

(1991) 05 AHC CK 0004
In the Allahabad High Court
Case No : H.C.P. No. 1646 of 1991

Birendra Kumar Rai

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-05-1991

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 3
Civil Procedure Code, 1908 (CPC) — Section 98

Citation : AIR 1992 All 151 : (1992) CriLJ 1436

Hon'ble Judges : Ravi S. Dhavan, J

Bench : Single Bench

Advocate : S.S. Bhatnagar and P.P. Srivastava, for the Appellant; A.G.A. and Shivaji Mishra, for the Respondent

Judgement

1. The proceedings before this court are by nomination of the Hon''ble the Chief Justice upon a difference of opinion between two Hon''ble Judges, who after having delivered their judgments desires the Hon''ble the Chief Justice to place the matter before a third judge.

2. A situation like this occurred in this court more than 100 years ago to which this court will refer to later, but, at the present moment it would be best to take recourse to the charter of this court known as Rules of the Court, 1952, the successor to the Letters Patent which established the High Court. The situation has arisen as learned counsel arguing for the petitioner has cautioned the court that he has reservation that the reference which has been made may not be compatible with the High Court Rules and it may not be misunderstood later that the situation was not brought to the court's notice.

3. At present, the court is not going into the merits of the matter. Suffice it to say that the Bench comprising of the Hon''ble Girdhar Malviya, J. and the Hon''ble K.K. Chaubey, J rendered a decision signed, sealed and delivered on the same day being April 23, 1991. The Hon''ble Presiding Judge allowed the petition and set at liberty the detenu. The other Hon''ble Judge dismissed the petition

upholding the detention. The detention order was under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. After the judgment had been delivered, the judges continued to constitute the Bench and agreed to disagree by passing the following orders:--

"Hon"ble Girdhar Malviya, J. Hon"ble K. K. Chaubey.J.

In view of the difference of opinion between us let the papers of this case be laid before the Hon"ble the Chief Justice to nominate the third judge for his decision.

Sd. G.M. Sd. K.K.C. 24-4-1991".

4. The matter was placed before the Hon"ble the Chief Justice, the next day and the endorsement of the Hon"ble the Chief Justice reads:--

"List it before Hon"ble Ravi S. Dhavan, J.

Sd. B.P.J. Reddy.

Chief Justice. 25-4-1991".

5. This court has now been put in a very delicate position as any decision which it may take will render one decision correct and the other incorrect certifying in effect that one Hon"ble Judge was right and the other was wrong. This cannot happen. After the two Hon"ble Judges aforesaid, delivered their independent decisions by separate judgments, and not even agreeing to state the points of difference, there is now a conflict of decisions. The situation is not dissimilar to conflict of judgments between two courts of coordinate jurisdiction. In these circumstances how would such a conflict in judgments be resolved?

6. Now comes the aspect on how to proceed in a matter when two judges are divided in opinion, so that a decision is rendered. Then, a situation when two judges have rendered their decisions and have not agreed with each other and without stating the points of difference seek the opinion of a third judge. In such a situation is the entire case to be heard de novo?

7. The difference of opinion in the process of judicial making inevitably will happen either (a) Before judgment or (b) after judgment. The two situation will need to be resolved separately as a matter of consistency and standardised procedure.

8. Thus, one aspect is clear that when a division of opinion occurs between Hon"ble Judges and the decision is yet to be given, then that is the stage when the Hon"ble Judges may formulate their points of difference and lay them before the Chief Justice for being referred to one or more of the other judges so nominated. Then only those points will be decided by the Hon"ble Judge or Judges so nominated. On the points referred, the decision would be by majority, between the judges who differed and the judge or judges to whom the matter was referred.

9. Such is not the situation in the present case as after the Hon"ble Judges had

rendered their decisions, delivered their judgments and parted with the case, they chose to deliver orders that there was difference of opinion between them and that the Hon"ble the Chief Justice nominate a third judge "for his decision". This court thus, at present is making no reference to any of the decision rendered by either of the two judges. This court has delicacy and reservations in expressing them even to the extent of placing on record that if this court were to make a mistake in expressing any opinion on the two decisions delivered it may amount to an impropriety.

10. After the two Hon"ble Judges had abdicated the process of making decision by judgments, the crucial question arises on what was to be done. Nomination of the third judge so to speak is permissible, but there is a stage to do it.

