Dama Seshadri Naidu, J.

Con.Case (C)No.1073 of 2014 S

Dated this the 9th day of January, 2015

REFERENCE ORDER

Introduction:

In his seminal book '*On the Rule of Law, History, Politics and Theory''*, the learned author *Brian Z Tamanaha* observes that the apparent unanimity in support of the rule of law is a feat unparalleled in history and that no other single political ideal has ever achieved global endorsement. Reminding us of the ideological abuse and general over-use of what has now become a contested concept of rule of law, albeit only in some schools of jurisprudence, the learned author has stressed that the principle of 'sovereignty of laws' has subordinated the principle of 'popular sovereignty'.

2. Exasperated at the mounting contempt cases, the erstwhile High Court of Andhra Pradesh, per me, has observed in **A.Suseelamma & Others v. District Educational Officer & Others**[1] thus:

> "It has become a rule, rather than an exception, that a litigant, having obtained an order from a Constitutional Court, is not sure of the order bearing the fruit of relief in actual terms. Every litigant is compelled, under varied circumstances, to knock the doors of the Court repeatedly with the same cause. The insouciant attitude of certain officials has reduced the solemn constitutional power of contempt, as enshrined under Article 215 of the Constitution of India, to that of an execution proceeding under Order 21 of Code of Civil Procedure. Thus, in every second instance of remedial orders given by the High Court, to have the order enforced, the petitioner is required to file a contempt case."

Facts:

3. The petitioner, an Assistant Professor in an aided college, filed W.P.(C)No.25527/2014, ventilating his grievance that the Government, having granted the benefit of enhanced pay, now, after twelve years, is taking steps to withdraw the said benefit. It is his particular grievance that without taking recourse to due process of law, the Government has issued directions to recover from him what is said to be the excess salary paid earlier. Apprehensive of the coercive steps contemplated by the Government in that regard, the petitioner sought an interim direction, which was given on

1 (2014 (4) ALD 537)

30.09.2014 to the following effect:

> "The learned Standing Counsel seeks time to get instructions. The learned counsel for the petitioner has, however, submitted that Exhibit P6 was issued without due process, proposing to withdraw the benefit of pay granted to the petitioner twelve years ago. It is apprehended that, now, the authorities have decided to take coercive steps to recover what is said to be the excess salary paid earlier to the petitioner.
>
> In the facts and circumstances, there shall been interim suspension of Exhibit P6 for a period of 3 weeks."

4. On 10th October, 2014, the petitioner filed the above contempt case. It is the case of the petitioner that on 04.10.2014 he communicated the interim order of this Court to the respondent through e-mail. Apart from that, the petitioner is also said to have physically handed over a copy of the order to the respondent on 06.10.2014. Despite such clear communication as was made by the petitioner, the respondent official, wilfully ignoring the order of this Court, much later in point of time, effected deductions in the petitioner's salary.

5. On 14.10.2014, when the matter was listed for the first time, directing the Registry to show the name of the learned counsel for the respondent, this Court adjourned the matter to the next day, when again it was adjourned to the subsequent day. On 16.10.2014, this Court adjourned the matter by one week; thereafter, on 21.10.2014, the Court adjourned the

matter by one more week. The matter, in course of time, underwent a few more adjournments to enable the learned Government Pleader to have instructions on the matter.

6. After all these adjournments, when I proposed to issue a notice, the learned Government Pleader has requested me to dispense with the presence of the respondent-contemnor. I told the learned Government Pleader that even on instructions he could not deny the violation of the interim direction given by the Court and that no justification was forthcoming in that regard. I accordingly informed the learned Government Pleader that the presence of the accused was going to be in accordance with notice in Form I, and that I could not discern any specific reason to dispense with the presence of the contemnor.

Submissions:

7. In that context, the learned Government Pleader has submitted that a learned single Judge does not have the power to order the appearance of the contemnor and that it is only a learned Division Bench of this Court that has the power in terms of the contempt rules in force. Being not entirely familiar with the Contempt of Courts (High Court of Kerala) Rules ('the Rules' for brevity), I queried further. Lacking the power to order appearance

of the contemnor, and at the same time, in terms of that 'lack of power', being compelled to dispense with the presence of the contemnor, appeared to me to be incongruous and incompatible. Once a learned single Judge does not have the power to order appearance of the contemnor, *ipso facto*, the necessity of dispensing with the contemnor's appearance is a contradiction in terms. When I have expressed the same opinion, the learned Government Pleader has placed reliance on **Jyothilal K. R. v. Mathai M.J.**[2], a judgment rendered recently by a learned Division Bench of this Court.

