

# **HIGH COURT OF JAMMU AND KASHMIR**

AT JAMMU

LPAOW No.52/2006

MP Nos. 60/2006, 21/2007 and 59/2007

LPAOW No. 53/2006

MP Nos. 61/2006 and 58/2007

Date of order: 28.04.2016

## **LPAOW No. 52/2006**

Satish Singh aged 38 years son of late Sh. Gupat Singh resident of House No.52/E Sainik Colony Jammu

Appellant.

Vs.

1 State of Jammu and Kashmir through Commissioner/Secretary  
Public Works Department Civil Secretariat Srinagar plus 7 others

Respondents.

## **LPAOW No. 53/2006**

Radhey Sham aged 49 years  
S/O Shri Anant Ram Khajuria  
R/O H. No. 645 Sector 4, Channi Himat, Jammu.

Appellant.....

Vs.

1 State of Jammu and Kashmir through Commissioner/Secretary  
Public Works Department Civil Secretariat Srinagar plus 7 others

Respondents.....

## **Coram:**

**Hon'ble Mr. Justice N. Paul Vasanthakumar, Chief Justice**

**Hon'ble Mr. Justice Dhiraj Singh Thakur, Judge**

**Hon'ble Mr. Justice B.S.Walia, Judge.**

## **Appearing counsel:**

For the Appellant(s) : Mr. D.C.Raina Advocate General with  
M/s Ravinder Gupta AAG & Amit Gupta Dy.AG

For the Respondent(s) : None

i/	Whether to be reported in Press/Media	:	Yes
ii/	Whether to be reported in Digest/Journal	:	Yes

**N.Paul Vasanthakumar, CJ**

1. This matter is placed before the Full Bench on the basis of difference of opinion in terms of order of Chief Justice made on 22.04.2009 on the note of Registrar Judicial to answer the following issues:-

a).Whether or not before referring the case to the Chief Justice of the High Court, formulation of point/s of difference by the Division Bench is an essential statutory requirement, so that point/s of difference can be referred to another Judge or Judges in terms of the aforesaid Rule.

b).Whether or not on the reference made by the Chief Justice, one of the Judges composing the Bench could decline to formulate the point/s of difference in light of the provisions of Rule 36(2).

2. As the legal issue alone has to be decided and having regard to the fact that the prayer sought for in the LP appeal has become infructuous due to efflux of time, which was in relation to consider the technical bit of the writ petitioner for allotment of work of construction of road from Purmandal to Panjowa via Deon (Block Purmandal) and Miran Sahib to Darsopur ( Block R. S. Pura), the tender was subsequently

conferred to other persons and the work has also been completed.

3. Issues which are to be answered, as narrated above, has been raised before the Full Bench. Even though the matter was to be placed before the Full Bench in terms of order dated 22.04.2007, it is only on 04.04.2016 that the matter was listed. We have heard arguments of Mr. B.S.Manhas Advocate appearing for the petitioner and Mr. D.C.Raina, Advocate General along with Mr. Ravinder Gupta AAG and Mr. Amit Gupta, Dy.AG for the respondents.

4. While hearing the LP appeals by the Division Bench, separate orders were pronounced on 19.10.2006 as there was difference of opinion between the Judges composing the Division Bench. However, points of difference of opinion were not formulated. In the light of the Rule position i.e. Rule 36 of the J&K High Court Rules, 1999, note dated 13.11.2006 was prepared and put up and the question was framed as to whether or not before posting the case to another Judge, formulation of point/s is required under Rule 36(2) so that points of difference be answered.

5. As stated supra, in the LP appeals, one of the Judges in a separate Judgment dismissed the appeal by upholding the order of the learned Single Judge by a detailed order and the

another Judge allowed the appeal and set aside the Judgment of the learned Single Judge also by a reasoned order.

6. When note was put up by Registrar Judicial on 13.11.2006 before the Chief Justice, the matter was ordered to be placed before Division Bench for formulating the points of difference by Administrative Order dated 17.11.2006.

7. On 11.12.2006, the matter was listed before the very same Division Bench as ordered by Chief Justice and one of the Judges, composing the Division Bench, observed as follows:

“In our considered opinion the reference made by the Hon’ble Chief Justice is without any legal competence. Once a Bench of the Court decides a case finally by passing a judicial order, it becomes functus officio. The validity or otherwise of the judicial order passed by the Bench can only be determined judicially by a Superior Court vested with such jurisdiction under law. The Chief Justice possesses no jurisdiction for remitting a case back to the Bench in exercise of his administrative power for reconsidering any point or issue involved in the case.

We therefore, with due deference to the learned Chief Justice(A) decline to entertain the reference.”

