

CASE NO.:
Appeal (crl.) 994 of 2005

PETITIONER:
Samya Sett

RESPONDENT:
Shambu Sarkar & Anr.

DATE OF JUDGMENT: 12/08/2005

BENCH:
CJI R.C. Lahoti, C.K. Thakker & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (Criminal) No. 2979 of 2004)

C.K. Thakker, J.

Leave granted.

The present appeal reminds us of a golden advice given by this Court before more than four decades. In *State of U.P. vs. Mohd. Naim*, (1964) 2 SCR 363, a single Judge of the High Court of Allahabad while deciding a criminal case, made certain sweeping and uncalled for observations against the entire police force of the State. The State, therefore, approached this Court making grievance against indiscriminate observations by the High Court. Observing that the case was exceptional in nature and inherent powers of expunging remarks were called for, this Court, speaking through S.K. Das, J. stated :

"The last question is, is the present case a case of an exceptional nature in which the learned Judge should have exercised his inherent jurisdiction under S. 561-A Cr.P.C. in respect of the observations complained of by the State Government? If there is one principle of cardinal importance in the administration of justice, it is this : the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-play and restraint. It is not infrequent that sweeping generalizations defeat the very purpose for which they are made. It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation

and reserve." (emphasis supplied)

In the case on hand, a judicial officer is constrained to approach this Court for expunging remarks made by a single Judge of the High Court of Calcutta against him. The remarks were made in the light of an order passed by the appellant in connection with a criminal case instituted against one Shambhu Sarkar. It was the case of the prosecution that the accused-Shambhu Sarkar was found possessing 1200 grams of ganja on September 21, 2003. He was, therefore, arrested and a case was registered in Naihati P.S. Case No.115 of 1993 under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1951 (hereinafter referred to as "NDPS Act"). He was produced on September 22, 2003 before the appellant who was then working as Additional District & Sessions Judge, 6th Court, cum- Special Court under the NDPS Act, Barsat, District 24 Parganas. An application for bail was moved by the accused which was rejected by the appellant. The case was directed to be listed on November 3, 2003 for the report of the investigating officer. On November 3, 2003, another bail application was moved by the accused which was also rejected by the appellant. The case was then fixed for hearing on November 17, 2003. On that day, the accused again made an application for bail which was rejected and the case was adjourned to December 1, 2003. Before that date, however, on November 21, 2003, an application for bail was moved on behalf of the accused under sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") contending inter alia that the statutory period for submission of charge sheet was over and no charge sheet had been submitted by the police. The accused was, therefore, entitled to be released on bail. Noting these facts, the appellant passed an order releasing the accused on bail on furnishing a bond of Rs.3,000/- with two sureties of Rs.1500/- each. On the same day, however, at a later stage, it was stated that the chargesheet had already been submitted. The case diary was produced by the prosecution which showed that the cognizance for an offence punishable under Section 20 of the NDPS Act had been taken against the accused. But as the public prosecutor was not present, those facts could not be brought to the notice of the court. In the circumstances, the appellant recalled the earlier order.

The accused preferred Criminal Revision against the order passed by the appellant in the High Court of Calcutta. The learned single Judge of the High Court, by an order dated December 5, 2003, allowed the revision and set aside the order passed by the appellant. According to the learned single Judge, when the appellant had passed the first order and granted bail to the accused, he could not have recalled the order "in absence" of the accused. The second order, according to the learned single Judge, therefore, was "not in accordance with law" and liable to be set aside. The appellant was accordingly directed to pass a fresh order. In the light of the directions issued by the High Court, the appellant again heard the matter on December 15, 2003. The defence counsel relied upon a decision of this Court in *Aslam Babalal Desai vs. State of Maharashtra*, (1992) 4 SCC 272, and contended that once bail was granted to the accused under sub-section (2) of Section 167 of the Code, it could not be cancelled or recalled. The appellant, however, distinguished *Aslam* and observed that the principle laid down therein was not applicable to the case since it was a case of cancellation of bail on filing of charge sheet. In the present case, bail was granted to the accused on the ground of non-submission of charge sheet but in fact charge sheet had already been submitted on the last day i.e. November 21, 2003 and hence the provisions of sub-section (2) of Section 167 of the Code were not attracted. The appellant also noted that when he had passed the order in the earlier part of the day, the learned public prosecutor in charge of the case was "not present" and thus he could not inform the court that the charge sheet against the accused had been submitted. Later on, it was found that the charge sheet had been filed against the accused. It was thus clear that sub-section (2) of Section

167 of the Code did not apply. Accordingly, the appellant rejected the prayer for bail. Against that order, once again the accused approached the High court by filing Criminal Revision which was allowed by the learned single Judge on January 30, 2004. He set aside the order, dated December 15, 2003 and directed the appellant to pass necessary order "forthwith" keeping in mind the observations made in the judgment. While deciding the revision, the learned single Judge made certain remarks and passed strictures against the appellant. Being aggrieved by those remarks and observations, the appellant is before us. The learned single Judge dealing with the revision against the second order passed by the appellant herein, inter alia stated :

"It is clear from the order dated 15.12.2003 that the learned Judge completely ignored the direction of this Court and his order dated 15.12.2003 amounts to clear violation of directions of this Court.

