Calcutta High Court
Dharmapal And Anr. vs Mohant Krista Dayal on 6 May, 1909
Equivalent citations: 4 Ind Cas 746
Author: Mookerjee
Bench: Mookerjee, Richardson
JUDGMENT Mookerjee, J.

1. The Court is invited in this Rule to stay execution of a decree made against the petitioners in the Court of the Subordinate Judge of Gaya on the 19th January 1909. The plaintiff opposite party commenced an action for declaration of right to and for possession of a house ordinarily known as the Burmese Rest-house near the Budh-Gaya temple. The defendants, now petitioners before this Court, resisted the claim on various grounds which are not material for the purposes of this Rule. After a protracted hearing the Subordinate Judge made a decree which entitled the plaintiff to recover possession of the house by ejectment of the defendants. The decree further directed the defendants to remove the images of Budha from the Rest-house and to vacate the house within one month from the date of the judgment. The judgment was delivered on the 19th January 1909. The decree, however, was not drawn up till the 5th February following. On the 15th February the defendants applied to the Subordinate Judge to extend the time within which they were directed to remove the image and to vacate the premises. The Subordinate Judge did not pass any order on this application. On the 11th February the defendant applied for a copy of the decree which was furnished to them on the 15th February. On the 25th February they preferred an appeal to this Court against the entire decree and on the 12th March applied for stay of execution during the pendency of the appeal. The Rule now under consideration was thereupon issued. The plaintiff opposite party contends that the Rule ought to be discharged on two grounds, namely, first, that the petitioners are in contempt as they have disobeyed the order of the Court below to remove the images of Budha and to vacate the premises within the time allowed which expired on the 18th February and that, therefore, they are not entitled to invite this Court to suspend the operation of the order which they have disobeyed; and secondly, that there are no merits in the application, that there is nothing to show that substantial loss may result to the defendants if the order is not suspended and is allowed to be enforced during the pendency of the appeal.

2. In support of the first of these grounds reliance has been placed by Mr. Hill upon the cases of Russel v. The East Anglian Railway Company (1850) 3 Mac. and G. 104; 6 Railw. Cas. 501; 20 L.J. (N.S.) Ch. 257; 15 Jur 1033; Clarke v. Dew (1829) 1 Rus and My. 103; Garstin v. Garstin (1865) 4 Sw. and Tr. 73; 34 L.J. Mat. 45; 13 W.R. 508; Herring v. Clovery (1841) 12 Sim. 410; Chuck v. Cromer (1846) 1 Cooper Temp. Cottenham 205 and Cavendish v. Cavendish (1866) 15 W.R. (Eng.) 182. On the authority of these cases it has been argued by the learned Counsel that a party in contempt is not entitled to be heard until he has cleared his contempt and that consequently he cannot ask for stay of execution of a decree which he has disobeyed and against which he has preferred an appeal after the period prescribed for carrying it out has expired. An examination of the cases, however, shows that the rule thus formulated is too broadly expressed.

3. In the first of these cases Russel v. The East Anglian Railway Company (1850) 3 Mac. and G. 104; 6 Railw. Cas. 501; 20 L.J. (N.S.) Ch. 257; 15 Jur 1033 it appears that the property in possession of a

Receiver appointed by the Court in a suit was in two instances seized by the Sheriff under writs of fieri facias issued by the judgment-creditors of the defendants. It was ruled by Lord Cottenham that the Sheriff could not justify the seizures by questioning the propriety of the order under which the Receiver was appointed and that as the Sheriff submitted to an order for withdrawal from possession and payment of costs no order for commitment for contempt was necessary for the maintenance of the jurisdiction of the Court. It may be observed that the matter came before the Court by way of appeal from an order of the Vice-Chancellor refusing a motion of the plaintiff for the committal of the Sheriff. The observation of the Lord Chancellor, therefore, that it is not open to any party to question the orders of the Court or any process issued under the authority of the Court by disobedience, can hardly be treated as equivalent to the comprehensive proposition enunciated on behalf of the plaintiff.

