

(1989) 04 MP CK 0018

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Petition No. 14 of 1989

Munna Singh Tomar

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 04-04-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 141
Criminal Procedure Code, 1973 (CrPC) — Section 438(1), 439
Government of India (Amendment) Act, 1935 — Section 223
Government of India Act, 1913 — Section 108

Citation : (1990) CriLJ 49 : (1989) JLJ 350 : (1989) MPJR 433 : (1989) MPLJ 414

Hon'ble Judges : K.K. Varma, J

Bench : Single Bench

Advocate : J.P. Gupta, for the Appellant; M.M. Qureshi, Dy. Govt. Advocate, for the Respondent

Judgement

K.K. Varma, J.

In Criminal Miscellaneous case No. 14 of 1989, Munna Singh Tomar v. The State of M.P., the learned single Judge, R. C. Lahoti, J., referred two questions of law for determination by a Division Bench, Hon'ble the Chief Justice has constituted a Division Bench for answering the questions which are as follows :--

(i) Whether in view of the dictum of the Apex Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, a subsequent application for bail should be placed for hearing before the same Judge be for whom an earlier application for bail of the same applicant was dismissed as not pressed, so long as he is available.

(ii) Would it make any difference if the earlier application for bail dismissed withdrawn or not pressed was at the stage of motion hearing and/or before a Vacation Judge?".

The context is as follows :

Applicant Munna Singh Tomar filed a bail application u/s 439, Cr.P.C. in the High Court on 19-12-1988. The case was listed before Dr. T. N. Singh, J., sitting as the Winter-Vacation Judge on 20-12-1988. The applicant's counsel Shri J: P. Gupta appeared for him before the learned Vacation Judge. After recording the presence of counsel the order-sheet runs as follows :

"Shri G. P. Gupta, counsel for the applicant. Counsel does not want to press this application. The application is dismissed as not pressed."

On 4-1-1989 applicant Munnasingh Tomar filed the second bail application u/s 439, Cr.P.C. in the High Court referring to the first bail application and the first bail order.

This application was listed before Dr. T.N. Singh, J., on 6-1-89 when he heard the applicant's counsel and order that a show cause notice was to issue to the Deputy Advocate General, Gwalior returnable on 13-1-89. The order sheet dt. 7-1-89 shows that the bail application was re-listed at the instance of Dr. T. N. Singh. J., because he wanted to be sure about his jurisdiction in the matter, because in the current roster he was not a Bail Judge. Shri J.P. Gupta submitted that he (Dr. T.N. Singh, J. had jurisdiction to deal with the applicant's second bail application. The learned Judge rejected the plea and passed the following final directions in the case so far he was concerned :

...That notice shall issue but this matter shall not come before me and shall go before the bail Judge who deals with such matters according to current Roster.

As has been laid down herein the Registry is directed not to list before me similar bail applications in cases in which earlier bail applications by the same bail applicant were disposed of as not pressed.

The reason given by Dr. T. N. Singh, J., in his order dt. 7-1-89 are as follows :

"Firstly, although a Vacation Judge has no specific Roster, he still deals with matters coming before him in accordance with the Rules of the Court. Any disposal made by him of any matter would be disposal subject to the Rules. If the Vacation Judge deals with any bail matter, disposal of any bail application by that Judge without passing any peremptory order on merits shall not be considered as disposal in due course of the bail application according to the Roster exercising his powers under the Roster. The power to deal with any matter of any learned Judge of this Bench, is circumscribed by the Roster fixed by the learned Chief Justice of this Court. When there is no vacation all bail applications must be dealt with in accordance with the current Roster as not Judge can arrogate to himself the power to change the Roster.

Secondly when the matter came up before me earlier on 20-12-1988, the only order that was passed was that the application was dismissed as "not pressed". I had not applied my mind at all to the merits of the case set out in the application

so that I would be required, according to the present practice adopted on the basis of the decision of the Hon"ble Supreme Court to deal with the subsequent bail application pertaining to the same applicant. I have no doubt that when their Lordships of the Supreme Court laid down the law that the same Judge has to deal with subsequent bail applications of the same accused, the intention of their Lordships was to discourage forum-shopping. If bail was refused to the applicant by any particular Judge of the Court on merits after due application of mind, on fresh facts and new contentions the same learned Judge could be moved to review his decision. The application which is dismissed as not pressed must be deemed to be an application not filed as the jurisdiction of the Judge was not invoked at all to reach any decision on the prayer made for release on bail. Such disposal would not come within the mischief of the rule laid down by the Hon"ble Supreme Court.

