

(1991) 09 CAL CK 0021
In the Calcutta High Court
Case No : Matter No. 3979 of 1988

Sakti Steel Traders

APPELLANT

Vs

Ashok Chakraborty and others

RESPONDENT

Date of Decision : 17-09-1991

Acts Referred:

Calcutta High Court Rules, 1914 — Rule 3, 4, 5, 6
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 10A
Constitution of India, 1950 — Article 141, 226

Citation : AIR 1992 Cal 187 : (1992) 2 CALLT 279 : (1992) 2 CHN 451 : (1993) CriLJ 969

Hon'ble Judges : Hazari, J

Bench : Single Bench

Advocate : Mr. Subrata Roy Chowdhury and Mr. Soumen Ghosh, for the Appellant; Mr. Somen C. Bose, Mr. L.K. Chatterjee, Mr. Amit Talukdar and Mr. Saptanshu Bose, for the Respondent

Judgement

1. M/s. Sakti Steel Traders filed an application under Art. 226 of the Constitution of India and the said application was filed in the Original Side of this Court. The said application was moved and an interim order was passed by the Hon'ble Mrs. Justice P. Banerjee in August, 1988.

2. The matter came up for hearing. Mr. S. Roychowdhury, the learned Advocate appearing for the petitioner opened this case. At that stage Mr. Soumen Bose, Advocate, appearing with Shri L. K. Chatterjee took a preliminary point that this writ application is not maintainable in the Original Side of this Court as no part of cause of action arose within the jurisdiction of this Court nor the respondent reside or carries trade for gain within the jurisdiction of this Court and as such it is submitted by Mr. Soumen Bose, learned Advocate, appearing for the respondent that the writ application should be dismissed.

3. Thereafter an application was filed by the writ petitioner to decide the said preliminary point. The said application was assigned before this bench.

4. Reliance was placed to the writ rules framed by the Full Bench of this Court particularly Rr. 4, 5 and 6 of the said rules.

5. The said rules had given certain guidelines when writ application should be moved in the Appellate Side or in the Original Side. Rr. 4, 5 and 6 provide as follows:--

"4. All applications for writs in the nature of Mandamus, prohibition and Quo Warranto, in which all the respondents reside or carry on business or have their offices situate within the ordinary original civil jurisdiction of this High Court, whether they relate to a person or Court, or authority, whether exercising civil, criminal or administrative jurisdiction, shall be dealt with by the Original Side and shall be mark as "Original Side" applications.

5. All applications for writ in the nature of Certiorari, where in the records are located or are available within the ordinary original civil jurisdiction of this High Court, whether they relate to an authority or Court exercising civil or criminal or other jurisdiction shall be dealt with by the Original Side and shall likewise be marked as "Original Side" applications, where such authority or Court and any other person, having custody of the records have their offices situate within the aforesaid ordinary original jurisdiction of this High Court.

6. All other applications whether they relate to a person or authority or Court exercising civil or criminal or other jurisdiction shall be dealt with by the Appellate Side of the High Court and marked as "Appellate Side "applications"

6. Relying on the said rules it was contended by Mr. Bose that this writ application should have been dealt with by the Appellate Side of this Court and not by the Original Side and in support of this contention reliance was made to a decision of the Division Bench judgment of this Court in the case of The University of Calcutta v. Shymal Kr. Das reported in 1985 CH N 187 wherein the Division Bench presided over by M.N. Roy, J. held that these rules are mandatory rules. It was held :

"admittedly no part of the cause of action arose within the appellate jurisdiction of this Court and in fact, the entire or whole of the cause of action arose within the original jurisdiction of this Court. That being the position, we hold that the concerned proceedings was not maintainable in the Appellate Side of this Court. That being the position, we are of the view that Rr. 4 and 5 of the said Rules as quoted hereinbefore, were a bar for this Court to entertain the application in the Appellate Side.

*** ***** We hold that the concerned application was not maintainable and entertainable in the Appellate Side of this Court and the same should have been moved and entertained in the Original Side. We thus direct, dismissal of the concerned proceeding in the Appellate Side and give liberty to the writ-petitioners, if they so intend or are so advised, to move the application afresh before the appropriate Bench in the Original Side."

