BOMBAY HIGH COURT

Dwarkadas Mulji

Vs.

Shantilal Laxmidas Gandhi

Contempt Petition No. 53 of 1979

(P.B. Sawant, J.)

07.03.1980

JUDGMENT

P.B. Sawant, J.

1. A point of considerable general importance is raised in this contempt petition viz., whether a party to a proceeding which is void ab initio can be said to commit a Contempt of Court for not complying with an undertaking given in such proceeding.

2. The facts leading to the present contempt petition are as follows :-

> The petitioners are the trustees of a public charitable trust known as Kuverbai Dayal Bhlmji Sanatorium Trust. They run a sanatorium situate at Kamla Nehru Cross Road, Kandivli West, Bombay 69. The sanatorium has several blocks and those blocks are given to the members of the Hindu Community for a period of two to three months on health grounds on a nominal charge. Sometime in the month of December 1976, the first respondent (hereinafter referred to as the respondent) approached the petitioners for allowing him to use one of the blocks on the ground of health for a temporary period. Accordingly the respondent was allowed to use Block No. 2 on the ground floor of the said sanatorium (hereinafter referred to as the suit premises) for a period of two months from 1.1.1977 to 28.2.1977 on monthly charges of Rs. 200/-. It may be mentioned that the suit promises are fully furnished with all the fittings and furniture necessary for occupation as residence. Subsequently, the period was extended by one more month upto 31.3.1977 on the respondent's application made for the purpose. However, in spite of the expiry of the said extended period, the respondent did not vacate the suit premises. Instead, on 14.4.1977 he filed a suit in the Small Causes Court, Bombay, being R.A. Declaratory Suit No. 1629 of 1977 and prayed for a permanent injunction restraining the petitioners Nos. 1 and 2, their agents and servants from dispossessing him and his family

members of the suit premises except by due process of law. In that suit, he applied for an ex parse ad interim injunction and obtained the same on the day be filed the suit. Thereafter the said ex parse ad interim Injunction was vacated by the said Court by its order dated 10-6-1977 and his appeal against the said order vacating the injunction, also failed. Thereafter the suit itself came up for hearing and during the course of the hearing, on 20-1-1979 the parties arrived at consent terms. Under the said consent terms. the respondent, among other things, agreed and undertook to vacate the suit promisee by 31.5.1979. It is this undertaking given to the Court which has given use to the present contempt petition.

3. Before the period to vacate under the said undertaking expired, the respondent made an application to the Small Causes Court for setting aside the said consent terms on the ground that they were null and void, since the suit filed by him in which the said consent terms were filed was without jurisdiction. The Small Causes Court by its order dated 11-6-1979 dismissed the said application on the ground that the suit was not maintainable the said Court and hence the suit itself ought to have been dismissed for want of jurisdiction the Court therefore held that since the suit itself was without jurisdiction the consent terms filed in the said suit were void ab initio. The Court further held that since the suit was dismissed and no decree was passed, no application lay under section 47 of the Civil Procedure Code since an application under the said provision was maintainable only if a decree was passed. The Court therefore, dismissed the said application. Thereafter petitioners Nos. 1 and 2 filed the present contempt petition in this Court under the Contempt of Courts Act, 1971 (hereinafter referred to as the said Act), for taking action against the respondent under section 10 thereof for committing breach of the said undertaking given by him on 20-1-1979 to vacate the suit premises by 31-5-1979.

4. The petition was contested by the respondent by raising four preliminary objections. The first objection was that the Trust was not a registered Trust and therefore no application for contempt could be filed on behalf of such Trust. The second contention was that all the trustees had not joined as petitioners in the petition and therefore the application by only two of the trustees was not maintainable. The third objection was that the petitioners had not taken consent of the Charity Commissioner under section 51 of the Bombay Public Trust Act, 1950 and the last objection was that the Small Causes Court, Bombay, had no jurisdiction to entertain the suit in which the undertaking was given and hence the undertaking itself was ab initio void and inoperative in law and therefore the present petition for taking proceedings under the said Act was not maintainable.

5. I find no substance it any of the first three objections raised on behalf of the respondent. The petitioners have produced in this Court the certificate of registration of the said Trust under the Bombay Public Trust Act, 1950 and on being furnished the same, the respondent had no answer and did not press his contention that the Trust was not a registered Trust.

