

(1999) 08 KL CK 0030
In the High Court Of Kerala
Case No : C.C.C. No. Nil of 1999

Dr. Joseph Kuzhijalil

APPELLANT

Vs

Joseph Pulikunnel alias P.S. Joseph and Another

RESPONDENT

Date of Decision : 18-08-1999

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 92

Constitution of India, 1950 — Article 129, 215

Contempt of Courts Act, 1971 — Section 10, 12, 14, 15, 15(1)

Citation : (1999) 2 ALT(Cri) 442 : (2000) CriLJ 1264 : (1999) 3 ILR (Ker) 489 :
(1999) 4 RCR(Criminal) 606

Hon'ble Judges : P.K. Balasubramanyan, J;G. Sasidharan, J

Bench : Division Bench

Advocate : Kurian Joseph and Firoz K. Robin, for the Appellant; Mathew Zacharia, for No. 1, for the Respondent

Judgement

P.K. Balasubramanyan, J.—The question raised in this proceeding filed invoking Article 215 of the Constitution of India and Sections 10, 12 and 15 of the Contempt of Courts Act, 1971 is whether this proceeding is maintainable at the instance of the petitioner on the ground that what is alleged is a criminal contempt of the subordinate Court and the sanction sought for by the petitioner before the Advocate General u/s 15 of the Contempt of Courts Act, 1971 read with Section 10 thereof was refused by the Advocate General. The Registry returned the papers to the petitioner by seeking a clarification whether the contempt of Court case is maintainable in view of the dismissal of the petition for sanction by the learned Advocate General. Counsel for the petitioner represented the petition with the endorsement that the sanction of the Advocate General was not necessary in the light of the decision of the Division Bench in Guruvayur Devaswom Managing Committee v. Pritish Nandi, (O.P. No. 7352 of 1985 (Contempt)). Counsel also stated that if that explanation was not acceptable the matter may be sent to the Court for decision. The Deputy Registrar noticing that this was a petition u/s 15 of the Contempt of Courts Act, 1971 and further

noticing that in view of the decision in Vakkanad G. Nagappan, Advocate Vs. M.S. Mani and Others, initiation of criminal contempt u/s 15 of the Contempt of Courts Act, 1971 by any person without the written consent of the Advocate General was not entertainable, posted the matter before the Court. Since the question involved was one in which there were apparently conflicting observations in two Division Bench decisions of this Court, this Court also heard, even at this stage, counsel for the respondent. Since the submissions were based on binding decisions of the Supreme Court not referred to by the Division Bench in Vakkanad G. Nagappan, Advocate Vs. M.S. Mani and Others, it was felt unnecessary to refer the matter to a Full Bench to resolve the conflict.

2. Section 2(c) of the Contempt of Courts Act, 1971 defines criminal contempt. Sections 3 - 6 indicate what do not amount to contempt. Section 7 of the Act saves some of the publications referred to in that Section. Section 10 of the Act confers power on the High Court to punish contempts of subordinate Courts. Section 14 of the Act enables the Court to award punishment if the contempt is in the face of the High Court. Cognisance of criminal contempt in other cases is provided for in Section 15 of the Act. It is provided therein that in the case of a criminal contempt other than a contempt referred to in Section 14 of the Act, the High Court may take action on its own motion or on a motion made by the Advocate General or any other person with the consent in writing of the Advocate General. Section 15(2) of the Act provides that in the case of any criminal contempt of a subordinate Court, High Court may take action on a reference made to it by the subordinate Court or on a motion made by the Advocate General. Section 17 prescribes the procedure after cognizance is taken and Section 18 of the Act provides that every case of criminal contempt u/s 15 of the Act shall be heard and determined by a Bench of not less than two Judges. Section 20 of the Act prescribes the period of limitation for initiation of any proceeding for contempt by Court either on its own motion or otherwise. Under Rule 8 of the Rules framed by the High Court of Kerala under the Contempt of Courts Act, 1971, procedure to be followed by the Subordinate Court while making reference is laid down and the procedure thereafter is also laid down.

