

(2002) 10 BOM CK 0117

In the Bombay High Court

Case No : Contempt Petition No. 201 of 2002

Damodar Mahadeo Patil

APPELLANT

Vs

Motiram Mahadeo Patil and Another

RESPONDENT

Date of Decision : 03-10-2002

Acts Referred:

Contempt of Courts (Bombay High Court) Rules, 1994 — Rule 7, 8
Contempt of Courts Act, 1971 — Section 12(1), 15, 2, 20
Limitation Act, 1963 — Section 5

Citation : (2003) 1 ALLMR 301 : (2003) 4 BomCR 274

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : G.S. Hiranandani, instructed by C.G. Gavnekar, for the Appellant;
I.S. Thakur and Sunil Kumar Rathore for Respondent No. 1 and K.K. Tated,
A.G.P., for the Respondent

Judgement

R.M.S. Khandeparkar, J.—Heard the Advocates for the parties. Perused the record.

2. The petitioner herein had filed regular Civil Suit No. 34 of 1991 against the respondent No. 1 and some others for partition and separate possession of 1/4 share contending that the agricultural property held by the brothers was a joint family property. The said suit was decreed by the trial Court while rejecting the monetary claim made by the petitioner against the defendants in the suit. The preliminary decree was passed on 17-1-1995. The Civil Appeal No. 36 of 1995 came to be filed by the respondent No. 1 herein against the said decree which was allowed by the lower Appellate Court by its judgment and decree dated 12-2-1998 and thereby the suit filed by the petitioner came to be dismissed.

3. The petitioner thereupon filed the Second Appeal No. 169 of 1998 and pending the hearing and final disposal of the said second appeal preferred Civil Application No. 3202 of 1998 for direction to the parties not to incumber the properties and/or to continue with the construction, if any, as also to restrain the

respondent No. 3 to the said appeal from creating third party interest over the land bearing Survey No. 24/2 situated in the village Tarankhop, Taluka Pen, District Raigad, and further for stay of the operation of the judgment of the lower Appellate Court. On the said application, an ad interim relief in terms of prayer Clause (b) which related to the relief of restriction on creation of third party interest in or over the land bearing Survey No. 25/2 by the respondent No. 3 to the said appeal was granted by order dated 4-5-1998, however, after issuance of notice and upon hearing the Advocates for the parties including the Advocate for the respondent No. 1 herein, it was ordered on 23-7-1998 that, "status quo as of today in the matter of possession to continue till the hearing and final disposal of the appeal subject to the condition that the parties will not create third party right or alienate or encumber the property" and with the said direction, the civil application was disposed of.

4. The petitioner herein filed the present petition on 9-4-2002 complaining of violation of the order dated 23-7-1998 in Civil Application No. 3202 of 1998 in Second Appeal No. 169 of 1998 accusing the respondent No. 1 herein, of having executed a sale deed dated 27-4-2001 thereby alienating an area admeasuring 16 gunthas from survey No. 25 in favour of the third party and that the said sale deed was registered in the office of the Sub-Registrar of Pen on 17-4-2002. Copy of the said sale deed was also produced alongwith the application. When the matter came up for hearing before this Court on 27-6-2002, whereupon after hearing the Advocate for the applicant and the respondent No. 2 and on perusal of records, this Court directed issuance of notice to the respondent No. 1 calling upon him to show cause as to why he should not be punished for willful disobedience of the order dated 23-7-1998 passed in Civil Application No. 3202 of 1998 in Second Appeal No. 169 of 1998 on account of execution of the said sale deed thereby transferring the rights in the said property in favour of the third party. Pursuant to the service of the notice, the respondent No. 1 herein filed his affidavit in reply dated 12-9-2002. The respondent No. 2 is only a proforma party.

