

(1992) 11 AHC CK 0054
In the Allahabad High Court
Case No : First Appeal No. 528 of 1992

Smt. Nirmal Swaran Singh	Vs	APPELLANT
Rozu-ud-din and others		RESPONDENT

Date of Decision : 25-11-1992

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 3
Civil Procedure Code, 1908 (CPC) — Section 10, 98
Constitution of India, 1950 — Article 14

Citation : AIR 1993 All 121 : (1993) AWC 957

Hon'ble Judges : B.P. Singh, J

Bench : Single Bench

Advocate : Sri G.N. Verma, for the Appellant; Mr. Rakesh Dwivedi, for the Respondent

Final Decision : Dismissed

Judgement

1. Suit No. 432 of 1990 Rozu-ud-din and another v. Smt. Nirmal Swaran Singh was filed in the court of Civil Judge, Saharanpur, for specific performance of a contract dated 20-9-1985. The suit was transferred to the court of IV Addl. Civil Judge, Saharanpur. The suit was decreed on 29-5-1992. Aggrieved by the judgment and decree of the trial court, Smt. Nirmal Swaran Singh filed First Appeal No. 528 of 1992, which was heard at the admission stage by a Division Bench of this Court comprising of Hon'ble G.D. Dube and Hon'ble G.S.N. Tripathi, JJ. On a perusal of the order sheet of the case it would appear that the appeal was heard at the admission stage on 18-8-1992. On 24-8-1992 two conflicting judgments were pronounced, signed and dated by two Hon'ble Judges. While the appeal was dismissed by Hon'ble G.S.N. Tripathi, J., the senior Judge Hon'ble G.D. Dube admitted the appeal and passed orders for staying the execution of the trial court decree. Thereafter, on the same day both the Hon'ble Judges passed the following orders on the order sheet:--

24-8-1992.

Hon. G.D. Dube. J.

Orders delivered today. Appeal admit. Issue notice. Stay application. Injunction granted.

Hon. G. S. N. Tripathi, J. Orders delivered today. Appeal is dismissed.

24-8-1992.

Hon. G.D. Dube. J.

Hon. G.S.N, Tripathi, J.

Since the two judgments have been passed differing with each other in this case at the admission stage, the case be placed before Hon"ble the Chief Justice for orders tomorrow."

2. The file was placed before the Hon"ble the Chief Justice on 25-8-1992, who passed the following order:--

"List before Hon"ble B.P. Singh, J. for opinion."

3. It is in this background that this appeal came up for opinion before this Court.

4. I have heard the learned counsel for the appellant, Shri G. N. Varma and the learned counsel for the respondents, Shri Rakesh Dwivedi at length.

5. A preliminary objection was raised by Shri Rakesh Dwivedi, learned counsel for the respondents, and it was vehemently contended by him that the reference for opinion to this Court was ultra vires. In this connection, reference has been made to Section 98 of the Code of Civil Procedure, Rule 3 of Chapter VIII of the Allahabad High Court, Rules, 1952 and the cases Lal Singh v. Ghanshyam Singh, ILR 9 All 625 (FB), Mt. Akbari Begam Vs. Rahmat Husain and Others and R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid,

6. The contention of the learned counsel for the respondents is that once the Hon"ble Judges had delivered their separate judgments without formulating their point of difference, the judgment and decree of the trial court stood confined, and the reference for the opinion of the third Judge, in the circumstances of the case, was unwarranted and ultra vires. On the other hand, learned counsel for the appellant has argued that the two judgments were passed by the Hon"ble Judges at the admission stage and there was no bar for the matter being referred to the third Judge for opinion.

7. The procedure when Judges are divided in opinion in a case finds place in Rule 3 of Chapter VIII of the Allahabad High Court Rules, 1952. Rule 3 runs as under:--

"3. Procedure when Judges are divided in opinion. -- When a case, to which the provisions of the CPC 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 Justice 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."