8. The said order was not signed by one of the Judges and the other Judge passed a separate order on 30.12.2006 and formulated the points of difference as follows:

“1). Would an agreement of five persons to constitute a partnership inter alia on the following

clauses in the deed of partnership dated 22.11.2005 be in violation of Section 25 of the Partnership Act rendering the Agreement, and the proposed Partnership, Void and Unenforceable?

“THAT Sh. Sanjay Singh the part of the Second part shall sign and execute all the necessary papers, documents, agreements and returns pertaining to the business of the partnership and required to be filed with any Government or other authority, department or any Corporation in the J&K State pertaining to the construction business mentioned herein above and the party of the 5<sup>th</sup> part shall remain responsible for all the liabilities and dues outstanding of the Partnership firm towards any department, authority or any Corporation in the J&K State from the date of execution of this deed pertaining to the construction business mentioned hereinabove.

22.THAT the provisions of Indian Partnership Act, 1932 and statutory modification thereof shall apply over all matters not provided for in this deed of partnership.”

2). Whether existence of Clauses 11 and 22, extracted in question No.1, in the agreement of partnership, does not contravene Section 25 of the Partnership Act?.

3).Would existence of Clauses 11 and 22 in the agreement of partnership, in the event of their being held to be violative of Section 25 of Partnership Act, would not affect the partnership and the liability of four persons, who had been excluded from the liability of a Firm, to third party/parties? “

9. Again the matter was placed before the Chief Justice by Registrar Judicial on 31.07.2007 and the Chief Justice ordered the matter to be placed before the Full Bench to answer the issues narrated above.

10. Interpretation to Rule 36 (2) will answer the issues raised.

Rule 36(2) of the Jammu and Kashmir High Court Rules, 1999 reads thus:

“ 36 (1): -----.

(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.”

11. As already stated, the Judges of the Division Bench did not agree with the issues and one Judge has chosen to allow the appeal whereas another Judge dismissed the appeal. The point upon which they differed can be culled out from the orders passed by each Judge if the learned Judges have specifically not stated the point upon which they differed. Once there is disagreement, the points of difference stated in separate orders can be inferred and the Registry itself can prepare a draft of differing points for considering the same by another Judge at the time of placing the papers before the Chief Justice or also on placing the matter before another Judge, the concerned Judge can also note the points of difference and answer the same. Similar issue came up before the Madras High Court in the Judgment reported in (2007) 2 MLJ 129 = (2007) 1 CTC 705 (**All India Anna Dravida Munnetra Kazhagam, Chennai Vs. State Election Commissioner and others**). The two Judges constituting the

Division Bench having expressed two views by separate orders, the cases were placed before the third Judge by the Chief Justice. The third Judge after noticing that without specifying points of difference the Judges have differed, at the first instance, narrated the points of difference and thereafter expressed his view on each points and concurred with the view of one of the Judges composing the Division Bench.

12. Here in this case, after the matter was again placed before the Division Bench for framing the points of difference, one of the Judges in the Division Bench narrated the points of difference as extracted above. The same is more than sufficient for placing the matter before the third Judge which will be in compliance with Rule 36(2) of the J&K High Court Rules, 1999. The purpose of the Rule, namely Rule 36 of J&K High Court Rules 1999, being that if the Judges composing the Division 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. Even if the said rule says that if the Judges composing the Bench are equally divided on point, they shall

state the point upon which they differ and if any of the Judges has framed such points of difference, the same is substantial compliance of the Rule as there is disagreement on those points by both the Judges. Thus, the word “they” can be read down. The object of the said Rule shall be kept in mind while giving interpretation. Reading down the provisions of an Act or Rule which is settled principle of interpretation so as to sustain their constitutionality as well as for effectuation of the purpose of the statute as held by Hon’ble the Supreme Court in the judgment reported in (1996)2 SCC 498 (**Pannalal Bansilal Pitti v. State of A.P**) (para 28).

13. Thus, the issue of reference is answered by holding that if the Judges in the Division Bench differ on points or issues, the same can be noted by the third Judge before whom the matter is assigned or if any one judge formulates the point/s of difference, the same is sufficient as the other judge is not in agreement with the points of difference.

14. In the light of the above answer given to the first question, we are of the view that the second question is rendered academic and no decision is required for the same.

15. As stated supra, the Letters Patent Appeals having become infructuous because of the efflux of time and the construction work having been assigned to third party and



same having been completed, the appeals are dismissed as infructuous. No costs.

**(N. Paul Vasanthakumar)**  
**Chief Justice**

**(Dhiraj Singh Thakur)**  
**Judge**

**(B.S.Walia)**  
**Judge**

**Jammu,**  
**28.04.2016**  
**Anil Raina Secy.**