

MOSES
v
WELARATNE

COURT OF APPEAL
ROHINI PERERA, J.
CA 312/99 (CONTEMPT)
DC COLOMBO 18335/L
JANUARY, 12, 2007

Contempt of Court – Undertaking given by party – Issue of an interim injunction by Court of Appeal based on the undertaking – Violation – No charge framed – What is relevant is whether the contemnor breached the undertaking?

Action was instituted to define and demarcate the boundaries of the corpus. It was alleged that the respondent had sought to destroy the Northern boundary and put up a building. The petitioner obtained an enjoining order but the application for an interim injunction was refused. The petitioner sought to revise the said order, and in the Court of Appeal an undertaking was given that, the respondent would not effect further constructions and would maintain the *status quo* (order Y). The petitioner complained of contempt committed by the respondent breaching / violating the interim injunction (Order Y).

The respondent raised a preliminary objection as to the sustainability of the application on the basis that there is no charge to which the respondent could plead.

Held:

- (1) The order Y does not specify the location, it is obvious that the order applies only to the Northern side, as that in fact was the disputed area.
- (2) The party had been expressly enjoined from doing a particular thing in a particular location, and if he violates those particular acts, then he would be guilty of civil contempt.
- (3) If the respondent did any act on the Northern boundary which would amount to a construction – he may then be guilty of contempt of Court. When there is no order with regard to the other boundaries,

there cannot be any compliance of such an order, hence no contempt is committed. The pleadings do not indicate with any specificity which part of the boundary, has been destroyed.

- (4) The object of the order Y was to preserve the *status quo ante* only of the Northern boundary. There is no undertaking with regard to the 'other boundaries' other than the Northern boundary.
- (5) Any undertaking given *ex facie curiae* is equivalent to a judgment or order from a Court.
- (6) It is a well recognized principle of law that no person ought to be punished for contempt of Court, unless the specific charge against him be distinctly stated and opportunity of answering it had been given to him.

In the matter of Contempt of Court.

Cases referred to:

1. *Ranjith Senanayake and others v Paul Peiris* – 1992 – 2 Sri LR 169, 175.
2. *P. A. Thomas and Company v Mould* – 1966 1 All ER 963, 967.
- 2a. *Redwing Ltd. v Redwin Forest Products Ltd.* – 1947 – 177 LT 387
3. *Harris v Haris* – 2001–2 FLR 895 at 328
4. *Coward v Stapleton* - 1953-90 CLR 579-80
5. *Nigam v Kedarnath Gupta* – 1992 AIR 2153 (SC)
6. *Kangol Industries Ltd. v Bray (Alfred) & Sons Ltd.*– 1953 – 1 All ER 44
7. *Comet Products (Pvt.) Ltd. v Hawkex Plastics Ltd.* – 1971 2 QB 67.

Ransiri Fernando with *Sarath Walgamage* for petitioner.

Manohara R. de Silva PC for respondent.

Cur. adv. vult

January 12, 2007

ROHINI PERERA, J.

The facts that led to the present proceedings commenced with the institution in the District Court of Colombo Case No. 18335 L. The plaintiff was dated 18th August 1998. According to the facts stated in the plaint, the plaintiff (hereinafter referred to as the petitioner) resides in lot 2 B depicted in plan No. 2451 dated 4.11.1996 drawn by Licensed Surveyor A.E. Wijesuriya. The defendant (hereinafter referred to as the respondent) resided in lot 2A also depicted on the said plan. This action was instituted for a decree to define and demarcate the boundaries of the land described in the schedule to the plaint.

It was alleged that on a particular date in July 1998 the respondents had destroyed the boundary in the Northern side of the premises of the petitioner and started constructing the boundary line of the Northern side as alleged by the petitioner. When the respondent began demolishing the wall and the roof of the petitioner's building and thereby caused its destruction, to the Northern side of the boundary as a prelude to commencing the respondent's own building operation, the petitioner made a statement to the police on 3.8.1998. According to the said complaint which is marked R1, it is alleged that by the time the complaint was made and recorded, the construction of the building had been completed, except that the roof of that building was in the process of being completed. Thereafter the petitioner filed action in District Court of Colombo seeking the assistance of that Court for a decree for demarcation of the said Northern boundary and further for a restraining order to restrain the respondents from destroying the wall and the roof of the petitioner's building on the Northern side. The reliefs prayed for in that plaint are as follows:

