SOMINDRA

v.

SURASENA & OTHERS

COURT OF APPEAL
HECTOR YAPA, J.
GUNAWARDENA, J.
CALA 211/96
DC KANDY 13007/P
17TH MARCH, 1998
29TH MAY, 1998

Partition Law 21 of 1977 - S.53(1) b - Surveyor prevented from executing commission - contempt of Court - Civil Procedure Code Cap. LXV - S.798 - Conviction - Direct appeal or leave to appeal - Court exercising Revisionary Jurisdiction - Contradiction by Omission - Standard of Proof - Criminal.

At the Contempt Inquiry Court was influenced by the evidence of the Surveyor that the Appellant pulled the chain and thereby obstructed the Surveyor and convicted the Appellant for contempt.

Held :

(i) There is a difference between the reason given by the Surveyor in his Report to the District Court and that given at the inquiry in court for not carrying out the survey.

(ii) The Court had overlooked the omission on the part of the Surveyor to state in the Surveyor's Report the fact that the Appellant, physically interfered with the chain and so prevented and obstructed the survey being done.

Per Gunawardena J.,

> "Traditionally contempts have been classified as being either civil or criminal, the former category comprises disobeying court orders and violating undertakings given to Court while the latter class of contempt is committed in a various of ways, such as, disrupting court process i.e. contempt in the face of court, publications or other acts such as in the case in hand, with persons such as the Surveyor, having duties to discharge in a Court of justice or persons to whom duties are entrusted by the Court.

Per Gunawardena J.,

> "As a general rule when the Surveyor does not act with rigid impartiality, that excites the suspicion of parties which leads to high feelings and high words the reaction of resentment is natural when one is unjustly treated."

(iii) Standard of Proof is proof beyond reasonable doubt.

APPLICATION for leave to appeal from an order of the District Court of Kandy.

Cases referred to :

1. *Fernando vs. Fernando* - 2 Balasingham's notes of cases 47.
2. *Sinnathangam vs. Meeramohideen* 60 NLR 394.
3. *Adams vs. Hughes* - 1819 1 Brod & Bing 24.
4. *R vs. Jermy* - 1752 Say 47.

D. R. P. Goonatilaka with *S. A. D. S. Suraweera* for 11th Defendant Appellant.

A. A. de Silva, P. C., with *Kithsiri Jayalth* for Plaintiff Respondent.

Cur. adv. vult.

July 25, 2000.

U. DE Z. GUNAWARDENA, J.

This is an application for leave to appeal against an order dated 21.8.1996 made by the learned Additional District Judge, Kandy, convicting the 11th defendant-petitioner of contempt of Court under Section 53(1)(b) of the Partition Act in that the 11th defendant-petitioner had, in the view or opinion of the learned Additional District Judge, obstructed the sureyor and had so prevented the latter from executing a commission issued by the District Court to the said surveyor to prepare a preliminary plan in terms of Section 16(1) of the Partition Law No. 21 of 1977. The learned District Judge had sentenced the 11th defendant-petitioner to a fine of Rs. 750/- and in default of the payment of the said fine to one month's simple imprisonment and had also directed the 11th defendant-petitioner to pay a sum of Rs. 1307.85 cts. as survey fees in respect of the abortive survey.

The main, if not the solitary, point raised by the plaintiff-respondent to this application was that the aforesaid order complained of by the 11th defendant-petitioner could be challenged only by way of a direct appeal against the same and as such no application for leave to appeal, as in fact, had been made, could be entertained. But the learned President's Counsel who put forward the above submission had failed to substantiate it, apart from saying this. To quote from his written submissions. "The short and simple objection taken was that the petitioner had been found guilty of the criminal offence of contempt of court for which the petitioner had been dealt with according to law and that if he is aggrieved with the said sentence and finding of guilty . . . he could if so advised avail himself of the provisions of law available to a person guilty of a criminal offence by a different kind of appeal or remedy."

The above is an excerpt from the written submissions and it is neither fish, flesh nor good red herring. Perhaps, no submission could have been less helpful or more secretive or vague. Nothing could be gained from the above submission since it failed to explain why the application for leave to appeal was not the correct proceeding or procedure to be resorted to or invoked in challenging the order in question. The reason as to why an application for leave to appeal need not or rather could not be made against the aforesaid order made by the District Court convicting a person in contempt proceedings under LXV of the Civil Procedure Code, as it had been in this case, is to be found in Section 798 of the said said Code which Section reads thus: "An appeal shall be to the Court of Appeal from every order, sentence or conviction by any Court in the exercise of its special jurisdiction to take cognizance of, and to punish by way of summary procedure the offence of Contempt of Court . . ."

