

(1978) 10 KL CK 0001
In the High Court Of Kerala
Case No : O.P. (Contempt) No. 945/78 K

Narayana Panicker

APPELLANT

Vs

The Sub Divisional Magistrate and Others

RESPONDENT

Date of Decision : 31-10-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 143, 145

Citation : (1978) 10 KL CK 0001

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : P.K. Kesavan Nair, K.N. Narayana Pillai, T.K. Venugopalan and A.S. Parameswaran, for the Appellant; M.M. Abdul Khader, General for Respondent Nos. 1 and 2 and M.M. Abdul Aziz, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, C.J.—This application for contempt discloses a state of affairs not altogether happy, and in regard to which, we feel that no relief can be given to the Petitioner in an application for contempt. It is unnecessary to state elaborately or in detail the facts of the proceedings, which started from 1124 M.E. and are still continuing to engage the attention of the courts. In 1124 M.E. the Petitioner before us filed M.C. No. 29 of 1124 M.E. u/s 143 of the Travancore Code of Criminal Procedure (corresponding to Section 145 of the Indian Code), in respect of a dispute as to possession between himself and the present 3rd Respondent. Ext. P-1 dated 15th June 1954 is the final order passed on that application finding the Petitioner to be in possession. We skip the proceedings in the Munsiff's Court, Parur filed by the 3rd Respondent, and the appeal and the other proceedings taken against the same, and notice Ext. P-4 order dated 19th February 1976 passed by one of us (Balagangadharan Nair, J.) directing the Sub Divisional Magistrate to return possession of property to the Petitioner. This application again was contested by the 3rd Respondent. To that application the Village Officer who had been appointed Receiver in the course of the 145

proceedings was also a party. Despite this order, the Petitioner seems to have been unable to secure actual possession of the property. Once again, there was occasion for the matter to come to this Court in a Revision Petition C.R.P. No. 1698 of 1977. This Court found that the 3rd Respondent and his sons are not entitled to resist Petitioner's claim for possession as the Receiver appointed by the Magistrate's Court in 1124 M.E. had taken possession and the same had not been returned despite order of Court. On this ground, the learned Judge refused the relief for injunction against taking possession, prayed for by the 3rd Respondent and his sons. These orders recognise the right to possession of the Petitioner; and the Petitioner's complaint in this application for contempt is that despite recognition of his right to obtain possession, the same is being denied to him and the orders of this Court are being disobeyed.

2. The learned Advocate General on behalf of Respondents 1 and 2 invited our attention to the counter-affidavit of the 1st Respondent paragraph 8, and the counter affidavit of the 2nd Respondent, also paragraph 8. These paragraphs of the counter affidavits state that although there was a direction to give possession, or recognition of the Petitioner's possession of the property, from the 145 proceedings initiated in 112+ onwards, nevertheless, the Village Officer who was appointed receiver had lost possession, and the 3rd Respondent is found to be in possession and in occupation of certain houses in the property. It is submitted that in the circumstances, the 1st and 2nd Respondents cannot certainly be held guilty of disobedience or contempt of the order of this Court, whatever else may be the position disclosed. The learned Advocate General drew our attention to the recent decision of the Court of Appeal in *In re-Bramblevale Ltd.* (1970) 1. Ch. 128 at 135. where, on somewhat different facts, the Court of Appeal recognised the principle that when the books which were directed to be produced in that case were damaged or lost in a car accident, even assuming the statement made about the accident and about the loss of the books is not true, that would not establish that the books were in the possession of the party sought to be proceeded against for contempt. The following passage is instructive;

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Take this very case. Mr. Hamilton told a lie when he said that the books were damaged and lost in the car accident on October 25, 1957. That lie does not prove that Mr. Hamilton kept those books for a further year and still had them in his possession from November 28 to December 5, 1968. He may have told the lie for another purpose -- to cancel the fact that he destroyed the books himself shortly after the car accident. That would be a criminal offence, but not the one with which he is charged. (p. 137)

Lowerdown the learned Judge Lord Dunniy stated:

Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt. Mr. Hamilton's conduct in telling lies was very reprehensible. But it is not sufficient ground for holding that he committed contempt of court about these two books. No doubt he was guilty of a contempt in not delivering the other papers in the seven days. He has been long enough in prison for that. I would allow the appeal. Mr. Hamilton can be released forthwith.

Our attention was called to the decision in 5 Lawyers" Edition 2 d. page 136 where the American Supreme Court recognised the principle that a Court could not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, or is impeding justice by not explaining what happened to them. Attention was also called to the 17 American Jurisprudence 2 d. page 53 paragraph 51 which states:

51. Effect of inability to comply with order. --

The inability of an alleged contemnor, without fault on his part, to render obedience to an order or decree of court is a good defense to a charge of contempt. It has been said that such a defense is effective only where, after using due diligence, the person is still not able to comply with the order. And on a motion for commitment for contempt in refusing to obey an order, it has been held that only evidence of something which has happened since the order was made, showing that there has newly arisen an inability to comply with the order, can be considered. Disobedience of an order does not constitute contempt where there is no actual legal authority to do the act ordered, but a mere opinion that an act will be illegal is not a good excuse. And where an alleged contemnor has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defence to a charge of contempt.

