge, First Class, Hoshangabad v. Jawhar Lal Ramchand, by his Lordship Vivian Bose :

'There appears to be an impression abroad that an apology consists of magic formula of words which has but to be uttered as an incantation at the last possible moment when all else has failed and it is evident that retribution is inevitable, to stave off punishment. It appears to be felt that a man should be free to continue unfounded attacks upon another's honour and character and integrity with the utmost license till the last possible moment and then when he is unable to stave off the consequence of his infamous conduct any longer, all he need do is to wave this single formula referred to as an apology in a Judge's face in order to emerge triumphantly from the fray. Nothing can be further from the truth, An apology is not a weapon of defence forged to purge the guilty of their offence It is intended to be evidence of real contriteness, the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a court of justice. Mere lip service to a formula without any contrition of heart will not do.'

It was observed in (S) AIR 1955 S. C. 19, M.Y. Shareef v. Judges of Nagpur High Court :

'An apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal penance, but it is intended ' to be evidence of real contriteness.'

The terms in which the apology has been offered by the contemner are no evidence of real contriteness and so the apology is not acceptable.

10. In the result, I hold the contemner Shri Nityananda Mohapatra guilty of contempt of Court and sentence him, under Section 4 of Act XXXII of 1952, to pay a fine of Rs. 100/- with fifteen days' simple imprisonment in default. Fine should be paid within a fortnight.