11. The procedure is given in the Rules of Court, 1952. It is prescribed in Chapter VIII Section 8 deals with: Judges sitting alone and in Division Courts. Rule 3 lays down the procedure when judges are divided in opinion. The sub-heading is misleading:--

"3. Procedure when Judges are divided in opinion--

When a case, to which the provisions of the Code of Criminal Procedure do not apply is heard by a Division Court composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority, if there shall be a majority. Should the judges be equally divided they may state the point upon which they differ and each judge shall record his opinion thereon. The case shall then be heard upon that point by one or more of the other Judges as may be nominated by the Chief Judges and the point decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it."

12. There is a chronological order between when the difference of opinion occurs, a reference is made and the matter heard again and decided thereafter according to the opinion of the majority. Certain phraseology needs to be emphasised as it occurs in this Rule. In this rule divided opinion takes place in a case where a decision has yet to be given, not has been given. In such a situation should the Judges be equally divided they are to "state the point on which they differ and each Judge shall record his opinion thereon". When this has been done, it is on this specifically stated opinion that the matter is laid before the Chief Justice and "the point" decided by the Judge (or Judges) to whom the matter has been referred. The Judges who have referred the matter, in the meanwhile, await the return of the reference which the Chief Justice has sought. Upon the reference being answered it is decided according to the opinion of the majority of Judges of all who have participated, this is the solution of solving differences of opinions between two or more Judges who have not agreed on certain points during the course of a hearing.

13. What would be the position when two Judges having differed, write out their

judgments which are judgments in conflict, and then get together, putting it simply, to recommend a reference to the Chief Justice, to a third Judge.

14. The law on this was settled by a ILR (1887) All 625 Lal Singh v. Ghan Shyam Singh Full Court in 1887. The Allahabad, High Court was constituted of five Judges and all gave a decision on the point under discussion and another matter. The judges were, Sri John Edge, Kt., Chief Justice. Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood. All the Judges were unanimous in their opinion on the fate of the reference after delivering conflicting judgments. Two Hon"ble Judges expressed themselves, the remaining concurred. The views of the three Hon"ble Judges who spoke are:--

"Edge, C.J. In this case a preliminary point is raised, that the order of reference ultra vires. Our brother Brodhurst informs us that the judgments of Sri Comer Petheram and himself were delivered, and that the order of reference was drawn up after the judgments had been delivered. Sir Comer Petheram and my brother Brodhurst, having delivered their judgments as judgments and without any reservation could not make an order under S. 575 of the Civil P.C. Under these circumstances the order was ultra vires, and we cannot entertain this reference. That order being ultra vires it must be set aside, and the judgment will be drawn up as if no such order had been made. There will be no order as to costs".

"Brodhurst J.....

As I now consider that the reference to the Full Bench was, under the circumstances above mentioned, illegal. I concur with the learned Chief Justice that the order must be reversed".

"Mahmood J. I concur with the learned Chief Justice, and if the objection were a mere matter of formality, I should have regarded it as unimportant, and would have added nothing to what has fallen from the learned Chief Justice.....

In the present case we have been assured by my brother Brodhurst that the judgments which he and Petheram, C.J. recorded were delivered from the Bench as judgments of the Court, and this being so, consistently with the views which I expressed in the case already cited, those learned Judges ceased to be possessed of the case, and could, therefore, make no reference under S. 575 of the Civil P.C. Indeed, under the provision of that section, the degree made by my brother Brodhurst prevailed, and the order which referred the case to us was, therefore, ultra vires, and the proper remedy open to the appellant was to have preferred an appeal under S. 10 of the Letters Patent. The remedy, may still be open to him, but I express no opinion as to how far such a remedy will be affected by the question of limitation".

15. The reference which was sought in the matter of Lal Singh v. Ghanshyam Singh (ILR 1887 All 625) (supra) by the two Judges who were not in unison, and had delivered their judgments was declared as ultra vires. But the law as it stood at that time still brought a decision. The old Civil P.C., in such situations carried a

logic that if there be a difference of opinion among judges in a matter under appeal, then the decree appealed against stood confirmed. When the reference was not answered by the Full Bench, the logic of the law followed. But what is important and relevant for the purpose of this court is the reason why the Full Court declined to answer the reference. As the Hon"ble Judges constituting the Full Court were unanimous in their views, the explanation for not answering the reference can be had from what Hon"ble Mahmood J. said.