8. The above quoted Rule 3 has taken the place of the Letters Patent and the present case is governed by its provisions for the simple reason that the provisions of the Code of Criminal Procedure are not applicable. A plain reading of this rule indicates that where two or more 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, but if the Judges be equally divided then they are to state the point upon which they differ and each Judge shall record his opinion thereon. It is in this eventuality that the case is then to be heard by one or more Judges as nominated by the Chief Justice. After the nomination of the Judge or Judges by the Chief Justice the point is to be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it. Thus, it is obvious that only the point upon which the Judges are equally divided is to be referred. It implies that the reference is to be made by the Judges who have heard the case and have not pronounced their final judgments in the case.

9. A similar question arose in the case of *Laf Singh v. Ghanshyam Singh* (supra). In this Full Bench case, Chief Justice Edge speaking for himself and his two brother Judges held:--

"In this case a preliminary point is raised, that the order of reference ultra vires. Our brother Brodhurst informs us that the judgments of Sir 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 u/s 575 of the Code of Civil Procedure. 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."

Justice Brodhurst, J. agreeing with the majority view observed as under:--

"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."

Justice Mahmood, agreeing with the majority view observed as under:--

"I concur with the learned Chief Justice, and if the objections 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 u/s 575 of the Civil Procedure Code. Indeed, under the provision 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 u/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."

Thus, the ratio of Lal Singh's case (supra) does not admit any ambiguity and is quite clear that once judgment has been delivered by the Judges who have differed each other without any reservation, they cannot take recourse to Section 575 of the Code of Civil Procedure. Section 575 of the old Code is similar to Section 98 of the Code of Civil Procedure, 1908. Section 98 of the Code runs as under--

"98. Decision where appeal heard by two or more Judges. -- (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench, and the Judges composing the Bench differ in opinion on a point of law, then may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court."

10. On a perusal of the proviso to subsection (2) of Section 98 of the Code of Civil Procedure, it is also obvious that where a Bench hearing an appeal is composed of two or other number of Judges and the Judges composing the 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 one or more of the other Judges and such point shall be decided according to the opinion of the majority, if any, of the Judges who have heard the appeal,

including those who first heard it. Section 98 of the CPC also lays emphasis that the point of law on which the Judges are differing is to be referred.

11. The Supreme Court in the case of Vishwanathan v. Abdul Wajid (supra) had the occasion to consider the Full Bench case of Lal Singh v. Ghanshyam Singh (supra). The Supreme Court quoted the following observation from Lal Singh's case:--

"Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court u/s 575 of the CPC (of 1882)."

12. In that case, a reference was made on a difference of opinion between two judges, but not on a question of law. Thus, it cannot be said that the decision in Lal Singh's case was overruled or disapproved when the Supreme Court was dealing with S. 15(3) of the Mysore High Court Regulation, 1884 and the practice which was prevalent in that Court.

13. A similar question arose in the recent case of B. K. Rai v. Union of India 1991 AWC 1408. Hon"ble R. S. Dhavan, J., after examining clause 27 of the Letters Patent and Rule 3 of Chapter VIII of the High Court Rules, 1952 and the cases referred to above came to the following conclusion:--

"Clause 27 of the Letters Patent was not different than Rule 3, in context, as it stands today. The implication which emerges from the Akbari Begum's case and earlier Full Court matter re: ILR (1887) 9 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."

I am in respectful agreement with the view taken by Brother R.S. Dhavan in the above cited case.

14. In view of what has been stated above, the present reference for opinion is ultra vires because both the Hon"ble Judges Hon"ble G.D. Dube and Hon"ble G.S.N. Tripathi, JJ. had ceased to have any jurisdiction over the case having delivered their separate judgments without stating the point or points of law upon which they were differing. It is not a case where the Hon"ble Judges were still possessed of the case. The mere fact that the Judges were hearing the appeal at the admission stage will not affect in any manner the position that having delivered their separate judgments the case was no more pending before them.

15. The reference being ultra vires, no opinion is given in the case.

16. Let the Registrar of the Court lay the papers of this case before Hon"ble the Chief Justice.

16. Order accordingly.