
(1994) 03 BOM CK 0020

In the Bombay High Court

Case No : Contempt Petition No. 297 of 1993

Baba Abdul Khan and Others

APPELLANT

Vs

Smt. A.D. Sawant, J.M.F.C., Nagpur and Others

RESPONDENT

Date of Decision : 07-03-1994

Acts Referred:

Constitution of India, 1950 — Article 129, 215
Contempt of Courts Act, 1971 — Section 11, 15, 16, 18, 2
Criminal Procedure Code, 1973 (CrPC) — Section 106, 15, 29, 322, 323
Penal Code, 1860 (IPC) — Section 34, 392, 420, 451

Citation : (1994) CriLJ 2836

Hon'ble Judges : B.U. Wahane, J

Bench : Single Bench

Advocate : R.S. Sundaram, for the Appellant; S.G. Aney, S.P. Dharmadhikari and A.V. Gupta, for the Respondent

Judgement

1. It is really an unfortunate thing that the instant contempt proceeding has been initiated against the member of the temple of justice and one another. The petitioners who moved this Court to initiate the contempt proceedings against the contemnors are the accused in Criminal Case No. 218 of 1991 for the offence punishable under sections 420, 392 read with Section 34 of the Indian Penal Code. Initially, on 3-11-1993, the notice before admission was issued by this Court against all the contemnors. The submissions on behalf of the contemnor Nos. 1 and 2 were filed and after satisfying that there is a prima facie case, this Court issued rule on 3-2-1994 against the contemnors calling upon them to show cause as to why action should not be taken against them under the provisions of Contempt of Courts Act, 1971.

In an ordered community, the Courts are established for the specific settlement of disputes and for the maintenance of law and order. In the general interest of the community, it is imperative that the authority of the Court should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not

because those charged with the responsibilities of administering justice are concerned their own dignity; it is because the very structure of ordered life is at risk if the recognised Courts of the land are so flouted that their authority wanes and is supplanted.

2. When the contempt does not occur in the presence and hearing of the Court, it must be brought to the attention of the Court by affidavits or sworn statements of the facts by persons who witnessed them or have knowledge of them. From the sworn facts, it must be shown prima facie that the contemnor/contemnors committed contempt to issue rule to the offender to show cause why he should not be punished for the alleged contempt.

A proceeding for punishment of the person/persons who have committed the contempt, is between the Court and the contemnor. Any person bringing the facts to the notice of the Court, is just an informant.

The jurisdiction to make an order for contempt is per se, neither civil nor criminal, but is segeneris.

3. Once this Court takes the cognizance of the matter with regard to the contempt and the rule is issued, it must be made clear for all purposes that the desire of the private party to continue or not to continue such proceedings, is insignificant and is totally irrelevant. The purpose of proceedings in contempt is mainly to maintain the dignity of the Court and instil confidence in the mind of the public about the institutional integrity.

4. The facts giving rise to the instant contempt petition, are narrated in brief as follows :

The contemnor No. 2 Shri Dilip Babulal Thakkar, a resident of Nagpur, alleged to have been engaged in the business of courier service in the name and style "Thakkar Agencies". According to the contemnor No. 2, in the courier business, he has to collect parcels, insured parcels, letters, packets, etc., from the parties to be delivered at different places including Bombay through his agents. As usual, he collected the money, ornaments and valuables from the parties and directed his employee by name Shri Shivshankar Desai on 31-5-1991 to proceed to Bombay. Shri Shivshankar Desai was carrying the material in rickshaw, Near Geetanjali Talkies, Nagpur, some persons committed theft/robbery and all the material which was in possession of Shivshankar Desai, were taken away. The incident had occurred at about 4 p.m. Immediately after receiving the knowledge about the theft/robbery, the contemnor No. 2 reported the matter to Tahsil Police Station, Nagpur, at about 5.25 p.m.

5. The Police machinery moved the wheels of investigation and ultimately, it is alleged by the prosecution, that some amount, ornaments and other articles were seized from the petitioners/accused. After the completion of the investigation, the charge-sheet was filed in the Court of Judicial Magistrate, First Class, Court No. 4, Nagpur and the criminal case is registered bearing number

284 of 1991.

6. While the investigation was in progress, the contemnor No. 2 had filed an application initially in the Court of Judicial Magistrate, First Class, Court No. 4, Nagpur, for return of the goods or material seized by the Police. The learned trial Court, after hearing the parties, rejected the application filed by the contemnor No. 2 for release of the property i.e. a sum of Rs. 24,00,842/- on supratnama. Against this order, Criminal Revision Application No. 176 of 1991 came to be filed in this Court. During the hearing it transpired that there should not be any prejudice to be caused to the accused and, therefore, to give them an opportunity to be heard, they were directed to be summoned by this Court. After hearing the learned counsel of the parties, Criminal Revision Application No. 176 of 1991, came to be rejected by this Court (B. U. Wahane, J.) vide order, D/- 1-11-1991.

7. Against the order passed by this Court, the contemnor No. 2 preferred a Special Leave to Appeal in the Hon"ble Supreme Court of India. On 21-9-1992, the Hon"ble Supreme Court passed the following order :

"We are not inclined to interfere in this SLP in view of the High Court's findings. We have been informed that the charge-sheet has been filed in the Court. The trial Court may consider the question of handing over the money to the petitioner in the light of the fresh material which has come before the trial Court. SLP is disposed of accordingly."

8. The contemnor No. 2 filed a fresh application u/s 457 of the Criminal Procedure Code to return the property including a currency amount of Rs. 24,00,842/- on supratnama. The application was filed in the trial Court on 14-12-1992. The learned trial Court on 14-12-1992 itself passed the following order :

"Case be registered as criminal case. Call the say and the report from P.S.O. A.P.P. to say."

On the basis of this order, the application was registered as Misc. Application No. 188 of 1992.

On 17-12-1992, the trial Court passed the following order :

"Criminal Case No. 284 of 1991 has already been registered. Only the say from A.P.P. be called and not from P.S."

9. On 6-1-1993, the A.P.P. gave his say. The learned trial Judge, after considering the say given by the A.P.P., passed the following order :

"Perused the application. The amount in cash currency notes appears to be more than Rs. 3,000/-. Case be transferred to the Hon"ble Chief Judicial Magistrate. Issue summons to the concerned applicant and the counsel to appear before Court of C.J.M. on 6-2-93."

On 26-7-1993, the contemnor No. 2 filed an application for hearing the matter on merit urgently. On this application, the learned trial Court the present contemnor No. 1, passed the following order :

"A.P.P. to say only to the limit as to whether this Court can entertain the application in view of the order passed by my learned predecessor."

The A.P.P. has resisted the application on the following grounds :

"The order transferring the case to the Court of C.J.M. passed by the predecessor of this Court, is final order and thus, it cannot be said to be an interlocutory order. The only alternative open to the applicant is to get the order set aside by filing revision. In view of the clear recital in Section 362 of Cr.P.C., this Court cannot alter its own order."

10. The original record which is called from the trial Court, shows that in Misc. Case No. 188 of 1992, the operative part of the order passed by the learned trial Court on 27-7-1993, is typed one. The learned trial Court made some corrections and put her initial too. Under her signature, the date 27-7-1993 is put by the learned trial Court. Considering the submissions made by the learned counsel for the applicant (the contemnor No. 2 before me), the order appears to have been passed on the application Exh. 5 which is filed u/s 457 of Cr.P.C., by the learned trial Court on 28-7-1993. Each page of the order is signed by the learned trial Court putting the date below her signature.

By this order, the learned trial Court set aside the order passed by her predecessor on 6-1-1993. The trial Court directed the concerned clerk of the Court to return the amount of Rs. 24,00,842/- to Shri Dilip Thakkar, which amount was already deposited in the Reserve Bank of India through orders of the Court. Further the learned trial Court directed the Senior clerk of the Court to return golden ornaments worth the Rupees 74,854/- to the applicant Dilip Babulal Thakkar, which were deposited in the Court. The cash and ornaments were to be returned to Dilip Babulal Thakkar after executing a bond of Rs. 24,00,842/- and Rs. 74,854/- respectively before the Court. Further directions were given to the applicant to the effect that "he shall give an undertaking in writing that he will return cash amount and ornaments to their respective claimants and will produce the golden and silver ornaments at the time of final hearing for identification". The letter was issued to the Reserve Bank of India accordingly.

