Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:
The Hon'ble Justice Aniruddha Bose
And
The Hon'ble Justice Joymalya Bagchi
And
The Hon'ble Justice Ranjit Kumar Bag

C.R.M. No. 3767 of 2016
With
C.R.A.N. No. 2604 of 2016

C.R.M. No. 3770 of 2016
With
C.R.A.N. No. 2605 of 2016

Mallikarjuna Rao & Ors.
Vs.
The State of West Bengal
With
A. Gopal Krisha Murthy @ A. Gopala Krishnamurthy & Anr.
Vs.
The State of West Bengal

Advocates for the Petitioner: Mr. Sekhar Basu, Senior Advocate
Mr. Sourav Chatterjee,
Mr. Chanchal Kumar Dutt,
Ms. Krishna Mullick.

Advocates for the State: Mr. Manjit Singh
(Public Prosecutor)
Mr. Pradipta Ganguly.

Judgement On: 13th July, 2016.

ANIRUDDHA BOSE, J.:

1. We are to deal with substantial questions of law on three counts in this reference, arising out of these two bail applications. Before we reproduce the substantial questions of law which we are to answer, we shall refer to the factual context in which this reference was made to us by the Hon'ble the Chief Justice. The facts have been narrated in an office note dated 22nd June 2016. These two applications were heard by

a Division Bench of this Court on 20th May 2016. The Division Bench was pleased to reject these applications on that date. The final order was signed by the Hon'ble Presiding Judge on that date itself and the order was sent to the Hon'ble Companion Judge. But the order was not signed by the Hon'ble Companion Judge on the same day. That was the last date after which the summer recess of this Court commenced. On 6th June 2016, this Court reopened after the vacation, and the order was placed before the Hon'ble Companion Judge. His Lordship signed the order on that date, i.e. 6th June 2016. After signing, however, the Hon'ble Companion Judge penned through his signature. Thereafter, on 7th June 2016, a separate order allowing both the bail applications was passed. The order of 20th May 2016, with the signature of the Hon'ble Presiding Judge, and the penned through signature of the Hon'ble Companion Judge, forms part of the records of these two applications. The order of the Hon'ble Companion Judge which shows the date 7th June 2016 on the margin of the order sheet indicating the date on which the order was being passed also forms part of records of these proceedings. On 7th June 2016, these applications did not appear in the list of the Division Bench.

2. The substantial questions of law which have been referred to us for consideration in this perspective, and which we would be answering in this judgment are these:-

I. Whether the Bench had become functus officio after rejecting the bail on 20th May 2016 and at least after signing of the order by both the Judges on 6.6.2016.

II. Whether it was within the jurisdiction of one of the Judges of the Bench to pen through his signature on the Original of the Order dated 20.05.2016 after affixing signature thereto on 6.6.2016.

III. There has to be a finding also whether the Order dated 7.6.2016 is a valid dissenting order necessitating reference to a Third Judge in terms of Clause 36 of the Letters Patent.

3. In this reference, Mr. Sekhar Basu, learned Senior Counsel appeared on behalf of the petitioners and State was represented by Mr. Manjit Singh, learned Public Prosecutor. Both of them submitted that they had appeared for the respective parties on 20th May 2016, and on that date the Hon'ble Companion Judge did not express any dissent after the Hon'ble Presiding Judge had dictated the Order of rejection. In the disposal statement of 20th May 2016, maintained by the Court registry also the two applications were recorded as having been rejected. Both of them were also ad idem on the point that these two petitions shall be treated as rejected in law. We shall examine the questions of law referred to us and express our opinion taking into account the submissions of the opposing parties made before us in course of hearing of this reference.

4. There is another factor which we shall have to consider while answering the reference. On behalf of the petitioners, two applications (being CRAN No. 2604 of 2016 and CRAN No. 2605 of 2016) have been taken out with prayers for withdrawing the original bail applications. On 4th July 2016, when this reference was being heard, Mr. Basu had submitted that he had instruction not to press these applications. On that date, we had expressed our view that the prayer for not pressing these applications could be considered only after, and if, we answered the first question in the negative. This view we still retain. In the event the petitions stood rejected on 20th May 2016, the petitions were incapable of being withdrawn at a later date.

5. It has been submitted before us both by Mr. Basu and Mr. Singh that the judgment rejecting the two applications was dictated in open Court on 20th May 2016. The procedure for pronouncing judgments in criminal trial has been laid down in Section 353 of the Code of Criminal Procedure, 1973. Though the composite decision in these two applications cannot be treated as a judgement in conclusion of a criminal trial, we are of the opinion that the principles incorporated therein shall also apply to other orders under the same Code, including orders under Section 439 thereof. The procedure earmarked in Section 353(1)(a) read with sub-Section (2) of the same provision under the 1973 Code specify the manner in which a judgment assumes its final form. If such judgment or order is delivered by a Bench of two Hon'ble Judges, the order or judgment would assume its final form once the process as contemplated in Section 353(1)(a) and (2) of the 1973 Code is completed by both the Hon'ble Judges. These provisions read:-

> *"**353. Judgment.-(1)** The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,-*
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> *(a) by delivering the whole of the judgment; or*
>
> *(b) by reading out the whole of the judgment; or*
>
> *(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.*

(2) Where the judgment is delivered under clause (a) of sub-section (1), the presiding officer shall cause it to be taken down in shorthand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court."