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(අ) පැමිණිල්ලේ 2 වන උප ලේඛනයේ ඉතා සම්පූර්ණ ලෙස විජර කර ඇති බලයලත් මිනින්දෝරු ඒ. ඊ. විජේසූරිය විසින් මෑත සාදන ලද 1986.11.14 දින දරන අ-ක 2451 දරණ පිඹුරේ පෙන්වා ඇති ලොට් බී දරන කට්ටිය වන කෝට්ටේ ඇතුළුකෝට්ටේ ජයවීර මාවතේ වර්පනම් අ-ක 54/14 ඒ දරන පැමිණිලිකරුට අයත් ස්ථානයේ උතුරු දිසාවේ මායිම නිශ්චය කර සලකුණු කරන මෙන්,

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(ආ) විත්තිකරු ඔහුගේ සේවකයින් හා නියෝජිතයන් විසින් මෙම පැමිණිල්ලේ 2 වන උපලේඛනයේ විස්තර කර ඇති බලයලත් මිනින්දෝරු ඒ. ඊ. විජේසූරිය විසින් මෑත සාදන ලද 1986.11.04 දින දරන පිඹුර ප්‍රකාර අ-ක 2451 පිඹුරේ පෙන්වා ඇති ලොට් 2 බී දරන ඉඩම් කට්ටිය වන කෝට්ටේ ඇතුළු කෝට්ටේ ජයවීර මාවතේ වර්පනම් අ-ක 56/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති එක් ස්ථානයේ බිත්තිය සහ වහලය විනාශ කිරීම. කඩා දැමීම සහ එක් ස්ථානයේ උතුරු දෙසින් එක් ස්ථානය ඇතුළත ව්‍යාභ්‍රයක් ඉදිකිරීම වලක්වාලන ස්ථිර තහනම් නියෝගයක් විත්තිකරුට විරුද්ධව නිකුත් කරමින් පැමිණිලිකරුගේ වාසියට නඩු නින්දුවක් ඇතුළත් කරන මෙන්,

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(ඇ) මෙම නඩුව අසා නිම කරන තුරු විත්තිකරු ඔහුගේ නියෝජිතයන් හා සේවකයින් විසින් මෙම පැමිණිල්ලේ 2 වන උපලේඛනයේ විස්තර කර ඇති බලයලත් මිනින්දෝරු ඒ. ඊ. විජේසූරිය විසින් මෑත සාදන ලද 1986.11.4

දින දරන අ-ක 2451 පිඹුරේ පෙන්නවා ඇති එක් ලොට් 2 බි දරන ඉඩම් කට්ටිය වන කෝට්ටේ ඇතුළතේට්ටේ ජයවීර මාවතේ 57/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති ස්ථානයේ බිත්තිය සහ වහල විනාශ කිරීම සහ කඩා දැමීමට හා එක් ස්ථානයේ උතුරු දෙසින් එක් ස්ථානයට ඇතුළු ව්‍යාජයන් ඉදි කිරීම වලක්වාලන අතුරු නියෝගයන් විත්තිකරුට විරුද්ධව නිකුත් කරන මෙන් ද.

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(අ) අතුරු තහනම් නියෝගය පිළිබඳ ඉල්ලීම විමසා අවසන් වනතුරු විත්තිකරු සහ

වරිපනම් අ-ක 57/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති එක් ස්ථානයේ බිත්තිය සහ වහල විනාශ කිරීම හා කඩා දැමීම හා එක් ස්ථානයේ උතුරු දෙසින් ඇති එක් ස්ථානය ඇතුළත ව්‍යාජයන් ඉදිකිරීම වළක්වාලන වාරණ නියෝගයන් විත්තිකරුට විරුද්ධව නිකුත් කරන මෙන් ද.

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(ඉ) එක් ස්ථානය ඇතුළත උතුරින් විත්තිකරු විසින් ඉදි කරන ලද ව්‍යුහයන් විත්තිකරු විසින් කඩා ඉවත් කිරීමට නියෝගයක් ද

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 විත්තිකරුට විරුද්ධව පැමිණිලිකරුගේ වාසියට නඩු නින්දාවක් ඇතුළත් කරන මෙන්.

