

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CONTEMPT PETITION NO. 37 OF 2016
IN
WRIT PETITION NO.1027 OF 2016
WITH
STAMP NUMBER (APPLN.) NO.3572 OF 2016

Canara Bank, SME Branch, through
its Manager, Mala, Panaji, Goa. Petitioner

Versus

1) Smt. Remediana D'Costa
wife of Victor D'Costa,

2) Victor D'Costa,
s/o. Luis Domnic D'Costa

3) Smt. Lavina D'Costa,
w/o. Rajesh Britto,

4) Rajesh Britto,
s/o. Joseph Britto.

All residing at H.No.116/1, Vaddem,
Socorro, Bardez, Goa. Respondents

Ms. Priyanka Kamat, Advocate for the Petitioner.

Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.

Date : 25 October 2018.

ORAL JUDGMENT : (Per N.M. JAMDAR, J.)

This Contempt Petition is filed with a prayer to punish the Respondents for non-compliance of the order dated 26 October 2016 passed by this Court in Writ Petition No.1027 of 2016 and also for breach of undertaking dated 27 October 2016.

2. The Petitioner is a Nationalized Bank. The Respondents availed of a loan from the Petitioner-Bank of around ₹ 72.00 lakhs. The Respondents mortgaged their property as a security towards the loan. Since the loan was not repaid, the Petitioner-Bank proceeded to attach the property and put up the same for sale. The Petitioner-Bank issued a notice on 30 September 2016 of e-auction. The liability of the Respondents on that date, was ₹ 84,31,657. The Petitioner had valued the property at ₹ 1,01,50,000. The last date of submitting the tender documents was 28 October 2016 and the e-auction was scheduled on 31 October 2016.

3. The Respondents filed Writ Petition No.1027 of 2016 on 24 October 2016, seeking to cancel the e-auction and for an interim prayer to postpone the e-auction. This Petition came up on board on 26 October 2016 and the Division Bench, after hearing the Petitioner, passed the following order :

“Heard Shri Pranay A Kamat, learned Advocate

appearing for the petitioners and Ms. Priyanka Kamat, learned Advocate appearing for the respondent.

2. Shri P. A. Kamat, learned Advocate for the petitioner essentially pleads that above petition be tried as a mercy petition to protect the petitioners from being dispossessed of his residential house which is likely to be subjected for a public auction on 31.10.2016 for recovery of the debts payable to the respondents. Shri P. A. Kamat, learned Advocate for the petitioner states that he does not dispute the correctness of the amount due to the respondent which is reflected in the auction notice to be sum of Rs.84,31,657.62 with interest. The learned Counsel further points out that he would pay the total amount due on the subject loan to the respondent within 2 months from today in specific installments. The learned Counsel as such submits that the auction proceedings fixed on 31.10.2016 be deferred and the petitioners be permitted to pay the total amount alongwith costs of auction proceedings within a period of two months.

3. On the other hand, Ms. P. Kamat, learned Counsel appearing for the respondents points out that in case the petitioners desire that the auction be deferred the petitioners should deposit a minimum 25% of the amount on or before 31.10.2016 and the balance amount with accrued interest thereon within two months from today. The learned Counsel further points out that the petitioners are the defaulters, and as such, there is no reason to give any further extension of time to clear the dues of the respondent.

4. Shri P. A. Kamat, learned Counsel in reply to said contention submits that the petitioners are not in

financial position to pay such 25% of the amount on or before 31.10.2016 but would pay the some substantial amount before the said date.

5. In peculiar facts and circumstance of the case and considering that the petitioners have offered to clear all the dues of the respondent alongwith costs of auction notice within two months from today, we find it fit to meet ends of justice to defer the action fixed on 31.10.2016 on the following terms:-

(i) The petitioners shall deposit a sum of Rs.10,00,000/- alongwith costs of auction proceedings on or before 31.10.2016.

(ii) The petitioners shall deposit further sum of Rs.10,00,000/- on or before 10.11.2016.

(iii) Balance amount due on the subject loan shall be paid by the petitioner alongwith accrued interest within two months from today.