7. Prior to this Division Bench judgment there are two Division Bench judgments on this point. The Division Bench of this Court presided over by B. C. Mitra, J. sitting with Janah, J. in the case of Messrs Arther Butler & Co. Mazuffarpur Ltd. v. Union of India in delivering the judgment on 20th September 1973 held that "This Court in entertaining the writ petitions and dealing with the same derives its jurisdiction not from the rules framed by this Court, but from Art. 226 of the Constitution. It is the Constitution which has conferred upon this Court the jurisdiction to entertain and deal with the writ petition and the rules set out above have been framed only for convenience of business". Subsequently, this very question came up for consideration before a Division Bench of this Court in the case of United Province Electric Supply Co. and Others Vs. Industrial Tribunal (III) Allahabad and Others, wherein Mr. S. P. Mitra the Chief Justice of this Court sitting with Mr. S. K. Roy Chowdhury, J. agreed with the view expressed by the earlier Division Bench in Messrs. Author Butler & Co."s case (supra) and observed that "In the absence of any such rules in a case in which the cause of action either wholly or in part arises within the territorial jurisdiction of the High Court at Calcutta, a writ petition may be filed either in the Original Side or in the Appellate Side according to the choice and convenience of the petitioner". In para 17 the Division Bench observed that "the question referred to us is whether an application under Art. 226 of the Constitution can be maintained on the Original Side of this Court where all the persons and authorities against whom the rule is asked for are outside the jurisdiction of this High Court, but where part of the cause of action is alleged to have arisen within the Original jurisdiction of this Court. Our answer to this question is in the affirmative". The earlier Division Bench judgment presided over by B. C. Mitra, J. in Arther Butler & Co."s case is the authority for the proposition that the writ rules have been framed only for the purpose of convenience and that does not "take away the jurisdiction of a particular Judge whether sitting in Appellate Side or in Original Side. The later judgment of this Court in 1985 C.H.N. 187 had only considered the Division Bench judgment of this Court in United Province Electric Supply Co."s case (supra) and sought to distinguish the same on the ground that this case was an authority for jurisdiction in regard to a case where part of cause of action arose within the Original Jurisdiction of this Court but the failed to take into consideration of the earlier Division Bench judgment of this Court in Arther Butler & Co."s case (supra).

8. It is now firmly established principle that a Division Bench cannot take a contrary view from that the view taken by the earlier Division Bench. The only course left to the later Division Bench is to refer matter to a larger bench, if the later Division Bench considered that the Division Bench judgment was not right. The later Division Bench judgment was to defer from the decision. The question is whether there are judgments on the field passed by the Division Bench of this Court, whether a subsequent Division Bench laid down any principle afresh when two or more judgments cannot stand together. Such a privilege is only conferred upon the Supreme Court, inasmuch as, the principles of per in curium decision is

applicable in case of Supreme Court only. The Supreme Court can take a contrary view and lay down law afresh, even two or more judgments cannot stand together. Article 141 of the Constitution embodies as a rule of law, the doctrine of precedents was enacted to declare the law binding on all the courts in the country excluding the Supreme Court itself. In the case of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, It was held by the Supreme Court that "the Latin expression "per in curium" means through in-: advertence. A decision can be said generally to be given per incurium when a High Court has acted in ignorance of a decision of the Supreme Court. The problem of judgment per incurium when actually arises would present no difficulty as the Supreme Court can lay down the law afresh even two or more judgments cannot stand together". In any event, when there are two conflicting decisions of the High Court, both of Division Bench, in that event, this Court sitting singly can follow either of them. It is not understood how the later Division Bench without considering the first judgment of Division Bench can take a contrary view in this matter. The Division Bench judgment of B.C. Mitra, J. laid down the principle on 20th September, 1973. The decision dealing with important question of jurisdiction given careful consideration, should not be reopened as this is bound to create a confusion and dead-lock in the administration of justice. It is the principle of public policy that a long standing precedent should not be departed from unless there are compelling reasons for it and unless it is established that the precedent was a bad precedent. So far as the provision of Art. 226 of the Constitution is concerned, the Appellate Side or Original Side rules of a particular High Court are unknown. The administrative rules of practice adopted for division of work amongst the Judges are directory and do not confer any right on the litigants. Procedural law cannot be mandatory. It was held by the Supreme Court in the case of Sharif-ud-din Vs. Abdul Gani Lone, "The difference between a mandatory rule and a directory rule is that while the former must be strictly observed in the case of the later, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to hold that the requirement is not mandatory and the specific consequence should not follow. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried at a subsequent stage unless by according such permission to rectify the error later or another rule would be contravened".

