

# CALCUTTA HIGH COURT

Dwijendra Krishna Dutta

Vs

Surendra Nath Nag Choudhury

(Rankin, C.J.)

14.12.1926

## JUDGMENT

### **Rankin, C.J.**

1. A sale which took place in execution of a mortgage-decree in respect of the properties mortgaged having been set aside under Order 21, Rule 90, Civil P.C., by the Subordinate Judge, Third Court, 24 Parganas, the decree-holders have preferred an appeal to this Court being appeal from Original order No. 200 of 1926, and the said appeal is yet pending. After preferring the appeal the decree-holders applied for the appointment of a receiver in respect of the mortgaged properties. By orders-passed on the 17th and 19th August 1926 this Court appointed a receiver to continue in office till the disposal of the appeal. As the result of further orders to which it is not necessary to refer Mr. Dwijendra Krishna Dutt, a Vakil of this Court, was finally appointed as such receiver with all the powers provided for in Order 40, Rule 1, Clause (d) of the Civil P.C., and a writ of appointment was issued in his favour on or about the 28th September 1926. The writ directed "that the said receiver do at once take possession of the mortgaged properties, for discharging his duties as such receiver."

2. The properties, we are told, are comprised within three Touzis, being Touzis Nos. 614, 633 and 1825, the first two being governed by a catchery at a place called Sobaria and the last one, a catchery at a place named Chaita. The principal amount secured by the mortgage which is dated somewhere about 1915, was Rs. 1,95,000, the amount of the mortgage-decree is Rs. 3,95,000 of which Rs. 25,000 has since been paid off by the mortgagors and at the sale which took place in execution of the said decree-and which has been set aside and the validity of which forms the subject matter of the appeal, the decree-holders themselves purchased the properties for Rs. 2,25,000.

3. For our present purposes it is not necessary to narrate the experiences of Mr. Dutt in connexion

with the work to which he was appointed it is sufficient, to say that they are not very happy and it is clear that he is labouring under-considerable difficulty and disadvantage in his endeavours to manage the estate and meet its dues and demands and to save it from being sold away. He submitted a report dated 10th November 1926, from which the following facts may be gathered. He appears to have attempted to serve personally through an officer of his, notices on Surendra Nath Nag Chowdhury, Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury, three of the judgment-debtors, calling upon them to supply him with collection papers of the estate. These notices were not accepted. He then sent the notices through registered post, when they were accepted by Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury but refused by Surendra Nath Nag Chowdhury. Not being able to get any collection papers he went out to do as best as he could in the matter of making collections from the tenants. He went to the catchery at Sobaria to take possession of it, but was resisted by one Amoda Kumar Nag Chowdhury a son of Surendra Nath Nag Chowdhury and his officers and Durwans. He had to take the assistance of the Police but even then the said Amode Kumar Nag Chowdhury and one Nibaran Chandra Nag, one Nani Gopal Bose, officers of the said Surendra, Satyendra and Jitendra, refused to give him possession of the catchery and, on the other hand, went on making collection from the tenants on receipts bearing back dates. The police appears to have reported to the Magistrate who thereupon issued prohibitory notices. Attempts to serve these notices proved futile as in the meantime the aforesaid persons left the place locking up the catchery and some of them persisted in making collections on giving antedated receipts. In one of the mouzahs, namely, Narayanpur the said Nibaran Chandra Nag, one Fani Bhusan Bose and one Monbahar Singh, employees of the said three judgment-debtors, openly went on dissuading the tenants from paying rent to the receiver.

4. On this report being received by this Court a rule was issued on the 18th November 1926, calling upon Surendra Nath Nag Chowdhury, Jitendra Nag Chowdhury and Satyendra Nath Nag Chowdhury, the three opposite parties, to show cause why they should not be committed to jail for contempt of Court in connexion with their conduct as disclosed in the receiver's report, dated the 10th November 1926, or why such other orders should not be passed as to this Court may seem proper. The Court issuing the rule directed that the notices upon Surendra Nath Nag Chowdhury would be served upon Babu Rupendra Kumar Mitter, who appeared on his behalf on that day, and the other notices would be served by registered post. It appears that the notice on Jitendra Nath Nag Chowdhury which was sent out by the office of this Court came back refused by the addressee.