(iv) The petitioners shall file an undertaking to the satisfaction of the Registrar(Judicial) of this Court within two days from today that they shall pay the said amount referred to herein above.

(v) The petition stands disposed off accordingly.”

(emphasis supplied)

3. On 15 November 2016, the Respondents filed Stamp Number (Application) No.3572 of 2016 to modify the order dated 26 October 2016. This Application filed on 15 November 2016 through an Advocate has remained pending, without removing the office objections and the Respondents did not circulate the Application.

4. On 2 November 2016, the Petitioner moved the present Contempt Petition. The Petitioner pointed out that the Writ Petition was treated as virtually a mercy petition and the Respondents gave a solemn undertaking and on their undertaking the auction was deferred causing loss to the Petitioner. When this Petition was moved before the learned Vacation Judge on 2 November 2016, it was adjourned to be placed before the regular Court. On the next date of hearing, the Respondents appeared through their Advocate and stated that they would pay the sum of ₹ 85,47,257 on or before 6 December 2016. By 6 December 2016, the amount was not paid and the Division Bench, after recording that prima facie the Respondents have committed breach, issued notices to the Respondents No.1 to 4 in Form 1, under Chapter XXXIV, Rule 9 of the Bombay High Court Appellate Side Rules. When this notice was issued, the Respondents were represented through their Advocate. Thereafter the Petition came up on board in respect of non-service on the Respondents.

5. Office endorsement of 23 November 2017 shows that as per Bailiff's report Respondents No.1, 2 and 4 are served. Since the Respondents did not appear, by way indulgence we directed the Registry to issue notices through the concerned Police Station to make the Respondents to remain present. Thereafter on 8 January

2018, bailable warrant was issued. Pursuant to the bailable warrant, Advocate appeared on 22 January 2018 and the bailable warrant was cancelled. Once the bailable warrant was cancelled, again the Respondents reverted back to their strategy of not appearing in the matter.

6. On 20 April 2018, this Court passed the following order:

“Heard learned Counsel for the petitioner. The learned Counsel for the petitioner points out that the Respondents had taken a loan and had mortgaged their property and when auction was fixed for sale of mortgaged property, the Writ Petition No.1027 of 2016 was filed by the Respondents. It is pointed out that by order dated 26 October 2016, the Division Bench deferred the auction on undertaking by the Respondents that they will deposit the amount and time table was so fixed. Thereafter the Respondents gave an undertaking within time stipulated, however did not pay any amount. According to the learned Counsel for the Petitioner the Respondents achieved their object of deferring the auction.

2. By order dated 6 December 2016, notice has been issued to the Respondents as to why action of contempt should not be taken against them. Notice has been served. In spite of the notice none appeared. One more notice was given. Thereafter another notice was directed to be served through Police station. A bailable warrant was issued which was cancelled since an Advocate appeared and sought time to file reply. Thereafter

Registry does not show any endorsement regarding vakalatnama filed neither the name of the Advocate is shown on the board.

3. It is upon the solemn undertaking given by the Respondents and on their contention that what was moved before the Court was a mercy petition, this Court exercised high prerogative writ deferred the process of auction of the Petitioner which is a sheer indulgence which was shown by the Court upon an undertaking given by the Respondents which court trusted and accepted, therefore this conduct of the Respondents cannot be lightly taken. Till date the Respondents have not filed their affidavit, let alone tendering any apology. This conduct amounts to clear defy the order of the Court and taking advantage of the judicial procedure. Since the Respondents are served there is no impediment in our way to proceed under the Contempt of Courts Act today itself however to give one more opportunity to the Respondents, we defer the hearing of this Contempt Petition to 27 April 2018. Concerned Police Station is directed to secure the presence of the Respondents on the next date. Stand over to 27 April 2018 for disposal.”

Thereafter on 4 May 2018 further order was passed. Again bailable warrant was issued. When the bailable warrant was issued, we found that the Police Authorities did not do their work satisfactorily and simply returned the warrant as if it was a courier. Therefore, we passed the following order on 3 September 2018.

