

(2010) 05 JH CK 0021
Jharkhand High Court
Case No: None

State of Jharkhand

APPELLANT

Vs

Manjuda Mahali

RESPONDENT

Date of Decision: May 14, 2010

Acts Referred:

- Advocates Act, 1961 - Section 30, 34, 34(1), 49
- Constitution of India, 1950 - Article 145, 22(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 303, 362, 395(2), 401
- Penal Code, 1860 (IPC) - Section 376

Citation: (2011) 6 RCR(Criminal) 1119

Hon'ble Judges: R.R. Prasad, J

Bench: Single Bench

Judgement

R.R. Prasad, J.

Learned Sessions Judge, Jamtara while was in seisin of a case bearing Sessions Trial No. 76 of 2009 in which accused Manjuda Mahali was facing charge u/s 376 of the Indian Penal Code, fixed it for evidence on 14.12.2009 on which date, prosecution witness put his attendance but neither the accused, who was on bail appeared before the court nor his Advocate, namely, Bibhuti Bhushan Singh did appear and as such, bail bond of the accused was cancelled and at the same time, defence counsel Sri Bibhuti Bhushan Singh was debarred from doing pairvi for the said accused. It was further ordered that: bail application filed on behalf of the accused would only be entertained if it is filed by another Advocate and not by Mr. Bibhuti Bhushan Singh.

2. Subsequently, learned Sessions Judge transferred the case before the 5th Additional Sessions Judge-cum- F.T.C. Jamtara. On 17.1.2010 the accused Manjuda Mahali was arrested and thereupon, a bail petition was filed on behalf of the accused by the same counsel Sri Bibhuti Bhushan Singh on 21.1.2010. When it was

moved by him, his very appearance was objected by learned A.P.P by referring the order dated 14.12.2009 under which learned Sessions Judge, Jamtara had debarred Sri Bibhuti Bhushan Singh for defending the accused which put the learned 5th Additional Sessions Judge, Jamtara at fix as on one hand, the accused does have constitutional as also legal right to be defended by legal practitioner of his choice but on the other hand, there was an order of the learned Sessions Judge debarring the counsel of the choice of the accused for defending the accused which order cannot be recalled/reviewed by succeeding court in view of the provision as contained in Section 362 of the Code of Criminal Procedure and as such, following questions were referred to u/s 395(2) of the Code of Criminal Procedure for its determination by this Court:

(1) Whether learned defence counsel Sri Bibhuti Bhushan Singh may be permitted to appear in instant case without recalling the order dated 14.12.2009 passed by learned Sessions Judge, Jamtara?

(2) Whether this Court can recall/review the above said order passed by the learned Sessions Judge, Jamtara which in opinion of this Court can not be done because this Court is also exercising jurisdiction of sessions court as an Additional Sessions Judge.

(3) How to proceed in the instant sessions trial, when the accused is not ready to engage any other lawyers whether compelling accused to engage another, will not affect his legal right to be defended by a Pleader/Legal Practitioner of his (accused) choice.

3. Upon institution of the case, Sri B.M. Tripathi, learned senior counsel was appointed as amicus curiae to assist this Court in favour of the reference whereas Sri Ramesh Kumar Singh, learned Counsel was appointed as amicus curiae to assist this Court against the reference.

4. Mr. B.M. Tripathi, learned senior counsel by referring Article 22(1) of the Constitution of India and also Section 303 of the Code of Criminal Procedure submits that the accused does have constitutional as also the legal right to be defended in a proceeding instituted under the Code by pleader of his choice and this fundamental right cannot be taken away except by due process of law and, therefore, any order debarring the Advocate of the choice of the accused from defending the accused would be violative of fundamental right and as such, the order would be void.

5. Learned Counsel in this respect further submits that the said order is otherwise also bad as before passing the order of debarring counsel of the choice of the accused, no show cause or opportunity of hearing was given to the learned defence counsel which is violative of the principle of natural justice.

6. Learned Counsel very fairly by referring to a case of [R.K. Anand Vs. Registrar, Delhi High Court](#), submits that of course the court does have supervisory and controlling power to conduct the cases in the court and in exercising of that power, the court may debar an Advocate after giving due opportunity to him if the Advocate is guilty of contempt of court or of unbecoming or unprofessional conduct but the present case is not as such whereby the conduct of the counsel was found to be unprofessional or unbecoming of a lawyer and hence, the order passed by the learned Sessions Judge debarring the counsel of the accused of his choice is patently illegal which warrants to be quashed by this Court in exercise of power u/s 401 of the Code of Criminal Procedure as even an order which is unconstitutional would be valid unless it is set aside by the court of competent jurisdiction.

