IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMP No.877 of 2021 in LPA No. 33 of 2019.
Reserved on: 06-03-2021.
Date of Decision: 8.03.2021.

Rajeev Bhardwaj ...Appellant.

Versus

State of H.P. & Others ...Respondents.

Coram:
The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?[1] ***YES***

For the Applicants/ Respondents No.3 to 6 : Mr. Rakeshwar Lal Sood & Mr. Bipin Chander Negi Ld. Senior Advocates, assisted by Mr. Arjun Lal & Mr. Nitin Thakur, Advocate.

For the Non-applicants: Nemo.

Anoop Chitkara, Judge.

Seeking appropriate directions qua the judgment passed by one of the Hon'ble Judges of this Court, who pronounced a dissenting verdict in Letters Patent Appeals, and decided in favour of the petitioners; the private respondents 3 to 6, came up before the third Judge, under Section 151 CPC, alleging that now they have come to know that wife of the Hon'ble Judge who gave the dissenting pronouncement, is related to the wife of one of the Appellants and thus the judgment given by the said Hon'ble Judge is non est as being coram non-judice.

2. The prayer clause of the application reads as follows:

> "a. That the dissenting view so recorded by the Hon'ble Justice Sureshwar Thakur, in LPA 33 and 39 of 2019, dated 11.3.2020, be declared coram non-judice and nonest in the eyes of law;

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

> b. That the LPA 33 and 39 of 2019 may thus kindly be remitted to the Hon'ble Chief Justice for constitution of a Division Bench for hearing the LPA afresh in the interest of justice and fairplay."

3. Mr. Bipin Chander Negi Ld. Senior Advocate, who represents 5th and 6th respondents, namely Mr. Chirag Bhanu Singh and Mr. Arvind Malhotra, in LPAs, argued that the allegations pointed out in the application establish bias. Thus, the application deserves acceptance in terms of its prayers. Ld. Sr. Advocate has relied upon the following judicial precedents to buttress his contentions:

a). **D K Khanna v Union of India**, AIR 1973 HP 30, wherein a Division Bench of this Court holds,

> "[24] Bias has been classified into different categories. We are concerned here with personal bias. Personal bias may arise from personal hostility to one party or from personal friendship or family relationship with the other. In the case of family relationship, the challenge to the proceeding need only establish so close a degree of relationship as to give rise to the reasonable likelihood of the Judge espousing the cause as his own. However, in England in 1572 a Court upheld an objection, in Vernon v. Manners. (1572) 2 Plowd 425 to the validity of a proceeding in which the Sheriff who had summoned the jury was related in the ninth degree to one of the parties. Closer relationship has invariably led to the invalidation of the proceedings. In Bridgman v. Holt. (1693) 1 Show PC 111, Holt C. J. withdrew from a case in which his brother was a party, Reference may be made to R. v. Rand. (1866) 1 QB 230. In Becquet v. Lamp-riere. (1830) 1 Knnaop 376 the Privy Council disqualified the jurat of the Royal Court of Jersey from hearing a case in which his deceased wife's nephew was a party."

b). **State of Punjab v. Sumedh Singh Saini**, (2011) 14 SCC 770, wherein Hon'ble Supreme Court holds,

> "[24] There may be a case where allegations may be made against a Judge of having bias/prejudice at any stage of the proceedings or after the proceedings are over. There may be some substance in it or it may be made for ulterior purpose or in a pending case to avoid the Bench if a party apprehends that judgment may be delivered against him. Suspicion or bias disables an official from acting as an adjudicator. Further, if such allegation is made without any substance, it would be disastrous to the system as a whole, for the reason, that it casts

doubt upon a Judge who has no personal interest in the outcome of the controversy.

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[36] Thus, it is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the factual matrix of the case in hand. The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. However, once such an apprehension exists, the trial/judgment/order etc. stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial "coram non-judice".

[106] The order impugned has rightly been challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 Cr.P.C. coupled with the principles of constructive res judicata; and the Bench had not been assigned the roster to entertain petitions under Section 482 Cr.P.C. The entire judicial process appears to have been drowned to achieve a motivated result which we are unable to approve of.

[107] It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

[108] In Badrinath v. State of Tamil Nadu & Ors., 2000 AIR(SC) 3243; and State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr., 2001 10 SCC 191, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.

