

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

Contempt Petition No. 14 of 2019

Abhishek s/o Daulal Kothari

..Vs..

Neha Abhishek Kothari (now known as Neha w/o Ashish Loya) & Another

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*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

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Court's or Judge's Orders

Shri B.N. Mohta, Advocate for the Petitioner.

*Shri Charuhas B. Dharmadhikari, Advocate and Ms. Gayatri B. Dharmadhikari,
Advocate for Respondent No.1.*

Ms. T.H. Udeshi, A.G.P. for Respondent No.2.

CORAM : S.M. MODAK, J.
DATE : 9th DECEMBER, 2019.

Heard the learned counsel for the parties.

02] Paragraph 5 of the Consent Terms for Mutual Consent Divorce, dated 16th December, 2017 is reproduced below:-

"5. The petitioner-wife have undertaken to withdraw proceeding registered under I.P.C. Section 498-A case No. 6703577/2015 against the respondent-husband and his family members and now pending at Metropolitan Magistrate, Borivali, Mumbai."

03] These consent terms were filed in two petitions before the Family Court, Nagpur. Both the parties are signatories to that consent terms.

04] The grievance of the petitioner-husband is that

respondent-wife has not withdrawn the proceedings No. W/6703577 of 2015 pending before the Court of Metropolitan Magistrate, Boriwali. It was for the offence under Section 498-A of Indian Penal Code. The present respondent-wife (who was the petitioner before the Family Court) has agreed to withdraw the said proceedings. It was further agreed to co-operate each other when the matter is posted before the Metropolitan Magistrate, Boriwali, Mumbai on 25th January, 2018.

05] The petitioner-husband contends that it was one of the important terms of the consent terms and he has agreed for giving divorce by mutual consent. Notice before admission was issued on 21st January, 2019. The respondent-wife has appeared and filed reply on affidavit. As agreed, as per the consent terms, she has attended the Court of Metropolitan Magistrate, Boriwali, Mumbai on 25th January, 2018. However, the case could not be withdrawn, as it was a criminal prosecution. She has tendered her apology, if there is wilful disobedience. On one hand, the petitioner-husband has approached this Court with a grievance of breach of an order, whereas on the other hand, the petitioner-husband was compelled to file quashing petition before the principal seat of this Court. Though, the respondent-wife was not successful in withdrawing the criminal complaint, she has consented for quashing by filing an affidavit thereby giving consent. The petition could not be heard by the principal seat. Even, this Court directed the respondent-wife to take steps for

early hearing of this petition. She has tried to move the Court, however, the matter could not be listed. In view of that, this Court has decided to take up this contempt petition for final hearing.

06] Today, I have heard learned Advocate Shri B.N. Mohta for the petitioner-husband and learned Advocate Shri Charuhas B. Dharmadhikari for the respondent-wife. With their assistance, I have gone through the record of this case. On one hand, the petitioner-husband contends that he has brought to the notice of the wife about her commitments by writing two e-mails i.e. on 18th November, 2018 and 6th December, 2018. The petitioner-husband also pointed out insufficiency of documents produced by the respondent-wife. Though, she has produced railway tickets showing her journey from Nagpur to Mumbai for attending the Court date on 25th January, 2018, the petitioner-husband contends that there is no document, which marks her presence before the Court of Metropolitan Magistrate, Borwali, Mumbai. The Roznama to that effect does not show her presence and any steps taken by her on that date. For these e-mails, the respondent-wife has not filed any reply. In her reply, it is submitted that the reply was filed on the preliminary point and if the leave is granted, she will file detailed reply. It is further submitted that those e-mails are not addressed to the respondent-wife.

07] It is submitted on behalf of the respondent-wife that this Court in its order dated 23rd April, 2019 has already expressed that no contempt is made out. Paragraph 4 is reproduced below:-

“4. In this view of the matter, in my opinion, there is no propriety in keeping the contempt petition pending since, in any event, there is no contempt made out.”

08] It is also submitted that if this Court is desirous to take a different view, the matter has to be referred to the Division Bench. Whereas, on behalf of the petitioner-husband, it is pointed out that the observations in paragraph 4 cannot be said to be the final opinion of the Court, but it is nothing but an opinion expressed without going into the merits of the matter.

09] On behalf of the petitioner-husband, two judgments are relied upon. They are as follows:-

- i. **S. Rathinavelu Chettiar Trust, Chennai vs. R. Padmanbhan (Died) and others**, reported in **2018 AIR CC 3000 (MAD)**
- ii. **Kunal Sudhir Sangani vs. Ishita Sangani** reported in **2016(5) ALL MR 948 (S.C.)**

10] Learned Advocate Shri B.N. Mohta read over the relevant paragraphs from the said judgments, whereas as per the respondent, the facts are different.

Conclusion

11] Section 2(b) of the Contempt of Courts Act, 1971 gives the meaning of the word “contempt”. It is in two parts, one is wilful disobedience to order of the Court and second is wilful breach of an undertaking given to the Court. In both the categories, emphasis is on the word “wilful”. It means not only disobedience or breach is important, but it has to be wilful breach.