R. C. Lahoti, J. observed at paragraph 5 of his order dt. 13-1-89 as follows :

"I have carefully considered the dictum of the Apex Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, and with respect to my learned brother Dr. T. N. Singh, J., I find it difficult to hear the application placed before me by the Registry pursuant to the directions made by him vide order dt. 7-1-89, I am afraid that in the context no distinction can be drawn between an application dismissed as not pressed, be it either at the stage of admission or at the stage of final hearing, and an application rejected after hearing on merits. The end of paragraph 3, in Shahzad Hasan Khan indicates that there also an earlier application was dismissed as withdrawn because the counsel for some unknown reasons did not press the bail application. Paragraph 5 of the report reveals that their Lordships of the Supreme Court considered it appropriate and desirable (and also in keeping with the prevailing practice in the High Court) that a subsequent application for bail be placed before whom had come up the earlier application for bail. Their Lordships noticed "long standing convention and judicial discipline" requiring a subsequent bail application to be placed before the Judge passing earlier order. Their Lordships observed, The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of Court in as much as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not. and is encouraged to file successive applications without any new factor having cropped up."

Paragraph 6 of R.C. Lahoti, J., runs as follows :

"What has been referred to as Forum shopping by my learned brother Dr: T: N. Singh, J. was termed as "Bench-hunting" by the Apex Court in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, (a SLP carried from Madhya Pradesh High Court), while laying down the law attracting applicability of the principles underlying Order 23, Rule 1, C.P.C. to writ petitions, though not applicable otherwise saying that such extension should be made in the interests of administration of justice not on the ground of res judicata but on

the ground of public policy, because that would discourage the litigants from indulging in Bench-hunting tactics. Soliciting a dismissal founded on a prayer of withdrawal or declaration of not-pressed without assigning reasons or even by assigning reasons which may probably have no existence, is mostly because the applicant does not feel comfortable or does not hope that the hearing would bring fruits. Permitting a bail-applicant to have a choice of Judge by repeating bail applications would certainly be Forum-shopping or Bench-hunting and it would hardly make any difference whether he chooses not to press or to withdraw his prayer or chooses to suffer an order on merits."

R. C. Lahoti. J. referring to Hon"ble the Chief Justice's order dt. 2nd July, 1987 and to the instruction appended to the monthly Rosters, (vide, para 3 above) went on to say at paragraph 7 :

".....Nevertheless, ever since then, a practice has been followed in this Bench seat and as it is understood, at the Main Seat and also the Bench Seat at Indore. that subsequent bail applications are placed before the same. Judge who had dealt with earlier application for bail by the same applicant, without regard to the fact that the earlier bail application was dismissed as not pressed or withdrawn at the stage of motion hearing or at that of final hearing and whether or not an order on merits was passed earlier. This practice has certainly brought out the result desired by the Apex Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, . Now there is consistency in judicial orders and frivolous or futile repetition of bail application has been discouraged."

Before us. Shri J. P. Gupta. learned counsel for the applicant, submitted that the law laid down in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, enjoined the listing of the applicant's second bail application before Dr. T.N. Singh, J., for hearing and disposal according to law there.

Shri M. M. Qureshi the learned Deputy Government Advocate adopted the submission of Shri J. P. Gupta.

We enter the quest for the answers 19 the two questions by looking up the law enunciated in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, .

That case arose out of the order of the High Court of Allahabad, Lucknow Bench passed by D. S. Bajpai. J. granting bail to respondent No. 1 Ishtiaq Hasan Khan (hereinafter referred as the "applicant").

The applicant's first bail application in the High Court was disallowed by Kamleshwar Nath. J., on 18-9-85. The second bail application was rejected by Kamleshwarnath, J., on 21-1-86. Then a few days the applicant made another bail application before P. Dayal. J., who, having regard to the judicial discipline and prevailing practice in the High Court, directed that it be placed before Kamleshwarnath. J., who had passed orders rejected earlier applications for bail.

This bail application was placed before Kamleshwar Nath. J., who had then been sitting in a Division Bench. The applicant's counsel sought his permission for

listing the bail application before Kamleshwar Nath. J., passed an order releasing the bail application. However, in spite of that order the bail application was not listed before any other Judge, instead it was listed before Kamleshwar Nath. J., on 24-3-86 when the applicant's counsel, for some unknown reasons, did not press the bail application. On his request the application was dismissed as withdrawn.

On 3-6-86 the applicant made another bail application before D. S. Bajpai, J., who was then the Vacation Judge. D. S. Bajpai, J., directed that the application be listed before Kamleshwar Nath. J., who was sitting as a Vacation Judge w.e.f. 23-6-86.

Two days later, the applicant made another application before D. S. Bajpai. J., for recalling his order dt. 3-6-86. When this application was taken up by D. S. Bajpai. J., the Asstt. Government Advocate and the complainant's Advocate appeared and filed their appearance. D. S. Bajpai. J., directed the application to be listed on 7-6-86 when the complainant's counsel filed application raising objection against the hearing of the bail application on a number of grounds, and he further sought 3 days time to file detailed counter affidavit in reply to the allegations made in the pending bail application. D. S. Bajpai. J., did not grant time. After hearing, the arguments he recalled his order dt. 3-6-86, and enlarged the applicant on bail on 7-6-86.