"In the present case we have been assured by my brother Brodhurst that the judgments which he and Petheram C.J. recorded were delivered from the Bench as judgments of the court and this being so, consistently with the views which I expressed in the case already cited, those learned judges ceased to be possessed of the case could therefore, make no reference under S. 575 of the Civil P.C; Indeed, under the provisions of that section, the decree made by my brother Brodhurst prevailed, and the order which referred the case to us was, therefore, ultra vires, and the proper remedy open to the appellant was to have preferred an appeal under S, 10 of the Letters Patent. The remedy may still be open to him, but I express no opinion as to how far such a remedy will be affected by the question of limitation."

16. Then, when a Division Bench makes a reference on account of difference of opinion, only the point of difference of opinion, should be referred and not the whole case *Mt. Akbari Begam Vs. Rahmat Husain and Others* . The Hon"ble Sulaiman, C.J., writing for the Full Court observed :--

"The learned Judges before whom this appeal came for hearing differed on some points. They considered that they differed on certain questions of law arising in the case and, accordingly directed that the case should be referred to a single Judge, or a larger Bench, for the determination of those questions and disposal of the case.

In my opinion the order directing certain points to be referred is perfectly justified, but the reference of the whole case, so that the new Bench should dispose of it, is neither warranted by S. 98, Civil P.C., nor by the Letters Patent. Under the former section when a Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by another Bench. It is obvious that the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case over again. The object obviously is that there should not be a further hearing of questions on which there has been no difference of opinion at all. S. 98 is confined to points of law only, but the newly added sub-s. (3) makes it subject to the provisions of our Letters Patent. S. 98 would apply only when there is no similar provision in the Letters Patent; but if there is a specific provision, S. 98 would not apply to a chartered High Court.

Under Cl. 27 of our Letters Patent, the Judges who differ on any points on which the decision of the case rests are bound to state those points and refer them to

the other Bench. It will be seen that Cl. 27 is wider in the sense that points both of law and fact should be referred and that such reference is not only discretionary but obligatory. But this clause also makes it necessary that the points on which they have differed should be stated and it is those points only which should be referred, and not the whole case.

I am therefore of opinion that the reference of the whole case for disposal by us is not competent, but that we should confine our attention to the three specific point referred us, provided the Judges have differed on them....."

17. Clause 27 of the Letters Patent was not different than Rule 3, in context, as it stands today. The implication which emerges from the Mt. Akbari Begam Vs. Rahmat Husain and Others and earlier Full Court matter re : ILR (1887) All 625 is that (a) upon a difference of opinion a reference must be made while the Judges are still possessed of the case and before judgment; (b) the points on which the Judges constituting a Bench differ must be stated; (c) the case shall be heard on that point only by "another" or "new" Bench. In other words, hearing by the other Judge (or Judges) is confined to the specific points stated and cannot cover the whole case all over again; (d) there should not be a further hearing of questions on which there has been no difference of opinion at all.

18. On this aspect of difference of opinion between two (or more) Judges who may constitute a Division Bench, there is yet another Full Bench decision of the Allahabad High Court reported in the case of Badal and Others Vs. Ram Bharosa and Others, . A matter of difference of opinion under the Civil P.C. and its resolution is prescribed under S. 98, This case decided the issue on the procedure which shall apply in such situations Civil P.C. or the Letters Patent. Thus, this case laid down that the points on which the Judges disagree must be stated, and the points under reference are to be decided in accordance with the opinion of the majority of the Judges including those who originally heard the appeal. The opinion of the Court was written by Hon'ble A.T. Harries, J., and concurred by the Acting Chief Justice Dr. E. Bennet and Hon'ble H.J. Collister, J. The relevant part of the decision in this Full Bench is as below : --

"For the reasons which I have given I would hold that where two Judges composing a Division Bench hearing a first appeal have disagreed either in law or in fact the point or points upon which they have disagreed must be stated and referred to another Judge or Judges and that the point or points must be decided in accordance with the opinion of the majority of the Judges including the two Judges who originally heard the appeal.

Bennet Ag, C.J. --- I agree. Collister J. -- 1 agree.

By the Court-- The question submitted is therefore answered as follows: Where two Judges comprising a Division Bench hearing a first appeal have disagreed either in law or in fact the procedure to be followed is that laid down in Cl. 27 of the Letters Patent of this Court and not that laid down in S. 98, Civil P.C.".