When the law has accorded, as pointed out above, the right to appeal, an appeal lies as a matter of right, and no leave to appeal need be or rather, could be sought - although, it is

debatable as to whether or not the right of appeal carries with it, as a necessary concomitant, the right to seek leave to appeal. It can, to say the least, arguably be said that the right of appeal, in any event, does not exclude - the right to seek leave to appeal, although, perhaps, it is wholly unnecessary or superfluous to seek leave or permission to obtain a thing which one is entitled to as a matter of legal right. Law is the dictate of reason (*lex est dictamen rationis*) and it is somewhat irrational to say that one has no right to seek leave to appeal, for no other or better reason than one has a right to appeal. He to whom the greater is lawful ought not to be debarred from the less as unlawful (*non debet cuiplus licet quod minus est non licere*). A person, for instance, who has a right to enter a particular place is not to be debarred from entering that place merely because he has sought leave, needlessly, though it be, to enter it.

In any event, I feel that the Court ought to act in revision to vacate the conviction that had been entered as against the 11th defendant-petitioner, who is innocent of the charge, as the sequel would serve to show, that had been laid against him and ought, therefore, to have been acquitted. As the Court can, and, in fact, ought, in the circumstances, to act in revision to grant relief against the order complained of, it is redundant to consider and express an authoritative opinion on the moot - point as to whether the right of appeal excludes, wholly and without limitation, the right to seek leave to appeal. Just as much as it is the judge who is condemned when a guilty man is acquitted, so it is the judge who is condemned when an innocent man is convicted. Law, or rather the Courts, ought not to fail in dispensing justice by making a fetish of technicalities. In *Fernando v. Fernando*[1] the accused was granted relief although the petition of appeal was defective because in the circumstances, of that case, Sampayo J. felt that imprisonment was not quite the suitable punishment. In this case in hand, if I were to refuse to intervene and so withhold relief for the reason that the 11th defendant-petitioner

has sought leave to appeal when, in fact, he ought to have directly appealed against the order, it would be something akin to a mockery of justice, if, in fact, it is not veritably so, for the conviction will stand although it has no tenable basis. In *Sinn althargam v. Meeramohideen*[2] *T. S. Fernando. J.* made it clear that the Court possesses the power to set right an erroneous decision in an appropriate case even though an appeal against such decision had abated on the ground of non-compliance with some of the technical requirements in respect of notice of security.

The next question is: do the facts disclose the commission of the offence of contempt in that the 11th defendant-petitioner can be said to have obstructed the surveyor although it is no doubt important to the due administration of justice that there should not be interference with the officers of Court, the surveyor, in this instance, falling into that category. It is difficult to say, even on the assumption that the surveyor's evidence is true, that the offence of contempt is constituted. The surveyor's evidence at the contempt inquiry before the learned Additional District Judge was that the 11th defendant-petitioner removed or rather shifted the chain (of the surveyor) slightly and that the surveyor therefore could not proceed with the survey. The tenor of English decisions are to the effect that trival incidents or conduct is to be ignored in view of the attitude of the Courts of recent times to discourage applications for contempt arising out of such incidents. In *Adams v. Hughes*[3] the Court held there was no contempt although it was asserted that the defendant: "Collared", the server of process, "shook him violently". The Court, however, in that case refrained from expressing an opinion that, under no circumstances, could such conduct be deemed to be contempt. There are however old English cases such as *R. v. Jermy*[4] in which it had been held that even verbal abuse of an officer of Court was tantamount to contempt. The last mentioned case, I take it, is rendered memorable, not only on account of the gravity of the contemptuous conduct of the defendant but more so - for the unbridled and blunt language

of his. To reproduce the piquant expressions attributed to him: "Take the rule back again to those from whom it came and bid them wipe their backsides with it."