[109] Similarly in Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors., 2005 3 SCC 422, this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.

[110] In C. Albert Morris v. K. Chandrasekaran & Ors., 2006 1 SCC 228, this Court held that a right in law exists only and only when it has a lawful origin.

(See also: Upen Chandra Gogoi v. State of Assam & Ors., 1998 3 SCC 381; Satchidananda Misra v. State of Orissa & Ors., 2004

8 SCC 599; Regional Manager, SBI v. Rakesh Kumar Tewari, 2006 1 SCC 530; and Ritesh Tewari & Anr. v. State of U.P. & Ors., 2010 AIR(SC) 3823).

[111] Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/orders/FIR/ investigation stand automatically vitiated and are liable to be declared non est."

c). **Supreme Court Advocates-on-Record Association and Another v. Union of India**, (2016) 5 SCC 808,

Per Hon'ble Mr. Justice J.Chelameswar,

"[10] t is one of the settled principles of a civilised legal system that a Judge is required to be impartial. It is said that the hallmark of a democracy is the existence of an impartial Judge.

[25] From the above decisions, in our opinion, the following principles emerge;

If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.

In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.

The Pinochet case added a new category i.e that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case."

Per Hon'ble Mr. Justice Kurian Joseph,

"One of the reasons for recusal of a Judge is that litigants/the public might entertain a reasonable apprehension about his impartiality. As Lord Chief Justice Hewart said:

"It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." R v. Sussex Justices, Ex parte McCarthy, 1924 1 KB 256. And therefore, in order to uphold the credibility of the integrity institution, the Judge recuses from hearing the case.

A Judge of the Supreme Court or the High Court, while assuming Office, takes an oath as prescribed under Schedule III to the Constitution of India, that:

"..... I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

[69] Called upon to discharge the duties of the Office without fear or favour, affection or ill-will, it is only desirable, if not proper, that a Judge, for any unavoidable reason like some pecuniary interest, affinity or adversity with the parties in the case, direct or indirect interest in the outcome of the litigation, family directly involved in litigation on the same issue elsewhere, the Judge being aware that he or someone in his immediate family has an interest, financial or otherwise that could have a substantial bearing as a consequence of the decision in the litigation, etc., to recuse himself from the adjudication of a particular matter. No doubt, these examples are not exhaustive.

[70]. Guidelines on the ethical conduct of the Judges were formulated in the Chief Justices' Conference held in 1999 known as "Restatement of Judicial Values of Judicial Life". Those principles, as a matter of fact, formed the basis of "The Bangalore Principles of Judicial Conduct, 2002" formulated at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague. It is seen from the Preamble that the Drafting Committee had taken into consideration thirty two such statements all over the world including that of India. On Value 2 "Impartiality", it is resolved as follows:

"Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

The simple question is, whether the adjudication by the Judge concerned, would cause a reasonable doubt in the mind of a reasonably informed litigant and fair-minded public as to his impartiality. Being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well- meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill- will. Therefore, I am of the view that it is the constitutional duty, as reflected in one's oath, to be transparent and accountable, and hence, a Judge is required to indicate reasons for his recusal from a particular case. This would help to curb the tendency for forum shopping."

4. Ld. Sr. Advocate has also referred to **Barium Chemicals v. Company Law Board**, AIR 1967 SC 295; **P D Dinakaran v. Hon'ble Judges Inquiry Committee**, (2011) 8 SCC 380; **Union of India and ors v. Sanjay Jethi and another**, (2013) 16 SCC 116.

5. Mr. Negi, learned Senior Advocate submitted that the allegations are supported by an affidavit construed in terms of Chapter-9 of 'The High Court of Himachal Pradesh (Appellate Side) Rules 1997', which deals with making and filing an affidavit in the High Court. He referred to sub-rule 5 and 6, which reads as follows:

> "5. When the deponent speaks of any fact within his own knowledge, he shall do so directly and positively using the words "I make oath (or affirm) and say'.
>
> 6. When a particular fact is not within the deponent's own knowledge, but is stated upon information, the deponent shall use the word "I am informed by (giving the source of the information, if possible) and verily believe it to be true and set forth the grounds of his belief, if any."

