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**Deviram and ors. Vs. State of M.P.**

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**Court** : Madhya Pradesh

**Decided On :** Aug-17-2004

**Reported in** : 2005(3)MPHT182

**Judge** : Dipak Misra and ;A.K. Shrivastava, JJ.

**Acts** : Advocates Act, 1961 - Sections 30, 34, 34(1) and 58AG; Code of Criminal Procedure (CrPC) , 1898 - Sections 41(1); Constitution of India - Article 145; Madhya Pradesh High Court Rules - Rule 34(2); ;Madhya Pradesh High Court Orders - Sections 1 and 2

**Appeal No.** : Criminal Appeal No. 2047/2000

**Appellant** : Deviram and ors.

**Respondent** : State of M.P.

**Advocate for Def.** : S.K. Rai, Govt. Adv. and ;Rajendra Singh and ;S.C. Datt, Sr. Advs. (amicus curiae)

**Advocate for Pet/Ap.** : Y.K. Gupta and ;Chanchal Sharma, Advs.

**Judgement** :
ORDER

**Dipak Misra, J.**

1. It had been stated long back that there is a beginning in the end and the aforesaid sentence, it we are permitted to say so, has travelled beyond the philosophical and mystical realm to the modern day pragmatism engulfing the encapsuling the necessary aspects of personal liberty which is extremely sanguine and paramount to human existence. When liberty is lost the exclusivity of the soul paves the path of destruction and loud cries do not substitute the soothening and quieting of the soul. May be, for that reason Patrick Henry had proclaimed as under :-

'Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery Forbid it, Almighty God I know not what course others may take, but as for me, give me liberty or give me death !'

2. Speaking about the lofty and distinguished essence of liberty the jurists have gone to the extent of stating, even if there would have been prevalent of a barter system, no one would have bartered on bargained his liberty for all the pearls of the sea. It can be put in a different way. A person whose liberty has been affected can look with contempt at all the tea of China and would not be over awed by any kind of authority. When liberty is lost, the euphoria of life melts into insignificance. Life refuses to kick one to live; the purpose of life gets fossilized and the ebullience slowly becomes ossified. In an orderly society the supply of electricity of liberty can never be allowed to be stopped. To live, is not necessarily mean to live like an unperson but to live with dignity. More than two centuries back, Edmund Burke, the great architect of Liberty and Rule of Law spoke thus :-

'Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the Counsels of the wise and good, in preference to the flattery of knaves. Society can not exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds can not be free. Their passions forge their fetters.'

3. Similar note was expressed by E. Barrett Prettyman, a retired Chief Judge of U.S. Court of Appeals :

'In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless meditation but in flashing, thrashing activity.'

4. At this juncture, we may with profit refer to a line from Robert H. Jackson-

'We can afford no liberties with liberty itself.'

In the 'The Road to Justice' Lord Denning expressed thus :-

'The price of freedom is eternal vigilance.'

5. Though, liberty is the paramount constituent for an elevated existence of a human being, yet the conception of absolute liberty is not acceptable in law because respecters of liberty also desire that there should be chaining of liberty by fixing such parameters which the collective prescribes on certain normative features. In the name of liberty, no individual can be permitted to create anarchy and usher in disorderliness or chaos. A matured society is governed by law and gets nurtured by Rule of Law. The liberty has to be acquired by following the law and simultaneously the same can be chained by taking recourse to law that has the sanction in proper sense of the term. Any thought that emanates from the factum that liberty can be acquired and exercised as per whim and fancy, is a total misconception. Liberty is not to be equated with total freedom. If we allow

ourselves to say, even in a hypothetical world or in an Utopian Society the concept of liberty is not thought of in absolute terms. It has to be limited, restricted and constricted as per the procedure that is evolved for sustenance of liberty.