9. Rules 3,4 and 5 of the said rules of this Court had simply stated under what circumstances a writ application should be dealt with by the Original Side and marked as "Original Side "application and in some case it should be dealt with by the Appellate Side and marked as "Appellate Side" application. Reading the said rules it is also clear that it was never intended by the Rule making authority that

this rule is mandatory in nature. If the reference is made to the relevant provisions of Civil Procedure Code, it would be abundantly clear that the provision of the CPC in this regard is clear and mandatory" and there is no scope for making any departure. In case of filing of a suit before a Court having no jurisdiction in the matter, O. 7, R. 10 of CPC provide specific provision for return of the plaint for presentation of the same to the Court in which the suit should have been instituted. O. 7, R. 10A and R. JOB provides elaborate procedure for such purpose if it was filed before a Court which had no jurisdiction to entertain. From the provision of the Code it was made clear that the rule of procedure in so far as the jurisdiction of the Court is concerned, was mandatory and the Court has no discretion in the matter. The rule framed under Art. 226 of the Constitution of India is completely silent on this aspect of the matter. The provision of the CPC is expressly inapplicable in case of writ proceeding. So far as the writ petitions are concerned, it has to be presented to the Judge having writ jurisdiction. No provision has been made in the writ rules for return of the writ petition if it was filed before an appellate side Judge when it was an original side writ. If the Original Side writ Judge had writ jurisdiction to hear and dispose of the matter, in that event, it can also dismiss the same. A petition can be dismissed if the Court had jurisdiction to deal with it. If the Court had no jurisdiction to deal with it, it cannot dismiss it. The only requirement under the rules was to make certain petitions in the Appellate Side and certain petitions in the Original Side. It does not lay down any other embargo with regard to the jurisdiction of a particular Judge, either taking Appellate Side or the Original Side. In my view, this artificial distinction between the Appellate Side and the Original Side of this Court cannot take away the jurisdiction of a Judge, should have been empowered to deal with the writ application by the learned Chief Judge. It is not a case of entertaining a writ application by the learned Judge who had no jurisdiction. It is a case where a particular Judge sitting in the Appellate Side or Original Side, has entertained a writ application and that under such circumstances, I am unable to hold that simply because, the application should have been marked as Appellate Side, the application should be dismissed by a Judge sitting in Original Side because the Judge sitting in Original Side has no jurisdiction to hear it. If it was the intention of the writ rules that the classification of the Original Side and the Appellate Side should be strictly followed and that these rules are mandatory in nature, in that event, that should have a provision akin to the CPC in this regard and that there would have been certain provisions declaring that unless this rule is strictly followed, the writ application should be incompetent and should not be followed by this Court by a particular side. Looking at the provision of Rule 4 in case of mandamus, it should be dealt with Original Side application. In case of certiorari, records must be in the Original Side. The said rules are strictly construed and an impracticable situation will be brought about. The said rules are not substantive rules, but rules of procedures. When there are two Division Bench judgments and in the absence of special bench judgment of this Court, this Court is entitled to follow the earlier Division Bench of this Court in the case of Messrs. Arther Butler & Co. (supra)

and that the Division Bench judgment reported in (1985) 1 CHN 187 cannot be treated to be a precedent as it is a decision of sub-silentio. The principle of sub-silentio applies where the case is fully argued and a decision sub-silentio cannot be regarded as a precedent and/or cannot claim to be an authority. A decision of sub-silentio cannot be regarded to be an authoritative precedent. Apart from the above Division Bench judgment this point was also considered by D. Basu, J. in C.R. No. 840(W) and 84I(W)/67 where the judgment was delivered on 23rd July, 1967, wherein the dispute with regard to the Original Side application and the Appellate Side application in writ proceeding, has been considered and held that so far as the Constitution is concerned the Original Side and the Appellate Side are unknown to it. The administrative rules of practice adopted for division of work amongst the Judges are directory and do not confer any right on the litigants. Similar view had been taken in the case of Krishnatosh Das Gupta v. Union of India, reported in 1979 (2) CLJ 104 : (1979 Lab 1C 1154). In this case Padma Khastgir, J. was pleased to follow the decision of the United Province Electric Supply Co. and Others Vs. Industrial Tribunal (III) Allahabad and Others,

10. In my view, this artificial classification of the Appellate Side and the Original Side jurisdiction is a matter of convenience and is directory in so far as the writ application is concerned. In so far as the writ applications are concerned, writ applications are entertained by the High Court under Art. 226 of the Constitution of India. In my view, whether it is Original Side application or Appellate Side application, is a question and the litigant cannot have any right to say that any application moved in one side, is bad for simple reason that it would be contrary to public policy. When a writ application has been entertained by the learned Judge having jurisdiction to entertain the petition under Art. 226 of the Constitution of India in the absence of any provision for transfer of the writ application from one side to another side and in the absence of provisions for non-compliance of the said rules, it would be mere harassment to the litigant from moving the writ application. It would result in wastage of public money and public time.