3. In the case on hand, contempt alleged is that of a subordinate Court. The claim is that by publication of a pamphlet marked Annexure-A, the first respondent had attempted to prejudice the due course of a judicial proceeding and this amounts to criminal contempt within the meaning of the Act. On this basis, instead of making a request to the concerned subordinate Court to make a reference for action under the Act, the petitioner moved the Advocate General by invoking Section 15 of the Contempt of Courts Act. u/s 15(2) of the Act, High Court may take action on a criminal contempt of a subordinate Court either on a motion made by the Advocate General or on a reference made to it by the Subordinate Court. Section 15(2) of the Act does not contemplate the moving of an application by a litigant or any other person competent, before the Advocate General regarding criminal contempt of a subordinate Court. But Section 15(1) of the Act which is in general terms provides that in the case of a criminal

contempt, High Court may take action either on a motion by the Advocate General or on a motion by any other person with the consent in writing of the Advocate General. The Advocate General, in the case on hand, after a reference to the materials, took the view that the publication of the pamphlet did not amount to contempt of Court and sanction to initiate contempt proceedings in the High Court was liable to be declined. The petition filed by the petitioner was thus dismissed. It is thereafter that the petitioner has filed this contempt of Court case not only by invoking Section 15 of the Contempt of Courts Act, 1971 but also by invoking Article 215 of the Constitution.

4. Article 215 of the Constitution of India lays down that 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. According to Whartons Law Lexicon, a Court of record is one where the acts of judicial proceedings in that Court are enrolled for a perpetual memorial and testimony and the Court has the power to fine and imprison. In other words, the fact that the High Court is a Court of record, itself confers on it the power to punish for contempt of itself. The scope of the expression "including the power to punish for contempt of itself occurring in this Article was considered by the Supreme Court in Delhi Judicial Service Association, Tis Hazari Court, Delhi Vs. State of Gujarat and others, in the context of Article 129 of the Constitution of India which is the corresponding provision regarding the Supreme Court. Their Lordships held at p. 3109 of Cri LJ:-

The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression "including". The expression "including" has been interpreted by Courts to extend and widen the scope of power. The plain language of Article 129 clearly indicates that this Court as a Court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a Court of record. In interpreting Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The Courts ought not to accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since the Supreme Court is designed by the Constitution as a Court of record and as the Founding Fathers were aware that a superior Court of record had inherent power to indict a person for the contempt of itself as well as of Courts inferior to it, the expression "including" was deliberately inserted in the Article. Article 129 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.

It is not necessary to multiply authorities on this aspect except to refer to the recent decision of the Supreme Court in Income Tax Appellate Tribunal through President Vs. V.K. Agarwal and Another, where their Lordships relied on and followed the decision in Delhi Judicial Service Association case referred to earlier. Article 129 of the Constitution is in part materia with Article 215 of the

Constitution concerning the High Court and, therefore, it is clear that the power available to the High Court under Article 215 of the Constitution of India is to punish for contempt of itself and also of the Courts subordinate to it.

5. Learned counsel for the respondents contended that since this was a case of contempt of the subordinate Court, the same was squarely covered by Section 15(2) of the Contempt of Courts Act and hence the petitioner had no right either to move the Advocate General for sanction or to move this Court thereafter by seeking to invoke Section 15(1) of the Contempt of Courts Act. On a reading of Section 15 of the Act, it could be said that such a view is possible. But the Supreme Court in *S.K. Sarkar, Member, Board of Revenue, U.P., Lucknow Vs. Vinay Chandra Misra*, has dealt with this aspect. After noticing that the operation of Sub-section (1) of Section 15 of the Act appeared to be confined to cases of criminal contempt of Supreme Court or the High Court itself and criminal contempt of a subordinate Court is dealt with in Sub-section (2) of the Act, the Supreme Court held that Sub-section (2) of Section 15 of the Act did not restrict the power of the High Court to take cognizance of and punish for contempt of a subordinate Court on its own motion. Their Lordships have stated at Pp. 286 and 287 of Cri LJ :-