8. Given the fact that *Jyothilal* (supra) has been rendered by a learned Division Bench, and further given the fact that statutory position regarding the contempt jurisdiction of the Kerala High Court is *apparently* at variance with that of most of the other High Courts, for example High Court of Hyderabad for the States of Telengana and Andhra Pradesh, I requested Dr. Satheesan, the learned Senior Counsel, to assist the Court as the *Amicus Curiae*, in determining the correctness of the submission made by the learned Government Pleader and also the application of the ratio of *Jyothilal*, more particularly in the back drop of the statutory scheme governing the issue.

---

2 2014 (1) KLT 147

9. In fact, the learned counsel for the petitioner and the learned *Amicus Curiae* have elaborately submitted on the issue, referring to a profusion of precedents, all of which have been adverted to at appropriate places in the discussion. Accordingly, before proceeding further to determine the issue, I place on record the Court's appreciation for the able and commendable assistance rendered by the learned *Amicus Curiae*.

Stare Decisis - Irreconcilability:

10. It is elementary that in a judicial system governed by the doctrine of *stare decisis*, a decision rendered by a bench of larger composition squarely binds a bench of smaller composition. It is inadvisable to take recourse to the devise of *per incuriam*, unless the decision of the larger Bench was rendered in ignorance of another decision by a still larger Bench or by the Hon'ble Supreme Court. Nor is it desirable to take recourse to stealth overruling. In that regard, the courts have served a word of caution to protect the judicial propriety and predictability, as well as certainty, that it is always advisable to take as binding the decision of the Bench of the superior strength. The Hon'ble Supreme Court has, however, provided one exception to this principle of *stare decisis*.

11. On the issue of a learned single Judge doubting the correctness

of a decision by a learned Division Bench, a three-Judge Bench of the Hon'ble Supreme Court in **Shri Bhagwan v. Ram Chand**[3] has held thus:

> "18. [I]t is hardly necessary to emphasise that considerations of judicial propriety and decorum require that *if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, needed to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.* It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself."
>
> (emphasis added)

12. A Constitution Bench of the Hon'ble Supreme Court in **Pradip Chandra Parija v. Pramod Chandra Patnaik**[4] held as follows:

> "6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. *But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the*

3 AIR 1965 SC 1767
4 (2002) 1 SCC 1 (at P.4)

> *reasons why it could not agree with the earlier judgment.* If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."
>
> (emphasis added)

13. Later, another Constitution Bench in **Union of India v. Hansoli Devi**[5] followed the same dictum.

Jyothilal - an analysis:

14. Now, I may examine whether the decision of the learned Division Bench in *Jyothilal* (supra) is so irreconcilable as to warrant any reference and thus is required to be placed before the Hon'ble the Acting Chief Justice.

15. In *Jyothilal* (supra), three contempt cases were considered. In all of them, a common issue has been formulated thus: In the absence of any finding to the effect that the appellants-respondents had committed any wilful disobedience of the directions of the Court or had any contumacious conduct warranting initiation of contempt proceedings against them, was there any justification for the learned Single Judge issuing the orders impugned directing appearance of the appellant officials?

16. Indeed, confining to the facts of one case, it is to be stated that,

---

5 (2002) 7 SCC 273

during the course of enquiry--preliminary, it may be called--the contemnor appeared and filed a detailed affidavit. Despite it, he was asked to appear during the next hearing as well. Resultantly, the order of the learned Single Judge was challenged before a learned Division Bench. It is contended that the order of the learned Single Judge compelling personal appearance continuously in a case, despite the interim order getting vacated under Article 226(3) of the Constitution, is without any justification. In its disposition, the learned Division Bench has placed reliance on **State of Gujarat v. Turabali Gulamhussain Hirani.**[6]

17. On merits, the learned Division Bench observed that Rule 6 provides that Division Bench alone can take cognizance of the contempt proceedings, that Rule 8 provides for preliminary hearing and notice when the matter is placed for preliminary hearing before the Division Bench, and that Rule 13 provides for hearing of the case and trial, followed by Rule 15 indicating the procedure for trial. It was further observed thus:

