

(2009) 06 CAL CK 0033

In the Calcutta High Court

Case No : WPCRC No. 134 (W) of 2009 and WP No. 8208 (W) of 2009

Sachin Halder

APPELLANT

Vs

Md. Shaid

RESPONDENT

Date of Decision : 23-06-2009

Acts Referred:

Constitution of India, 1950 — Article 215, 226

Contempt of Courts Act, 1971 — Section 12, 12(1), 2

Citation : AIR 2009 Cal 216 : (2009) 3 CALLT 322 : 113 CWN 1009 : (2010) 8 RCR(Civil) 2331

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Dipankar Bose, for the Appellant; Debasish Saha, for the Respondent

Judgement

Sanjib Banerjee, J.—The petitioner complains of the respondent having wilfully disobeyed an order of this Court made on May 4, 2009 in proceedings brought under Article 226 of the Constitution of India by the petitioner. The petitioner had complained of a vehicle owned by the petitioner having been illegally requisitioned by the authorities for the purpose of the last general election.

2. WP No. 8208 (W) of 2009 was decided on the basis of an earlier judgment reported at 2006 (4) CHN 207 : Anirban Ghosh Vs. Dist. Election Officer and Another, where it had been held that a private car not used for hire but meant exclusively for personal use may not be requisitioned for election purpose. The order of May 4, 2009, in its operative part, reads as follows:

Since a view has been expressed by a Bench of co-ordinate jurisdiction which has held the field at least since the last Assembly election, the writ petition is allowed on the strength of the Anirban Ghosh dictum. The respondents shall forthwith release the petitioner's vehicle and the petitioner will be entitled to payment or compensation for the duration that the vehicle has been illegally detained by the respondent authorities in accordance with law.

3. The respondents to the writ petition were the district magistrate and district election officer; the officer-in-charge of Canning police station; the sub-divisional officer, Canning sub-division; and, the State of West Bengal. The State was represented on May 4, 2009 and submission was made on behalf of all the respondents.

4. The petitioner says in the present petition that a copy of the order along with a letter issued by advocate on his behalf was served on the respondent on May 6, 2009. Annexure P-4 to the contempt petition evidences due service of a letter of May 5, 2009 forwarding a copy of the order. There is no dispute that the respondent was contemporaneously aware of the order and had been duly served a copy thereof on May 6, 2009.

5. The car was not immediately released on May 4, 2009 despite the order having been made in open Court and in presence of counsel representing the State. The car was not released even on May 6, 2009 when the respondent was served a copy of the order. On May 8, 2009 a notice of May 7, 2009 was issued to the respondent calling upon the respondent to immediately release the vehicle or face contempt proceedings. The petitioner has averred at paragraph 11 that such notice was not accepted by the office of the respondent on May 8, 2009 and the petitioner was constrained to post such notice thereafter. In dealing with the statements in paragraph 11 of the petition, the respondent has said, at paragraph 14 of his affidavit, that "I deny and dispute the allegations and/or averments which are contrary to the admitted records."

6. The election process was due to be over on May 13, 2009. On May 8, 2009 advocate representing the petitioner received a copy of a stay application in connection with an appeal bearing MAT No. 379 of 2009 preferred against the order of May 4, 2009. The notice accompanying the cause papers spoke of the stay application being proposed to be moved on May 12, 2009.

7. The petitioner says that the respondent has acted contumaciously and the filing of the appeal and the stay application therein was only in furtherance of the respondent's game-plan to not comply with the order requiring the vehicle to be released forthwith. The petitioner contends that the respondent has wilfully and deliberately refused to release the vehicle despite being aware of the order of May 4, 2009 and the directions contained therein. The petitioner has pleaded that the respondent has lowered the dignity and majesty of this Court and has prayed for the respondent being adequately dealt with under the Contempt of Courts Act, 1971.

8. A Rule as prayed for was issued against the respondent on May 12, 2009. On the returnable date, the respondent presented himself before Court and his personal appearance was dispensed with on his undertaking to present himself before Court when called for. The respondent was given leave to respond to the Rule. An affidavit has been affirmed by the respondent on June 18, 2009.

