

Bank Of Baroda vs Sadruddin Hasan Daya And Anr on 12 December, 2003

Equivalent citations: AIR 2004 SUPREME COURT 942, 2004 (1) SCC 360, 2003 AIR SCW 7223, 2003 (10) SCALE 681, (2004) 1 KHCACJ 316 (SC), 2004 (1) KHCACJ 316, 2004 (1) SLT 595, (2004) 14 ALLINDCAS 646 (SC), 2004 (1) ALL CJ 625, (2003) 10 SCALE 681, (2004) 2 GUJ LH 41, (2004) 3 MAD LW 656, (2004) 1 RECCRIR 298, (2004) 1 SUPREME 140, (2004) 13 INDLD 998, (2004) 56 ALL LR 139, (2004) 2 ALL WC 1450, (2004) 1 BANKJ 655, (2004) 1 ALLCRILR 621, (2004) 118 COMCAS 241, (2004) 1 CURCC 278, (2004) 97 CUT LT 581, (2003) 3 BANKCLR 20, (2004) 3 BOM CR 44

Bench: S. Rajendra Babu, G.P. Mathur

CASE NO.:

Contempt Petition (civil) 180 of 2001

PETITIONER:

BANK OF BARODA

RESPONDENT:

SADRUDDIN HASAN DAYA AND ANR.

DATE OF JUDGMENT: 12/12/2003

BENCH:

S. RAJENDRA BABU & G.P. MATHUR

JUDGMENT:

JUDGMENT 2003 Supp(6) SCR 764 IN Civil Appeal No. 4138 of 1999 The Judgment of the Court was delivered by G.P. MATHUR, J. : l. This petition has been preferred by Bank of Baroda for initiating contempt proceedings against the respondents; Sadruddin Hasan Daya and Shohin S. Daya. The facts leading to the filing of the contempt petition are as under.

2. The Bank of Baroda filed Summary Suit No. 2949 of 1996 against (1) M/s Dawood & Co. (2) Sadruddin Hasan Daya and (3) Shohin S. Daya for recovery of certain amount of money. The respondents were granted unconditional leave to defend the suit by the order dated 15.4.1998 passed in Summons for Judgment No. 580 of 1996. This order was challenged by the petitioner Bank of Baroda by filing Special Leave Petition (Civil) No. 2730 of 1999, which was renumbered as Civil Appeal No. 4138 of 1999. During the pendency of the Appeal, the parties arrived at a settlement, the minutes of the decree were drawn and the same were placed on record. By the order dated 28.7.1999, the appeal was disposed of with a direction that there shall be a decree in terms of the minutes of the decree drawn by learned counsel for the parties. As per the said consent terms the

parties, inter alia, agreed that the respondents (defendants) would pay to the petitioner (plaintiff) Rs. 2,44,71,616 and Rs. 2,40,69,447 together with interest thereon as specified, in accordance with the schedule of instalments mentioned in paras 3(a) and 4(a) respectively of the said order. It was further agreed between the parties that in the event of default by the respondents to abide by the said consent terms as per Clauses 3 and 4, the remaining amount shall forthwith become due and payable and the petitioner (plaintiff) will become entitled to execute the decree. Clauses 5(a), 5(b), 7 and 9 of the consent terms, which are relevant, are being reproduced below :

"5(a) The properties namely at Versova, Madh Island and Alibagh mentioned in the Order dated 6th May 1988 shall remain under attachment in Execution till the decree as set out in Clause (2) hereinabove is fully satisfied.

5(b) In case of decree(s) becoming executable as provided in Clauses 3 or 4 above, the said properties at Versova, Madh Island and Alibagh or anyone of them as may be required be sold in execution of the decree by the Court Receiver of the High Court of Bombay. The Court Receiver is hereby appointed in Execution. He shall however proceed only if default is committed in Clauses 3 and 4 above. Leave to execute the decree under Rule 314 of Bombay High Court (O.S.) Rules is granted. The Court Receiver to pay over the net sale proceeds to the plaintiffs in or towards satisfaction of the decree(s) herein. There are other suits against the Defendants in which attachment before judgment orders and or injunctions are passed inter alia in respect of the said properties. However, the same will not affect the sale, which will be in Execution of the decree(s) passed herein.

