
(2011) 09 JH CK 0116

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 724 of 2004

Irniyus Tigga and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4(1)
Constitution of India, 1950 — Article 215, 22, 22(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 303

Citation : (2011) 4 JCR 212

Hon'ble Judges : Prakash Tatia, Acting C.J.; P.P. Bhatt, J

Bench : Division Bench

Judgement

1. The office has raised objection that learned counsel for the appellants has filed the power on behalf of appellant No. 5-John Tigga @ Johan Tigga only and has not filed the power on behalf of rest of the appellants.

2. It has been submitted that such objection has been raised by the office in view of the order of the Division Bench, passed in Cr. Appeal No. 272 of 2002 Binod Kumar Lal and Another v. State of Jharkhand, on 6th August, 2008, wherein the Division Bench has observed that the practice of filing/giving no objection to a counsel to appear on behalf of some of the appellants only is deprecated. Then this Court held "no doubt, if a counsel wants to withdraw his appearance from a case, he can be allowed but he can't be allowed to retain power for one person and give no objection to any other counsel for another person". In addition to above, a direction has been issued to the office, obviously to the Registry of the High Court, not to accept such Interlocutory Application or Vakalatnama in future. Learned counsel for appellant No. 5 submitted that order dated 6th August, 2008 is per-incurium, in view of the judgment of the Hon'ble Apex Court in the case of R.D. Saxena Vs. Balram Prasad Sharma, , as by this order, right of litigant has been curtailed in choosing the advocate.

3. In this case, appellant No. 5 alone has decided to engage the present counsel

and gave his power to appear in this appeal on behalf of appellant No. 5. The appellant No. 5 has also moved application for suspension of sentence through the present counsel and if, the appellant No. 5 will not be represented through the counsel of his choice, it will violate his fundamental right. It is also submitted that order dated 6th August, 2008 is not based on any legal provision, rather it runs to the contrary to the constitutional provision of accused's right to get defended through counsel of his choice as well as contrary to the provisions made in Section 303, Cr PC which recognizes the right of a person, against whom proceedings are instituted to be defended, which specifically provides that such accused shall have right to be defended by a Pleader of his choice.

4. We have considered the submission of learned counsel for the appellants and perused the judgments of R.D. Saxena's case (supra) 2000 (3) ECC 1055 (SC) and the reasons given in the order dated 6th August, 2008, passed in Cr. Appeal No. 272 of 2002.

5. The order dated 6th August, 2008, passed in the case of Binod Kumar Lal & Anr. prohibits not only the litigant from getting the assistance of the advocate of his choice but also prohibits advocates from appearing for the litigant who has engaged the advocate and paid him his remuneration and has faith in him. Above order provides for keeping the advocate by litigant against his wish if other appellants will not change advocate of their choice. The said order is a direction to the High Court registry not to accept any Interlocutory Application or Vakalatnama in future in a case where one of the appellants or few of the appellants out of several appellants engages/engage another advocate and where the advocates file the power after obtaining the no objection from the counsel who has filed the power earlier in the matter. The advocates have been directed to not to give consent for one out of several appellants and if he gives permission to another counsel to appear for one as the appellant then he has to give consent for all appellants even if such appellants do not want to change the advocate.

6. So far as first issue is concerned with respect to the right of the litigant in the matter of choosing the advocate is concerned, we are of the view that before the Division Bench, neither the statutory provision like Section 303, Cr PC, nor the judgment of the Apex Court delivered in the case of R.D. Saxena were placed and brought to the notice of the Court. Since it is a criminal matter and the procedure is prescribed by the statutory provision Section 303, Cr PC and the judgment of Supreme Court delivered in the case of R.D. Saxena would have been brought to the notice of the bench, the direction may not have been given by the Court contrary to Section 303, Cr PC and contrary to judgment delivered in the case of Binod Kumar Lal & Anr. Section 303, Cr PC reads as under :

303. Right of person against whom proceedings are instituted to be defended.-- Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

7. The bare perusal of above Section 303, Cr PC clearly indicates that right of the litigant has been recognized statutorily and it has been provided that the accused shall have right to defend by a Pleader of his choice. The effect of the order passed by a Division Bench of this Court in Cr. Appeal No. 272 of 2002 dated 6th August, 2008 will be that in a case where more than one appellants are there and appeal is originally preferred through one advocate then any of the appellants shall have no right to retain advocate of his choice in case one of the appellants chooses to engage another lawyer meaning thereby the right to be defended by advocate of his choice has been taken away. At the same time, such litigant will have to engage same advocate which has been chosen by one of them as consent to engage more than one advocate in one appeal by several appellants stand excluded by the reading of the order dated 6th August 2006, even if appellants do not want to change the advocate. The advocate cannot retain power of one appellant and give no objection to any other counsel for another appellant, meaning thereby, even if the litigant wants to retain the counsel, he cannot keep the counsel.

8. The Hon''ble Supreme Court in R.D. Saxena's case (supra) 2000 (3) ECC 1055 (SC) has held as under :--

15. A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is pre judicial to the interest involved in the lis, or for any other reasons. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

16. In civil cases, the appointment of an advocate by a parry would be deemed to be in force until it is determined with the leave of the Court (vide order 3 rule 4 (1) of the Code of Civil Procedure). In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22 (1) of the Constitution. The said right is absolute in itself and it does not depend on other laws. In this context, reference can be made to the decision of this Court in State of M.P. v. Shobharam. The words "of his choice" in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client.

