PATNA HIGH COURT

N. Baksi

Vs

O.K. Ghosh

M.J.C. No. 174 of 1957

(Ahmad and Choudhary, JJ.)

25.04.1957

JUDGMENT

Ahmad, J.

1. This proceeding in contempt arises out of Miscellaneous Judicial Case No. 40 of 1957. In that case the prayer made was to enjoin Mr. O.K. Ghosh, I. A. and A. S., Accountant General, Bihar, to perform his statutory obligations by acceding to pay for the passage benefits, as provided in the Superior Civil Services Rules 1924, to the wife and the children of the petitioner Mr. N. Baksi, I. C. S., Member, Board of Revenue, Bihar. That miscellaneous judicial case on contest was disposed of by the order dated the 11th March 1957. The concluding portion of that order reads as follows :

> "In the result, however, for the reasons already given, I hold that this application should be allowed and accordingly a writ in the nature of mandamus is directed to issue commanding the Accountant General, Ranchi, to pay the passage money, as provided in the Statutory Rules, to the wife and children of the petitioner as prayed for. But in the circumstances of the case, there will be no order as to costs".

It is said that thereafter on the same date, namely, 11th March, 1957, when the aforesaid order was passed, Mr. N. Baksi wrote a letter to the opposite party to comply with the same and to give effect to it within ten days from its making. In reply thereto the following letter was delivered to him on 18-3-57.

> "Office of the Accountant General, Bihar Ranchi
>
> No. DG-2/2979/ (R - AO)
> Dated Patna the 18th March, 1957

From
The Accountant General, Bihar, Ranchi.
To
Sri N. Baksi, I. C. S.,
Member, Board of Revenue, Bihar,
2. King George Avenue, Patna 1.
Subject : Passage certificates.
Sir,

In inviting a reference to your letter No. nil, dated March 11, 1957, on the above mentioned subject, I am to inform you that necessary steps are being taken by us to move the Supreme Court in the matter. Further information in this regard will be conveyed to you after orders are passed in the Supreme Court case.

Yours faithfully,
Sd. S.P. Gugnani
Deputy Accountant General, Bihar.
Camp : Patna

2. The grievance of Mr. Baksi is "that the refusal of the opposite party to give effect to the orders passed by this Hon'ble Court is not *bona fide* and that the attitude adopted by him to frustrate, the object of the application made by the petitioner and deprive the petitioner and his family of the opportunity to sail according to their scheduled programme amounts, in effect, to flouting the command addressed to the said opposite party in the said case". He has accordingly in the present petition prayed that a proceeding in con tempt be taken against Mr. O.K. Ghosh to secure compliance of the aforesaid order. In Court this petition was filed on 20th March 1957, though it is claimed that its drafting had been completed by 19th March, 1957, so much so that the other side also was served with a copy of the same on that very date. Thereafter on 21st March, 1957, as against the order passed in M. J. C. No. 40 of 1957, an application for leave to appeal to the Supreme Court was filed. That was on behalf of two persons Mr. O.K. Ghosh and the Union of India. It was numbered as Supreme Court Appeal No. 41 of 1957 and while it was still pending for disposal the petition for contempt came up for hearing on 26th March, 1957, when the Court on hearing the parties issued the rule nisi calling upon the Accountant General, Bihar, to show cause why a proceeding in contempt should not be drawn against him on the facts as alleged in the petition. In the meantime, it is said, the Accountant General has complied with the order and has already issued the necessary passage certificates as commanded toy this Court in the order dated the 11th March 1957. In that view of the matter, Mr. P.R. Das appearing for the Petitioner has now pressed this application only for costs.

3. The learned Solicitor General appearing for Mr. O.K. Ghosh has shown cause and an affidavit in opposition has also been filed though it is in the form of an application in reply. That is sworn