6. Referring to the affidavit filed by Mr. Chirag Bhanu Singh, in support of the application, Mr. B.C. Negi, learned Senior Advocate, has specifically drawn the attention of this Court to its contents, whereby the deponent affirmed as follows:

> "…. the contents of paras 1 to 8 of the application are stated to be true as per information received, which in turn is relied upon. That nothing relevant to the present query has been concealed therefrom."

7. Mr. Rakeshwar Lal Sood, learned Senior Advocate, who represents 3rd and 4th respondents in LPAs, namely Mr. Sushil Kukreja and Mr. Virender Singh, argued that notices be issued in the application, and reply be called. Learned Senior Advocate argues that the applicants have a reasonable apprehension of bias, which attracts the doctrine of prejudice. He further highlights that it is the apprehension in the applicants' minds, which is crucial while coming to bias. This bias mentioned in the application must be brought to the notice of Hon'ble Mr. Justice Sureshwar Thakur to seek his response about the correctness of facts. Admission or denial of relationship can come only by way of a reply for which this Court must issue notices. This Court can arrive at a prima facie satisfaction only after calling for a response and not before that. He submits that if Hon'ble Mr. Justice Sureshwar Thakur denies the relationship, then this application on the sole ground of denial would come to an end. However, if his Lordship accepts the relationship, his Lordship should withdraw the judgment authored by him. Mr. Sood further draws this Court's attention to the decision of a Division Bench of this Court in **D. K. Khanna v. Union of India**, *supra*. He argues that the likelihood of bias in the applicants' minds is sufficient to issue notices. Mr.

R.L. Sood, learned Senior Advocate argued that the existence of relationship itself establishes bias and whenever such knowledge comes on record, irrespective of the time of acquiring this knowledge, the judgment, in question, has to be withdrawn by the concerned Judge.

REASONING:

8. The facts about the relationship and its knowledge to the applicants find mention in Para 3 of the application, which reads as follows:

> "3. That the reason for filing of the present application has been occasioned by the fact that after the disposal of the LPA 33 of 2019, it has now come to the knowledge of the present applicants/respondents, that the wife of the real brother (Shri Suresh Bhardwaj) of the present appellant/original petitioner (Shri Rajiv Bhardwaj), is the real sister of the wife of the Hon'ble Justice Sureshwar Thakur. Therefore, Hon'ble Justice Sureshwar Thakur and the real brother of the present appellant/original petitioner, are co-brothers. This fact was not in the knowledge of the applicants/respondents earlier. Unfortunately, the said fact was never even disclosed by the appellants/original petitioner before the Hon'ble Judge during the pendency of the present appeals. It was the duty of the present petitioner, to have upheld the majesty of law and brought the aforesaid conflict of interest, to the notice of the concerned Hon'ble Judge, at the time of hearing of the appeals, more so being a District Judge himself."

9. Mr. B.C. Negi, learned Senior Advocate while arguing the matter had specifically drawn the attention of this Court to that affidavit wherein it is mentioned explicitly that the contents of paras 1 to 8 of the application are stated to be true as per information received, which in turn is relied upon and that nothing relevant to the present query has been concealed therefrom.

10. A perusal of the application reveals that the name and other particulars of the person, from whom the deponent had received such information, have not been mentioned. Even as per the affidavit, the contents of the application were true as per information received and nothing was concealed therefrom. On the other hand, the deponent has concealed the name and other particulars of such a person from whom such information was gathered. This is contrary to the affidavit itself, to which Mr.

B.C. Negi, learned Senior Advocate has drawn attention. It shows that the applicants have withheld material information from this Court.

11. The allegations stated in the application withhold the following material particulars:

1). What was the approximate date of such knowledge?
2). On which date the applicants met, physically or virtually, to decide the further course of action?
3). Out of the four applicants, who came to know about this relationship?
4). Why and for what reasons, such source conveyed the information?
5). Who was the source?
6). How did the applicant(s) ascertain the credibility of such information?
7). When did such applicant convey the information to the other three applicants?
8). What inquiry did the other applicants make to verify the genuineness of the information?
9). How much proximate were the relations between the said relative(s) and the Hon'ble Judge?

12. The burden to mention all these facts was on the applicants because that information was only in their knowledge and none else. The applicants are not ordinary litigants but serving District and Sessions Judges, who have filed this application seeking adjudication from this Court. In the absence of such material information, the applicants fail to make a prima facie case worth issuing notices.