4. In the second of the cases relied upon Clarke v. Dew (1829) 1 Rus and My. 103 it was ruled by Lord Lyndhurst that a party who is in contempt for disobedience of an order in a cause is not thereby precluded from making a motion in another cause having reference to a distinct subject though between precisely the same parties. There the petitioner had disobeyed certain orders made in a cause in which he was a defendant and was a prisoner for contempt of the Court of Chancery, under these circumstances the Lord Chancellor observed that, in equity as in law, a party cannot move till he has cleared his contempt; but that the rule must be confined to proceedings in the same cause.

5. In the third case Garstin v. Garstin (1865) 4 Sw. and Tr. 73; 34 L.J. Mat. 45; 13 W.R. 508 it was held that the Court would not hear a party who was in contempt, for any purpose except that of his contempt. There the petitioner set the authority of the Court at defiance and at the same time asked that the orders which he had disobeyed should be rescinded. To the same effect is the decision in Cavendish v. Cavendish (1866) 15 W.R. (Eng.) 182.

6. In Herring v. Clovery (1841) 12 Sim. 410 a bill upon hearing was dismissed with costs and the plaintiff was for non-payment of such costs imprisoned in the Fleet. The plaintiff had appealed from the decree and on his making a motion that he might be discharged out of custody and that further processes of contempt might be stayed until after his petition of appeal should have been heard, it was objected on the part of the defendant that the plaintiff was in contempt for non-payment of the costs of certain orders made in the cause prior to the decree and not appealed from. Thereupon those costs were paid and the motion proceeded, the costs due under the decree which was appealed from still remaining unpaid. Under those circumstances it was ruled by Vice-Chancellor Shadwell that the motion must be refused on the merits on the grounds, first, that no good reason was shown for stay of execution, and secondly, that the application had not been made with due diligence. The case, therefore cannot be treated as an authority for the broad proposition that when an appeal has been preferred against a decree the appellant is not entitled to ask for stay of execution because he has in the meanwhile failed to carry out the terms of the decree. The marginal note to the report of the case, namely that when a party against whom a decree had been made with costs appealed from it and afterwards moved to stay execution of it, the Court allowed the motion to proceed notwithstanding the party was in contempt for non-payment of costs, is quite accurate, though at first sight it might seem inconsistent with the report, It is obvious from an examination of the facts

set out that the order for costs which was asked to be stayed had not been carried out and yet the Court dealt with the application on the merits.

7. The fifth case Chuck v. Cremer (1846) 1 Cooper Temp. Cottenham 205, merely rules that in general a party in contempt cannot take a proceeding in the cause for his own benefit. In that case attachment had actually been issued against the defendant for not having put in his answer. It was stated by Lord Cottenham that a party in contempt was entitled to be heard if his object was to get rid of the order which placed him in contempt; but he was not generally entitled to take proceedings in the case for his own benefit. The learned Judge further added that there were exceptions to the rule but that they were few in number. The notes of the cases appended to the report of Chuck v. Cromer (1846) 1 Cooper Temp. Cottenham 205 do not support the broad contention of the learned Counsel for the plaintiff before me. That the rule in question is neither inflexible nor of universal application is clear from the judgment of the Court of Appeal in Gordon v. Gordon (1904) Pr. 163 in which it was held that the rule that a person who is in contempt cannot be heard to make any application to the Court, applies prima facie to voluntary application made by him, for example, when he comes to the Court for an indulgence, but the rule does not prevent a person who is in contempt from appealing against an order made after the contempt was committed on the ground that the order was made without jurisdiction. We may take it, therefore, that although, in the words of Lord Brougham in Carter v. Carter (1845) 5 Moore P.C. 252 at p. 256 it is a general rule of all Courts that no party shall be allowed to take active proceedings if in contempt the rule is not of universal application and the Court has a discretion in the matter "for it is the right of the Court, and the Court has a right to say that it will not allow a process issuing out of the Court to treated with contempt." The view I take is supported by the propositions laid down in a work of high authority (Daniel's Chancery Practice Vol. l,p. 724). In fact if the broad contention of the plaintiff was to prevail, it might very well be argued that the appeal itself ought not to be heard, because at the time when the appeal was lodged in this Court the party had already failed to carry out the terms of the decree or again, if the decree had directed the immediate removal of the images, the defendants might in this view, be without a remedy as they could not by any means obtain a stay of execution. I think the matter may also be usefully considered from a slightly different point of view. A decree of the description now before us has to be enforced under Order 21, Rule 32 of the Code of 1908 and it is open to the plaintiff after the defendants had an opportunity to obey the decree and had wilfully failed to obey it to apply to the Court to enforce it by the detention of the defendants in the Civil prison or by the attachment of their property or both. If, however, such an application is made the Court has a discretion in the matter, and before any order can be made in favour of the decree-holder the Court must be satisfied that the judgment-debtor had an opportunity to obey the decree and had wilfully failed to obey it. The Court may further in lieu of an order for detention or attachment direct the act required, to be done, so far as practicable, by the decree-holder himself. These provisions in my opinion make it manifest that simply because a party is found to be in contempt the Court is not bound to deny him all assistance or protection but the Court will act in such a manner as will maintain its own dignity and at the same time subserve the ends of justice. In the words of Sir John Nichol in Barlee v. Barlee (1822) 1 Addams 301 when contempt has been committed and the Court is invited to exercise its authority, it cannot refuse to accede to the application without a breach of its duty and a denial of justice. The two elements, therefore, to be borne in mind are the maintenance of the authority of the Court and the requirements of justice as