12] In the case of **S. Rathinavelu Chettiar Trust** (*supra*), there was an undertaking given to handover the vacant possession of the land on or before 31st July, 2017. It was by way of memorandum of compromise. The defendants have breached that undertaking. In paragraph 7 of the judgment, it has been observed that any undertaking given to the Court is breached, contempt petition is maintainable.

13] It will be material to consider the background in which the consent terms were executed. It seems that two petitions were pending before the Family Court. During its pendency, consent terms were executed through marriage counsellors. Apart from the withdrawal of the criminal case, there were also other terms. As per the agreement, the respondent-wife has withdrawn the maintenance and domestic violence case. On 16th December, 2017, the Family Court has dissolved

the marriage. There is reference in the order to treat the consent terms as part of the decree. Except non-compliance of withdrawal of the criminal prosecution, there seems no dispute amongst the parties about non-compliance of the agreed terms.

14] There are photocopies of railway tickets from Nagpur to Mumbai on 23rd January, 2018 and return journey on 25th January, 2018. Table giving details of the Roznama from the Metropolitan Magistrate Court, Boriwali, Mumbai, has been filed by the petitioner. The Roznama dated 25th January, 2018 mentions absentee of the accused and issuance of non-bailable warrant against him. It is true that there is neither reference of the respondent-wife attending there nor taking any steps. Learned Advocate Shri B.N. Mohta is right in his submission about not moving the Court on that date. The respondent-wife has got an explanation to give. According to her, though she has attended that Court, she was told that withdrawal is not possible.

15] No one can deny that in spite of this compromise before the Family Court, the petitioner-husband was required to attend the Court of Metropolitan Magistrate, Boriwali, Mumbai. No one can also deny that he was required to file a quashing petition. At the same time, it is very well true that the respondent has appeared in that petition on her own. She has also filed reply on 25th September, 2019 thereby expressing her desire not to proceed in a criminal prosecution. Even, she tried to

move the Court on 20th November, 2019. The railway tickets for attending the Court of Metropolitan Magistrate, Boriwali, Mumbai are also filed.

16] In the second judgment, in the case of Kunal Sudhir Sangani (*supra*) compromise was entered into before the Hon'ble Apex Court and on that consent terms, the appeal was disposed of. Learned Advocate Shri B.N. Mohta invited my attention to paragraph 6 of the cited judgment. The Hon'ble Supreme Court has granted a liberty to the aggrieved parties to move for appropriate action in case of violation of an undertaking.

17] After considering all circumstances, I am of the considered opinion that though there is no substantial compliance of the undertaking given by the respondent-wife, I do feel that she has taken certain steps in that direction. The Roznama dated 25th January, 2018 does not show the attendance of the respondent-wife. I find no reason for her to arrange the railway tickets and to file an affidavit of attendance there falsely. Everyone knows that offence under Section 498-A of Indian Penal Code is a non-compoundable offence.

18] Considering the legal difficulty, this Court in many cases have allowed the quashing petition and one of the grounds is settlement between the parties. So, approaching the Hon'ble High Court is only the right step for withdrawing the petition. It is no doubt true that the respondent-wife along with the petitioner

could have approached the principal seat with the joint petition. The consent, which the respondent-wife had given later on, could have been given earlier by filing joint petition. But, unfortunately and to the misfortune of the petitioner-husband, it has not happened.

19] But, certainly not taking proper steps on behalf of the respondent-wife, it cannot be said to be a wilful breach of an undertaking. For an act to be wilful, mere non-compliance is not sufficient. The aggrieved party needs to show that there is an intention to breach the order thereby showing disrespect to the Court. I do not find such intentional breach of the order. In the case of S. Rathinavelu Chettiar Trust, (supra), the defendant has failed to give possession within the period of two years.

20] Learned Advocate Shri Charuhas B. Dharmadhikari for the respondent is right in his submission. It is true that in that case, it was the activity in between the defendant and plaintiff. He has to handover the possession and the plaintiff, who has to accept it. No third party agency or institution like the Court is involved. Whereas, in this case, the withdrawal was permissible only on direction of the Court.

21] The respondent-wife did commit a mistake. She has signed on the consent terms. It is not clear whether she did it on the legal advice or not. She ought to have taken an advice that withdrawal is not a proper remedy. She did commit one more

mistake. After attending the Court of Metropolitan Magistrate, Boriwali, Mumbai on 25th January, 2018, she has not taken further steps. The anguish of the petitioner-husband is certainly understandable, but it does not lead to prove the case for wilful breach.

22] It is true that the Hon'ble Apex Court in the case of Kunal Sudhir Sangani (*supra*) granted liberty to aggrieved person to take appropriate action. It is in general terms. There was never an issue about any observation given on the basis of wilful breach of an undertaking. So, the petitioner-husband though has made out a case for breach of an undertaking, he is unable to convince this Court that it was wilful. Learned Advocate Shri B.N. Mohta has tried his level best in convincing the Court about wilful breach. But for the reasons stated above, I could not accept his argument. So, this contempt petition has to be dismissed.

23] Lastly, I may say that even though this contempt petition is argued, it would not affect the desire of the respondent-wife in withdrawing the consent terms, which was already given in a quashing petition. With these observations, the following order is passed:-

The contempt petition is dismissed with no order as to costs.

JUDGE