

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CONTEMPT PETITION NO. 48 OF 2017

IN

WRIT PETITION NO. 6936 OF 2016

Sydd. Umar Sydd. Hasan and others

vs.

Shahnuwas Khan Noorkhan and another

Office Notes, Office Memorandum of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri. A. J. Thakkar, counsel for petitioners.
Shri. Mohtesim Badar, counsel for respondents

CORAM : **MANISH PITALE, J.**

RESERVED ON : 15/11/2019

PRONOUNCED ON : 10/12/2019

By this contempt petition, the petitioners have claimed that the original respondent Nos.2 & 3 have committed contempt of this Court under Section 2(b) of the Contempt of Courts Act, 1971, read with Article 215 of the Constitution of India.

2. It is the contention of the petitioner that the said respondents willfully disobeyed order dated 13/12/2016, passed by this Court in Writ Petition No.6936/2016, whereby they had been restrained from making construction on plot No.29 of Mouza Paras, which the petitioner claimed to be public amenity space.

3. The said writ petition was filed by the petitioners challenging rejection of stay application in a revenue appeal

filed by them before the Additional Collector. The petitioners claimed that the said respondents had started construction on the said plot of land, which was identified as public amenity space and that, therefore, immediate direction for stay of construction was required. The subject matter of challenge in the revision application before the Additional Collector was an order passed by the Sub Divisional Officer, whereby entries had been challenged showing the said plot as belonging to the said respondents instead of the earlier entry of public amenity space. As noted above, by order dated 13/12/2016, this Court granted interim relief, thereby restraining the aforesaid respondents from making construction on the said plot.

4. The petitioners contended that despite service of the aforesaid interim order on the said respondents, they willfully disobeyed the same and continued construction on the plot completing the entire construction, thereby, not only avoiding the interim order passed by this Court, but also committing contempt of order.

5. Notice was issued in this contempt petition and after submissions filed by the respondents were taken into consideration, on 03/09/2018, this Court framed the following charge against the said respondents.

“Whether the respondent Nos.2 and 3 prove that the breach of the order passed by this Court in W.P.No.6936/2016 dated 13/12/2016, restraining the respondent Nos.2 and 3 from making construction on plot No.29 of Mouza-Paras is not willful and intentional ?”

6. Mr. A. J. Thakkar, learned counsel for the petitioner submitted that the manner in which the charge was framed by this Court would show that it was found by this Court that there was indeed breach of the aforesaid interim order dated 13/12/2016 passed by this Court in Writ Petition No.6936/2016, and now onus was on the said respondents to demonstrate as to why the said breach could not be said to be willful and intentional. It was submitted that the petitioners had placed on record sufficient material including bailiff report to demonstrate that the aforesaid interim order was served more than once on the said respondents. It was further submitted that a notice issued by this Court through bailiff was also served and the said report was also on record. The respondents initially refused even to receive notices and thereafter, when the bailiff made an attempt to serve such notices, they had flatly refused to accept the same. On this basis, it was submitted that said respondents could not have feigned ignorance of the interim order passed by this Court and that they had committed contempt of this Court by not only flouting the interim order despite being aware of the same, but deliberately refusing repeatedly to receive the notices and the said interim order of this Court. It was submitted that by completing construction on the plot in question, the said respondents had willfully disobeyed the interim order of this Court and virtually rendered proceedings before the Authorities below as infructuous. On this basis, it was submitted that said respondents deserved to be punished for contempt of this Court under Section 12 of the aforesaid Act.

7. On the other hand, Mr. Mohtesim Badar, learned counsel appearing for the said respondents submitted that there was no willful disobedience of the interim order passed by this Court. It was submitted that the said respondents were never served with the said interim order or notices issued by this Court, as claimed by the petitioners and that it was only in the first week of February 2017 when the original respondent No.2 herein i.e. Shahnuwas Khan Noorkhan attended the proceeding pending before the Additional Collector that the said respondents became aware of the said interim order passed by this Court. It was submitted that the petitioners had placed on record copy of the said interim order in the said proceeding for the first time in February 2017, wherein returnable date was shown as 25th February 2017. Upon becoming aware of the said ex-parte interim order passed by this Court, the respondents took steps to enter their appearance and contest the same. It was further submitted that by this time i.e. February 2017, almost all the construction was already completed and that upon becoming aware of the said order, the respondents immediately stop further construction. On this basis, it was contended that there was no willful disobedience of the interim order passed by this Court.

8. It was further submitted that a perusal of the material placed on record on behalf of the petitioners demonstrated that the said respondents were never actually served with the notices issued by this Court or copy of the aforesaid interim order. It was submitted that the address

written on the envelopes was deliberately misleading and reports were got prepared from the postal authorities indicating as if said respondents had refused to accept the said notices. It was further submitted that even the bailiff report relied upon by the petitioners was not in consonance with the requirement of law specified under Order 5 Rule 17 to 19 of the Civil Procedure Code (C.P.C.), as also the bailiff manual. On this basis, it was submitted that since the said respondents were never served with the notice and interim order passed by this Court, in the present case, there was no willful disobedience of the orders of this Court and that the contempt petition deserved to be dismissed.

