

IN THE HIGH COURT OF BOMBAY AT GOA**CONTEMPT PETITION NO.17 OF 2019
IN
CRIMINAL WRIT PETITION NO.90 OF 2019**

Smt. Anju Jain

.... Petitioner

Versus

Shri Sanjay Suresh Jain

.... Respondent

Ms. Asha Desai, Advocate for the Petitioner.

Shri J. Supekar, Advocate for the Respondent.

Coram:- DAMA SESHADRI NAIDU, J.**Date:- 23 February 2021****ORDER :**

The petitioner and the respondent are wife and husband, having married over three decades ago. From the wedlock, they had two children, a boy and a girl, both now in their 30s. The husband faces the allegation of deserting the petitioner, abandoning the matrimonial home, and leaving for another younger woman. It was in 2016.

2. In May 2017, the wife filed Case No.18/DVA/2017/D, before Judicial Magistrate of First Class, Mapusa, under the Protection of Women from Domestic Violence Act, 2005 ("the Act"). In October 2017, the JMFC passed these interim orders: (a) protection order, (b) residence order, (c) order of maintenance—two lakh rupees per month, and (d) a chauffeur-driven car.

3. The husband appealed to the Sessions Court under section 29 of the Act; but, through Order, dt.24.11.2017, in Criminal Appeal No.142 of 2017, the Sessions Court refused to grant any interim stay. The appeal is said to be still pending. Meanwhile, the wife applied to JMFC under section 128 of Cr PC to have the interim order, dt.06.10.2017, enforced. By order, dt.25.07.2018, JMFC allowed that application: it directed the

husband to pay the arrears in 30 days. Failing that, the consequences under section 125(3) of Cr PC should follow.

4. Aggrieved, the husband filed CRWP No.233 of 2018 before this Court; he wanted it to quash JMFC's order, which directed him to comply with the interim order of maintenance, and so on. He also filed Criminal Appeal No.142 of 2017, questioning the Sessions Court's Order, dt.24.11.2017, which refused to stay the JMFC's order granting interim relief. Before this Court, the husband proposed a settlement. This proposal took its own time to fructify. Pending the settlement, on 10 April 2019, this Court recorded the husband's undertaking that he would deposit Rs.5 lakh by 22.04.2019. It was to show his *bona fides*.

5. On 22 April 2019, the husband did pay that amount. Then, on 3 March 2019, both the parties filed before this Court the terms of consent. In that process, the husband undertook, among other things, to pay Rs.28,50,000/- to the wife by 31 May 2019. Now, in this Contempt Case, the wife alleges that the husband has not complied with the terms; there is wilful violation.

6. Let us see, what has the husband agreed to perform under the consent terms:

(a) to pay the entire arrears of Rs.28.50 lakh by 31 May 2019.

(It was complied with in July 2019, though)

(b) to pay or deposit with the court Rs.60 lakh as permanent alimony (one-time settlement) and to file mutual consent divorce proceedings. The wife may also earn interest on the deposited amount.

(Parties filed the mutual consent divorce, and the husband paid the money "in parts", fulfilling the promise by February 2020.)

(c) The husband should approve “the deed of lease for 20 years ... within two weeks from the date of signing of the agreement dated 03.05.2019 or in any case before the payment of the total arrears”.

(The husband has not fulfilled this undertaking, nor has he “paid the agreed rent amount”, which comes to Rs.3,67,000/- by October 2020. So the wife put the husband on notice to vacate.)

(d) The husband “was supposed to enlist the gold loans and give written instructions to the bank” to release the gold upon his repayment of the loan in 6 months.

(The husband offered to pay to the wife the value of the gold, Rs.50 Lakh, but has failed to do that, either.)

(e) The husband agreed to hand over to the respondent a chauffeur-driven car.

(He did comply with this condition on 23 May 2019; but that was “without the documents, without servicing, without updated insurance, and without updated insurance”.)