11. It has been brought to my notice by the petitioners that as they were not noticed about the second application filed by the contemnor No. 2, they had no knowledge about the same. As soon as they learnt about the impugned order passed on 27th and 28th July 1993, they filed an application on 27-7-1993 to supply the copy of the application and time to file their reply. The matter was posted at 3.30 p.m. However, the application came to be rejected. Surprise to note that though the order appears to have been passed on the application filed by the applicants/accused vide Exh. 6, on the reverse of the same, neither it

bears the signature nor initial of the learned trial Judge.

On 28-7-1993, another application vide Exh. 7 came to be filed by the accused for grant of stay of the order passed by the learned trial Judge for return of the property and ornaments to Shri Dilip Thakkar. The objection was raised. The learned trial Judge rejected the same on the ground that there is no provision to stay the order. Further it has been observed by the learned trial Judge that by return of the property to the applicant Shri Dilip Thakkar, no prejudice is likely to cause to the accused persons. It is specified that the Court not having the inherent power as suggested by the learned counsel of the accused, the order cannot be stayed.

12. From the facts as alleged in the instant petition and stated at bar by Shri Sundaram the learned counsel for the petitioners, it reveals that a complaint was lodged with the learned District and Sessions Judge, Nagpur and on the basis of that, the impugned order passed by the learned trial Court on 27th and 28th July, 1993, was stayed. According to the petitioners, the steps taken by the learned trial Court and the order passed in haste, are not in keeping with the spirit of judicial administration and the norms. The order and the conduct of the contemnors clearly depict the picture of mala fides. It is specifically stated that the present petitioners being the accused in the Criminal Case No. 284 of 1991, in the interest of justice and propriety, as it is the settled principle of law, they ought to have been noticed and heard. From the record it is clear that no notice was given to the accused, and also no opportunity of hearing was accorded to them. Therefore, according to the petitioners, the learned trial Judge - the contemnor No. 1 has not only committed the contempt of its own Court, but of this Court and the Hon"ble Supreme Court of India. Therefore, the petition was filed in this Court on 2-11-1993. The main crux of the submissions of the learned counsel for the petitioners, Shri Sundaram, is as follows :

(1) The accused, as settled principle of law, were required to be noticed. It being the essential requirement of imparting justice to the litigants and particularly in this case as it is alleged that the properties have been recovered from the accused, thereby the prejudice has been caused to the accused, which smacks the ill-motive of the contemnors.

(2) The contemnor No. 1 has no power or jurisdiction to review its own order which was passed by her predecessor on 6-1-1993.

(3) The fresh application filed by the contemnor No. 2 on 14-12-1992, does not reveal any fresh material to release the huge amount and ornaments to the applicant contemnor No. 2 without any material on record whatsoever to substantiate his ownership. Therefore, this also smacks the mala fides of the contemnors.

13. Both the contemnors filed their submissions duly sworn. Both the contemnors have specifically stated that the learned trial Judge who passed the order on 6-1-1993, has no jurisdiction whatsoever to transfer the case to the

Court of Chief Judicial Magistrate. Converse to this only Chief Judicial Magistrate. Converse to this only Chief Judicial Magistrate is empowered u/s 410 of Cr.P.C. either to transfer the case or to withdraw the case from the file of his subordinate i.e. Judicial Magistrate, First Class. It is also specifically stated that there being no provisions to issue notice to the accused and accord the hearing, the contemnor No. 1 has rightly not issued any notice to the accused and accorded no hearing to them. Further, it is stated that on the day, they being present in the Court, the accused as well as their counsel had knowledge of the application filed by the contemnor No. 2 for release of the property. Under the circumstances, according to contemnors, if they had really been interested in the case and also desirous to oppose the application for return of the property, they would have come forward and made submissions. But, they did not do so. Thus, according to the contemnors, this petition is motivated levelling false allegations against them.

It is further submitted that it has wrongly been stated that there is no fresh material to pass the order on the fresh application filed u/s 457, Cr.P.C. According to the contemnor No. 2, fresh material has been indicated in paras 12 and 13 of the application. Thereby the impugned order was rightly passed. According to the contemnors, the contemnor No. 1 being competent to pass such order, has committed no mistake, illegality or at least there is nothing on record to show that she has committed contempt of Court. Further it is submitted that all the orders have been passed bona fide and even if this Court comes to the conclusion that the contemnors have committed contempt of Court, they tender unconditional apology.

14. Besides the submissions made by the contemnors, Shri Aney, the Senior Counsel for the contemnor No. 1 and Shri Dharmadhikari, the learned counsel for the contemnor No. 2, raised various legal aspects in this case and took me through various provisions of the Contempt of Courts Act, 1971 and of Criminal Procedure Code, Indian Penal Code and Judicial Officers' Protection Act.

Before discussing the legal submissions made by the learned counsel of the rival parties. I will deal first with the question whether trial Court who passed the order on 6-1-1993, was competent or not to pass the order and thereby to transfer the case to the Court of Chief Judicial Magistrate, Nagpur.

On behalf of the contemnors only stale claim has been made that there is no provisions in law empowering the Judicial Magistrate, First Class to transfer the case from his own file to the file of Chief Judicial Magistrate or any other superior Court. I do not agree with the submissions. Sections 322 to 325 of the Criminal Procedure Code deal with the powers of the Judicial Magistrate, First Class, regarding the transfer of the cases in certain situation to the file of the Chief Judicial Magistrate and Sessions Judge for trial.

15. Section 322 of Cr.P.C. reads as under :

"(1) If, in the course of any inquiry into an offence or a trial before a Magistrate

in any district, the evidence appears to him to warrant a presumption -

- (a) that he has no jurisdiction to try the case or commit it for trial, or
- (b) that the case is one which should be tried or committed for trial by some other Magistrate in the district, or
- (c) that the case should be tried by the Chief Judicial Magistrate,

he shall stay the proceedings and submit the case, with a brief report explaining its nature, to the Chief Judicial Magistrate or to such other Magistrate, having jurisdiction, as the Chief Judicial Magistrate directs."

Section 323 of Cr.P.C. also empowers the Judicial Magistrate, First Class to transfer the case to the Court of Session if it appears after the commencement of the enquiry or trial that he is unable to try and award the punishment above three years.

Section 323, Cr.P.C. reads as under :

"If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made."

Provisions of S. 325 of Cr.P.C. empowers the Magistrate to transfer the cause to the superior courts if he is of the opinion that he cannot pass a sentence sufficiently severe. Section 325(1) of Cr.P.C. reads as under :

"Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused, is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under S. 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate."

Thus, from reading the provisions of Sections 322 to 325 of the Criminal Procedure Code, it is seen that (1) if it appears to the Magistrate from the facts disclosed in the police report and other evidence that he will not be able to inflict adequate punishment in the case and, thus, the case ought to be tried by the Chief Judicial Magistrate, he is empowered to submit the case to the Chief Judicial Magistrate under S. 322 of Cr.P.C.; (2) if the Magistrate, after closing of the evidence of both the parties, finds the accused guilty and thinks that the accused ought to receive a punishment different in kind or severe than that which he is empowered to inflict, he is empowered to submit the case to the Chief Judicial Magistrate, u/s 325 of Cr.P.C.; (3) if on the other hand, it appears to the Magistrate at any stage of the trial before signing the judgment that the case is one which ought to be tried by the Court of Session (who has concurrent

jurisdiction), he shall commit the case to the Court of Session u/s 323 of the Criminal Procedure Code.

Considering the specific provisions referred above, it is expected from the trial Court to exercise the discretion judicially after considering the circumstances of the case, the gravity of the offence and the punishment to be inflicted upon conviction.

