

WIJERATNE
v.
JESUDASAN AND ANOTHER

COURT OF APPEAL
S.N. SILVA, J. AND
ANANDACOOMARASWAMY, J.
C.A. NO. 195/88
D.C. COLOMBO 2828/SPL
JANUARY 23, 31 FEBRUARY 1, 2, 3,
22, 24 AND MARCH 4, 1989

Contempt of Court - Disobedience of interim order of District Court made under Companies Ordinance - Removal of files

The 2nd respondent - respondent (Jesudasan) was charged with committing contempt of court by removing certain files from the premises of Carson Cumberbatch & Co. Ltd. utilising his position or authority as Director in contravention of the interim order made by the District Court. (The 3rd respondent (Poulier) was also similarly charged but he was discharged for lack of evidence against him at an early stage of the proceedings)

The evidence showed that the 2nd respondent removed two bags loaded at the Company in his car. Upon his premises being searched on a search warrant two files were found by S.I. Mendis. His description of the bag in which he found the two files did not tally with the description of the bags given by the security guards who saw two bags being brought in and later removed in an apparently loaded state in a car. The petitioner did not adduce any direct evidence to the effect that the 2nd respondent - respondents removed any files from the Company premises after the interim order was served. In his statement to the Police the 2nd respondent - respondent said he brought home documents belonging to himself and the documents relating to the District Court case.

Held: -

The items of circumstantial evidence do not lead to the necessary inference that the 2nd respondent - respondent removed files of the company after the interim order was served. The circumstances are equally consistent with an innocent explanation. Further it was not established that the 2nd respondent - respondent "utilised" his position as Director to remove these files. There is no evidence adduced of any act done by the 2nd respondent - respondent inside the company premises after the interim order was served. In fact the evidence is that the 2nd respondent - respondent moved out of the premises taking with him his personal belongings and the documents relating to the case. The charge of contempt therefore fails.

INQUIRY into charge of contempt of court.

Faiz Mustapha, P.C., with D. Deraniyaga, C. Gunaratne and S.A Parathalingam for petitioner

Dr. H.W. Jayewardene, Q.C., with H.L. de Silva, P.C., Dinal Phillips and H. Cabral for 2nd respondent-respondent.

K.N. Choksy, P.C., with N. Fernando and Anil Tittawella for 3rd respondent-respondent.

Cur.adv. vult.

September 22, 1989

S.N. SILVA, J.

These proceedings were initiated by the 4th Respondent-Petitioner abovenamed by filing a petition and affidavit dated 4.3.1988 supported by the documents marked P1, P1A, P2, P2A, P3, P4, P5, P6 and P6A. It is alleged that the 2nd and 3rd Respondent-Respondents committed certain acts of contempt against the authority of the District Court of Colombo.

The 4th Respondent-Petitioner, the 1st and 2nd Respondent-Respondents (being the persons accused of committing contempt of Court) and the 5th to 10th Respondents abovenamed, at the material time, constituted the Board of Directors of Messrs. Carson Cumberbatch & Co. Ltd., and being the 1st Respondent-Respondent abovenamed.

Dr. Gayathri Madan Mohan residing in London, who is a share holder of the said Company, filed petition dated 26.1.1988 in the District Court of Colombo (case No.2828/Spl.) in terms of section 210 to 219 of the Companies Act No.17 of 1982 in respect of the company, citing the Directors as the Respondents. This petition was filed with the consent of certain other shareholders, who, together with the Petitioner owned 51,750 shares being in excess of five percent of the issued capital of the Company. She averred, *inter alia*, that the affairs of the company, were conducted with a lack of probity and fair dealing. She sought certain interim and final orders against the 2nd and 3rd Respondent-Respondents above named. Upon this petition being filed the District Court issued notice on the Respondents. Thereafter, the 4th Respondent-Petitioner filed petition dated 5.2.1988 seeking *inter alia*, interim orders restraining the 2nd and 3rd Respondent-Respondents from functioning or acting as Directors of the Company and its subsidiaries and associates, pending the final determination of the main application. This application was supported *ex parte* on 5.2.88 and the District Court issued the interim order prayed for against the 2nd and 3rd

Respondents. The charges of contempt are based on the allegation that subsequent to the interim order being served on the Respondent-Respondents they removed certain files from the premises of the company at No.67, Dharmapala Mawatha, Colombo 7, by utilising their position and authority as Directors and thereby acted in contempt of the interim order of the District Court.