19. In a Supreme Court decision ILR (1887) All 625 has come in for passing reference in the matter before the Supreme Court. The head note (0 of the journal in which this case has been reported, carries the remark that this Full Bench decision of the five Judges in re: ILR (1887) All 625 is "overruled". The judgment of the Supreme Court does not say so. The remark in the head note is misleading. The judgment of the Supreme Court and the decision of the Full Court in 1987 are operating in two different fields and in effect, where the Full Court decision may have left off, as far as this court is concerned, the Supreme Court has given the guidance on what to do in situations where Judges while differing with each other, deliver conflicting judgments without expressing anything in the judgment itself. The Full Court decision of the Allahabad High Court rests on the proposition that in such a situation reference to a third Judge, in effect, is bad. The Supreme Court in the case under discussion: R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid, , deals with a situation of conflicting judgment and has made observations to the effect, that should the matter be before a larger Bench in such a situation, then, the larger Bench to which the matter may be referred, will not be under any inhibition nor incompetent to hear every aspect of the case before it, as it would be a matter of resolving conflict of judgments and not one of answering an opinion sought on points specifically stated, as a statement on specific points on which Judges differed was never made. On conflict of judgments and incompatible final orders from the same Division Bench, the Supreme Court observed (at p. 20 of AIR):

"The true rule envisaged by S. 15(3) of the Mysore High Court Regulation is that the Court or the referring Judge shall set out the material portions on which there is a difference of opinion without expressing any opinion on the result of the Appeal. The two judges did agree: they did disagree on almost every question which had a bearing on the claim made by the plaintiffs, and they delivered their separate opinions expressing their mutual dissent, and even incorporated in their respective opinions the final orders to be passed on their respective views in the appeal. In so doing the judges committed a procedural irregularity, but, in our judgment, this procedural irregularity does not affect the competence of the Full Bench constituted to hear the reference under S. 15(3). Bala-krishanaiya J. and Kandaswami Pillai J. did deliver separate and self contained opinions, setting out the final orders which in their respective opinion to be made in the appeal, but their intention was clear; they intended that in view of the difference of opinion (so expressed) the case should go before a Full Bench and Balakrishanaiya J. passed an order for reference presumably with the concurrence of Kandaswami Pillai J".

20. Thus, in the matter of stare decision and binding precedents and finding solutions when there were conflicting judgments, the decision of the Supreme Court goes beyond the line left by the Full Court in ILR (1887) All 625.

21. In so far as the decision of the Supreme Court R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid, is concerned this court is guided by yet another decision

of the Supreme Court which declares that a decision is only an authority for what it actually decides and what is of the essence in a decision is its ratio and not every observations found in a decision nor what logically follows from the various observations made in it. This clarification is given by the Supreme Court in its decision *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, . For purposes of interpretation H.M. Seervai has quoted this passage for purposes of taking guidance on the interpretation of situations on observations of the Supreme Court as apart from point of law which is decided.

22. Putting the entire situation together, in a situation as the present one the position of this court does not fit into the framework of resolutions or solutions laid down by the Full Bench decisions of this court as also the Supreme Court decision *R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid*, , referred to above.

23. From the last aspect, this court could even go thus far that having made a reference in the judgment and not having stated the points of difference, the court to which matters have been referred may extract, those points on which there is a difference. But this will depend on circumstances and the record of each case and how easily points of difference are capable of being identified and extracted. The hearing before the referred court then will be on these points only. But, the other aspect as laid down in *ILR (1887) All 625* remains. Delivering conflicting judgments as a Division Court and not stating the points on which judges have differed may not be a case of reference to a third judge. Divergent opinions of two judges delivering conflicting judgments but in seeking a reference as an opinion from another court will be an occasion for address before a larger Bench which in any case will have all the advantages, without being incompetent (to use the expression of the Supreme Court), to decide the entire matter of controversy.

24. This court is firmly of the opinion that the balance of this court, and the principle of stare decision or binding precedents, hangs by a very slender thread. It is not for this court, thus, to certify one judge right and another judge wrong, in the matter which has been referred to it. should this happen then it would be a bad precedent and it will precipitate a situation of three separate judgments in a single case on the entirety of the matter without the Bench being constituted. A key to unlock this situation lay as the Full Benches and the Supreme Court have laid down in the matter being laid before a larger Bench. In those circumstances basing its views on the Full Bench and Supreme Court decisions, this court must return the reference unanswered and without any comment.

25. The Registrar, High Court, will lay papers of the matter referred to this court before Hon"ble the Chief Justice.

26. Order accordingly.