by the Accountant General himself. Therein facts have been stated in some detail to explain as to why the application for leave to appeal to the Supreme Court could not be filed earlier. And I think there is no reason for me to say that it was not so though I cannot help observing that with some more diligence that application for leave to appeal could have been filed a few days earlier or at least the present complications could have been avoided by drawing the attention of the Court in the meantime to the difficulties that stood in the way of an early application. Unfortunately that not having been done it now arises for consideration as to whether the way in which Mr. O.K. Ghosh has moved in the matter has laid him open in law to a charge of wilful disobedience of the order passed by this Court. In answer thereto the learned Solicitor General has strongly defended Mr. O.K. Ghosh and in support of his defence has raised four contentions, namely (1) that the demands made by Mr. Baksi in his letter dated the 11th March 1957" were more comprehensive or wider than those in the original writ petition or in the order made by the High Court"; (2) that the notice served upon the respondent did not comply with the accepted rule inasmuch as it did not clearly and fully specify the matters in regard to which con tempt was alleged to have been committed; (3) that no order or writ had yet been served on the respondent and so the question of dis obedience to such an order on writ could not at that point of time arise; and (4) that the letter sent in reply to the communication of Mr. Baksi 'did not mean and was not intended to mean a refusal to comply with any direction of this Hon'ble Court" and whatever was written in the letter was under the *bona fide* belief that the respondent was entitled to a reasonable opportunity to take his decision as to whether in the circumstances of the case an appeal was advisable against that order.

4. So far as the first, two contentions are concerned, they have been just referred to without any much elaboration of the same and I think rightly for even if it be conceded that Mr. Baksi in making the demands under the letter dated the 11th March 1957 went beyond the relief grant ed to him under the order passed by this Court that did not and indeed could not stand in the way of the Accountant General to comply at least with that part of his request which had been commanded to him under the aforesaid order. Likewise, it is difficult to accept that the notice served upon the respondent in this case was in any sense too general in its terms or that it did not specify the necessary facts precisely and accurately. On the contrary, my reading of that notice with the copy of the petition which had been seat to the respondent along with it shows that the facts as to the charge that the respondent had been called upon to meet were given therein in full. Further I think that in view of the law as enunciated in *Prakash Chandra v. Manindra Nath*[1], there is now not much force left in an objection of such a highly technical character. It is true that Oswald in his book on contempt has laid some stress even on the technical side of the procedural law in a matter like this. Therein at page 17 he says :

> "It should always be borne in mind in considering and dealing with contempt of Court that it is an offence purely sui generis, and that its punishment involves in most cases an exceptional, interference with the liberty of the subject, and that, too, by a method or process which would in no other case be permissible, or even tolerated, It is highly,

> necessary, therefore, in all questions of this nature, where the functions of the Court have to be exercised in a summary manner, that the Judge : in dealing with the alleged offence should not proceed otherwise than with great caution and deliberation, and only in the cases where the administration of justice would be hampered by the delay in proceeding in the ordi nary course of law; and that when any antecedent process has to be put in motion every prescribed step and rule, however, technical should be carefully taken, observed, and insisted upon. The jurisdiction should be exercised the more care fully in view of the fact that the defendant is usually reduced or pretends to be reduced, to such a state of humility in fear of mere severe consequences if he shows any recalcitrency that he is either unable or unwilling to defend him self as he otherwise might have done."

But I think, so far as our Court is concerned, this has to be read in the light of the procedure that is now actually in practice here and not in relation to what is prevalent in English Courts. And what our procedural law in a matter like this, as now established by practice, requires us the substantial compliance of the rule relating to notice and not any technical form of it. Therefore, if the facts stated therein are in substance sufficient to apprise the other side of the charge that he has to meet that in law has to be considered as a valid notice. Thus the first two contentions fail.

5. Coming to the third point it has to be conceded that it is a slightly tickly point ana perhaps for that reason the case has been argued mainly from this point of view. An enquiry from our registry shows that in the matter of writs the practice followed here is first to send a copy of the judgment to the person concerned and thereafter to issue a regular writ for service as directed in the judgment. In the present case we are informed that a copy of the judgment was forwarded to the Accountant General on 14th March 1957 which was received by him on the 19th March 1957. Thereafter a regular writ, as directed in the judgment, was issued. That was on 21st March, 1957 and the same was served on the Accountant General on 1st April, 1957. Thus, there can be no denying from the face, as claimed toy the respondent, that by the time the reply, referred to above, had been sent, the respondent had neither received a copy or the judgment from the Court nor had been served with the writ as directed to be issued therein. Therefore on those facts what actually falls for consideration is as to whether in the absence of the service of the writ, as directed in the judgment, any proceeding in contempt may at all be taken in law for the non-compliance thereof.