6. As regards the second objection, it is true that as has been admitted on behalf of the petitioners, there are five trustees of the said Trust. However, it was pointed out on their behalf that the respondent himself had joined only two of the trustees to the said suit filed in the Small Causes Court and therefore they had initiated the present contempt proceedings only at the instance of the said two trustees. However, they preferred an application for joining the three other trustees as parties to the present petition in order to leave no scope for making a grievance in that behalf. This application was not contested on behalf of the respondent. I have therefore by my separate order passed on the said application already granted the said application. Therefore assuming that there was some lacuna in the filing of the petition the same has been removed. Hence the said objection also no longer survives.

7. As regards the third objection, I am afraid that the learned counsel for the respondent has misconstrued the provisions of section 51 of the Bombay Public Trust Act, 1950. The said section requires the consent of the Charity Commissioner only if a suit of the nature specified in section 50 of the said Act, is to be filed. The provisioner of the said section 50 show that the contempt proceedings of the present kind are not covered by it and there is no need to obtain consent of Charity Commissioner for filing the present contempt petition. Thus I find that all the said three objections have no merit in them.

8. However, I find that there is a great force in the contention advanced on behalf of the respondent that no action can be taken against him for Contempt of Court since the suit in which the said undertaking was given was itself void and without jurisdiction. In order to appreciate this contention, it is necessary in the first instance to point out the nature of the suit which was filed by the respondent. The averments In the plaint show that the plaintiff had claimed that he was a licensee in respect of the suit premises and it was his contention that unless and until the defendants in the said suit who were the first two petitioners in the present petition, got an order in ejectment from the said Court viz., the Small Causes Court, they could not forcibly throw him out of the suit premises. The respondent then on this simple averment proceeded to state that this was a fit case for granting an injunction as prayed for by him. Thereafter in regard to the nature of the suit contained in paragraph 9 of the plaint, he stated that it was a suit between a licensor and licensee and that the Hon'ble Court had gut jurisdiction to entertain and try the suit. He thereafter made the only prayer for a permanent relief and that was for an injunction restraining the defendant from dispossessing him and his family members of the suit premises except by due process of law. It is clear from the averments in the plaint that this was a suit filed by the respondent on the footing that s a licensee In respect of the suit premises and graving for an injunction restraining the defendants from evicting hint torn the suit premises otherwise than in due course of law. He had not claimed to be protected licenses under the Rent Act, nor could the suit be covered by Chapter VII of the Presidency Small Causes Court Act. Admittedly the Small Causes Court had no jurisdiction to entertain and try the said suit. Hence the suit as flied in the said Court was on the face of it void ab initio.

9. Since the suit itself was void for want of jurisdiction from the inception, it follows that all orders whether final or interlocutory, by consent or otherwise, which were passed in the said suit were also void, inoperative and not binding on any of the parties to the suit. Hence, prima facie the consent terms dated 20.1.1979 including the undertaking incorporated in the said consent terms were void and inoperative in law.

10. The question however, which was debated hotly before me was whether the respondent could or could not be punished for committing a breach of the said undertaking in spite of the fact that the suit was void ab initio. It was contended on behalf of the petitioners that the undertaking such as the present one was an undertaking given by the respondent solemnly to the Court. Such solemn declaration made to the Court has no relation to the maintainability or non-maintainability of the proceedings in the Court in which such a declaration is made. Even if the proceedings themselves are not maintainable, the solemnity and the gravity of the undertaking given by a party to the Court in such proceedings is not whittled a bit on slat account. For, argued Shri Abhyankar, the undertaking is given to the Court and not to the party and it is essentially a matter between the Court and the party giving the said undertaking. He further argued that in order to upheld the majesty of law and the orders passed by the Courts solemnly, it is necessary that the parties should he bound down to the representations which are made, to the Court's and should not be allowed to flout such representations with impunity on the spacious ground that the proceedings in which they had made such representations were themselves void. He further urged that in the press it case, the respondent himself had filed the said suit in the Small Causes Court and had thus invoked the jurisdiction of that Court to give him assistance, He tried to obtain an interim injunction but failed because he could not make out a prima facie case. However, thereafter during the course of the proceedings he agreed to the consent terms and thereby gained advantage of residence in the suit premises from January 1979 to 31.5.1979. It is only when the said period was to expire that he approached the said Court for setting aside the said consent terms and thus to relieve him of the said undertaking. This was, according to Shri Abhyankar, a case of approbation and reprobation and hence the respondent should not be allowed to dis own a situation which he had himself created and of which he had taken a full advantage. On this line of reasoning, Shri Abbyankar argued, a distinction can be made where an order is passed in a void proceeding which is instituted at the instance of at party who has given the undertaking and a void proceeding which is instituted by the rival party. Shri Abhyankar therefore urged that in any twee since the present suit in which the undertaking was given was instituted by the respondent himself or the principle that a person should not be allowed to approbate and reprobate, the respondent should be punished for the breach of the said undertaking.