The Developments Before this Court:

7. Let us leave aside the delays in the husband’s complying with the terms which now, anyway, stand fulfilled. We will focus on what has not been complied with.

8. On 24 July 2019, the husband wanted the Court to given him “five weeks to make full compliance of the consent terms”. On 29 August 2019, he took time “to place or record some material documents”. After a few failed promises and a few adjournments, the husband paid Rs.60 lakh by 6 March 2020. On that day, he sought two weeks’ time “to work-out the modalities of parting with the gold in favour of the applicant”.

9. On 24 August 2020, the husband’s counsel informed the Court that he had no instruction from his party. He sought two weeks “to try

and contact the client”. On 7 September 2020, both parties reported to the Court that they would like to explore the options settling the matter. But parties could not settle the issue, nor has the husband honoured his remaining commitments. Instead, both parties advanced arguments on the merits. In fact, the husband, as the alleged contemnor, filed elaborate written arguments, through his counsel.

The Issue:

10. Has the husband complied with the terms of compromise or wilfully violated them, thus, committing contempt under section 12 of the Contempt of Courts Act?

The Petitioner-Wife:

11. Ms. Asha Desai, the learned counsel for the petitioner, has first enlisted all the instances of the respondent’s failure to comply with the consent terms. Then, she has pointed out that the matrimonial petition is ripe for disposal as the mandatory waiting period has already expired. But as the terms of compromise have not been complied with, the petition has not yet been disposed of. According to her, because of that, the petitioner could not withdraw the alimony amount of Rs.60 lakh. Besides, Ms. Desai has also submitted that if the respondent had deposited the entire amount in lumpsum as promised, the petitioner would have earned an interest of Rs.6 lakh. But as the respondent deposited that amount in piece meal, she could so far earn only Rs.3 lakh.

12. Ms. Desai has also submitted that the respondent has neither paid the rent nor vacated the premises. It is even though the petitioner is a housewife, dependent on the amount she gets as rent. According to her, the petitioner has been struggling to survive. Already in her 50s, the petitioner has no prospects of having independent earning. In this process, Ms. Desai points out that on litigation the petitioner has so far spent over Rs.10 lakh, for before this Court alone, there are about 17 cases,

including two criminal writ petitions, two contempt petitions, and one execution application.

13. The respondent should not be allowed to go, Ms. Desai stresses, scot free after his dishonouring the consent terms, which were also agreed to be treated as part of the decree. To support her contentions, she has relied on *Rama Narang v. Ramesh Narang (I)*^[1], *Rama Narang v. Ramesh Narang (II)*^[2]; *European Investment Ltd. v. Triumph International Finance*^[3], *Rajinder Kumar Malhotra v. Paresh Bihailal Vyas*^[4].

Respondent:

14. Shri Jitendra Supekar, the learned counsel for the respondent, on his part, has listed out the consent terms and, then, asserted that the respondent has complied with clauses (I), (V), (VI), and (VIII). That is, he has paid the entire maintenance arrears of Rs.36 lakh and the alimony of Rs.60 lakh. As to the staggered payments, instead of lumpsum, the learned counsel pleads the respondent's financial difficulty.

15. About the petitioner's flat, which the respondent has been occupying and on which he refuses to pay the rent, the respondent blames the petitioner. So he does for his failure to redeem the petitioner's gold he had pledged. He pleads that when he had borrowed Rs.6 crore from a bank, the petitioner, originally, stood guarantee by providing the flat and the gold as collateral security. Now, the petitioner has refused to renew that guarantee. So the bank has declared the loan an NPA. The petitioner has refused to renew the guarantee despite her "specifically agree[ing] to cooperate with the Respondent". According to him, he is "put in a precarious situation", and he could "get the gold as well as the said Flat no. 2 ... only after the entire loan amount of Rs. 6 crores is cleared".