between the litigating parties. I am unable, therefore; to accede to the contention of the learned Counsel for the respondent that the present application for stay of execution should be refused merely on the ground that the defendants have not carried out the orders of the Court within the time prescribed, and have lodged their appeal in this Court and applied for the suspension of the order after they have been technically in contempt. The case, therefore, has to be tried on the merits.

8. In support of the second ground urged on behalf of the plaintiff it is pointed out that the defendants cannot possibly suffer any loss by the removal of the images, that the images were brought from Japan and had apparently been moved from one place to another till they were enshrined in the rest-house about 15 years ago and that the defendants may without any difficulty find temporary lodgings where they can remove the images. In answer to this argument, it is pointed out on behalf of the petitioners that the images are of great religious sanctity and are exceedingly beautiful works of art, that if, an attempt were made to remove them the feelings of the entire Buddhist community would be offended, and the images themselves might be irreparably damaged. Under these circumstances, I feel no hesitation that it would not be right to compel the defendants to remove images and vacate the premises daring the pendency of the appeal. The case is clearly brought within the terms of Order 41, Rule 5 of the Code of 1908. An application has been made to this Court to suspend the operation of the decree against which an appeal has been preferred. It has been satisfactorily shown that substantial loss may result to the petitioners if the order is not suspended; and the application has been made with diligence. The applicants have further offered to give security for the due performance of such decree as may ultimately be made by this Court in the appeal; the applicants are consequently entitled to an order for stay of execution. I am further satisfied that the applicants had not the remotest intention to commit any contempt of Court. They have throughout acted in perfect good faith. The decree itself was not drawn up till the 15 th February and five days were taken by the Court in furnishing the defendants with a copy thereof. They could hardly be expected to lodge an appeal in this Court in such a heavy and contentious suit before the date on which the appeal was actually lodged. Further, I feel convinced that the plaintiff will not in any way be inconvenienced if the order of the Court below is suspended. On the other hand if the present application is refused the defendants might be seriously prejudiced. At the same time I feel that it would not be right to allow the petitioners a stay of proceedings for any great length of time nor is any such order necessary as they have expressed their willingness to expedite the appeal.

9. The result, therefore, is that this Rule must be made absolute, the portion of the decree in so far as it entitles the plaintiff to take possession of the house by ejectment of the defendants and orders them to remove the images of Budha and to vacate the house will be suspended till the 15th January 1910. It is to be expressly understood, however, that this order will not operate as a suspension of that part of the decree which directs the defendants to pay costs of the suit to the successful plaintiff. The Rule will, therefore, be made absolute in these terms. The Court below will take from the defendants sufficient security to indemnify the plaintiff against any loss he may suffer by reason of this stay of execution of the decree for possession.

