

## Zynab Hydari Vs State of Maharashtra and Others

**Court:** Bombay High Court

**Date of Decision:** March 18, 2004

**Acts Referred:** Contempt of Courts Act, 1971 â€” Section 12

**Citation:** (2004) 4 BomCR 874 : (2004) 3 MhLj 275 : (2004) 3 MhLj 274

**Hon'ble Judges:** A.M. Khanwilkar, J

**Bench:** Single Bench

**Advocate:** D.H. Mehta and B.H. Vyas, for the Appellant; Mahendra Rathod, instructed by Poddar and Co. for Respondents No. 5 and 6, for the Respondent

### Judgement

A.M. Khanwilkar, J.

Heard Counsel for the parties. Perused the affidavit filed in support of the Motion as well as the affidavit in reply,

opposing the Motion. The relief prayed in this Notice of Motion is to recall and/or set-aside the order passed by this Court in dismissing the

Contempt Petition on the ground of default of the petitioner and his Advocate to appear when the matter was taken up for hearing.

2. Counsel for the respondents 5 and 6 submits that the relief claimed in this Application, cannot be granted because this Court has no power to

recall the order of dismissing the petition for default. In support of this submission, reliance was placed on the unreported decision of this Court

dated September 29, 2003 in Notice of Motion No. 2740 of 2003 in Contempt Petition No. 69 of 2003 - Konark Builders Pvt. Ltd. v.

Ramakant S. Damohi and Ors. However, on perusal of that order, there is nothing to indicate that the Court has stated the legal position as is

pressed on behalf of the respondents, that once the Contempt Petition is dismissed for default, the Court has no power to set-aside that order so

as to restore the petition for being heard on merits. In my view, however, it will be inexpedient to accept such proposition. Inasmuch as, when

petition is filed and brought before the Court, it is merely an attempt made by the petitioner to bring to the notice of the Court about the alleged act

of contempt committed by the Contemnor. It is possible that in a given case due to unavoidable circumstances neither the petitioner nor his

Advocate could appear to assist the Court when the petition is taken up for hearing, for which reason the Court had dismissed the petition for

default. It is possible that the facts of the case are so glaring or telling that a clear case of contempt has been made out, still the matter is dismissed

for default. That would not mean that the Court had applied its mind to the case stated in the petition as to whether the case of Contempt has been

made out or not. If it is so, it is surely not an order deciding the merits of the controversy. A priori, if the proposition as is canvassed, was to be

accepted, the category of deserving cases will be totally extricated from the consideration of the Court though it warranted serious view of the

matter. Indubitably, action of contempt is a matter between the Court and the Contemnor. If it is so, such technicalities cannot and ought not to

deter the Court from reopening the case unless it was already decided on merits one way or the other, for, the Court is obliged to take appropriate

action against the Contemnor if the allegation is established from the record. That is the mandate to ensure that the orders passed by the Court are

complied with in its letter and spirit by all concerned to observe rule of law. Viewed in this perspective, it is not possible to countenance the

argument that the Court will have no power to set-aside the order of dismissal of the Contempt petition for default, and to restore the petition, to

be heard on merits. Accordingly, the argument that the Contempt of Courts Act is a complete Code in itself and makes no express provision for

restoration of the petition dismissed for default, in no way impinges upon the powers of the Court to recall its own order dismissing the petition for

default.

3. The next question that needs to be considered is whether sufficient cause has been made out in the fact situation of the present case. The

affidavit in support clearly states that it was due to circumstances beyond the control of the petitioner and his Advocate that the matter went by

default. That the petitioner was unaware about the date of hearing. And the petitioner's Advocate did not attend because the concerned clerk of

the Advocate on record was on leave during the relevant time and the Advocate on record himself was also not attending the office due to ailment

(retina detachment). This obviously is a sufficient cause made out by the petitioner. There is additional reason for restoring the Contempt Petition in

the fact situation of the present case. It is rightly brought to my notice that the concerned respondents have filed Notice of Motion for modification

of the order of which non-compliance is complained of, which presupposes that the order of this Court is still operating and has not been carried

out.

4. Accordingly, Notice of Motion is made absolute in terms of prayer Clauses (a) and (b). Contempt Petition be placed for admission after two

weeks.

5. At this stage, Counsel for respondents 5 and 6 prays that operation of this order be stayed, as in all probability, the said respondents would like

to take the matter in appeal. This request is acceded to. The operation of this order is stayed for a period of two weeks only.

6. All concerned to act on the ordinary copy of this order, duly authenticated by the Associate of this Court.

7. Issuance of certified copy is expedited.