

(2019) 07 BOM CK 0195

In the Bombay High Court

Case No : Contempt Petition No. 596 Of 2018, Criminal Application No. 2042 Of 2017

Gopal

APPELLANT

Vs

State Of Maharashtra through Police Inspector And Others

RESPONDENT

Date of Decision : 05-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 420
Contempt Of Courts Act, 1971 — Section 2(b), 12, 20
Insolvency And Bankruptcy Code, 2016 — Section 14(1)
Limitation Act, 1963 — Section 5

Citation : (2019) 07 BOM CK 0195

Hon'ble Judges : Prasanna B. Varale, J;R.G. Avachat, J

Bench : Division Bench

Advocate : Amit A. Mukhedkar, P.G. Borade, Kuldeep S. Kahalekar, R.F. Totla

Final Decision : Dismissed

Judgement

R.G. Avachat, J

1. This petition has been filed by the petitioner, alleging the respondents No. 2 to 9 to have committed willful disobedience of the final order dated 5.5.2017, passed by the Division Bench of this Court in Criminal Application No. 2042/2017 and has, therefore, sought for punishing them for contempt of Court.

FACTS:

2. The petitioner is a timber merchant. He runs a saw mill. The petitioner would supply wood and allied products in the name of his two firms, namely "Tirumala Traders" and "Pandurang Wooden Furniture". The petitioner has office of his business at Nanded. The respondents No. 2 to 6 are the Incharge of, and responsible to the conduct of the business of the respondent No. 9 - Sirpur Paper Mills Ltd. The petitioner had time to time supplied the respondent No. 9, wood for production of paper. The payment of the wood supplied to the respondent No.

9 went in arrears. A sum of Rs. 82,42,986/- was due from the respondent No. 9. The petitioner found it to be a case of intentional and willful default on the part of the respondents No. 2 to 7 to make payment of the price of goods supplied. The petitioner, therefore, lodged F.I.R. at Nanded (Rural) Police Station against the respondents No. 2 to 6, alleging them to have duped him and thereby committed offence punishable under Section 420 read with Section 34 of the Indian Penal Code.

3. The respondents No. 2 to 6 had preferred an application (Criminal Application No. 4093/2015) before this Court for quashing the said F.I.R. They were, however, unsuccessful therein. Later on, the petitioner and the respondents No. 2 to 6 and 9 arrived at an understanding. A memorandum of understanding/settlement deed came to be executed between the petitioner and respondents No. 2 to 6 on 10.8.2016, whereunder the respondent No. 2 agreed to pay the petitioner Rs. 15 Lakhs. The remaining amount was agreed to be paid or recovered from the respondent No. 9 - Company. The respondents No. 2 to 6, therefore, again preferred an application, being Criminal Application No. 2042/2017 for quashing the F.I.R., being Crime No. 100/2015, registered with Nanded (Rural) Police Station. The petitioner and the respondent No. 4 again filed before the Court a joint compromise pursis, reiterating the terms of the compromise that has already been arrived at on 10.8.2016. In view of the understanding arrived at between the parties, the said Criminal Application came to be allowed.

4. The respondent No. 8 - J.K. Paper Ltd. is stated to have taken over the respondent No. 9 Company. The respondent No. 7 is Resolution Professional appointed for the respondent No. 9 under the provisions of the Insolvency and Bankruptcy Code, 2016 for short 'the Code'). Since the respondents No. 2 to 9 did not pay the petitioner an outstanding amount as per the terms of the compromise accepted by the Court for allowing the Criminal Application and quashing the F.I.R., the petitioner issued a demand notice, calling upon the respondents No. 2 to 9 to pay the amount as per the terms of the compromise-cum-undertaking given to the Court. The respondents did not comply with the demand notice. The petitioner has thus preferred this petition for taking action against the respondents No. 2 to 9 for committing contempt of the order of the Court, dated 5.5.2017 passed in Criminal Application No. 2042/2017.

5. Heard. Perused the record. Mr. Amit A. Mukhedkar, learned counsel for the petitioner made submissions consistent with the averments in the petition. According to learned counsel, the terms of the compromise have been accepted by the Court. The terms of compromise thus became an undertaking given to the Court. On issuance of the demand notice, 10% of the amount due was offered to be paid to the petitioner. According to learned counsel, since it was a deliberate act of non-payment of the outstanding dues of the petitioner, the same constituted contempt of the undertaking given to the Court.