..... \005.. \005.. \005..
After perusing the order of the learned Judge dated 15.12.2003 in the said case I find that the learned Judge did not realise his mistake and not only that, by his impolite and arrogant attitude he has clearly ignored the order of this Court. His order has made it clear that he did not realize the observation of this Court that later part of order dated 21.11.2003 was set aside by this Court as the said order was bad in law.

..... \005.. \005.. \005..
The learned Judge did not realize that in our country administration of Justice and justice delivery system deserves that subordinate Courts should obey, honour and follow the orders and directions of higher courts. A subordinate court cannot simply keep aside and ignore the direction of the higher Court.

..... \005.. \005.. \005..
His conduct was aiming towards dangerous trend and was about to destroy this system and discipline. The manner in which learned Judge passed the order on 15.12.2003 in spite of Hon'ble Supreme Court's pronouncement in Aslam Babai Desai's case (supra) and direction of this Court dated 5.12.2003 makes it clear that by ignoring order of higher court he has made breach of judicial discipline and has damaged out criminal justice system.

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In my opinion the conduct of learned Judge Sri S. Sett is an example of ignoring direction of this Court for which the entire matter should be placed before the Administrative Committee of this Court for taking appropriate action against the concerned learned Judge."

On July 9, 2004, when the matter came up for admission, this Court granted permission to file Special Leave Petition and issued notice to the Registrar General of the High Court of Calcutta. The Court, however, stated:

"Notice need not go to the respondents impleaded by the petitioner as they have no interest in contesting the petition".

We have heard the learned counsel for the appellant. As already observed hereinabove, the facts are almost admitted. The appellant was Additional District & Sessions Judge and in charge of Special Court

under NDPS Act. Accused Shambhu Sarkar was produced before him on September 22, 2003 and his bail application was rejected. On November 21, 2003, an application for bail was moved by the accused praying for grant of bail on the assertion by the accused that no charge sheet had been submitted within the stipulated period. The appellant, in absence of the public prosecutor and in the light of averments made by accused, ordered him to be enlarged on bail. It was thus a case of "default bail". On the same day, however, at a later stage, the public prosecutor appeared, drew attention of the court that the factual basis on which the accused was ordered to be enlarged on bail was incorrect, the charge sheet had already been submitted and sub-section (2) of Section 167 of the Code could not be invoked. The appellant considered the submission of the public prosecutor, noted that when the first order was passed, learned public prosecutor was not present and after observing that the charge sheet had been submitted, recalled the order. No doubt, the accused had right to challenge that order and he in fact challenged the order by filing Criminal Revision. He contended before the High Court that the second order was passed by the appellant recalling the first order in his absence and without giving him opportunity of hearing. The learned single Judge of the High Court, in our opinion, was right in allowing revision petition of the accused and in observing that once the order was passed in favour of the accused releasing him on bail, it could not have been recalled without observing principles of natural justice. The learned single Judge was also right in setting aside the said order and in directing the appellant to afford opportunity of hearing to the accused and to pass an appropriate order "in accordance with law". The appellant again heard the matter and rejected the bail application. Negativating the contention of the accused that he was entitled to bail under sub-section (2) of Section 167 of the Code and in view of the law laid in Aslam, the appellant held that neither sub-section (2) of Section 167 of the Code nor ratio in Aslam could apply inasmuch as the accused was not enlarged on bail and bail was not cancelled thereafter. According to the appellant, within the requisite period, charge sheet had been submitted by the police and the accused was not entitled to the benefit of default bail.

Now, whether the second order dated December 15, 2003, passed by the appellant was or was not correct is not the matter in issue in the present proceedings. But, in our opinion, the learned single Judge of the High Court was not justified in passing strictures against the appellant to which reference has been made by us in the earlier part of the judgment. It may be recalled that when the matter had come to the High Court earlier, the learned single Judge set aside the order passed by the appellant on November 21, 2003 and directed him to give an opportunity of hearing to the accused and to pass an appropriate order 'in accordance with law'. That direction had already been complied with and carried out by the appellant. He afforded hearing to the accused and rejected the application after considering the arguments put forward by the learned advocate. In our considered opinion, therefore, it cannot be said that the appellant had attempted 'to maintain his own order' though it was held to be bad by the High Court. It also cannot be said that the appellant had "completely ignored" the directions issued by the High Court. The learned single Judge of the High Court is also not correct in observing that from the order dated December 15, 2003, passed by the appellant, it is clear that the appellant did not realize his mistake and had shown "impolite and arrogant attitude". Likewise, it cannot be said that the appellant had not shown respect to the order of the superior court and his conduct would destroy judicial system and discipline.