> "20. [T]he learned Single Judge is required to hold a preliminary enquiry, only to find out whether there is or not a prima facie case. He shall not take cognizance in the matter. He directs the matter to be posted before the Division Bench only if he finds that there is a prima facie case. Only after learned Single Judge finds that a prima

6 (2007) 14 SCC 94

> facie case is made out, the petition would be placed before a Division Bench for a preliminary hearing as per R.8 of the Contempt of Courts (CAT) Rules. Again, at the time of preliminary hearing as per sub rule (ii) of R.8, Division Bench also has to satisfy itself whether a prima facie case is made out against the respondent. Only when the Division Bench satisfies that a prima facie case is made out, notice to the respondent shall be issued. When notice is issued to the respondent, it shall be served in the manner specified in the Contempt Rules. On service of notice as per R.10 and the format provided therein, the respondent shall appear in person before the Court on the first day of hearing or when the case stands posted unless he is exempted from such appearance. This exemption to appear must be an order of the Court... In other words, prior to issuance of notice, Division Bench must satisfy that there is a prima facie case and before framing charges, on consideration of the matter, including the reply to be filed by the respondent contemnor, the Division Bench has to ponder over the matter to find out whether a prima facie case is made out or not."

18. In paragraph 21 of the judgment, the learned Division Bench observed that the finding of the learned Single Judge does not preclude the Division Bench from proceeding with the trial as the rules make it clear that Division Bench also has to find out a *prima facie* case at the time of hearing. Issuance of notice to the contemnor by the learned Single Judge to hold a preliminary enquiry is only for a short exercise whether a *prima facie* case is made out or not. Thereafter, in paragraph 22, it is observed that Rules 6 and 9 read together do not make the Division Bench sitting in appeal over the decision of the learned Single Judge from holding a preliminary enquiry.

Eventually, it concludes that it is only a Division Bench which can initiate contempt proceedings and if it finds that no *prima facie* case is made out or if it differs in its opinion from that of the learned single Judge with regard to the *prima facie* case, it can dismiss the contempt petition or drop the proceedings.

19. On the issue of summoning the contemnor, the learned Division Bench observes as follows:

> "22. [T]he decision in *Turabali Gulamhussain Hiram's* case (supra) clearly lays down the proposition that summoning of senior officials like Secretaries and Directors of Government should be done in rare and exceptional cases and only under compelling circumstances. The word moment means 'a particular occasion'. Summoning of respondents to appear in person in order to hold an enquiry as contemplated under second proviso to Rule 6 of the Contempt Rules of the High Court does not require presence of the respondent for the purpose of satisfaction that a prima facie case is or not made out. One has to necessarily remember summoning of Government officials also burdens public exchequer."

20. In para 24 of the judgment, it is further observed thus:

> "24. [A]s contemplated under second proviso to Rule 6, learned single Judge has to find out whether a prima facie case of contempt is made out or not and then refer the matter to a Division Bench which alone can take cognizance and proceed with the matter further. *High Court Rules clearly indicate, after taking cognizance when notice is issued by the Division Bench, unless the respondent contemnor is exempted from personal appearance, he should necessarily appear before the*

> *court. Till then there is no requirement for the appearance of the respondent contemnor especially for the limited purpose of making an enquiry whether a prima facie case is made out to refer the matter to a Division Bench or not."*
>
> (emphasis added)

21. Before examining the procedural parameters prescribed by the Rules, in the back drop of Article 215 of Constitution of India and the Contempt of Courts Act, 1971, the principal statute, it may be requisite to refer to the decision relied on by the learned Division Bench to arrive at the above conclusion.

22. If we examine *Turabali Gulamhussain Hiram* (supra), the facts, as set out in the judgment, though not verbatim, are that the State filed a Criminal Appeal with a delay of 25 days. A learned Judge of the Gujarat High Court, on the application for condonation of delay in filing the appeal, passed the impugned order directing the Chief Secretary and Law Secretary of the Gujarat Government to be personally present before him on 20.04.2007. The explanation offered in the petition was that there was shortage of staff including stenographers in the office of the Public Prosecutor. In that context, the Hon'ble Supreme Court has observed that the learned Judge of the Gujarat High Court was totally unjustified in summoning the Chief Secretary and Law Secretary merely because there

was a delay of 25 days in filing the appeal. The Court has further observed that the same Hon'ble Judge in several other cases also summoned the Chief Secretary to appear before him personally.

