

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
(CIVIL JURISDICTION)

BETWEEN:

1. ROHAN PAHLAD, formerly of Lot 15 B Albion Front, Corentyne, Berbice, now residing at 88-42 72nd Place Woodhaven, New York 11421, United States of America, represented herein by his duly constituted attorney SEERINAUTH HARILAL, of Lot 14 B Albion Front, Corentyne, Berbice, agreeably with Power of Attorney No. 676 of 2010 (Berbice).
2. NETRAM PAHLAD
3. GOBIN PAHLAD, both formerly of Lot 15 B Albion Front, Corentyne, Berbice, now residing at 88-42 72nd Place Woodhaven, New York 11421, United States of America represented herein their duly constituted attorney SEERINAUTH HARILAL, of Lot 14 B Albion Front, Corentyne, Berbice, agreeably with Power of Attorney No. 677 of 2010 (Berbice).
4. SOBHANLALL PRAHALAD
5. PARBATTY VYTHILINGUM
6. DONIE PAHLAD

7. DEVIKA SINGH, all of 88-42 72nd Place Woodhaven, New York 11421, United States of America, represented herein their duly constituted attorney SEERINAUTH HARILAL, of Lot 14 B Albion Front, Corentyne, Berbice, agreeably with Power of Attorney No. 680 of 2010 (Berbice).

Plaintiffs/Applicants

-and-

1. GANESH PERSAUD PRITIPAL
2. REGISTRAR OF LANDS

Defendants/Respondents

CHANDRADAI PRITIPAL

Added Respondent

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Adrian Anamayah for the Applicants

Ms. Kim Kyte for the First Named Respondent and Added Respondent

Heard November 9th 2016, January 9th & 30th, February 16th, March 1st and May 8th 2017

RULING

BACKGROUND

The Applicants herein instituted High Court Action numbered 93 W/S of 2010 in the High Court of the Supreme Court of Judicature in the County of Berbice on July 21st 2010 claiming *inter alia* a Declaration that the Plaintiffs (Applicants herein) are the lawful owners and entitled to possession of Parcel 29 (Lot 15B), Albion Front, Corentyne, Berbice with the building thereon and an injunction restraining

the First Named Defendant (First Named Respondent herein) by himself, his servants and/ or agents from entering or re-entering and/ or remaining on the Plaintiffs' property or in any way interfering with the Plaintiffs' possession of the said lot.

A trial was conducted in the matter and on December 30th 2014 Justice Bovell-Drakes granted judgment in favour of the Applicants against the First Named Respondent.

The First Named Respondent appealed the judgment to the Court of Appeal on January 29th 2015 (Civil Appeal No. 8 of 2015) and applied for a stay of execution of the said judgment on February 9th 2015.

On March 18th 2015 Cummings-Edwards JA (as she then was) made the following orders in Chambers;

The Appellant hereby consents to give up possession of the premises described as parcel 29 Albion Front, Corentyne, Berbice and to close the beer garden and parlour situate on the premises within one (1) week from the date hereof.

IT IS FURTHER AGREED that the remaining businesses on the premises namely, grocery, ice and water businesses will be operated by CHANDRADAI PRITTIPAL the wife of the Appellant until the hearing and determination of the appeal.

The Appellant undertakes not to construct any building on the property and or establish any new investment or business on the said premises. The Appellant further undertakes not to mortgage, sell, alienate or dispose of the said premises pending the hearing and determination of the appeal. The Respondent undertakes not to dismantle or remove any structures erected on the property pending the hearing and determination of the appeal.

On January 11th 2016 a consent order permitting that order to be amended was made Roy JA in Chambers allowing the insertion of the following penal clause at the foot of the order;

If you the above named Appellant neglect to obey this order you will be liable to process of execution for the purpose of compelling you to obey the same Order.

That order was entered on January 18th 2016 and served on the First Named Respondent and Added Respondent herein by Marshal Pompey, a Marshal of the Supreme Court, on April 14th 2016.