On 19.8.1998 the District Court issued the enjoining order. On 2.9.98 the respondent filed his objections to the said application for an interim injunction. Further the respondent filed his answer for the main case. On the 23.2.1999 the District Court delivered the order dismissing the said application for an interim injunction.

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On 8.4.1999 the petitioner filed an application for revision in the Court of Appeal against the order of the District Court. The reliefs sought in the said revision application were as follows:

- (a) Act in Revision and set aside the said Order 23.2.99 of the learned Additional District Judge of Colombo.
- (b) Grant issue an interim injunction until the hearing and determination of this action restraining the respondents, his agents and servants from destroying and breaking the roof and the wall on the Northern side of the premises depicted as Lot 2B in plan No. 2451 dated 4.11.1986 made by A.E. Wijesuriya licensed Surveyor bearing assessment No. 54/14A, Jayaweera Mawatha, Etul Kotte, and construct-

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ing structures on the Northern side in the said premises.

- (c) Grant and issue an interim injunction until the hearing and determination of this action restraining the respondent and his agents and servants from destroying and breaking the roof and the wall on the northern side premises depicted as Lot 2B on Plan No. 2451 dated 4-11-1986 made by A.E. Wijesuriya, Licensed Surveyor, bearing assessment No. 57/14A, Jayaweera Mawatha, Etul Kotte, Kotte and constructing structures on the northern side in the said premises. 90

The respondents filed objections to the revision application on 10.6.1999, and annexed R1 which is the police complaint dated 8.3.98.

In the statement of objections the respondents stated that the construction of the building was now been completed with the roof as well and the Certificate of conformity was marked as R2. This revision application was taken up for argument on the 30.6.99 and the Court of Appeal made the following order. 100

"same appearance as before – at this juncture the respondent (as the defendant stood then) undertakes not to effect further constructions and to maintain *status quo*. The interim injunction is accordingly issued restraining the defendant-respondent from continuing to build thereafter".

I shall refer to this order dated 30.6.99 as Y.

Any undertaking given in *ex facie curiae* is equivalent to a judgement or Order from a Court. Whenever, such an undertaking is breached it would amount to a contempt of Court. On the 30th of June 1999, the parties would have provided the court an undertaking to refrain from constructing any additional buildings and thereby to maintain the *status quo ante* of the Northern side of the boundary of lot 2B as depicted in the plan 2451. 110

'It may sometimes happen that a party gives a more wide ranging undertaking than he intended. In such a situation, the Court in it's discretion may decline to enforce that part of the undertaking which had been given by mistake'. (see: *Aldridge, Eady and Smith*,

on Contempt, Sweet & Maxwell, London, 2005, at paragraph 12-189)

The parties could not have undertaken to maintain the *status quo ante* and thus refrain from building on 'all the boundaries' for that is not the dispute. In *Ranjith Senanayake and Others v Paul Peiris*⁽¹⁾ at 169, 175, this Court had laid down the following principles to which I will now refer. The facts of that case are not relevant to these proceedings. However, the principles laid down in that decision is relevant to the present Appeal. It was held by this Court.

- (1) That the petitioner's apprehension that they would be liable for Contempt of Court is not well founded and therefore there was no exceptional circumstances to act in revision. 130
- (2) That in view of the criminal nature of the Contempt of Court proceedings,
 - (a) there must be clear evidence of violation of any Court order or injunction
 - (b) such an order should be strictly construed
 - (c) in determining whether or not breach has been committed, regard should be paid to circumstances and the object for which such injunction was granted or order was made".

The object of the order referred to as Y was to preserve the *status quo ante* only of the Northern boundary. 140

At 175 in *Ranjith Senanayake's (supra)* decision to which we have referred above, the Court of Appeal had written:

"in the case of *P.A. Thomas and Company v Mould*⁽²⁾ it was held that, where parties seek to invoke the power of the Courts to commit people to Prison and deprive them of their liberty, there have got to be quite clear and certainty about it."

It has been stated in *Arlidge, Eady & Smith* at 908:

"An order of undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which govern the interpretation of Penal Statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed." 150

Therefore it is fundamentally important that one reads the petition and the reliefs that were prayed for on which the alleged breached undertaking was based.

