

NAGPUR HIGH COURT

Zikar

Vs

Government of State of M.P

Misc. Petri. No. 16 of 1950

(R. Kaushalendra Rao and Deo, JJ.)

14.09.1950

ORDER

(R. Kaushalendra Rao, J.)

1. (Application No. 4857 dated the 23rd August 1950). - This is an application for transfer of Misc. Petn. No. 16 of 1950 which we are hearing to another Civil Division Bench on account of the incidents which we have recorded in the order sheet dated 21-8-1950. [2] The applicant applied under Article 226 (1) of the Constitution for enforcement of his fundamental rights as a citizen of Bharat. The - applicant entered this country from Pakistan under a temporary permit dated 27-1-1950, the permit expiring on 12-3-1950. The District Superintendent of Police extended the period by 20 days. The applicant prayed that the High Court be pleased to declare him, his brother and their families described in Schedule A as citizens of Bharat entitled to all the rights under Article 19 (1) of the Constitution. He also desired orders and directions to the Government of Madhya Pradesh as were necessary and proper to ensure the free and full enjoyment of all the rights of citizenship, more particularly the rights under sub-cl. (d) to (f) of clause (1) of Article 19. Lastly he prayed for an interim order prohibiting the non-applicant from excluding or deporting, or attempting to exclude or deport, the applicant from the limits of Madhya Pradesh on the expiration of the extended permit on 2-4-1950.

3. On 23-3-1950 the Court passed an ex parte interim order of stay which was confirmed on 6-4-1950 when the Advocate General appeared for the State.

4. The non-applicant filed a return on 20-5-1950. On 8-8-1950, the non-applicant filed a statement in addition to the return pointing out that in his application for a permit made at Karachi on 19-1-1950 the applicant had declared that he was domiciled in Pakistan and there carried on business in bidi leaves, that he was in possession of property in Pakistan and that his purpose in visiting India was for a change of climate. It was further asserted that in the application he had falsely declared that that was his first visit to India although he had come to India twice before. In an earlier application dated 25-2-1949 for a temporary permit to visit India, the applicant had also declared that he was a national of Pakistan. In support of the application he filed a certificate dated 3-2-1949 from the Additional District Magistrate, Karachi, according to

which the applicant is a Pakistani National and a *bona fide* resident of Karachi.

5. The non-applicant contended that the applicant had deliberately suppressed this material information in his application and in view of the declaration made in Pakistan and the certificate of the Additional District Magistrate, the applicant has no locus standi to make this application.

6. On 11-8-1950 we heard the learned Additional Government Pleader in support of his preliminary objection that the application is not maintainable, as there was suppression of material facts and the order of stay had been obtained on false averments. He pressed for the immediate vacation of the interim order of stay and the rejection of the application without going into the merits. The learned counsel for the applicant in reply to the preliminary objection denied that there was any suppression of facts and contended that the case cannot be disposed of on the preliminary objection. In any case the counsel submitted that he could not deal with the objection unless he touched the merits as well. He desired that the case be heard in full. He argued that it was necessary to refer to several facts in order to show that the applicant had not suppressed any facts in his application. The counsel read out to us several passages in the petition and the corresponding replies in the return. We allowed him considerable latitude in meeting the preliminary objection, but we expressed no opinion on the preliminary point. So the statement in para. 2 of the present application in so far it is meant to imply that he was heard on merits as though after overruling the preliminary objection, is not correct. We had yet to hear the learned Additional Government Pleader in reply to the submissions being made by Shri Shareef.

7. When the case was taken up on 17-8-1950, at the commencement of the hearing the learned Additional Government Pleader cited *Indumati Debi v. Bengal Court of Wards*¹, and not *The King v. The General Commissioners for the purposes of the Income-tax Acts for the District of Kensington*², which according to our recollection was cited earlier. Whichever be the case, we remarked that the case might have been cited earlier so that the learned counsel for the applicant might have had an opportunity to deal with it in his reply. We, however, allowed the learned Additional Government Pleader to make his submissions with respect to the case. Shri Shareef continued his arguments.