The Supreme Court observed that there were some disturbing features" in the aforementioned "matrix of facts". Their Lordships were of the view that three successive bail applications having been rejected by Kamleshwar Nath. J., it would have been appropriate and desirable that the bail application, which was ultimately allowed by D. S. Bajpai. J., should have been placed before Kamleshwar Nath. J. It was further observed that it was plain that the applicant was keen, that his bail application, which had come before Kamleshwar Nath. J., on 24-8-86, should not be placed before the learned Judge. Their Lordships continued and said;

"..Long standing convention and judicial discipline required that respondent's bail application should have been placed before ""Justice Kamleshwar Nath who had passed earlier orders, who was available as Vacation Judge. The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of Court inasmuch as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not. and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the Court and the confidence of the other side being put in issue and there would be wastage of courts" time. Judicial discipline required that such matter must be placed before the same Judge, if he is

available for orders. Since Justice Kamleshwar Nath was sitting in Court on June 23, 1986 the respondents bail application should have been placed before him for orders. Justice D. S. Bajpai should have respected his own order dated June 3, 1986, and that order ought not to have been recalled, without the confidence of the parties in the judicial process being rudely shaken."

In the wake of the aforementioned judgment Hon'ble the Chief Justice High Court of Madhya Pradesh Jabalpur passed the following order on 2-7-87 which was conveyed to the Additional Registrar of the Gwalior Bench of the Court. Thereafter, the following instructions have been issued along with all Roster years every month, including the months of Dec., '88 and Jan. '89 :

"Where a subsequent bail application on the same subject is filed, it should be placed before the same Judge, who had passed earlier order."

Chapter 7 (Roster, Cause-List and Miscellaneous Instructions) in Part I of the Rules the High Court of M.P. deserves a mention. The first sentence of Rule 1 reads as follows :

"The Judges shall sit singly or in Benches of two or more judges and dispose of Civil or Criminal work in accordance with a Roster approved by the Chief Justice).""

In this context a Full Bench decision of the Nagpur High Court appears in our ken. In AIR 1930 177 (Nagpur) , it was held that the rules of the High Court bearing on Benches have the force of statutes, their Lordships observed as follows :

"The Rules of the High Court bearing on Benches are thus made by virtue of the powers granted by the Letters Patent read with Section 108 Government of India Act, 1913, the operation of which section is preserved by Section 223 Government of India Act, 1935, Section 108 reads :

"(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 High 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 deals with the exercise of the jurisdiction of the High Court. For this purpose rules have to be framed by the High Court. Sub-section (2) deals with the powers of the Chief Justice to designate Judge for cases in other words with powers to settle the roster of the Court.

There can be no doubt that the powers to make rules are extensive and almost unfettered. The rules made by the High Court within the scope of the authority thus given, have the force of statutes : In re Kunhammad Haji ILR 46 Mad 382 : AIR 1923 Mad 426: 24 Cri LJ 439 and In Re: Philip N. Godinho, . Such rules are

subject to the same principles of interpretation as the statute under which they are made : The Attorney General v. Sillem (1864) 11 ER 1200 : 10 HLC 704. There is no provision in the Government of India Act. 1915, or the Government of India Act 1935. that the rules shall take effect as if enacted in the statute. This is of some importance only when rules have to be placed before Parliament. Where an enactment to this effect is contained in the statute the rules cannot be called in question, but where there is no such provision the Court can consider whether those who made the rule had the power to make it : see Lord. Herschell LC in Institute of Patent Agents v. Lockwood 1894 AC 347 360 : 63 LJ PC 74."

It is therefore evident that the portion of Rule 1 extracted above has statutory force.

Now we shall take up the matter in the questions referred to us in the light of what has been said so far keeping in mind the reasons given by Dr. T. N. Singh J., and R. C. Lahoti J., in their orders passed in this case: order dt. 7-1-89 of Dr. T. N. Singh, J., and the order dt. 13-1-89 of R. C. Lahoti, J.

It is noteworthy that Kamlesh warnath J., did not have to dispose of the third bail application but had ordered its dismissal on withdrawal as the applicant's counsel did not press it before him. Notwithstanding in this feature akin to the feature of the case before Dr. T.N. Singh. J., -- the Supreme Court held that the next bail application should have been placed before Kamlesh warnath J., for hearing and disposal according to law.