7. The Defendants undertake not to sell, mortgage, alienate, encumber or charge the said properties described hereinabove to anyone until the decree as per Clause 2 above is satisfied.

9. All the orders passed in Suit No. 2949 of 1996 and the proceedings therein including the Summons for Judgment No. 580 of 1996, Review Petition No. 36 of 1998 and Appeal Nos. 540 and 543 of 1998 are set aside and the said suit and all proceedings connected therewith are disposed of in terms of this order."

3. Oman International Bank, SAOD had also filed Summary Suit No. 4571 of 1996 against M/s Dawood & Co. and the respondents for recovery of certain amount in Bombay High Court. Against an order passed in Summons for Judgment No. 493 of 1997 in the said suit, an appeal was preferred by M/s Dawood & Co. & others before the Division Bench, wherein the parties entered into a settlement. The appeal was disposed of in terms of the consent terms by the order dated 5.10.1999, which reads as under :

"Undertaking given to this Court by the Appellants in terms of the Consent Terms is accepted. The Consent Terms taken on record and marked 'X'. The appeal is disposed of in terms of the Consent Terms which would be binding on the parties....."

Under the Consent Terms, the defendants had to pay a sum of Rs. 1,11,27,146 together with interest thereon at the rate of 14% per annum in quarterly instalments. Clauses 5,6,7 and 8 of the Consent Terms, which formed part of the decree are being reproduced below :

"5. Agreed, declared and confirmed that the immovable prop-erties belonging to and owned by the Appellants situated at:

(a) Land, building and structure standing on Moon-Dust Property, J.P. Road, Versova, Andheri (e), Mumbai 400 058,

(b) Land, building and structure standing on Fazalbai Wadi, Erangal village, area of Madh Island, Malad (W), Mumbai.

(c) Land, building and structure standing on Survey No. 54/3, 56 at village Revadanda, Taluka Alibaug, District Raigad.

(d) Land, building and structure standing on Survey No. 35-3A-B, Survey No. 35/3A, Barashir (Murud).

shall continue to remain under attachment as attached pursuant to the Order dated 20th December, 1996 passed in Notice of Motion No. 111 of 1997 till the decree is fully satisfied.

6. In the event of the decree becoming executable as contemplated under clause 4 above, the Court Receiver, High Court Bombay shall stand appointed Receiver in execution in respect of the properties set out in clause 5 above with power to sell and shall effect sale in the serial order in which the properties are set out in clause 5 and pay over the net sale proceeds to the Respondents towards the satisfaction of the decree.

7. The appellants hereby undertake to this Hon'ble Court not to alienate, encumber or create third party right or part with possession of any of the properties set out in clause 5 hereinabove till satisfaction of the decree.

8. In view of the decree herein the Order passed on Summons for Judgment No. 493 of 1997 dated 6th July, 1999 is set aside and the Order passed on the Notice of Motion No. 111 of 1999 is vacated except to the extent set out in clause 5 above."

4. The respondents (defendants), however, committed default and did not deposit any amount though the first instalment had fallen due on 1.11.1999 and consequently the decree became executable forthwith. The petitioner (Bank of Baroda) accordingly moved the Court Receiver, High Court of Bombay, to execute the decree, but the Court Receiver could not take any positive steps to recover the amount. The petitioners thereafter moved the Debts Recovery Tribunal, Bombay, in May 2000 for execution of the consent decree dated 28.7.1999. The Debts Recovery Tribunal then sent a demand notice to M/s Dawood & Co. and the respondents herein on 31.7.2000 directing them to comply with the decree and to deposit the amount. The respondents thereafter filed a written

submission before the Debts Recovery Tribunal on 18.9.2000 on the ground, inter alia, that the decree passed by the Supreme Court on 28.7.1999 was without jurisdiction. Paragraphs 3 and 5 of the written submission are being reproduced below:

"3. Without prejudice to the aforesaid, in view of the provision of Sections 17, 18 and 25 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the Notification dated 16th July, 1999, with due respect to the Hon'ble Supreme Court and without meaning any disrespect to the Hon'ble Supreme Court, the Hon'ble Supreme Court has no jurisdiction to pass any decree dated 28th July, 1999 and such decree has no validity considering the provisions of the said Recovery of Debts due to Banks and Financial Institutions Act, hereinabove. Thus based on such a decree, no recovery proceedings can be initiated including issuance of a Demand Notice.

5. The applicants in the light of the aforesaid facts and circum-stances and the law as laid down submit to the Hon'ble Tribunal that in the absence of adjudication having taken place and in the absence of any Recovery Certificate having been issued and in view of the fact that the decree has been passed by the Hon'ble Supreme Court without jurisdiction and is hence a nullity, the present Demand Notice dated 31st July, 2000 ought to be set aside."

5. The present Contempt Petition has been filed on the grounds, inter alia, that in the suit instituted by Oman International Bank SAOD the respondent, without disclosing the consent decree dated 28.7.1999 passed by this Court, entered into a settlement whereby a consent decree was passed by the Bombay High Court on 5.10.1999 and thereby they violated the undertaking given in Clause 7 of the consent decree and further they made contemptuous statement before the Debts Recovery Tribunal, Bom-bay that the decree passed by this Court was a nullity.

6. Shri Mukul Rohtagi, learned counsel for the petitioners has submitted that under para 7 of the consent terms, the respondents had undertaken not to sell, mortgage, alienate, encumber or charge the properties situate at Varsova, Madh Island and Alibaug until the decree was satisfied. However, in Summary Suit No. 4571 of 1996 instituted by Oman International Bank, SAOD in the Bombay High Court, the respondents entered into a settlement just two months thereafter on 5.10.1999, wherein they gave an undertaking that the same three properties and one more situate at Barashir (Murud) shall remain under attachment till the decree in the said suit was satisfied and further undertook not to alienate, encumber or create third party right over the said properties. While entering into the settlement in Summary Suit No. 4571 of 1996 before the Bombay High Court, the respondents deliberately concealed the settlement entered into and the undertaking given by them resulting in passing of the consent decree by the Supreme Court on 28.7.1999. Learned counsel has further submitted that the written submission filed by the respondents on 18.9.2000 before the Debts Recovery Tribunal, Bombay, wherein they stated that the Supreme Court had no jurisdiction to pass the decree dated 28.7.1999 and the said decree had no validity, was without jurisdiction and a nullity and therefore no recovery proceedings could be initiated in pursuance thereof, was highly contemptuous statement. It is thus submitted that the respondents have committed contempt of this Court and they are accordingly liable to be punished for the same.

7. Shri R.F. Nariman, learned senior counsel appearing for respondent No. 1, has submitted that the contempt proceedings are quasi-criminal in nature and as such the standard of proof required is that of criminal proceedings and the breach or violation has to be established beyond reasonable doubt. If two equally consistent possibilities are present, it would not be right to hold that the offence is proved beyond reasonable doubt. Learned counsel has also submitted that like all criminal cases the burden to establish that the respondents have committed contempt of Court is upon the petitioner. In support of his submissions learned counsel has referred to a decision of this Court in *Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors.*, [2001] 3 SCC 739. Shri Nariman has further submitted that non-compliance of the terms of a consent order or decree cannot amount to contempt of Court and the remedy of the aggrieved party is to apply for execution of decree. In support of this submission reliance is placed on *Babu Ram Gupta v. Sudhir Bhasin & Anr.*, [1979] 3 SCR 685, wherein it was held as under :

"1. The act of the appellant in not complying with the terms of the consent order did not amount to an offence under S. 2(b), however improper or reprehensible his conduct might be.