5. The rule came on for hearing on the 26th November 1926. All the three persons appeared to oppose it. An affidavit sworn to by the above named Nani Gopal Bose, who described himself as

the Sudder Naib of Jitendra and Satyendra, as well as an affidavit of one Surendra Nath Banerji, who described himself as the Superintendent of the estate of Surendra, both dated the 24th November 1926, were filed in opposition and an affidavit in reply on behalf of the receiver sworn to by his officer Rajendra Nath Chowdhury on the same date was also filed. The Court on the 26th November 1926, passed an order which concluded in the manner following: We are accordingly of opinion that the receiver has the right to immediate possession of the catchery bari and the opposite parties named above are guilty of unlawfully obstructing him in the discharge of his lawful duties. We, however, do not think that we should pass the order we propose to pass as we intend to give another opportunity to the opposite party to carry out the order of this Court. With regard to the collection papers the respective lawyers for the opposite party No. 1 and opposite parties Nos. 2 and 3 undertake to supply the receiver with a set of current collection papers within 10 days from date to enable him to collect rent from the tenants. We, therefore, order that the opposite party do supply the receiver with collection papers within 10 days from date and we further direct that the opposite party do offer no resistance or obstruction to the receiver in his taking possession of the catchery bari at Sobaria. If these orders are not carried out the law will take its course. Let this matter come up before us Monday week.

6. On the expiry of the period of 10 days mentioned in the aforesaid order the matter has come up before us. An affidavit sworn to by one Soroshi Bhusan Chowdhury, an officer of the Receiver, on the 7th December 1926, has been filed on his behalf and counter-affidavits sworn to by Surendra Nath Banerjee, Superintendent of the estate of Surendra, on the 7th December 1926 and by Bepin Behari Dutt, officer of Satyendra and Jitendra, on the 8th December 1926, have also been filed. It appears that possession of the catchery at Sobaria has been given to the receiver. It appears that of the collection papers all that have been tendered to the receiver and have now been filed before us are : (1) Certain papers which are called 'karchas' for 1333 B.S., in respect of all the three Touzis (2 copies, evidently prepared from the same original) one set being filed by Surendra and the other by Satyendra and Jitendra; (2) some counterfoils (1 book) for 1331 B.S. in respect of Touzis Nos. 614 and 633 filed by Surendra; (3) some counterfoils for 1333 B.S., in respect of Touzi No. 614 (1 book) and No. 633 (3 books) filed by Satyendra and Jitendra. The 'karcha?' show the names of the tenants, their lands and the rental thereof and are mere copies which have been evidently prepared for being produced as aforesaid, and it is said they have been so prepared from the books of 1316 and 1317 B.S., which are in existence. All the parties, namely the decree-holders, the three opposite parties and the receiver, have appeared before us and we have heard what they have submitted.

7. It will be convenient to deal here with one question which arises for consideration, namely, whether the opposite party have sufficiently complied with the undertaking which their lawyers

gave to this Court on the 26th November 1926, and upon which the order of that date was passed, or in other words whether they have supplied the receiver or produced all the current collection papers. (The judgment then discussed the evidence and proceeded.) The conclusion at which we have arrived, so far as the collection papers are concerned, is that they are available, and that the current collection papers, for the last 3 years, that is to say, from 1330 up to now are in the possession and control of the opposite party and are quite within their power to produce. We are clearly of opinion that the explanation offered in the affidavits to which we have referred is absolutely false and that it does not bear examination for a moment. We regret that the opposite parties have thought fit to withhold these papers notwithstanding the undertaking given by their lawyers on the 26th November 1926, and they have flagrantly disobeyed the Court's order with the object of hindering the receiver in his management of the estate. In our opinion there is no extenuating circumstances nor any redeeming feature, for it is clear that the Court's authority is being trifled with and recourse is being had to deliberate and willful perjury in order to deter the due administration of justice.