23. Now, I may refer to the observations of the Hon'ble Supreme Court in the above factual back drop.

> "7. *There is no doubt that the High Court has power to summon these officials, but in our opinion that should be done in very rare and exceptional cases when there are compelling circumstances to do so.* Such summoning orders should not be passed lightly or as a routine or at the drop of a hat.
>
> xxxxxx
>
> 10. Hence, frequent, casual and lackadaisical summoning of high officials by the Court cannot be appreciated. We are constrained to make these observations because we are coming across a large number of cases where such orders summoning of high officials are being passed by the High Courts and often it is nothing but for the ego satisfaction of the learned Judge.
>
> 11. *We do not mean to say that in no circumstances and on no occasion should an official be summoned by the Court. In some extreme and compelling situation that may be done, but on such occasions also the senior official must be given proper respect by the Court and he should not be humiliated.* Such senior officials need not be made to stand all the time when the hearing is going on, and they can be offered a chair by the Court to sit. They need to stand only when answering or making a statement in the Court. The senior officials too have their self-respect, and if the Court gives them respect they in turn will respect the Court. Respect begets respect."

(emphasis added)

24. It is worthwhile to observe that in *Turabali Gulamhussain Hiram* (supra), the issue has not arisen under the Contempt of Court Act, nor has Article 215 fallen for consideration. The Court has further observed that it cannot be said that under no circumstances and on no occasion should an official be summoned by the Court, and accordingly acknowledged that in some extreme and compelling situation it may be done. In the present instance, the issue is entirely on a different footing. The learned Division Bench has held that under no circumstance is there any need for the presence of the contemnor before the learned single Judge. The question is whether the statutory scheme mandates thus?

The ratio & the Reasoning:

25. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be complete 'law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision

to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their reasoning. (see **CIT v. Sun Engg. Works (P) Ltd.** (1992) 4 SCC 363).

26. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. [Lord Halsbury in **Quinn v. Leathem** (1901 AC 495) quoted with approval in **Balwant Rai Saluja v. Air India Ltd.,** (2014) 9 SCC 407.]

Statutory Scheme:

27. When the statutory scheme is examined, it is clear that notices are issued to the contemnor at three stages. Initially, before the learned single Judge for forming a *prima facie* opinion, or, in other words, at the initial stage enabling the learned Judge to form an opinion. Later, once he forms a *prima facie* opinion, in the event either the contemnor has not

tendered an apology or the one tendered has not been to the satisfaction of the learned single Judge, the case will be referred to a learned Division Bench. Issuing notice for the second time is to enable the learned Division Bench to form a *prima facie* opinion. Assuming that, the learned Division Bench, too, forms a *prima facie* opinion about the contempt, the third occasion arises. This will be the stage when the learned Division Bench takes cognizance of the contempt. Thus arises the need for issuing notice for the third time.

Issue in Perspective:

28. According to *Jyothilal* (supra), when the matter is placed before the learned Division Bench, unless the appearance is dispensed with, the contemnor is required to appear before the Court on every hearing. Now, the issue is whether the Rules *per se* make any such distinction? If they do, whether the contemnor is required to appear before the Division Bench, unless his presence is dispensed with, at pre-cognizance stage or post-cognizance stage or on both occasions?

29. Now, what is required to be examined is while issuing notice either for *prima facie* satisfaction of the learned Single Judge on one hand, or that of the learned Division Bench initially, or during the enquiry by the

Division Bench after taking cognizance of the contempt, on the other hand, has there been any dichotomy of procedure mandated under the Rules?

Discussion:

30. If we examine the constitutional contours of the issue, Article 214 thereof deals with establishment of High Courts for States. Following it is Article 215, which declares a High Court to be a Court of Record. Article 216 speaks of the composition of High Court as comprising a Chief Justice and such other Judges, *à la* the *puisne* Judges. Thus, the High Court as a Court of Record comprises a Chief Justice and other Judges who are appointed to the said Court by the President from time to time. Article 225, which deals with the jurisdiction of the existing High Courts, is not relevant for our purpose, as High Court of Kerala is a post-constitutional High Court.

31. In fact, in **High Court of Judicature at Allahabad v. Raj Kishore Yadav**[7], the Hon'ble Supreme Court, after referring to the Government of India Acts of 1915 and 1935, the precursors of the Indian Constitution, has held as follows:

> "[A] conjoint reading of Section 108 of the Government of India Act, 1915, Section 223 of the Government of

7 (1997) 3 SCC 11

> India Act, 1935 and Article 225 of the Constitution of India makes it clear that every High Court by its own rules can provide for exercise of its jurisdiction, original or appellate, by one or more Judges or by division courts consisting of two or more Judges of the High Courts and it is for the Chief Justice of each High Court to determine what Judge in each case is to sit alone or what Judges of the court whether with or without the Chief Justice are to constitute several division courts."

