
(1996) 04 AHC CK 0037

In the Allahabad High Court

Case No : First Appeal From Order No. 1 of 1990

Union of India (UOI) and Another

APPELLANT

Vs

Joginder Singh Bhasin and Another

RESPONDENT

Date of Decision : 12-04-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 98, 98(2), 98(3)
Constitution of India, 1950 — Article 225, 226, 227, 228
Criminal Procedure Code, 1973 (CrPC) — Section 429
Government of India Act, 1935 — Section 229
High Court Rules, 1952 — Rule 3, 6

Citation : (1996) 04 AHC CK 0037

Hon'ble Judges : T.P. Garg, J;Sudhir Narain, J;R. Dayal, J

Bench : Full Bench

Advocate : S.P. Mehrotra, for the Appellant; N.B. Nigam and U.N. Sharma, for the Respondent

Judgement

R. Dayal, J.—This appeal was filed by the Appellants for setting aside the judgment and decree dated 7.10.1989 passed by the Civil Judge, Bareilly making award of the arbitrator dated 23.2.1988 a rule of the Court with a slight modification about interest. The appeal was heard by a Division Bench consisting of Hon''ble Om Prakash, J. and Hon''ble S. C. Verma, J. They were divided in their opinion and rendered on 9.12.1993 conflicting judgments. While Hon''ble Om Prakash, J. dismissed the appeal, Hon''ble S. C. Verma, J. allowed the appeal holding that the arbitrator had committed manifest error of law and so the award was liable to be set aside and directing that the award be remitted for reconsideration by the arbitrator in accordance with the observations made in the judgment and in accordance with law. Some ancillary directions were also given. After delivering these judgments, the learned Judges passed another order referring the following question for decision by a third Judge to be nominated by the Hon''ble Acting Chief Justice:

While on the facts and in the circumstances of the case, the impugned award

deserves to be set aside.

2. Accordingly, a direction was given for the record to be placed before the Hon"ble Acting Chief Justice for nominating a Judge at an early date. The Hon"ble Acting Chief Justice nominated Hon"ble D. S. Sinha, J. as the third Judge before whom the case was directed to be listed. Hon"ble D. S. Sinha, J. in his order dated 6.7.1994 took note of Rule 3 of Chapter VIII of the Rule of Court 1952 and observed:

Rule 3 of Chapter VIII of the Rules of Court contemplates that should the Judges be equally divided in opinion as to the decision to be given on any point, they may state the point upon which they differ and each Judge shall record his opinion thereon. The case is then to be heard upon that point alone by the Judge nominated by the Chief Justice. Further, division in opinion conceived of by the Rule 3 of the Rules is a division at a stage prior to the finalisation of the process of decision making, i.e., before the delivery of judgment. Difference of opinion after the finalisation of the process of decision making, i.e., after the delivery of the judgment is not contemplated. In the instant case, two conflicting judgments were delivered and duly signed by the Hon"ble Judges, completing the process of decision-making and bringing into existence two valid judgments, and the question for reference for decision by a third Judge to be nominated by the then Hon"ble the Acting Chief Justice, without stating the point or the points upon which difference existed, was framed thereafter.

In support of his view, Hon"ble Sinha, J. referred to *Birendra Kumar Rai Vs. Union of India and others*, and *Smt. Nirmal Swaran Singh Vs. Rozu-ud-din and others*, and said that this Court has firmly ruled that reference to third Judge for his opinion under Rule 3 of Chapter VIII of the Rules of Court after delivery of conflicting judgments, and without stating the point or points on which there was difference amongst the Judges forming the Division Court, is incompetent and *ultra vires*."

Further, the learned Judge observed that in "the case of *Birendra Kumar Rai v. Union of India and Ors.* (supra), it has been further ruled that in a situation as is obtaining in the instant case, proper course will be reference to a larger Bench, in the instant case to a Full Bench, or an appeal before the Hon"ble Supreme Court of India." The conclusion reached by the learned Judge is as under:

Inevitable conclusion, therefore, is that no reference otherwise than on difference of opinion on a point of fact or law arising before the finalisation of the process of decision-making, to be precise before delivery of the judgment, is visualised either by Rule 3 of the Rules or by the proviso to Sub-section (2) of Section 98 of the Code.

