
(2016) 04 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 284 of 1989

Munshi Ram and Ors.

APPELLANT

Vs

State of Jammu and Kashmir and Ors.

RESPONDENT

Date of Decision : 12-04-2016

Acts Referred:

Jammu and Kashmir High Court Rules, 1975 — Rule 23

Citation : (2016) 2 JKJ 620 : (2016) 4 LawHeraldSC 2809 : (2016) 3 RCRCivil 932

Hon'ble Judges : N. Paul Vasantha Kumar, C.J., Dhiraj Singh Thakur and Bansi Lal Bhat, JJ.

Bench : Full Bench

Advocate : None, for the Appellant; A.V. Gupta, Sr. Advocate with Adiiya Gupta, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

N. Paul Vasantha Kumar, C.J.—This writ petition is filed by the petitioners who were implicated as accused persons in Case No. 43/Sessions

titled State v. Ram Lal and Ors. on the file of learned Additional Sessions Judge, Jammu. Before the Acquittal was recorded by the learned

Additional Sessions Judge, one Harinder Singh Sahi filed WPIL No. 1175/1988 seeking directions to the Senior Superintendent of Police Jammu

to execute the warrants issued by the Additional Sessions Judge Jammu on 09.07.1988 for securing presence of respondent No. 5 in the said writ

petition. On 20.09.1988 the Division Bench asked the writ petitioners to show the locus standi to file the writ petition. During the pendency of the

writ petition the petitioners herein were acquitted on 11.10.1988.

2. The writ petition was heard by the Division Bench on 04.11.1988 and one of the learned Judges gave a finding that the writ petitioner, Harinder

Singh Sahi had no locus standi to file the writ petition. The learned Judge also gave a finding that there was no iota of evidence in the case

implicating respondent No. 5 with the commission of rape, who was a Minister in the State Cabinet and the writ petition was filed simply to defame

him and gain political mileage by abusing the process of the Court and dismissed the writ petition.

3. Another learned Judge of the Division Bench, while agreeing with the conclusion arrived by one learned Judge, dismissed the writ petition on the

issue of locus but deferred with regard to the finding, taking note of the acquittal order passed and trial Court ignoring the procedure established by

law and held that in spite of the stay of the proceedings granted by the High Court by order dated 04.06.1988 the trial was proceeded and

acquittal order was passed on 11.10.1988. The learned Judge also took notice of the order of the Additional Sessions Judge dated 19.09.1988

giving directions to the APP to produce the prosecutrix and other witnesses specified in the list of witnesses and the statement of prosecutrix was

recorded on 08.10.1988 and order of acquittal was passed on 11.10.1988, rendering the writ petition as infructuous. The learned Judge also

deferred with the observations made by the other learned Judge to the effect that there is no evidence in the case implicating Mula Ram with the

commission of the offence of rape and refrained him from commenting as it may affect any of the parties in case any appeal or revision is filed

against the judgment. It is also mentioned in the said dissenting order that acquittal was prima facie recorded in haste and in gross violation of the

provisions of law which requires judicial probe, hence the learned Judge in exercise of powers under Section 435 read with Section 439 of

Cr.P.C., for the purposes of satisfying himself to the correctness, legality, propriety and regularity in the proceedings recording a finding of

acquittal, directed to call for record for examination of proceedings of the trial court. The records were directed to be placed before the learned

Judge for appropriate orders after expiry of period of limitation prescribed for filing an acquittal appeal and the Deputy Registrar of this Court was

directed to issue a notice to the Advocate General in that eventuality to assist the Court for disposal of the case according to law. The learned

Judge also observed that order shall be submitted to the Chief Justice for taking such appropriate action against the Presiding Officer, namely,

XXX, with a further direction to place a copy of the order on the personal file of the said Presiding Officer for record.

4. The said action of one of the learned Judge, in taking suo moto revision on the basis of dissenting view, without placing the matter before the

Chief Justice for getting the views of the 3rd Judge in terms of Rule 23 of the Jammu and Kashmir High Court Rules, 1975 read with Section 439

Cr.P.C is raised in this writ petition by the two accused persons (subsequently acquitted), namely, Munshi Ram and Puran Singh, praying for

quashing the directions issued by one of the Division Bench Judges, directing placing of the record before him and quashing the proceedings

thereon dated 25.02.1989.

