Privy Council Appeal No. 4 of 1944

Ali Mahomed Adamalli - - - - - - - *Appellant*

v.

The King-Emperor - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1945

Present at the Hearing:

LORD THANKERTON

LORD PORTER

SIR MADHAVAN NAIR.

[*Delivered by* LORD PORTER]

This is an appeal by special leave from a judgment of the High Court of Bombay dated the 2nd December, 1941, by which the appellant was fined Rs.1,000 for contempt under the Contempt of Courts Act (XII of 1926) in failing to obey an order made by the Acting Chief Judge of the Court of Small Causes at Bombay on the 4th September, 1939. The order had directed the appellant to furnish a statement of particulars of Wakf property under Section 3 of the Mussulman Wakf Act, 1923 (Act No. XLII of 1923) as amended by the Mussalman Wakf (Bombay Amendment) Act, 1935 (Bombay Act XVIII of 1935).

Under that section it is provided that every mutawalli shall furnish to the Court within the local limits of whose jurisdiction the property of which he is mutawalli is situated a statement containing certain particulars.

By section 5 every mutawalli is ordered to prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, containing certain prescribed particulars, within three months after the 31st March next following the date on which the statement referred to in section 3 had been furnished.

Section 6A (1) enacts: " Notwithstanding anything contained in section 3 it shall be competent to the Court on failure of a mutawalli to furnish a statement as required under the said section to require the mutawalli to furnish within such time as the Court shall fix a statement containing all or any of the particulars referred to in the said section ".

Section 6B contains similar provisions on failure of a mutawalli to furnish a statement of accounts under section 5.

Under the provisions of section 6C of the Act—

> " (1) The Court may, either of its own motion or upon the application of any person claiming to have an interest in a wakf, hold an enquiry in the prescribed manner at any time to ascertain—
>
> (i) Whether a wakf is a wakf to which this Act applies;
>
> (ii) Whether any property is the property of such wakf and whether the whole or any substantial portion of the subject matter of such wakf is situate within the local limits of the jurisdiction of the Court; and
>
> (iii) Whc is the mutawalli of such wakf.
>
> (4) On completion of the enquiry provided for in sub-section (1) . . ., the Court shall record its finding as to the matters mentioned in the said subsection. . . ."

By section 6F it is provided that—

" The entries made by the Court in the register of wakfs and the findings recorded under section 6C shall, subject to the provisions of section 6C, be final for the purposes of this Act."

By section 6L of the Act—

" (1) There shall be constituted in each district a Wakf Committee to advise and assist the Court in all matters relating to the registration, superintendence, administration and control of wakfs."

And by section 6M—

" (1) It shall be competent to the Court to refer at any time to the Wakf Committee or any three or more members thereof, for advice, opinion, enquiry, report or recommendation, . . . any matter relating to the registration, superintendence, administration and control of wakfs and in particular any matter relating to

(*a*) the conduct of a mutawalli or a trustee in the administration of a wakf or his fitness to continue as a mutawalli or a trustee;

(*b*) the settlement, cancellation or alteration of a scheme for the administration of a wakf; or

(*c*) the application of the funds of a wakf or any surplus thereof."

By section 10—

" Any person who is required by or under section 3 . . . or 6A . . . to furnish a statement of particulars . . . or who is required by section 5 or Section 6B to furnish a statement of accounts . . . shall if he, without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement . . . be punishable with a fine which may extend to five hundred rupees. . . ."

The appellant is a member of the Dawoodi Bohra Community and is alleged to be mutawalli of certain property, said to be wakf property. This property is in fact situate within the jurisdiction of the Court of Small Causes at Bombay.

On the 27th September, 1938, the appellant was served with a notice, dated the 19th January, 1938, issuing out of the Court of Small Causes at Bombay, requiring him to appear before the Chief Judge of the said Court to show cause, if any, why he had failed to furnish statements of particulars and accounts under sections 3 and 5 of the Act, respectively, in respect of this property.

The appellant resisted the notice on the grounds that the property in question was not wakf property and that he was not its mutawalli. He said that the property had been donated as a gift by his forefathers to His Holiness the Mullaji Saheb in whom it was now vested.

The Chief Judge referred the matter to a Sub-Committee of the Wakf Committee for investigation and report and the Sub-Committee reported that: (A) there was no evidence that the Mullaji Saheb was connected with the property; (B) there was conclusive evidence that the property was managed by the appellant on behalf of his firm for the benefit of the Dawoodi Bohra Jamat without any interference or intervention by the Mullaji Saheb; (C) there was no recorded instance of accounts having been rendered, and balances paid over, to the Mullaji Saheb; (D) the rents received from the property had been credited, and expenses incurred debited, to a special account opened in the books of the appellant's firm; and (E) there was evidence that the property had been used for charitable purposes for twenty or forty years.