6. Once a judgment or order is pronounced and assumes its final form, the jurisdiction of the same Court lapses over that particular judgment or order. That judgment or order cannot be altered, barring correction of any clerical or arithmetical error, except by the process of prescribed by law. Such alteration has to be on cogent ground, through a process having sanction of law. This principle of law applies in both criminal and the civil field. In the case of ***State Bank of India and others Vs. S.N. Goyal*** [(2008)8 SCC 92], it has been held:-

"It is true that once an authority exercising quasi-judicial power takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage an authority becomes functus officio in regard to an order made by him. P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn., Vol. 2, pp. 1946-47) gives the following illustrative definition of the term 'functus officio':

'Thus a judge, when he has decided a question brought before him, is functus officio, and cannot review his own decision."

7. It is, however, of common occurence that after a judgment or order is dictated in open Court, that Judgment or order undergoes some cosmetic changes undertaken by the Presiding Judge only. If it is the judgment or order of a Division Bench, such cosmetic changes can be a collective exercise. If the two Hon'ble Judges choose to express individual opinions, their respective opinions may be subjected to such changes. Only after such changes are incorporated in the transcribed copy of the order or judgment, and thereafter is signed, the judgment or order attains its final form. Dealing with the aspect of a judgment attaining the final form under the Code of Civil Procedure, it has been held in the case of ***State Bank of India*** (supra):-

> *"…Order 20 of the Code of Civil Procedure deals with judgment and decree. Rule 1 explains when a judgment is pronounced. Sub-rule (1) provides that the court, after the case has been heard, shall pronounce judgment in an open court either at once, or as soon thereafter as may be practicable, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose of which due notice shall be given to the parties or their pleaders. Sub-rule (3) provides that the judgment may be pronounced by dictation in an open court to a shorthand writer [if the Judge is specially empowered (sic by the High Court) in this behalf]. The proviso thereto provides that where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such corrections as may be necessary, be signed by the Judge, bear the date on which it was pronounced and form a part of the record.*

Rule 3 provides that the judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to save as provided by Section 152 or on review. Thus, where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to Section 152 and power of review)...."

8. Dealing with a similar question of law under the 1973 Code, it has been held by the Supreme Court in paragraph the case of ***Kushalbhai Ratanbhai Rohit and Others Vs. State of Gujarat*** [(2014)9 SCC 124]:-

"We do not find any forcible submission advanced on behalf of the petitioners that once the order had been dictated in open court, the order to review or recall is not permissible in view of the provisions of Section 362 CrPC for the simple reason that Section 362 CrPC puts an embargo to call, recall or review any judgment or order passed in criminal case once it has been pronounced and signed. In the instant case admittedly, the order was dictated in the court, but had not been signed."

We would, however, point out here that there are authorities that an order granting bail under Section 439(1) of the 1973 Code is an interlocutory order, and does not attract the restrictive provisions of Section 362 of the 1973 Code, which apply to a judgment or a final order [***Dukhi Shyam Benupani Vs. Parasmal Rampuria*** {1998 (2) CLJ 501}]. But in this reference, we are not concerned with the impact of Section 362 of the 1973 Code. In this reference, we are examining as to whether after an order rejecting bail in open Court is pronounced by dictating the order, and later on the same is signed by both the Hon'ble Judges, whether it is permissible for one of the Hon'ble Judges to pen through his signature and give a contrary opinion at a later date.

9. The trend of authorities for over a century is that corrections, and in some cases even taking a view different from that pronounced in open Court would be permissible under certain exceptional situations provided the judgment or order is not signed. A Division Bench of this Court in the case of ***Amodini Dasee Vs. Darasan Ghose*** [(1911) ILR 38 Cal 828] observed and held:-

> *"When this Rule was heard on the 16th June last, we delivered judgment discharging the same, but on the same day, the case of Mir Ahwad Hossein v. Mahomed Askari was brought to our notice, and it subsequently appeared that we were under a misapprehension on the facts of the case. As we had not signed our judgment, we thought it proper to hear both the learned vakils again to-day.*
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> *It has been contended by the learned vakil for the opposite party that we cannot, having once delivered our judgment, review the same. We entertain no doubt*

that it is competent to us to do so. The terms of section 369 of the Criminal Procedure Code are general, and we have not signed our judgment. The same view may reasonably be inferred from the case of In the matter of the petition of Gibbons and a very extreme case is that of Queen-Empress v. Lalit Tiwari, where it was held that a judgment or order of the High Court is not complete until it is sealed in accordance with the Rules of the Court, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken."

