

(2006) 12 BOM CK 0010
In the Bombay High Court
Case No : Contempt Petition No. 35 of 2005

Vishwanath Chandrikaprasad Gupta	Vs	APPELLANT
M. Karunanithi and Others		RESPONDENT

Date of Decision : 18-12-2006

Acts Referred:

Employees State Insurance Act, 1948 — Section 45G, 45H, 75

Citation : (2007) 2 ALLMR 652 : (2007) 4 BomCR 226

Hon'ble Judges : Joshi A.H., J

Bench : Single Bench

Advocate : A.P. Wachasundar, for the Appellant; B.P. Maldhure, for Respondent No. 1, M.G. Bhangde and S.S. Ghate, for the Respondent

Judgement

Joshi A.H., J.—Heard learned Advocate for the petitioner at length, and perused reply of respondents" Advocates.

2. Petitioner herein is a proprietor of the Firm M/s. Shivraj Builders & Developers, Nagpur, and is a partner of two old establishments, namely "Hotel Shivraj" and "Shivraj Bhojnalaya", Nagpur.

3. According to petitioner, present Contempt Petition is filed by him to report to this Court the act of willful disobedience and the contempt committed by the respondents of the orders passed by Employees" State Insurance Court in ESI Case No. 28 of 2004 passed on 19th November, 2004 and in ESI Case No. 30 of 2004 passed on 22nd December, 2004.

Background:

4. The background, in brief, as to the cases filed by the petitioner is as hereinafter:

5. Provisions of the Employees" State Insurance Act, 1948, were made applicable to the establishments of the petitioner. He challenged those orders by filing a Dispute u/s 75 of the Employees" State Insurance Act, 1948. Admittedly, those

cases were dismissed in default. According to the petitioner, until those cases were restored, there was no stay order in operation, and taking advantage of the fact that no stay was in operation, the Recovery Officer of the Employees' State Insurance Corporation respondent No. 1 initiated recovery proceedings, coercing the petitioner to pay excessive and unreasonable demands.

6. According to the petitioner, the respondent No. 2 issued two orders both dated 4th October, 2004 one pertained to Hotel Shivraj and another to Shivraj Bhojnalaya u/s 45-H of the Employees' State Insurance Act, 1948. Copies of these orders are at pages 20 and 24 of the Contempt Petition paper-book respectively. The sum as dues requisitioned through notices is Rs. 74,188/- and Rs. 88,580/- respectively. By these orders, respondent No. 1 directed the respondent No. 3 herein to pay to the Recovery Officer the sums demanded therein, with a direction that if the amount was so paid to the Recovery Officer, it will amount to due discharge of payment thereof to the party concerned. It was also directed that any amount held in the name of the Firm or its proprietor was subject to said attachment/ order of Garnishee.

7. It is an admitted fact that though the petitioner has not revealed it in the petition, however, has come on record that the respondent No. 3 by letter dated 25th October, 2004, answering the notices dated 4th October, 2004, informed the respondent No. 1 as follows:

R/Sir,

With reference to above we would like to inform you that M/s. Hotel Shivraj having current A/c with us and balance in his A/c as on dt. 19-10-04 is Rs. 716.20 [Rs. Seven hundred sixteen and N.P. Twenty only] and no any A/ c of M/ s. Shivraj Bhojnalaya Hence for your kind information.

Thanking you

Sd/- Assistant Manager, Bhagwaghar Branch

[quoted from page 81 of the paperbook of contempt petition]

8. Petitioner has not disclosed, but it is revealed from the synopsis furnished by the respondent No. 1 that on 2nd November, 2004, the respondent No. 1 passed orders of attachment of immovable property of the proprietor. He, therefore, came forward and issued post-dated cheques as follows:

For M/s. Hotel Shivraj:

Sr. Dates Cheque Amount No. Nos. 1. 3-11-2004 398545 Rs. 40,000-00 2. 5-11-2004 398546 Rs. 37,688-00 For M/s. Shivrai Bhoinalaya:

Sr. Dates Cheque Amount No. Nos. 1. 16-11-2004 398547 Rs. 30,000-00 2. 23-11-2004 398548 Rs. 30,000-00 3. 30-11-2004 398549 Rs. 31,910-00 Cheque Nos. 398545, 398546 and 398547 were present for collection, and were dishonoured for insufficient funds.

