
(2016) 2 JKJ 168

Jammu & Kashmir High Court

Case No: Others Writ Petition (OWP) No. 377 of 2014

ACE Enterprises

APPELLANT

Vs

R.K. Arora

RESPONDENT

Date of Decision: Dec. 16, 2015

Acts Referred:

- Constitution of India, 1950 - Article 227
- Constitution of Jammu and Kashmir, 1956 - Section 104

Citation: (2016) 2 JKJ 168

Hon'ble Judges: Mr. Ali Mohammad Magrey, J.

Bench: Single Bench

Advocate: Mr. Anil Bhan, Advocate, for the Respondents; Mr. M. Sultan, Advocate, for the Appellant/Petitioner

Final Decision: Allowed

Judgement

Mr. Ali Mohammad Magrey, J. - The petitioner has filed this petition invoking the power of superintendence of this Court under Section 104 of

the Constitution of Jammu and Kashmir read with Article 227 of the Constitution of India to set aside the order dated 06.11.2013 whereby the

learned Sub-Judge (CJM), Srinagar, has dismissed the contempt petition, alleging wilful violation of the ad interim court order dated 22.06.2011,

filed by the petitioner against the respondents on the ground that proceedings initiated by any party in exercise of statutory right, cannot be

construed as flouting of the order of the civil court or wilful or deliberate violation of the order.

2. Briefly put, the facts of the case are that in a suit titled M/s ACE Enterprises v. Union of India and others praying for multiple reliefs of

declaration and of permanent injunction filed by the petitioner against respondent no. 1 herein and others, the defendants had made an application

before the trial court on 17.05.2006 under Section 8 of the J&K Arbitration Act, 2002 for referring the parties to arbitration in view of clause 25

of the Agency Agreement for IBP stockist and Agency Agreement for sale of automotive grades of lubricants both dated 01.01.2006, and clause

32 of the Satellite Depot Contractor Agreement dated 30.09.1997. While the said application was pending consideration before the trial court, the

defendants of their own, initiated arbitration proceedings on 25.05.2010, appointing respondent no. 2 herein as Arbitrator. On an application

moved by the petitioner, the trial court on 22.06.2011 passed an ad interim direction staying the proceedings before the Arbitrator with regard to

the matter titled M/s ACE Enterprises v. Union of India and Ors. The order passed by the learned trial court is quoted hereunder in to:

I have perused the application in hand and the main file. The Ld. counsel for the applicant has submitted an application on 14.06.2011 which was

put along with the main file on 17.06.2011. On 17.06.2011 Ld. counsel for the applicant was present, but nobody caused presence on behalf of the

other side and file was kept awaited for non-applicants/defendants. Again on 17.06.2011 file was taken up for hearing but nobody caused

presence on behalf of the non-applicants/defendants.

Ld. counsel for the applicant submitted that defendants are not interested in contesting the case because without any reason they have remained

absent from the court for last two hearings. He prayed that the orders may be passed in the present application in the interests of justice, otherwise

applicant will suffer an irreparable loss and there are chances that whole case of the applicant will get infructuous. He drew the attention of the

court towards the application which was already filed by the applicant on 25.04.2011 in which counsel for the non-applicant caused presence on

2.05.2011. In the said application same relief was prayed by the Id. counsel for the applicants, whereas, the Id. counsel for the non-applicant has

stated at bar that the proceedings before the arbitrator are different from that involved in the present suit.

Perusal of the main file reveals that the suit was instituted on 13.04.2006 and defendants have not filed written statements in the case and the

defendants were proceeded ex parte.

The Id. counsel for the non-applicant later on has caused his presence before the court on 17.05.2008 wherein he has prayed that the matter be

referred to arbitrator and to the said application the plaintiff has submitted objections and the application has not been decided. So far no order

with regard to the said application has been passed.

Ld. counsel for the applicant submitted that the arbitration proceedings are not different from the issues which are involved in the present suit. Ld.

counsel for the present applicant submitted that on last date of hearing dated 2.05.2011 the counsel for the non-applicant has misrepresented the

facts by stating that the matter before the arbitration pertains to different matter. Ld. counsel for the applicant submitted that the same matter is

involved in the present suit and the arbitrator has initiated the proceedings with regard to the same subject matter. So the matter is identical and is

not different from the issue. He prayed that the application be allowed and proceedings before arbitration may be stayed. The application is

supported with a duly sworn affidavit.