Now, in the circumstances of the case, following three alternatives are available:

(i) confirmation of the decree under appeal by the Division Court which heard the appeal u/s 98(2) of the Code;

- (ii) appeal to the Hon''ble Supreme Court of India by the aggrieved party;
- (iii) reference of the whole case to a Full Bench.

Let the case, therefore, be placed before the Hon''ble the Chief Justice for orders.

3. The then Hon''ble Chief Justice passed an order on 18.8.94 directing the listing of the matter before a Full Bench in the following words:

List before S. C. Mohapatra. D. K. Trivedi and Sudhir Narain, JJ.

Subsequently, Full Bench was reconstituted on 10.11.1995 by the following order:

List before the Bench of Hon''ble Justice R. Dayal, Hon''ble Justice Sudhir Narain and Hon''ble Justice T. P. Garg.

That is how the matter is before this Full Bench.

4. We have heard Sri S. P. Mehrotra, Advocate, on behalf of the Appellants and Sri U. N. Sharma, Advocate, on behalf of the Respondents, Sri S. P. Mehrotra has submitted that under the proviso to Sub-section (2) of Section 98 of the Code of Civil Procedure, the learned Judges who were divided in their opinion could refer to a third Judge only a point of law on which they differed and the third Judge was then to hear only on that point of law and it was thereafter that the appeal was to be decided according to the opinion of the majority of the Judges who heard the appeal including those who had first heard it, but since the learned Judges did not refer any specific point of law and rendered full judgments including orders, they became functus officio, and so, thereafter, they could not make reference and consequently, the reference is incompetent and. therefore, the decree of the lower Court stood confirmed under Sub-section (2) of Section 98. On the other hand, Sri U. N. Sharma, has submitted that reference to the third Judge was valid under the High Court Rules.

5. The point of decision in the reference is whether the reference by the Division Bench to a third Judge was incompetent and, if so, whether the judgment and decree of the learned trial court stood confirmed u/s 98(2) of the CPC and if, the judgment and decree of the trial Court have not stood so confirmed, then how the matter should proceed further.

6. At the very outset, it may be pointed out that the Hon''ble Judges of the Division Bench though, after delivering their separate conflicting, judgments, framed a question reproduced in Paragraph 1 above, that was neither a question of fact nor of law. It, in substance, amounted to referring the whole case for decision by the third Judge.

7. Now, a reference may be made to the relevant rules and statutory provisions and also the authorities cited at the bar. The relevant provisions in the statute and also in the rules speak in one voice that where an appeal is heard by two or more Judges, the appeal is to be decided in accordance with the unanimous

opinion of the Judges constituting the bench, if there is unanimity, and by the majority opinion, if majority opinion is available. The difficulty arises where the Judges constituting the bench are equally divided and no majority opinion is available. For the sake of brevity, while referring to the relevant provisions, we shall be referring only to those portions which bear on the course to be adopted where the Judges are equally divided in their opinion.

8. The High Court of Judicature at Allahabad was established by the Letters of Patent of His Majesty issued on 17th March, 1866. Para 10 thereof provides, inter alia, that an appeal shall lie to the High Court from the judgments of one Judge of the High Court in the matters specified therein. Para 27 thereof provides that if the Division Court composed of two or more Judges in the exercise of its original or appellate jurisdiction "should be equally divided, 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 and the point shall be decided according to the opinion of majority of the Judges who have heard the case including those who first heard it." Thus, according to this paragraph, reference was required to be made on every point of difference whether of law or of fact on which the Judges differed and it was thereafter that the case was required to be decided according to the opinion of the majority including the Judges who first heard it. By para 17 (a) of the United Provinces High Courts (Amalgamation) Order, 1948, promulgated in exercise of the powers conferred by Section 229 of the Government of India Act, 1935 and all other powers in that behalf which came into force on the appointed day, i.e. 26th of July, 1948, the Letters Patent dated 17th March, 1866 ceased to have effect from the appointed day except for the purpose of constituting or giving effect to that order. Para 9 of the Amalgamation Order inter alia, provides that subject to the provisions of this Order, the law in force immediately before the appointed day with respect to practice and procedure in the High Court in Allahabad shall, with the necessary modifications, apply in relation to the new High Court, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the High Court in Allahabad. The first proviso to that paragraph says that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court in Allahabad shall until varied or revoked by rules or orders made for the new High Court, apply with the necessary modifications in relation to practice and procedure in the new High Court as if made by that Court. Para 13 of the Order says that the "law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and division Courts of the High Court in Allahabad and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the new High Court." Thus, paras 9 and 13 preserved the powers of the High Court to hear Letters Patent appeals. In this view, we find support from the decision of a Full Bench comprising five learned Judges of this Court in *The Notified Area Committee and Another Vs. Sri*

