State of Maharashtra

Vs

Dr. Budhikota Subbarao

Criminal Appeal No. 275 of 1993

(R. M. Sahal, S. R. Pandian JJ)

16.03.1993

JUDGMENT

R. M. SAHAI, J. -

1. Strictures of 'sharp practice', suppression of facts, obtaining orders by playing fraud upon the court against State by Mr. Justice Saldanha of the Bombay High Court, while deciding criminal miscellaneous petition filed by the opposite party, accused of leaking official secrets and violating provisions of the Atomic Energy Act, 1962 and awarding Rs. 25,000 as compensation, for consultancy loss, suffered by him, due to ex parte order obtained by the State against order of the trial Judge permitting the opposite party to go abroad, compelled the State to file this appeal and assail the order not only for legal infirmities but factual inaccuracies.

2. Reasons to quote the learned Judge which, 'compelled the conscience of the court to pass' the impugned order were, 'the unfortunate proceedings that bristled(s) with mala fides'. Basis for these inferences was, the conclusion by the learned Judge, that the State, deliberately, procured the interim order by another learned Judge by filing a separate writ petition, when it knew that the main petition for quashing of the proceedings was pending before the Division Bench (Puranik and Saldanha, JJ). The learned Judge felt, strongly, against the public prosecutor as she being aware of the proceedings before the Division Bench failed in her duty of apprising the learned Judge of correct facts.

3. Was this so ? Did the State procure the order by concealing facts ? Was the public prosecutor guilty of violating professional ethics or her duty as responsible officer of the court ? What led to all this was an application filed by the opposite party, in the writ petition pending for quashing the charge-sheet framed under [The Indian] Official Secrets Act, 1923 and Atomic Energy Act, 1962, for release of his passport on which the Division Bench of which Mr. Justice Saldanha was a member, passed the order on February 13, 1991 that it may be presented before the trial Judge. On the very next day the Additional Sessions Judge, (hereinafter referred as 'ASJ') after hearing the parties, directed that the passport and identity card of the opposite party be returned. He, further, Permitted the opposite party to leave India and travel abroad as per the itinerary during the period from February 17, 1991 to February 22, 1991 on executing a personal bond of Rs. 50,000. The State was, obviously, disturbed by this order as serious charges had been levelled against the opposite party who had been arrested, earlier, just when he was about to leave the country and board the plane, for leakage of official secrets and whose bail had, even, been cancelled by this Court, appeared to be in danger of leaving the country again. Since the order was passed on February 14, 1991 and the opposite party was to fly on February 17, 1991 and February 16, 1991 was Saturday, the State challenged the correctness of the order passed by the ASJ by way of a writ petition under

Article 227 of the Constitution read with Section 482 of Criminal Procedure Code and the learned Judge, who under the rules was entitled to hear such a petition, passed and ex parte order on February 15, 1991 staying that part of the order which permitted the opposite party to leave the country and directed the application to be listed for further orders on February 18, 1991. On coming to know of this order, in the evening, the opposite party approached the Division Bench where the main petition was pending on February 16, which after making an observation that the public prosecutor ought to have brought it to the notice of the learned Single Judge that the main matter was pending before the Division Bench and the trial Judge had passed the order in pursuance of the direction issued by the Division Bench, directed that matter, being urgent, it should be placed before the same learned Single Judge. Consequently parties appeared before the learned Judge on February 16, who, after hearing, confirmed the interim order passed, a day earlier.

4. With confirmation of interim order the proceedings which had commenced on the application file by the opposite party to leave the country came to an end. But the writ petition in which the interim order was passed remained pending. And when the revision filed by the State, directed against the order acquitting the accused, was taken up for hearing by Mr. Justice Saldanha, and observations were made, during course of judgment dictated in open court from October 5 to 12, 1991 against the public prosecutor and the State, the opposite party appears to have made a mention on October 10, that the writ petition filed by the State against the order of the trial Judge releasing his passport and permitting him to travel abroad may be summoned and disposed of. The request was accepted and on direction of the learned Judge the office listed the case before him on October 11. When the petition was taken up, on October 11, and the public prosecutor was asked if she had any objection to hearing it was stated by her that it did not survive. But the learned Judge after completion of Judgment in criminal revision on October 12, appears to have, taken up the writ petition. It was pointed out by the learned senior counsel for the State that since the criminal revision filed by the State against the order acquitting the accused had been dismissed, the writ petition had become infructuous and orders may be passed accordingly.