2. When a person appearing before a court files an application or affidavit giving an undertaking to the court or when he clearly and expressly gives an oral undertaking which is incorporated by the court in its order and fails to honour that undertaking then a wilful breach of the undertaking would amount to an offence punishable under the Act. An undertaking given by one of the parties should be carefully construed by the Court to find out the nature and extent of the undertaking given by the person concerned. It is not open to the Court to assume an implied undertaking when there is none on the record.

3. While it is the duty of the court to punish a person who tries to obstruct the course of justice or brings into disrepute the institution of judiciary this power has to be exercised not casually or lightly, but with great care and circumspection. Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of the contumacious conduct and coercion to compel to contemner to do what the law requires of him.

4. The reason why a breach of clear undertaking amounts to contempt of court is that the contemner by making false representation would obtain the benefit and if he fails to honour that undertaking he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings the judicial institution into disrepute. The same cannot, be said of a consent order or compromise decree where the fraud is played not on the court but on one of the parties. The offence committed is qua a party and not qua the court and therefore the very foundation for proceeding for contempt of court is completely absent in such cases."

8. In view of the facts of the case and the submissions made by the parties, the principal question to be examined is whether the respondents have committed breach of any undertaking given by them.

9. In the consent terms filed by the respondents before this Court on the basis whereof the decree dated 28.7.1999 was passed, it is clearly mentioned that the properties at Varsova, Madh Island and Alibaug shall remain under attachment in execution and in Clause 7, the respondents (defendants) undertook not to sell, mortgage, alienate, encumber or charge the aforesaid properties to anyone until the decree as per Clause 2 was satisfied. It is an admitted position that the respondents did not make any payment whatsoever. However, just two months thereafter, in Summary Suit No. 4571 of 1996 instituted by Oman International Bank SAOD in the Bombay High Court, the respondents entered into a settlement on 5.10.1999 where under they offered and placed the same three properties and one more under attachment till the satisfaction of the decree passed in the said suit. They further agreed that in the event the decree in the suit became executable, the Court Receiver, Bombay High Court, shall stand appointed as Receiver in execution in respect of the aforesaid properties with power to sell and pay over the net sale proceeds to the plaintiff towards the satisfaction of the decree. After filing of the consent terms and passing of the decree by this Court, it was not open to the respondents to file consent terms in another suit whereunder the same properties were to remain under attachment till the decree passed in the said suit was satisfied and in the event of the decree in the said suit becoming executable, the Court Receiver would have power to sell the said properties and to pay over the sale proceeds to the plaintiff of the said suit. It is, therefore, clear that by the consent terms filed by the respondents before the Bombay High Court in the suit instituted by Oman International Bank, SAOD, on the basis of which the said suit was disposed of, the undertaking given before this Court in Civil Appeal No. 4138 of 1999 not to encumber or charge the aforesaid three properties to anyone until the decree was satisfied, was clearly violated.

10. A legal plea taken by a party that a decree passed by a Court (including Supreme Court) is without jurisdiction and therefore a nullity, will not normally amount to a contemptuous statement. However, the written submission made by the respondents before the Debts Recovery Tribunal, wherein they said that the Supreme Court had no jurisdiction pass the decree dated 28.7.1999 and the decree had no validity and is a nullity, has to be seen in the factual background of the case. It may be noted that the decree had been passed on the basis of consent terms. It is not the case of the respondents that any fraud was played upon them by any party when they entered into a settlement and signed the minutes of the decree. It appears that the respondents from the very inception had no intention of paying the amount, but they agreed for a settlement and consent terms only for the purpose of gaining time whereunder instalments were fixed. They adopted the same procedure in the suit instituted by Oman International Bank, SAOD, wherein they offered the same property to remain under attachment till the decree was satisfied. Placing the same property under attachment is bound to create problems for the decree holders of either of the suits as no one wants to buy such property in court auction which may land him in further litigation. The respondents intentionally and deliberately adopted such a course of action so that further hurdles may come in the way of execution of the decree and therefore it is clearly a case of willful breach of an undertaking given to the Court.