6. True it is, the conception of liberty can not be allowed to remain in a stage of comatose and its basic essence entombed but simultaneously the balance has to be struck between individual aspiration for availing liberty and the collective restrictions which are prescribed keeping in view the facet of rule of law. To elaborate, the claim of individual liberty, the anxiety to get liberty and the concern for personal liberty have to pass through the prismatic reflection of the cumulative tests of the Collective so that in the name of liberty, anarchy does not get garnered or generated. A person because he is deprived of liberty can not take the law unto his hands to achieve the same. Similarly to abdicate or give an unceremonial burial to the adjective law in toto and march ahead in whim and fancy because of the preachings from the pulpit is also not legitimate and allowable. A balance has to be struck a synthesis has to be arrived at and a 'Laxman Rekha' has to be engraved. Anyone who has an ounce of analytical mind does understand the basic tenet of freedom, that it can not be chartered into every sphere.

7. We have dwelled upon the aforesaid prefatory note as the present factual scenario exposits not a very wholesome picture. On the contrary, it does fresco a depiction which is not only not salubrious but is disturbing, at times projecting a spectrum that can create a cellular disturbance in the marrows of law and affect the dignity of the Courts. The three appeals, which have been placed before us, in the first two appeals, there is prayer for grant of bail, and in the third appeal, there is prayer for further orders. The first appeal has been preferred by four accused persons, the second appeal by two, and the third one is at the instance of eight persons, namely, all the convicted persons.

8. Mr. Y.K. Gupta, learned Counsel for the appellants in first two appeals submitted that he had been duly engaged by the accused who have filed the application for bail. Learned Counsel for the appellants in the third appeal contended that she has been authorized to present the appeal. As we notice the said appeal has been filed by all the convicts at a later stage. Mr. Gupta

propounded a proposition that his appeals being earlier should be entertained by this Court and be dwelt upon on merits. Be it noted, when the matter was listed on the previous occasion, we sought assistance of Mr. S.C. Datt, learned Senior Counsel to appear as amicus curiae. Mr. Datt, learned amicus curiae submitted that the question of filing of appeal prior or later, has no meaning or significance and it would depend upon the nature of instruction. Elaborating the aforesaid submission, Mr. Datt clarified that the one may file an appeal within ten days from the date of conviction but if he has not been instructed by the accused then simply saying that he has been instructed, would not make the appeal a lawful one or presented in accordance with law. His proponement is that authorization and instruction should be as per law. The present problem is not a singular one, which has been conceded to by all concerned appearing before us. It is not a case in which we can foreclose the appeal preferred by Mrs. Chanchal Sharma and dispose the same and address ourselves to other two appeals solely on the bedrock of prior filing. The said step will not be the solvation of the situation that has emerged before us.

9. Mr. Rajendra Singh, learned Senior Counsel who was present in Court, when questioned, upon due deliberation, submitted within categorical and unequivocal manner that the practice that has developed is not a desirable one and he can say so with sixty seven years experience at the Bar. Learned Senior Counsel submitted that a memorandum which is to be filed before the Registry of this Court should be a proper one indicating real authorization and can not be one only to make a formality which eventually would be an exercise in futility, a Sisuphean endeavour. Incrementing the aforesaid submission, submitted Mr. Singh that with efflux of time, the law has to keep it self abreast with the social panorama and when a situation like this has emerged. There must be purposive, acceptable, functional and workable construction of the Rule.

10. Presently, we shall proceed to state the provision contained in the Advocates Act, 1961, Section 34 of the aforesaid Act reads as under :-

'34. Power of High Courts to make rules.- (1) The High Court may make rules laying down the conditions subject to which an Advocate shall be permitted to

practise in the High Court and the Courts subordinate thereto.

(1) (A) The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.

(2) Without prejudice to the provisions contained in Sub-section (1), the High Court at Calcutta may make rules providing for the holding of the intermediate and the Final Examinations for articled clerks to be passed by the persons referred to in Section 58AG for the purpose of being admitted as Advocates on the State roll and any other matter connected there with.'

11. On a scrutiny of the aforesaid provision, it is luminescent that the High Court has the jurisdiction to frame rules laying down conditions, subject to which advocates shall be permitted to practice in the High Court or any Court subordinate to it. In this context, we may refer with profit to the decision rendered in the case of Ex.-Capt. Harish Uppal v. Union of India and Anr., AIR 2003 SC 739, wherein the Constitution Bench held thus :-

'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. Such a rule would be valid and binding on all.'