9. Respondent No. 1 came to know, after the dishonoured cheques were perused, that partner of Hotel Shivraj and Shivraj Bhojnalaya was proprietor of Shivraj Developers & Builders, and had an account with respondent No. 3, further that this information was suppressed by the respondent No. 3 and transactions were permitted in the said account.

10. By letter dated 15th December, 2004, the respondent No. 1 brought to the notice of respondent No. 3 the suppression by the respondent No. 3, and called upon him to explain the circumstances in which the information was withheld, and called the respondent No. 3 to show cause as to why the respondent No. 3 should not be declared as a defaulter and principal employer in view of this suppression. The text of letter dated 15th December, 2004 reads as follows:

Sir,

With reference to the above, you are informed that you have failed to furnish and concealed the information regarding the account of Mr. Vishwanath Chandrakant Gupta as proprietor of M/s. Shivrai Builders and Developers. Nagpur.

Hence you are called upon to furnish the entire details immediately with documentary evidence viz. A/c statement from 1.10.04 till date and remit the amount held by you in the said account in accordance with the above cited notice, failing which the amount will be recovered from you treating you as if principal defaulter under Sections 45-G and 45-H of ESI Act, 1948.

[quoted from page 83 of the paperbook of Contempt Petition].

11. The respondent No. 3 replied show-cause-notice dated 15th December, 2004 and communicated through its letter dated 21st December, 2004 in response to letters dated 4th October, 2004, 25th October, 2004 and 15th December, 2004 as follows:

Sir,

With reference to above, we are sending herewith D.D. No. 274464 of Rs. 5000/- [Rupees five thousand only] dt. 21-12-2004 towards payment of dues of ESIC.

Further it is submitted that information regarding account of M/s. Shivraj Builders & Developers has escaped inadvertently in our letter dtd. 25/10/2004. Hence we are sending account statement of M/s Shivraj Builders & Developers from 04/10/2004 till date.

Kindly acknowledge the same.

Sd/- Assistant Manager, Shikshak Sahakri Bank Ltd;, Nagpur, [Bhagwaghar Branch]

[quoted from page 84 of the paperbook of contempt petition].

12. It is seen that in view of the fact that no satisfactory explanation was given by the respondent No. 3, the respondent No. 1 passed an order on 24th

December, 2004, declaring the respondent No. 3 as deemed principal employer and the defaulter and called the respondent No. 3 to pay a sum of Rs. 1,62,768/-, and communicated it to the respondent No. 3 by letter dated 24th December, 2004.

13. It seems that from the orders of declaration of respondent No. 3 as principal employer, it had become clear that the respondent No. 3 had been a party to siphoning of funds from the amount of Shivraj Builders by failing to hold and/or attach the amount demanded and remit it to respondent No. 1 which was patent disobedience of the orders. The Reserve Bank of India, therefore, being a controlling authority, found it appropriate to issue directions to Regional Director of Reserve Bank of India to comply with the notice dated 24th December, 2004. In turn, the respondent No. 2 debited a sum of Rs. 1,62,768/- and furnished it to the respondent No. 1 by Demand Draft No. 080111 on 28th December, 2004.

14. According to the petitioner, aggrieved by the order dated 4th October, 2004 directing attachment of the deposits, if any, and directing respondent No. 3 to pay the dues to the respondent No. 1, petitioner herein preferred to challenge these notices before ESI Court u/s 75 of the Employees' State Insurance Act, 1948. The case was registered as ESI Case No. 28 of 2004 Shivraj Bhojnalaya v. ESI.

On 19th November, 2004, as the designated ESI Court was not available, Industrial Court, who was in charge-charge of ESI Court, passed orders of stay of recovery proceedings. The interim order was continued by order dated 29th November, 2004 and by order dated 7th January, 2005. According to petitioner, all these orders were within the knowledge and were brought to the notice of the respondents. They have, however, failed to obey the same.