I think on principle, firstly for the reason of the nature of such a proceeding and 2ndly for the reason of the most usual and drastic consequences that arise therefrom, it is but inherent in the situation that a person charged with an obligation under a judgment or order of a Court should not be hauled up for the disobedience thereof unless a copy of the order commanded therein has been validly served upon him barring no doubt those cases where any delay in service instead of promoting the cause of justice is likely to frustrate the very object underlying a proceeding in contempt. Oswald in his book on Contempt of Court (3rd edition) dealing with the subject at page 199 summarises the entire law on this point in these words :

> "The judgment on order should be served on the party personally In re, Cunningham, (1887) 55 LT 766, except in the following cases : (1) prohibitive orders, the drawing up of which is not completed *Skip v. Harwood*[2], *Kimpton v. Eve*[3], (D); *Scott v. Becher*[4], *In re, Bishop, Ex parte Langley*[5], (F); *C. A. Avory v. Andrews*[6], (G); *United Tele phone Co. v. Dale*[7], (H); (2) orders embodying an undertaking to do an act by a named day (*D. v. A and Co*[8]., In re, Launder; *Launder v. Ri chards, (1908) WN 49* (J); (3) orders to ans wer interrogatories or for discovery or inspection of documents *Little v. Roberts*[9], *In re, Mulcaster; Dalston v. Nanson*[10], (L); *Joy v. Hadley*[11], (M); *Hampdon v. Wallis*[12], C. A.; In re, Tuck; *Murch v. Loosemore*[13], (4) where an order for substituted ser vice has been made *Skegg v. Simpson*[14], *In re, Lloyd*[15], *Roby v Scholes*[16], (R); In re, Steele; *Green v. King*[17], (5) where the respondent has evaded service of the order *Kistler v. Tettmar*[18], *Hyde v. Hyde*[19], *Allen v. Allen*[20], *Miller v. Miller*[21], (W). After service of the order it is no excuse for the party served to plead ignorance of its contents because he did not read it In re, Witten. (An Infant), (1887), 4 TLR 36."

To the same effect is the law laid down to *Dwijendra Krishna Dutta v. Surendra Nath*[22], *Gordan v. Gordan*[23], and (1906) 1 Ch 692.

6. In AIR 1927 Calcutta 548, the learned Judges put the law in these words :

> "In order to found an application for attachment or committal for disobedience of an order, service of the order alleged to have been dis obeyed 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 expected or special, cases. Personal service may be dispensed with if it is shown that the person to be served has evaded service *Kistler v. Tetman*[24], 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 (1906) 1 Ch 692."

7. Similarly in 1946-1 All ER 247, while dealing with the question of service, Lord Greene, M.R. observed :

> "It is quite clear that the proposition that knowledge of the order takes the place of service is negatived with the greatest emphasis and clearness and the very important distinction is brought out between an order directing the doing of an act and an injunction which restrains the doing of an act. I need not read more of that case. It is the most recent case in this Court, and in my opinion we are bound to follow it.

If I may respectfully say so, I cannot see how it ever came to be argued or suggested that the Court has got some sort of inherent power to dispense with compliance with a perfectly clear rule of Court requiring an order to be brought in a particularly formal way to a person's know ledge

merely because ho knows of the order from a different source. The requirement of a penal endorsement confirms this view."

8. Then comes a similar dictum laid down in (1906) 1 Ch 692. Therein the point made out by the petitioner was that the order had been made by consent and it was at a time when the other side was present in Court and, therefore, personal service was not
necessary. That was met, as its placitum reads, in these words :

> "A writ of attachment will not usually be issued against a trustee for disobedience of an order directing him to pay money into Court unless the order has been personally served upon him. The fact that the order was made by con sent, and that he was in Court when it was made and initialled one of the briefs, will not make personal service unnecessary unless it is shown that he is evading service."

Therefore, barring exceptions as stated above, the rule is that service of the order or judgment is essential for founding an action in contempt. Mr. Das, however, has challenged the correctness of this proposition and in respect thereof has drawn our attention to some other passages from Oswald's book on Contempt of Court. One of these passages is at page 108 and that reads :

> "Ignorance of the contents of the order is no excuse, where the party served with it does not read it himself, but relies on a mere statement of its effect by his solicitor (1887) 4 TLR 36. But actual service is not essential if it is shown that the party knew or might have known of the order (1884) 25 Ch D 778 (H)."