(emphasis supplied).

9. The Hon''ble Supreme Court held that in criminal cases, every person accused in an offence has the right to consult and be defended by a legal practitioner of his choice and that has been made a fundamental right under Article 22(1) of the

Constitution and emphasis has been given by observing that the said right is absolute in itself and it does not depend on other laws. Therefore, even in absence of Section 303, Cr PC, the litigant would have right to be defended through counsel of his choice.

10. At this juncture, it will be worthwhile to mention here that even in a case when different advocates appear in one appeal preferred by the different accused persons and Court is of the view that, that may create procedural difficulty even then in view of the statutory provision and Constitutional provision under Article 22(1) of the Constitution, the Court cannot prescribe the law which may infringe the right of the accused given in Constitution. At this juncture, it will be relevant to mention here that if, the direction as given in the order dated 6th August, 2008 is accepted then also the appellants or one of the appellants may submit before the Court that he/they may be permitted to separate from the appeal that may result in multiplicity of the litigation against one judgment and therefore, even if it may create some inconvenience, it is always better to allow the advocate to argue on behalf of the different appellants in appeal as they could have been allowed in case, the accused would have preferred appeal separately and counsel would have got the right to argue the appeal, as a matter of right.

11. In view of the above legal position, the order dated 6th August, 2008 runs contrary to, not only statutory provision of Section 303, Cr PC but also contrary to the Constitutional provision under Article 22 (1) and runs contrary to the law laid down by Supreme Court in the case of R.D. Saxena, therefore such directions given in the order dated 6th August. 2008 shall have no effect and operation in the light of the reasons given above.

12. Another question of larger importance is that, while exercising appellate jurisdiction in criminal side, by order dated 6th August, 2008 issued order/direction against the High Court and the Division Bench has directed the office of the High Court, obviously the Registry of the High Court, not to accept Interlocutory Application or Vakalatnama in future in the facts discussed above. The question arises whether the Division Bench could have issued such direction to the High Court and High Court registry in the matter of filling up applications and Vakalatnama.

13. The Hon"ble Apex Court in the case of State of Rajasthan Vs. Prakash Chand and Others, . has held that "That the administrative control of the High Court vest in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals". Therefore, the Registry of the High Court is in direct control of the Chief Justice of the High Court. In another case where several directions were issued by the Single Judge of the High Court in respect to the procedure to be followed by the Registry of Rajasthan High Court, the matter came up before the Bench of Rajasthan High Court in the case of Rajasthan High Court, Jodhpur v. State and Others, D.B. Civil Special Appeal No. 3 of 2010, wherein it was held by the Division Bench of the High Court on 1st April, 2011 (in which one of us, Prakash Tatia. ACJ. was a member), that the directions in the form of writ and

orders can be issued under Article 226 of the Constitution of India and, it is apparent from the order dated 6th August, 2008 passed in the case of Binod Kumar Lal & Anr. that direction was given to the High Court in Criminal Appeal and whereas no power vests in Court while exercising power under a procedure governed by the Criminal Procedure Code to issue writ and direction in the form of writ or order under Article 226 of the Constitution of India. Furthermore, the procedure of dealing with the matters which are filed in Courts are governed and regulated by the procedure prescribed by the rules framed by the High Court under Article 215 of the Constitution of India and may be governed by any other rules framed by the High Court or as per the order of the Chief Justice and if, there are no rules then also by prescribing the procedure by the High Court or by the Chief Justice. Passing any order in judicial side in the matter of filing and dealing with the filings may amount to legislating by judicial pronouncement which is not permissible, in view of the judgment of the Apex Court, delivered in the cases of Divisional Manager, Aravali Golf Club v. Chander Hass, reported in (2008) 1 SCC 683 and P. Ramachandra Rao Vs. State of Karnataka, . Therefore, also the direction given by the Division Bench of this Court in the order dated 6th August, 2008 being contrary to the law laid down by the Supreme Court and has been issued while passing orders in the judicial side in criminal appeal, cannot be given effect to by the High Court and its Registry. Furthermore, the High Court was neither the party nor was heard before issuing such direction.

From the decisions rendered by the Hon"ble Supreme Court, as referred above, as well as in the case of Rajasthan High Court, Jodhpur v. State and others (supra), it is clear that whenever there is any difficulty in following the procedure comes before the Bench hearing the judicial matters then the proper procedure is to draw attention of the Chief Justice of the High Court in administrative side, with respect to the procedural difficulty, which may be considered by the High Court or the Chief Justice, as the case may be, to take a decision with respect to the making changes in procedure if required.

14. In view of the above reasons, the office objection is overruled and it is held that order dated 6th August, 2008 with respect to the issues referred in this order is per incurium being (sic) to, not only statutory provision, but contrary to the Constitutional provision and the law laid down by the Supreme Court in the case of R.D. Saxena and counsel for appellants is permitted to appear on behalf of appellant No. 5 alone.

15. Learned counsel for the appellant No. 5 sought time to argue I.A. No. 1592 of 2011.

16. Put up this case in the next week, as prayed.