9. As is evident from the above quoted charge framed against the said respondents, it is clear that the onus is upon them to demonstrate as to why it cannot be said that they had willfully and intentionally breached and disobeyed the interim order dated 13/12/2016 passed by this Court in Writ Petition No.6936/2016. There has been breach of the said order is beyond doubt, because, as per the said order the said respondents were restrained from making construction on the plot in question and yet construction was continued and substantially completed despite the said order passed by this Court. In order to examine whether the charge framed against the said respondents is proved, the crucial aspect is, as to whether it could be said that despite service of the notice and the aforesaid interim order on the said respondents, they willfully continued to disobey the same by continuing with the construction.

10. In order to claim that the said respondents were served with the notice and the said interim order, the petitioners have heavily relied upon copies of envelopes showing that the said respondents had refused to accept the notices issued by the registry of this Court. Reliance is also placed on report of the bailiff dated 06/01/2017. On the basis of such documents it is claimed that the said respondents repeatedly refused to accept the notice and copy of the said interim order and that therefore, they could not now claim that they were unaware about the said interim order while continuing construction on the plot in question. A perusal of the aforesaid document shows that the notice sent on behalf of the petitioners to the said respondents after the interim order was passed by this Court was returned with the remark 'refused'. Similarly, envelopes containing notices sent by the dispatcher of this Court were also returned with the remark 'refused'. A perusal of the bailiff report dated 06/01/2017 shows that according the bailiff, the said respondents were not present at home. When father of the said respondents was sought to be served with notice, he gave a phone call to the said respondents who told him not to receive the notice sought to be served by the bailiff. The report further records that the father of the said respondent refused to even sign or give any acknowledgment on the said notice. The report also shows that house of the said respondent was shown to the bailiff by the petitioner.

11. Thus, such is the material on which the petitioners have relied to contend that the said respondents

had willfully violated the interim orders passed by this Court, despite efforts taken to serve them with notice and the interim order. In order to accept the contentions raised on behalf of the petitioners, it needs to be examined, as to whether it can be concluded with absolute certainty that attempts were made to serve the said respondents with notice and the interim order, in accordance with law and that the said respondents had deliberately refused to accept the notice. This is because, a finding of this aspect would lead to a conclusion that the said respondents willful disobeyed the interim order of this Court, thereby demonstrating contumacious conduct on their part, inviting punishment under the provisions of the said Act. As construction was indeed carried out substantially by the respondents in breach of the interim order, a finding on the aforesaid aspect of service of notice and the interim order would be the most crucial aspect to lead to a conclusion against the said respondents.

12. In this regard, the learned counsel appearing for the said respondents invited attention of this Court to Order 5 Rule 17 to 19 of the C.P.C. It was contended that when the said respondents could not be served with the notice, the bailiff ought to have affixed copy of the notice on the outer door or some other conspicuous part of the house in which the said respondent ordinarily resided and that the original of such notice along with an appropriate report was required to be placed on record of the Court. The details of the name and address of the person who had identified the house and

in whose presence the copy was affixed was also required to be given. The learned counsel also placed reliance on judgments of Hon'ble Supreme Court and this Court to contend that the requirement of service of notice as per Order 5 Rule 17 of the C.P.C. was mandatory in order to conclude that the notice or summons were indeed served.

13. There cannot be any dispute about the fact that service of notice or summons has to be strictly proved in accordance with the procedure prescribed by law under Order 5 Rule 17 of the C.P.C. In this regard, Rule 19 is also relevant. This Court in the case of **Manju w/o Baldev Narang and anr. vs. Prakash s/o Manohar Lokhande and others 2013(6) Mh.L.J. 810**, has held that provisions of Order 5 Rule 17 to 19 are mandatory in nature and that they are to be scrupulously followed, in absence of which it cannot be concluded that there has been appropriate service of notice/summons. In the case of **Deepali w/o Pratap Sonawane vs. Pratap s/o Irappa Sonawane (215) 4 Mah.L.J. 378**, this Court has held that the aspect of proper service under Order 5 Rule 17 and 19 cannot be taken casually and that scrupulous adherence to the same is necessary. It has been held that affidavit of the person accompanying bailiff for the purpose of identification is an important requirement, which needs to be complied with. Thus, the test for concluding as to whether there has been service of notice or summons requires that there is sufficient material to prove that the notice/summons were served in accordance with the procedure prescribed under the C.P.C. Additionally, the

Bailiff's Manual also states that no bailiff charged with the service of a process is entitled to call upon the party interested in the service to point out the person to be served. It is further specified that in cases where the bailiff doesn't know the individual on whom the process is to be served and the said individual is pointed out to him, there should be a verification of the endorsement on the process by the person who points out the individual concerned.