9. Lest the stand taken by the respondent be diluted in the contents of the

affidavit being paraphrased, the material statements therein are set out from paragraph 4 thereof:

e) Upon hearing the Learned Counsels on behalf of the respective parties and in view of the earlier decision of Hon''ble Justice Girish Chandra Gupta passed in the matter of Anirban Ghosh Vs. Dist. Election Officer and Another, this Hon''ble Court was pleased to direct the respondents therein inter alia to release the said vehicle of the petitioner forthwith upon payment of compensation.

f) I most respectfully submit that the order and/or Judgement passed by Hon''ble Justice Girish Chandra Gupta in the matter of Anirban Ghosh v. District Election Officer (Supra) did not consider the Judgement passed by the Hon''ble Supreme Court in N.P. Ponnuswami v. The Returning Officer, Namakhal Constituency and Ors. reported in AIR 1952 Pg. 64 and thereafter in series of Judgements, where it was categorically held that the term election has been used in Part - XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature.

g) This Hon''ble Court in order dated 04.05.2009, that is in the order under contempt, categorically emphasized in the ordering portion that "since a view has been expressed by a Bench of co-ordinate jurisdiction which has held the field at least since the last Assembly election, the writ petition is allowed on the strength of the Anirban Ghosh dictum.

h) So in view of such situation the concerned authorities have been advised to test the said order and/or judgement dated 04.05.2009, passed in W.P. No. 8208 of 2009 before the Hon''ble Division Bench of this Hon''ble Court since the said order and/or Judgment dated 04.05.2009 was passed in the light of the said order and/or Judgment of Hon''ble Justice Girish Chandra Gupta in the Matter of Anirban Ghosh v. District Election Officer and Anr.

i) Accordingly an appeal being MAT 379 of 2009 has been preferred against the order under contempt before the Hon''ble Division Bench, comprising of Hon''ble Chief Justice Surinder Singh Nijjar and Hon''ble Justice I.P. Mukherjee. A stay petition was taken out in the said appeal being C.A.N. No. 4314 of 2009 and the same was affirmed on 07.05.2009. It is the admitted position that thereafter on 08.05.2009 the Learned Advocate of the petitioner was served upon with a copy of such stay application and he was also put to notice that the said application will be moved before the aforesaid Hon''ble Division Bench on 12.05.2009, or so soon thereafter.

10. Upon the matter being taken up on June 19, 2009, it is submitted on behalf of the respondent, with particular reference to paragraph 4(m) of his affidavit, that the respondent had never disobeyed any order passed by any court of law and, if it was found that he had violated any order, the respondent tendered his unqualified apology as such violation was not wilful or deliberate.

11. The only point urged on behalf of the respondent is that since the respondent

had questioned the propriety of the order of May 4, 2009 in the appeal and since a stay application in connection with the appeal was pending at the relevant time, the petitioner could not have instituted the contempt proceedings. It is stated by the respondent that the Division Bench in seisin of the appeal had, "after prolonged persuasion and repeated mentioning by the Learned Advocate on behalf of the appellant and/or the respondents to the writ petition, ...(was) pleased to fix the said appeal on 21.05.2009 ..." At paragraph 4(1) of the affidavit the respondent has averred that the stay application was disposed of with the observation that it had become infructuous as the process of election was already over and the vehicle had been released.

12. The vehicle was released on or after May 13, 2009 after the election was concluded.

13. The respondent has pegged his defence to the appeal having been filed and a stay application having been taken out therein. The essence of the submission is that upon an order being appealed from and a stay application being taken out in the appeal, proceedings in contempt for alleged non-compliance of the order under appeal cannot be maintained or should not be continued. No authority is cited in support of such contention and no further submission is made on any legal or factual aspect.

14. The only issue is as to whether the order of May 4, 2009 has been wilfully violated by the respondent and whether any measures are called for in the circumstances.

15. Even in the absence of any meaningful assistance on behalf of the respondent, the best arguable case of the respondent has to be discovered before the defence to the Rule is discarded. Though there is no statutory provision that the pendency of an appeal or a stay application therein would bar contempt proceedings, there is a body of judicial precedents that instructs the Court to be slow in exercising its jurisdiction in contempt at such stage. Notwithstanding the respondent having brought no authority to bear on such aspect, since the jurisdiction is quasi-criminal, the judicial authorities have to be kept in mind.