15. As Reserve Bank of India has paid the amount to the Recovery Officer, he has withdrawn the attachment, which is clear from order dated 7th/11th January, 2005.

According to petitioner, this order dated 7th January, 2005 is an admission of the fact that in spite of orders of stay, recovery was made and an open act of contempt.

16. According to respondent No. 1, no corrective measures were taken against the petitioner after order of stay and hence the contempt has occurred. Action taken against respondent No. 3 though is germane to dues recoverable from the petitioner, respondent No. 3 became liable due to its own act which was per se wrong apart that it is collusive and malacious.

17. Barring the fact about letter dated 24th December, 2004, the petitioner has preferred to keep silent in the petition on various other factual details.

18. From above quoted factual matrix, now this Court has to find out if contempt is committed. Analysis of facts 8B Submissions.

19. Looking solitarily, and upon perusal of plea of the petitioner, it prima facie appears that there is an order of stay, the respondents either knew or were made known, the respondents either knew or were made known, and in spite of stay, the recovery has been proceeded.

20. Learned Advocate for the petitioner placed reliance on following Judgments. The ratio of these judgments has been narrated below each case:

(1) Har Kishun Singh and Others Vs. Chhotan Mahton and Others, ; when an order of stay or other such prohibitory order has been made and when the subordinate judge or Magistrate is informed of the order by an Advocate or Pleader, he ought to accept what is stated and further stay proceedings. If a subordinate Judge or Magistrate disregards a prohibitory order of which he has been given notice in this way, it amounts to contempt of Court.

(2) Tapan Kumar Mukherjee Vs. Sri Heromoni Mondal and another, ; Officers of Government should exercise utmost vigilance in compliance of Court's orders. Where a case of willful disobedience is made out, the courts will not hesitate and will convict the delinquent officer and that no lenience in the Court's attitude should be expected from the Court as a matter of course, merely on the ground that an order of conviction should damage the service career of the concerned officer.

(3) Joti Parshad Vs. State of Haryana, ; This Judgment was relied on by the petitioner to interpret the meaning of the terms "knowledge" and "reason to believe."

[4] P.G. Patra Vs. Puran Foods and Another, ; The appellants in this case were found guilty of civil contempt as the electric connection of the respondent despite injunction order remained disconnected at hours during which time there was no general disconnection.

[5] K. Shamrao and Others Vs. Assistant Charity Commissioner, ; This judgment was cited to enunciate the power of inquiry and the manner in which it is to be conducted by officers who fits in the definition of "Court."

[6] Prithawi Nath Ram Vs. State of Jharkhand and Others, , while dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision, which has received its finality, had been complied with or not. It would not be permissible for a Court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision. Even if ultimately the interim order is vacated or relief in the main proceeding is not granted to a party, the other side cannot take that as a ground for disobedience of any interim order passed by the Court.

21. On perusal of plea of the respondent No. 1, it is seen that in paragraph 2, the respondent No. 1 has tendered apology. Respondent No. 1 has thereupon tendered the explanation. Though the affidavit runs into as long as nine pages,

crux of the defence as grasped from affidavit and oral submissions is as follows:

[i] After order of stay, no persuasion or coercive measures for recovery are taken by the respondent No. 1. Whatever is the action taken by the respondent No. 1 is disclosed through letter dated 15th December, 2004 [page 83], sent by the respondent No. 1 to respondent No. 3, and order dated 24th December, 2004 sent by respondent No. 1 to respondent No. 3. These two letters are eloquent enough. The contents of letter dated 15th December, 2004 are quoted in para number 10 above.

[ii] It is clear that the action is taken against the respondent No. 3 bank on account of Bank's "suppression of facts of the account" of the partner Vishwanath Chandrakant Gupta which the Bank was having, which has been specifically mentioned in the orders dated 4th October, 2004.