12. The High Court has framed the Rule under Section 34(1) of the Advocates Act, 1961. Rule 34 (2) occurring in Section 2 Chapter 1 of the M.P. High Court Rules and Orders is relevant. It reads as under :-

'2. Save as otherwise provided for in any law for the time being in force, no advocate shall be entitled to appear, plead or act for any person in any Court in an

proceeding unless the advocate files an appointment in writing signed by such persons or his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment and signed by the Advocate in token of its acceptance or the advocate filed a memorandum of appearance in the form prescribed by the High Court:

Provided that where an advocate has already filed an appointment in any proceeding, it shall be sufficient for another advocate, who is engaged to appear in the proceedings merely for the purposes of pleading, to file a memorandum of appearance or to declare before the Court that he appears on instructions from the advocate who has already filed his appointment in the proceedings : Provided further that nothing herein contained shall apply to an advocate who has been requested by the Court to assist the Court amicus curiae in any case or a proceeding or who has been appointed at the expense of State to defend an accused person in a criminal proceeding.

Explanation :- A separate appointment or a memorandum of appearance shall be filed in each of the several connected proceedings, notwithstanding that the same advocate is retained for the party in all the connected proceedings.'

13. Submission of Mr. Singh and Mr. Datt is that the language which has been employed in Sub-rule 2 can be segregated into two parts, namely, the advocate may file a appointment signed by such person or some one duly authorised by or under a power of attorney to make such appointment or second, the advocate may file a memorandum in the proforma prescribed by High Court. We have perused the memorandums which have been filed in all the three cases. In Cr.A. No. 2459 of 2000 the relevant portion of the memorandum is as under :-

'I (a) We have been duly instructed and authorised by Ratiram and others.'

In the memorandum filed by Mr. Y.K. Gupta, the only distinction is that it has been stated that he has been engaged and authorised by appellants which would mean whose names are in the cause title. Similar to the effect is the memo filed in Cr. A. No. 2125 of 2000. At a first glance it may look that the learned Counsel for the accused/appellants have complied with the Sub-rule (2) of Section 1 of the High

Court Rules and Orders occurring in Chapter 1. But on a deeper probe the colossal fallacy is perceived as we seen cover on.

14. There is consensus that this is the proforma prescribed. We assume the said proforma to be correct. It has been stated in the said memorandum 'I have been duly engaged, instructed and authorised. The four words, namely, 'duly engaged, instructed and authorized' are of enormous significance. Every word that occurs in the memorandum has to be conferred due weightage. In our considered opinion, the four words used in the memo have to be understood in proper perspective, not in a casual manner. What the memo stipulates is that, Counsel must give a declaration that he has been engaged, instructed and authorised. Memo does not stop using one word. Word 'duly' has a different affect in the obtaining factual matrix. The Counsel must be satisfied that he has been duly engaged and authorized and instructed. Merely requiring him to file a memo, in our considered opinion, would not subserve the ends of justice. He must be satisfied that it has been duly done and he should have the foundation to make a declaration about his engagement and authorisation.

15. The word 'instruction' is of immense purport. The said word has to be read in conjunction with the term 'duly'. Submission of Mr. Y.K. Gupta, learned Counsel for the appellant in Cr. Nos. 2047 of 2000 and 2125 of 2000 is that he has been instructed by a local Counsel. But on a perusal of the memorandum, we have found that the memo reflects that she has been engaged by Deviram and others meaning thereby the appellants. The cause title exposits names of eight persons in her appeal. The seminal question that arises before us whether by writing the term appellants or local Counsel would subserve the requirement The answer has to be in a categorical and emphatic 'No'.

16. The declaration is formal in nature. It was said almost eight decades back that formality is the hallmark of authenticity in the absence of proper formalization, it is extremely difficult to give credence that there has been proper engagement, instruction or authorization. At this stage, we may usefully refer to the meaning of the terms used in the memorandum. In this context, we may refer with profit to the decision rendered in the case of V.K. Godhwanj and Anr. v. State and Anr., :

AIR1965 Cal79 , wherein it has been held that a person acting under the direction of Public Prosecutor is obviously a person engaged by the Public Prosecutor. It is relevant to state here, the said decision was rendered in the context of Section 41(1)(t) of the Code of Criminal Procedure 1898. We have referred to the said as Their Lordships have dealt with the conception of engagement.