11. In order to support their rival contentions, several authorities were cited at the bar which may be examined now. The first authority relied upon by Shri Abhyankar for the petitioners is a decision of the Supreme Court reported in *(Babu Ram Gupta v. Sudhir Bhasin and another*[1]*,* to that care there was a partnership between the parties for running a theatre. The partnership deed

contained the usual arbitration clause, Disputes arose between the partners as a result of which an application under section 20 of the Arbitration Act was made before the High Court, and the High Court on hearing the application referred the dispute to the sole arbitration of a retired judge of the Allahabad High Court. Along with the said application, the respondent had filed an application for appointment of a receiver as he apprehended that the appellant would misappropriate the funds of the partnership property. The application for appointment of a receiver was allowed and the respondent himself was appointed as a receiver of the theatre. Thereafter, the appellant being aggrieved by the said order filed an appeal before the Division Bench of the Delhi High Court and in that appeal the Delhi High Court passed an order appointing a receiver of the cinema theatre with the consent of the counsel of the parties, pending decision of the dispute between the parties which had been referred to arbitration. The receiver was directed to submit quarterly reports to the High Court regarding the running of the business of the said theatre and the appellant who was subsequently hauled up as a contemner before the Court was directed not to interfere with the receiver appointed or with the business of the running of the said theatre. He was however, directed to give to the receiver all cooperation that the receiver might require. It appears

[1] AIR 1979 SC 1528

that thereafter the appellant who was in possession of the said theatre did not hand over possession of the same to the receiver and therefore contempt proceedings were taken against him under the said Act. As the Supreme Court put it, the gravamen of the charge against the contemner was that he had committed a serious breach of the undertaking given to the Court to hand over possession to the receiver. It was argued on behalf of the contemner firstly, that there was no undertaking given by the contemner to hand over possession of the theatre to the receiver and therefore there was no breach of the undertaking. Secondly, it was submitted that even assuming that an undertaking was given to the Court, as the appeal before the Division bench in which appeal the said undertaking was given) was wholly incompetent, the proceedings before the Division Bench were non est and the order passed by the High Court being a nullity a disobedience of such an order would not attract the provisions of the Act. On behalf of the respondent it was contended that even if the order of the High Court was void, it was not open to the appellant as a litigant to assume the role of a Judge and unilaterally decide that the order of the High Court was non est and he was not bound to obey the same. It was further contended that he having himself filed an appeal before the Division Bench and thereby having invited the Court to pass a consent order which was agreed to by the appellant, he could not by virtue of the rule of estoppel by judgment be heard to say that the appeal filed by the appellant himself being incompetent the judgment was void and hence the appellant could disobey the same with impunity. On behalf of the respondent, reliance was placed on certain judgments which have also been cited before me in this petition. The Supreme Court however did not decide the said issue since on the other issue the Court had come to the conclusion that there was no undertaking given to hand over possession of the theatre, and therefore allowed the appeal and set aside the sentence passed against the appellant by the High Court under the said Act. I am only quoting here the relevant observations in the matter since Shri Abbyankar contended these observations

had in terms indicated the view which the Court wanted to take on the raid issue. The said observations are as follows :

> "While we do find considerable force in the argument of Miss Seita Vaidyalingam, Counsel for the respondent we are of the opinion that the point is not free from difficulty and in the view that we have decided to take on the first point raised by counsel for the appellant the second point does not fall for determination. We, therefore, refrain from going into this point and leave the matter to be decided in a more proper and suitable case."

It is difficult to construe the above observations to mean that the Court had accepted the contention advanced on behalf of the respondent there, as urged by Shri Abhyankar. The said authority therefore is not of much assistance to the petitioners in the present case to hold that even when the proceedings are ab initio void, if they are instituted by the contemner himself, a breach of the undertaking given by the contemner in such proceedings will be punishable under the said Act.