“Various orders have been passed from time to time. Ultimately, we had directed to issue bailable warrant to

the Respondents to be executed through Porvorim Police Station. This order was passed on 9 July 2018. The Registry has forwarded the same to the Porvorim Police Station immediately thereafter. A report is received by the Registry today by post dated 31 August 2018 wherein the concerned Officer has stated that he made inquiries and during the inquiries, he learnt that the house was previously owned by Mr. James S/o Keshwant D'Souza, r/o Colvale Bardes Goa, however, the present whereabouts are not known and he has stated that the "non-bailable warrant" remained to be unexecuted.

2. Firstly, the concerned Police Officer has not noticed that what we had issued "Bailable Warrant". Secondly, this is not a conduct was expected of a Police Officer when he is asked to serve a "Bailable Warrant", he simply gone to the house and returned as if serving a notice. Registry shall send a copy of the report to the Director General of Police, Goa, and this order for his perusal, as we find that the duties have not been taken seriously by the concerned Officer.

3. Stand over to 25 September 2018. By next date, we expect response from the Director General of Police.

4. The Registry will ensure that the copy of this order and the copy of the report is placed before the Director General of Police for his perusal."

Thereafter, the Respondents have chosen not to appear in the matter.

7. Considering the various orders that have been passed and the fact that the Respondents have filed a Civil Application through an Advocate, on three occasions the Advocate has appeared and on one occasion party in person, it is clear that the Respondents are fully aware of the proceedings. Orders passed by this Court are uploaded on the website of this Court and are available. We find it difficult to believe that somebody worthy of availing loan to the tune of ₹ 80.00 lakhs suddenly vanishes. It is more than amply clear to us that the Respondents are avoiding to appear in this matter inspite of service upon them. It is not necessary to extend any further indulgence for the purpose of hearing.

8. As far as contempt is concerned, the order passed on 26 October 2016 is clear. Further the Civil Application filed by the Respondents acknowledges their liability. Even in this Contempt Petition, a statement was once made for deposit. No such deposit is made. The Respondents have not even bothered to appear, nor tendered any apology.

9. The Respondents had moved the Writ Petition just before the property was put up for sale. They made a solemn statement to the Court, which was believed and the auction was postponed. It is increasingly noticed that such tactics are adopted

by unscrupulous litigants, only to buy time, because if the auction is postponed, entire procedure has to be initiated by the creditor all over again. By making such statements on the last date before the auction, the recalcitrant debtors buy time and if they get longer time, interest and other benefits accrue. There could be cases of genuine debtors who are willing to pay the amounts even at the last minute. But the conducts of such as the one exhibited by the Respondents will jeopardize the chances of genuine debtors from praying for equity jurisdiction. Such conduct has, therefore, larger ramifications. The Respondents who had no intention to pay the amount have denied the Court in extending indulgence in their favour. The conduct is clearly contemptuous.

10. The Respondents have deliberately and mischievously led this Court to exercise its equity jurisdiction. They have not honoured the solemn statements made to the Court. Even if the property is sold subsequently, the dishonest intention remains. The conduct of the Respondents has continued even in this Contempt Petition of making commitments, then not appearing inspite of notice at the time of hearing and avoiding service.

11. By avoiding service in such a manner, the Respondents have further deceived the process of law. There is no reply filed, nor

apology is tendered.

12. It is a fit case to hold the Respondents guilty of the contempt of the order passed on 26 October 2016 and various undertakings given. The Respondents are liable to be proceeded with under the Contempt of Courts Act, 1971 and Article 215 of the Constitution of India. Accordingly the Respondents are held guilty of the same and are sentenced to undergo eight days Simple Imprisonment. It is hereby directed that the Respondents be detained in civil prison for a period of eight days and shall pay a fine of ₹1000 each. In default of payment of fine, they shall be detained for a further period of four days. The Registrar (Judicial) of this Court shall issue warrant of commitment and detention under his signatures in view of Chapter XXXIV, Rule 26 of the Bombay High Court Appellate Side Rules, 1960.

13. In view of the disposal of the Contempt Petition, the Civil Application stands disposed of.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.