10. As the defendants petitioners have applied for an indulgence, they must pay the costs of this Rule to the plaintiff opposite party as laid down by this Court in Chuni Lal v. Anantram 25 C. 893.

The hearing fee is assessed at three gold mohurs.

Richardson, J.

11. In deference to Mr. Hill's argument, I would add that I examined the cases on which he relied, which were for the most part cases in the English Court of Chancery. No doubt as a guide to the exercise by the Court of its discretionary powers, it is a very salutary rule that a party who is in contempt cannot be heard when he comes to the Court with a voluntary application asking for something or some indulgence Gordon v. Gordon (1904) Pr. 163 and the fact that the rule is not to be found in express terms in the Civil Procedure Code is no bar to the adoption of its principle in a proper case. But so much being admitted the question still remains whether the rule is applicable in the present case which stands thus.

12. On the 19th January 1909 the learned Subordinate Judge in the Court below delivered judgment in a suit between the plaintiff who is the Mohunt of the Budh Gaya temple and the defendants who are two Budhist priests and the Secretary of State for India in Council. The suit was for recovery of possession of a samll house close to the temple, known as the Burmese rest-house and among other prayers in the plaint was a prayer for the removal from the house of two images of Budha enshrined therein by the defendants priests. The Subordinate Judge decided the suit in favour of the plaintiff. The judgment is not before me, but no doubt coming to the conclusion he did, the Subordinate Judge was bound to make an order for the removal of the two images and the judgment accordingly directed that the images should be removed within a month from its date, and that the house should be vacated by the defendants priests within the same time. One of the images had been placed in the house in 1895 and the other apparently not long after. Apart from any other consideration the Subordinate Judge's order appears to me to be harsh in regard to the time limited for carrying it out. It appears still harsher when it is known that the decree was not signed till the 5th February. On the 15th February the defendants priests applied to the Subordinate Judge for a stay of the order, but no order was made on that application and on the 25th February, the petition on which the present Rule was issued was filed in the High Court. An appeal against the decree was also filed on the same day.

13. These being the facts it is contended for the plaintiff, (the opposite party showing cause), that the petitioners (defendants priests) are in contempt and cannot be heard because they did not remove the images or apply to the High Court before the 19th February: That is to say because they did not apply to the High Court till the 25th February and so far disregarded the order, the operation of which they now seek to suspend. In these circumstances, I do not think that this is a case in which the rule in question should be enforced even if it applies.

14. No doubt the petitioners are not seeking to set aside the order on the ground that the order is irregular (that appears to be an exception to the rule recognised in England) but apart from anything else the facts that the Subordinate Judge passed no order on their petition of 15th February, saves them, in my opinion, from being in contempt. But even if they are in contempt the dates I have mentioned justify us in regarding the case as exceptional. Cf. Herring v. Clovery (1841) 12 Sim. 410. In the present case, therefore, it is not necessary to go outside the four corners of Order

41, Rule 5 of the new Code. It is a mere question whether the application should be granted or not, due regard being had to the conditions laid down in Sub-Rule 3 of that Rule. Now the petitioners tell us in substance that the images of Budha are works of art, that it is difficult to find suitable accommodation for them, and that their safety and beauty may be endangered, if they are removed before proper arrangements have been made for their custody. These contentions are not seriously denied and that is sufficient for the purposes of Clause (a) of Sub-rule (3), which requires the Court to be satisfied that substantial loss may result to the party applying for stay of execution unless the order is made. The next condition requires that an application should be made without unreasonable delay and I think there was no such delay in the present case. These are the two preliminary conditions. The third condition requires security to be given by an applicant for the due performance of such decree or order as may ultimately be binding upon him and this the applicants are willing to give. There being no bar to the grant of the application it is, in my opinion, proper and reasonable in the circumstances that it should be granted to the extent indicated by my learned brother.