The non-applicants have not caused their presence in the main suit and have chosen to remain absent. Keeping in view the submissions made by

the Id. counsel I deem it proper that till the other side will file objections to the present application, if the application in hand will not be allowed,

there are chances that the suit of the applicant will become infructuous. So in the interests of justice the application in hand is allowed and the

proceedings before the arbitration with regard to the matter titled M/s ACE Enterprises v. Union of India and Ors. is stayed till the objections

from the other side is filed.

A copy of the aforesaid interim order so passed by the trial court was communicated to the Arbitrator who, in turn, passed an order on

24.06.2011 adjourning the proceedings sine die with liberty to the claimant for revival of the arbitration proceedings as and when the stay order

granted by the court of Judge Small Causes, Srinagar, was vacated.

3. Subsequently, the defendants in the suit made an application before the Arbitrator on 04.11.2011 seeking recall of the order dated 24.06.2011

on the ground that the interim order dated 22.06.2011 passed by the civil court was in civil suit titled M/s ACE Enterprises v. UOI and others

and that the Arbitrator had not to enter upon any dispute which was the subject matter in the suit. The Arbitrator, by order dated 16.09.2011,

allowed the application, expressing the view that there was no direction to him to stay the proceedings in the arbitration proceedings.

4. The petitioner approached the trial court with a contempt petition against the respondents herein which was tried, heard and dismissed by the

learned Sub-Judge (CJM), Srinagar, vide order dated 06.11.2013., holding as under:

The proceedings of the arbitration continued by the Arbitrator, is based on the understanding of the Arbitrator and the learned counsel for the

defendants as to the correct import of the order dated 22.06.2011. The said understanding arrived at, though is borne out from the facts and

circumstances pertaining to the controversy, cannot be construed as wilful and deliberate attempt on the part of counsel for parties involved, to

flout the order of the court dated 22.06.2011. The arbitration proceeding is an independent and statutory remedy available under the provisions of

Jammu and Kashmir Arbitration Act, 2002. The provisions of said Act have overriding effect over the general laws. Exercise of statutory remedy

and proceedings under the special act, cannot be scuttled in ordinary course of events. Only if the statute provides for such exercise of power by

the civil court, the civil court can enter into the domain of such jurisdiction, that too in limited sphere.

The exercise of jurisdiction by the Arbitrator, available under the provisions of Jammu and Kashmir Arbitration Act, advise rendered by the

learned counsel representing the defendants in the court or before the Arbitrator, and proceedings initiated by any party in exercise of statutory

right, cannot be construed as flouting of the order of the civil court or wilful or deliberate violation of the order, unless the violation is clear,

emphatic and apparently wilful and deliberate, aimed at defeating the order passed by the court. From the nature of the order passed by the court

of Sub-Judge/Judge Small Causes Court, Srinagar, and the facts and circumstances pertaining to the case, I find no flouting or violation of the

order dated 22.06.2011 by the persons named in the contempt application. No justifiable and sufficient ground exists for proceeding against the

said named persons for contempt of court. Accordingly, the contempt proceedings are dropped against the said named persons. Application is

dismissed. Record of application be made part of suit file on completion.

5. It is this order which is challenged in this petition under Section 104 of the Constitution of Jammu and Kashmir read with Article 227 of the

Constitution of India, inter alia, on the grounds that the trial court has exercised such jurisdiction as was not vested in it in law; that the trial court

grossly mis-appreciated the factual gamut of the contempt matter; that a case of wilful disobedience of court order dated 22.06.2011 is fully borne

out by the records; that the trial court has had an erroneous view about the scope of the stay order; that the trial court has given an impression that

statutory motions have an overriding effect on general law.

6. Despite notice, the respondents did not choose to file any objections. By order dated 15.12.2014, six weeks' time was granted to them for filing

objections and it was ordered that in case of default, their right to file the same shall be deemed closed. However, no objections were filed.

Resultantly, the petition was admitted to hearing by order dated 19.03.2015 on which date the respondents had gone unrepresented. Post-

admission notice was served on the respondents and they were duly represented before the Registry by Mr. Anil Bhan through his Clerk.

However, again they chose not to file any reply despite the matter having come up before the Court on several occasions after its admission.

However, Mr. Bhan, learned counsel for the respondents, on 30.11.2015 instead of seeking any further opportunity to file reply, proceeded to

make his submissions. Consequently, the matter was finally heard. The right of the respondents to file reply affidavit stand thus waived.