8. In reply to the additional return dated 8-8-1950, the applicant pointed out in his reply dated 9-8-1950 that the additional return had not been supported by an affidavit. The applicant's counsel also mentioned this omission on the 11th. An affidavit dated 14-8-1950 was accordingly filed on behalf of the non-applicant on 17-8-1950. Paragraph 10 of the affidavit contained a fresh allegation that the applicant had made a statement before the District Magistrate, Chanda, on 14-12-1948 that the applicant did not present any application for a permanent permit to the High Commissioner for India in Pakistan and that he had only intended to make such an application. On this the applicant desired to file an affidavit with respect to para. 10 of the affidavit of the non-applicant. We directed the applicant to file his affidavit by 21-8-1950 and adjourned the hearing.

9. On 21-8-1950 the applicant filed four documents, two copies of the reply to the non-applicant's affidavit dated 14-8-1950, both signed in Gujarathi by the applicant, the affidavit signed in Gujarathi and a copy of the affidavit. The learned counsel for the applicant had suggested in the course of his argument that his client does not know English and the statements in the applications for permits dated 25-2-1949 and 19-1-1950 that the applicant waft domiciled

in Pakistan and was a Pakistani national were probably made without understanding them. In para. 4 of the reply the applicant also asserted that the statement recorded by the District Magistrate, Chanda does not conform, (in original the word written is 'confirm'), to facts and is not correctly rendered in English. In para. 6 he made the assertion (on 19th/21st August 1950): "the non-applicant had raised the preliminary objection at the hearing on 11-8-1950 but the Honourable Court was pleased to hear the applicant's counsel on the merits." This statement is incorrect and does not even square with what the applicant himself states in para. 3 of the present application (dated: 23-3-1950):

"The applicant's counsel replied to the preliminary motion and the case stood adjourned to 21-8-1950 for orders on the motion and in the event of disallowance, for hearing on merits."

The underlining (here italicised) is by us. If according to the applicant the position on 17-8-1950 was as described in the latter statements there was no point in making, the assertion contained in para. 6 of the reply and the affidavit (dated 19th/21st August 1950) unless it be to mislead some one.

10. The statement contained in para. 6 was really not called for in view of the fact that the non-applicant only desired to file a reply to para. 10 of the affidavit dated 14-8-1950. Further the statement as we feel then and feel even now was put in to imply that we had heard the learned counsel for the applicant on merits having overruled the preliminary objection. Nothing of that kind happened.

11. This is a petition in which an appeal to the Supreme Court might very well be taken. Having regard to the suggestion made that the applicant did not understand what had been, stated in the applications made in Pakistan on two occasions and the further assertion in para. 4 of the reply dated 21-8-1950 that the statement recorded by the District Magistrate also does not conform to facts and was not correctly rendered in English, we wanted to make sure if the applicant had understood what was being stated in this Court at least to prevent any arguments of that nature being raised in the future. When we questioned the counsel, we had not noticed the endorsement, in the margin of the affidavit (original) that the contents of paras. 1 to 6 were interpreted and admitted as correct by the deponent. This endorsement is not to be found on any of the other three documents filed by the applicant's counsel that day. We were looking at two of these. Nor did the counsel for the applicant when questioned, refer us to the endorsement on the affidavit (original). When the learned counsel informed us that the contents were explained by him to the applicant, we did not pursue the matter further.

12. Before we rose for the recess, the learned counsel for the applicant had finished his submissions and the learned Additional Government Pleader was addressing us in reply on the preliminary point. When we re-assembled after the recess, the learned counsel for the applicant informed us that he desired to apply for transfer of the case to another Bench because of the questions raised by us regarding paras. 4 and 6 of his reply and affidavit. An intimation of that nature at that stage in a case in the High Court being unexpected, we thought it better to adjourn the case to 25-8-1950 to enable Shri Shareef to make the application.

