

Noorali Babul Thanewala

Vs

K. M. M. Shetty and Others

Civil Miscellaneous Petition (Civil) No. 13066 of 1989

(CJI Sabyasachi Mukharji, V. Ramaswami II JJ)

20.12.1989

JUDGMENT

RAMASWAMI, J. -

1. In this petition the petitioner has prayed for convicting respondents 1 and 2 for committing the contempt of this Court by violating the terms and conditions of the undertaking filed in Civil Appeal No. 2628 of 1980 and for a direction that whosoever is in possession of the suit premises hand it over to the petitioner. The petitioner as the owner and landlord of the property, Tika No. 3, City Survey House, bearing No. 344/345, Jambli Naka, Thane, consisting of ground floor, first floor and second floor in which the business of restaurant known as Ramakrishna Hindu Hotel or Ramakrishna Hotel is carried on, filed Civil Suit No. 213 of 1970 in the Court of Civil Judge, Senior Division, Thane against respondent 1 and four others, by name, P. A. Dange, V. A. Dange, Haribhan Shivale and Giri Anna Shetty for eviction from the abovesaid premises. The suit was decreed by the trial court. Respondent 1 who was defendant 1 in the suit alone filed an appeal against this decree before the District Court. The appeal was dismissed confirming the order of eviction. Thereafter, respondent 1 filed writ Petition No. 354 of 1975 in the High Court of Bombay and that writ petition was also dismissed. Though defendants 2, 3, 4, and 5 did not file the appeal or take the matter further to the High Court they were impleaded as respondents in the appeal and the writ petition filed by respondent 1 herein,. Respondent 1 thereafter filed Civil Appeal No. 2628 of 1980. The said appeal was dismissed by this court on August 18, 1987. However, at the request of the appellant this Court allowed the appellant to continue to be in possession and carry on the business till March 31, 1989 subject to the

"appellant and all those persons who are now occupying the premises as employees or staff and are staying in the premises file an usual undertaking in his Court within eight weeks from today stating inter alia that they will hand over and deliver over vacant possession of the premises on the expiry of the period mentioned above and also indicate that they will go on depositing the mesne profits until the possession is delivered. In default of furnishing or filing the undertaking in the manner indicated within the time aforesaid the decree of execution shall become executable forthwith."

2. In pursuance of this order respondent 1 K. M. M. Shetty filed an undertaking on October 5, 1987. Respondent 1 through his advocate had produced the muster roll showing the names of persons employed by him for running the hotel business in the suit premises as well as a list of persons staying in the said hotel. This list showed 17 persons as being the employees and persons staying in the hotel, and as directed by this Court the 17 persons also filed an undertaking.

3. Some time in the beginning of 1989 one Raghuram A. Shetty respondent 2 in the contempt application filed Civil Suit No. 306 of 1989 in the Thane Civil Court before the III joint Civil Judge, Senior Division, Thane, for a declaration that the decree for eviction obtained in respect of the suit premises in Civil Suit No. 213 of 1970 cannot be executed against him and for a permanent injunction against the petitioner herein. Pending the suit he had also filed an application under Order XXXIX Rules 1 and 2 read with Section 151 of CPC for a temporary injunction from executing the decree for eviction. By an order dated April 5, 1989, the III Joint Civil Judge, Thane, granted a temporary injunction against the petitioner herein restraining him up to the disposal of Civil Suit No. 306 of 1986 from executing the decree for eviction given in Civil Suit No. 213 of 1970. Thereafter, the petitioner has filed this contempt petition both against his original tenant - K. M. M. Shetty and also against respondent 2 who was the plaintiff in Civil Suit No. 306 of 1989.

4. Respondent 2 has filed a reply statement in which he has contended that P. A. Dange had taken over the hotel business which was being carried on by the tenant - K. M. M. Shetty in the name and style of "Ramakrishna Hindu Hotel" at the ground floor of the suit premises on November 29, 1986 and under an agreement dated January 2, 1967 the said P. A. Dange with the consent of the tenant transferred the said business and the exclusive possession of the hotel to respondent 2 herein. Subsequently there was another agreement executed between the tenant and respondent 2 on August 1, 1972 under which respondent 2 was paying royalty to the tenant and that to the knowledge of the petitioner he was in the occupation of the premises and carrying on the business and that in spite of it he had not been impleaded in the eviction suit or the subsequent proceeding and that therefore he was not bound by the decree for eviction. A rejoinder has been filed by the landlord-petitioner to this reply.