The conclusion of the Sub-Committee was that the property in question was a wakf property.

On the case coming up again in the Court of Small Causes, before another Judge of that Court, the Judge, by his Judgment dated the 4th September, 1939, found himself in entire agreement with the conclusion of the Sub-Committee and ordered the appellant to furnish within thirty days from the date of the judgment a statement of particulars under

section 3 of the Act (in the form in Schedule D of the Wakf Rules) and a statement of accounts under section 5 of the Act (in the forms in Schedules A and B of these Rules) in respect of the property, in default of which the sanction required by section 10B (1) would be given for his prosecution for an offence under section 10 of the Act.

The appellant refused to obey this order, and, therefore, in accordance with its terms, sanction for his prosecution was granted on the 9th October, 1939.

At his prosecution in the Court of the Presidency Magistrate, 4th Court, at Girgaum, Bombay, the appellant pleaded " not guilty ", and, in a written statement, denied that the Act applied to the property in question, or that he was its " mutawalli " within the meaning of that word as defined in the Act.

By his Judgment, dated the 9th August, 1941, the Magistrate found the appellant guilty and convicted him under section 10 read with section 6A of the Act for failing to furnish a statement of particulars of the property in question and sentenced him to pay a fine of Rs.201, or, in default, to suffer two months' simple imprisonment. The Magistrate was of opinion that as the findings of the Judge of the Court of Small Causes had been recorded under section 6C (4) of the Act, the appellant was precluded by section 6F thereof, from questioning their validity.

Against his conviction and sentence, the appellant appealed to the High Court of Judicature at Bombay. His appeal was heard by a Bench consisting of Beaumont C.J. and Wadia J., who set aside the conviction, ordered refund of the fine imposed (if paid) and remanded the case to the Magistrate for re-trial.

Beaumont C.J. (with whose judgment Wadia J. agreed) was of opinion that the Chief Judge of the Court of Small Causes had no jurisdiction, under section 6M of the Act, to refer the question whether the property was or was not wakf property to the Wakf Committee, that being a matter which could be enquired into only by the Court itself under section 6C; and that it was open to the appellant to say that he did not know that an enquiry under section 6C was being held, or that the Judge of the Court of Small Causes would record findings in respect of matters which would be covered by an enquiry under that section. He concluded this part of his judgment by saying " On that ground we must send the matter back to the learned Magistrate to be dealt with on the basis that there has not been any recorded finding under section 6C."

The learned Chief Justice, however, added at the end of his judgment—

> " There is one other matter which I desire to mention. Experience seems to show that the Dawoodi Bohra Community are very reluctant to accept this Act, and mutawallis of wakfs created by that community are reluctant to render accounts. We are not, of course, concerned with the merits of any question of that sort. All that the Court has to do is to see that the law is enforced. Now, here we have a specific order made apparently under section 6A directing certain particulars and accounts to be delivered by the accused within a certain fixed period. That order has been disobeyed. On the face of it that seems to show that the accused has been guilty of contempt of the Court of Small Causes, and that is a matter which this Court may deal with under the Contempt of Courts Act, 1926. The matter has, of course, not been considered up to the present moment; but we propose to serve notice upon the accused and upon the Public Prosecutor to show cause why the accused should not be committed to prison, or otherwise dealt with, under the Contempt of Courts Act, for his contempt in having disobeyed the order made by the Acting Chief Judge of the Small Cause Court on 4th September, 1939, directing him to furnish within thirty days from the date of the order a statement of particulars under section 3 (in the form in Schedule D) and a statement of accounts under section 5 (in the form of Schedules A and B) of the Mussalman Wakf Act in respect of the wakf property at Falkland Road, C.S. No. 170 of Tardeo Division ".

By section 2 (1) of the Contempt of Courts Act, 1926 (XII of 1926), a High Court of Judicature in India established by Letters Patent (the High Court at Bombay was so established) has and exercises the same jurisdiction, powers and authority, in accordance with the same procedure

and practice, in respect of a contempt of court subordinate to it, as it has and exercises in respect of contempts of itself, except that section 2 (3) provides that no High Court shall take cognizance of a contempt of a subordinate Court, where such contempt is an offence punishable under the Indian Penal Code.

By section 3 of the said Act, save as otherwise provided by any law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to Rs.2,000 or both.

In accordance with the directions of the High Court a notice was issued out of that Court and served upon the appellant requiring him to appear and show cause why he should not be committed to prison or otherwise dealt with under the Contempt of Courts Act, 1926, for his contempt of the Court of Small Causes at Bombay caused by his disobedience to the order of that Court, dated the 4th September, 1939.