A comparison between the two sub-sections would show that whereas in Sub-section (1) one of the three alternative modes for taking cognizance, mentioned is "On its own motion", no such mode is expressly provided in Sub-section (2). The only two modes of taking cognizance by the High Court mentioned in Sub-section (2) are : (i) on a reference made to it by a subordinate Court; or (ii) on a motion made by the Advocate General, or in relation to a union territory by the notified Law Officer. Does the omission in Section 15(2) of the mode of taking suo motu cognizance indicate a legislative intention to debar the High Court from taking cognizance in that mode of any criminal contempt of a subordinate Court ? If this question is answered in the affirmative, then, such a construction of Sub-section (2) will be inconsistent with Section 10 which makes the powers of the High Court to punish for contempt of a subordinate Court, co-extensive and congruent with its power to punish for its own contempt not only in regard to quantum or prerequisites for punishment, but also in the matter of procedure and practice. Such a construction which will bring Section 15(2) in conflict with Section 10, has to be avoided, and the other interpretation which will be in harmony with Section 10 is to be accepted. Harmoniously construed, Sub-section (2) of Section 15 does not deprive the High Court of the power of taking cognizance of criminal contempt of a subordinate Court, on its own motion, also. If the intention of the Legislature was to take away the power of the High Court to take suo motu cognizance of such contempt, there was no difficulty in saying so in unequivocal language, or by wording the sub-section in a negative form. We have, therefore, no hesitation in holding in agreement with the High Court, that Sub-section (2) of Section 15, properly construed, does not restrict the power of the High Court to take cognizance of and punish contempt of a subordinate Court, on its own motion.

So the fact that what is complained of is the contempt of a subordinate Court does not preclude this Court from exercising its jurisdiction u/s 15(1) of the Act.

6. Section 15(1) of the Contempt of Courts Act contemplates a motion either by the Advocate General or by any other person with the consent in writing of the Advocate General. The refusal of consent by the Advocate General cannot be said to be justiciable. Unlike in the case of a refusal of sanction u/s 92 of the CPC before its amendment in the year 1976, when an Advocate General refuses sanction for moving the Court u/s 15(1) of the Contempt of Courts Act, no right of a party could be said to have been impaired. Hence the principle recognised by this Court in *Simon v. Advocate General*, 1975 Ker LT 78 : AIR 1975 Kerala 57 (FB) may not have application to a case where the Advocate General refuses the consent. This was the view adopted by this Court in *Berely v. Xavier*, 1986 Ker LT 1078 : 1988 Cri LJ 90 wherein this Court held that the refusal to give consent by the Advocate General is not justiciable and a petition under Article 226 of the Constitution of India seeking to challenge that order was not maintainable. This Court of course relied on the decision of the Karnataka High Court in *N. Venkataramanappa Vs. D.K. Naikar and Another*, in support. Though the decision in *N. Venkataramanappa Vs. D.K. Naikar and Another*, was overruled by a Full Bench of the Karnataka High Court in *A.V. Kowdi and Co. v. R.V. Lakshmi Devamma* ILR 1990 KANT 4355 that was not on this point but on the point of applicability of Section 20 of the Contempt of Courts Act in the matter of initiation of suo motu action under Article 215 of the Constitution.

7. In *Conscientious Group Vs. Mohammed Yunus and Others*, the Supreme Court indicated that when reasons for refusal of consent by the Advocate General (Solicitor General in that case) are not found to be irrelevant or arbitrary, Court cannot permit the revival of the contempt of Court proceeding which had earlier been permitted to be withdrawn so as to enable the petitioner to move first, the Solicitor General for consent u/s 15(1) of the Act. This decision indicates that the Court can when it is moved for initiating action for contempt of Court, consider whether the reasons given by the Advocate General are irrelevant in the eye of the law and to a limited extent can consider whether the view expressed by him is arbitrary, illegal or unreasonable. This Court, in the judgment in *O.P. 7352 of 1985 (Contempt)* 1986 KLT 21 Case No. 38 while considering the question of absence of consent by the Advocate General stated :-

It is true that even in a case where suo motu action for contempt is not taken, and where the Advocate General had declined to give his consent, this Court, when properly alerted, can consider action under the Act against the offending publications. However, the fact that the Advocate General had not considered it fit to give his consent would weigh with this Court as one of the aspects to be adverted to, in embarking upon an enquiry whether the statements complained of constitute contempt.