16. Need not to say that under S. 15 of the Criminal Procedure Code, every Chief Judicial Magistrate is subordinate to Sessions Judge and every Judicial Magistrate, First Class is subordinate to the Chief Judicial Magistrate. The Court of Magistrate of the First Class is empowered under S. 29 of Criminal Procedure Code to pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding Rs. 5,000/- or of both. Under this section itself, the Chief Judicial Magistrate is empowered to pass any sentence authorised by law except the sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

It is, thus, clear from the above provisions that the Judicial Magistrate, First Class is empowered to transfer the case either to the Court of Chief Judicial Magistrate or to the Sessions Court. In a case of Shiv Dutt Salwan Vs. The State, , the learned Judge observed that Section 323 of the Cr.P.C. gives a wide discretion to the Magistrate which should be exercised judiciously and not upon a mere request of a party. He should have adequate reason for sending a person to stand trial before a Court of Session for an offence which he could himself try. The learned Judge has considered various cases in which the concurrent jurisdiction of the Judicial Magistrate as also of the Chief Judicial Magistrate to transfer the cases to the superior Court under particular circumstances, are discussed. In a case of Krishnaji Prabhakar Khadilkar v. Emperor AIR 1929 Bom 313 : 1929 (30) Cri LJ 1090 it is held :

"having regard to the seriousness of the offence and public importance of the case, committal to a Court of Session was directed."

In a case of In Re: Sant Prakash Sahni, , it was held that either because of the gravity of the matter or for any other sufficient reason if the Magistrate is of opinion that the Court of Session was the proper tribunal for disposal of the case, he can commit the case.

It will be, thus, seen that S. 323(2) gives a wide discretion to the Magistrate to transfer the case though the Magistrate is empowered to try the same, after considering the seriousness, adequate sentence and public importance of the case.

17. The petitioners/accused have to face the trial u/s s 420 and 392 of the Indian Penal Code. The cases under both these sections are triable by the Judicial Magistrate, First Class. However, in both the cases, the imprisonment is for 7 years and fine. The provisions of S. 392 of the Indian Penal Code further

provides that if the robbery is committed on the highway between sun set and sun rise, the imprisonment may be extended to 14 years. If the robbery is committed in the broad day light on the main road or on the National Highway of the city, there is no doubt it is a heinous offence for which deterrent sentence is required. Under the circumstances, even the value of the stolen property is not the criteria for the severe punishment. In the instant case, it is the case of the prosecution that the robbery took place at 4 p.m. on Central Avenue Road which is the main road of the city having huge traffic. The huge amount is involved. This case has a public importance, because every citizen expects that such robbery should not take place in the day light and that too on the road having heavy traffic. Thirdly, there is a seriousness also. If really the petitioners/accused have committed the robbery in the fashion as alleged by the prosecution, then they are required to be dealt with stern hands by imposing a severe punishment. Considering all these aspects, though it has not been specified by the learned Judge in the order passed on 6-1-1993, he applied his mind and rightly transferred the case to the Court of Chief Judicial Magistrate.

18. Surprisingly, it is submitted by the learned counsel on behalf of the contemnors that there is no provisions either in the Criminal Procedure Code or any other statute, to issue notice to the accused and accord them an opportunity of being heard before deciding such application. However, there is nothing in any criminal law which bars the Court from according an opportunity of being heard to the parties which are likely to be adversely affected. Thus, the prudence, discretion and circumspection are called for. This is the question of an irreparable injury likely to be caused to the accused in the case. The principle of natural justice required to issue notice to other side and to give an opportunity of being heard before the order is passed. But, the learned trial Court failed to render elementary justice to the accused. Denial of an opportunity may lead to grave irreparable private injury to the accused, public mischief or shake the citizen's faith in the impartiality of the public administration, though law presumes that the public authorities function properly and bona fide with due regard to public interest. In a case of Basappa Durgappa Kurubar and Others Vs. The State of Karnataka and Another, , while considering the provisions u/s 451, Cr.P.C., the learned Judge observed as follows (at page 1543 of Cri LJ) :

"It may however be asked that the provisions of S. 451, Cr.P.C. do not contemplate issue of notice to or hearing of the parties adversely affected. But, all the same, an order made without hearing the parties adversely affected does not cease to be an ex parte order. Though S. 451, Cr.P.C. does not expressly require a notice to be issued or a hearing to be given to the parties adversely affected, as pointed out by the Supreme Court in State Bank of India Vs. Rajendra Kumar Singh and Others, , there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for the return of the seized property, and while dealing with this subject the Supreme Court said thus :

"It is true that the statute does not expressly required a notice to be issued or a hearing to be given to the parties adversely affected. But though the statute is silent and does not expressly require issue of any notice there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for return of the seized property."

Their Lordships of the Supreme Court also considered the observations of Lordships made in the case of *Cooper v. Wandsworth Board of Works*, (1863) 14 CB NS 180.

Byles, J. said that -

"through there are no positive words in a statute requiring that the party shall be heard yet the justice of the common law will supply the omission of the legislation."

This rule is of universal application and founded upon the pianist principles of justice.

In a case of *M. Narayanan Nambiar Vs. State of Kerala*, , the Lordships of the Supreme Court observed :

"The principles of natural justice require that no court shall give a finding whether on fact or law and particularly on facts without giving an opportunity to all the contesting parties. Where the Judge acted upon a document filed by the prosecution without giving an opportunity to the accused to file objections or to contest its reliability it must be held that the principle of nature justice is violated and the finding of the Court must be set aside."

19. In the instant case, the High Court, while considering the Revision Application No. 176 of 1991 filed by the contemnor No. 2, issued notices to the accused/petitioners. In the SLP which was preferred before the Hon"ble Supreme Court, the petitioners/accused were made party. Though it is alleged by the prosecution that various properties have been seized from the various accused, one cannot jump to the conclusion that they have committed the offence of cheating and robbery. Similarly, there is no positive evidence on record to show that particular person or customer had given the particular notes or particular person had entrusted particular ornaments to the contemnor No. 2. There is, thus, no prima facie case to show that entire property belongs to or was in the custody of contemnor No. 2. Under the circumstances, the principles of natural justice require the notice to the accused and also an opportunity to them of being heard.

20. Now the question arises whether the provisions of the Criminal Procedure Code empower the Judicial Magistrate, First Class, to review its own order. None of the learned counsel of the contemnors could lay their fingers on any of the provisions to indicate that the Judicial Magistrate, First Class, is powered to review its own order. Admittedly, no inherent powers are vested in the Judicial Magistrate, First Class. Any order passed by the Judicial Magistrate, First Class,

can be modified, set aside or reviewed by the superior authority only. Once an order is passed by the Judicial Magistrate, First Class, the court becomes functus officio in the matter and cannot entertain the fresh prayer for the same relief unless and until the order is set aside by the superior court authority. In other words, the Court of Judicial Magistrate, First Class, has no powers to review or set aside its own order. In a case of Mohammad Yousuf Vs. Abdul Ahad Shah, an application for return of the seized property on supratnama was made by the accused. As the order was passed without notice to the complainant, the order was set aside. In a case of Basappa Durgappa Kurubar and Others Vs. The State of Karnataka and Another, , the observations made in the case of Mohammad Yousuf Vs. Abdul Ahad Shah, have been considered thus :

"Once an order is made under this section the court becomes functus officio in the matter and cannot entertain a fresh prayer for the same relief unless and until the order has been set aside. In other words the court has no power to review an order made under this section, for there is none given by the Code of Criminal Procedure nor can one be found in the absence of a direct statutory provisions."

The Court has powers to alter the judgment under the circumstances enumerated under S. 362 of Cr.P.C., which reads as under :

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same, except to correct a clerical or arithmetical error."

Giving conscious thought to the provisions and the principles laid down by the Supreme Court and other Courts, it is apparent that the Judicial Magistrate, First Class, has no power to review its own order. Therefore, the order passed by the contemnor No. 1 setting aside the order passed by her predecessor, is nullity being without power and jurisdiction.