Assuming that the defendant-appellant pulled or slightly shifted an instrument, that is, the chain of the surveyor, it is such trivial conduct which would not have actually prevented the survey - if, in fact, the surveyor had been keen to proceed with it. It looks as if the surveyor had been too quick to take offence and that he had obviously left the land in a huff. The tenor of English decisions seem to favour the view that if the conduct of the defendant was not such as to effectually prevent the accomplishment of the task that the officer of the Court was entrusted with, then, such conduct would not amount to contempt. For instance, in the matter service of process, trivial conduct, which does not actually prevent the service, had been held not to constitute contempt. Allegations, against the sureyor of partiality towards the plaintiff-respondent had been made even at the contempt inquiry. These allegations seem to have, to say the least, a substratum of truth. Bickerings or disorder at the surveys can be avoided, to an appreciable extent, if the surveyor conducts himself such a manner as to inspire the confidence of parties in himself. As a general rule when the surveyor does not act with rigid impartiality, that excites the suspicion of parties which leads to high feelings and high words. The reaction of resentment is antural when one is unjustly treated. Apart from slightly shifting the surveyor's chain, assuming that the 11th defendant-appellant had, in fact, done what he is alleged to have done, the 11th defendant-appellant had done nothing else than to shift the chain a little. For instance, the 11th defendant-appellant had not threatened the surveyor; nor had he abused him although neither, of those things, in itself, would for certain have amounted to contempt unless it effectively prevented the surveyor from performing his duty or accomplishing his task.

It is not improbable that the surveyor abandoned the survey as he had a disinclination to survey the land or show

the North - Eastern boundary of the same as pointed out by the 11th defendant-appellant as well, on account of his partiality for the plaintiff-respondent. Perhaps, the surveyor's partiality or bias in favour of the plaintiff-respondent has shown itself unwittingly in his report submitted to Court wherein the surveyor had stated thus: "ඒ පාර්ශවකරුවන් අතර බහින් බස් වීමක් ඇති වුවත් පැමිණිලිකරුගේ නැසිරීම මනා පාලනයකින් පැවතුනා." Making such landatory observations with a view to protect the plaintiff-respondent was quite un-called for in the context. Why should the surveyor choose out the plaintiff-respondent for special praise or attention as if the plaintiff-respondent was the only party who behaved well or conducted himself decorously. This somewhat strengthens the impression that the surveyor was averse from surveying North-Eastern boundary of the land, in regard to the position or situation of which there was a difference of opinion, except as shown by the plaintiff-respondent. That, possibly, explains why the survey was not carried to completion. The evidence shows that there had been a difference of opinion between the parties as regards the location of the North - Eastern boundary. The plaintiff-respondent and some others had taken one view as regards the location of the said boundary whilst several others, including the 11th defendant-appellant, had taken a different view as to where the North-Eastern boundary should be fixed or located. In fact, in his report, submitted to court, with regard to this very matter, which report is undated, so far as I can see (although the date of survey is 12.03.1995), the surveyor had not said anything about the 11th defendant-appellant pulling or shifting his chain or any other instrument of his. The learned Additional District Judge had been greatly influenced by this piece of evidence viz. that 11th defendant-appellant pulled the chain and thereby obstructed the surveyor although the learned District Judge had not given any thought to the omission on the part of the surveyor to state that fact in his report which was submitted to the Court prior to the date of the inquiry into the matter of contempt. In fact, the learned Counsel who

appeared for the 11th defendant-appellant in the District Court and in appeal had been oblivious to that fact which, in fact, is a contradiction by omission which, to say the least, makes one look askance at the evidence of the surveyor (given at the inquiry) that the 11th defendant-petitioner pulled or shifted the surveyor's chain and so prevented or obstructed him from carrying out the survey. It is worthy of remark that evey omission does not amount to a contradiction. Omissnion, in order to be a contradiction should not be of an inconsequential or un-important nature. In an Orissa case referred to at page 701 (Law of Evidence by A. N. Saha) the accused was indicted for having committed rape on a lady, the accused having entered her bed-room. The lady said in her evidence that the accused touched her and she woke up. Further, she said, in evidence, that she asked him why he entered the room, when her parents were away and that she told the accused that she would raise an alarm. Whereupon, the lady said, in her evidence in Court, that the accused put a towel in to her mouth, gagged her and stripped off the saree that she was wearing and raped her. There was no mention in her statement of her being gagged. That was an important omission for it was the gagging that prevented her from raising an alarm and the omission to state that fact viz. gagging being vital was treated as a contradiction by omission. And, according to the evidence of the surveyor, given in the District Court, substantially, the sole reason as to why he couldn't survey the land was the fact that the 11th defendant-petitioner pulled or shifted the chain of the surveyor. To quote from the surveyor's evidence:

ප්‍ර: සොමින්දර කළ බාධාව මොකක්ද?