11. One of the pleas taken in the reply filed by the respondents is that they had given the undertaking before the Bombay High Court on 5.10.1999 but the present petition for initiating contempt proceedings against them was filed after more than one year in May 2001 and consequently, the

same was barred by limitation by virtue of Section 20 of the Contempt of Courts Act. In this connection it may be noticed that the petitioners are not party to Summary Suit No. 4571 of 1996 which was instituted by Oman International Bank, SAOD in Bombay High Court wherein the respondents entered into a settlement and gave an undertaking in the consent terms on 5.10.1999. Normally, a person who is not a party to the suit or proceedings can get no knowledge of the affidavits or documents filed therein. It is categorically stated in para 14 of the present petition that in January, 2001 the petitioners learnt about the consent decree passed in the case of Oman International Bank during the course of execution proceedings before the Debt Recovery Tribunal, when steps were taken to attach the aforesaid three properties. The respondents have neither controverted the said fact nor have placed any material to show that the petitioners got knowledge of the consent terms filed by the respondents in the Bombay High Court at any time prior thereto. The petitioners filed the present application within five months of getting knowledge of the undertaking given by the respondents in the aforesaid case. In such a situation, the proceedings initiated against the respondents cannot be held to be barred by limitation in view of the law laid down by this Court in *Pallav Sheth v. Custodian*, [2001] 7 SCC 549 (paragraphs 44 and 47), wherein it has been held that the period of limitation in a case like the present one has to be counted from the date of knowledge.

12. The submission of Shri R.F. Nariman, learned counsel for the respondents, that this Court having passed a consent decree, the remedy of the petitioner lay in executing the same and there was no occasion for initiating contempt proceedings against the respondents has hardly any merit. The willful breach of an undertaking given to a Court amounts to "civil contempt" within the meaning of Section 2(b) Contempt of Courts Act. The respondents having committed breach of the undertaking given to this Court in the consent terms filed on 28.7.1999, they are clearly liable for having committed contempt of Court. The fact that the petitioner can execute the decree can have no bearing on the contempt committed by the respondents. The law in England on the subject of breach of undertaking given to Court is same. In Volume 9(1) Halsbury's Laws of England Para 482, it has been stated as under :

"An undertaking given to the court in pending proceedings by a person or corporation (or by a government department or Minister of the Crown acting in his official capacity) on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt."

13. An identical argument was considered and repelled in *Bajranglal Khemka v. Kapurchand Ltd.*, AIR (1950) Bombay 336. Here a suit for specific performance of an agreement of sale was filed wherein parties entered into a compromise and the consent terms were reduced to writing and were signed by counsel for the parties. One of the terms was with regard to execution of a lease within a period of two months by the defendants in favour of the plaintiff in respect of property in suit and the defendants further undertook to have Paradise Cinema Ltd. To join as a confirming party to the lease. The defendants having failed to execute the lease as agreed, execution proceedings were taken out. The plaintiffs called upon the defendants to get the Paradise Cinema Ltd. to join as a confirming party to the lease and the defendants having failed to comply with that requisition, a Motion was

taken out for contempt of Court. The Trial Judge (Justice N.H. Bhagwati) held that there was a willful default on the part of the defendants and thereupon he ordered that the defendants should carry out their undertaking within one month from the date on which the order was passed, otherwise a warrant was to issue for the committal of the defendants to prison. In appeal against the said order Chagla, CJ and Gajendragadkar, J. after a detailed consideration of the law on the subject, held as under :

"There is no reason why even in a consent decree a party may not give an undertaking to the Court. Although the Court may be bound to record a compromise still, when the Court passes a decree, it puts its imprimatur upon those terms and makes the terms a rule of the Court; and it would be open to the Court, before it did so, to accept an undertaking given by a party to the Court. Therefore, there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the Court in the consent decree, which undertaking can be enforced by proper committal proceedings."