21. The learned counsel appearing for the contemnors vehemently submitted that there was sufficient fresh material on record to pursue the Court to pass the order to return the property on supratnama. In the application, in para 10, various reasons have been quoted. It is also stated in para 12 of the application that during the investigation the Crime Branch Police has verified from the account-books, receipt books and the other documents of the applicant. In para 13 of the application, it is stated that during the investigation, the statement of about 100 persons have been recorded. It is further contended that from the above circumstances, it will be seen that the property seized from the accused belongs to the applicant. However, the main crux is otherwise for the return of the property, which are incorporated in the application in para 15 onwards. Those are as under :

(1) The applicant is under a legal obligation to return the property back to his customers.

(2) Except the currency notes worth Rs. 4,840/-, the remaining currency notes would not be required for identification at the time of trial. The same is the case with the golden and silver ornaments.

(3) It is alleged that there is no likelihood of disposal of the case at an earliest stage. The customers of the applicant are pressing him for the return of the property entrusted by them.

(4) The applicant is required to pay interest to his customers on the amount entrusted by them to him. The applicant has already suffered huge loss because of the blockage of the property.

(5) The reputation of the applicant has also suffered as a result of which there is a stiff decline in the customer ship of the applicant.

(6) If the property is not returned to the applicant, his business will be stopped and in such eventuality, he will lose his bread and butter. It would be, therefore, in the interest of justice to return the property to the applicant at an early date.

(7) According to him, the property is not likely to be required during the trial for the purposes of evidence.

(8) None of the accused is claiming the property.

According to the applicant, considering his submissions made in the application dt/- 14-12-1992, there is no hurdle in returning the property to him. The submissions made by the applicant-contemnor No. 2 prevailed upon the contemnor No. 1 to allow the application and, therefore, she directed the concerned Senior Clerk to return the amount to the tune of Rs. 24,00,842/- and golden and silver ornaments worth Rs. 74,854/- to the applicant after executing the bond in respect of the property. The learned trial Judge directed the applicant to submit an undertaking to the effect that he will return the cash amount and the ornaments to the respective claimants and produce the golden and silver ornaments at the time of final hearing. It needs to be mentioned here that the contemnor No. 2 has not filed any document or list giving details of the customers with names and addresses as also showing amount and/or ornaments alleged to have been entrusted to him on or before the date of alleged incident of theft or robbery. Under the circumstances, it is difficult to understand or fathom the working of the mind of learned trial Court/contemnor No. 1, regarding the propriety directing contemnor No. 2 to return the property to others; when none approached and claimed the seized property. In fact, there is no need to go into the merits, but apparently, except the seizure memo in respect of the seizure of the properties from the accused, there is no material on record to show the ownership of the property. Admittedly, no person who alleged to have deposited the amount, parcel or ornaments, approached the court for the return of the property. There is no whisper in the speaking orders dt/- 27-7-1993 and 28-7-1993 that the learned trial Court/contemnor No. 1 had gone through the alleged statements of 100 persons and thereafter only revealed that a particular

customer claimed particular amount or ornaments and those be returned to them even though they are not before the Court. No reasons are assigned how to return the property to the strangers who are not before the Court. The learned trial Court, at the initial stage, arrived at the conclusion that, because there are certain seizure memos from the accused, the custody or the ownership of the applicant Shri Dilip Thakkar is prima facie proved. Admittedly, no document was placed on record to show that particular ornament or the particular currency notes were entrusted to the applicant by any particular customer and the same amount or the ornaments has nexus with the robbery, barring the currency notes of Rs. 4,840/- on which there are specific identifying marks. It has been observed that the property will not be required for the identification. Even though the case is not opened, how the Judge can opine that the property will not be required for identification. On the contrary it is evident that the accused were opposing the application for return of property since beginning. In my opinion, the property will be required to substantiate two things, viz., firstly, that the particular property was seized from the particular accused and secondly, the particular currency notes and/or ornaments belong to particular persons/customers who entrusted the same to contemnor No. 2 for handing over to a particular person at Bombay. Till the moment the property is identified by the witnesses as belonging to them, it cannot be said that the property belongs to that particular person. Surprisingly the applicant has been directed by the contemnor No. 1 to give an undertaking that he will return the amount and the ornaments to the respective customers. If really, the property is returned as directed by the contemnor No. 1, the production of the property at the time of recording evidence is not only difficult but rather impossible. It would be rather difficult to secure the presence of the persons and properties. No document being evidently executed by any alleged customer/customers, how a Court can compel the executant of any supratnama in favour of Court to produce material directed to be returned to contemnor No. 2. In other words, trial was impossible under the circumstances. Thus, even though there is no iota of evidence as is clear from the speaking order, the contemnor No. 1 smacks mala fides and, therefore, in undue haste order is passed to return the property with separate letter to Reserve Bank of India.

22. Even though the submissions and the additional returns have been filed on record, the mystery, how the operative order has been signed on 27-7-1993 when the speaking order was passed on 28-7-1993, has not been solved. There is no justification either in the submissions or in the subsequent return filed by the contemnor No. 1. It is interesting to note that the date is not only typed one, but it is in the handwriting of the contemnor No. 1 also under her signature. This speaks the ill-intention of the contemnor No. 1. By the operative order dt/- 27-7-1993, the contemnor No. 1 had already directed the senior clerk of the Court to hand over the cash amount of Rs. 24,00,842/- and the golden and silver ornaments worth Rs. 74,584/- to the contemnor No. 2. Therefore, it has been rightly submitted by Shri Sundaram, the learned counsel for the petitioners, that

the order is passed without any fresh material on record. Mere filing of the charge-sheet will not amount to a fresh material on record. The party has to substantiate prima facie that he is either the owner or, at the relevant time, he was the custodian of the property and also to prove the nexus of the property with the robbery and unless it is shown, no property can be returned to the claimant whosoever he may be.

23. Shri Dharmadhikari, the learned counsel for the contemnor No. 2, vehemently argued that the order of the High Court is merged in the order of the Hon"ble Supreme Court passed on 21-9-1992. According to him, there is no doubt that the whole order was challenged and as such, the order passed by the High Court is automatically merged in the order passed by the Hon"ble Supreme Court. In spite of this, the Hon"ble Supreme Court had granted liberty to the contemnor No. 2 to make a fresh application for return of the property on fresh grounds. There is no dispute that even otherwise the parties are at liberty to make the application afresh. Here the Hon"ble Supreme Court had granted him liberty to make a fresh application on fresh grounds. Therefore, according to Shri Dharmadhikari, the learned counsel for the contemnor No. 2, the order of the High Court was no more in force. Thereby, according to him, no contempt of this Court has been committed by the contemnor No. 2 either of civil or criminal nature as prayed by the petitioners. A reliance has been placed on a case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , wherein in para 10 of the judgment, it is observed :

"There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision alone which subsists and is operative and capable of enforcement; but the question is whether this principle can apply to the Income Tax Officer's order granting registration to the respondent."

24. Repelling the submissions, Shri Sundaram, the learned counsel for the petitioners, submitted that the doctrine of merger applies when there is a fusion of two orders. If there is a fusion of two orders then only it can be said that the order of this Court is non est, means it is not in existence. To give finality to the order passed by this Court, will not be a fusion. Only concession was granted by the Hon"ble Supreme Court to the contemnor No. 2 to file a fresh application for return of property. In the instant case, no special leave was granted. The petition was dismissed in limine. So the yard-stick applied in the case cited above, cannot be applied in this case considering the facts and circumstances of this case. According to Shri Sundaram, the learned counsel for the petitioners, the Hon"ble Supreme Court kept the findings given by this Court alive. There would have

been a merger if the Hon''ble Supreme Court would have heard the matter on merits and passed the reasoned order. Shri Sundaram drew my attention to a case Jyotish Thakur and Others Vs. Tarakant Jha and Others, , in which the doctrine of merger has been considered with the following observations (para 11) :

"While the union of the superior and subordinate interests will not automatically cause a merger, merger will be held to have taken place if the intention to merge is clear and not otherwise. In the absence of any express indication of intention, the courts will proceed on the basis that the party had no intention to merge if it was to his interest not to merge and also if a duty lay on him to keep the interests separate. In deciding the intention of the party the court will have regard also to his conduct."