In this case the relevant application is the application dated 08.04.1999 which is also connected to the original Complaint filed in the District Court dated 08-08-1998 which was marked XI. That undertaking which was imposed on 30.06.1999 had been properly entered and the writing is sufficiently clear to ensure that the defendant should not disturb the boundary and maintain the *status quo ante* of the premises concerned. It should be noted notwithstanding the fact that the word "Northern Boundary" is not incorporated in the said order, the disputed area is the "Northern Boundary" as stated both in the Complaint and the Petition and Affidavit dated 08.04.1999. 160

"A defendant cannot be committed for contempt on the ground that upon one of two possible constructions of undertaking being given he has broken that undertaking. For the purpose of relief of this character, I think the *undertaking must be clear and the breach must be clear beyond all question.*" 170

Words of *Jenkins J. in Redwing Ltd v Redwing Forest Products Ltd.*^(2a) Cited in *Harris v Harris*⁽³⁾ at 328. **Quoted at page 909 of Arlidge, Eady and Smith on Contempt.**

The petition now before this Court for decisions is dated 24.3.2003. The relevant paragraph is paragraph 17 which states the following.

"In the aftermath of the aforesaid conviction, while being placed on bail by your Ladyship's Court, the respondent once again in violation and/or disobedience of the interim injunction issued by your Lordship's Court on 30-06-1999 acting by or through his agents carried out the construction of 180

- a) Steel posts along the boundaries of the premises concerned,
- b) A steel mesh along the boundaries of the premises concerned,
- c) A new covering of the roof of the premises concerned, overlooking the Plaintiff-Petitioner-Petitioner's roof.

The petitioner produces herewith marked "C5", a copy of the complaint made by the petitioner to Welikada Police on 07-06-2003 and marked "C6", "C7", and "C8" photographs depicting the unlawful construction work carried out by the respondent on 07-06-2003 and plead them part and parcel hereof. 190

And the plaintiff-petitioner prays that this Court take cognizance of the Contempt Committed by the respondent breaching/disobeying/violating the order Y and punish the respondent."

On 28.2.2006 Counsel for the respondent took up a preliminary objections as to the sustainability in Law of the application of the petitioner dated 24 Nov. 2003 on the basis that there is no charge to which the respondent could plead. The Counsel agreed to file written submissions on this preliminary objection. 200

"It is a well recognized principle of Law that no person ought to be punished for Contempt of Court unless the specific charge against him be distinctly stated and opportunity of answering it had been given to him". *Coward v Stapleton*⁽⁴⁾ at 579-80.

"This principle must be rigorously insisted upon", (ibid., 210 *Arlidge, Eady and Smith* page 68 para 2-18).

However, before this Court makes a determination with regard to that aspect of the objection, the Court should determine whether the order made by the Court, had been violated, and whether there is a basis for commencing proceedings for contempt.

However, I do not agree with the written submissions submitted by the respondents to this Court in its entirety. The order Y does not refer to the demolishing of the wall or the roof and if the respondent had not demolished the wall or the roof of the Northern side he cannot be held to have acted in defiance of the order Y. It must be noted that at the time the respondent filed his statement of objections it had been alleged by the petitioner that the walls had already been demolished and the roof had already been damaged. The building on the alleged disputed area was already completed. And it was undertaken by the parties on the 30.6.99 'not to effect 220

further constructions and to maintain *status quo ante*. By order Y the parties are prohibited from effecting additional constructions and the parties must maintain the current situation that existed on the Northern boundary as at 30th June 1990 as depicted in the plan 2451. Though the order Y does not specify the location it is obvious that the Order applies only to the Northern side, as that in fact was the disputed area. It may also be relevant to mention that the earlier application for revision was filed by the petitioner, at a time when, the respondent had been punished for contempt. This matter is now on appeal to the Supreme Court. In that petition dated 08.04.99 the petitioner alleged that "the respondent is continuing to construct structures on the Northern side in the said premises destroying the boundaries of the premises on the Northern side and thereby irreparable loss and damage is caused to the petitioner". (paragraph 13)

However, in the present petition dated 24-03-2003 the petitioner states the following namely,

"That the respondent is carrying out the construction of

- a) Steel posts along the boundaries of the premises concerned,
- b) A steel mesh along the boundaries of the premises concerned,
- c) A new covering of the roof of the premises concerned, overlooking the plaintiff-petitioner-petitioner's roof."