^{1]} (2006) 11 SCC 114

^{2]} (2009) 16 SCC 126

^{3]} (2004) 6 Bom CR 356

^{4]} (2016) 2 Bom CR 678

16. Now the bank has taken symbolic possession of the flat. So the execution of the deed of lease, according to the learned counsel, “would be illegal”. Shri Supekar also contends that the respondent wanted to pay money in lieu of gold, but the petitioner has refused the offer. In the alternative, he says the petitioner has demanded more money for the gold than its market value. When the respondent has tried to deposit the rent, the petitioner’s bank has not accepted it, contends the learned counsel.

17. Shri Supekar has also argued that that the petitioner has already applied for the execution of the consent decree, so the contempt proceedings do not survive. That apart, the learned counsel asserts that the foundation for a consent agreement is that the parties to that deed must “negotiate, compromise, and consent to do any act or to omit from doing any act which may enable the parties to settle the disputes amicably”. Then, according to him, the petitioner is guilty of non-cooperation.

18. Finally, customarily and cautiously, the respondent, through his counsel, pleads that if the his “Court is of the opinion that indeed the respondent has committed contempt, then ... such act of violation is [not] wilful, disobedient, or deliberate, or in any manner belittle[s] the majesty, prestige, and dignity” of this Court. In the end, the respondent relies on *Ved Prakash Abbot v. Kishore K. Avarsekar*^{5]}.

19. Heard Ms. Asha Desai, the learned counsel for the petitioner; and Shri Jitendra Supekar, the learned counsel for the respondent.

Discussion:

20. For both parties, the facts are the same, but they have different views about those facts. Whose view should prevail? That is, they admit the facts, not the consequences. There is a matrimonial discord; that discord led to litigation; that litigation seemingly led to a settlement. That settlement was made a part of this Court’s disposition. In that disposition, the respondent undertook to comply with the terms of

^{5]} 2019 DGLS (Del.) 323

compromise. Partially he did. About what has not been complied with or violated, the petitioner complains that the respondent has no justification. His non-compliance is deliberate and wilful. The respondent asserts that he has justification. He puts the blame on the petitioner.

21. The question is, has the respondent been guilty of wilfully disobeying his undertaking or, in the alternative, this Court's directive?

22. To unravel the issue, we should look at the unfulfilled terms of the compromise (summarized).

(XII) The respondent and the petitioner undertake and agree to enter into a deed of lease for 20 years with the petitioner for the Flat No. 2 in Mount View Apartment, Alto Porvorim, Goa. In that flat, the respondent carries on his business. He should pay Rs.20,000/- per month, with an annual increase of 5%, until he hands over the vacant possession. The petitioner reserves her right to terminate the agreement if the respondent fails to pay the rent for three months. If the default occurs, the respondent agrees to hand over vacant possession "free from all encumbrances and loan" without any further litigation. If the petitioner is forced to litigate, the respondent agrees to pay the cost of litigation.

(XIV) The respondent admits that when the relationship with the petitioner was cordial, the respondent had raised loans on the flats owned by the petitioner. The respondent "undertakes to pay all the loans raised on the said flats owned by the [petitioner] within five years.

23. The flat belongs to the petitioner, and in that the respondent carries on his business. He is a lessee. He must pay Rs.20,000/- per month as rent. Let us keep aside the annual increase. The respondent should formalise the lease, but he has taken no steps in that regard, nor has he paid the rent. In defence, he informs the Court that he tried to pay the rent

but the petitioner's baker refused to take the money. Hard to believe—rather impossible. That said, let us believe that the petitioner's banker has not accepted the rent; then, the respondent should have either written to the petitioner or complained to this Court about it. He did neither. So, I must hold the respondent's defence is an excuse and does not impress the Court.

24. *Denouement*: When the arguments were concluded and the matter was kept aside for pronouncement, the respondent's counsel informed me that the arrears of rent had been cleared.