8. It has also been laid down by the Supreme Court in *Goodwill Paint and Chemical Industry Vs. Union of India and another*, that Section 15 of the

Contempt of Courts Act prescribes the modes for taking cognizance of criminal contempt by the High Court and by the Supreme Court. It is not a substantive provision conferring power on the High Court and the Supreme Court for taking action for contempt of its subordinate Courts. The whole object of prescribing procedural modes of taking cognizance u/s 15 of the Act is to safeguard the valuable time of the High Court and the Supreme Court being wasted by frivolous complaints of contempt of Court. Section 15(2) of the Act does not restrict the power of the High Court to take cognizance of the contempt of itself or of a subordinate Court, on its own motion although apparently, the Section does not say so. It can thus be seen that the Advocate General moved for sanction, is not taking a decision on whether contempt of Court has been committed, but only considers whether sanction ought to be given on the materials placed before him. But certainly, it is a procedural safeguard to weed out frivolous or unnecessary motions being made before the Court for initiation of contempt action. In that context, when the Court is moved after sanction is refused by the Advocate General, the Court has necessarily to keep that fact in mind before deciding to initiate suo motu action for contempt of Court. As observed by the Division Bench in the Guruvayur Devaswom case referred to earlier, the view of the Advocate General in that context, is entitled to weight and due consideration. But that is different from saying that the Court cannot initiate action merely on the ground that the Advocate General has not granted the consent sought for in a given case.

9. In *Jose v. Alice Francis* 1979 KLT 262 a Division Bench of this Court held that the High Court had power u/s 15(1) of the Act to initiate action for contempt of a Court subordinate to it. The power of the Court as a Court of record recognised by the Constitution cannot be taken away by Section 15(2) of the Contempt of Courts Act. Section 15(2) only provided that the Subordinate Court or the Advocate General can move the Court in a case of criminal contempt of the subordinate Court. It does not prohibit suo motu action by the High Court. So if somebody else brings the criminal contempt of a subordinate Court to the notice of the High Court by filing a petition before High Court, Section 15(2) of the Act cannot stand in the way of the High Court taking suo motu action for contempt u/s 15(1) of the Act. This decision is, therefore, authority for the position that the Court can entertain a petition for initiation of contempt action even of a subordinate Court, even though the requirements of Section 15(2) have not been complied with and even though the Advocate General himself had not been moved u/s 15(1) of the Act.

10. In *Pritam Pal Vs. High Court of Madhya Pradesh, Jabalpur through Registrar*, the Supreme Court reiterated the position as follows :

The power of the Supreme Court and the High Court being the Courts of Record as embodied under Articles 129 and 215 respectively cannot be restricted and trammelled by any ordinary legislation including the provisions of the Contempt of Courts Act. Their inherent power is elastic, unfettered and not subjected to

any limit. The power conferred upon the Supreme Court and the High Court, being Courts of Record under Articles 129 and 215 of the Constitution respectively is an inherent power and the jurisdiction vested is a special one not derived from any other statute but derived only from Articles 129 and 215 of the Constitution of India and, therefore, the constitutionally vested right cannot be either abridged by any legislation or abrogated or cut down. Nor can they be controlled or limited by any statute or by any provision of the Code of Criminal Procedure or any Rules. The caution that has to be observed in exercising this inherent power by summary procedure is that the power should be used sparingly, that the procedure to be followed should be fair and that the contemner should be made aware of the charge against him and given a reasonable opportunity to defend himself. (Head Note)