[iii] Bank's explanation to the said suppression was found false. It was noted that because of the said suppression, an amount of Rs. 6,15,380/- was allowed to be withdrawn from the account of Shivraj Builders, and recovery of amount, which was initiated well before the Court granted stay was thereby frustrated.

[iv] The action against bank towards suppression was never part and parcel of proceedings before ESI Court.

[v] The Recovery Officer, therefore, urged that the efforts of the petitioner is of arm twisting, being untruthful and unfair before the Court, and respondent No. 3 and petitioner are in collusion.

[vi] The beneficiary of suppression of facts by respondent No. 3 was the petitioner.

[vii] The petitioner had, while securing stay order suppressed from the Industrial Court that Cheque No. 398547 dated 16th November, 2004 for Rs. 30,00 0/- was dishonoured. Thus, the petitioner is not an honest relator and his hands are not clean, and he is not a law-loving and law-abiding citizen.

22. Learned Advocate Mrs. Maldhure for respondent No. 1 placed reliance on three judgments, ratio therein is as herein below:

[1] Union of India (UOI) and Others Vs. Oswal Woollen Mills Ltd. and Others, ;

Wherein a writ petition the High Court granted injunction against issuing an order of abeyance under Clause 8-B of Import [Control] Order, the non-disposal of petitioners' application for licences etc. expeditiously, could not be made ground for contempt of Court by the Import and Export Control Authorities. The stay of the operation of the "abeyance" order merely meant that the writ petitioners were entitled to have their applications disposed of by the concerned authorities. The High Court not having set any limit of time for the disposal of the applications, it was not for the writ petitioners to impose a time limit and demand that their applications should be disposed of forthwith. If the writ petitioners were aggrieved by the failure of the authorities to dispose of their

applications expeditiously, it was open to them to seek a further direction from the Court fixing a limit of time within which the applications were to be disposed of. The authorities could not be said to have committed any contempt of Court, even prima facie, by their mere failure to take action in the matter of the disposal of the applications of the writ petitioners.

[2] State of Jammu & Kashmir Vs. Mohd. Yaqoob Khan and Others, , and

In this case, an *ex parte* interim order was passed by the High Court. It was held by the Supreme Court that so long the stay matter in the writ petition was not finally disposed of, the further proceeding in the contempt case was itself misconceived and no order therein should have been passed. The scope of the contempt proceeding is very different from that of a pending main case yet to be heard and disposed of.

[3] Rainbow Industries v. State Government of Maharashtra and Ors. 1996 (II) C.L.R. 44;

It is only the State Government, which by notification in the Official Gazette, can constitute an Employees Insurance Court for some local area as may be specified in the notification.

Learned Advocate Mrs. Maldhure also argued that the In-charge Industrial Court was not put into charge officially as ESI Court. There was no notification issued under the Employees' State Insurance Act, 1948, and relying upon the Division Bench Judgment in the case of Rainbow Industries v. State Govt. of Maharashtra and Ors. 1996 (II) C.L.R. 441, (cited *supra*) urged that the order of stay granted by the Industrial Court is nonest. Apart from this, learned Advocate Mrs. Maldhure pleaded independent right in taking action against respondent No. 3, cause of action where for had accrued due to respondent No. 3's disobedience and that when the said action was so taken, no action, whatsoever, under the provisions of Contempt of Courts Act is warranted.

23. This Court finds that it is not necessary to go into the details of discussion on precedents any further.

REASONS:

24. This Court considers that the conduct of the petitioner and of respondents will have to be first tested on facts and thereafter to find out if there is willful disobedience of order of Court by and on the part of respondent Nos. 1 to 3.

25. On perusal of record, it is seen that it is a clear case that the petitioner has failed to show any action or overt act of respondent No. 1, whereby respondent No. 1 has called upon the petitioner to make the payment or has taken any coercive action against petitioner. It is clear that the respondent No. 1 has not even reiterated the demand of recovery to the petitioner.