5. As stated earlier the Suit No. 213 of 1970 was filed by the petitioner for eviction not only against the original tenant - K. M. M. Shetty but also against P. A. Dange, V. A. Dange and two others. The case of the petitioner-landlord was that the tenant had sub-let the premises to the said P. A. Dange-defendant 2 and V. A. Dange-defendant 3. The tenant filed written statement contending that he had allowed defendant 2 to manage and conduct the said hotel business under the terms and conditions set out under an agreement made and entered into between them and that municipal licence for the business had always been and still was in the name of the tenant-defendant 1. Neither P. A. Dange nor V. A. Dange ever stated that they had parted with the possession to respondent 2 either as a licensee or in any other capacity. Again in the Writ Petition No. 354 of 1975 filed in the High Court respondent 1 had stated that P. A. Dange was permitted to conduct the said business under an agreement dated February 29, 1970 on his paying the tenant a sum of Rs. 500 per month by way of royalty, that this agreement was subsequently renewed on January 29, 1970 increasing the royalty amount from Rs 500 to Rs. 600 per month but, however, during the pendency of the appeal before the learned District Judge, Thane, defendants 2 and 3 had returned the business together with the premises, stock-in-trade, furniture, fittings and all paraphernalia which were given to them for conducting the said business to respondent 1 herein and that respondent 1 had been in sole possession and occupation of the said premises and of the business conducted therein and he himself had been carrying on the business from that time. Again in this Court when he filed the special leave petition respondent 1 prayed for stay of dispossession. This Court by an order dated November 5, 1980 granted stay of dispossession on condition that the respondent will continue to pay compensation equivalent to rent every month regularly to the petitioner herein and that he shall not induct anybody else in the premises in question.

6. When the petitioner received notice in Civil Suit No. 306 of 1989 he sent the lawyer's notice dated March 14, 1987 to respondent 1 inviting his attention to the undertaking given by him to

vacate the premises before March 31, 1989 and the consequences that may follow, if in breach of the said undertaking, he does not hand over possession. In this notice he also brought to the notice of respondent 1 that the suit was filed at the instigation of respondent 1 and charged collusion between respondents 1 and 2 and stated that the suit is based on false and fictitious allegations intentionally made to postpone the date of delivery of the premises. Respondent 1 sent a reply to this notice on August 23, 1989 stating that he is not at all concerned in any manner whatsoever with the suit filed by respondent 2, and that he would be filing necessary affidavit in the Suit No. 306 of 1989. Respondent 1 filed an affidavit in the suit in which also he stated that he had nothing to do with the suit filed by the plaintiff and denied the claim of the plaintiff and further stated that the suit premises had to be handed over to the petitioner by March 31, 1989 as per his undertaking given in this Court. He had also prayed the court to pass "such suitable orders to facilitate compliance of the orders" of this Court in respect of the suit premises. He had enclosed copy of his reply to the lawyer's notice sent by him to the petitioner along with this affidavit. However, for the first time in the reply filed to the contempt application respondent 1 had stated that "the petitioner has with ulterior motives deliberately withheld from this Hon'ble Court material facts i.e. respondent 1 has not been (in landlord's knowledge) in the suit premises since 1967 i.e. even before the suit for eviction was filed in the trial court" and that "at that time of final hearing of the appeal, it was landlord's duty to bring to the notice of this Hon'ble Court that the answering respondent is not in possession of the dispute premises." He had further stated that when the undertaking was filed by him he was not in possession of the suit premises and that it was well within the knowledge of the landlord. He had also stated that respondent 2 had been in possession of the suit property,. We cannot now accept this statement of respondent 1 that he was not in possession at the time when he gave the undertaking on the facts and circumstances stated above. If respondent 2 is in possession as he claims now, it would mean that respondent 1 had been playing a fraud on the court, and swearing false affidavits and making false statements and obtaining orders on the basis of such false statements. It may be noted, however, that there was absolutely no need for making such false allegations and obtain orders which are of no use to him if he had not been in possession, as stated now. If it is said that he might have been motivated by a desire to spite the landlord and to deprive him of the possession it would clearly be an abuse of the process of the court.