5. Yet the learned Judge passed the impugned order. What weighed with the learned Judge to infer mala fides against the State was that the order dated February 14, 1991 having been passed in open court in presence of the opposite party and counsel for the State, permitting the opposite party to leave the country on February 17, 1991, the opposite party, genuinely expected and according to the learned Judge, rightly, that any further application which the State would make could only be addressed to the Bench, namely, the Bench of Puranik and Saldanha, adressed to the Bench, namely, the Bench of Puranik and Saldanha, opposite party, justifiably, waited and watched in the Bench, whole day for moving of any application but the State instead of moving any such application filed a fresh writ petition and obtained an ex parte order, the information of which was given to opposite party in the evening. The learned Judge was of opinion that it was deliberate as it was known to the public prosecutor that the Bench on February 13, 1991 after crutinising the papers was of opinion that it was a genuine case in which the passport should be released and the opposite party should be permitted to travel abroad but due to paucity of time the Bench instead passing the order directed the opposite party to approach the trial judge. The learned Judge further held that even though the public prosecutor and the Inspector of Police knew these facts and that the opposite party was to fly on February 17, 1991 yet the notice was obtained from the learned Judge returnable on February 18, 1991 by which time the delegation from Reliance Industries of which the accused was to be a member was to have left the country. Since the effect of the interim order and the fixing of the petition on February 18, 1991 nullified the opposite party's going to United States of America, the court felt that the order was obtained not only unfairly, but that it constituted a sharp practice. The motive of the public prosecutor and the State was further attempted to be shown to be dishonest and

motivated as the averments in the petition on which the interim order was obtained were false to their knowledge. The falsity found was that the State had deliberately tried to mislead the court by alleging that the trial was fixed for hearing on February 18, 1991 and the same had been adjourned to February 24, 1991. The court found that the learned Single Judge was misled in passing the order as was clear from ground No. 6 which was to the effect that the trial being fixed for February 18, 1991, the trial Judge was not justified in issuing the orders in favour opposite party. The learned Judge also felt aggrieved by the conduct of the public prosecutor in not informing the learned Single Judge that the main writ petition was already listed for hearing before the Division Bench and that the direction to the ASJ to consider the application for return of passport had been issued by the Bench. The learned Single Judge was not satisfied with explanation of the State that a petition under Article 227 of the Constitution read with Section 482 of Criminal Procedure Code being maintainable before the learned Single Judge under the High Court rules it had no option but to proceed in accordance with law. The learned Single Judge pointed out that if the State would have pointed out to the Registry the correct facts then the case could not have been listed before the learned Single Judge.

6. That any party aggrieved by an order passed by a court is entitled to approach the higher court cannot be disputed nor can it be disputed that a petition under Article 227 of the Constitution read with Section 482 of the Criminal Procedure Code against the order of trial Judge was maintainable and under rules of the court it could be listed before the learned Single Judge only. The State, therefore, in filing the petition against the order of the Sessions Judge did not commit any illegality or any impropriety. A copy of the writ petition, has been annexed to this special leave petition which, does not show any disclosure of incorrect facts or any attempt to mislead the court. Even the learned Single Judge did not find that the trial was not fixed for February 18, 1991. Disclosing correct facts and then obtaining order in favour is not same as procuring an order on incorrect facts. Former is legitimate being part of advocacy, latter is reprehensible and against profession. But if the State persuaded the court to stay the operation of the order passed by the trial Judge while mentioning the details about the pendency of the earlier petition before the Division Bench and issuing of directions to the Sessions Judge to decide the application for release of passport etc., it is difficult to imagine how any inference of obtaining order on incorrect facts could be drawn. During arguments the opposite party attempted to highlight averments in paragraph 6 of the writ petition to the effect that the Division Bench had dismissed the application of the opposite party when no such order was passed. The sentence, in fact, reads as under :

> "The application was not dismissed and directed the respondent to move trial court and further directed the trial court to consider the same in accordance with law."

True, the application was not dismissed. But the sentence had to be read in its entirety. No court could be misled from the use of the word dismissed as the directions issued by the court were mentioned correctly. The inference drawn by court and the finding recorded by it obtaining the order by 'suppression of facts and making positively false statements' is factually incorrect and legally unsound. The grief of the opposite party in missing an opportunity of going to the United States and the grievance against functionaries of the State, namely, public prosecutor and prosecuting Inspector can be appreciated. We can, also, visualise the vehemence and eloquence of the opposite party, of which he is capable of, as appeared from his submission when he appeared in person in this Court, but what has baffled us that the learned Judge was persuaded to record the finding of suppression of facts on such weak and insufficient material.