26. The steps taken by the respondent No. 1 against the respondent No. 3 as a remedial measure against the siphoning of funds permitted by respondent No. 3

despite the order of garnishee, which, therefore, is an independent action. The stay to the letter dated 24th December, 2004 communicating that the respondent No. 3 is declared deemed employer is granted by the Court on 7th January, 2005, i.e., much after the money was remitted by Reserve Bank on 28th December, 2004. Thus, the stay order was granted after the order was already acted upon. Petitioner has not shown as to how the action taken against the respondent No. 3 towards suppression of facts and diversion of money amounted to contempt.

27. It is a clear case that in the guise of moving a contempt petition, petitioner wants the money recovered by the respondent No. 1 to be refunded by respondent No. 1 to the respondent No. 2. The petitioner has spent one-and-half-year before this Court, instead he should have prosecuted the ESI case before the ESI Court.

28. At no point of time, the petitioner moved the ESI Court disclosing that the cheque of Rs. 30,000/-, in relation to which the ESI Court was led to presume that the payment was made one day before the date when the petitioner argued the case before ESI Court, was dishonoured. Copy of dishonoured memo is brought on record by the respondent No. 1, which is at page 82 of the petition along with cheque, revealing that the cheque was dishonoured on 18th November, 2004 itself. It is also clear that at no point of time the petitioner voluntarily disclosed to the ESI Court about the dishonour of cheque, to seek exemption from payment, or seeking extension of time to pay said amount. On the other hand, he has failed to make the deposit towards the said amount till he lost in this Court, and this Court gave him one month more. He has even taken time to pay the amount which was ordered as a condition precedent by the ESI Court. Even when ESI Court, while confirming the order, directed the payment of a sum of Rs. 30,000/- pertaining to the dishonoured cheque, it is not represented that said order is complied.

29. Petitioner's conduct needs to be noted, namely when he has got ex parte order on 19th November, 2004, he had represented to the Court that he has delivered three cheques. As regards first cheque, his conduct is of "suppressions facto and suggestio verbi". He has maintained silence about dishonour of cheque No. 398547 for Rs. 30,000/- dated 16th November, 2004 before the ESI Court. Petitioner's conduct is gravely unfair in view of:

[i] Firstly petitioner gave cheques knowing fully well that no funds are arranged for.

[ii] Secondly, knowing fully well that first cheque was bound to be dishonoured, he has led Court to believe that the payment covered by first cheque was about to be released, and led the Court based on said belief to stay further payments on deposit of a sum of Rs. 30,000/- only.

[iii] Thirdly, never himself informed the ESI Court about dishonour of said cheque of Rs. 30,000/-, tender whereof was the foundation of stay order.

[iv] Fourthly, he has contested the payment towards dishonoured cheque when it was directed under express order of ESI Court passed on 16th March, 2006, which was maintained up to High Court. It is in this context of plural acts of suppression and misrepresentations, the petitioner poses himself to be a law abiding citizen, and wants this Court to take action towards alleged acts of contempt.

30. The conduct of the petitioner, who is representing before this Court for insisting upon an action under the Contempt of Courts Act, as if he is a torch bearer of maintenance of prestige of justice and Courts, cannot be left unattended. Eloquently enough to himself, he very well knew that the cheque of Rs. 30,000/- given by him, when issued, was issued to prevent the coercive action by the respondent No. 1. At that time, he very well knew that there were no funds in the said account. Thus, the element of deception was very well in existence on the date of issuance of cheque. The said element of deception gets enlarged, not just visually magnified when he, knowing fully well the intention behind issue of cheque and fate thereof, suppressed from the ESI Court that the said cheque was bound to be dishonoured.

31. The conduct of the petitioner itself is contemptuous, he has thereby, by playing fraud, influenced the In-charge Industrial Court due to misrepresentation as to the deposit of money by him. This conduct itself, in fact, is liable to be viewed as a contempt. This Court is at loss to appreciate as to how such fraud has not been noticed by the ESI Court while it passed further orders. Solely on the ground of suppression, in fact, the present petitioner should have been delivered the consequences of fraud and even ought to have been dealt with for contempt.