The petition for contempt of court was supported on 10.3.88 and this court issued summons on the Respondent-Respondents requiring them to answer the charges of contempt. They appeared in court on 27.4.88 and pleaded not guilty to the charges. Thereafter the matter was fixed for inquiry which commenced before this bench on 23.1.88

After the evidence of several witnesses was recorded an application was made on behalf of the 3rd Respondent-Respondent that he be discharged from the proceedings because the evidence adduced against him did not warrant his defence being called for by court. Counsel for the Petitioner at that stage conceded that he had no further evidence to adduce against the 3rd Respondent-Respondent but submitted that the evidence already adduced was sufficient to warrant a defence being called for from this Respondent. The application for a discharge was then considered by us, and by order dated 3.2.89 we discharged the 3rd Respondent-Respondent from these proceedings on the basis that the Petitioner failed to establish a prima facie case against this Respondent.

On 24.2.89, after the evidence of witness Hettige, Sub-Inspector of Police attached to the Kollupitiya Police Station was concluded, Counsel for the Petitioner submitted that he had no further evidence to adduce against the 2nd Respondent-Respondent. He submitted that he would call the Petitioner as a witness only in compliance with the order made by Court on 31.1.89. However, it was his position that the evidence of the Petitioner does not implicate the 2nd Respondent-Respondent with regard to the commission of the alleged act of contempt of court. Thereupon Counsel for the 2nd Respondent-Respondent submitted that the Petitioner failed to establish a prima facie case against his client and as such his client should be discharged from the proceedings. This order relates only to the case as against the 2nd Respondent-Respondent.

On the charge as contained in the summons served on the 2nd Respondent-Respondent, the Petitioner has to establish, two matters, they are:

- (1) that after the interim order of the District Court was served, this Respondent removed certain files from the premises of the company utilising his position or authority as Director:
- (2) that such removal of files was in contravention of the interim order and as such constituted a contempt of the authority of the District Court.

The matter referred to at (1) above is a question of fact that has to be established on evidence. The matter referred to at (2) is an inference that may be drawn on the facts that are established on evidence, considered in the light of the interim order and the law relating to contempt of court. It is necessary to consider the second matter only if we are satisfied that the Petitioner has adduced sufficient evidence to establish the first.

The Petitioner called witnesses, Sunil Fernando who represented the Registrar of the District Court, Colombo and A.H.Somapala, Process Server, to prove that the interim order referred to above was made by the District Court on 5.2.88 and that it was served on the 2nd Respondent-Respondent at the premises of the company. According to Somapala the interim order was served by him on the Respondent at about 4.30 p.m. This evidence was not challenged by the 2nd Respondent-Respondent.

W.K. Selvaratnam, a Security Guard who was on duty at the main gate of the company premises, stated that on 5.2.88 at about 6 p.m. the 2nd Respondent-Respondent's car came into the premises driven by one Ponnambalam who is the regular driver. There was no one else in the car. The car was searched in keeping with the normal procedure and he saw two large leather suit cases, inside the boot of the car. The suit cases were empty. Between 7.30 and 8.10 p.m. the car left the premises but at that stage it was not searched because the 2nd Respondent-Respondent was inside.

B.I. Careem, a Security Officer of a Private Security firm engaged by the company, stated that on 5.2.88 between 5.30 and 6.30 p.m. he was on duty at the main entrance of the company building, near the place where the lifts are located. He saw Ponnambalam come inside the building carrying two large bags that were taken up the lift to the floor where the 2nd Respondent's office was located. He

observed that these bags were empty. Later he saw Ponnambalam leave the building with the bags that appeared to be loaded. The bags were not searched by him at any stage. He also saw the 2nd Respondent-Respondent leave the premises in the car driven by Ponnambalam.

A complaint was made to the Kollupitiya police by P.J. Fernando, a Director of the company who is the 5th Respondent abovenamed. The complaint was recorded by D.E. Alahaperuma, Police Sergeant 2990, commencing at 1.55 a.m. on 6.2.88. The recording of the statement concluded at 3.10 a.m. Thereafter, a police party went out to search the houses of the 2nd and 3rd Respondent-Respondents. The 3rd Respondent-Respondent permitted a search of his house but no files or documents belonging to the company were found there. The 2nd Respondent-Respondent refused to permit a search of his house.