10. We have gone through the order dated 20th May 2016, as also the order signed by the Hon'ble Companion Judge dated 7th June 2016. The opinion reflected in the order carrying the date 7th June 2016 is totally at variance with the opinion reflected in the order which bears the signature of the Hon'ble Presiding Judge as also the penned through signature of the Hon'ble Companion Judge. The order of 20th May 2016 has been rendered in first person, plural. There is no indication of any expression of dissent on the part of the Hon'ble Companion Judge in the Order dated 20th May, 2016. It is admitted position, however, that the Hon'ble Companion Judge did not sign the Order on 20th May itself.

11. If we leave out the aspect of signing of the order by the Hon'ble Companion Judge on 6th June 2016 and subsequent penning through of His Lordship's signature, would the Hon'ble Judge have become functus officio, in taking a contrary view later on? In our opinion, in such a situation also, though the Hon'ble Judge might not have had become functus officio, but to take a contrary view, His Lordship ought to have

had brought the matter back on the list, notified the parties and then express His Lordship's contrary view and the reason for taking such contrary view. Deviation from the order or judgement dictated in open Court ought to be undertaken in extra-ordinary situation and should be adequately reasoned. Following an earlier authority, ***Surendra Singh & Ors. Vs. State of Uttar Pradesh*** (AIR 1954 SC 194), in the case of ***Vinod Kumar Singh Vs. Benaras Hindu University*** (AIR 1988 SC 371), the course to be adopted in such a situation has been prescribed by the Hon'ble Supreme Court:-

> "…….*In the present case, we are concerned with a judgment that had been pronounced but not signed. The provision in O. 20, R. 3 of the Civil P. C. indicates the position in such cases. It permits alterations or additions to a judgment so long as it is not signed. This is also apparently what has been referred to in the last paragraph of the extract from the judgment of Bose, J. quoted above, where it has been pointed out that a judgment which has been delivered "can be freely altered or amended or even changed completely without further formality, except notice to the parties and rehearing on the point of change, should that be necessary, provided it has not been signed." It is only after the judgment is both pronounced and signed that alterations or additions are not permissible, except under the provisions of S. 152 or S. 114 of the Civil P. C. or, in very exceptional, cases, under S. 151 of the Civil P. C.*
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> *But, while the Court has undoubted power to alter or modify a judgment, delivered but not signed, such*

power should be exercised judicially, sparingly and for adequate reasons. When a judgment is pronounced in open court, parties act on the basis that it is the judgment of the Court and that the signing is a formality to follow.

We have extensively extracted from what Bose J. spoke in this judgment to impress upon everyone that pronouncement of a judgment in court whether immediately after the hearing or after reserving the same to be delivered later should ordinarily be considered as the final act of the court with reference to the case. Bose J. emphasised the feature that as soon as the judgment is delivered that becomes the operative pronouncement of the court. That would mean that the judgment to be operative does not await signing thereof by the court. There may be exceptions to the rule, for instance, soon after the judgment is dictated in open court, a feature which had not been placed for consideration of the court is brought to its notice by counsel of any of the parties or the court discovers some new facts from the record. In such a case the court may give direction that the judgment which has just been delivered would not be effective and the case shall be further heard. There may also be cases - though their number would be few and far between - where when the judgment is placed for signature the court notices a feature which should have been taken into account. In such a situation the matter may be placed for further consideration upon notice to the parties. If the judgment

delivered is intended not to be operative, good reasons should be given.

Ordinarily judgment is not delivered till the hearing is complete by listening to submissions of counsel and perusal of records and a definite view is reached by the court in regard to the conclusion. Once that stage is reached and the court pronounces the judgment, the same should not be reopened unless there be some exceptional circumstance or a review is asked for and is granted. When the judgment is pronounced, parties present in the court know the conclusion in the matter and often on the basis of such pronouncement, they proceed to conduct their affairs. If what is pronounced in court is not acted upon, certainly litigants would be prejudiced. Confidence of the litigants in the judicial process would be shaken. A judgment pronounced in open court should be acted upon unless there be some exceptional feature and if there be any such, the same should appear from the record of the case. In the instant matter, we find that there is no material at all to show as to what let the Division Bench which had pronounced the judgment in open court not to authenticate the same by signing it. In such a situation the judgment delivered has to be taken as final and the writ petition should not have been placed for fresh hearing. The subsequent order dismissing the writ petition was not available to be made once it is held that the writ petition stood disposed of by the judgment of the Division Bench on 28-7-1986."