14. It needs to be examined whether the aforesaid stringent test was satisfied in the facts and circumstances of the present case to show that the notice and interim order issued by this Court were indeed served upon the said respondents. It has been specifically submitted on behalf of the said respondents that the address written on the envelopes in which the legal notice along with the copy of the order was sent by the Advocate for the petitioner, was not the correct address of the said respondents. It was also contended that the address given in the writ petition and consequently on the envelopes containing the notice and interim order dispatched by the office of this Court, was also not correct, as a result of which, the said envelopes were returned with the remarks 'refused'. A perusal of the bailiff report dated 06/01/2017, shows that the bailiff has referred to the very address which was stated in the writ petition as also the envelopes in which the notice and the interim order were dispatched by the office of this Court. A perusal of the bailiff report shows that the house of the said respondents was shown by the petitioner to the bailiff. It was stated in the

report that father of the respondents was found in the house and that the respondents were not present. It was further recorded that the father of the said respondents gave phone call to the respondents regarding the said notice and that the respondents told their father not to accept the same. This report is signed by the bailiff and it is endorsed in the presence of the assistant superintendent of the Civil Court that the contents of the same were true.

15. The crucial question is, as to whether the said bailiff report could be said to be in consonance with the mandatory requirements under Order 5 Rule 17 and 19 of C.P.C. Under the said provision, the bailiff ought to have pasted or affixed copy of the notice on the door of the house or any conspicuous part thereof. It was necessary for the bailiff to have stated the name and address of the person who had identified the house and in whose presence copy of the notice was affixed and further that the original of the notice was required to be returned to the Court.

16. Apart from this, the bailiff was supposed to have filed an affidavit when such notice was returned. In the present case, none of these mandatory requirements were satisfied. Apart from this, there was clear violation of the prohibition under the bailiff's manual to the bailiff calling upon the party interest in the service to point out the person to be served. In the present case, the report of the bailiff itself records the fact that it was the petitioner who had taken the bailiff to the alleged place of residence or house of the said respondents. Thus, such a bailiff report, in the facts and

circumstances of the present case cannot lead to a conclusion that the said respondents were indeed served with the notice and interim order passed by this Court.

17. The strict requirements of the procedure were not followed and hence this Court is unable to come to the conclusion that the notices and copies of the interim order were served on the respondents and that despite service, they had willfully disobeyed the interim order passed by this Court. The respondents have placed on record material to show that they were residing in a quarter at Vidyut Colony, allotted to their father and that thereafter they had shifted to another place called Adnan Colony, while in the address of the respondents stated in the writ petition, they were shown as residents of Bada Mohalla area. Copies of documents pertaining to allotment of quarter to the father of the respondents and other such documents were placed on record before this Court. In such a situation, it would not be safe to accept that the notice and interim order was deliberately avoided by the said respondents and that the bailiff report could be accepted as a proof of such deliberate avoidance on the part of the said respondents. This Court is unable to reach a conclusion that the notice and interim order issued by this Court were conclusively served upon the said respondents in the present case.

18. In this situation, the statement made on behalf of the said respondents before this Court could be accepted that they first become aware of the notice of the interim order issued by this Court in the first week of February 2017, when

one of them attended the pending proceeding before Additional Collector wherein a copy of the said interim order was placed on record of the petitioners. There is no allegation made by the petitioners with the said respondents continued to carry out construction even after first week of February 2017. It is contended that most of the construction was over by January 2017.

19. But, this Court is unable to come to a conclusion that the respondents either deliberately avoided receiving notice and copy of interim order or that being aware of the interim order they willfully and deliberately violated the same. In this context, the learned counsel appearing for the respondents is justified in relying upon judgments of the Hon'ble Supreme Court and this Court laying down the position of law that the power of punishing ought not to be used casually and in a routine manner. Before exercising such power, the Court is required to reach a considered conclusion that the material on record indicates clearly and without any doubt that the alleged contemnors have deliberately and willfully disobeyed the order and directions of this Court to constitute civil contempt as defined under Section 2(b) of the said Act. In the facts and circumstances of the present case, this Court is unable to reach such a conclusion against the respondents, although construction was continued by them despite interim order dated 13/12/2016 passed by this court in Writ Petition No.6936/2016.

20. It is relevant that with passage of time the said

writ petition itself stood disposed of as infructuous by order dated 09/02/2018. This Court recorded in the said order that the main appeal pending before the Additional Collector itself stood disposed of on 28/09/2017 and that a revision application filed against the same by the petitioner was pending before the Additional Commissioner. Thus, the dispute between the parties on merits is pending before the competent authority and it is obvious that if ultimately it is found on merits that the construction undertaken by the said respondents on the aforesaid plot is illegal, consequences will follow, in accordance with law. It is relevant that while disposing of the said Writ Petition No.6936/2016 as infructuous, this Court continued the interim order dated 13/12/2016 restraining the said respondents from undertaking construction till disposal of the revision application pending before the Additional Commissioner. Therefore, the said respondents would continue to abide by the restraint order towards further construction. It is not even the case of the petitioners that the said respondents continued to make construction in the said plot even after February 2017.

21. In view of the above, this Court finds that the charge framed against the said respondents is not proved and made out by the material on record. Accordingly, the charge is dropped and the contempt petition is dismissed.

JUDGE