32. It is seen that the respondent No. 3 had independently challenged the order dated 24th December, 2004 passed by respondent No. 1 which is at page 85, by filing a Writ Petition, and when it failed, it filed Letters Patent Appeal where admittedly according to the petitioner the respondent No. 3 has also failed and the said order has been tested judicially and found to be within the power and authority of the respondent No. 1. The respondent No. 3 has failed in persuading this Court to hold that order dated 24th December, 2004 was bad due to stay by Industrial Court or otherwise. It is seen from record of Writ Petition No. 504 of 2005 and of Letters Patent Appeal No. 231 of 2006 that the respondent No. 3 had relied upon stay order granted by in-charge Industrial Court on 19th November, 2004 [Annex. P-2] to Writ Petition No. 504 of 2005. It is also seen that this Court while deciding said writ petition took s conscious note of the fact of stay granted by ESI Court as can be seen from last four lines of third para of order dated 1st August, 2006. It cannot be lost sight that the respondent No. 3 holding the money of petitioner was for all purposes a delegatee or agent of the petitioner. It preferred to challenge the order of declaration of principal employer without challenging the order of garnishee. The challenge by respondent No. 3 could also be construed as a challenge in proxy by petitioner himself. Failure of

challenge by the respondent No. 3 would, therefore, certainly bind the petitioner.

33. Respondent Nos. 2 and 3 were not in the array of petition, nor were respondents before ESI Court. They were independently not bound to obey stay order of ESI Court. The stay orders were even not served on these respondents. The order of stay is not a judgment in rem and it is, therefore, not necessary to proceed in contempt against the respondent Nos. 2 and 3. They were in no way restrained by orders of ESI Court and were in contrast bound to obey notices dated 4th October, 2004 and dated 24th December, 2004 which notices/orders have in due course received the seal of approval from High Court in Writ Petition No. 534 of 2004 and Letters Patent Appeal No. 231 of 2006.

34. In the circumstances, it is a clear case where the petitioner's conduct which is too far away from fairness. His intentions are not bona fide. In the guise of maintaining and enhancing prestige of law, the petitioner is exploiting this jurisdiction for personal gains and for inappropriate behaviour and for ulterior motives, which is, as described by the respondent No. 1, an effort of arm twisting.

35. In fact, punctual ness could have been shown by the respondent No. 1 by way of bringing to the notice of the ESI's lawyer and in turn ESI Court the fact of dishonour of cheque at an earliest possible occasion. Had this been done, probably the ESI Court may have observed restraint while extending the interim order on 29th November, 2004, as well on 7th January, 2005. Thus, it is a case where the petitioner, who is absolutely unscrupulous, and is throughout litigating, is trying to take disadvantage of the fact that orders were passed, yet the Recovery Officer acted in his statutory independent authority and power which action, namely action u/s 45-G of the Employees' State Insurance Act, 1948, was not put under any restraint of injunction until 7th January, 2005.

36. Thus, conduct of the petitioner is such that he has by misrepresentation secured an order, and failed to comply with the said payment, and the said order is now being put into use as a foundation for contempt. It is, therefore, a case where a person, who has no respect for the truth and fairness, is in voting the jurisdiction of this Court in the guise of solemn and sincere effort for enhancement and maintenance of majesty and prestige of Law and of Court. This attitude of using the court proceedings for selfish gains by unscrupulous people needs to be deprecated. One needs to identify the hound under the hide of a sheep lamenting for the cause of justice.

37. Like in other criminal case, the respondents have raised adequately strong defence and satisfied this Court that the petitioner has failed in proving willful disobedience of orders passed by the ESI Court. This Court, therefore, holds that the petition does not call for an action by way of conviction and sentence. Contempt petition, therefore, does not call for any action by this Court. Notice is discharged with costs which are quantified in a sum of Rs. 1,000.00 [rupees one thousand only] in favour of each, i.e., the respondent No. 1 and the respondent

No. 2. The respondent No. 1 shall recover this amount along with its dues of ESI contribution etc., and respondent No. 2 may recover it by debiting it to any of the petitioner's bankers. The role of respondent No. 3 has been dubious. It is an abettor of wrongs. The respondent No. 3 should suffer the costs.