14. The respondents had filed consent terms in this Court but the same contained an undertaking that they would not alienate, encumber or charge the properties to anyone until the decree was satisfied. Acting upon this undertaking and the consent terms, this Court passed the decree whereunder the respondents (defendants) were given the facility of depositing the amount in eight quarterly instalments commencing from 1st November, 1999 to 1st August, 2001, This Court, therefore, put its imprimatur upon the consent terms and made it a decree of the Court. The violation or breach of the undertaking which became part of the decree of the Court certainly amounts to contempt of Court, irrespective of the fact that it is open to the decree holder to execute the decree. Contempt is a matter between the Court and the alleged contemner and is not affected in any manner by the rights or obligations of the parties to the litigation inter se.

15. Shri Nariman has referred to the affidavit filed by respondent No. 1 before the Debts Recovery Tribunal, Bombay in the recovery proceedings initiated by Oman International Bank, SAOD and has submitted that the respondents have no money or assets apart from the immovable property, which is lying under attachment, to pay the amount. Learned counsel has also submitted that the respondents have themselves tried their best to secure a purchaser for the property at Varsova which is the only valuable property in order to pay the amount to the petitioner. Copy of a letter sent to Recovery Officer, Debts Recovery Tribunal-II, Bombay on 10.10.2003 by the Solicitors of an intending buyer, who had made an offer to purchase the said property for Rs. 3 crores along with a demand draft of Rs. 30 lakhs was also placed before us. Shri Rohtagi, learned Additional Solicitor General has, on the other hand, submitted that apart from the Oman International Bank SAOD, one Shear Taher Ali Lokhandwala has also obtained a money decree against the respondents due to which several problems have arisen in executing the decree and realizing the amount. In the present proceedings we are basically concerned with the violation or breach of the undertaking given by the respondents. Shri C.A. Sundaram, learned senior counsel, has submitted that the Respondent No. 2 was not personally present and the undertaking was given by him through a power of attorney. In our opinion, the mere fact that the respondent No. 2 was personally not present and the undertaking and the consent terms were given through a power of attorney will make no difference as he also got

benefit under the consent decree passed by this Court.

16. Coming to the question of sentence, we are conscious of the fact that the power to punish for contempt must always be exercised consciously, wisely and with circumspection. At the same time, the Court should act with seriousness and severity where justice is jeopardized by a grossly contemptuous act of a party. It the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society [See *In re Vinay Chandra Misra*, [1995] 2 SCC 584]. The present petition was heard on 27.8.2003 when we enquired whether the respondents would be willing to deposit the amount. Learned counsel for the respondents sought time and the case was adjourned to 23.9.2003 and then to 14.10.2003 and finally to 28.10.2003. However, even on the said date, learned counsel for the respondents reiterated the problems of the respondents in depositing the amount and so the matter was heard on merits. The position remains that though under the consent decree passed by this Court on 28.7.1999, the respondents had to deposit the first instalment on or before 1.11.1999 and the last instalment by 1.8.2001, but they have not deposited or paid even a single penny. In these circumstances, we are of the opinion that there is no occasion for showing any leniency in the matter of punishment.

17. We accordingly hold that the respondents have committed contempt of Court for which they are sentenced to undergo four months imprisonment. It is, however, directed that after they have undergone 15 days imprisonment, they shall be released on short term bail for a period of three months on their furnishing bail bonds, etc., to the satisfaction of the Registrar, Bombay High Court. If during this period of three months, they deposit the entire amount in terms of the consent decree dated 28.7.1999, the sentence of four months imprisonment imposed upon them shall be reduced to the period already undergone, failing which they will undergo the balance period of imprisonment.