We are. therefore of the view and we say it with utmost respect to Dr. , T. N. Singh. J. -- that the observations in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, extracted at paragraph 17 (supra) do not afford any purchase to the observations of Dr. T. N. Singh J., to the effect that the application which is dismissed as "not pressed" must be deemed to be an application not filed as the jurisdiction of the Judge was not invoked at all. In fact. the applicant did invoke the High Court's jurisdiction when he filed the first bail application on 19-12-1988. The application's counsel's statement in Court on 20-12-88 that he did not wish to press the application was in the exercise of the undoubted right of an applicant to seek a hearing before and an order from the Court about his plaint in the case. Our view is in line with the dictum in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, to the effect that a dismissal founded on a prayer, of withdrawal or declaration of not pressed without assigning reasons is fully effective.

Indeed, if the view favoured by Dr. T. N. Singh, J., were to be given effect to the rule laid down in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, would be rendered otiose.

Besides, the view of Dr. T. N. Singh, J., was taken regardless of the order dt. 2-7-1987 of Hon''ble the Chief Justice, and the instructions (extracted at p. 18 (supra) issued by him in carrying out the mandate in Shahzad Khan's case.

Hence the view taken by Dr. T. N. Singh. J., under the second head of the reasons in his order dt., 7-1-1989. does not lay down good law as it runs counter to the dictum in Shazad Khan's case. The point of view of R. C. Lahoti J., is in accord with the aforementioned Supreme Court decision.

Now we take up Dr. T. N. Singh J., said under his reasons under the heading firstly.

If the Vacation Judge deals with any bail matter, disposal of any bail application by that Judge without passing any peremptory order on merits shall not be considered as disposal in due course of the bail application according to the Roster exercising his powers under the Roster... when there is no Vacation all bail applications must be dealt with in accordance with the current Roster as no Judge can arrogate to himself the power to change the Roster,"

Now. the Roster commencing on 31-10-88 was in force up to 16-12-88. i.e. it ended before the commencement of the Winter Vacation on and from 1988. The following order was received from the Main Registry :--

"The Vacation arrangement of Indore/Gwalior Bench would be decided by Hon"ble Judges sitting at the Bench. In case no Hon"ble Judge is available the cases shall be heard at Jabalpur."

When this was circulated some of the Judge Dr. T. N. Singh. J., said that he would be sitting on 20-12-88.

As to the arrangement for institution and listing of cases, the Main Registry Order No. Q/AR(J)/1-7-7/1988 Jabalpur, dt. Nil Dec., 88 spelled out for the Additional Registrar of this Bench that institution during the Winter Vacation will be only of criminal cases, Further it was clarified that there shall be no hearing of criminal cases except bail applications. Thus, when Dr. T. N. Singh, J., sat on 20-12-88, the Roster arrangement by naming Vacation Judge had ended on 16-12-88. There was no Roster in that sense during the Winter Vacation. The arrangement, however, stipulated that only bail applications shall be heard on the criminal side of the judicial work, and it in the context of this that Dr. T. N. Singh. J., had observed that he would be sitting on 25-12-88. It is also noteworthy that Clause (g) of Rule 1 in Chapter 1 of Part I of the High Court Rules and Orders is to the effect that a petition under Criminal Procedure Code which necessarily includes applications under Sections 438(1) and 439, Cr. P. Code shall ordinarily be heard and disposed of by a Judge sitting alone. Hence, in our view when Dr. T.N. Singh. J., sat as the Vacation Judge to deal with the applicant's application on 20-12-88 he was not performing anything out of the way, but only exercising the powers of a single Judge in accordance with Rule 1(g). We, therefore fail to see how his powers exercised in dismissing the applicant's first bail application could have considerably deferred from those of a single Judge sitting to hear and dispose of, bail applications in the rosters -- approved by the Hon"ble the Chief Justice for the working days not covered by the Vacation of the High Court. Hence, with utmost respect, we are unable to agree with the reasons give by Dr. T. N. Singh.

J., under the heading firstly. We are of view that the fact that Dr. T. N. Singh. J., disposed of the applicant's first bail application on 20-12-88 sitting as a Vacation Judge did not take the order out of the rule laid down in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, and the order dt. 2-7-87 passed by the Hon"ble the Chief Justices and his -- instructions, passed and issued to carry out the mandate in Shahzad Hasan Khan's case, binding on all under Article 141 of the Constitution.

We therefore answer the two questions as follows :--

In view of the dictum of the Supreme Court, in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, if the earlier bail application had been dismissed; as withdrawn or not pressed, by any single Judge of the High Court as a Vacation Judge sitting during the High Court Vacations or otherwise, to hear and dispose of bail applications, either at the stage of the motion hearing or otherwise, a subsequent bail application of the same applicant should be placed for hearing before the same judge who had rejected the earlier bail application. so long as he is available.

In the result the Additional Registrar of this Bench shall list Miscellaneous Criminal Case No. 14 of 89). Munnasingh Tomar v. State of M. P. and similarly situated bail applications before Hon"ble Shri Justice Dr. T. N. Singh. J., for hearing and disposal.