13. On 23-8-1950, the applicant presented in the High Court this application for, transfer of the case to another Civil Division Bench for disposal on the grounds that we were prejudiced and had made up our mind and had indicated that he (the applicant) would have to go in appeal to the Supreme Court. According to the applicant, the references to the Supreme Court were unnecessary and left no doubt in the applicant's mind that he would not receive justice and prayed that in the interests of dispensation of impartial justice the case be transferred to another Civil Division Bench.

14. We may at once say that the statement that we indicated that the applicant would have to go in appeal to the Supreme Court is absolutely incorrect. We did not indicate as to who should go in appeal to the Supreme Court. If the proceedings of the Court on 21-8-1950 were interpreted in that way to the applicant by his learned counsel, then what the latter had done is far from commendable.

15. In pressing the application for transfer, the learned counsel for the applicant submitted that this application should have been placed before the Honourable the Acting Chief Justice. There is nothing to show that the application was meant for the Honourable the Acting Chief Justice. The application was presented to the Court and as we are in seisin of the case, it was rightly placed before us. We asked the learned counsel under what provision of law this application was being made. The learned counsel was unable to point to any provision but made a half-hearted reference to Section 24, Civil Procedure Code, which he himself later conceded was not applicable to transfer of cases within a High Court.

16. According to the learned counsel for the applicant, there is some power in the Chief Justice of a High Court analogous to that possession by a Sessions Judge or a District Magistrate under section 528, Criminal Procedure Code, to withdraw a case pending before a Judge or a Division Bench and transfer it to some other Judge or Division Bench.

17. The learned counsel for the applicant referred to a case in which the Honourable the Acting Chief Justice was pleased to transfer the case pending before one of us to the other of us. We have since sent for the record *Nanhelal v. Shiamkali*³, and seen the order. The Honourable the Acting Chief Justice was moved to pass the order on the statement made in the application that the first Judge had no objection to the hearing of the case by the second Judge. Whether that statement was founded on fact or not is not much to the purpose of the present case. The case is, however, distinguishable.

18. After the hearing of this application, the applicant made another application (No. 5077, dated 31-8-1950), this time specifically to the Chief Justice reiterating all that has been stated in the present application. The Honourable the Acting Chief Justice was pleased to defer action on the application made to him pending our decision on the application before us.

19. The application for transfer and the contentions of the learned counsel for the applicant, raise questions of far-reaching importance which vitally concern the right of a litigant to move for a transfer in the course of hearing by one Division Bench to another and the powers of the Judges of this Court and the Chief Justice. We have, therefore, considered it necessary to examine the position at length.

20. Had we any personal interest in the subject matter of this case or had we for any special

reasons of a personal nature felt it undesirable for us to hear this case, it might have been submitted for orders of the Honourable the Acting Chief Justice for being placed before another Bench. This is usually done at a very early stage in a case. Neither of us had any concern with the applicant before the present case which came before us in the normal course. The applicant had his full say on the preliminary objection. He had no complaint to make till 21-8-1950. But for this application the learned Additional Government pleader would have concluded his address and we would have proceeded to our decision on the preliminary objection. At that stage there was no point in complaining that we had made up our mind even if we had done so. But the fact of the matter is if we were in such a fixed state of mind we would not have allowed the applicant to continue to get the advantage of the interim stay order which has not been vacated so far, though the learned Additional Government Pleader had pressed upon us such a course of action in his arguments and subsequently on 25-8-1950, even made a formal application for that purpose.