5. The learned Advocate appearing for the respondent No. 1 has urged that, in view of unconditional apology tendered by the respondent No. 1 in relation to the execution of the sale deed inspite of the order dated 23-7-2001, for the reasons and the circumstances mentioned in the affidavit in reply, the matter may be closed by accepting the said unconditional apology tendered by the respondent No. 1. Without prejudice, the proceedings are sought to be defended mainly on three grounds. Firstly that, the proceedings which are initiated are for criminal contempt, and the same is evident from the cause title of the application itself and, hence, the same having been initiated without obtaining Advocate General's consent, the proceedings are liable to be dismissed in limine. In that connection, reliance is sought to be placed in the decision of the Apex Court in the matter of State of Kerala v. M.S. Mani & others, reported in 2001(4) All.M.R. 489; secondly, on the ground that though the application u/s 15 of the Contempt of Court Act was presented in the Court on 9-4-2002, suo motu cognizance of the civil

contempt was taken by the Court on 27-6-2002 in relation to the alleged offending act committed on 17-4-2001 and the same being beyond the period of one year from the date of the cause of action, it is barred by law of limitation and, therefore, on that count also the proceedings are liable to be dropped. Reliance is placed in that regard in the matter of Om Prakash Jaiswal v. D.K. Mittal & another, reported in 2001(1) Mh.L.J.333; thirdly, it has also been submitted that the application filed by the applicant is not supported by necessary affidavit as is otherwise required under Rule 7-B of Chapter 34 of the Bombay High Court Appellate Side Rules, 1960. On facts, it is submitted that the affidavit in reply filed by the respondent No. 1 apparently discloses justifiable reasons for execution of the sale deed dated 17-4-2001 and considering the decision of the Apex Court in the matter of Niaz Mohammad and others, etc. etc. Vs. State of Haryana and others, , financial constraint, disclosed by the respondent No. 1 as being the ground and reason for execution of the said sale deed should be considered as the justifiable ground in the matter and the mitigating circumstances while considering the issue regarding the alleged violation of the said order. It is also submitted that what has been sold by the sale deed is a small piece of land admeasuring about 16 Gunthas of area. It is also submitted that the sale deed was executed on the bona fide belief that the order of injunction was against the respondent No. 3 in the said appeal and not against all the parties to the second appeal, as the relief prayed for in the Civil Application No. 3202 of 1998 in relation to the restrain against raising of third party interest in the property was against the respondent No. 3 in the said appeal and not against other respondents.

6. Without prejudice to the above submissions, it has been further submitted that, in case the Court is not inclined to agree with the respondent No. 1 in relation to the grounds raised for non-maintainability of the proceedings and about the justifiable reasons said to have been given for execution of the sale deed, then the lenient view may be taken while imposing the punishment considering the age of the respondent No. 1. The punishment may be confined to the imposition of the fine only.

7. The records apparently disclose that, by order dated 23-7-1998 passed in C.A. No. 3202 of 1998, the respondent, in the Second Appeal No. 169 of 1998 were directed to maintain status quo as regards the possession of the properties and were also directed not to create the third party right or to alienate or incumber the properties which were the subject matter of the appeal. The records also disclose the execution of sale deed dated 17-4-2001 by the respondent No. 1 in relation to the piece of land out of properties which were subject matter of the said appeal. It is a fact that execution of such a sale deed has also been clearly admitted by the respondent No. 1. Being so, the fact of passing of the order restraining the respondents in the said second appeal including the respondent No. 1 herein is not in dispute as well as the execution of the sale deed by the respondent No. 1. Undoubtedly, in the reply, the contention is sought to be raised that the respondent No. 1 bona fide believed that the order restraining creation

of third party interest was against the respondent No. 3 in the second appeal and was not against the respondent No. 1. However, the fact remains that the records apparently disclose the order dated 23-7-1998 was against all the respondents in the second appeal and yet the respondent No. 1 ventured to execute the sale deed creating third party interest in contravention of the said order.

8. As regards the first contention of the respondent No. 1 that contempt petition is filed u/s 15 of the Contempt of Court Act, 1971. It is to be noted that the nature of the contempt proceedings does not depend upon the section of the Contempt of Court Act referred to or mentioned in the application but the substance of the application is the decisive factor in that regard. If one peruses the contents of the application, the same reveal the grievance of the applicant relating to the willful non-compliance of the order of this Court. Section 2(b) of the Contempt of Court Act, 1971 defines expression "civil contempt" means willful disobedience of any judgment, decree, direction, order, writ or other process of a Court or willful breach of undertaking given to a Court; whereas section 2(c) defines expression "criminal contempt" means the publication whether by words, spoken or written, or by signs, or by visible representations, or otherwise of any matter or the doing of any other act whatsoever which, (i) scandalizes or tends to scandalize, 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 proceeding; or (iii) interferes, or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner. Once it is apparent that the grievance of the applicant relates to willful non-compliance of the order passed by this Court it is evident that the proceedings relate to civil contempt and not the criminal contempt.