To us, it is clear that the appellant, keeping in view the directions issued by the High Court, heard the matter afresh after affording opportunity of hearing to the accused and holding that the provisions relating to 'default bail' would not apply and the ratio in Aslam was not

attracted, rejected the prayer for bail. Even if it is assumed that the appellant was not right in rejecting the application for bail of accused, it was not a case which called for remarks and strictures against him.

This Court has, in several cases, deprecated the practice on the part of Judges in passing strictures and in making unsavoury, undeserving, disparaging or derogatory remarks against parties, witnesses as also subordinate officers.

In *Alok Kumar Roy v. Dr. S.N. Sarma & Another*, (1968) 1 SCR 813, the vacation Judge of the High Court of Assam and Nagaland passed an interim order during vacation in a petition entertainable by Division Bench. After reopening of the Court, the matter was placed before the Division Bench presided over by the Chief Justice in accordance with the High Court Rules. The learned Chief Justice made certain remarks as to "unholy haste and hurry" exhibited by the learned vacation Judge in dealing with the case. When the matter reached this Court, Wachoo, C.J., observed :

"It is a matter of regret that the learned Chief Justice thought fit to make these remarks in his judgment against a colleague and assumed without any justification or basis that his colleague had acted improperly. Such observations even about Judges of subordinate courts without the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. We are glad that Goswami, J. did not associate himself 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 the same assumption and had not made these observations castigating Dutta J. for they appear to us to be without any basis. It is necessary to emphasize 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." (emphasis supplied)

In *State of M.P. v. Nandlal Jaiswal & Others*, (1986) 4 SCC 566, disparaging and derogatory remarks were made by the High Court against the State Government. When the matter came up before this Court and a complaint was made against these remarks, it was observed by this Court that the remarks were "totally unjustified and unwarranted".

Bhagwati, C.J. stated :

"We may observe in conclusion that judges should not use strong and carping language while criticizing the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognize that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

In *A.M. Mathur v. Pramod Kumar Gupta*, (1990) 2 SCC 533, which was an offshoot of *Nandlal Jaiswal*, certain observations were made by the High Court against the conduct of Advocate General of the State. Quoting Justice Cardozo and Justice Frankfurter, the Court

stated that the Judges are flesh and blood mortals with individual personalities and with normal human traits. Still judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint should be constant theme of judges, observed the Court. "This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary."

The Court further added :

"The Judge's Bench is a seat of power. Not only do judges have power to make binding decision, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct."

In the matter of 'K' A Judicial Officer (2001) 3 SCC 54, one of us (R.C. Lahoti, J.), (as his Lordship then was) again considered the relevant decisions on the point and said :

"Several cases are coming to our notice wherein observations are being made against the members of subordinate judiciary in the orders of superior forums made on judicial side and judicial officers who made orders as presiding Judges of the subordinate Courts are being driven to the necessity of filing appeals to this Court or petitions before the High Courts seeking expunging of remarks or observations made and sometimes strictures passed against them behind their back. We would, therefore like to deal with a few aspects touching the making of observations or adverse comments against judicial officers and methodology to be followed if it becomes necessary.

A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four-corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of

Judge." (emphasis supplied)

[See also In the matter of : 'RV', A Judicial Officer, (2004) 7 SCC 729]

In State of Bihar vs. Nilmani Sahu & Another, (1999) 9 SCC 211 while disposing of the Special Leave Petition against an order passed by a single Judge of the High Court of Patna, this Court observed; "We find that the view taken by the learned single Judge, Justice P.K. Dev, with due respect, if we can say so, is most atrocious".

Feeling aggrieved by the remarks, an application was made in a disposed of Special Leave Petition and it was submitted to this Court that the remarks were not necessary. Allowing the application and deleting the remarks, this Court stated that they were "wholly inappropriate".

It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes and dislikes; their preferences and prejudices. Dealing with an allegation of bias against a Judge, in Linahan, Re, (1943) 138 F IInd 650, Frank J. stated;

"If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices."

Justice John Clarke has once stated :

"I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of the Mother Earth' \026 even those of us who wear the long robe."
(emphasis supplied)

Similar was the view of Thomas Reed Powell, who said; "Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is."

In the present case, however, as we have already noted in the earlier part of the judgment, whether the order passed by the appellant was correct or not, but the remarks made, strictures passed and directions issued by the learned single Judge of the High Court against the appellant were improper, uncalled for and unwarranted. Apart from the fact that they were neither necessary for deciding the controversy raised before the Court nor integral part of the judgment, in the facts and circumstances of the case, they were not justified. We, therefore, direct deletion of those remarks.

The appeal is accordingly allowed to the extent indicated above.

JUDIS