13. The application of the judicial precedents cited by Learned Senior Counsels would have arisen if the applicants had made out a prima facie case. To the contrary, a plain and simple reading of allegations made in the application do not even blink the doctrine of prejudice.

14. In **Barium Chemicals v. Company Law Board**, AIR 1967 SC 295, Constitutional Bench of Hon'ble Supreme Court holds,

> "[57]. The question then is: What were the materials placed by the appellants in support of this case which the respondents had to answer? According to Paragraph 27 of the petition, the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him, the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on "reasons to believe". Even for their reasons to believe, the appellants do not disclose any information on which they were

> founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made, such as its contents, its time or to which authority it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of mala fides, but then where such knowledge is wanting he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in 1952 SCR 674: AIR 1952 SC 317, that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of O. XIX, R. 3 of the Civil Procedure Code and that where an averment is not based on personal knowledge, the source of information should be clearly deposed…"

15. In **Union of India and ors v. Sanjay Jethi and another**, (2013) 16 SCC 116, Hon'ble Supreme Court holds,

> "[45]. The plea of bias it is to be scrutinised on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum."

16. In the present matter, the time of knowledge is the soul of the biasness. If the applicants knew of the relationship before the hearing, then the bigger question is: Were the applicants waiting for the verdict's outcome? A perusal of the allegations mentioned only in para 3 (*supra*) does not whisper about the exact or approximate time. The only thing which is stated is that they came to know of such relationship only after the pronouncement of the verdict. They should have mentioned the reasons for fishing an inquiry, the time of information, the source, the motive behind furnishing information, if it was given without any efforts from the applicants' side, etc. The applicants knew the finest points of law. They would be aware of the consequences of withholding material particulars and the scope of improvements if made. Despite that, they chose not to disclose any of such particulars. They have not assigned any reasons due to which they have kept their cards closer to their chests.

17. Merely because persons are related do not establish that the relationships were working or cordial. In the fast-changing present times, there is no presumption that

relatives carry good relationships. Given the demanding nature of jobs and urban life fatigue, the frequency of interactions with relatives is gradually declining. In the present times, people are connected more through social media than through physical meetings, where even the neighbours, if know each other then it is through WhatsApp, Facebook, Instagram or Twitter and if they meet outside, then even they might not recognize each other. The farther the distance from the native place, the lesser the proximity of relationships, has become the new ground reality. During inter-se dependence days, people had no other option but to nurture working relationships even with distant relatives residing in the vicinity. Nowadays, people prefer to take professional services instead of harping upon relatives or neighbors. Instead of taking obligations, people prefer to pay for services, like a nurse instead of an attendant amongst relatives. Services have become so common that the Government included the name "Services" even in taxation. From the internet, people even come to know the ratings given to such service providers. Moreover, due to the increase in the value of land, relationships are getting estranged. This Court cannot close its eyes from what is happening around us, which we all witness, experience, and go through. Thus, it was for the aggrieved to substantiate that such relationship was neither dormant nor estranged but was a working relationship, which they miserably failed to point out.

18. In the application, the allegations lack necessary and material particulars. The burden was on the aggrieved to show the approximate date of knowledge of the relations, so as to steer clear of shady grey areas of reasonable doubt. The crucial aspect could have been the time period of such knowledge to enable this Court to arrive at a reasonable belief that the applicants had acquired such information after the dissenting verdict's pronouncement and not before that. The pin-drop silence about the context due to which one or more of the respondents-applicants launched such probe or fishing inquiry to find out about the relationship is pricking this Court's conscience. A complaint must disclose all material facts, whereas the allegations made in this application are unsubstantiated.

19. The entire history of the litigation and the time of raising the issue is also significant. This Court refrains from elaborating further. Suffice it to say that even if

the wife of the said Hon'ble Judge is distantly related to one of the petitioners, this nowhere implies that such Judge is prejudiced, unless the bias with all material particulars, is shown in the allegations, that too within a reasonable time. Based on this, issuing notice would be flogging a dead horse.

20. After overall analysis, the allegations levelled in the application are unsubstantiated, general, withhold material particulars, and prima facie fail to show discrimination or bias or even likelihood of bias.

21. Given above, the application is baseless, without any merits, and accordingly dismissed.

March 8, 2021 (mamta/*ps*). **(Anoop Chitkara), Judge**.