7. Throughout P. A. Dange and respondent 1 who were stated to have given a licence to respondent 2 for carrying on the business were parties to the proceedings but they never informed the court about the possession being with respondent 2. As already stated the learned counsel for respondent 1 produced in this Court at the time of hearing of the civil appeal the muster roll for running the hotel as well as a list of persons who are stated to be staying in the hotel. In that list respondent 2's name did not find a place. Now if respondent 1 states that respondent 2 had been in the possession of the suit premises and carrying on the hotel business ever since January 2, 1967 respondent 1 is guilty of deliberately suppressing the facts and giving a false undertaking to this Court that he is in possession of the suit premises.

8. In the Civil Suit No. 306 of 1989, respondent 2 had prayed for the injunction on the basis that he was a licensee originally from P. A. Dange and later under the tenant himself and that though there was no privity between the petitioner and respondent 2, by reason of certain amendments to the Bombay Rents, Hotel and Lodging House Rates Control Act he had become the tenant directly under the petitioner herein and entitled to protection. An interim injunction has been granted by the III Joint Civil Judge, Thane, on the ground that it is necessary, till the plaintiff established his right, to allow him to be in possession. The learned Judge was not well founded in this view. In the light of the earlier statements made by respondent 1 - K. M. M. Shetty, P. A. Dange and V. A. Dange in the eviction proceedings and in this Court and in the light of the undertakings given by respondent 1

and 17 others the learned Judge should have directed the plaintiff to prove his claim in the suit first before any relief is given against the defendants pending the suit. It may be mentioned that the argument of the learned counsel of the petitioner was that respondent 1 had falsely instigated respondent 2 to file the suit and obtain injunction. If this contention is true then respondent 1 is guilty of contempt in not handing over vacant possession as per the undertaking and in fact respondent 2 would equally be guilty as abettor of the breach. However, we are not going into the question of respondent 2's right in Civil Suit No. 306 of 1989 and that may have to be decided after trial. Suffice it to say that we are of the view that the order of injunction against the petitioner from executing the decree against respondent 2 is not justified in this case. We would like to add that as the facts of the undertaking given and the various statements made by the tenant in the eviction proceedings were before him, we would have expected the learned Civil Judge, Thane, to have directed the parties to obtain a clarification from this Court, if there was any doubt as to the executability of the decree passed by this Court.

9. Be that as it may, we now direct that that portion of the order granting injunction against the petitioner from executing the eviction decree against respondent 2, on the facts and circumstances of this case, shall not be operative and that petitioner is entitled to execute the decree for eviction against all persons who are in possession of the property.

10. Now coming to the question of relief that is to be granted to the petitioner and the punishment to be imposed on respondent 1, the learned counsel for respondent 1 contended that his client is an old man of more than 84 years and that in fact though he was willing to hand over vacant possession, on the facts and circumstances he could not comply with undertaking bona fide.

11. When a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For the purpose of enforcing an undertaking that undertaking is treated as an order so that an undertaking, if broken, would involve the same consequences on the persons breaking that undertaking as would their disobedience to an order for an injunction. It is settled law that breach of an injunction or breach of an undertaking given to a court by a person in a civil proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt. The remedy in such circumstances may be in the form of a direction to the contemnor to purge the contempt or a sentence of imprisonment or fine or all of them. On the facts and circumstances of this case in the light of our finding that there was a breach of the undertaking we think that mere imposition of imprisonment or fine will not meet the ends of justice. There will have to be an order to purge the contempt by directing respondent 1 - contemnor to deliver vacant possession immediately and issuing necessary further and consequential directions for enforcing the same.

12. In the foregoing circumstances, we find respondent 1 guilty of committing contempt by wilful disobedience of the undertaking given by him in this Court and accordingly we convict him and sentence him to pay a fine of Rs. 500 within the period of four weeks, failing which he shall suffer simple imprisonment for one month, and also direct him to deliver vacant possession of the premises forthwith to the petitioner to the extent possible by him. We further direct the District Magistrate, Thane, to evict all those who are in physical possession of the property including respondent 2 and his men and if necessary with police help and give vacant possession of the premises to the petitioner forthwith.

13. However, we discharge the rule issued against respondent 2.

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