12. We do not find in the order carrying the signature of the Hon'ble Companion Judge dated 7th June 2016 any reasoning as to why His Lordship was expressing a view different from that reflected in the order of 20th May 2016. When an order is dictated in open Court by a Division Bench, the dissenting view also ought to be expressed at the time such pronouncement is made. In respect of these two petitions, this course was not undertaken by the Hon'ble Companion Judge. On the other hand, Court records indicate that these two petitions were rejected on that date. The learned counsel for the opposing parties have also submitted that there was no difference of opinion between the Hon'ble Presiding Judge and the Hon'ble Companion Judge on 20th May 2016. In such circumstances, even if we accept the Hon'ble Judge's jurisdiction to express a dissenting view, the parties should have been notified of such change of view, the matters should have been brought back on list and the dissenting view ought to have been expressed after following this course. That is the procedure prescribed in the case of ***Vinod Kumar Singh*** (supra) and we do not think in connection with an application for bail in the criminal jurisdiction of the High Court, any different course ought to be pursued. We are of course, not considering the implication of Section 362 of the 1973 Code while answering this reference. We have already explained the reason for this. In absence of the aforesaid formalities having been followed, signing an order on a day these matters were not listed, and these petitions having been rejected by pronouncement in open Court, it would have been a grossly irregular, if not, illegal procedure.

13. In our opinion, however, the order of rejection of these two petitions had attained final form after the Hon'ble Companion Judge had signed the same on 6th June 2016. Authorities, both in criminal and civil jurisdiction are uniform that after signing a judgement or order, the

order attains finality, and in this case, the moment the Companion Judge had signed the order of 20th May 2016, the same became finalized. The Bench, comprising of the two Hon'ble Judges had become functus officio after both the Hon'ble Judges had signed the order. By penning through the signature, the jurisdiction of the Hon'ble Companion Judge could not be revived, to reconfer jurisdiction upon the Hon'ble Companion Judge to take a different view.

14. The very process of penning through His Lordship's own signature by the Hon'ble Companion Judge was effected when His Lordship had become functus officio. It is apparent from the facts available before us that such "penning through" was not a spontaneous corrective measure occasioned by an inadvertent error. If that was the case, there ought to have been recordal of that factor in the subsequent opinion in the form of an order dated 7th June 2016. And the matter ought to have been listed on that date. It is impermissible for an order to be passed on a day the matter is not listed, and the parties having no alert over a fresh order going to be passed in petitions already disposed of. In any event, there cannot be two orders of two different Judges of a Division Bench in the same set of matters on two different dates. Such a course defeats the very objective of having a Division Bench. In exceptional cases, if such a course is to be adopted, the reason should be disclosed in open Court for withholding the order, and such reason ought to be incorporated in the Court records. This did not happen in the two petitions from which this reference originates. Legally impermissible course was adopted by the Hon'ble Companion Judge to revive jurisdiction over matters which was already lost.

15. For these reasons, we answer the reference in the following terms:-

i. The Bench had become functus officio after the prayers for bail of the two petitioners were rejected on 20th May 2016, and signing of the order was effected by both the Hon'ble Judges on 6th June 2016. The Hon'ble Presiding Judge in this case had signed the order, however, on 20th May 2016. The order had assumed its final form after the same had been signed by the Hon'ble Judges.

ii. After the order of 20th May 2016 was signed by both the Hon'ble Judges, none of the members of the same Bench retained any jurisdiction to alter the order. In such circumstances, the act of penning through His Lordship's own signature by one of the Judges of the Bench was beyond jurisdiction, and hence non est in law. In fact, the Hon'ble Companion Judge had become functus officio on 7th June 2016. Hence, the mode and manner in which the dissenting order was sought to be brought on record is wholly impermissible in law.

iii. The order dated 7th June 2016 is not a valid order. This order has been issued at a time the Bench had become functus officio. The order of 7th June 2016 is also flawed because it has been issued on a date these matters were not listed, and the parties were also not notified of this order. Such order is non est and void, and no legal recognition can be accorded to such order. The dissent expressed in the said order of 7th June 2016 does not have any validity in the eye of law, and in our opinion no reference to a third Judge in terms of Clause 36 of the Letters Patent is required to be

made on the basis of this order. These two petitions stood rejected on 20th May 2016.

iv. In view of our opinion as aforesaid, the applications for withdrawal of the two petitions are dismissed as not maintainable.

16. The first question of the reference thus is answered in the affirmative and the second and the third questions are answered in the negative. The reference is thus disposed of.

17. The materials produced by the department be returned.

18. Urgent Photostat certified copy of this order be given to the parties expeditiously, if applied for.

(Aniruddha Bose, J.)

I agree.

(Joymalya Bagchi, J.)

I agree.

(Ranjit Kumar Bag)