25. Under S. 15 of the Contempt of Courts Act, 1971, the Hon''ble Supreme Court or the High Court can take action on its own motion or on a motion made by (a) the Advocate General, or (b) any other person, with the consent in writing of the Advocate General.

Under S. 15(2) of the Contempt of Courts Act, 1971, in the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate General, or, in relation to a Union Territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

In accordance with the provisions of S. 11 of the Contempt of Courts Act, a High Court has jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction and whether the person alleged to be guilty of contempt is within or outside such limits. The High Court has derived the power from Article 215 of the Constitution of India. The Article 215 reads as :

"Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

The Hon''ble Supreme Court has derived the powers under Article 129 of the Constitution of India. The Article 129 reads as under :

"The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

26. Considering the rival submissions and the principles laid down by the Supreme Court, I do not agree with the proposition put forth by Shri Dharmadhikari the learned counsel for the contemnor No. 2. The findings given by this Court in Criminal Revision Application No. 176 of 1991, are confirmed and the SLP was dismissed in limine. Lordships of the Supreme Court specifically observed :

"We are not inclined to interfere in this SLP in view of the High Court's findings."

It means that the findings of this Court, while rejecting the Criminal Revision Application No. 176 of 1991, have been kept alive. Thus, the contemnor No. 2 has to comply with the requirements indicated in the order and also to place the fresh clinching material on record for the return of the property. The Court has to return the property only after satisfying the requirements discussed by this Court in its order in Criminal Revision Application No. 176 of 1991. Therefore, in my opinion, there is no merger of the order of this Court in the order passed by the Hon'ble Supreme Court. This Court while deciding the Criminal Revision Application No. 176 of 1991, has specifically observed :

- (1) The applicant has not satisfied how his business is legal.
- (2) Though the applicant has alleged that he received money from the customers, he could not place entire material with full addresses of the customers which is apparent from para 5 (chart) of the application.
- (3) Considering this aspect, it is observed by this Court that the applicant failed prima facie to establish even the unlawful possession of the property in question.
- (4) There is no evidence even prima facie that the amount which has been recovered from the accused, has nexus with the amount and parcels entrusted by various customers to the applicant or his servant.
- (5) In para 22, it is specifically observed that the applicant has failed to prove the ownership or establish his possession over the property seized from the accused. He even failed to show any nexus of the property seized from the accused with the property alleged to have been entrusted to him by his customers.
- (6) It is also further observed in para 22 itself that if the amount is returned to the applicant, it will be nothing but to grant a licence to encourage the person to carry on the illegal business.
- (7) The accused filed their objection before the learned Judicial Magistrate, First Class, Nagpur for return of amount and the property, which has been discussed by the learned trial Court in his order, dt/- 28-3-1991.
- (8) Under the above circumstances, the possibility cannot be ruled out that they may raise any defence at the trial.

Return of amount would cause prejudice to the accused at the time of trial.

27. Besides the above circumstances, this Court in para 14 of its order d/- 1-11-1991 observed the submissions of learned A.P.P. as under :

"It is further submitted by Shri Paranjape the learned P.P. that till this date the applicant has not supplied the exact details about the names, occupations, addresses of the parties from whom he received money and to whom the said amount is to be paid. Such a vital information has not been supplied by the

applicant to the Investigating Agency. Some information has been detailed in the application in para 5 on page 4. Perusal of the list will indicate that at Sr. Nos. 3, 5, 7, 8, 14, 17, 21, 26, 27, 28, 29, 32, 33, 34, 35, 36, 43, 44, 54, 71, 81, 83, 85 the full names and addresses are missing and, therefore, it is difficult to approach the parties for investigation.

Similarly in the same para on page 9, under the caption B - details of insured parcels, show that no addresses of the parties have been given. Such insured articles are 11 in numbers.

Under the circumstances the applicant has not approached this court with clean hands as well as not extended any co-operation to investigation agency. Thus, it appears that the transaction is seized in the list appear to be false, fictitious and bogus. The investigating agency could hardly ensure the statement of only 20 persons including those who filed affidavits."

In spite of these specific observations made by this Court, which have been confirmed by the Hon'ble Supreme Court while dismissing the petition in limine, the contemnor No. 1 did not consider these aspect while allowing the application filed by the contemnor No. 2 on 14-12-1992. Therefore, it has been rightly submitted by Shri Sundaram, the learned counsel for the petitioners that there was no fresh material except the alleged seizures from the accused, on record, to release the property in favour of the contemnor No. 2. It needs mention that the contemnor No. 1 was persuaded and she, without applying her mind or for the other reasons best known to her, became the victim of the persuasion and ordered the return of the property to the applicant. It appears that the contemnor No. 1 was overwhelmed by the statement made by the contemnor No. 2 that he is suffering loss in his business. Shri Sundaram, the learned counsel has rightly stated that even perusing all the documents which have been placed on the record, the learned trial Court, contemnor No. 1 could not find and therefore not discussed in its order fresh material to effect the release of the property in favour of the contemnor No. 2.

28. One important aspect overlooked by the contemnor No. 1 deliberately, that the contemnor No. 2 lodged report on 31-5-1991, at about 5.25. p.m. with Tahsil Police, Nagpur, wherein it is specifically stated that in the theft or robbery, he lost an amount of Rs. 5/- lakhs only. However, he applied for return of Rs. 24,00,842/- and golden and silver ornaments worth Rs. 74,584/-. No whisper in report about loss of ornaments. This discrepancy definitely requires recording of evidence and satisfactory explanation. Till satisfaction, the Court cannot jump to the conclusion that the contemnor No. 2 is entitled to claim return of huge property without any discussion on this material aspect.

One another aspect has been brought to my notice that on 19-7-1993, the learned counsel for the applicant/contemnor No. 2, and the A.P.P. were heard. Exh. 11 dt/- 19-7-1993 shows that the learned trial Court formed a question which was to be replied by the contemnor No. 2 and the A.P.P. The order sheet of

19-7-1993 shows that A.P.P. and the counsel for the contemnor No. 2 were heard and the matter was kept for order on 26-7-1993. From the record it also appears that on 26-7-1993, the applicant filed an application for urgent hearing. If really the matter was heard on 19-7-1993, there was absolutely no necessity for the contemnor No. 2 to file another application for urgent hearing on merits.

29. The learned counsel for the contemnors vehemently argued that as the order of this Court merged into the order of the Hon"ble Supreme Court, this Court has no jurisdiction to proceed against the contemnors under the provisions of Contempt of Courts Act, 1971. According to them, if there is any contempt, then it is the contempt of the Apex Court and only the Apex Court has jurisdiction to proceed against the contemnors. In a case of State of Maharashtra Vs. R.A. Khan, Chief Jdl. Magistrate Gadchiroli, Contemnor, , bail applications made by the accused were rejected by the trial Court, High Court and the Apex Court. But, the proceedings were started for contempt against the Judicial Officer in this Court. This Court being satisfied, initiated the proceedings against the Chief Judicial Magistrate and issued warning after confirming that he had committed the criminal contempt of this Court. Considering the facts and circumstances as discussed in the preceding paras, observations made by this Court in Criminal Revision Application No. 176 of 1991, I am of the opinion that this Court is competent to take cognizance or initiate the contempt proceedings against the contemnors.

30. Shri Aney, the learned senior counsel for the contemnor No. 1, raised objection to the maintainability of the proceeding and, thus, submitted that considering the facts and circumstances, they may disclose the criminal contempt and not the civil contempt. Thereby, the learned counsel means to say that the only Division Bench of this Court is empowered to take the cognizance and initiate the proceedings against the contemnors. Section 18 of the Contempt of Courts Act, 1971, clearly speaks that every case of criminal contempt under S. 15 shall be heard and determined by a Bench of not less than two Judges. There is no dispute in respect of the provisions of this section. It is specifically submitted that in the instant case there appears no material to say that the contemnors have committed a civil contempt. Civil contempt is regarding the execution of the order passed by this Court or any other subordinate Court.