7. Having heard the learned counsel for the parties, I have perused the material on record and considered the matter.

8. The learned counsel for the parties made an endeavour to put across their respective arguments for and against the proposition that contempt

was committed by the respondents and consequently the validity or otherwise of the impugned order passed by the trial court. In other words, they

made their submissions mostly touching the merits of the case. One needs to bear in mind that contempt proceedings are essentially a matter which

concern the administration of justice and are intended to be a protection to the public whose interests would be very much affected if by the act or

conduct of any party, the authority of the court is lowered and sense of confidence which people have in the administration of justice by it is

weakened. Contempt jurisdiction is not to be invoked for redress of grievances.

9. This Court in this petition is not sitting in appeal over the order passed by the learned trial court, nor is this a writ petition under Section 103 of

the Constitution of Jammu and Kashmir read with Article 226 of the Constitution of India. This, as mentioned at the very outset of this judgment, is

a petition filed under Section 104 of the Constitution of Jammu and Kashmir read with Article 227 of the Constitution of India. If this Court had the

jurisdiction to sit in appeal over the impugned order and proceed to legally analyse it on the touch stone of established law, given the reasoning

recorded therein by the learned Sub-Judge (CJM), it would not withstand the scrutiny of law even for fraction of a second.

10. In terms of the aforesaid two provisions of the two Constitutions, namely, Section 104 of the Constitution of Jammu and Kashmir and Article

227 of the Constitution of India, this Court has the power of general superintendence to keep the subordinate courts within the bounds of their

authority, to see that they do what their duty requires them to do and that they do it in a legal manner. This power does not involve the

responsibility for correctness of their decisions either on fact or on law. It has been laid down by the Supreme Court that the power of

superintendence is not to be exercised unless there has been an unwarranted assumption of jurisdiction, not vested in a court or tribunal; gross

abuse of jurisdiction or an unjustifiable refusal to exercise jurisdiction vested in a court or tribunal. It has been clarified that if only there is a flagrant

abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice,

power of superintendence can be exercised. This is a discretionary power to be exercised by the Court and cannot be claimed as a matter or right

by a party. Reference in this connection may be made to the judgment of the Supreme Court in *Shalini Shyam Shetty v. Rajendra Shankar*

Patil, (2010) 8 SCC 329. Therein it was also laid down that unless there is any violation of some jurisdictional error, the application under Article

227 is not maintainable.

11. In context of the jurisdiction exercisable by this Court under Section 104 of the State Constitution and Article 227 of the Constitution of India,

the real question that arises for consideration in the instant case is whether the learned Sub-Judge (CJM), Srinagar, had the jurisdiction to pass the

impugned order. I am conscious that there is no appeal available under the Contempt of Courts Act against an order or decision dismissing a

contempt petition, and one of the reasons in that context being that this jurisdiction is not to be invoked by a party for the redress of his grievances.

12. Admittedly, the impugned order has been passed by the learned Sub-Judge in a contempt petition filed by the petitioner. The Jammu and

Kashmir Contempt of Courts Act, 1997 (Act No. XXV of 1997) (for short, Contempt of Courts Act) was enacted to define and limit the power

of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto. There is no provision in this Act to empower a

subordinate court to punish contempt of itself. However, Section 10 of the Contempt of Courts Act vests with the High Court the power to punish

contempt of subordinate courts. It says that the High Court shall have and exercise the same jurisdiction, powers and authority in accordance with

the same procedure and practise, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself;

provided that the High Court shall not take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where

such contempt is an offence punishable under the Ranbir Penal Code, 1989. Thus, the law provides that if there is contempt of any court

subordinate to the High Court, it is the High Court alone which has the power to punish for such contempt. Essentially, therefore, a court

subordinate to the High Court cannot take cognizance and initiate proceedings to punish for contempt of itself, the question of conducting trial of an

application for contempt and taking a decision thereon is far remote.