On September 2nd 2016 the Applicants caused the Motion herein to be filed praying for an Order committing First Named Respondent and Added Respondent for wilfully disobeying the orders of Cummings-Edwards JA and Roy JA by;

- I. Failing/ refusing to give up possession and remaining in occupation of premises described as parcel 29 (lot 15B), Albion Front, Corentyne, Berbice from the 25th of March, 2015 to the present time.
- II. Continuing to operate the beer garden and parlour situated on the said premises from the 25th of March, 2015 to the present time.
- III. Operating and opening the beer garden and parlour and hosting a “stag beer” party on the premises on the 14th of August 2016.
- IV. Executing construction works on the said property by breaking the existing structure and adding new structures during the period January 2016 to May 2016.

A trial was conducted by this Court commencing November 9th 2016.

THE LAW

The aspect of contempt concerned with the enforcement of orders of court is known as civil contempt and although it is known as civil contempt it has been said to be of a criminal nature and so many of the rules that apply when seeking to prove an accused guilty of a crime, apply when seeking to show that a defendant has committed civil contempt and therefore, additionally, any rules safeguarding the alleged contemner’s rights must be strictly complied with.

The power of contempt, though drastic, is necessary not just as a means of enforcing a court order but also to maintain the authority of and respect for the court and

therefore the sanctions that can be imposed are not only coercive but are also punitive.

An injunction is a form of order made by the court expressly enjoining a party either to do a particular act, in which case it is a mandatory injunction, or directing a party to refrain from doing a particular act, in which case it is a prohibitory injunction.

It is imperative that injunctive orders be implicitly observed, as was aptly stated by Wood V-C in *Spokes v Banbury Board of Health* (1865) LR 1 Eq 42 @ 48; “*the simple and only view is that an order must be obeyed ... So long as it exists, the order must be obeyed, and obeyed to the letter.*”

Because strict observation of the rules safeguarding the alleged contemnor’s rights must be observed, Courts will only punish a person for contempt upon proof beyond a reasonable doubt of the following elements;

1. It must be established that the terms of the injunction are clear and unambiguous;
2. It must be shown that the defendant/s had proper notice of such terms and that endorsed upon such order is a penal clause in accordance with Order 35 rule 5 of the Rules of the High Court; CAP 3:02;

The requirement for such an endorsement is, in the words of Luxmore J in *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 @

97, “*to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences.*”;

3. There must be clear proof that the terms have been broken by the defendant/s and the standard of proof is **beyond a reasonable doubt**;

As per Lord Denning MR in *Re Bramblevale* [1969] 3 All ER 1062, “*A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.*”;

4. The *mens rea*, as required in each case must be established;

Section 2 (a) of the Contempt of Court Act; CAP 5:05 of the Laws of Guyana provides that contempt of court includes “*the **wilful** disobedience to, or disregard for, any judgment, decree, direction or order of a court.*” and section 2 (b) further provides that contempt of court includes “*the **wilful** breach of an undertaking given in a court.*”

It must be noted that this differs from the applicable law of England and Wales where the word “wilful” is absent from that jurisdiction’s legislation. Therefore in Guyana it must be proven that the act that allegedly resulted in a

breach of the Order of Court was voluntary and intentional though not necessarily malicious.

Intention is generally proven from the evidence of the action and the manner in which the action was carried out by the alleged contemnor.

THE FACTS

The Applicants' case was based on the evidence of Seerinauth Harilal, the duly constituted attorney of the Applicants and Royden Pompey, a Marshal of the Supreme Court and the Respondent and Added Respondent testified in their defence.

The Respondent accepted that he was present in the Court of Appeal when the order/ undertaking was made before Cummings-Edwards JA and further the evidence of Marshal Pompey that he served the Respondent and the Added Respondent with the Orders of Court of Cummings-Edwards JA and Roy JA by Marshal Pompey on April 14th 2016 was not disputed or challenged in any way.