It is true that this passage when read independent of its context does give support to the contention of Mr. Das. But it is an established rule of interpretation that in order that any passage may be understood in its true meaning, it ought to be read in its context. Looked at from that point of view, it is important to note, as pointed out by the learned Solicitor General, that it falls in Chap. IV, which deals with the subject "Disobedience to Orders and Breach of Undertakings, other than Orders and Undertakings for the payment of money" and further that the case also which has been relied upon therein in support of that proposition, namely, (1884) 25 Ch D 778, is one which relates to the case of the breach of an undertaking. Therefore, what is stated in the aforesaid passage is not the general rule relating to service but is one which falls in the list of exceptions thereto. This is so is also clear from para graph 64 of Halsbury's Laws of England (3rd Edition), Volume 8, at page 36, where dealing with the subject it expresses the same view.

9. The other passage of Oswald's Contempt of Court relied upon by Mr. Das is at P. 203. It reads :

> "In order to justify committal for breach of a prohibitive order it is not necessary that the order should have been served upon the party against whom it has been granted, if it be

> proved that he had notice of the order, aliunde, as by telegram, or newspaper report, or otherwise, and knew that it was intended to be enforced or if he consented to the order, or if he was present in Court when the order was pronounced, or when the motion was made, although he left before the order was pronounced."

This again, as is obvious from its very terms, relates to a case of committal for breach of a prohibitive order, which, as already stated, is another exception to the general rule. Therefore, that also has no relevancy to the consideration of the general rule in a matter like this. The third passage relied upon is at page 201. That says :

> "Where any person is by any judgment or order directed to pay any money, on to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand."

Here also its terms show that it deals not with the question of service but with the question of demand and as a matter of fact as to service it concedes that it is obligatory and essential. Lastly in this connection Mr. Das has drawn our attention to the decision in *Hadkinson v. Hadkin son*[25], No doubt it does lay down that it is the unqualified obligation of every person against, or in respect of whom, an order has been made by a Court of competent jurisdiction, to obey it unless and until that order is discharged but nowhere it goes to the length of saying that that obligation though subsisting so long as it is not discharged operates at once against the person charged even without any service of that order on him. Therefore, the contention of Mr. Das on the point of service cannot be accepted.

10. In the alternative, Mr. Das has argued that the order, referred to above, which has led to this proceeding in contempt, was in substance a prohibitory order though couched in an affirmative form and as such it fell in the list of exceptions to the general rule. On principle, it cannot be denied that an order though affirmative in form may in certain cases, be, in substance, prohibitory or restrictive as in the case of some contracts or covenants, for example, Kerr on Injunctions (6th Edition) at page 457 says :

> "The mode in which contracts or covenants, when affirmative in form, are, as a general rule, enforced by Courts of equity is by decree for specific performance. But contracts and covenants, though affirmative in form, may often involve a negative in substance. When the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts which are inconsistent with the agreement. Thus where A agrees to give B a first refusal of property, this involves a negative con tract, and A will be restrained from parting with the property to any one else without giving to B the 'first refusal' at a reasonable price."

And then to the similar effect an illustration of it may be found in *Tulk v. Moxhay*[26], But can it be said in this case that what was commanded to be done by the respondent under the order dated 11th March 1957, though affirmative in form, was in fact a prohibitory order? In my opinion, the answer has to be given in the negative. A prohibitory order is one which operates in restraining a party from doing an act which if clone will result in irreparable injury to the other side. In other words the gist of a prohibitory order lies in preventing a man from doing what he has already begun to
do or intends to do. In this case the grievance of Mr. Baksi, in sub stance, is that the Accountant General is not doing what under the Superior Services Rules he is en joined to do and, therefore, he has prayed for a writ in the nature of mandamus directing him to what is imposed on him under law. That being so, the order directing him to do the same is but an affirmative order. Therefore, though it is true, as conceded by the learned Solicitor General, that in a case of prohibitory order service of the order is not essential for founding an action in contempt, that rule is not applicable in this case, as here the order passed by the Court is not one which is prohibitory.