21. While we are not eager to hear any particular case, we owe a duty to ourselves as Judges and to the Court as a whole to see that we do not yield to contrivances to get rid of particular Judges from dealing with a case. Such manoeuvres if not suppressed must ultimately undermine the confidence of the public in the dispensation of justice by the highest Court in the State. The applicant's right is to invoke the jurisdiction of the High Court and not to have his case decided by any particular Judge or Judges : *Radhakishan v. Shridhar*⁴, The particular Judge or Judges who may happen to be dealing with any class of cases at any given moment is entirely a matter of internal arrangement in the High Court with which the litigant has no concern.

22. The question still remains whether there is any power in the Chief Justice of a High Court to withdraw or transfer a case of which a divisional Court is in seisin.

23. The powers of the Chief Justice of a High Court have to be found either under the Constitution or the Letters Patent or the rules of the Court or under any other statute. The holder of that exalted office has no doubt a special position under the Constitution : See -Articles 159, 217, 224 and 229. But none of these Articles has any relevance to the exercise of the judicial power of the High Court.

24. The High Court has a number of Judges. It is, therefore, not practicable that all the Judges should hear every case that comes up before the Court. So clause 26 of the Letters Patent provides that any function which is directed to be performed by the High Court of Judicature in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of Section 108, Government of India Act. Section 108, Government of India Act, 1915, runs :

"(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges, of the High Court, of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several Division Courts."

The first sub-section authorizes the Court as a whole to frame rules for the exercise of the jurisdiction possessed by the High Court. The second sub-section empowers the Chief Justice to regulate the sittings of the Court.

25. The two sub-sections of Section 108, Government of India Act, substantially reproduce Sections 13 and 14, High Courts Act, 1861 (24 and 25 Vict. C. 104). Article 225 of the Constitution provides that the respective powers of the Judges of a High Court in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts shall be the same as immediately before the commencement of the Constitution. The position prior to the commencement of the Constitution was that Section 223, Government of India Act, 1935, preserved the powers of the Judges of the High Court and the power to make rules and regulate sittings of the Court under section 108 of the earlier Act: See In the matter of K. L. Gauba, I.L.R. (1942) Lah. 411 at p. 414 : (AIR 1942 Lahore 105 : 43 Cr. L. J. 599 F.B.).

26. The rules made by the High Court only provide for the convenient exercise of jurisdiction of the Court, but do not give any special judicial power to the Chief Justice over the other Judges of the Court. Under the rules the jurisdiction of the High Court is exercised by one or more Judges according to the nature of the cases. But a decision by a single Judge or a division Court given in accordance with the rules of the Court is a decision of the Court itself: See *Mt. Oodey Koowar v. Mt. Ladoo*⁵, and In the matter of the petition of F. W. Gibbons, 14 Cal. 42 at p. 45 (F.B.). In the latter case, Sir Comer Petheram C. J. with whom Macpherson and Grant JJ. concurred observed that every Divisional Bench constitutes the Court in itself for the purpose of its judgment. and every judgment of a Division Bench is a judgment of the Court and no difference exists between one Bench and another.

27. In some cases appeals do lie within the High Court. Such appeals within the High Court are regulated by clause 10 of the Letters Patent. Under that clause, an appeal lies to the High Court from a judgment of one Judge of the High Court or one Judge of any Division Court. The history of clause 15 of the Letters Patent of the chartered High Courts which corresponds to clause 10 of our Letters Patent shows the progressive curtailment of the right of appeal within the High Court. By an amendment made in 1919, judgments passed in civil cases in exercise of the Court's powers of revision were made unappealable. By a further amendment in 1928, modelled on the lines of clause 13 in the Letters Patent of the Rangoon High Court, the right of appeal from a judgment passed by a single Judge in second appeal is restricted to cases in which the Judge grants a certificate that the case is fit for appeal. The right of appeal when the Judges of the Division Bench are equally divided in opinion was abolished and the matter is left to be governed by the amendment of Clause 36 of the Letters Patent of the chartered High Courts. With the amendment of that clause, the Judges of a High Court have all been placed on an equal footing irrespective of their seniority. The corresponding clause is clause 26 of the Letters Patent of this Court. From the decision of a Division Court an appeal which formerly lay to the Privy Council now lies to the Supreme Court: See *Alam Sher Khan v. Allah Din*⁶) and *Seshamma v. Venkata Narasimharao*⁷, So the remedy of a litigant who feels aggrieved by the manner of hearing or the decision of a Division Court is to appeal to the Supreme Court when such an appeal is permissible.