5. While hearing the writ petition, a Division Bench, noticing the difference of opinion expressed by the earlier Division Bench in their separate

orders dated 04.11.1988, referred the matter to the Full Bench by framing following questions:--

1. When the judges are equally divided on a point which has vital bearing on an issue of acquittal or further prosecution of a person, is the

judgment of the Single Judge alone operative and can any proceedings be initiated on the judgment of the Single Judge constituting Division Bench

with which any other Judge of the Division Bench has dis-agreed.

2. That whether the revisional powers in the present case could be exercised by the Single Judge alone or by the Division Bench constituting the

Division Bench.

3. Whether it was proper for the registry to place the revision petition before a Single Bench without following the procedure laid down in Rule 23

of J&K High Court Rules, 1975 which enjoins that upon dis-agreement between the Judges constituting a Bench, who are equally divided, point of

difference is to be referred to a third Judge under orders of the Hon'ble Chief Justice who has to designate a Judge for the purpose to resolve the

difference between the Judges constituting the Division Bench.

4. Whether Rule 23 (1) and (2) is mandatory or directory in nature. Even if the rule 23 (1) is held to be directory whether it will be consistent with

the rule of law that only one Judge was party to the Division Bench, on dis-agreement with the other Judge on the point which is the subject matter

of revision petition, could initiate revisional proceedings at his own discretion,

without referring the matter to the Hon'ble Chief Justice,

6. After framing the said questions the Division Bench also issued notice to the respondents and directed the Registry to place the matter before

Chief Justice for constituting a Full Bench for consideration of the aforesaid questions and till the reference is answered the suo moto revision

registered as C.R. No. 11/1989 was ordered to lie over without taking any proceedings. The said reference order was passed on 09.03.1989. On

10.11.2000 the matter was directed to be listed before Full Bench for hearing from 04.12.2000 and onwards.

7. The matter was not placed before the Full Bench for more than 6 years and when the matter was listed on 25.04.2007, the matter was

adjourned with a direction to list again on the availability of the Bench. On perusal of the record it is evident that thereafter the matter was not listed

before any Full Bench and when the registry was directed to place the list of the cases referred to the Full Bench, the registry gave the list including

this matter, hence the matter was listed before this Bench on 29.03.2016.

8. When the matter was taken up, Mrs. Sindhu Sharma, learned counsel submitted that she has no instructions to appear. As the question of law

alone is raised and having regard to the fact that the writ petition is pending from 1989 which has been referred to the Full Bench as early as on

09.03.1989, we have chosen to hear legal submissions addressed on behalf of the High Court which is shown as second respondent in the writ

petition.

9. Mr. A.V. Gupta, learned senior counsel appearing for the 2nd respondent/High Court argued that when there is a difference of opinion among

the Judges of the Division Bench, the matter shall be placed before the Chief Justice in terms of Rule 23 of the J&K High Court Rules, 1975. As

there is no decision of the Division Bench and the differing views expressed by the two Judges are their individual opinion and only if the matter is

placed before the 3rd Judge, who concurs with the opinion expressed by any one Judge, the same becomes judgment by majority and the said

procedure having not been followed, the 3rd question referred i.e. ""Whether it was proper for the registry to place the revision petition before a

Single Bench without following the procedure laid down in Rule 23 of J&K High Court Rules, 1975"" has to be answered against the Registry. The

learned senior counsel also argued that Rule 23 (1) and (2) is mandatory and the learned Judge, who rendered a different view in the Division

Bench, was not justified in taking suo moto revision No. 11/1989 under Section 435 read with Section 439 Cr.P.C.

10. We have considered the said submission and perused the record, namely, differing views expressed by the two Judges constituting the Division

Bench with regard to recording of acquittal against the petitioners by the learned Additional Sessions Judge in his judgment dated 11.10.1988, and

Rule 23 of the Jammu and Kashmir High Court Rules, 1975.