The evidence of Mr. Harilal shows that the Respondent was at the premises at parcel 29, Albion Front, Corentyne, Berbice on numerous occasions and the Respondent did not dispute this. The Respondent in his defence sought to explain his presence.

The Respondent testified that his wife, the Added Respondent, now manages the businesses that are permitted to operate at parcel 29 Albion Front, however, since the premises does not utilise the facilities of GPL or GWI, the premises is powered

by a generator and whenever there is a problem with the generator or any other machine at the location she would call him and he would go and fix the problem.

Mr. Harilal testified that a Stag beer party was held at parcel 29 Albion Front on August 14th 2016.

Mr. Harilal also testified that persons were sitting at a table on the premises at parcel 29 Albion Front and there were beer bottles on the table and also tendered photographs showing this (Exhibits "J1 to J5").

Both the Respondent and Added Respondent testified that the beer garden has not been in operation since the order of Cummings-Edwards JA and further they have no knowledge of when the event depicted in Exhibits J1 to J5 would have occurred.

They both testified that Ansa McAl, the distributors of Stag beer in Guyana, did have a promotional event in front of parcel 29 Albion Front, on the road, and they, the Respondent nor the Added Respondent, were not involved in any way with the event.

Mr. Harilal accepted that he has not seen beer sold at the premises and he has never bought beer at the premises.

Mr. Harilal testified that he saw persons mixing cement in the yard of parcel 29 Albion Front, putting the cement into wheel barrows and pushing it into the ice factory which is in the rear of parcel 29 Albion Front. He testified that he also saw electric planes and electric saws.

Mr. Harilal accepted that he did not actually see any construction works done and neither did he see any new structure erected on the premises.

ANALYSIS

ISSUE I

Did the Respondent fail/ refused to give up possession and remained in occupation of premises described as parcel 29 (lot 15B), Albion Front, Corentyne, Berbice from the 25th of March, 2015 to the present time?

The Respondent consented to give up possession of the premises described as parcel 29 Albion Front.

Possession is defined as the fact of having or holding property in one's power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others. [Black's Law Dictionary, Ninth edition]

The fact that the Respondent is physically present at various times at the property does not in itself establish in any way that the Respondent is in possession of the property, it does not demonstrate that he is dominion or control over the property.

Further his evidence that he was there merely assisting his wife has not been negated in any way and if in fact he is there assisting his wife, that in fact would tend to show that his wife, the Added Respondent, is the one in possession of the property.

The fact that the order of court goes on to speak of the remaining businesses being operated by the Added Respondent shows that possession as used in the order contemplated possession as per the afore-stated definition.

If this were not so then that aspect of the order of court would be ambiguous and therefore unenforceable.

The Court does not find the fact that the Respondent's address was published as 15B, Albion Front on February 5th 2016 pursuant to the requirements of section 51 of the Local Authorities (Elections) Act; CAP 28:03 of the Laws of Guyana (Exhibit "E") to be proof beyond a reasonable doubt that the Respondent was in possession of the property.

Section 44(3) of the Local Authorities (Elections) Act requires the candidate's address to be listed.

Address is defined as "the place where mail or other communication is sent."
[Black's Law Dictionary, Ninth edition]

The Respondent testified that that was the address in the system because he used to live there and it was not changed, not that he give them that as his current address.

Even if the listed address is taken to be where a person lives, this would still not be proof that the Respondent was in legal possession of parcel 29 Albion Front since a person can be resident, but not in possession of a property, exercising dominion, over that property.

Though, by the wording of the Notice of Motion it seems that this was also a ground advanced for holding the Added Respondent in contempt of Court, the Court fails to see how this aspect of the Order of Court could have been breached by the Added Respondent.

ISSUE II

Did the Respondent and/ or the Added Respondent continue to operate the beer garden?

Proof that the beer garden was in operation at any time would necessarily be proof that the beer garden was physically open and functional and items were sold from there.