On 6.2.88 being a Saturday, the Kollupitiya police made an application for a search warrant in respect of the residence of the 2nd Respondent-Respondent. The first attempt to obtain the warrant failed because the documents in respect of which the search was applied for were not adequately described in the application. Thereafter, a further statement was recorded of P.J. Fernando and an amended application was made for a search warrant. The Magistrate issued a search warrant in respect of premises number 6, 6th Lane, Colombo 3, being the residence of the 2nd Respondent-Respondent. The search warrant was issued at about 6.30 p.m. and a party of police officers led by Sub-Inspector Mendis of the Kollupitiya Police searched the house of the 2nd Respondent-Respondent commencing at about 7.30 p.m. In the course of the search, Sub-Inspector Mendis took charge of two files produced marked 'X14' and 'X15', titled, "Malaysianisation policy" and "Callingham Crane".

Counsel for the 2nd Respondent-Respondent cross-examined witness Alahaperuma and Mendis at length, to support the suggestion that the files were voluntarily handed over by the 2nd Respondent-Respondent. It was his contention that the title of the files to be searched for had been recorded in the statement of P.J. Fernando and in the search warrant in Sinhala and that what was recorded could not possibly have led any person to discover 'X14' and 'X15'. There is indeed considerable merit in the suggestion of

Counsel. But, sub-Inspector Mendis persisted in saying that he found the files unaided by the 2nd Respondent-Respondent.

The description given by S.I.Mendis of the bag in which the files were found, does not tally with the description of the bags given by witnesses Careem and Selvaratnam. Counsel for the 2nd Respondent-Respondent suggested that the files 'X14' and 'X15' were kept in the residence of the 2nd Respondent-Respondent, all along in view of certain investigations that were carried out by the Exchange Control Department. In fact, M. Nagahawatta, the former Controller of Exchange who was called by the Petitioner stated that there was an investigation carried out by the Department into certain affairs of the company and that the 2nd Respondent-Respondent attended interviews at the Department in this regard. Certain folios of 'X14' contained correspondence had between the Exchange Control Department and the company. These letters had been signed by the 2nd Respondent-Respondent on behalf of the company.

The Petitioner did not adduce any direct evidence to the effect that the 2nd Respondent-Respondent removed any files from the company premises after the interim order was served. He invited the Court to draw that inference from the items of circumstantial evidence referred above. It was Counsel's submission that X14 and X15 had been removed in the bags that were carried by the driver Ponnambalam. Counsel sought to buttress this submission by producing X19 being a portion of the statement recorded by S.I.Hettige of the 2nd Respondent-Respondent. It was sought to produce this statement as an admission. X19 reads as follows:

"Thereafter I remained in my office till about 7 p.m. and came home bringing the documents belonging to me and the documents relating to the action in the District Court."

It was the contention of Counsel, that words "documents relating to the action in the District Court" referred to the two files X14 and X15. However, S.I.Hettige in answer to Court clearly stated that he questioned the 2nd Respondent-Respondent as to whether the latter, brought any files of the company. Hettige specifically stated that the 2nd Respondent-Respondent answered this question in the negative. Therefore, we are of the view that the contention of Counsel in this regard does not hold water.

In the result we are left with certain items of circumstantial evidence which do not lead to the necessary inference that the 2nd

Respondent-Respondent removed files of the company after the interim order was served. The circumstances are equally consistent with an innocent explanation.

The charge made against the 2nd Respondent-Respondent states that certain files were removed by him "utilising his position and authority as Director". Therefore the charge would not be established merely by proving that certain files were in fact removed by the 2nd Respondent-Respondent. It would be necessary to establish further that he "utilised" his position as Director to remove these files. No evidence has been adduced by the Petitioner as to any act done by the 2nd Respondent-Respondent inside the company premises after the interim order was served. On the contrary the evidence is clear that after the interim order was served, the 2nd Respondent-Respondent moved out of the premises taking with him his personal belongings and the documents relating to the case. Therefore, we are of the view, that the Petitioner has failed to establish the charge of contempt of court that has been made against the 2nd Respondent-Respondent. We accordingly find him not guilty on the charge and discharge him from these proceedings

ANANDACOMARASWAMY, J. – I agree.

*2nd respondent-respondent
discharged.*