The contempt proceedings which followed came up before Beaumont C.J. and Wadia J., who by Judgment dated the 2nd December, 1941, found the appellant guilty of contempt of the Court of Small Causes and imposed a fine of Rs.1,000 upon him, to be paid into Court within one week, in default of payment of which the notice to show cause was to be restored to the List.

In the course of his judgment the Chief Justice said:—

> " The respondent [the present Appellant] has refused, and still refuses, to obey the order. His contention is that the order was wrong, because the property in respect of which it was made is not wakf property. But if that was his contention, he could have filed a suit in the High Court for a declaration to that effect and applied for a stay of the order of the Small Cause Court. He did not do that, and the order has been in force, and has been disobeyed for over two years. He also says that he understood from the direction to prosecute in default of compliance with the order, that that was the only penalty which he would incur. We have, however, offered him further time in which to comply with the order, but he says, through his Counsel, quite definitely, that he does not intend to comply with the order.
>
> " As this is the first case of the kind which has come before the Court, we do not propose to send the respondent to prison, without the option of paying a fine. But we wish to make it perfectly clear that orders of the Court are to be obeyed, and in future when the Chief Judge of the Small Cause Court makes a specific order under section 6A of the Wakf (Amendment) Act directing accounts to be furnished within a limited time, and that order is disobeyed, this Court will not hesitate to enforce obedience to the order by sending the disobeying party to prison, where he may remain for a period not exceeding six months under the Contempt of Courts Act ".

As a consequence of this Judgment, on the 10th March, 1942, the Public Prosecutor for Bombay applied to the Presidency Magistrate, 4th Court, Bombay, for leave to withdraw the charge against the appellant under section 10 read with section 6A of the Act, which had been remitted by the High Court to the Presidency Magistrate, by its order of the 12th November, 1941.

This leave was granted and the appellant was accordingly acquitted of the charges under section 494 (*b*) of the Criminal Procedure Code.

Against the judgment and order of the High Court, dated the 2nd December, 1941, the appellant applied to His Majesty in Council for special leave to appeal which, by an Order-in-Council, dated the 6th August, 1942, was granted to him.

The present appeal to His Majesty in Council is accordingly against the above mentioned judgment and order of the High Court dated the 2nd December, 1941.

As to this matter, their Lordships would observe in the first place that there is still in existence and in force the order of the Court of Small Causes dated the 4th September, 1939, which has never been appealed or set aside and which the appellant has refused and neglected to obey. *Prima facie* he is, as the High Court has pointed out, in contempt.

Three objections, however, are taken to the order of the High Court.

(1) It is said that the remedy of committal for contempt of Court is arbitrary and unlimited and should be most jealously and carefully

watched and should only be exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.

This contention is in substance a repetition of the language of Sir George Jessel M.R., in *Clements* v. *Erlanger* (1876) 46 L.J. Ch. 375 at pages 381 and 382.

Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt, but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships would be slow to interfere with that discretion.

But indeed it has not been contended that there has been such disregard; rather it is said that the appellant could have been prosecuted and convicted under the Wakf Act if proper steps had been taken to establish before the learned Magistrate that the appellant was mutawalli of wakf property, and that, in those circumstances, the arbitrary remedy of committal should not have been adopted. On this matter their Lordships agree with the observations of the learned Chief Justice already quoted as to the necessity of obedience to the orders of the Small Cause Court and do not accept the contention that the discretion of the High Court was wrongly exercised.

(2) The appellant, however, argued in the second place that the Court had no discretion in the matter. If, it was said, there is, in the case of an offence created by statute, procedure for punishment prescribed, that procedure should alone be followed and committal for contempt should not be resorted to for inflicting collateral or additional punishment. The argument was put both as a matter of right and of discretion.

As to discretion their Lordships have nothing to add to what they have already said. The contention however that a Court cannot commit for contempt if any other remedy exists is novel and no authority to that effect was quoted, or is known to their Lordships.

The argument presented in the past to the Court, when a question of this kind has arisen, has been, not that the existence of another remedy precludes the application of the remedy of attachment but that if there be two remedies, one by indictment and the other by committal for contempt, the former ought to prevail inasmuch as it is more desirable that these matters should be determined by a jury than by the Court summarily. Such an argument was presented in *R.* v. *Almon* (1765) Wilm. 243, but did not prevail. No doubt the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. The Court may, therefore, consider that after two years of disobedience a heavier fine than that permitted by the Wakf Act should be imposed, or in a proper case that imprisonment should be awarded.

An argument was at one time presented to their Lordships based upon Section 26 of the General Clauses Act which runs as follows:—

> " When an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence ".