8. The question then is, what is the action that we should take in the matter? To answer this question we have got to look at the circumstances from two distinct view points : 1st, whether the opposite parties have been guilty of contempt by reason of the obstruction that was offered to the receiver in his attempt to take possession of the Sobaria catchery; and 2nd, whether the opposite parties have been so guilty because of their failure to hand over the collection, papers to the Receiver.

9. So far as the first of these matters is concerned, this Court has already in its order, dated the 26th November 1926, found that "the opposite parties named above are guilty of unlawfully obstructing him (that is to say the receiver) in the discharge of his lawful duties. We may add that on considering the materials on the record and hearing all that has been submitted to us in the course of the arguments we feel no hesitation in affirming the view that a most flagrant defiance was offered to the receiver and, therefore, to the authority of this Court. The obstruction that was offered to the receiver and the attempt that was made to intercept and prevent the payment of rents to him amounted clearly to an interference with the Court's possession and the persons who were concerned therein were guilty of contempt of Court. There is no question as regards the powers of this Court to punish those who were guilty of such contempt. In the case of *Governor of Bengal v. Moti Lal*<sup>1</sup>, Sir Lawrence Jenkins, C.J., on an elaborate discussion of the whole law on the subject observed thus:

Now this Court is a Court of record in all its-jurisdictions and it thus has power to commit for any contempt in relation to any of those jurisdictions : In re Abdool and Mahtab 8 W.R. Cr. 32. Thus I have no doubt that were there to be an interference with the due administration of justice

by a Division Bench in relation to a criminal appeal (for the case then before the Court was one in which a criminal appeal to this Court was likely to be filed) pending before it, and that interference amounted to an offence, this Court on its Crown Side would have power to punish it as a contempt on a summary proceeding.

10. In the same case at page 252 (41 Cal.) Mookerjee, J., dealt with the distinction between civil and criminal contempt and observed thus: The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked, A criminal contempt in conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character, in the case of criminal contempt, the proceeding is for punishment of an act committed against the Majesty of the law and the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. It is conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in those cases where the two merge into one another. But, in ordinary cases the line of demarcation is not difficult to determine.

11. In the case of *In the matter of Amrita Bazar Patrika* [1918] 45 Cal. 169, Mookerjee, J., as a member of the Special Bench observed as follows: The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this two fold attribute, proceedings in contempt may be regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of Judicial Power.

12. Again:

The view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the

power of the Court to make its judgment, in part, at least punitive or vindicatory in its character; in other words, where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may nevertheless, in its discretion, add a punishment by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate.

13. Contempt by obstructing an officer of the Court is punished, not for the purpose of vindicating the dignity or the person of the officer, but to prevent undue interference with the administration of justice *Helmore v. Smith*<sup>2</sup> and *In re Johnson*<sup>3</sup> Then receiver is an officer of the Court and the Court must protect him while discharging his duties, and interference with or disturbance of a receiver appointed by the Court is a contempt. When a receiver is appointed by this Court in its appellate jurisdiction, pending an appeal in this Court, this Court has ample jurisdiction to deal with matters relating to the receiver including proceedings for contempt; and so also when the appeal itself has been disposed of but the receiver has not been discharged. *Grey v. Woogramohun Thakur*<sup>4</sup> There is, however, a difficulty, which to our mind, seems insuperable in dealing with the opposite party so far as this matter is concerned. The opposite parties do not appear to have personally done anything which may be said to have amounted to obstruction to the receiver or interference with the Court's authority. A number of names are mentioned in the receiver's report; those persons must have acted either under the express orders or at least with the connivance of the opposite parties or at least of some of them, and certainly for the benefit of them all. But the facts lie only within the region of probability, and unless reasonable certainty is attained, no punishment can possibly be awarded. The defence that Sobaria Cutchery was not included in the mortgage, even if bona fide or well-founded, would not afford any justification for the obstruction for the order must be construed as meaning that the appointment was being made in respect of the mortgaged properties as mentioned in the decree and if that order was wrong the Court, by which it was made, should have been moved to set it right. As matters stand, however, it is not possible to punish the opposite parties or any of them for the obstruction that was offered to the receiver.