11. It is not in dispute that the petitioners and others were shown as accused in Criminal case No. 43/Sessions on the file of Additional Sessions

Judge Jammu and they were charged under Sections 366/376 RPC and before recording acquittal the petitioners preferred a petition under

Section 561-A Cr.P.C before this Court praying to quash the challan. A separate petition was filed by respondent No. 6 under the same provision

to quash the challan. Notices were issued in the said petitions, however, the trial court was allowed to continue and expedite the trial of the case as

the said case was an old one. Thereafter the trial Court acquitted the accused persons by judgment dated 11.10.1988. The said acquittal was

taken note of while hearing the writ petition filed by one Harinder Singh Sahi in WP No. 1175/1988 and the Division Bench concurred with the

issue of no locus of the writ petitioner, however, having regard to the acquittal recorded by the learned Additional Sessions Judge during the

pendency of the writ petition one of the learned Judges held that there is not an iota of evidence in the case implicating Mula Ram, respondent No.

5, with the commission of rape. The another learned Judge of the Division Bench opined that the trial court has prima facie passed the order of

acquittal in haste and in gross violation of the provisions of law as incorporated in the Criminal Procedure Code which requires judicial probe in the

matter, hence he was inclined to exercise revisional powers in terms of Section 435 read with Section 439 Cr.P.C for the purposes of satisfying

himself to the correctness, legality, propriety and regularity in the proceedings recording a finding of acquittal and directed for calling the records of

the trial court for such purposes.

12. Whether initiation of revision No. 11/1989 on the basis of the differing views,

without getting the decision/opinion of the 3rd Judge is in

compliance with Rule 23 (1) and (2) of the Jammu and Kashmir High Court Rules, 1975, is the main issue and for deciding the said issue it is just

and proper to extract the said rule:--

23 (1): In the event of difference of opinion among the Judges composing any bench of the Court, the decision shall be in accordance with the

opinion of the majority of the Judges.

(2) If the Judges composing the Bench are equally divided on any point they shall state the point upon which they differ and the case shall then be

heard upon that point by one or more of the other Judges designated for the purpose by the Chief Justice and such point shall be decided

according to the opinion of the majority (if any) of the Judges who have heard the case, including those who first heard it.

13. The corresponding Rule 36 (1) and (2) of the Jammu and Kashmir High Court Rules, 1999 reads thus:--

36 (1): In the event of difference of opinion among the Judges composing any bench of the Court, the decision shall be in accordance with the

opinion of the majority of the Judges.

(2) If the Judges composing the Bench are equally divided on any point they shall state the point upon which they differ and the case shall then be

heard upon that point by one or more of the other Judges designated for the purpose by the Chief Justice and such point shall be decided

according to the opinion of the majority (if any) of the Judges who have heard the case, including those who first heard it.

14. There is no change in the earlier Rule 23 of the 1975 Rules and present Rule 36 of 1999 Rules. On perusal of the said Rule 23 (1) and (2),

which was the relevant rule applicable then, it is evident that in the event of difference of opinion amongst Judges composing the Division Bench,

the decision shall be in accordance with the opinion of the majority of the Judges and as per sub Rule (2) of Rule 23, if the Judges are equally

divided on any point they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other

Judges designated for the purpose by the Chief Justice and according to the opinion of the majority, if any, of the Judges who have heard the case,

including those who first heard it. Thus it is evident that if the Judges in a

Division Bench are not agreeing with a point and differing in their views, the views expressed by the Judges individually shall be treated as their opinion and cannot be treated as a decision or judgment as the Section itself states that a decision shall be in accordance with the opinion of the majority of the Judges which means that if there is difference of opinion between the Judges constituting the Division Bench, the Registry shall place the matter before the Chief Justice who shall place the matter before the 3rd Judge and the 3rd Judge also must give his opinion and if the opinion given by the 3rd Judge is in concurrence of the opinion of any one Judge, the majority opinion should be treated as decision/judgment in the said case. Thus this Court is of the view that unless the matter is placed before the 3rd Judge by the Chief Justice to express his opinion on the point and a judgment is drawn on the basis of majority opinion (view), there is no decision or judgment in the said case. This view is deducible from the definition given to judgment. A judgment is a decision on issues which is finally rendered in a case which is binding on the parties. Therefore, there is a distinction between the opinion and decision/judgment.