6. Mr. R.F. Totla, learned counsel for the respondent No. 7 would, on the other

hand, submit that, the respondent No. 7 was not a party to the business transaction between the petitioner and the respondents No. 2 to 6 and respondent No. 9. He was also not a party to the Criminal Application. The respondent No. 7 is a Resolution professional for respondent No. 9. The proceedings under the Code were pending against the Sirpur Paper Mills Limited before the National Company Law Board, at Hyderabad. He has been appointed as Resolution Professional in those proceedings. The petitioner is operational creditor. His claim may be settled according to the provisions mentioned in the resolution plan. The learned counsel would further submit that the petitioner wanted to ride two horses at a time. The petitioner preferred the present application and even before that, filed a petition for recall of the order dated 5.5.2017 passed in Criminal Application No. 2042/2017. The petitioner has suppressed these facts. In view of the learned counsel, it is not a case of willful disobedience since it was a case of civil dispute settled out of the Court. There was, therefore, no question of the Court passing any order directing the respondents to comply with the same. The contempt petition is not within limitation. The learned counsel ultimately urged for dismissal of the petition.

7. Mr. Kuldeep S. Kahalekar, learned counsel for the respondents No. 2 to 6 would submit that, the matter was settled between the petitioner and the respondents No. 2 to 6 out of Court by executing a deed of compromise. As per the terms of the compromise, the petitioner has been paid a sum of Rs. 15 Lakhs. The remaining amount was agreed to be paid by the respondent No. 9. The respondents No. 2 to 6 were in no way liable to pay the petitioner any amount nor did they undertake to pay. As such, the respondents No. 2 to 6 could not be said to have committed breach of the compromise terms submitted before the Court for disposal of the Criminal Application.

REASONS:

8. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as the Act for short) defines civil contempt to mean a willful disobedience of any judgment, decree, direction, order, writ or other process of Court or willful breach of an undertaking given to a Court. Section 12 speaks of a punishment for contempt of Court. Reading of provisions of Section 12 of the Act would indicate that the person found guilty of contempt of Court in respect of any undertaking given to a Court may be a Company. Every person, who, at the time the contempt was committed, was incharge of and was responsible to, the Company for the conduct of the business of the Company as well as the Company, shall be deemed to be guilty of contempt and the punishment may be enforced against each of such person.

9. In order to punish a contemnor, it has to be established that disobedience of the order is 'wilful'. The word 'wilful' introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of one's state of mind. 'Wilful' means knowingly intentional, conscious, calculated and deliberate with full knowledge of

consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligent or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct". (S. Sundaram Pillai v. V.R. Pattabiraman: (1985) 1 SCC 591 : AIR 1985 SC 582).

10. The petitioner is a timber merchant. He would supply timber to the respondent No. 9 - Sirpur Paper Mills Ltd. The respondent No. 9 Company went in arrears to pay the petitioner dues towards cost of the timber supplied. The petitioner, therefore, lodged the F.I.R., being C.R. No. 100/2015 with Nanded Police Station, alleging the respondents No. 2 to 6 to have duped him. These respondents had preferred Criminal Application for quashing of the F.I.R. After having been unsuccessful therein, a Memorandum of Understanding/Settlement Deed was executed between the petitioner on one hand and the respondents No. 2 to 6 and 9 on the other on 10.8.2016. The material terms of the settlement deed are as follows:

1. That the parties have decided, agreed and understood that a sum of Rs. 15,00,000/- (Rupees Fifteen Lac only) shall be paid by Mr. Devashish Poddar to Mr. Gopal S. Kotalwar and the balance sum of Rs. 67,42,986/- approx. (subject to verification from books) shall be paid to Mr. Gopal S. Kotalwar by the Sirpur Paper Mills Limited as and when the Sirpur Paper Mills Limited started its operations or it is disposed whichever event happens first.

2. That upon the receipt by Mr. Gopal S. Kotalwar of the sum of Rs. 15,00,000/- (Rupees Fifteen Lac only), Mr. Gopal S. Kotalwar shall have no complaint, grudge, cause of action or any other form of grievance against the affected parties.

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... ..

17. It is further made clear that this settlement is made without prejudice to the right of Mr. Gopal S. Kotalwar to initiate necessary proceedings against the company in case his balance amount is not paid to him after happening of event as stated in para No. 1 of this settlement deed.