The party had been expressly enjoined by injunction from doing a particular thing in a particular location and if he violates those particular acts, then he shall be guilty of Civil Contempt. The petitioner should have demonstrated that the alleged Contemnor intentionally (not accidentally) knowing the facts which rendered it a breach of the relevant order or undertaking had committed the act. Here there is no undertaking with regard to the "other boundaries" other than Northern boundary.

The Authorities have clearly stated, that:

"Probabilities not sufficient". Mere probabilities may not be sufficient to exercise jurisdiction and there must be proof of willful conduct. *Nigam v Kedarnath Gupta*⁽⁵⁾. (See Narayan, Law of Contempt 4th Edition, at paragraph 85).

What is relevant is whether the Contemnor had breached the undertaking and not whether it was done accidentally, mistakenly, intentionally, or willfully. These matters are matters that are relevant at the inquiry. Here in this Court it is only a determination of a preliminary issue.

If the respondent did any act on the Northern boundary which would amount to a construction or which would change the condition in which the boundary was, as it had existed on the 30th June 1999, he may then be guilty of Contempt of Court. 270

When there is no order with regard to the other boundaries there cannot be any compliance of such an order, hence no Contempt is Committed. The pleadings merely refer to "Boundaries of the premises concerned" and refer further to "a new covering of the roof of the premises concerned overlooking the plaintiff-petitioner-petitioner's roof".

These do not indicate with any specificity which part of the boundary has been violated and which part of the roof has been given a new covering. There is a most cogent view of the law which is relevant to these proceedings on this point, 280 expressed by the authors of the book *On Contempt* to which reference has been made earlier (*ibid.*, *Arlidge, Eady & Smith* at paragraph 12-190). It reads as follows:

"Just as with a breach of an Order, where the Court will not commit and alleged contemnor unless the breach is strictly proved, so with an undertaking if there is doubt it may be appropriate, instead of invoking the process of contempt, to apply for an order requiring the alleged contemnor to state whether he has complied with his undertaking, although this does not seem to be an option that is often invoked", (see 290 *Kangol Industries Ltd. v Bray (Alfred) & Sons Ltd.*⁽⁶⁾)

Additionally, Lord Denning M.R., in his judgment in the English Court of Appeal, in *Comet Products (UK) Ltd. v. Hawkes Plastics Ltd.*⁽⁷⁾ expressed the view:

"I am prepared to accept that such a rule [compulsory interrogation] did exist in the days of Sir William Blackstone but I do not think it exists any longer today. The genius of the

Common Law has prevailed. I hold that a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him prove his guilt. I reject the submission that the defendant is a compellable witness in the contempt proceedings" (*ibid.*, at pages 74-75). We are firmly of the view that the petitioner had failed to establish to our satisfaction that the respondent had violated the Order Y, to which we have previously referred and therefore on the facts submitted to this court, the circumstances do not warrant a commencement of contempt proceedings. 300

To commence Contempt proceedings in cases of Civil Contempt summons should be issued on the Contemnor with a copy of the order of the alleged violation. 310

"It is also necessary to establish service of any order which is alleged to have been disobeyed by leaving a copy with the person to be served. The importance of personal service of the order, where committal is sought, is to enable the person bound by that order, and who is alleged to be in contempt, to know what conduct would amount to a breach; (at page 904 of Arlidge, Eady & Smith on Contempt)

It appears that the documents served on the respondents are C1 and C8. And along with the Summons the charge sheet is also attached. But the alleged violated order dated 30.6.99 is not attached. C1 is the judgment dated 8.10.2002, C2 sentencing order dated 8.10.2002, C3 petition of the S.C. Spl. L.A. Application No. 271/ 2002, C4 the order with regard to bail C5 which is the statement of the petitioner to the Welikada Police on 07-06-2003. 3 photographs marked as C6, C7, C8 and the negatives of the photographs and the police investigation notes. 320

However, there is no disclosure of a violation of the Court order Y in the Petition and Affidavit produced on behalf of the petitioner on 24-11-2003. Therefore, notwithstanding the fact that summons had been issued this Court has a discretion to terminate these Contempt Proceedings. The Contempt Proceedings are thus terminated and the respondent is discharged from these Contempt Proceedings. 330

Contempt proceedings terminated.