17. In the Black's Law Dictionary (sixth edition), the word 'authorize' has been defined as under :-

Authorise. To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right. People v. Young, 100 Ill. App. 2d 20 : 241 N.E. 2d 587, 589. To permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act.

'Authorised' is sometimes construed as equivalent to 'permitted', or 'directed', or to similar mandatory language. Possessed of authority; that is, possessed of legal or rightful power, the synonym of which is 'competency'. Doherty v. Kansas City Star Co., 143 Kan. 802 : 57 P. 2d 43, 45.

The word 'instruct' has been defined as under :-

'Instruct. To convey information as a client to an attorney, or as an attorney to a Counsel, or as a Judge to a jury. To authorize one to appear as advocate; to give a case in charge to the jury.'

18. True it is, an accused has the right to engage a Counsel of choice and change the Counsel but he has to remember that to change the Counsel, proper procedure has to be followed. In the case at hand, it is not clear because the memo filed by the appellants is not clear. We are reminded of the old saying, nothing comes out of nothing. Whether the Counsel has been engaged or instructed has to be seen. It should be manifest and clearly demonstrable. In the obtaining factual matrix, to record a finding in that regard, in our considered opinion, would be a Sisuphean endeavor. This kind of filing of memorandum is an anathema to law and the same can not be allowed to continue. We may say at this juncture, it has become imperative on the principle of ex-rigore-juris.

19. Accordingly, we proceed to record our conclusion in seriatim as under:-

(1) If a Counsel files a memo of appearance he must show/indicate that he has been duly engaged, authorized and instructed and to do the same he must append a document expositing the authority that he has been instructed by the person engaging him. The letter of authority must be affixed so that the identity of the person authorising the Counsel can be known and the advocate would be competent to say that he has been appropriately engaged in this regard so that confusion is avoided.

(2) The authority vests with the accused to authorise the Counsel and the Counsel really can state that he has been authorised and instructed and engaged, if the document so shows. True it is, the accused may be in custody but document can be obtained from him to indicate due engagement, instruction and authorisation. The authorisation has to be certified by the jail authority if he is in custody. If he is not in custody, needless to state that the accused may sign the memo of appearance which would reflect the fact that he has engaged, duly instructed and authorised the Counsel. We have not tried to introduce something which is not there in the memo but we have only tried to explain and clarify the memo as that has become absolutely imperative and necessitous today and according to our opinion is a logical consequence as per the language employed in the memo.

(3) It has been stated before us by Mr. Gupta with immense vehemence that the State of M.P. being a large one, it may be difficult to get authorisation in quite promptitude as a result of which accused would be compelled and constrained to remain in jail. We appreciate the aforesaid submission, and bestowing our anxious consideration, we are inclined to direct if a Counsel files a criminal appeal on the basis of a memo without the authority as has been stated hereinabove, the memo of appearance will remain valid for a period of three weeks and the matter can be listed for any purpose as prayed for by the Counsel for the appellant. But the same has to be regularised within a span of three weeks.

(4) When we have said so we may further clarify, if vakalatnama is filed by the Counsel concerned on behalf of the accused duly certified by the jail authorities, there can be no objection for the same from any Counsel.

(5) In cases where the accused is convicted the convicting Court would permit the accused to execute the vakalatnama.

(6) If an approach is made on behalf of the accused person for execution of vakalatnama before the jail authorities the same should be permitted within a period of 24 hours as conceded to by Mr. S.K. Rai, learned Government Advocate.

(7) This order shall become effective from 1-11-2004.

Let a copy of the order be sent to the Chief Secretary of the State as well as the Home Secretary for immediate circulation among all concerned authorities to do the needful for appropriate compliance so that nobody can take a sophisticated plea that he did not have the knowledge or he was not aware of the same.

Let a copy of the order be communicated to all Sessions Judges of the State after following due procedure so that they would instruct themselves as well as all other Judges in the District Judiciary dealing with the similar matter.

This Court hope and trusts that no executive authority would show any delinquency as such deviation would tantamount to contempt of this Court.

Call on 6th of September, 2004.

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