11. It is in this context that one has to consider the decision in Vakkanad G. Nagappan, Advocate Vs. M.S. Mani and Others, In that decision, the Division Bench did not refer to any of the decisions referred to earlier. It referred only to the decision in State of Mizoram Vs. Biakchhawna, wherein the Supreme Court held that when a statute indicated that the action to be taken was to be done in a particular manner, it must be done in that manner and in no other way. According to the Division Bench, from a reading of Section 15(1) of the Contempt of Courts Act, it can be discerned that consent in writing of the Advocate General was the sine qua non for initiation of criminal contempt before the High Court by any person other than the Advocate General. Initiation of criminal contempt by any person without the written consent of the Advocate General, cannot be entertained on the ground that sufficient information with regard to the contempt has been laid by him before the High Court and it is for the High Court to take action thereon. A person cannot circumvent the provisions contained in Section 15(1) of the Act and seek initiation of contempt action by the High Court on the plea that he had invited the High Court's attention to the contempt action. With respect, it may be noted that Article 215 of the Constitution of India and the decisions rendered by the Supreme Court on the scope of the power saved by that Article of the Constitution, were not brought to the notice of the Court and apparently the jurisdiction of the Court was not sought to be invoked for initiation of action suo motu. Apparently, only Section 15(1) of the Contempts of Court Act was sought to be invoked and it is in that context that the Division Bench is seen to have made the above observations. But with respect, it appears to us that even on the scope of the invocation of power u/s 15(1) of the Contempt of Court Act, the authorities having a bearing on the question, were not brought to the notice of the Court. Senior Counsel of the petitioner appears to be justified in submitting that the decision in Vakkanad G. Nagappan, Advocate Vs. M.S. Mani and Others, must be considered to be one rendered per incuriam. With respect, in the light of the decisions of the Supreme Court referred to, the said decision cannot also be considered to be laying down the correct law. As we noticed earlier, since the relevant decisions of the Supreme Court were not brought to the notice of the Court in that case, we do not think it

necessary to refer this case for decision by a Full Bench even though the decision in Nagappan v. Mani was rendered by another Division Bench of this Court.

12. A Full Bench of the High Court of Patna in Shri Harish Chandra Mishra and Others Vs. The Hon"ble Mr. Justice S. Ali Ahmed, by a majority, held that the requirement of written consent in an application for initiating proceedings for criminal complaint by a private individual is a must and a motion by a person without the written consent of the Advocate General is not maintainable. Two of the learned Judges took the view that an application for taking action for contempt of Court cannot be rejected merely on the ground that it is not maintainable unless it is accompanied by a written consent of the Advocate General. In the light of the decisions of the Supreme Court referred to earlier, the view taken by the majority in the said decision cannot be accepted as correct law. Though the majority referred to the decision of the Supreme Court in S.K. Sarkar, Member, Board of Revenue, U.P., Lucknow Vs. Vinay Chandra Misra, recognising the power of the Court to act suo motu, their Lordships held that the same could not be considered an authority for taking the view that the provision in Section 15(1) of the Contempt of Courts Act is only directory and not mandatory. The view in Vakkanad G. Nagappan, Advocate Vs. M.S. Mani and Others, and in the decision of the Patna High Court can probably be understood as being confined to cases where the jurisdiction of the High Court is invoked only u/s 15(1) of the Contempt of Courts Act and the motion is not made also as one bringing to the notice of the Court certain facts which might induce the Court to take action on its own, in exercise of its power in that behalf. The right of a person other than the Advocate General to move the Court can be said to be circumscribed by the need for him to move the Advocate General first for his consent when what is complained of is a criminal contempt of the Court. But nothing stands in the way of the High Court treating the information furnished before it as sufficient to initiate action suo motu for contempt of itself or of a Court subordinate to it.

13. In the present case, the petitioner has invoked the jurisdiction of this Court not only u/s 15 of the Contempt of Courts Act, 1971 but also under Article 215 of the Constitution of India. The Registry was not justified in not numbering the Contempt of Court Case in the circumstances, and in not sending it up for necessary orders.

14. The question then is whether in the case on hand, it is necessary for this Court to take action on its own on the basis of the information furnished by the petitioner. It is no doubt true that the pamphlet was published relating to an application filed in the Court during the interlocutory stage when the suit itself was pending. The pamphlet does contain comments on some of the claims in the counter-affidavit filed on behalf of the defendant in that suit. The Advocate General had refused consent when moved in that behalf. In a situation where the comment is regarding a proceeding pending adjudication in Court, the test of contempt is whether the publication complained of creates a risk that the course

of justice will be seriously impeded or prejudiced. (See the views of Phillimore Committee on the Law of Contempt). On reading the pamphlet as a whole in the light of the surrounding circumstances, we are not satisfied that the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced. On the whole, we consider it inexpedient to take any action for contempt of Court in the case on hand. We, therefore, close this contempt of Court motion.