32. Indeed, the Hon'ble Supreme Court has gone on to observe further thus:

> "Article 215 saves the inherent powers of the High Court as a court of record to suitably punish the contemnor who is alleged to have committed civil contempt of its order. Order might have been passed by any of the learned Judges exercising the jurisdiction of the High Court as per the work assigned to them under the Rules by the orders of the Chief Justice, but once such an order is passed by a learned Single Judge or a Division Bench of two or more Judges the order becomes the order of the High Court. Breach of such an order which gives rise to contempt proceedings also pertains to the contempt of the High Court as an institution. At that stage Article 215 does not operate, but it is only Article 225 read with the Rules framed by the High Court on administrative side and the power inhering in the Chief Justice, of assigning work to the appropriate Bench of Judge or Judges, under Section 108 of the Government of India Act, 1915 read with Section 223 of the Government of India Act, 1935 which would have its full play."

33. In the light of the above ratio, it can safely be concluded that hearing of civil contempt case by a Bench of the High Court other than the one that had passed the order, the non-compliance of which is in issue, is not going to affect the jurisdiction of the High Court as a superior court of

record.

34. Insofar as the Kerala High Court Contempt Rules are concerned, somewhat uniquely, there is a dichotomy of adjudication. It is not the case of transfer of adjudication from one bench to another bench, but, on the contrary, the rules contemplate two-tier adjudication of the same issue with division of proceedings. There does not seem to be any dispute on this count either. The issue is what powers can a learned single Judge exercise while dealing with contempt jurisdiction under Article 215 read with Section 12 of Contempt of Courts Act, 1971 and the Kerala High Court Contempt Rules?

Rules that govern the issue:

35. Not much of controversy having arisen regarding the principal legislation, i.e., the Contempt of Courts of Act, 1971, we may focus on the delegated legislation, the Contempt of Courts (High Court of Kerala) Rules, 1975 ('the Rules' for brevity).

36. Rule 6 concerns itself with taking cognizance to the effect that every proceeding for contempt shall be dealt with by a Bench of not less than two Judges. Inter alia, Rule 6 has a proviso attached to it and it reads thus:

> *"Provided further that where civil contempt is alleged in respect of the judgement, decree, direction, order, writ or other process of a Single Judge, the matter shall be posted before that Judge who shall hold the preliminary enquiry in the matter*. The Judge, if satisfied that no prima facie case has been made out, or it is not expedient to proceed with the matter, may dismiss the petition. *If a prima facie case is made out and unconditional apology is not tendered by the respondent and accepted by the Court, the Judge may direct that the matter be posted before the Bench dealing with contempt matters:* (emphasis added)

37. Proviso to Rule 6 envisages the following steps: (1) the learned Single Judge shall hold a preliminary enquiry in the matter; (2) on such preliminary enquiry, if he is satisfied that no *prima facie* case has been made out, or it is not expedient to proceed with the matter, he may dismiss the petition; (3) if a prima facie case made out, an order to that effect is required to be passed and made available to the respondent; (4) on receipt of the said order, the respondent may or may not tender an unconditional apology; (5) if tendered, the apology ought to be to the satisfaction of the learned Judge; (6) either if it is not to the satisfaction of the Judge or not at all tendered, the Judge may direct that the matter be posted before the Bench dealing with contempt matters.

38. Rule 7, on the other hand, deals with initiation of *suo motu* proceedings. The rule, in fact, mandates that any information other than a

petition under Rule 3 or reference shall, in the first instance, be placed before the Chief Justice on the Administrative side. If the Chief Justice, or such other Judge as my be designated by him for the purpose, considers it expedient or proper to take action under the Act, he shall direct that the said information be placed for preliminary hearing. Rule 7 too has appended to it a proviso, which reads thus:

> *"Provided that if action for Contempt of Court is directed to be taken by any Judge or Judges in any proceedings before the High Court, the same shall be placed before the appropriate Bench."*
>
> (emphasis added)

39. If we remove the passive construction of the above proviso, it perhaps reads thus: If the Chief Justice directs any Judge or Judges to take action for contempt of court in any proceedings…"

Administrative or Adjudicative?

