

Alok Kumar Roy

Vs

Dr. S. N. Sarma and Anr.

Civil Appeal No. 1028 of 1967

(CJI K. N. Wanchoo, K. S. Hegde, R. S. Bachawat, G. K. Mitter, V. Ramaswami JJ)

19.10.1967

JUDGMENT

WANCHOO, C.J. -

This is an appeal by special leave against the judgment of the Assam High Court by which the writ petition filed by the appellant was dismissed. Brief facts necessary for present purposes are these. It appears that the appellant was expelled from the Medical College, Gauhati on October 26, 1966. It is said that the appellant tendered unqualified apology on October 27, 1966 and attended classes up to the end of October 1966. The Principal, however, does not seem to have accepted the apology and when the appellant went on, November 2, 1966, to deposit the fee for the examination which was to be held from November 4, 1966, he was told that as he had been expelled and as the order of expulsion stood no examination fee would be accepted from him. It was thereafter that the appellant filed the writ petition on November 3, 1966, out of which the present appeal has arisen.

It may be mentioned that the High Court was in vacation from September 17, 1966 to November 19, 1966. Mr. Justice S. K. Dutta was nominated as the Vacation Judge for the vacation and certain dates were fixed on which he was to sit and hear urgent civil and criminal applications. One of those dates was October 31, 1966 and another was November 10, 1966. It was also stated in the order that if there was any matter which was extremely urgent it would be heard on any other day by appointment through the Registrar.

It appears that Mr. Justice Dutta was also working as a Commission of Enquiry during that time. For that purpose he had to go out of Gauhati, which is the seat of the High Court. It seems that Mr. Justice Dutta went away to Sibsagar after the vacation sitting on October 31, 1966. Therefore on November 2, 1966 he was not available at Gauhati, even though he was the Vacation Judge and even though the order relating to vacation sittings said that if any matter was extremely urgent it could be heard on any other day by appointment through the Registrar. As the examination was to be held from November 4, 1966, the filing of the writ petition against the order of expulsion was undoubtedly a very urgent matter, if any order was to be obtained before November 2, 1966. What the appellant is said to have done was this. He gave notice to the Government Advocate on November 2, 1966 at Gauhati as required by the Rules and thereafter went to Sibsagar where Mr. Justice Dutta was holding the Commission on Enquiry and presented the writ petition there. This petition was entertained by Mr. Justice Dutta and he passed interim orders thereon. A copy of the interim order was prepared at Sibsagar and given to the appellant to be taken to Gauhati where it was to be sealed. The appellant took the order to Gauhati and after getting it sealed served it on the university. He was thereupon allowed to sit at the examination subject to the result of the writ petition. It also appears that thereafter the papers relating to the writ petition were sent to Gauhati

and the High Court and occasion to deal with the writ petition and passed miscellaneous order thereon at Gauhati after the vacation was over. Eventually, the writ petition came up for hearing in May, 1967. A preliminary objection was raised to the maintainability of the petition on behalf of the respondent. It was urged that as Mr. Justice Dutta was holding a Commission of Enquiry he could not act as a Judge of the High Court. It was also urged in the alternative that even if he had the jurisdiction to act as a Judge of the High Court, he could not exercise that jurisdiction while at Sibsagar for the seat of the High Court was at Gauhati.

The petition was heard by a Bench consisting of the learned Chief Justice and Mr. Justice Goswami. The learned Chief Justice seems to have held that Mr. Justice Dutta while performing the duties of a Commission of Enquiry could not also perform the duties of a Judge of the High Court. He further held that in any case as the seat of the High Court was at Gauhati. Mr. Justice Dutta could not pass any order as a Judge of the High Court as Sibsagar, which was not the seat of the High Court. Finally, learned Chief justice made certain remarks as to the "unholy haste and hurry exhibited in dealing with this matter by Dutta J," at Sibsagar and set aside the order of stay granted by Dutta J. on November 3, 1966 and also set aside the order issuing rule nisi, and dismissed the petition. Goswami J. did not fully agree with the learned Chief Justice though he agreed with the order setting aside the stay granted by Dutta J. and also agreed with the order dismissing the writ petition. He observed that "I shall content myself in assuming that Dutta J. had no anxiety other than what prompted him to do in the interest of what his Lordship thought to be justice", when he passed the order in question on November 3, 1966. But he was of the view that a judge of the High Court could not hold a sitting anywhere in Assam except at the seat of the High Court, namely, Gauhati, and therefore the order passed on November 3, 1966 by Dutta J. was without jurisdiction.