25. The respondent has undertaken to clear the loan in five years and let the petitioner have her property—the flat—free of encumbrance. As we have already seen, when the respondent borrowed money from the bank, the petitioner stood guarantee. As a part of that guarantee, she offered the flat as security. Now, the respondent has defaulted; with that, the bank has declared the loan a Non-Performing Asset. That said, a guarantor has every right to withdraw or renew her guarantee; it is for the debtor to substitute. Here, the petitioner has exercised her right. The respondent, it seems, stopped paying the instalments. So, the bank has declared the loan an NPA. The respondent strangely contends that the petitioner has agreed to cooperate, but she has not. He could “get the gold as well as the said Flat no. 2 ... only after the entire loan amount of Rs. 6 crores is cleared”. So goes his assertion.

26. First, Cooperation, as contemplated under the consent terms, does not mean that the petitioner should embroil herself in a debt. The respondent undertook to clear the loan and redeem the petitioner's property in five years. This promise, on his part, has not cast any corresponding obligation on the petitioner. Therefore, the petitioner's refusal to continue as a guarantor violates no consent term. But the respondent's refusal to contract a lease and to pay the rent to the petitioner does violate one of the vital consent terms.

27. Stranger is the respondent's logic in not executing the deed of lease. Any such lease, he points out, would be illegal because the bank had already taken symbolic possession of the property. True. But can he blame the petitioner for the wrong he has committed—the wrong of not playing the loan instalments. It is he that made it impossible for the parties to comply with one of the consent terms. I am afraid the respondent cannot take advantage of his own wrong.

28. The same reasoning as we have set out above applies to the respondent's getting the petitioner's gold released from the bank. Admittedly, he pledged the gold for securing the loan. He undertook to get it released in a timeframe. He did not. Now, he cites two reasons for his failure to adhere to the promise. On the one hand, the respondent argues that as he could not get the gold released from the bank, he wanted to pay money for gold's worth. According to him, the petitioner rejected this proposal. Contradicting this plea, he also submits that the petitioner demanded more money than the gold could fetch in the market.

29. I reckon both the assertions are contradictory. That apart, on numerous occasions the respondent sought time from this Court to comply with the consent terms. Not even on one occasion has he brought to the Court's notice his efforts to pay for the gold he could not release and the petitioner's alleged refusal. Therefore, the Court is not ready to buy the respondent's story.

30. Now, we will address what seem to be technical objections the respondent has raised.

What is the Nature of Compromise Terms that have been Incorporated into a Judicial Order?

31. A Division Bench of this Court in *Bajranglal Gangadhar Khemka v. Kapurchand Ltd.*^[6], has held that when the Court passes a decree based on a compromise by the parties, it puts its imprimatur upon the consent

^{6]} AIR (37) 1950 Bombay 336

terms and makes the terms a rule of the Court. When any such undertaking is given by a party to the Court, it becomes an order of the Court. And the proceedings for contempt can be taken out for the enforcement of that order. According to it, in all orders and decrees of the Court, whenever the expression “a party undertakes” has been used, it has always borne the meaning that the undertaking has been to the Court. On the issue regarding the Court's approval to the consent terms, *Bajranglal Gangadhar Khemka* has held that “the very fact that the Court passed a decree after an undertaking was embodied in the consent terms clearly shows that the Court did sanction a particular course; and that course was the putting of its imprimatur upon the consent terms.”

32. In *European Investment Ltd.*, this Court, per R.M.S. Khandeparkar J, has held that undoubtedly there may be remedies against a person failing to fulfil the undertaking or comply with the order passed based on the consent terms. But those remedies do not affect or impede the court's powers to prosecute the defaulter and to punish him for Contempt of Court. If the consequences are specifically provided under the consent terms for their non-compliance or breach of the undertaking, certainly whether an action for contempt lies or not depends on the facts of each case. But mere provision in the consent terms for consequences in case of breach of undertaking will not disentitle the Court from exercising its powers under the Contempt of Courts Act when wilful violation of the order or wilful breach of the undertaking is brought to its notice.