28. Under Sub-Section (2) of Section 108, Government of India Act, 1915, it is for the Chief

Justice in each High Court to determine what Judge in each case is to sit alone and what Judges of the Court are to constitute the several Division Courts. Rule 1 of chap. 7 of the High Court Rules has its basis in Sub-Section (2) of Section 108. Under the roster approved by the Honourable the Acting Chief Justice for the month of August and September, we were constituted the Civil Division Bench. Petitions for the enforcement of the fundamental rights under Article 226 of the Constitution are registered as miscellaneous petitions and placed before the Civil Division Bench.

29. The point for consideration is whether the power to regulate the sittings of the High Court which the Chief Justice undoubtedly possesses can be invoked for withdrawing and transferring a case of which a Division Court is in seisin. The power to regulate the sittings of the Court which is an administrative power cannot afford any basis for regulating the mode of hearing of a case by a Court properly seized of it. The power to withdraw and transfer a case from such a Court without its concurrence is a power to prevent the exercise of jurisdiction by that Court which can only be done by virtue of a superior power of control or correction for which authority must be found either in an express provision or by necessary implication. There is no express provision and in our view there is no warrant for any such implication.

30. The question about the position and the powers of the Chief Justice has arisen more than once in the Calcutta High Court. Accordingly it will be helpful if we refer to the precedents in that Court.

31. In the matter of Abdool Sobhan, 8 Cal. 63, an application was made before a Division Court consisting of Cunningham and Prinsep JJ. for transfer of a trial from Patna to the High Court. In support of the application the counsel wanted to read two long affidavits which he was not permitted to do. The counsel sat down under protest. Then an application was made to the Chief Justice for constitution of another Bench to re-hear the application upon the ground that there was no valid hearing before the Criminal Bench. What passed in the course of the argument between the counsel and Sir Richard Garth C. J. is very illuminating. The counsel submitted :

"The Judges must give the parties a hearing. They are appointed to hear and determine cases and cannot determine them without a hearing. Suppose they had said 'they would not hear the defense, but would act according to the case for the prosecution, could they be said to be acting according to your Lordship's instructions ?

GARTH, C.J. :- Suppose I did the same thing, who is to set me in order? Is a Division Bench consisting of two Puisne Judges in a different position from a Division Bench consisting of myself and another Judge ? In such a case the proper course is to appeal to Government. Mr. BRANSON :- Your Lordship is, undoubtedly, above the other Judges of the Court.

GARTH, C.J. :- As Chief Justice I have certain functions to perform in constituting Benches but having done so, have I power to call them to account?"

32. The learned Chief Justice held :

"It is the province and duty of the Chief Justice under section 14 (now Sub-Section (2) of Section 108) of the High Courts Act, to determine what Judge or Judges shall decide each case; and if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no single Judge has any jurisdiction to hear it.

But here there was no question of jurisdiction. The rule was disposed of by a Court of two Judges duly constituted by myself for that purpose; and the only complaint is, that those Judges, having heard the case up to a certain point, decided it without allowing Mr. Jackson to read certain affidavits. If they erred at all in this, their error was simply one of law in the course of dealing with a matter which was clearly within their jurisdiction. There is no pretence for saying, as it seems to me, their decision was a nullity, or that the Chief Justice of this Court has any right to question its legality."

33. If the legality of a decision of a Division Court cannot be questioned by the Chief Justice, in our view, if we may state it with due respect, much less can the propriety of what transpires at the hearing by a Division Court be canvassed before the Chief Justice.