31. The jurisdiction to make an order for contempt is, per se, neither civil or criminal but is sui generis, though when a person is sought to be punished, proceedings attract principles of penal policy requiring the establishment of the ingredients of the offence beyond a reasonable doubt, which has been observed in a case of K. Adinarayana v. S. Mariyappa, 1984 Cri LJ 992.

The civil contempt is defined under S. 2(b) of the Contempt of Courts Act, 1971, as under :

""civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to

a court."

The criminal contempt is defined under sub-section (c) of S. 2 of the Contempt of Courts Act, 1971, as under :

"criminal contempt" means the publication (whether by words, spoken or written, or by visible representations, or otherwise of any matter or the doing of any other act whatsoever which -

(i) scandalises or tends to scandalise or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

In a case of *Dulal Chandra Bhar and Others Vs. Sukumar Banerjee and Others*, , the Division Bench of the Calcutta High Court has observed (para 3) :

"The line between civil and criminal contempt can be broad as well as thin. Where the contempt consists in mere failure to comply with or carry out an order of a Court made for the benefits of a private party, it is plainly civil contempt and it has been said that when the party, in whose interest the order was made, moves the court for action to be taken in contempt against the contemnor with a view to enforcement of his right, the proceeding is only a form of execution. In such a case, there is no criminality in the disobedience and the contempt, such as it is, is not criminal. If however, the contemnor adds defiance of the Court to disobedience of the order and conducts himself in a manner which amounts to obstruction to or interference with the course of justice, the contempt committed by him is of a mixed character, partaking as between him and his opponent of the nature of a civil contempt and as between him and the court or the State, of the nature of a criminal contempt. In cases of this type, no clear distinction between civil or criminal contempt can be drawn and the contempt committed cannot be broadly classed as either civil or criminal contempt. There is, however, a third form of contempt which is purely criminal and which consists in conduct tending to bring the administration of justice to scorn and to interfere with the course of justice as administered by the Courts. Contempt of this class is purely criminal, because it results in an offence or a public wrong, whereas contempt consisting in disobedience of an order made for the benefit of a private individual results only in a private injury."

Mr. Dharamadhikari, the learned counsel of the contemnor No. 2 placed reliance on various cases to show the difference between the civil and criminal contempt. Those cases are as follow.

(1) *The State Vs. Dasrath Jha*, .

(2) *Zikar Vs. State*, .

(3) S.S. Roy and Another Vs. The State and Another, .

(4) Dulal Chandra Bhar and Others Vs. Sukumar Banerjee and Others, .

Considering the facts of the case and principles laid down in the various cases cited supra, the question posed by Shri Dharmadhikari, the learned counsel for the contemnor No., 2, is whether any right was accrued in favour of other party and whether either of the contemnors has infringed the same ? In absence of such right, the question of committing the civil contempt does not arise. According to the learned counsel, no order was in operation in favour of the petitioners/accused. Thus, no case of criminal contempt is made out and, therefore, the question of punishment does not arise. The learned counsel placed reliance on a case of Delhi Judicial Service Association, Tis Hazari Court, Delhi Vs. State of Gujarat and others, . In this case the C.J.M. was handcuffed by the Police. The learned Counsel took me through the important portions of the judgment from paras 13 and 29. In para 13 it is observed :

"The power to take proceedings for the Contempt of Court is an inherent power of a Court of record, the Criminal Procedure Code does not apply to such proceedings. Since, the contempt proceedings are not in the nature of Criminal proceedings for an offence, the pendency of contempt proceedings merely because it may end in imposing punishment on the contemner. A contemner is not in the position of an accused, it is open to the Court to cross-examine the contemner and even if the contemner is found to be guilty of contempt, the Court may accept apology and discharge the notice of contempt, whereas tendering of apology is no defence to the trial of a criminal offence. This peculiar feature distinguishes contempt proceedings from criminal proceedings."

Further in para 29 of the judgment, Lordships of the Supreme Court referred Art. 129 of the Constitution of India and observed as under :

"Art. 129 declares the Supreme Court a Court of record and it further provides that the Supreme Court shall have all the powers of such a Court including the power to punish for contempt of itself. The expression used in Art. 129 is not restrictive instead it is extensive in nature. If the framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "including the power to punish for contempt of itself"

It has been further observed in para 29 as under :-

"Art. The jurisdiction to make an order for contempt is, per se, neither civil or criminal but is sui generis, though when a person is sought to be punished, proceedings attract pr recognised the existing inherent power of a Court of record in its full plenitude including the power to punish for the contempt of inferior Courts."

The learned counsel for the contemnors made an attempt to show that as the allegations against the contemnors do not constitute a civil contempt, this Court

has no jurisdiction to entertain this case and thereby to punish the contemnors. According to the learned counsel, there is nothing on record to show that the contemnors have committed any contempt. According to the contemnor No. 1, the learned trial Court has elaborately discussed and gave reasons for setting aside the order passed by her predecessor on 6-1-1993 regarding the transfer of the case to the file of Chief Judicial Magistrate, Nagpur. According to the learned counsel, the contemnor No. 1 might have committed the error in expressing her opinion. View taken by the contemnor No. 1 may be illegal. So merely expressing an erroneous view or committing an illegality will not amount to either civil or criminal contempt. No material has been brought on record to show that the order is perverse and speaks about dishonesty and even if it is so, it will not amount to a civil contempt.

32. When the proceeding is tenable under the Contempt of Courts Act, 1971, for civil contempt, that has been defined in sub-section (b) of Section 2 of the Contempt of Courts Act, 1971, it refers not only the wilful disobedience of any judgment, decree, direction, order or writ or other process of Court.

What is meant by the process of Court, requires to be considered ? The kinds of contempt of process of Court has been discussed in Halsbury's Laws of England Vol. IX, para 2 on page 3, as under :

"Contempt of Court may be classified either as (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice or (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgment, orders or other process of the Court, and involving a private injury."

Para 54 deals with misconduct. Circumstances involving misconduct, civil contempt bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.

In para 38 the words "abuse of process in general" have been described as the Court has power to punish as contempt any misuse of the court's process. Thus the forging or altering of Court documents and other deceits of like are punishable as serious contempts. Similarly, deceiving the court or the court's officers by deliberately suppressing a fact, or giving false facts, may be punishable as contempt. In certain cases where an irregularity or misuse of process amounts to an offence against justice, extending its influence beyond the parties to the action, it may be punished as a contempt.

In a case of Assistant Government Advocate Vs. Upendra Nath Mukerji, , the meaning of the words "abuse of process" has been explained as under :

"In the expression "abuse of process" in Section 561-A, "process" is a general word meaning in effect anything done by the Court."

In a case of Kameshar Prasad v. Bhikhan Narain Singh, ILR (1893) Cal 609, the following observations are made :

""Process" includes writs of summons, and without a writ of summons, or in our phraseology here, a summons, a suit cannot be validly instituted at all. The word "process" in its full meaning, includes summons, and in doing so, bars all suits to which the clause applies."

33. Giving conscious thought to the submissions made by the learned counsel of the petitioners and the contemnors, I have to consider whether the contemnor No. 1 has committed the contempt of Court wilfully and dishonestly. As it is rightly said, the question of contempt particularly in this case, is a mixed question of civil and criminal nature. I have perused the original record of the trial Court. There is a voluminous material placed on record which itself shows that the contemnors have committed the contempt of Court. The contemnor No. 1 had not only committed the contempt of its own court, but of the High Court also. The circumstances at the cost of repetition are again precisely enumerated below :

(1) While setting aside the order passed by her predecessor, directing to transfer the case of C.J.M., the contemnor No. 1 has taken a bold stand as she being sure of the provisions that there is no provision in the Criminal Procedure Code empowering the Judicial Magistrate, First Class to transfer the case from its file to the file of superior Court. I have already indicated in the preceding paras those specific provisions of Section 322 to 325 of Cr.P.C. which empower the Judicial Magistrate, First Class to transfer the cases from its file to the file of superior Court. The contemnor No. 1 even in her additional submissions on solemn affirmation maintained her stand that there is no provisions of transferring the cases from its file to the file of the superior Court. Considering her bold stand, there is room to say that even if she is a Judicial Officer, she is ignorant of law. It is true that sometimes the ignorance is a bliss, but not always. In the instant case, the question of ignorance does not arise as the contemnor did not express her ignorance, but she appears to be cock sure as is evident from the submissions on solemn affirmation stating that there is no such provision. It is, thus, clear that her actions are contrary to the specific provisions of law. The only inference deducible on writ large is to pass such order which will be beneficial to the contemnor No. 2, ignoring the legal provisions, seriousness of the case and public interest it being a case of broad-day robbery.