Ram Singhasan Prasad Kalwar, .

8A. The High Court framed new rules in exercise of the powers conferred by Article 225 of the Constitution and all other powers enabling it in that behalf and these rules are known as the Rules of Court, 1952. Rule 3 in Chapter VIII of these rules, inter alia, says that when a case to which the provisions of the Code of Criminal Procedure do not apply is heard by a Division Bench composed of two or more Judges and 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 majority of the Judges who have heard the case including those who first heard it." Thus, under Rule 3, reference is contemplated on both points of law and fact. Rule 6 in Chapter V of the Rules of Court provides for reference to a larger Bench as under:

6. Reference to a larger Bench.--The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event, the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.

Thus this rule, inter alia, provides for reference of the whole case to a Bench of two or more Judges. Relying upon this rule, Sri U. N. Sharma has submitted that this Full Bench may decide the whole case. However, the most important provision is contained in Section 98 of the Code of Civil Procedure. Sub-section (2) of the section says that "where an appeal is heard by a Bench of two or more Judges and there is no majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed. Proviso to that subsection says 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 of 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." Thus, Sub-section (2) provides two alternatives; one is to confirm the decree from which the appeal has arisen, and the other is to make reference on a point of law on which the Judges differ. For making a reference, the two essential conditions which must necessarily be present are, first that the Court must consist of more Judges than those that constituted the bench and, second, that they must differ on a point of law. Reference is also contemplated to be made before a final decision is recorded by the Judges. It is only after a decision on the point of law referred has been decided that the case is to be decided according to the opinion of majority of the

Judges who have heard the appeal including those who first heard it. However, as will appear from the later part of the judgment, this is merely an irregularity and not an essential condition to be complied with for the competence of the reference. Sub-section (3) of Section 98 provides that nothing in the section "shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court." Thus, where there is a conflict between the provisions contained in Section 98 and the Letters Patent of any High Court which are still in force, the Letters Patent prevail. Rules made by the High Court under Article 225 of the Constitution of India do not have this type of overriding effect over a statutory provision. Article 225 expressly makes the power to make rules of the Court subject to the provisions of any law of the appropriate Legislature, and so where there is a conflict between a statutory provision and any rule, the statutory provision must prevail. In the instant case, there is a clear conflict between the statutory provision and the relevant rules. The statutory provision contained in Section 98 of the CPC contemplates dismissal of the appeal where the Judges are equally divided in opinion and permits them to make reference only on a point of law. On the other hand, the rules do not at all contemplate dismissal of an appeal in such situation and provide for reference both on a point of law and fact and also reference of the whole case before a larger Bench. So, in view of Article 225 of the Constitution, the provisions contained in Section 98 of the CPC have overriding effect.

9. However, Sri Sharma has submitted that the Rules of Court were made in exercise of the constitutional powers contained in Article 225 of the Constitution, and for this reason alone, the rules should prevail over the statutory provisions and has referred in support of his submission to *Umaji Keshao Meshram and Others Vs. Radhikabai and Another*, . However, we do not see any merit in this submission. When Article 225 itself specifically makes the rules made under that Article subject to statutory provisions, it is in compliance of the constitutional provision contained in that Article that statutory provisions prevail over the rules framed under that Article. We find nothing in the authority referred by Sri Sharma to support his submission. The authority has merely clarified that the words "subject to" cannot be construed as referring only to a provision limiting or restricting the Jurisdiction and powers of the existing High Court but also include a provision which enlarges the Jurisdiction and powers of the existing High Courts. "Article 225, therefore, comprehends within its scope not only the jurisdiction which the existing High Courts possessed immediately prior to the commencement of the Constitution but also the jurisdiction and powers which the other Article of the Constitution, such as Articles 226, 227 and 228 confer upon the High Courts."