9. In *State of Kerala v. M.S. Mani*, (supra) the State had filed the petition complaining that the dignity and authority of the Supreme Court were undermined by the opponents by publishing a three column news on the front page of the newspaper "The Kerala Kaumudi" on 5-5-1999. The respondents had raised preliminary objection regarding absence of the consent of Attorney General u/s 15 of the Contempt of Courts Act. In relation to the said objection, it was ruled that the written consent of Advocate General to the motion for criminal contempt is mandatory and obtaining consent subsequent to notice cannot cure the initial defect. Once it is clear that the present proceedings are not for criminal contempt but for civil contempt, the question of obtaining written consent of Advocate General for initiation of such proceedings does not arise at all and, therefore, the decision of the Apex Court in the matter of *State of Kerala* is of no assistance in the matter in hand.

10. As regards the second contention pertaining to suo motu cognizance for the contempt proceedings, it is to be noted that the order dated 27-4-2002 clearly refers to the notice having been issued pursuant to the application filed by the petitioner. It is therefore evident from the records that it is not a suo motu

cognizance taken by the Court but the notice was issued pursuant to the application filed by the applicant bringing to the notice of the Court willful act on the part of the respondent No. 1 in violation of the order of this Court. The same, therefore, does not amount to taking suo motu cognizance of the offending act of the respondent No. 1 by this Court for the purpose of the contempt proceedings.

11. The Apex Court in Om Prakash Jaiswal case (supra), it was held that filing of an application or petition for initiating proceeding for contempt or a mere receipt of such reference by the Court does not amount to initiation of proceedings by the Court. On receiving any such document it is usual with the courts to commence some proceedings by employing an expression such as "admit", "rule", "issue notice" or "issue notice to show cause why proceedings for contempt be not initiated". In all such cases notice is issued either in routine or because the Court has not yet felt satisfied that a case for initiating any proceedings for contempt has been made out. It is only when the Court has formed an opinion that a prima facie case for initiating proceedings for contempt is made out and that the respondents or the alleged contemnors should be called upon to show cause why they should not be punished, then the Court can be said to have initiated proceedings for contempt. Undoubtedly, applying the law laid down by the Apex Court in Om Prakash Jaiswal's case (supra), the cognizance having been taken on 27-6-2002 in relation to the offending act committed on 17-4-2001, the proceedings would be barred by law of limitation. However, as fairly conceded by the learned Advocate for the respondents, the Apex Court in subsequent decision of three Judge Bench in Pallav Sheth v. Custodian & others, reported in 2001(4) Mh.L.J. 1, has held that section 20 of the Contempt of Court Act has to be construed in a manner which would avoid anomaly and hardship both as regards the litigant as also by placing a pointless fetters on the powers of the Court to punish for its contempt. Proceedings in civil contempt normally commence with a person aggrieved bringing to the notice of the Court the willful disobedience of any judgment, decree or order etc. which could amount to the commission of offence. Attention of the Court is drawn to such contempt having been committed only by person filing an application in that behalf. When the judicial procedure requires the application being filed before the Court or consent being sought by a person from the Advocate General or a Law Officer, it must logically follow that proceedings for contempt are initiated when the applications are made. Action for contempt is divisible into two categories viz. that initiated suo motu by the Court and that instituted otherwise than on the Court's own motion. Proper construction to be placed on section 20 must be that action be initiated either by filing of application or by the Court issuing notice suo motu, within a period of one year from the date on which the contempt is alleged to have been committed. Referring to the decision of Om Prakash Jaiswal's case, it was observed that the proposition to the effect that initiation of proceedings u/s 20 can only be said to have occurred when the Court forms a prima facie opinion that the contempt has been committed and issue notice to the contemner to show cause as to why he should not be punished, then the Court could be said to

have initiated proceedings for contempt u/s 20, is not warranted. It is further observed that, if the interpretation of section 20 put in Om Prakash Jaiswal's case is correct, it would mean that notwithstanding both the subordinate Court and the High Court being prima facie satisfied that the contempt has been committed, the High Court would become powerless to take any action. Apparently, the view taken by the Apex Court in Om Prakash's case has not been approved by the larger Bench of Apex Court in its subsequent decision in Pallav Sheth's case.