11. Thereafter, the respondents No. 2 to 6 again preferred application, being

Criminal Application No. 2042/2017 for quashment of the F.I.R. It appears to be a petition preferred with consent, since the petitioner herein gave consent for quashing of the F.I.R. in view of out of Court settlement arrived at between the parties. The petitioner and respondent No. 4 in this petition submitted a compromise pursis before the Division Bench of this Court, reiterating therein to have compromised the matter in terms of the settlement deed dated 10.8.2016. The Division Bench, by its order dated 5.5.2017, allowed the application in view of settlement between the parties. The Court observed thus:-

"In order to prevent the abuse of process of law, we are inclined to accept the said terms of joint compromise pursis/affidavit and dispose of this application on the basis of the terms of compromise pursis affidavit"

12. The aforesaid part of the order is alleged to have been flouted by the respondents herein. Admittedly, the respondents No. 7 and 8 were not parties to the application wherein the aforesaid order came to be passed. These respondents, therefore, could not be said to have committed any breach of the said order. In our view, the facts undoubtedly indicate that it was a civil dispute between the parties. The Division Bench did not pass any positive order directing the respondents to pay the petitioner his dues quantified in the settlement deed. The Court simply accepted the terms of the settlement and quashed the F.I.R. Whether acceptance by the Court of the terms of settlement constituted an undertaking was a question. None of the parties, however, could shed light on this issue. Be that as it may, the afore-quoted material terms of the settlement deed undoubtedly indicate the petitioner to have given up his claim against the respondents No. 2 to 6 (referred therein as affected parties). After payment of Rs. 15 Lakhs to the petitioner, the remaining amount was agreed to be paid by Sirpur Paper Mills Ltd. (respondent No. 9) after it starts its operation or it is disposed of, whichever event happens first. Mr. Nimbagal Veda Kumar (respondent No. 4) alone signed the settlement deed as Executive Director for and on behalf of Sirpur Paper Mills Ltd. Since the petitioner, in no uncertain terms, gave up his claim against the respondents No. 2 to 6, they could not be said to have disobeyed the terms of settlement accepted by the Court for quashing of the F.I.R. True, Mr. Veda Kumar, being Executive Director of Sirpur Paper Mills Ltd., could be arrayed as an alleged contemnor in view of he being a party to the settlement deed on behalf of Sirpur Paper Mills Ltd.

13. The petitioner, before filing of the Contempt Petition, had issued a notice to all the respondents, calling upon them to pay his dues in terms of the settlement deed. The demand notice was issued on 29.6.2018. The petitioner has alleged therein, the respondents to have committed contempt of the so called undertaking given to the Court on 3.5.2017. The petitioner's demand notice was replied by the respondent No. 7 and other respondents as well. The respondent No. 7 informed the petitioner that he was appointed as an Insolvency Professional in the proceeding initiated before National Company Law Tribunal, Hyderabad since financial status of Sirpur Paper Mills Ltd. was dwindled. The

petitioner was also in the know of the said fact as is evident from the record. The respondent No. 8 J.K. Papers Ltd. had not yet taken over the business of the Sirpur Paper Mills Ltd., since Sirpur Paper Mills Ltd. was under Corporate Insolvency Resolution process before National Company Law Tribunal, Hyderabad. There was moratorium for prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration panel or other authority (Section 14(1) of the Insolvency and Bankruptcy Code, 2016).

14. The aforestated facts undoubtedly indicate that Sirpur Paper Mills Ltd. Could not pay petitioner his dues quantified in the deed of settlement and agreed before the court for quashing of the F.I.R. only on account of its financial constraints. Thus, the Sirpur Paper Mills Ltd. could not be said to have committed willful breach of the so called undertaking given to the Court.

15. The present Contempt Petition came to be filed on 1.8.2018, i.e. one year after the alleged contempt. Section 20 of the Act states that, no Court shall initiate any proceeding for contempt, either on its own motion, or otherwise, after the expiry of period of one year from the date on which the contempt is alleged to have been committed. Admittedly, Section 5 of the Limitation Act does not apply to the proceedings under the Contempt of Courts Act. As such, it does appear that, the petition has been filed one year after the alleged contempt. There is interdict to the Court to take cognizance of the alleged contempt. Here again, it is to be stated that, none of the parties to the petition made much submissions on this point.

16. In the result, the inaction/failure of the Sirpur Paper Mills Ltd. to pay the petitioner his dues does not constitute contempt of Court. The petition is thus devoid of any merit. The same is, therefore, dismissed.