The present appeal has been brought before us by special leave and it is urged on behalf of the appellant that it was not correct to hold that Dutta J. could not act as a Judge of the High Court while he was working as a Commission of Enquiry and further that Dutta, J. had no jurisdiction while at Sibsagar to entertain the petition and to pass the stay order. We shall deal with the two contentions in that order.

We are of opinion that the learned Chief Justice was not right when he held that Dutta J. could not act as a Judge of the High Court while he was working as a Commission of Enquiry. Learned Attorney-general appearing for the State of Assam did not support that view. It also appears that Goswami J. has said nothing on this aspect of the matter; presumably he did not agree with the view of the learned Chief justice. Often times, Judges of High Court are appointed under the Commission of Enquiry Act to head Commissions for various purposes. These Commissions are temporary affairs and many a time their sittings are not continuous. A Judge of the High Court when he is appointed to head a Commission of this kind does not demit his office as a judge and when the Commissions is not actually sitting he is entitled to sit as a Judge of the High Court. It is only where a Judge of the High Court is appointed to another post, which is a whole time post that it may be said that on such appointment he can no longer work as a Judge of the High High Court for the time being, though even in such a case, when the work is over, he reverts as a Judge of the High Court without fresh appointment. Such, for example, was the case of Income Tax Investigation Commission where the appointments were whole time and a Judge of the High Court appointed as a member of the Investigation Commission could not at the same time work as a Judge of the High Court. But Judges appointed to head Commissions under the Commission of Enquiry Act stand in a different position altogether. As we have said, these Commission are temporary and are not whole time posts and their sittings are not even continuous. In such a case we are of opinion that a Judge appointed to head a Commission of Enquiry remains as part of the High Court and if the

Commission of Enquiry is not working continuously he is entitled to sit and act as a Judge of the High Court in the intervals. It is not disputed that Dutta J. was heading a Commission of Enquiry of this temporary nature, and as such we are of opinion that he was entitled to sit and act as a Judge of the High Court whenever he had time to do so. It is remarkable that Dutta J. was appointed Vacation Judge while he was working as Commission of Enquiry and that appointment was in our opinion quite in order, for by heading the Commission of Enquiry, Dutta J. did not demit his office as a Judge of the High Court. We cannot therefore agree with the observation of the learned Chief Justice that Dutta J. could not have assumed to himself the role and duties of the Judge of the High Court exercising jurisdiction as a Bench of the High Court. We also disagree with the view expressed by the learned Chief Justice that it was highly objectionable on the part of Dutta J. to work as a Judge of the High Court while he was heading the Commission of Enquiry. We are of opinion that where a Judge heads temporary Commission of Enquiry under the Commission of Enquiry Act, he remains a part of the High Court and is entitled to sit and act as a Judge of the High Court whenever he thinks fit. The appointment of a Judge as Commission of Enquiry does not deprive him of the rights and privileges of a Judge of the High Court. Whenever he finds time to attend to his duties as a Judge of the High Court while action as a Commission of Enquiry, he can do so.

The next question is whether Dutta J. could act as a Judge of the High Court at Sibsagar when Gauhati is the seat of the High Court under the notification issued under Art. 10 of the Assam High Court Order, 1948. We do not think it necessary to decide this question in the present appeal. We shall assume that Dutta J. could not pass orders as a Judge of the High Court anywhere else except at Gauhati, which is the seat of the High Court. Even assuming that, all that can be said is that the presentation of the writ petition before Dutta J. at Sibsagar was irregular. As we have said already, he was still a Judge of the High Court while holding a Commission of Enquiry at Sibsagar, and if he received the petition at Sibsagar, all that can be said is that the petition was irregularly presented there when it should have been presented at Gauhati. But assuming that the presentation of petition at Sibsagar was irregular, the fact remains that the petition was sent to Gauhati later and was dealt with there. We do not see why the petition should have been dismissed because the presentation was irregular. There is in our opinion no difficulty in holding that the petition was represented when it was sent to Gauhati and was dealt with there in the High Court. The presentation should have been taken in such circumstances to have been made at Gauhati when the petition reached Gauhati and the petition should have been dealt with as such. Of course, if the presentation of the petition at Sibsagar was irregular, the order passed by Dutta J. would also be irregular. But when the petition came to the High Court thereafter, the irregularity in presentation must be held to have been cured. It was open to the High Court to consider whether the irregular order of stay should be regularised. Apart from that even if the irregular stay could not be regularised, there was no reason why the petition should have been dismissed merely on the ground that it was irregularly presented, when it finally did reach the High Court at Gauhati. Whatever therefore may be said about the order under appeal setting aside the irregular order of stay, we are of opinion that the High Court was not right in dismissing the petition as it did on May 24, 1967. The petition must be held to have been represented to the High Court when it reached the seat of the High Court at Gauhati and should have been dealt with as such and could not have been thrown out merely on the ground that the original presentation on November 3, 1966 was irregular. We are therefore of opinion that the order dismissing the petition must be set aside and the High Court should now go into the question whether the petition should be admitted and whether it should be set down for hearing. Finally we consider it our duty to refer to certain observations made by the learned Chief Justice with respect to Dutta J.'s handling of the petition. In this connection reference was made by the learned Chief