7. On the other hand, Mr. R.K. Singh learned Counsel by referring to observation made in paragraph 34 in a case of [Ex-Capt. Harish Uppal Vs. Union of India \(UOI\) and Another](#), which got approval in a case of [R.K. Anand Vs. Registrar, Delhi High Court](#), submits that in order to have smooth functioning, the court does have ample power to regulate the proceeding of the court even if it adversely affects the right of an Advocate.

8. Learned Counsel by drawing strength from the observation made in the case, as referred to above, submits that learned Sessions Judge by debarring the defence counsel from defending the accused has not committed any illegality.

9. In the context of the submission made above, reference may be made to Article 22(1) of the Constitution of India which reads as follows:

No person who is arrested shall be detain in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice.

10. At the same time, I may also refer to Section 303 of the Code of Criminal Procedure which reads as follows:

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.

11. Reading both the provisions conjointly, it may be stated that Criminal Procedure Code allows the right to be defended by counsel of the choice but that is not the guaranteed right. However, the Framers of the Constitution have well thought of this right and by including the prescription the Constitution have put it beyond the power of any authority to alter it without the constitution been altered. The first is the right to be told the reason of the arrest as soon as the arrest is made, second is the right to be produced before the Magistrate within 24 hours and the third is the right to be defended by a lawyer of one's choice. Therefore, any order passed by the court in derogation of the Constitutional right as enshrined under Article 22(1) of the

Constitution of India would certainly be unconstitutional, void and illegal. Therefore, the order passed by the learned Sessions Judge debarring the counsel of the choice of the accused is unsustainable.

12. In fairness to submission made by Mr. Singh, I must refer to observation in regard to Lawyer's right to appear before the court made in paragraph 34 of a case of Ex-captain Harish Uttal v. Union of India (supra) which reads as follows:

34. One last thing which must be mentioned is that the right of appearance in courts is still within the control and jurisdiction of courts. Section 30 of the Advocates Act has not been brought into force and rightly so. Control of conduct in court can only be within the domain of courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an advocate) can practice in the Supreme Court and/or in the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note; that unless self-restraint is exercised, courts may now have to consider framing specific rules debarring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for his clients before an arbitrator or arbitrators, etc. Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file vakalat on behalf of a client even though his appearance inside the court is not permitted. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by them in exercise of their disciplinary powers. The right to practice, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct case in the court is a matter on which the court must and does have major supervisory and controlling power. Hence, courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate. A rule can stipulate that a persons who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Council cannot over rule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty

of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practice law. While the Bar Council can exercise control over the latter, the courts are in control of the former. The distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practice i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practicing before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practice in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right of an advocate to appear in a court. An advocate appears in a court subject to such conditions as are laid down by the court. It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by Bar Council of India. There is thus no conflict or clash between the provisions of the Advocates Act on the one hand and Section 34 and Article 145 of the Constitution of India on the other.

13. Thus, it has been laid down that the court in course of proceeding does have controlling power and if any of the Advocate guilty of contempt and/or unprofessional or unbecoming conduct, he can be debarred from appearing for the accused. However, as has been expressed by the Hon'ble Supreme Court in a case of *R.K. Anand v. Registrar, Delhi High Court* (supra) the rule of natural justice demands that before passing any order debarring an Advocate from appearing any court, he must be heard in the matter.

14. Here in the instant case, the learned Sessions Judge without asking any explanation from the counsel appearing for the accused about his absence debarred him from defending the accused and in that event, conduct of the lawyer cannot be said to be unprofessional if he did not appear in the case on the date fixed as there may be numerous reasons for his non-appearance on the date fixed and, therefore, the order under which counsel of the accused was debarred from

appearing for the accused is not only illegal but also unconstitutional which is unsustainable in law and hence, by exercising suo motu revisional power, I set aside the order dated 14.12.2009 passed by the learned Sessions Judge, Jamtara in Sessions Trial No. 76 of 2009.

15. Accordingly, learned 5th Additional Sessions Judge shall now proceed with the case in accordance with law. In this event, reference made need not to be answered in any specific terms.

16. Before parting with this order, I must record my appreciation to both the counsel who with their best of abilities rendered assistance to the court in order to arrive at to just decision.