12. Applying the law laid down by the Apex Court in Pallav Sheth's case, it is apparent that the proceedings in the case in hand were initiated by an application by the petitioner filed on 9-4-2002 in relation to the offending act committed by the respondent No. 1 on 17-4-2001 and, therefore, it is within the period of limitation.

13. As regard the third contention that the application does not satisfy the requirements of the rules framed by this Court, undoubtedly, Rule 7-B of Appellate Side Rules the High Court requires the petitioner to file affidavit in support of an application for initiating proceedings for Contempt of Court. However, the objection in that regard in the case in hand is of no consequence at this stage as the fact that the order passed by this Court in C.A. 3202 of 1998 on 23-7-1998 directing the parties not to create third party interest as well as the fact that the respondent No. 1 did execute the sale deed conveying the piece of land from the suit property in favour of third party are not in dispute, besides being that the said facts are clearly borne out from the record and being so, mere absence of affidavit of the petitioner in support of the application cannot render the proceedings to be bad in law and that too at this stage. The purpose behind requirement of affidavit is to bind the person and to hold him responsible for the facts alleged by him while complaining about violation of order of the Court and to avoid frivolous complaints.

14. As regards the unconditional apology sought to be tendered by the respondent No. 1, the same cannot be accepted unless the grounds alleged by the respondent No. 1 as being disclosing justifiable reasons for execution of the sale deed dated 17-4-2001, and the contention of the respondent No. 1 that on account of acute poverty and financial constraint he was forced to sale the small piece of property for discharging of liability of bank and other persons and to keep things survive, are established by cogent evidence in that regard. The list of the properties of the respondent No. 1 submitted by the learned Advocate for the respondent No. 1 in the course of the argument discloses various properties which are in possession of the respondent No. 1. It is not the case of the respondent No. 1 that the said properties are consisting of barren land or that the respondent No. 1 does not receive any income from those properties. The statements in the affidavit in reply are to the effect that the respondent was compelled to sell the piece of land for discharging the debt and liability of the bank and other persons and to keep him survive. However, it is not supported by

any evidence. As regards the alleged subsisting liability of the respondent No. 1 on the date of the execution of the sale deed either to any bank or to any other person, neither any details in that regard have been disclosed nor any identity of the bank or the persons, to whom if the respondent No. 1 owed any amount, are disclosed nor the details regarding the alleged debt and liability have been narrated in the affidavit in reply. Apparently, it is a mere statement to avoid the punishment which respondent No. 1 may have to face on account of violation of the order of this Court. If really the respondent No. 1 had to clear any debt or liability from any bank or person, no one had prevented the respondent No. 1 to disclose the details about the same and only upon such disclosure perhaps it could have been said that the respondent No. 1 was really in a financial difficulties and, therefore, was compelled to dispose of his property. This is not to say that the respondent No. 1 could have disposed of the property without obtaining prior permission of the Court. Even in case of such financial constraint, nobody, had prevented the respondent No. 1 from approaching the Court for necessary modification of the order dated 23-7-1998 for seeking permission to dispose of the piece of land to clear the alleged debt and liability towards the bank or any other person.

15. It is true that the respondent No. 1 has also contended that he bona fide believed that the order regarding restrain in relation to creation of the third party interest was against respondent No. 3 and that, therefore, he proceeded to execute the sale deed. The statement in the affidavit in reply which clearly disclose knowledge to the respondent regarding the order passed on 23-7-1998, reads thus

"In Civil Application No. 3202 of 1998 in the Second Appeal 170 of 1998 the ad interim relief granted on 4-5-1998 was confirmed and in Civil Application No. 3201 of 1998 in Second Appeal No. 169 of 1998, an order of status quo was granted and possession to continue till hearing and final disposal of the second appeal subject to the condition that the parties will not create third party right or alienate or encumber the property."