33. So without much ado, we may accept that the consent terms made part of a judgment become an undertaking not only to the reciprocal parties but also to the Court. The wilful violation of undertaking, indeed, attracts the contempt jurisdiction. In fact, violation of an undertaking takes within its fold wilfulness. Thus, the expression “wilful violation” of an undertaking is tautological. A court of law may impose or inflict an order—*in invitum*—on a person. Compelled to comply

with that judicial directive, he may fail. Then, called to answer any contempt proceedings, he may explain to the Court why he could not comply with the judicial directive despite his best efforts. In that eventuality, the Court may, first, conclude that the party has failed to comply with directions. But it may, in the same breath, hold that the party has not wilfully or deliberately violated the order. Then, the rigours of contempt will not apply.

34. On the contrary, if a party undertakes before a court and if that undertaking becomes part of the court's disposition, the undertaking bears a dual character: a party's promise and also a court's directive. It is enforceable; its violation contemptuous. A party assesses his position, considers all attending circumstances, and finally files his promise before the court as an undertaking. Thus, much thinking and planning goes into a party's undertaking before the court. Despite such advanced deliberations and planning, if that party fails to perform, wilfulness is writ large on the face of the failure. In other words, there is a presumption of wilfulness in a party's failure to fulfil an undertaking. It needs no further proof.

35. Before closing our discussion on this point, we may refer to *Noorali Babul Thanewala v. K.M.M. Shetty*^[7]. In that case, the Supreme Court has held that when a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the court by or on behalf of a party to a civil proceeding is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For enforcing an undertaking, that undertaking is treated as an order so that if it is broken, the breach would involve the same consequences on the persons breaking that undertaking as would their disobedience to an order for an injunction. It is settled law that

^{7]} (1990) 1 SCC 259

breach of an injunction or breach of an undertaking given to a court by a person in a civil proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt.

36. In *Rama Narang (II)*, the Supreme Court has approved its holding in *Noorali Babul Thanewala* and has noted on facts that the contemnor acted absolutely contrary to the letter and spirit of his undertaking given to the Court. Then, it has concluded that “in order to maintain sanctity of the orders of the highest court of the country, it has become imperative that those who are guilty of deliberately disregarding the orders of the court in a clandestine manner should be appropriately punished. The majesty of the court and the rule of law can never be maintained unless this Court ensures meticulous compliance with its orders.”

Are Execution Proceedings and Contempt Proceedings Mutually Exclusive?

37. The respondent has contended that the petitioner has already laid execution, so she should not invoke the contempt jurisdiction. This issue does not detain us long. The precedential position on this point is clear.

38. In *Rama Narang (I)*, the Supreme Court has dispelled all doubts and held that all decrees and orders are executable under the Code of Civil Procedure. Consent decrees or orders are, of course, also executable. But merely because an order or decree is executable, it would not take away the Court's jurisdiction to deal with a matter under the Contempt of Courts Act. It is, however, subject to one satisfaction: The violation is such as to warrant punishment on the grounds that the contempt substantially interferes or tends substantially to interfere with the due course of justice.

39. *Rama Narang (I)* has held that a consent decree comprises both a command and a contract. It has examined section 2(b) of the Contempt of Courts Act, 1971. This provision defines civil contempt to mean “wilful disobedience to any judgment, decree, direction, order, writ or other

process of a court *or* wilful breach of an undertaking given to a court”. Analysed, the definition provides for two categories of cases: (1) wilful disobedience to the court’s process, and (2) wilful breach of an undertaking given to a court. As with the first category, the word “any” further indicates the wide nature of the power. No distinction is statutorily drawn between an order passed after an adjudication and an order passed by consent. This first category is separate from the second and cannot be treated as forming part of or taking colour from the second category. The legislative intent clearly was to distinguish between the two and create different classes of contumacious behaviour. Interestingly, the courts in England—for example, in *C.H. Giles and Co. Ltd. v. Morris*^[8]—have held that the breach of a consent decree of specific performance by refusal to execute the agreement is punishable as contempt.