34. In *Girdharilal v. Eagle Star and British Dominions Insurance Co. Ltd.*⁸, the Chief Justice appointed a Bench consisting of Greaves and Buckland JJ., to try only certain issues in a suit. This is what Greaves J., observed:

"I desire to say with all respect to the Chief Justice that I do not understand his order referring the matter to this Bench which he appointed to try the issue raised in paras. 16 and 17 of the written statements which is substantially the issue of law which we have tried. It is of course open to him to appoint a Special Bench of two Judges to try a suit but having done so it is not, I think, open to him in any way to fetter the discretion of the Bench as to how the suit shall be tried. It is for the Bench and the Bench alone to decide how the suit is to be tried, that is to say, whether issues of fact and law are to be tried together or whether the issues of law shall be tried first."

35. Finally reference may be made to *Dahu Raut v. Emperor*⁹, In that case a complaint was made in Court to the Acting Chief Justice by Deputy Legal Remembrancer that certain orders passed by a Division Court consisting of Lort-Williams and McNair JJ., were illegal and made without jurisdiction. The Acting Chief Justice decided that he had no jurisdiction whatsoever to interfere with the orders of the Division Bench. Lort-Williams J., observed:

36. "I fail to understand what was the object of making a complaint to the Acting Chief Justice, or what interest he was alleged to have in the matter. Such a procedure was an act of disrespect to the Court, directly to the Division Bench, and indirectly to the Acting Chief Justice. No complaint had been made to us by the Deputy Legal Remembrancer or anyone else, and presumably the Deputy Legal Remembrancer, and the Legal Remembrancer, who instructed him, had some knowledge of the legal position, which was stated with clarity and precision by Sir Comer Petheram C. J. and a Full Bench. In the matter of the petition of F. W. Gibbons, 14 Cal. 42 F.B.), decided so far back as the year 1886, which decision no one since has seriously attempted to question. A judgment of two Judges of this Court, sitting as a Criminal Bench, is a

judgment of the High Court of Judicature at Fort-William in Bengal, and no other Judge or Bench of Judges of this Court has power to override such judgment. The judicial powers of the Chief Justice are not greater than, nor different from, but exactly the same as, those of any other Judge of the Court." In view of the repeated pronouncements of their Lordships of the Calcutta High Court about the powers and the functions of the Chief Justice, it is needless for us to add anything further in the matter except to say that we are in respectful agreement with them. The argument of the learned counsel for the applicant that the application should have been placed before the Honourable the Acting Chief Justice or that the Acting Chief Justice has the power to withdraw or transfer a case before us without our concurrence is devoid of any basis in law and is in fact opposed to precedents. The application is not maintainable and is rejected.

37. The application before the Honourable the Acting Chief Justice is yet to be disposed of. So at this stage we would not like to enter into the question how far it was proper for the applicant and his two counsel, even if so instructed by their client, to cast on the Court the aspersions contained in grounds 1 and 2 and the prayer clause of the application before us.

38. Let the case be put up before us on 21-9-1950.
Application rejected.

Cases Referred.

¹ I. L. R. (1938) 1 Cal. 476 : AIR 1938 Cal 385

²(1917) 1 K. B. 486 : (86 L. J. K. B. 257)

³S. a. No. 158 of 1950

⁴I. L. R. (1950) Nag. 532 at p. 540 : (AIR 1950 Nag 177 F.B)

⁵13 M. I. A. 585 at pp. 595, 596 : (6 Beng. L. R. 283 P.C)

⁶AIR 1939 Lah 517 at p. 519 :I.L.R. (1940) Lah. 88 and 90

⁷I.L.R. (1940) Mad. 454 at p. 474 : (AIR 1940 Mad 356 F.B)

⁸AIR 1924 Cal 186 : (80 I. C. 637)

⁹61 Cal. 155 : (AIR 1933 Cal 870 : 34 Cr. L. J. 1100)