The said statement has been confirmed on solemn affirmation by the respondent No. 1. Apparently, therefore, the respondent No. 1 had full knowledge about the nature of the order passed in the concerned civil application in relation to restrain against the creation of third party interest in the properties which were the subject matter of the appeal and this was, inspite of the fact, that the respondent No. 1 was also aware that in the application filed by the appellant in the said appeal, the relief of injunction in relation to creation of third party interest was asked for against the respondent No. 3. In other words, the respondent No. 1 was fully aware that though in the proceedings before the Court, the relief prayed for injunction against creation of third party interest was against the respondent No. 3, the Court while deciding the application had passed the order restraining all the parties to the proceeding from creating third party interest. Inspite of the specific knowledge about the nature of the order,

the respondent No. 1 willfully proceeded to execute the sale deed on 17-4-2001 without even obtaining prior permission of the Court and without seeking any modification of the order of injunction. Apparently, it cannot be said that the respondent No. 1 has acted bona fide or without knowing the consequences of such acts. Apparently the respondent No. 1 had deliberately, intentionally and willingly acted in disobedience of the order passed by this Court and thereby is guilty of Contempt of Court.

16. It was sought to be argued that the financial constraint is a justifiable ground to avoid the punishment in contempt proceedings. In that connection, the decision of the Apex Court in the case of Niaz Mohammad & others was sought to be relied upon. The Apex Court in the said decision has held that---

"9. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act") defines "Civil Contempt" to mean "willful disobedience to any judgment, decree, direction, order, writ or other process of a Court.....". Where the contempt consists in failure to comply with or carry out an order of a Court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the Court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order. The Court while considering the issue as to whether the alleged contemner should be punished for not having complied and carried out the direction of the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be willful disobedience to any judgment, @ page S.C. 311 decree, direction, order, writ or other process of a Court. Before a contemner is punished for non-compliance of the direction of a Court, the Court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was willful and intentional. The Civil Court while executing a decree against the judgment debtor is not concerned and bothered whether the disobedience to any judgment, or decree, was willful. Once a decree has been passed it is the duty of the Court to execute the decree whatever may be consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was willful and intentional. If from the circumstances of a particular case, brought to the notice of the Court, the Court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the Court may not punish the alleged contemnor

From bare reading of the said decision, it reveals that the Apex Court was dealing with the matter whereby the Government of Haryana had expressed its inability to comply with the directions issued in relation to the payment of arrears of salary to the employees on account of financial constraint. It was not a case of positive act of violation of the Court's order but an inability to perform an act which was directed to be performed by the Court. There is a difference between two such acts. In case of inability to perform an act on the ground of the financial constraint, the same may not always be an act of disobedience, and perhaps rarely be called as intentional or willful. However, when the party to whom specific direction is given not to perform a particular Act and yet the party performs the said act, it apparently shows disobedience of the Court's direction. Undoubtedly, in order to hold a person to be guilty of Contempt of Court, such disobedience has to be coupled with willful act on the part of performer.

17. As already held above, the respondent No. 1 was fully aware and had sufficient knowledge of the scope and nature of the order passed in the civil application in relation to restrain imposed upon creation of third party interest in the property which was subject matter for the proceeding in the second appeal. In spite of the same, the respondent No. 1 willfully and intentionally proceeded to execute the sale deed in relation to a piece of land. The excuse sought to be given regarding financial constraint being not established with necessary details in that regard, the only conclusion which can be drawn is that the respondent No. 1 has no facts to disclose in that regard and, therefore, the respondent No. 1 has not given any details regarding such financial constraint and the alleged debt and liabilities. Being so, the act of execution of conveyance of sale deed dated 17-4-2001 cannot be said to be otherwise than willful and intentional disobedience of the Court's order.

18. Reliance is also placed in the decision of the Apex Court in the matter of Vishwa Dev Sharma Vs. State of Rajasthan, and Ms. Sophy Kelly & another v. Chandrakant Ganpat & others, reported in 1999 All.M.R. 667, in support of the contention that the old age factor may be taken into account while considering the imposition of punishment.

19. Considering the materials on record, therefore, I have no doubt that the respondent No. 1 has willfully and intentionally disobeyed the order dated 23-7-1998 by executing the sale deed dated 17-4-2001 and, therefore, is guilty of Contempt of Court and is liable to be punished.

20. In the facts and circumstances of the case, therefore, the apology tendered by the respondent No. 1 cannot be accepted. Undoubtedly, considering the age factor of the respondent No. 1, the same has to be borne in mind while imposing the punishment. Respondent No. 1 is stated to be of the age of 78 years. Bearing the same in mind, while holding the respondent No. 1 guilty of Contempt of Court, he shall undergo the civil imprisonment till rising of the Court and further shall pay fine of Rs. 2000/ within a period of 15 days and on payment of such amount, the same shall be credited to the account of legal aid cell.

Contempt petition stands disposed of.