(2) Admittedly, there is no provision in Criminal Procedure Code empowering the Judicial Magistrate, First Class to review its own order. No finger has been pointed out at any provision which empowered the contemnor No. 1 to review the order passed by her predecessor transferring the case from its file to the file of Chief Judicial Magistrate.

(3) The mystery is not solved as to how the operative order has been passed on 27-7-1993 while speaking order is dated 28-7-1993. The application filed on

27-7-1993 by the accused/petitioners for supply of copy of the application and time to file the reply, was rejected by the contemnor No. 1 on 27-7-1993 itself. However, the speaking order was passed on 28-7-1993. It is not the case of the contemnor No. 1 that operative order was passed on 27th and speaking order was dictated on 28th July, 1993. If the speaking order was not passed on merits after hearing the learned counsel of the applicant, i.e. the contemnor No. 2, it is very difficult to understand the propriety of rejecting the application of the accused. This also smacks the intention of the contemnor No. 1 and also exposes the working of her mind.

(4) While passing the order of return of property, the contemnor No. 1 adjudicated that the property particularly the golden and silver ornaments will not be required for the identification. It needs no clarification that in a case of robbery, the identification of the accused and the property are the only essential aspects to be proved. Admittedly, except some currency notes of Rs. 4,840/-, no identification marks were noted on other property. Therefore, the property definitely would be required for identification, not only by the contemnor No. 2, but the others who alleged to have entrusted the property with the contemnor No. 2.

(5) Admittedly, the contemnor No. 2 has specifically contended that the property which is alleged to have been seized from the accused, is not owned by him, but he was the custodian of the same as he had received it from the customers. None of the customers came forward to claim either the currency notes or ornaments before the Court, nor anyone placed any document on record to establish their ownership.

(6) The accused/petitioners opposed the return of property in the trial Court itself even earlier to the presentation of the second application dt/- 14-12-1992. As they had opposed to the return of the property in the trial Court, this Court had issued notice to the accused. In Cri Revision Application No. 176 of 91 though they were not made parties to this proceedings. In the Special Leave Petitioner filed by the contemnor No. 2 before the Supreme Court, the accused were made parties to the petition. At the initial stage, the accused need not to disclose their defence. Since the accused/petitioner were parties in the Spl. leave petition before Supreme Court, it was incumbent on the Magistrate to afford an opportunity of being heard to them. Despite this contemnor No. 1 did not issue notices to them and passed order in their absence and consequently deprived them from hearing. The principles of natural justice demand that the party who is likely to be prejudiced, must be noticed and heard before any order is passed.

(7) The criminal case No. 284 of 1991 is under sections 420, 392 read with Section 34 of the I.P.C. In my view, Cri. Case pertaining to the property in question pending before Trial Court was itself capable to decide the matter and therefore separate application for return of property was not registrable. In the instant case, admittedly a miscellaneous criminal application was registered as Miscellaneous criminal Case No. 188/92. To This application, the accused persons

were not made parties and, therefore, by no stretch of imagination one can expect that they are aware of the facts or process regarding the return of the property at the behest of the contemnor No. 2. Another interesting aspect which I found is that before passing the final order, the contemnor No. 1 directed the concerned Senior Clerk to return the money and ornaments immediately, vide the operative part of the order dt/- 27-7-1993. Similarly, the contemnor No. 2 filed an application for grant of ham dust to effect the release of the property immediately and the contemnor No. 1, without any hesitation, acceded to the request made.

(8) As the petitioners/accused had earlier opposed the release of the property in favour of the contemnor No. 2 the natural justice demands that if the accused had asked for the time to take the copies of the order passed on 27th and 28th July, 1993, in natural course, without any (sic) at least a reasonable time could have been granted to the accused. But, the contemnor No. 1 asked for the specific provisions of the principles of natural justice.

(9) Another circumstance which depicts mens rea is the direction given to the contemnor No. 2 to give an undertaking that he would return the property to the respective claimants. Such type of order to return the property to a stranger who is not before the Court nor identified by any one having any title and interest; beyond understanding or to digest as such type of order is not seen or read in any pronouncement during my experience of about 33 years at Bar and bench. In such eventuality, if property, as directed, is returned, Court having no lien, then how the trial Court could secure the property from 70 to 80 persons as indicated in application, as none of them had executed a supratnama to Court. Adoption of such modus-operandi by the trial Court wanted to have no trial at all. Learned Magistrate contemnor No. 1 who decided matter, appear to have proceeded neglecting the observations made by this Court in Criminal Rev. Application No. 176/91 which came to be confirmed by apex Court. This in my opinion is not correct approach. Every Judicial Officer is duty bound to first peruse the orders passed by its superior Courts in the matter to be decided by it and if any specific directions, terms and conditions are incorporated, without surpassing those aspects, it should not pass any order contrary to or in defiance of those terms, directions or conditions.

(10) The First Information Report which was filed on the date of occurrence itself, shows that the theft or robbery was of Rs. 5,00,000/-, while the contemnor No. 2 demanded cash of Rs. 24,00,842/- and the ornaments worth Rs. 74,854/- to be released in his favour. Under this circumstances, the evidence and the identification of property in the Court was necessary, this aspect has been completely overlooked or deliberately ignored by the contemnor No. 1, while passing the order.

34. Under the circumstances, the conduct and attitude adopted by the contemnor No. 1 in the instant case, cannot, by any stretch of imagination, be said to be the casual, accidental or unintentional. Therefore, after giving

conscious thought to the circumstances referred in the preceding paras, this Court has to draw the only in deducible inference that the contemnor No. 2 persuaded the contemnor No. 1 to return the property of which he was neither the owner nor the custodian, without any evidence placed on record. Contemnor No. 1 became the victim of the (sic), but definitely not in ignorance or is writ large. No circumstance is brought to my notice to consider or term the order as illegal or committed mistake in expressing her opinion. Every act or omission or commission on the part of the contemnor No. 1 is with dishonest intention and that too to return the property to the contemnor No. 2.

35. Courts of Justice are called as "Temple of Justice". Temple denotes sanctity, purity and reality. So in the Temple of Justice, these three things are observed while administering Justice. As the Temple is the holy place, so is the Court where justice is made impartially and aggrieved parties are put to happiness with dignity and sanctity. Judges are the guardians of Law and Justice. Judges have remained the moral guardians of Indian polity, preserving the high ideals of law and liberty enshrined in the constitution. In every case, Judge's conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise and indifferent to private, political or partisan influences. A judge is expected to administer justice according to law and deal with his/her appointment as a public trust; he should not allow other affairs of his private interest to interfere with the prompt and proper performance of judicial duties; nor should he administer the office for the purpose of advancing his personal aims or increasing his popularity.

The judiciary, as an institution, depends on continuous public assumption that judiciary is an honest and uncorrupt able institution and any allegations of corruption or dishonesty are bound to lower down the status of judiciary. Till this date, the people look up to the judges to obtain justice, this being the only institution where the guardians and trustees of the constitution and public interest are working.