11. The last contention raised by Mr. Das is that the English decisions relied upon by the learned Solicitor General in support of the pro position that generally no action in contempt can be founded without the service of the order are not applicable to the facts of this case and that for two reasons firstly, because they are based on a well defined rule as provided in the procedural law of England and secondly because in those cases the process of attachment and committal was in relation to a criminal contempt and not what is called civil contempt, as is the case here. In my opinion, there is no substance in either of these two contentions. As against the first, the clear answer is that though in our Courts there is no defined procedure laid out for a proceeding in contempt, as is to be found in the procedural law of England, but the authorities unquestionably establish that the principles underlying those rules have been uniformly acted upon in our Courts. As against the second, it will suffice to say that though there is, as is well known some points of difference between a criminal and a civil contempt but that difference does not touch the matter of execution by attachment and committal in the case of a civil contempt in contrast to the process of attachment and committal as followed in a criminal contempt. The difference, if any, between a criminal and a civil contempt, lies essentially in the nature of conduct that gives rise to the one or the other. Mookerjee, J., in Moti Lal Ghosh *In re*[27] says :

> "Consequently, in the case of a criminal con tempt, the proceeding is for punishment of an act committed against the Majesty of the law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms, as nearly as possible, to proceedings in criminal cases. In the case of civil contempt, on the other hand, the proceeding in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefits of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character.

But here also, refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority; at that stage, at least, the Proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempts may become indistinct in those cases, where "the two gradually merge into each other :

* * * * *

The power to punish for contempt is inherent in the very nature and purpose of Courts of justice. It sub-serves 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 twofold 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. Hence such proceedings have sometimes been styled sui generis. That they are largely of a criminal nature, inasmuch as the Court has power to convict and punish for the wrong committed, cannot be disputed, and yet it must be recognised that in some respects, by reason of the end sub served, they partake of the nature of a civil remedy." Therefore, it is obvious that apart from certain exceptions which may arise due to the special nature of the conduct giving rise to a criminal con tempt, the law as to attachment and committal as a form of procedure in either case is essentially the same, namely, whether it be followed as a summary process for criminal contempt or as the form of execution of an order or judgment in a civil contempt. That being so, there is no substance in the contention that the general rule relating to service in the case of a criminal contempt is not applicable to a case of civil contempt.

12. Therefore, in view of the finding arrived at in this case that the writ had not been served on Mr. O.K. Ghosh by the time he had sent the afore said reply to Mr. Baksi and also in view of the fact that this case does not fall in any of the exceptions to the general rule, as held above, it follows that this proceeding in contempt is not competent. Therefore, on that ground alone, it fails. And if that is so then the question as to whether there was any intention or not on the part of the respondent to commit any wilful dis obedience of the order passed by this Court be comes purely academic and in that view of the matter I think it is not necessary to give any definite finding on that point; though on principle this much will have to be conceded that if not in the case of prohibitory injunctions at least in the case of mandatory orders the question of intention may be relevant in deciding that the contempt, if any, was not wilful but only casual or accidental or what is called unintentional in which case the act may not amount to contempt at all or even if it amounts to any it may be so slight as the Court may not feel it prudent or wise to take any action in the matter.

13. Therefore, I hold that the proceeding should be dropped and the rule discharged.

Choudhary, J.

14. I agree.

Rule discharged,

Cases Referred.

[1] ILR (1946) 2 Cal 499
[2](1747) 3 Atk 564
[3](1813) 2 Ves and B, 349 at p. 350
[4](1817), 4 Price 436
[5](1879) 13 Ch. D 110 at P. 119
[6](1882) 51 LJ Ch 414
[7](1884) 25 Ch D 778
[8](1900) 1 Ch 484
[9](1874) 30 LT 367
[10](1878) 47 LJ Ch 609
[11](1883) 22 Ch D 571
[12](1884) 26 Ch D 746
[13](1906) 1 Ch 692 at p. 696 O.A
[14](1848), 2 De. G. and Sm. 454
[15](1848) 10 Beav 451
[16](1853) 1 W R 118
[17](1879) 23 Sol Jo 906
[18](1905) 1 KB 39 C.A
[19](1888) 13 PD 166 C.A
[20](1885) 10 PD 187
[21](1870) 2 P and D 54
[22] AIR 1927 Cal 548
[23]1946-1 All ER 247
[24](1905) 1 KB 39 (Z-1)
[25]1952 PD 285
[26](1848) 41 ER 1143
[27] ILR 45 Cal 169