Mr. Harilal was clear that he could not testify to that, he could not even see the beer garden from where he was. He never even went to the beer garden to be able to testify that he saw it open.

The Court is being asked to draw inferences from Exhibits “J1-J5” that the beers being consumed by those persons were purchased at the beer garden, not just that the beers were purchased at that premises but at that beer garden, since the Order of Court does not prohibit any of the other businesses being operated on the premises from selling beer.

The law requires the Court to draw the inference most favourable to the Accused (in this case the Respondent and Added Respondent) where two inferences of equal weight can be drawn.

Similarly, even if Mr. Harilal's evidence of a Stag beer party is accepted, there is no further evidence to show that such an event was being operated in collaboration with the beer garden.

The Added Respondent testified that it was on the road. It could even have been in collaboration with the grocery business.

It simply has not been proven beyond a reasonable doubt that the beer garden was/ is being operated.

Further, the Order of Court does not stipulate how long the beer garden must remain closed once it was closed within a week from the making of the Order, March 18th, 2015.

The Order was a mandatory order to close the beer garden directed at the Respondent and his failure to close the beer garden could not, in any event, make the Added Respondent liable for a breach of that aspect of the Order.

ISSUE III

Did the Respondent and/ or Added Respondent execute construction works on the property by breaking the existing structure and adding new structures?

Mr. Harilal's testimony is conclusive in this regard; "*I did not actively see construction work being done.*"; "*I did not see any construction as I stated in paragraph 21.*"; "*I did not see any new structure in the yard.*"

ISSUE IV

In addition to the foregoing, the Court finds that Chandradai Pritipal has been improperly added as a party to HCA 93 W/S of 2010 (Berbice).

Counsel for Chandradai Pritipal argues that adding her is improper since, as per the record, there has been no compliance with Order 14 rules 14 or 15 of the Rules of the High Court; CAP 3:02 of the Laws of Guyana.

In fact, since this matter is currently engaging the Court of Appeal those rules are not applicable and in fact at this stage she cannot be added to this action at all.

That is not to say that she cannot be sanctioned for contempt of an Order of Court.

Lindley LJ made it very clear that a person aiding and abetting the breach of an injunctive order can be punished for contempt in *Seaward v Paterson* [1897] 1 Ch 545 and further established in *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175 @ 1180 per Denning MR where it was stated as follows;

"The Court has jurisdiction to commit for contempt a person, not a party to the action, who knowing of an injunction, aids and abets the defendant in breaking it."

In order to properly bring Chandradai Pritipal before the Court for contempt, a Notice of Motion ought not have been filed in this existing action but rather ought to have been an originating Motion.

ISSUE V

Based on a proper review of the Orders of Court tendered in this Court during the hearing of this Motion and made in Civil Appeal No. 8 of 2015 [Exhibits “B” and “C”], it appears to this Court that an Order of Court indorsed with a penal clause has never been served on either the Respondent or the Added Respondent.

The Order of Roy JA dated January 11th 2016 simply permits the Order of Cummings-Edwards JA dated March 18th 2015 to be amended by inserting a penal clause with the following words;

If you the above named Appellant neglect to obey this order you will be liable to process of execution for the purpose of compelling you to obey the same Order.

The Order of Cummings-Edwards JA was in fact never actually amended by the insertion of that penal clause.

In these circumstances the **mandatory** aspects of the Order of Court could not have been enforced against the Respondent. *Ramdat Sookraj v Comptroller of Customs and Excise* (1992) 48 WIR 163 @ 174 per George C.

CONCLUSION

Based on the foregoing the Applicants have failed to establish beyond a reasonable doubt all of the necessary elements under any of the grounds stated for the Court to find that the Respondent or Added Respondent are in contempt of Court.

In the circumstances this Motion is dismissed with costs to the Respondent and Added Respondent in the sum of \$100,000 against the Applicants.

Justice N. A. Singh