Justice to a decision of this Court in *Principal, Patna College v. K. S. Raman* ([1966] 1 S.C.R. 974 : A.I.R. 1966 S.C. 707). It is enough to say that the facts of that case are very different from the facts of the present case and the observations on which the learned Chief Justice relies do not apply to the facts of the present case. In the present case, the petition was presented during vacation when no Judge was actually sitting at Gauhati and in the circumstances the action taken by the appellant in presenting the petition at Sibsagar before Dutta J. who was the Vacation Judge and the only Judge available, after giving notice to the Government Advocate on November 2, 1966 at Gauhati, seems to have been the only course open to him in the circumstances, for the examination was to be held from November 4, 1966 and the appellant came to know on November 2, 1966 when the examination fee was not accepted that he would be able to sit at the examination. In the circumstances the observation of the learned Chief Justice that there was "unholy haste and hurry exhibited in dealing with this matter by Dutta J." is entirely uncalled for. Assuming that Dutta J. wrongly took the view that he could entertain the petition and pass the stay order at Sibsagar, he could only act in the way he did in the view that he took, and it cannot be said that this was a case of "unholy haste and hurry". We also cannot agree with learned Chief Justice that the notion of sending a copy to Gauhati for getting it sealed so that it might be properly authenticated was in any way objectionable. The situation being what it was, that seems to us to be only way open, once it is clear that Dutta J. took the view that he could entertain the petition and pass orders thereon - even though that view may not be correct. Nor do we think that the learned Chief Justice was satisfied in observing that "the whole thing discloses an unnecessary zeal on the part of Dutta J. to assist the appellant". Once Dutta J. took the view that he had jurisdiction to entertain the petition and pass orders thereon, the order he passed and the steps he took so that the order was served before November 4, 1966 (which was the date of the examination) appear to us to be the only steps that could have been taken, and such steps cannot be said to be opposed to the great traditions that obtain in a High Court; nor can it be said that Dutta J.'s action reflected adversely on the independence and aloofness of that august institution. There is no reason to hold that any unnecessary zeal was shown by Dutta J. in assisting the appellant when he passed the order which he did, once Dutta J. took the view that he had the jurisdiction to entertain the petition and pass the order thereon at Sibsagar. All that happened thereafter appears to us to be quite proper and cannot in any way reflect on the conduct of Dutta J. in this case. It is a matter of regret that the learned Chief Justice thought fit to make these remarks in the judgment against a colleague and assumed without any justification or basis that his colleagues had acted improperly. Such observations even about the Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleagues they are even more open to objection. We are glad that Goswami J. did not associated with these remarks of the learned Chief Justice and was fair when he assumed that Dutta J. acted as he did in his anxiety to do what he thought was required in the interest of justice. We wish the learned Chief Justice had equally made some assumption and had not made these observation castigating Dutta J. for they appear to us to be without any basis. It is necessary to emphasis that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible. Remarks such as these made by the learned Chief Justice make a sorry reading and bring the High Court over which he presides into disrepute. Even when there is jurisdiction for criticism, the language should be dignified and restrained. But in this case we do not see any justification at all for such remarks.

We therefore allow the appeal and set aside the order the High Court dismissing the writ petition and send it back to the High Court with the direction that the High Court should reconsider whether the petition should be admitted, taking it as represented on the day it reached Gauhati, and if so it

should be set down for hearing in due course. In the circumstances we make no order as to costs.

V.P.S.

Appeal allowed.

</html