40. Incomprehensible are the following aspects: (1) How a judicial adjudication of an issue whether a person is required to be proceeded against for any contempt can be made by the Hon'ble the Chief Justice on *administrative side*, for to determine the issue whether action is to be initiated or not for contempt of court is not a routine administrative matter, but, on the contrary, a judicial one; (2) how Judge or Judges (as expressed in

the proviso) get *directed* by the Hon'ble the Chief Justice on *administrative side* to decide an issue of contempt.

41. A seven-Judge Bench of the Hon'ble Supreme Court in **SBP & Co. v. Patel Engg. Ltd.**[8] quotes with approval the ratio of the English Court in **Attorney General of the Gambia v. Pierre Sarr N'jie**[9]. In *Patel Engg.*, one of the issues was whether the Chief Justice exercises judicial power or administrative power under Section 11(6) the Arbitration & Conciliation Act, 1996. It pays to quote the ratio of *Pierre Sarr N'jie* as extracted in *Patel Engg.:*

> "In Attorney General of the Gambia v. Pierre Sarr N'jie 1961 App Cas 617 the question arose whether the power to judge an alleged professional misconduct could be delegated to a Deputy Judge by the Chief Justice who had the power to suspend any barrister or solicitor from practicing within the jurisdiction of the court. Under Section 7 of the Supreme Court Ordinance of the Gambia, the Deputy Judge could exercise "all the judicial powers of the Judge of the Supreme Court". The question was, whether the taking of disciplinary action for professional misconduct; was a judicial power or an administrative power. The Judicial Committee of the Privy Council held that a judge exercises judicial powers not only when he is deciding suits between the parties but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. By way of illustration, Lord Dining stated "Suppose, for instance, that a judge finding that a legal practitioner had been

8 (2005) 8 SCC 618
9 1961 App Cas 617

> guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see Myers v. Elman, per Lord Wright). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off."

42. In fact, the Hon'ble Supreme Court has tellingly observed to the effect: (paragraph 8) :

> "[O]nce a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power."

Paradox:

43. The paradox is that under Rule 6, on a complaint, a learned Judge or learned Judges, as the case may be, can *prima facie* decide whether the charge of contempt can be maintained, which is thus a judicial adjudication, but once the same Judge or Judges *suo motu* feel that there is an element of contempt in the action of a party to a *lis* and that it needs to be adjudicated upon, the matter, then, is required to be placed before the Chief Justice on administrative side.

The notice & the Rules:

44. Rule 9 provides for preliminary hearing and notice and it reads as under:

> "9. Preliminary hearing and notice. (i) Every petition, reference, information or direction shall be placed for preliminary hearing before the appropriate Bench.
>
> (ii) (a) The Court, if satisfied that a prima facie case has been made out, may direct issue of notice to the respondent, otherwise, it shall dismiss the petition or drop the proceedings.
>
> *(b) The notice shall be in Form No. 1 and shall be accompanied by a copy of the petition, reference, information or direction and annexures, if any, thereto."*
>
> (emphasis added)

45. Rule 9 concerns itself with twin aspects: preliminary hearing and notice. It is required to be read in conjunction with Rule 6. Firstly, if no *prima facie* case is found, the petition has to be dismissed. On the contrary, if prima facie case is found, the Court, *per* the Judge, shall issue notice to the respondent. The notice shall be in Form No.I.

46. In terms of Rule 6, if *prima facie* case is found, the question of the learned Single Judge undertaking further hearing does not arise. Is one required to conclude that Rule 9 as a whole applies to the hearing before the learned Division Bench, once the matter is forwarded to it by the learned Single Judge? That means, under Rule 6 there is no stage at all for issuing

notice to the respondent, and the satisfaction should be based on the material available on the record. Even in that event, to accept or not to accept the apology, the respondent is required to be put on notice. To expect the respondent to tender an unconditional apology, is it not requisite to hear him before hand? Which is the notice that is required to be issued under Rule 6, if not the one contemplated under Rule 9? These are the questions that press themselves for an answer.

47. If Rule 9 also applies to Rule 6 proceedings, the incongruity is that whenever Form No.I notice is issued, after the *prima facie* satisfaction, a judge is required to pass an order dispensing with the presence of the putative contemnor. Going by *Jyothilal,* when no such power is existing to be exercised by the Judge, the question of his dispensing with it while issuing Form No.I notice is a contradiction in terms.