11. The last submission of Mr. Roy Chowdhury was that if the Court decides that* the writ application should be filed in the Appellate Side then the Registrar Original Side of this Court may please be directed to send the records of this case to the Registrar, Appellate Side to register the same as a mandamus application in the Appellate Side. Mr. Bose opposed such submission of Mr. Roy Chouchury and submitted that this writ application must be dismissed and fresh application be filed in Appellate Side. I am unable to accept such contention of Mr. Bose.

12. The Calcutta High Court is one High Court only for the purpose of administrative facility, there are two sides namely, Original Side and Appellate Side. It cannot be said that the Calcutta High Court has been divided into two High Courts namely, Calcutta High Court Original Side, Calcutta High Court Appellate Side. A Judge of the Calcutta High Court is a Judge of the Calcutta High

Court as a whole it cannot be said that the Judge sitting in the Original Side is a Judge of the Original Side of the Calcutta High Court and a Judge sitting in the Appellate Side is a Judge of the Appellate Side of the Calcutta High Court. It is the determination made by the Hon'ble Chief Justice of the Calcutta High Court and a Judge takes up a matter relating to Original Side and matters relating to the Appellate Side but fact remains, a Judge of a High Court is a Judge of the High Court Calcutta which includes Original Side and also the Appellate Side. When a litigant filed an application under the Art. 226 of the Constitution of India the description constitutional writ jurisdiction is the description of the jurisdiction of the High Court. The words "Original Side" or the words "Appellate Side" are superfluous. The said words do not confer any jurisdiction on the High Court whatsoever. It is for the identification for the facility of the administration that the application will be heard in the Original Side and/or in the appellate side. When a litigant files an application in the High Court and the application is entertained by the Calcutta High Court, it cannot be said that the application was filed before the Original Side of the High Court, Calcutta or the application is filed in the Appellate Side of the High Court, Calcutta. I have already pointed out that the Calcutta High Court is one High Court and not two High Courts and when an application filed before the Calcutta High Court and is entertained by any Judge of this Court whether in the Original Side or in the Appellate Side in its writ jurisdiction, the said application got to be decided on merit and it cannot be thrown away or dismissed on the ground that the same should be filed in the Appellate Side or in the Original Side and/or the lack of jurisdiction of the Judge concerned in the Calcutta High Court. Since the present application was entertained by this Court, I hold the applicant cannot be denied justice by holding that this matter should be heard by a Judge of the Appellate Side and as such the application should be dismissed. As the same is tantamount to denial of justices to a litigant which he is entitled to under Art. 226 of the Constitution of India, and this Court will be failing in it's duty if the application is not disposed of on merit.

13. It is well settled that long standing practice of the Court should not be normally disturbed. Since 1950 thousand of writ applications have been filed, some in Appellate Side, some in Original Side. If such a proposition is entertained at this stage, relying upon the Division Bench judgment, which is a per in curium and a decision sub-section in that event, that will create an uncertainty and will result injustice. This will create an administrative problem in this Court.

14. In the case of Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, Supreme Court held that in case where the District Judge entertained an appeal in which the District Judge had no jurisdiction to entertain the appeal and when the District Judge had set aside the order passed by an subordinate authority illegally, Supreme Court held that such inference by the District Judge setting aside the order was made in the interest of justice and the said order of the learned District Judge was held to be proper, and in this case

admittedly, the District Judge had no jurisdiction, I am unable to uphold the preliminary objection which was justifying to create a deadlock in the administration of the Court and it would not serve cause of justice and on the contrary it will create a deadlock in the administration of the Court and it would serve in the interest of either parties. It is not the duty of the Court to adopt a procedure, which would upset the long standing practice of the Court and would not introduce anything which stands in the way of justice to the litigant.

15. Accordingly, such preliminary objection is overruled and I hold that this Court had jurisdiction to proceed with hearing of this writ application filed in the Original Side, even though it might have been filed in the Appellate Side of this Court.

16. Order accordingly.