15. The Jammu and Kashmir High Court Rules, 1975 were enacted in exercise of the powers conferred by Section 102 of the Constitution of

Jammu and Kashmir read with Section 67 of the Jammu and Kashmir Constitution Act, 1996 (XIV of 1996) (1939-AD), Section 122 of the

Code of Civil Procedure, Samvat 1977 (X of 1977) (1920-AD), Section 8 of the Jammu and Kashmir State Civil Courts Act, Samvat 1977

(1920-AD) and Clause 26 of the Letters Patent (Jammu and Kashmir) and other powers enabling it in this behalf, by the High Court with the

previous approval of the Governor and notified in the official Gazette. These rules are statutory rules to be treated as special rules and are to be

enforced in terms of the judgment of this Court reported in AIR 1978 JK 65 (State of J&K v. G.S. Baroca). Thus the said Rules framed are

statutory Rules which are to be followed by all including the Chief Justice, Judges of this Court and the Registry.

16. As stated supra, if there is a difference of opinion between the Judges in the Division Bench, the procedure to be followed is prescribed in the

Statute. It is well settled proposition of law that if a statute says that a particular thing should be done in a particular manner, the same shall be done

in that manner and not in any other manner. The same is expressly held in Taylor v. Taylor (1876) 1 Ch.D 426 which was followed in the

decision of Privy Council in the decision reported in AIR 1936 PC 253 (2) (Nazir Ahmed v. King Emperor), AIR 1961 SC 1527 (Deep

Chand v. State of Rajasthan), AIR 1964 SC 358 (State of UP v. Singhara Singh) and 1999(3) SCC 422 (Babu Verghese v. Bar

Council of Kerala). The crux of the judgments cited supra, is that ""where a power is given to do a certain thing in a certain way, the thing must be

done in that way or not at all"". Thus, the rule namely Rule 23 of the Jammu and Kashmir High Court Rules 1975 was bound to be followed and

any action taken/initiated on the basis of the view expressed by one of the Judges could not be allowed to proceed which was rightly ordered to lie

over by the Division Bench of this Court while referring the matter to the Full Bench.

17. While considering two references made by three Judge Bench, the Constitution Bench (5-Judges) of Hon'ble the Supreme Court in the

decision reported in AIR 2016 SC 1213 (Pankajakshi and Ors. v. Chandrika and Ors.), after considering the entire aspect held that Special

Rules framed by the High Court either by an Act or by Rules will prevail over the general law, namely, Section 98 CPC as there cannot be any

repealment of the earlier Act called the Travancore-Cochin High Court Act and the contra decision rendered by Hon'ble the Supreme Court

reported in AIR 2002 SC 2445 (Hemalatha's v. Kattamkandi Puthiya Maliackal Saheeda and Anr.) was overruled. In para 50 the

Hon'ble Supreme Court expressed the reasons for coming to the said conclusion which reads thus:--

50. Even between the High Courts themselves another anomalous situation would arise. Those High Courts, such as Bombay, Calcutta and

Madras, which are ""Letters Patent"" High Courts so to speak, would not be governed by Section 98 in view of sub-section (3) thereof, but if we

were to accept Shri Viswanathan's argument, High Courts like the Kerala High Court which are not established by any Letters Patent, would be so

governed. This again would lay down two different rules for different sets of High Courts depending upon a wholly irrelevant circumstance-whether

their Charter originated in the Letters Patent or in a statute. Here again the acceptance of Shri V. Giri's argument leads to one uniform rule applying

down the board to all the High Courts in this country.

18. By applying the said principle and in the light of the statutory provision, namely, Rule 23 of the J&K High Court Rules, 1975, it can be safely

held that in the event of difference of opinion between Judges composing the Bench, the decision shall be in accordance with the opinion of

majority of Judges and if there is difference of opinion between the Judges of the Division Bench, the point of difference shall then be heard by

other Judge designated for the purpose by the Chief Justice and such point shall be decided according to the opinion of the majority, and until and

unless the 3rd Judge gives his opinion in terms of Rule 23 (2), the differing view expressed by the learned Judges of the Division Bench will not

become a decision or judgment.