14. Then as regards the collection papers. - No order for delivery of the collection papers to the receiver was passed by the Court, at any time before the 26th November 1926. The receiver, no doubt, was perfectly justified in asking for them, but the opposite parties were under no obligation to comply with his demand. The rule, we are dealing with, was issued on the 18th November 1926, when there was no order upon the opposite parties relating to the collection papers. On this simple ground they cannot be dealt with for there could be no contempt in respect of an order which was not in existence on that date. Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money or abstain from doing

anything, is a contempt of Court punishable by attachment or committal. Formerly, in the Court of Chancery, a man was attached for neglecting to do an act ordered to be done and committed for doing a prohibited act *Callow v. Young*<sup>5</sup> Attachment and committal are now alternative remedies whether the order to be enforced is mandatory or prohibitory *Harvey v. Harvey*<sup>6</sup> and both are modes of execution available for enforcing judgments and orders. In order to found an application for attachment or committal for disobedience of an order, service of the order alleged to have been disobeyed has to be proved as a sine qua non. The rules as to service are very stringent under the English Law, and personal service is insisted on except in certain excepted or special cases. Personal service may be dispensed with if it is shown that the person to be served has evaded service *Kistler v. Tettmen*<sup>7</sup> and the fact that the person ordered to do the act was actually in Court when the order was made is not a ground for dispensing with such personal service. In re *Tuck, Murch v. Loosemore*<sup>8</sup> In the present case far from there having been any service of the order, the order itself was not in existence. Can we deal with them for breach of the undertaking which their lawyers gave, presumably on their behalf, on the 26th November 1926, and on the basis of the order that was passed on them on that day for supplying those papers to the receiver within 10 days? - The answer must, in our opinion, be in the negative for this order also was never served on the opposite parties personally. Moreover, the hearing that has taken place before us was not in relation to any proceedings for contempt for non-compliance with that order but only on the footing whether they have sufficiently atoned for their guilt in respect of the obstruction to the receiver by giving him the collection papers that they were ordered to give. For these reasons, therefore, it is not possible to punish them for their non-compliance in this respect.

15. The rule issued on the 18th November 1926, must accordingly be discharged. The receiver, however, will be entitled to his costs for these proceedings as against the opposite parties because it was the obstruction offered by their men which necessitated the proceedings. We assess the hearing-fee in this rule at 10 gold mohurs.

16. Though the rule is thus disposed of we cannot let the matter rest here. We have already expressed our view as regards the collection papers and we think we shall be failing in our duty if in the present case we do not make further orders which are, in our opinion, necessary in order to place the receiver in more effective possession of the estate and to obviate his difficulties in the management of it and to enable him to make the collections which he must make at once if the estate is to be saved from being sold for its demands. We accordingly order that the opposite parties Surendra Nath Nag Chowdhury, Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury do within four days deliver to the receiver all cheque, counter-foils, jamawasilbakis, jamabandis, karchas, sehas and jaripi chittas and all such other papers as they may have in their possession, control or power, for and relating to the years 1330 to 1333 B.S. in respect of Touzis

Nos. 614, 633 and 1825.

17. Copies of this our order will be served by the proper officer of this Court on each of the opposite parties at once. Every effort should be made for effecting personal service of this order and if that be found impossible then the service should be made in the manner prescribed by law for substituted service. A proper report of the service will have to be submitted to this Court as soon as it is effected. The receiver will report to this Court on the expiry of four clear days from the date of the said service whether this order has been complied with by the opposite parties or not. The Court will then proceed to take such action as, in its opinion, may be necessary, just and proper.

#### Cases Referred.

1[1913] 41 Cal. 173

2[1886] 35 Ch. D. 449

3[1888] 20 Q.B.D. 68

4[1901] 28 Cal. 790

5[1887] 56 L.J. Ch. 690

6[1884] 26 Ch. D. 644, D. v. A. & Co. [1900] 1 Ch. 484

7[1905] 1 K.B. 39

8[1906] 1 Ch. 692