16. Section 2(b) of the Contempt of Courts Act, 1971 defines civil contempt to be 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. Section 12 of the said Act provides for the punishment for contempt of an order of court. The material part of the section is as follows:

12. Punishment for contempt of court.-(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may

be remitted on apology being made to the satisfaction of the court.

Explanation. - An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in Sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

17. The undisputed fact is that despite the order of May 4, 2009 requiring the vehicle to be returned to the petitioner immediately upon the order being made, it was not returned. The order was not complied with. The question that arises is as to whether such non-compliance was wilful and deliberate. The facts as they present themselves lend to the view that it was the considered opinion of the respondent that the vehicle should not be released before the election was over. In such sense, the act of not complying with the order was wilful and deliberate; it was not accidental or unintentional. Yet mere non-compliance of an order may not make the act contumacious inviting censure or more punitive measures. The act needs to be coupled with a defiance that the word disobedience conveys.

18. The constitutional scheme of things provides for a certain order. Though the demarcations are getting increasingly blurred between the functioning of the three limbs of governance, there is no escape from the constitutional protocol. A State functioning under a constitution has necessarily to adhere to it for the legitimacy of its actions. Subject to the hierarchy within it, the judiciary has the primacy in the matter of adjudication. An order made at the lowest rung of the totem pole by a superior court is, subject to statutory sanction, amenable to correction within the system. The legal compulsion to comply with an order is tempered by the statutory right to question the propriety thereof in a superior forum. If a right of appeal is recognized, then reasonable breathing space must per force be allowed for the exercise of such right. This is the underlying thought in the principle that courts should be loath in proceeding in contempt for the non-compliance of an order when an appeal therefrom is pending and a superior forum is in seisin of the question of the immediate implementation of the order in the connected stay application. It is, as in alternative remedy, a manner of self-imposed restraint that is exercised by courts; not a want of jurisdiction.

19. Of the several authorities that could have been brought to throw some light on the subject, a judgment reported at (1995) Supp. 4 SCC 465 : Modern Food Industries (India) Ltd. and Anr. v. Sachidanand Dass and Anr., 1995 Supp.(4) SCC 465 appears to be the best-suited in justification of the respondent's defence. Paragraph 4 of the report captures the principle:

4. Before the High Court, appellants urged that before any contempt proceedings could be initiated, it was necessary and appropriate for the Division Bench to examine the prayer for stay, or else, the appeal itself might become infructuous. This did not commend itself to the High Court which sought to proceed with the contempt first. We are afraid, the course adopted by the High Court does not commend itself as proper. If, without considering the prayer for stay, obedience to the Single Judge's order was insisted upon at the pain of committal for contempt, the appellants may find, as has now happened, the very purpose of appeal and the prayer for interlocutory stay infructuous. It is true that a mere filing of an appeal and an application for stay do not by themselves absolve the appellants from obeying the order under appeal and that any compliance with the learned Single Judge's order would be subject to the final result of the appeal. But then the changes brought about in the interregnum in obedience of the order under appeal might themselves be a cause and source of prejudice. Wherever the order whose disobedience is complained about is appealed against and stay of its operation is pending before the Court, it will be appropriate to take up for consideration the prayer for stay either earlier or at least simultaneously with the complaint for contempt. To keep the prayer for stay stand-by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. This is the view taken in *State of J & K v. Mohd. Yaqoob Khan*.

20. Even while laying down the principle, the Supreme Court has reminded that the mere filing of an appeal or an application for stay does not by themselves absolve the appellant from obeying the order under appeal. The court has not imposed the duty of obedience. The word "disobedience" is found in the relevant statute. Article 215 of the Constitution recognises every High Court to be a Court of record and accords all powers of such a Court "including the power to punish for contempt of itself."

21. If the mere filing of an appeal or of an application for stay therein may not be enough to impede the contempt proceedings, it needs to be assessed as to when the court would exercise restraint and not permit the contempt petition to be prosecuted during the pendency of an appeal from the relevant order or an application for stay in the appeal. There can be no inflexible rule. There are certain orders that are orders of the moment and require immediate compliance. An injunction restraining a construction to be carried on or a demolition to be executed cannot be ignored on the ground of an appeal having been preferred therefrom or of a stay application in the appeal languishing in some corner of the department.