Having regard to their Lordships' view it is not necessary for them to decide whether the section applies or not. If it did their Lordships would point out that inasmuch as the prosecution has now been withdrawn the appellant will suffer only one punishment, viz., a fine for his contempt and will not be punished twice.

Finally it was said that by reason of the provisions of the Contempt of Courts Act, 1926 (Act No. XII of 1926), the High Court had no jurisdiction to punish contempts of the orders of the Court of Small Causes.

Section 2 (1) of that Act provides that—

> " Subject to the provisions of sub-section (3) the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice in respect of contempts of courts subordinate to them as they have and exercise in respect of contempts of themselves."

This subsection would if it stood alone give the High Court the authority required, but it is qualified by the terms of subsection (3) which is said to take away the jurisdiction of the High Court in the present case.

Subsection (3) reads as follows—

> " No High Court shall 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 Indian Penal Code."

The appellant relied upon this sub-section and contended that the contempt of which he was found guilty was an offence punishable under the Indian Penal Code. He maintained therefore that the High Court had no cognizance of it.

To this contention two answers were made. (1) It was said that upon its true construction the sub-section only prohibited the High Court from dealing with offences punishable under the Code as contempt and that there is no provision in the Code making this particular offence punishable as contempt. The view that sub-section (3) has reference only to cases where the Indian Penal Code empowers the Court to punish for contempt as contempt appears to have commended itself to some of the Courts of India (see *Kaulashia* v. *King-Emperor* (1932) I.L.R. 12 Pat 1, and *Jnanendra Prasad Bose* v. *Gopal Prasad Sen* (1932) I.L.R. 12 Pat. 172).

Having regard to their Lordships' view that the contention that the contempt of which he was found guilty was an offence punishable under the Indian Penal Code is unsound for the reasons hereafter given, their Lordships do not find it necessary to determine this matter. (2) Secondly, however, it was maintained that the appellant had not committed an offence punishable under the Indian Penal Code. That he had committed an offence against the Mussalman Wakf Act was admitted, but it was said that that is not enough: to take away the High Courts' powers some offence against the provision of the Indian Penal Code must be relied upon and none had been established.

The argument was put in this way:—The only section of the Indian Penal Code which could be prayed in aid as creating a crime of which this appellant might be guilty is section 176 which so far as is material runs as follows:—

> " Whoever *being legally bound* to furnish information on any subject to any public servant as such intentionally omits to furnish such information in the manner and at the time required by law shall be punished with imprisonment or fine ".

Italics are used to stress the words to which in their Lordships' view attention must in particular be directed.

It is common ground (1) that there is in existence a valid order of the Court of Small Causes ordering the appellant to furnish information;

(2) that the order directs that the information be given to the Court;

(3) that a Judge of the Court is authorised to receive it and is a public servant to whom the information is to be given as such; and

(4) that the appellant has intentionally omitted to furnish it.

But the question still remains was he legally bound to furnish it within the meaning which those words bear in the Code. The expression has been defined in section 43 of the Act in these words:—

> " The word ' illegal ' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action, and a person is said to be ' legally bound to do ' whatever it is illegal to him to omit ".

According to this definition the appellant is only legally bound to do what it is illegal for him to omit and it is only illegal for him to omit what is an offence or prohibited by law or is ground for a civil action.

The furnishing of the information required is not prohibited by law—it is enjoined by law—nor does its omission furnish ground for a civil action. Is it then an " offence "?

It is no doubt an " offence " if that word be used in its ordinary meaning, but " offence ", like " legally bound to do " has a technical meaning in the Code. It is defined in section 40 which says:—" Offence denotes a thing made punishable by this Code ". It follows that an act of omission is not an " offence " as that word is used in the Code if it is punishable only under some other enactment.

If then sections 40, 43 and 176 be read together, the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under section 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.

The only conclusion therefore to be derived from this language appears to be that what is punishable under the Code is punishable under section 176 of the Code. The statement is no doubt true but it is not of much assistance in ascertaining what is punishable under the Code. To answer that enquiry one must look elsewhere than to section 176 and if no other section of the Code deals with the matter, then one must conclude that the particular crime may be punishable under some other enactment but it is not punishable under the Code.

It follows in the present instance that though the failure to furnish information is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Indian Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of section 2 (3) of the Contempt of Courts Act.

This conclusion disposes of the last argument presented to their Lordships against the jurisdiction of the High Court to commit for contempt in this case, and as in their Lordships' opinion the other contentions put forward on the appellant's behalf fail also, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

(42698) Wt. 8077—36 170 7/45 D.L. G. 338

In the Privy Council

ALI MAHOMED ADAMALLI

v.

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DELIVERED BY LORD PORTER

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