In a case of State of Maharashtra Vs. R.A. Khan, Chief Jdl. Magistrate Gadchiroli, Contemnor, also a Chief Judicial Magistrate was involved in the proceedings under Contempt of Courts Act, 1971. Para 6 of the Judgment needs to be reproduced :

"The state of affairs as reflected are certainly disturbing. Undisputedly, the offences as disclosed in the charge-sheet was triable by the Sessions Judge. Apparently, it was beyond the jurisdiction of the Chief Judicial Magistrate to entertain the application for bail. He also made a venture to appreciate the material. Illegality which is patent, in passing the orders, is writ large. The orders in question are absolutely without any propriety. It also lacks sense of responsibility. Illegality in judicial exercise, according to us, by itself may not constitute a contempt unless it is in good faith or owing to bona fide error.

However, apart from the absence of jurisdiction, the learned Chief Judicial Magistrate released the accused persons on bail on the face of verdicts successively given by the Higher Courts. He had a conscious knowledge of those orders. This venture of the Chief Judicial Magistrate is certainly derogatory to well defined judicial responsibility. It lacks both good faith and bona fide. It is well intended deliberate and tainted with suspicion also. It tends to exhibit under disregard to the judicial authority of the Courts in high rank. From the narration of events in the reference which are not controverted the act of the respondent is explicitly well calculated with a design to undermine the authority of the Higher Court."

Shri Dharmadhikari, the learned counsel for the contemnor No. 2, referred the case of Debabrata Bandopadhyaya reported in Debabrata Bandopadhyay and Others Vs. The State of West Bengal and Another, , which has been reproduced in the case of S. Abdul Karim and Others Vs. M.K. Prakash and Others, , as under :

"A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arise that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To make the law of contempt do duty for other measures and is not to be encouraged."

In a case of the The Aligarh Municipal Board and Others Vs. Ekka Tonga Mazdoor Union and Others, , their Lordships observed about the punishment in a case of contempt as follows (Para 5) :

"Contempt proceeding against a person who has failed to comply with the Court's order serves a dual purpose : (1) Vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemnor to do what the law requires of him. The sentence imposed should effectuate both these purposes. To employ a subterfuge to avoid compliance of a court's order about which there could be no reasonable doubt may in certain circumstances aggravate the contempt."

36. Giving conscious thought to the facts and circumstances of the case, I am of the opinion that the trial Court, High Court and the Appex Court issued a negative mandate that unless and until the contemnor No. 2 Dilip Thankkar places the material on record to show that the property involved in the case, belongs to him or produces the person concerned before the Court who claims the property, it was not to be returned. In spite of this specific negative mandate,

the contemnor No. 1 passed the order releasing the property in favour of the contemnor No. 2 and thereby, accordingly to me, she has committed a civil contempt.

37. It is apparent as discussed above that there was not only defiance of the order passed by this Court, on the part of the contemnor No. 1, but she deliberately and dishonestly set aside the order passed by her predecessor on 6-1-1993 and ordered to release the property in favour of the contemnor No. 2 without notice and hearing the petitioner/accused who are naturally bound to be prejudiced. This Court takes a serious note of it. In a case reported in State of Maharashtra Vs. R.A. Khan, Chief Jdl. Magistrate Gadchiroli, Contemnor, , cited supra, at the initial stage itself, without advancing arguments, the Chief Judicial Magistrate came forward before the Court and tendered an apology and, therefore, only warning was issued to him by this Court. In the instant case the contemnor No. 1 has tendered an apology. But, considering the facts and circumstances of the case as well as the conduct and attitude of the contemnor No. 1, this is not a case where apology can easily be accepted. There cannot be any rule that every contempt proceeding should be dropped as soon as an unconditional apology is tendered. The very nature of the judicial function makes Judges sympathetic and responsive. However, every thing will depend upon the facts of each case. If the contempt is of a technical type or if the contempt can be termed as not serious or grave, the court is likely to accept the apology. In other cases, mere apology would not do. So, before considering the various circumstances, the court should consider and scrutinise the nature of contempt.

Keeping the object in view, I have to consider from the facts and circumstances, whether the contempt committed by the contemnors is a technical or a minor one ? Whether it is grave or serious ? What would be its impact on the society ? All these aspects are relevant along with the various other circumstances to accept or not to accept the apology. In certain cases the court should accept apology if the matter is such where acceptance of apology would be in the interest of justice. Similarly, the Court will be failing in it's duty if necessary punishment is not awarded if the manner deserves any such punishment.

Shri Aney, the learned counsel for the contemnor No. 1, attracted my attention to the Judicial Officers' Protection Act, 1850 and submitted that in view of the provisions of this Act, no proceedings can be instituted against the contemnor No. 1 being a Judicial Officer. This Act is consisting of only one section. Section 1 reads as follows :

"Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders - No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person,

bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

Mere perusal of the provisions show that there is no specific mention that the Judicial Officers are immuned from the action under Contempt of Courts Act, 1971. There is no need to mention that before the law everybody is equal. Section 16(1) of the Contempt of Court Act, 1971 is very clear that the provisions of the Act are applicable even to Judge, Magistrate, etc. The Section reads as follows :

"Subject to the provisions of any law for the time being in force, a Judge, Magistrate or other person acting judicially shall also be liable for contempt of his own court or of any other court in the same manner as any other individual is liable and the provisions of this Act shall, so far as may be, apply accordingly."

In view of this provision, according to me, the provisions of the Judicial Officers' Protection Act, 1850, are not of any help to the contemnor No. 1.

38. Considering the probabilities and the facts and circumstances of this case, according to me, it is a serious and deliberate lapse on the part of the judicial officer. If the judiciary is considered as a Temple of Justice and if the idols of the Temple are committing such type of serious lapses causing prejudice to other parties, it smacks the mens rea and dishonesty. Therefore, if this Court releases the contemnors merely issuing the warning, it will not meet the ends of justice.

The contemnor No. 2 a trade-man, probably indulging in the courier services, which is contrary to the Postal Department of Government of India. This trade has no legal sanctity or legal recognition. However, in this case, without any material, he persuaded a judicial officer to commit such type of contemptuous act and thereby he tarnished the image of the judiciary. Therefore, according to me, he too deserves the serious punishment.

39. The learned counsel for the contemnors and the contemnors were heard on the point of punishment.

I have already held that both the contemnors have committed the contempt of this Court as well as the trial Court who passed the order on 6-1-1993 transferring the case from its file to the file of Chief Judicial Magistrate. By this wilful disobedience of the contemnors with an oblique motive to return the property to the contemnor No. 2 only, who is admittedly, not the owner of the property, prejudicing the case of the accused. According to me, both the contemnors have caused substantial damages to the Temple of Justice. However, no citizen could have to approach the Judicial Officer and no Judicial Officer be the victim or prey of some consideration or interest either in the person or the property, according to me, a simple sentence to both the contemnors till rising of

the Court will be sufficient but, in addition to it, they are directed to pay a fine of Rs. 500/- on each count, i.e. a wilful disobedience of the order passed by the trial Court dt/- 6-1-1993 and the wilful disobedience of the order passed by this Court in Criminal Revision Application No. 176 of 1991. Thus, each of the contemnors has to pay Rs. 1,000/- on both the counts, within a week, in default to suffer simple imprisonment for seven days.

40. Before concluding, lastly, it is equally the duty of this Court to say few words in respect of the learned counsel who appeared and assisted this Court and made valiant efforts to convince this Court the points raised by respective counsel, to enable this Court to appreciate the facts and law laid down and thereby to adjudicate the matter at my best.

41. Rule in the above term is made absolute.

42. Shri Dharmadhikari, the learned counsel for the contemnor No. 2, requested to suspend the sentence and fine. Considering the various circumstance and it being the specific case to tarnish the image of temple of justice at the hands of the contemnors, there should not be repetition of such act again either by any citizen of India or by the member of the temple of justice. I do not accept the request. Considering their attempt to tarnish the image of the idols instituted in the temple of justice. I think that the contemnors do not deserve any more lenience. Therefore, the request made by Shri Dharmadhikari, the learned counsel for the contemnor No. 2 is not accepted. Similar prayer is made by Shri Sanyal on behalf of the contemnor No. 1 and for the reasons given above. I do not accept the request of Shri Sanyal, also.

43. Rule against the contemnor No. 3 stands discharged.

44. Order accordingly.