40. After holding thus, *Rama Narang* has approved this Court’s view in *Bajranglal Gangadhar Khemka* that a consent decree is a contract with the imprimatur—with the authorisation or approval—of the court. In other words, by passing a decree in terms of a consent order, the court authorises and approves the course of action consented to.

41. In *Bank of Baroda v. Sadruddin Hasan Daya*^[9], the Supreme Court has reiterated that the violation or breach of the undertaking which became a part of the court’s decree certainly amounts to contempt of Court; it is open, however, for the decree-holder to execute the decree. According to it, the plaintiff’s remedy to execute the decree has no bearing on the contempt committed by the defendant.

42. *European Investment Limited* has held that merely because the order is an executable one, it does not follow that no contempt proceedings would lie against the defaulter in such cases. Nor can it be said that in case of monetary claim under an order or undertaking, the defaulter cannot be prosecuted for contempt. The contempt proceedings

^{8]} [(1972) 1 All ER 960 : (1972) 1 WLR 307 (Ch D)]

^{9]} AIR 204 SC 942

are independent of the execution proceedings and are primarily made to ensure the compliance of the court's order rather than giving a relief to the parties. So mere availability of the execution proceedings cannot be construed as a bar against contempt proceedings. They both can be invoked simultaneously. The purpose behind the execution proceedings is solely to enable the decree holder to enjoy the fruits of his decree, while the contempt proceedings are primarily to ensure that the violator gets punished for his wilful disobedience.

43. This Court in *Rajinder Kumar Malhotra*, per K. R. Shriram J, has summed up most of the cases cited above. His Lordship has succinctly summarized the legal position. When a party in whose favour an order has been made approaches the court to have a person punished for disobedience of the court's order, he does not use those proceedings to get the order executed. He merely brings to the court's notice the party's objectionable conduct and seeks action against that party for committing contempt of court. There is a clear distinction between having an order executed and having a breach punished.

44. Even *Ved Prakash Abbot*, the decision the respondent has relied on, accepts that a contempt petition would lie in case there is a violation or non-compliance of a compromise or a consent decree. And merely because execution is a remedy available to the decree holder, it cannot be said that the Court's jurisdiction to deal with the matter under the Contempt of Courts Act is taken away.

45. After analysing the statutory and precedential position, *Ved Prakash Abbot* has, on facts, examined whether the alleged contemnor's action can be termed as willful. The question in *Ved Prakash Abbot* was, by not paying the money to the petitioner under the compromise decree, have the respondents willfully disobeyed the order? In the end, it has held that in the absence of any wilful disobedience by the respondents, court cannot grant the relief sought by the petitioner.

Conclusion:

46. The respondent, no doubt, gave many an undertaking to this Court. Based on those undertakings, the Court disposed of the matter. On many occasions, the respondent took time to comply with them. With some, he has complied; with some other, he has not. Especially, about the leased property and redeeming the gold, he has breached his undertaking. For that, he has blamed the petitioner herself. But I find no force in those counter allegations. Nor have I found any contrition of heart excepting the respondent's saying that he has fallen on hard times, though he has no intention to violate any undertaking or judicial directive. I gather from the respondent's conduct that the violation has no justification; it is wilful and with impunity.

Result:

As a result, I sentence the respondent Sanjay Jain to undergo simple imprisonment of six months and to pay a fine of Rs.2,000/- (Rupees Two Thousand only). If the contemnor fails to pay the fine, he shall further undergo simple imprisonment for one month. The payment of fine shall be made within one month from today.

DAMA SESHADRI NAIDU, J.

NH

47. At this juncture, the respondent's counsel wants the order suspended for eight weeks, so that the respondent may explore his options to seek redressal against the order now pronounced.

48. The order, accordingly, stands suspended for eight weeks.

DAMA SESHADRI NAIDU, J.

NH