10. In *Lal Singh v. Ghanshyam Singh* ILR 9 All 625 (FB), majority of the Court held that 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 Code of Civil Procedure. But this judgment, as will appear

later, has not been approved by the Supreme Court in *R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid*, . In *Mt. Akbari Begam Vs. Rahmat Husain and Others* , where a reference was made for determination of the specified questions and also for disposal of the case, it was held by Sulaiman, C.J. that "the other 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 Section 98, CPC not by the Letters Patent. Under the former section, when a Bench differs 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 hearing by the other Judges is confined to the specific points and cannot cover the whole case over again. The object obviously is that there should not be further hearing of questions on which there has been no difference of opinion at all. Section 98 is confined to points of law only, but the newly added Sub-section (3) makes it subject to the provisions of our Letters Patent. Section 98 would apply only when there is no similar provision in the Letters Patent; but if there is a special provision, Section 98 would not apply to a chartered High Court."

12. In another decision *Rajendra Kishore Sahi Vs. Nand Prasad* , it was held that where two Judges composing 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 Clause 27 of the Letters Patent of the High Court and not that laid down in Section 98 of the Code of Civil Procedure. But that is so because Clause (3) of Section 98 itself makes it clear that section is not to affect any of the provisions of Letters Patent of any High Court.

13. We, therefore, hold that where an appeal is heard by two or more Judges and the Judges are equally divided in their opinion and there is no majority which concurs in a judgment varying or reversing the decree appealed from, the appeal is to be disposed of in terms of Section 98 of the Code of Civil Procedure. Under that section, decree of the lower court may be confirmed. Another alternative procedure of reference is also available under the proviso to Sub-section (2), if two essential conditions exist, namely, first, that the court is composed of more Judges than those constituting the Bench that heard the case, and second, that the difference is on a point of law. If this alternative procedure is decided to be acted upon, the Judges may state the point of law upon which they differ. Then the appeal is to be heard upon that point by one or more of the other Judges and such point is thereafter to be decided according to the opinion of the majority of the Judges who have heard the appeal including those who first heard it. Where any of these two essential conditions stipulated in the proviso does not exist, the alternative procedure of reference is not available. In such situation, there is no choice except to confirm the decree from which the appeal has arisen. However, where the first condition exists, namely, that the High Court is composed of more Judges than those constituting the Bench that heard the appeal and the Judges constituting the Bench render full judgments and refer the whole case, instead of a point of law, procedural irregularity occurs, because firstly, the reference is

made after rendering their final opinions on the merits of the case and, secondly, reference is not confined to a specified point of law on which difference of opinion exists. But merely because the learned Judges have recorded their respective final opinions including the proposed orders does not imply that they have become functus officio. Despite the recording of final opinion of the individual Judges, a final operative order capable of execution still remains to be passed. In such case, none of the two available alternative procedures has been adopted. To say that since reference is incompetent, the decree appealed against should be deemed to be confirmed would be to penalise the Appellant for no fault of his. Choice for dismissal u/s 98 was not made by the Bench and there is no presumption that if provisions of Section 98 were brought to the notice of the Bench, the Bench would necessarily have confirmed the decree appealed against. Keeping in view the fundamental rule reiterated by the Supreme Court in *Kerala State Electricity Board and Anr. v. M.R.F. Limited* (1966) 1 SCC 597 in Paragraph 24, "it is an imperative duty of the Court to ensure that the party to the lis does not suffer any unmerited hardship on account of an order passed by the Court." Our conclusion is that in such case, the Bench that initially heard the appeal and if that Bench, for any reason is not available, any other Bench which may be nominated by the Chief Justice for hearing the appeal should consider in the light of the provisions of Section 98 whether the difference of opinion was on a point of law. If the learned Judges find the answer to be in the negative, they will have no alternative except to confirm the decree. If the answer is in the affirmative, they will decide which of the two alternative courses available should be adopted. The decision has to be a conscious one to be taken in the light of Section 98. In this view, we find support from the decision of the Apex Court in *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, . There the Court was considering the ground of incompetence of the Mysore High Court, which was at the relevant time a foreign Court, to deliver the judgment set up as a bar to the trial of the Madras suit. Both the Judges of the Mysore High Court constituting the Division Bench had differed on almost every question raised in the appeal. One learned Judge was for reversing the judgment of the trial Court and the other learned Judge was for affirming the same. Thereafter, the case was referred to the Full Bench u/s 15(3) of the Mysore High Court Regulation of 1884. The Court observed:

29. ...The relevant statutory provisions then in operation relating to the procedure to be followed in the event of a difference between Judges constituting a Bench were these : Section 98 of the Mysore CPC provided:

(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.

Section 15(3) of the Mysore High Court Regulation, 1884, as amended by Act XII

of 1930, provided:

The decision of the majority of Judges comprising Full Bench of the High Court or other Bench of the said Court consisting of not less than three Judges shall be the decision of the Court.

When a Bench of the High Court consists of only two Judges and there is a difference of opinion between such Judges on any material question pending before it, such question shall be disposed of in the manner prescribed by Section 98, CPC or Section 429 of the Code of Criminal Procedure as the case may be or at the discretion of either of the Judges composing the Bench it shall be referred to a Full Bench and the decision of the Majority of the Judges on such Full Bench shall be the decision of the High Court.

If Judges constituting the Bench differed and there was no majority concurring in varying or reversing the decree appealed from, the judgment had to be affirmed. But it was open to the Judges or either of them to refer u/s 15 of the Mysore High Court Regulation the questions on which there was a difference to a Full Bench. The true rule envisaged by Section 15 (3) of the Mysore High Court Regulation is that the Court or the referring Judge shall set out the material questions on which there is a difference of opinion without expressing any opinion on the result of the appeal. The two Judges did disagree; they disagreed on almost every question which had a bearing on the claim made by 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 appeals. 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 u/s 15 (3), Balkrishnaiya J. and Kandaswami Pillai, J. did deliver separate and self-contained opinions, setting out the final orders which in their respective opinions should be made in the appeals, 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 Balakrishnaiya, J. passed an order for reference presumably with the concurrence of Kandaswami Pillai, J.

14. In para 30 of the judgment, reference was made to Lal Singh's case (supra) and it was held that this does not assist the Plaintiffs in support of the plea that reference to Full Bench was invalid and the Mysore High Court was incompetent to hear the reference. Several reasons were given. One reason is as under:

30. ...Again, the principle of Lal Singh's case ILR All 625 (FB) and broadly enunciated by the majority of the Court has not been approved in many later cases in other High Courts; for instance, Karali Charon Sarma Vs. Apurba Krishna Bajpayi and Others, ; Umar Baksh v. Commissioner of Income Tax, Punjab ILR Lah 725 : AIR 1931 Lah 578 and Jahangir v. Secretary of State 6 BLR 131. In these cases, it was held that in each case the question is one of intention of the Judges differing in their opinions. The Mysore High Court held in Narayana v.

Lingappa 4 DLR (Mys) 118 (FB) that it is not illegal to refer a case u/s 15 (3) of the Mysore High Court Regulation, 1884, after the Judges differing have recorded judgments including the final orders they are to make, and without any reservations.

15. Thus the Apex Court did not approve the view taken in Lal Singh's case and said that in each case, the question is one of intention of Judges differing in their opinion. So, with respect, the decisions of this Court in Birendra Kumar Rai Vs. Union of India and others, and Smt. Nirmal Swaran Singh Vs. Rozu-ud-din and others, taking a contrary view do not lay down correct law.

16. In the instant case, the learned Judges constituting the Bench that heard the appeal did not make any conscious choice from the two alternatives available of them, since the provisions of Section 98 were not brought to their notice. No specific point of law was referred by them. So reference was incompetent. The matter needs to be disposed of by the Bench that heard the matter initially by deciding which of the two options mentioned in Section 98(2) of the CPC should be exercised. It is made clear that it will be open to them to make fresh reference on a point of law.

17. So, we direct that the matter be placed before the Hon'ble the Chief Justice for a direction to list the appeal for further orders before the Bench consisting of Judges who initially heard the appeal and rendered conflicting judgments, for disposal in the light of this judgment.