12. The second authority relied up in Is the decision of the Allahabad High Court reported in *State of Uttar Pradesh v. Rattan Shukla*[2], It appears that the contemner had appeared in a drunken state is the Court which was the Court of the Additional District Magistrate who was bearing the appeal under section 160 of the Uttar Pradesh Municipalities Act,

[2] AIR 1956 All 258

1916. It was contended there that only the District Magistrate had power to bear the appeal and not the Additional District Magistrate who had heard the said appeal. It was further contended that since the Additional District Magistrate had no jurisdiction to hear the said appeal, there was no contempt which could be said to have been committed of the learned Magistrate.. While dealing with this contention it was observed by the Division Bench of the Allahabad High Court as follows:

> "It is not the law that a Court dealing with a matter which is beyond its jurisdiction can be contemned with impunity or that the liability of a person to be punished for contempt of a Court depends upon whether the Court was acting within its jurisdiction at the time when it is alleged to have been contemned. The opposite party, therefore, cannot claim that he is not guilty of contempt because Shri S.M. Ibrahim had no jurisdiction to decide the appeals."

It must be remembered that the contempt with which the Court was concerned in that case was contempt in the lace of the Court which is covered by section 14 of the said Act and not contempt as in the present case under section 10 of the said Act. Therefore, these observations have to be read in the context of the facts of that case and cannot be extended to a case such as the present one where the contempt alleged arises out of the breach of the order or direction of

the Court or undertaking given to the Court. The two cases are materially different and have no comparison with each other. I am therefore not prepared to persuade myself to hold that the Division Bench of the Allahabad High Court in the aforesaid case has taken the view that where the proceeding are ab initio void, a breach of the orders made in such proceedings will fall within the purview of section 10 of the said Act.

13. The next case relied upon is reported in *Umrao Singh v. Man Singh and others*[3], This was a case where the respondents had not filed a suit for possession of land in dispute against the appellant on the allegation that the appellant was in unauthorised occupation of the land. The suit was resisted by the appellant on the ground that the Civil Court had no jurisdiction to try the suit since he was in lawful possession of the land and the predecessors-in-title of the respondents being the Bhumidhar of the land could not have sold the land in favour of the respondents in contravention of the provisions of section 33 of the Delhi Land Reforms Act and the Bast Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. The suit was however decreed in favour of the respondents and the decree was affirmed in appeal and thereafter in second appeal by the learned single Judge of the Delhi High Court. It was held that the Civil Court had jurisdiction to try the suit. In the Letters Patent Appeal it was contended that the finding given by the learned single Judge of the High Court that the. predecessor-in-title of the respondents was not the Bhumidhar of the land was not correct. The Division Bench found that earlier, the predecessor-in-title of the respondents had filed a suit for ejectment against the appellant in the Revenue Court. In that suit the appellant had filed a written statement and had taken a preliminary objection that the suit filed in the Revenue Court was not maintainable because the said predecessor-in-title was not a Bhumidhar. The Revenue Court had accepted that contention and had held that the said predecessor-in-title was not the Bhumidhar and dismissed the suit. It was while considering this aspect of the matter and repelling toe contention advanced on behalf of the appellant that the said

[3] AIR 1973 Del 1

predecessor-in-title was a Bhumidhar that the Court observed as follows in paragraph 8 of its judgment :

> "..... To allow the appellant to take up inconsistent position and to blow hot and cold or to play fast and loose according to his convenience in a case like the present would result in a situation which is not only anomalous but is also manifestly inequitable and unjust. Such a situation cannot be countenanced by the courts. The matter has been discussed in Bigeloo on Estoppel, Sixth Edition, in the following words :-
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> 'It parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts of justice would in most cases be paralysed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights to all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one

who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose."

The Division Bench then discussed further authorities in the rest of the Judgment on the doctrine of election and concluded that the appellant having successfully resisted the earlier suit in the Revenue Court by contending that the said predecessor-in-title was not a Bhumidhar, could not now be allowed to turn round and take an inconsistent stand that he was a Bhumidhar. This was on the footing that the appellant having already taken advantage of his plea about the status of the said Predecessor-in-title on the maintainability of the suit in the Revenue Court, could not he allowed to take a stand that he was a Bhumidhar and thus to defeat the suit filed by the respondents