19. It is also to be noted at this juncture that the Registry without following the mandatory provisions as mentioned in the Rule 23 of the Rules, has

chosen to place the file before the learned Judge who opined that acquittal was prima facie recorded in haste and in gross violation of the

provisions of law which requires judicial probe and revisional jurisdiction has to be invoked under section 435 read with section 439 Cr.PC after

the expiry of limitation prescribed for filing acquittal appeal, and issuing notice to the parties. The Registry, instead of placing the file before the

Judge who differed with the view of other judge, ought to have placed the matter before the Chief Justice by following the Rule, namely Rule 23 of

the J&K High Court Rules 1975. Hence, question No. 3 is answered against the Registry.

20. Insofar as question No. 4 is concerned, Rule 23 (1) & (2) is mandatory which can be ascertained from the language used in the rule itself. Rule

23 states that in the event of difference of opinion among the Judges composing any bench of the Court, the decision shall be in accordance with

the opinion of the majority of the Judges. There is no ambiguity in reading the said Rule that only after majority Judges gives their opinion, the

opinion will become a decision. Thus, we hold that issue No. 4 has to be answered in favour of the petitioners.

21. It is queer that the differing Judge who was of opinion that judgment of acquittal was passed in hot haste and in gross violation of the provisions

of law proceeded to assume revisional jurisdiction after expiry of period of

limitation caring a fig for the opinion of the other Judge composing the Bench. This amounted to usurpation of jurisdiction not vested in him as mandated under Rule 23. Once the two Judges constituting the Division Bench differed in their views, they became functus officio. It was for the Registry to place the matter before Chief Justice for referral of the matter to a third Judge. The Judge ought to have exercised restraint and made room for the Rule to operate. The Hon'ble Supreme Court in the decision reported in 2014 (2) SCALE 262 (Renu and Ors v. District & Sessions Judge, Tis Hazari and Anr.) has held that in a democratic set up which is governed by rule of law the supremacy of law has to be acknowledged. "The higher the dignitary, the more objectivity is expected to be observed." "the power can be exercised only to the width of the constitutional and legal limits and "that High Court is a constitutional and an autonomous authority subordinate to none.

22. In fine, the reference is answered in the following terms :-

Question No. 1: "When the judges are equally divided on a point which has vital bearing on an issue of acquittal or further prosecution of a person, is the judgment of the Single Judge alone operative and can any proceedings be initiated on the judgment of the Single Judge constituting Division Bench with which any other Judge of the Division Bench has dis-agreed".

As we have already held that the Judges in the Division Bench if are differing in their views, the same is not a decision and only after the matter is placed before the 3rd Judge by the order of the Chief Justice, and 3rd Judge expressing his opinion/views, concurring with the view expressed by one or the other Judge, the majority view alone will become a decision/judgment.

Question No. 2: "That whether the revisional powers in the present case could be exercised by the Single Judge alone or by the Division Bench constituting the Division Bench".

Since question No. 1 is answered as stated supra, question No. 2 becomes irrelevant and same need not to be answered.

Question No. 3: "Whether it was proper for the registry to place the revision petition before a Single Bench without following the procedure laid down in Rule 23 of J&K High Court Rules, 1975 which enjoins that upon disagreement between the Judges constituting a Bench, who are equally

divided, point of difference is to be referred to a third Judge under orders of the Hon'ble Chief Justice who has to designate a Judge for the purpose to resolve the difference between the Judges constituting the Division Bench".

The said question is answered against the Registry in terms of answer given to Question No. 1.

Question No. 4: "Whether Rule 23 (1) and (2) is mandatory or directory in nature. Even if the rule 23 (1) is held to be directory whether it will be consistent with the rule of law that only one Judge was party to the Division Bench, on dis-agreement with the other Judge on the point which is the subject matter of revision petition, could initiate revisional proceedings at his own discretion, without referring the matter to the Hon'ble Chief Justice".

As we have discussed above, Rule 23 (1) and (2) is held mandatory and disagreeing Judge is not empowered to initiate revisional proceedings at his own discretion without referring the matter to Chief Justice.

23. Thus the issues are answered as above and the Registry is directed to place the matter before the Chief Justice for referring the difference of opinion dated 04.11.1988 and posting the matter for hearing before another Judge within a period of four weeks.