7. Mala fides violating the proceedings may be legal or factual. Former arises as a matter of law

where a public functionary acts deliberately in defiance of law without any malicious intention or improper motive whereas the latter is actuated by extraneous considerations. But neither can be assumed or readily inferred. It requires strong evidence and unimpeachable proof. Neither the order passed by the learned Single Judge granting ex parte order of stay preventing opposite party from going abroad was against provisions of law nor was the State guilty of acting mala fides in approaching the learned Single Judge by way of writ petition. The order of the trial Judge could not be challenged before the Division Bench. Under the rules of the court, the correctness of, the order could be assailed only in the manner it was done by the State. Any party aggrieved by an order is entitled to challenge it in a court of law. Such action is neither express malice in law.

8. The opposite party was charged with very serious offence. He was arrested when he was about to leave the country. The State was possessed of material that he had, even, applied for matrimonial alliance in response to an advertisement issued from New York. The order of the trial Judge, therefore, permitting opposite party to leave the country without trial must have created a flutter in the department. It was by all standards a sensational and a sensitive case. The public prosecutor and the prosecuting Inspector who were entrusted with responsibility to prosecute the opposite party must have felt worked up by the order permitting the opposite party to leave the country. Decision must have been taken to prevent the opposite party by approaching the High Court by way of a writ petition instead of approaching the Division Bench. Assuming that the State took recourse to this method, as it might have been apprehensive that it would not get any order from the Division Bench, the State could not be accused of mala fides so long it proceeded in accordance with law. Apart from that once it was brought to the notice of the Division Bench that the State had procured an ex parte order from the learned Judge who was requested by the Division Bench to treat the matter urgent and hear parties and the application was heard on February 16 and the learned Judge refused to vacate the interim order and confirmed it, the entire basis of mala fide stood demolished. The learned Judge was not justified in blaming the State for getting the notice returnable on February 18. That was order of the court. In any case the opposite party having appeared on 16th yet the learned Judge having refused to modify his order it was too much to hold the State or public prosecutor responsible for it.

9. Sharp practice is not a court language. We are sorry to say so. Facts did not justify it. Legal propriety does not countenance use of such expressions favourably. The learned Judge, to our discomfort, used very harsh language without there being any occasion for it. A State counsel with all the aura of office suffers dual handicap of being looked upon by the other side as the necessary devil and the court too at times, find it easier to frown upon him. The moral responsibility of a State counsel, to place the facts correctly, honestly and fairly before the court, having access to State records, coupled with his duty to secure an order in favour of his client requires him to discharge his duty responsibly and sensibly. Even so if a State lawyer who owes special duty and is charged with higher standard of conduct in his zeal or due to pressure, not uncommon in the present day, adopts a partisan approach that by itself is not sufficient to warrant a finding of unfairness or resorting to sharp practice. In this case too not more than this appears to have happened. Maybe the public prosecutor may have exhibited more zeal. But that could not be characterised as unfair. Maybe it would have been proper and probably better to inform the learned Single Judge about the earlier order passed by the Division Bench. But assuming the public prosecutor did not inform and remained content with its disclosure in the body of the petition she could be held to have acted dishonestly.

10. We are constrained to observe our unhappiness on the matter in which the writ petition was summoned by Mr. Justice Saldanha from the office, heard and decided. As stated earlier the writ

petition was directed by the learned Judge to be listed before him, on a mention made by the opposite party in course of dictation of judgment in criminal revision wherein he had made observations against the public prosecutor. A Judge of the High Court may have unchallenged and unfettered power to direct the office to list a case before him. But that by itself restricts the exercise of power and calls for strict judicial discipline. We do not intend to make any comment but we are of opinion that if the learned Judge would have avoided sending for and deciding the petition, which as pointed out by the learned senior counsel for the State had become infructuous, it would have been more in keeping with judicial culture.

11. For reasons stated above by us this appeal succeeds and is allowed. The order dated October 28, 1991 passed in civil miscellaneous writ petition is set aside. It shall stand dismissed as infructuous. The Intervention Application No. 943 of 1992 of the Public Prosecutor is allowed. We make it clear that all the observations and remarks made by the learned Judge against the State and Public Prosecutor shall stand expunged.

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