14. It is relying on the aforesaid discussion on the doctrine of election that Shri Abhyankar contended that the facts of the present case would be covered squarely by the said observations In this connection he stressed the fact that It was the respondent himself who had filed the said suit in the Small Causes Court and had agreed to the consent terms under which he had taken advantage of a further stay for about four and a half months. He should, therefore, according to Sri Abhyankar, not be allowed to turn round and question the validity of the said proceedings which he had filed. I do not see any parallel between the facts of the case. In the aforesaid decision and the said facts pointed out by Shri Abhyankar from the present case. It is true that the doctrine of election does not permit a party to approbate and reprobate at the same time. However the said doctrine is relevant only to questions of fact and cannot be invoked against the operation of law. For there cannot be an estoppel against law. To apply the doctrine to the facts of the present case, as suggested by Sri Abhyankar, will mean that parties can confer jurisdiction on a Court which has no jurisdiction in law. All that the doctrine means is that if a party chooses to attribute a particular character to a person or a document or a transaction and take an advantage of the same in one form or the other, the same party cannot be allowed subsequently to take an inconsistent plea and to gain an advantage thereby. That would certainly amount to playing truant with the administration of justice and no Court of law will permit such double game. This is because the estoppel acts against the conduct of the party and not against any provision of law. I therefore do not see as to how the aforesaid decision and the observations made therein will assist the petitioners in the present case.

15. The next decision is of the Punjab High Court reported in *Narain Singh v. S. Hardayal Singh Harika, Executive Officer, Municipal Committee, Patiala*[4]*,* The observations made in paragraph 14 of the said judgment which were sought to be relied upon by Shri Abhyankar, Instead of helping him, go counter to his contention to quote the exact observations.

> ".....The only questions open for consideration in proceedings for contempt for violating an injunction are whether the Court had jurisdiction to award the injunction, and whether it had in fact been violated. Further inquiry as to its advisability or legality is not

called for. The Court, in contempt proceedings, will not inquire into the merits of the case in which the injunction was issued."

These observations themselves make it clear that even according to the learned Judge, of the Punjab High Court, in that case if the Court which passed the order of Injunction had no jurisdiction to pass such an order that would have been a relevant consideration in the proceedings for contempt. In .other words, according to the learned Judge, if the order of injunction is without jurisdiction It will not be possible to punish a person for breach of such order.

16. The rest of the decisions cited were those of the Supreme Court of the United States. they are Ex-parte Rowland 1881 U.S.S.C.R. 26 L.Ed. 604, Ex-parte Fisk 1884 U.S.S.C.R. 28 L.Ed. 1117, Ex-parte Sawyer 1887 U.S.S.C.R. 31 L. Ed. 200, *United States of America v. United Mine Workers of America*[5], and *Joseph F. Maggio v. Raymond Zetiz*[6], It is not necessary to discuss the facts in each of these cases it is sufficient to state that in all these decisions, a unanimous view has been taken that there is no contempt. If the breach is of the orders passed in proceedings which are ab initio void for lack of jurisdiction from their very Inception.

17. Lastly, I may quote with benefit the statement of the American law on the subject as found on para 19 of Corpus Juris Secundum Volume XVII. It is as follows :

"Disobedience of, or resistance to, a void mandate, order, judgment or decree, or one issued by a Court without jurisdiction of the subject matter and parties litigant, is not contempt, and where the Court has no jurisdiction to make the order, no waiver can cut off the rights of the party to attack its validity. The lack of jurisdiction must be such as is manifest in the inception of the proceedings, and not that which developer through the hearing and determination of the cause ....."

18. It is not disputed that in the present case the lack of jurisdiction was patent on the averments in the plaint itself and was from its inception and no arguments were needed to point out that the Small Causes Court had no jurisdiction to entertain and try the suit. This was, therefore a proceeding which was ab initio void and hence on the aforesaid authorities. It will have to be bald that the breach of the undertaking given in the said proceeding does not amount to contempt of Court.

[4] AIR 1958 Pun 180

[5] 1946 U.S.S.C.R. 91 L.Ed. 200

[6] 1947 USSCR 92 L. Ed. 476

19. Shri Abhyankar then tried to make a distinction between a dis-obedience of an order passed in such proceedings and disobedience of an undertakings given therein. I find it difficult to accept this distinction as being in any way relevant to the result. If a proceeding is ab initio void, all orders passed and all representations made therein including undertakings given by the parties will have also to be hold as void. When a proceeding is void it is in the eyes of law non est or non existent and therefore everything done therein loses its legal existence. It is for this reason

that no such distinction can be made as urged by Shri Abhyankar.

20. For all these reasons, I am of the view that in the state of the law as It is, the petitioners are not entitled to succeed in the present petition. It is with great reluctance that I have in the circumstances to dismiss the petition and discharge the rule granted therein. The rule is accordingly discharged with no order as to costs.
Petition dismissed.