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In Corpus Juris Secundum Vol. 17 page 48 paragraph 19 it is stated:

19. Ability to Comply. --

Failure to obey an order of court does not constitute contempt where the person to whom the order is directed is unable to comply therewith, unless the inability to do so is a result of his own wrongful act.

It is essential to constitute a contempt that the thing ordered to be done be within the power of the person against whom the order is directed. Accordingly, there is no contempt in refusing to obey an order where the party charged, without fault on his part, is unable to comply therewith, as, for instance, where he is unable to comply with an order to surrender property or a person over which he no longer has possession or control.

To excuse, however, it must be shown satisfactorily that the party charged cannot obey or perform the thing required, for if articles ordered to be produced can be obtained by the party charged, failure to produce will be held contempt. Also, a party will be punished as for contempt where the inability to obey is brought about through his negligence or willfulness. So, too, if the order could have been obeyed when made, the party is in contempt, although at the time of the contempt proceedings he could not comply.

Our attention was also called to a recent publication: "The contempt of Court" by C.J. Miller where at page 246 it is stated:

A somewhat different problem is presented by the person who claims that he is simply unable to comply with the terms of an order or undertaking, whether through a, lack of funds or for some other reason. In the nature of things this problem is more likely to arise in the case of a mandatory order than in the case of a prohibitory order. It was touched upon by the Court of Appeal in *Lewis v. Pontypridd, Caerphilly and Newport Railway Co.* (1895) 11 T.L.R. 203. Here the Defendant company pleaded a lack of funds to excuse its non-compliance with a judgment requiring it to make a junction to connect the Plaintiff's works to its own line. Lord Esher, M.R. dealt with the submission by saying: "If from the time when the judgment was given they had always been unable, through want of funds, to do the work, probably they could not be said to have wilfully disobeyed the judgment. But it was necessary for the directors to make that out." On the facts of the case it could not be established that all possible economies had been made to enable the junction to be built and the orders for writs of attachment against the directors were upheld. The view that liability for contempt will not be incurred where a lack of funds creates a genuine inability to comply with the order has been accepted in some American cases. A genuine inability to comply with the terms of an order may equally arise for other reasons, as where D is called upon to deliver up documents and he claims that he does not have them in his possession or control. In *Re Bramblevale Ltd.* (1970) 1 Ch. 128 : (1969) 3 All E.R. 1862 the Court of Appeal quashed a committal order where it had not been proved that the relevant documents were in the Defendant's possession at the time of the Registrar's order calling on him to deliver them up. Equally, it is thought, a contempt would not be committed where the disability arises after the order has been made but before the time has elapsed for complying with it....

3. In the light of the above principles of law, whatever be the reason for the unfortunate consequence, the position disclosed is that since the date of the order directing possession in favour of the Petitioner and appointing the Village Officer as the Receiver of the property, the Receiver has lost possession and possession has gone to the hands of the 3rd Respondent and his sons, and Respondents 1 and 2 have reported to the Court that as they are living in the property in houses and have made improvements, there is grave danger in evicting them from the property. The learned Advocate General represented that appropriate proceedings will be taken against them. The land in question is not

government land; and the remedy of filing a suit or taking other appropriate steps, we are assured, would be thought of. It has not been shown that the 2nd Respondent lost possession, as indicated in the authorities noticed, through his negligence or contumacy. In the circumstances, we do not think that anything has been made out to hold Respondents 1 and 2 guilty of contempt. (The 1st Respondent is the Magistrate and the 2nd Respondent is the Village Officer).

4. The position, however, is rather different as far as the 3rd Respondent is concerned. The proceedings to which we have referred commencing from the 145 proceedings in M.C. No. 29 of 1124 seem to us to clearly show the possession of the Petitioner, and the direction of the Court in favour of the Petitioner for possession, and also the fact of the Village Officer being appointed Receiver in respect of the properties. But it is now stated in the counter-affidavit filed by the Respondents that the Village Officer had been at some stage or the other, out of possession, and the 3rd Respondent and his sons have got into possession of the property. It seems fairly reasonable and clear, if not definite, that this can only be as a result of interference with the possession of the Receiver, which should amount to contempt. But our difficulty in this case is in holding the 3rd Respondent guilty of contempt without knowing how, when, and in what manner he dispossessed the Receiver and got into possession of the property either by himself, or along with his sons, as alleged. This is particularly important when we see that the litigation in respect of this property started as early as 1124 M.E. (1948) and has dragged on. Without showing the exact date and particulars of dispossession of the Receiver by the 3rd Respondent, we do not think it either safe or appropriate to adjudge him guilty of contempt. On this ground, we would decline to hold the 3rd Respondent guilty of contempt, and would leave the Petitioner to pursue his appropriate remedies for obtaining possession of the property. We dismiss this application but in the circumstances without costs.