22. Since the order of May 4, 2009 was not complied with, the reasons for such non-compliance have to be looked into. The respondent could have bona fide been of the view that the order was erroneous. The respondent had a right to carry the order in appeal. But the bona fides of the respondent had to be demonstrated once it was apparent that the order had not been complied with.

The act that the writ petitioner complained of was not one of confiscation of the property for good. The nature of the order of requisition was such that even without the intervention of court, the vehicle was liable to be returned. The implication of the order of May 4, 2009 was that the act of requisitioning the vehicle was bad and it had to be returned forthwith. For the respondent to have consciously ignored the order, a little more diligence in the appeal was called for. The order was pronounced in presence of counsel representing the respondent and an authenticated copy thereof was available on the same afternoon. The respondent was perfectly justified in harbouring a view that the order was erroneous and required correction, but since the efficacy of the direction contained in the order was of limited duration, the mere filing of an appeal and an application for stay therein would not absolve this respondent of the duty to obey the direction and to respect the constitutional scheme of things.

23. It is necessary to look into the seriousness of the effort in obtaining a stay of the operation of the order under appeal. The respondent has said in his affidavit that he attempted to have the stay application taken up by the Division Bench. The relevant passage from the affidavit has been quoted earlier. It would have been expected that the seriousness of the endeavour would have been reflected upon a notice for mentioning having been issued to the respondent in the appeal. There is nothing in the affidavit to show that any effort was, in fact, made for mentioning the stay application for early listing or that upon such prayer being made at the earliest, it had been declined.

24. The order was made in the morning of a Monday. Even if some latitude were given to the State for preparing the appeal papers, it would still have been expected that an attempt would have been made to press the stay application by the end of the week. Yet, it is only on the evening of the Friday that the appeal papers were served on the petitioner herein and it was indicated in the notice that the stay application may be moved on May 12, 2009. There is complete lack of bona fides in such conduct. Since the election process was to conclude on May 13, 2009, an attempt to move the stay application in the appeal on May 12, 2009 would only have resulted in leave being given for it to be moved on or after May 13, 2009. By such time, irrespective of the order of May 4, 2009, the vehicle was, in any event, liable to be returned. It would also do well to notice the following note that appeared in the cause list regularly and on May 12, 2009, pertaining to the relevant Division Bench:

4. No mentioning shall be allowed unless it is submitted in a foolscap and in the form of an application setting out the reasons and bearing the signature of the person/advocate-on-record and upon notice to the other side.

25. As has already been noticed, the respondent's affidavit does not refer to any notice having been issued to the petitioner that the stay application would be mentioned before the Division Bench, far less any copy of such notice being appended to the affidavit. It would not be harsh, in the circumstances, to conclude that the preferring of the appeal and a stay application therein was only

a charade orchestrated by a disobedient functionary having scant regard for the order and only drawing up a roadmap for a likely escape route in contempt proceedings that he apprehended would inevitably be brought. It is just as possible that this official was taken in by advice obtained from persons masquerading as experts with superficial knowledge of the applicable principles. But since it is this respondent who was admittedly aware of the order and consciously decided to not comply with the same on the pretext of an appeal and a stay application having been filed, he must answer for the obvious disobedience.

26. The order of May 4, 2009 may still be found to be erroneous in the appeal therefrom that remains pending. But what is of concern is that an order of the moment has been wilfully and deliberately disobeyed by the respondent by a subterfuge of a stay application that was never attempted to be pressed before the efficacy of the order ran out. It is an affront to the primacy of the institution of the judiciary that needs to be kept in mind in the exercise of this jurisdiction and even on such high test the respondent is deserving of punishment under the said Act of 1971.

27. The rationale of contempt proceedings not being proceeded with during the pendency of a stay application in the relevant appeal is to avoid the beneficiary of the order to enjoy the fruits thereof with undue haste without having the order tested before a superior forum. In the present case the respondent has merely filed the appeal and the stay application and allowed the time to run out before taking any meaningful steps in the appeal.

28. The respondent is guilty of contempt for having wilfully and deliberately disobeyed the order of May 4, 2009. The matter will appear at 2 pm on June 29, 2009 for an appropriate order to be passed consequent upon the respondent's conduct. The respondent is directed to be present at such time.

29. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.