48. In a conspectus, it may have to be stated, based on the rules discussed so far, there are two types of hearing; namely, preliminary hearing as is evident from Rule 9 by a learned Single Judge, and later 'main hearing' by a learned Division Bench. In both the cases notice is required to be given.

49. Section 11 contemplates coercive steps to be taken once the Court has reason to believe that the respondent has absconded or otherwise

has evaded the service of notice, or has failed to appear in person in pursuance of the notice.

50. Once notice is given, what should be the consequence is provided under Rule 12, which reads as under:

> "12. Appearance of the Respondent. – The respondent shall appear in person before the High Court on the first day of hearing and on such subsequent dates to which the same stands posted, unless, exempted by an order of the Court."

51. Pertinently, Rule 12 only employs the expression 'hearing', which, in fact, can be either preliminary or final. It has made the presence of the respondent before the Court for every day's hearing, unless exemption is ordered by the Court. No doubt needs to be entertained concerning the scope of Rule 14, which, in my considered view, applies exclusively to proceedings before the learned Division Bench, i.e., the main hearing.

Forms of notice:

52. Forms appended to the Rules are as follows: Form No.I – Notice to Respondent; Form No.II – Warrant of Arrest; Form No.III – Warrant of Commitment for Contempt; Form No.IV – Warrant for Attachment of Movables; and Form No.V – Warrant of Attachment by District Collector. Other than Form I, the Rules do not contemplate any

other notice for summoning the respondent. In the same breath it is to be observed that Form I makes the dispensing with the presence of the respondent optional.

53. In my respectful submission, in the light of the above discussion, the decision of the learned Division in *Jyothilal* is irreconcilable with the procedural parameters fixed by the Rules governing the contempt proceedings before this Court.

54. Proceeding further, we can see that Rule 13 deals with the reply of the respondent; Rule 14 with the hearing of the case and 'trial'; and Rule 16 with procedure for trial.

Discretion:

55. In the end, while adjudicating on the discretionary power of a learned Single Judge in determining the need and necessity of the presence of the putative contemnor at an appropriate stage, it needs no reiteration that the presence or dispensation thereof depends on myriad circumstances, and they need no elucidation. At any rate, at least as a matter of apophasis, it is to be stated that no learned Judge revels in insisting on the presence of a party before the Court, nor has the learned Judge the propensity to exhibit the power of the Court at the drop of hat. It is, however, one thing to say that

power is to be exercised, *ex debito justiae*, sparingly, and it is entirely another thing to say that there is total denudation thereof.

56. Suffice it to recall to the mind the adjuration of the Hon'ble Supreme Court in **Amar Pal Singh v. State of U.P.**[10], that a Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A Judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on the use of dignified language and sustained restraint, moderation and sobriety. It is not to be forgotten that independence of the Judiciary has an insegregable and inseparable link with its credibility. Yet, it is a matter of statutory interpretation and, *a fortiori*, the dispensation of justice, that has made me to come to a conclusion, despite my humble endevour to reconcile *Jyothilal* with the regulatory regime of the contempt jurisprudence as practiced in this Court, that *Jyothilal* is incompatible with the terms of the statutory scheme and precedential parameters fixed by the Hon'ble Supreme Court. It thus requires reconsideration by a Bench of appropriate strength as is to be determined by the Hon'ble the Chief Justice.

Conclusion:

10 (2012) 6 SCC 491

57. In the facts and circumstances, though discussion has been made both on Rules 6 and 7 of the the Contempt of Courts (High Court of Kerala) Rules, in the present factual circumstance, any reference to Rule 7 can only be an academic exercise, which is, acceptably, impermissible. Rule 6 and the other concomitant issues alone fall for consideration. Thus, I formulate the following question for reference:

Issue for Reference:

Whether *Jothilal* (supra) has laid down the correct law in concluding in paragraph 24 of the judgment while declaring: "[H]igh Court Rules clearly indicate, after taking cognizance when notice is issued by the Division Bench, unless the respondent contemnor is exempted from personal appearance, he should necessarily appear before the Court. Till then there is no requirement for the appearance of the respondent contemnor especially for the limited purpose of making an enquiry whether a prima facie case is made out to refer the matter to a Division Bench or not."

Accordingly, I direct the Registry to place the matter before my Lord the Hon'ble the Acting Chief Justice for consideration and appropriate action.

Dama Seshadri Naidu, Judge

tkv