උ: දම්වැල් අයින්කර උපකරණ වලින් මනින්න යන විට මනින්න දුන්නේ නැහැ.

In fact, the learned District Judge, in her order convicting the accused, had reproduced the above piece of evidence and identified the shifting or the meddling with the chain as the

major obstruction caused by the 11th defendant-petitioner which prevented the completion of the survey of the land. But as pointed out above, the learned District Judge had failed to consider whether or not it would have been more natural for the surveyor to have stated that fact in his report to Court had the obstruction assumed the form described by the surveyor in his evidence at the contempt inquiry but not in his report. It is only in his evidence in Court, at the inquiry, that the surveyor had said that the 11th defendant-petitioner obstructed him by meddling with his chain. There was no mention whatsoever of any physical obstruction as such in the surveyor's report submitted to Court previous to the date of inquiry. In the said report the reason given by the surveyor as to why he couldn't complete the survey had been stated (by surveyor) as follows: සොමින්දර (එන්. ජී. විසින් මැනීම ඉදිරියට ගෙන යන්න ඉඩ සැලසුවේ නැත. එයට හේතුව වූයේ දැන් දකින්නට නැති උතුරු නැගෙනහිර මායිමේ පිහිටීම ගැන සිදු වූ ඔවුනොවුන් අතර ඇති වූ වචන හුවමාරුවයි.)

Seemingly, at least, there is somewhat of a difference between the reason given by the surveyor in his report to the District Court and that given at the inquiry in Court for not carrying out the survey which makes one wonder whether surveyor is fishing for reasons. It is to be observed that the reason given in the surveyor's report for not completing or for stopping the survey half-way was the exchange of words between the two rival groups or parties who were present.

The learned District Judge had readily accepted the evidence of the surveyor to the effect that the 11th Defendant-petitioner obstructed him by interfering with his chain. I cannot bring myself to believe that the learned District Judge would have done that, that is, accept that evidence and convicted the 11th defendant-petitioner thereon, had the learned District Judge not overlooked the omission, on the part of the surveyor, to state in the surveyor's report the fact that the 11th defendant-petitioner physically interfered with the chain and so prevented or obstructed the survey from being

done. It is to be observed, as remarked above, the surveyor in his report had attributed his failure to survey the land solely to the exchange of words amongst the parties as regards, the location or situation of the north - eastern boundary of the corpus. Anyone familiar with local conditions will know that wordy warfare, if I may say so, is almost always a concomitant of a survey of any land and that is no sufficient reason for not executing a commission issued to a surveyor, or leave it half-done.

Traditionally contempts have been classified as being either civil or criminal. The former category i. e. civil contempt comprises disobeying Court orders and violating undertakings given to Court while the latter class of contempt is committed in a variety of ways, such as, disrupting Court process i. e. contempt in the face of Court, publications or other acts which tend to interfere with particular legal proceedings, interfering, such as in the case in hand, with persons, such as the surveyor, having duties to discharge in a Court of justice or persons to whom duties are entrusted by the Court. The surveyor in this case had been mandated or commissioned to survey the corpus as a preliminary to its partition. What is worth noting in this regard is that obstruction of such an officer having a commission (from Court) to execute would be criminal contempt. Broadly speaking, rationale of both civil and criminal contempt is substantially the same, that is, to uphold the effective administration of justice and in all cases whether alleged contempt is civil or criminal the standard of proof is the criminal one i. e. proof beyond reasonable doubt. That being so, I wonder whether, on the surveyor's evidence, the 11th defendant-petitioner could have been convicted on the charge of contempt on the basis that the 11th defendant-petitioner obstructed or prevented him (the surveyor) from surveying the land by meddling with his chain because omission to state that fact in his report, if, in fact, it was true, discredits the surveyor's evidence in Court and makes the truth of it, to say the least, doubtful.

For the aforesaid reasons, I do hereby set aside the conviction and the fine imposed on the 11th defendant-petitioner. Further, the surveyor is ordered to refund the sum of Rs. 1307.85 cts. if, in fact, he had collected the said sum from the 11th defendant-petitioner as his fee, and further, the surveyor is ordered to re-survey the land or complete the survey at his own expense, which only means, that the surveyor is not entitled to any additional fees for additional expenses, if any, for completing the survey which he had left, so to say half-done.

HECTOR YAPA, J. - I agree.

Conviction and fine set aside