13. It may be observed here that it is not that the courts subordinate to the High Court do not have any power to punish a person for disobedience

of its interim orders. Order 39, Rule 2A of the Code of Civil Procedure provides for the consequences of disobedience or breach of injunction. It

provides that in the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on

which the injunction was granted or the order was made, the court granting the injunction or making the order or any court to which the suit or

proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such

person to be detained in the civil prison, for a term not exceeding three months unless in the meantime the court directs his release. Thus there

exists a special provision enacted by the legislature in the shape of Order 39, Rule 2A CPC which provides for punishment for disobedience of the

orders of injunction and to maintain the dignity of the courts subordinate to the High Court. In fact, the Supreme Court in *Food Corporation of*

India v. Sukh Deo Prasad, (2009) 3 SCC 665 has held that the power exercised by a court under Order 39, Rule 2A CPC is punitive in nature

and akin to the power to punish for civil contempt under the Contempt of Courts Act.

14. Since the subordinate courts do not have the jurisdiction to take cognizance of contempt of itself, or initiate proceedings on a contempt petition

or try it, it cannot proceed to decide it finally. In the instant case, the learned Sub-Judge has not only taken cognizance but has proceeded to

initiate, and conducted, proceedings thereon and finally decided it. Thereby the learned Sub-Judge has assumed a jurisdiction, not vested in it

under law.

15. It may be observed here that the High Court in exercise of its power under Section 23 of the Contempt of Courts Act has framed the rules

called ""The Rules, to Regulate Proceedings for Contempt of the Subordinate Courts and the High Court of Jammu and Kashmir, 1998"". These

rules have been prescribed to come into force on the date of their publication in the J&K Government Gazette. However, the rules have not yet

been published in the Government Gazette and, therefore, have not come into force. Even under these Rules the subordinate courts do not have

any power to initiate proceedings on a contempt motion made before them. In fact, perusal of rules 3 to 9 thereof clearly demonstrate that such

proceedings can be taken only by the High Court and proceedings would be initiated: (a) by a petition presented by a party or parties aggrieved;

or (b) by the High Court on its own motion; or (c) in case of any civil contempt of a subordinate court on a reference made to it by that court. Rule

8 of the aforesaid Rules under the heading ""Admission and Notice"", provides that where the Chief Justice or such Judge or Judges of the High

Court to whom the matter is referred under Rule 6 decide/decides that action should be taken under the Act against the alleged contemnor, the

Registrar shall cause the notice to be issued to the alleged contemnor and every notice issued shall be accompanied by a copy of the motion,

petition or reference, as the case may be, etc. This rule clearly demonstrates that notice on the motion, petition or reference of contempt to the

contemnor will go from the High Court, not from the subordinate court. As mentioned above, these Rules have not published as yet and, therefore,

cannot be enforced. But the intendment of the various provisions of the Contempt of Courts Act as understood by the High Court becomes

manifest from a perusal thereof, which is that the subordinate court does not have any power to initiate or conduct contempt proceedings, and

when a motion is made in that regard before a subordinate court, it, as best, can make a reference to the High Court.

16. In light of the above discussions, I am of the considered opinion that, in the instant case, the learned Sub Judge (CJM), Srinagar, having

commended and conducted the contempt proceedings and proceeded to finally decide the same, has acted beyond its bounds, authority and

jurisdiction. This, therefore, is a fit case where this Court exercise its power under Section 104 of the Constitution of Jammu and Kashmir read

with Article 227 of the Constitution of India to keep the subordinate court in question within its bounds, authority and jurisdiction, and to ensure

that outrageous miscarriage of justice meted out in the instant case by resort to a jurisdiction not vested in the Sub-Judge (CJM), Srinagar, is

undone.

17. This petition is, therefore, allowed. The impugned order dated 06.11.2013 passed by the Sub-Judge (CJM), Srinagar, in File No.

226/Misc titled M/s ACE Enterprises v. R.K. Arora and Ors. is set aside with direction to the court concerned to act in the matter in

accordance with law.

18. During the course of arguments of this case, the learned counsel for the petitioner brought it to the notice of the Court that the Arbitrator

appointed in violation of the ad-interim orders of the trial court has ultimately concluded the proceedings and passed the final award against the

interests of the petitioner. Pending decision in the contempt petition in terms of applicable laws, there shall be stay of final award. It hardly needs a

mention here that in the event it is found that there has been a violation of the interim order of the trial Court, the appointment of the Arbitrator and

the proceedings conducted by him together with any award passed by him would be rendered non-est in the eyes of law.

19. Registrar Judicial to send down the court below record immediately. Parties are directed to appear before the Court below. The court below

shall summon the parties for appearance on 28th Dec. 2015.

20. No order as to costs.