

Kulwant Singh Johal & Ors. vs Mrs Masooda Jabeen & Ors. on 29 November, 2018

Author: Chief Justice

Bench: Chief Justice

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

CTA No.38/2018

IA No.01/2018

Date of order: 29.11.2018

Kulwant Singh Johal & Ors.

V.

Mrs Masooda Jabeen & Ors.

Coram:

HON'BLE THE CHIEF JUSTICE.

Appearance:

For the appellant(s) :M/s Sunil Sethi & L. K. Sharma, Sr. Advocates, with
Mr. Karman Singh, Advocate.

For the respondent(s): Mr. M. A. Qayoom, Advocate, with

M/s P. S. Ahmad, Bilal Ahmad, Arshid Ahmad & Irshad Mohi-ud-Din Bhat, Advocates.

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| i) | Whether approved for reporting in Law journals etc.: | Yes. |
| ii) | Whether approved for publication in press: | Yes. |

01. The present application, (accompanied by an affidavit attested on 24th September, 2018), stands filed by the applicants (Kulwant Singh Johal & Others), seeking transfer of the miscellaneous appeal being MA No.54/2018 titled Masooda Jabeen v. Kulwant Singh Johal and others, from the Srinagar Wing to the Jammu Wing of the High Court.

Factual narration:

02. The factual matrix, as is necessary, for adjudication of the application is set out below:

- (i) In the appeal, the appellant (Masooda Jabeen) is assailing the order dated 20th July, 2018 passed by the learned Additional District Judge, Jammu, restraining the non-applicants/ defendants (including the appellant Masooda Jabeen) from alienating / transferring the House No.132, Wazarat Road, Jammu ('suit property' hereafter) to any third party or from raising any new construction on the suit house/ property till the disposal of the suit.

(ii) The house no.132, Wazarat Road, Jammu, is stated to have been sold by defendants 2 and 3 in the suit to the defendant no.1, Mrs. Masooda Jabeen, vide a sale deed dated 8th February, 2016. This sale deed was called in question by the applicants herein by filing the suit under the Act of 1993 with the consequential relief of possession of the house in question in Jammu.

(iii) A house on the northern side of the house no.132, constructed by Kulwant Singh Johal Wazarat Road, Jammu, is claimed to have an easement right by prescription and necessity over the house No.132, Wazarat Road, Jammu. It has been claimed that the house constructed by Kulwant Singh Johal (one of the applicants herein) has a dominant heritage over the house no.132 apart from other rights available to the applicants under Section 15 of the Jammu & Kashmir Right of Prior Purchase Act, 1993. ('Act of 1993' hereafter)

(iv) Mrs. Masooda Jabeen, had filed an application under Order 7 Rule 11 of the Code of Civil Procedure ('CPC' hereafter), seeking rejection of the plaint, which came to be dismissed by an order dated 4th June, 2018. By a separate order dated 20th July, 2018 passed by the learned Additional District Judge, Jammu, the status-quo order earlier granted was confirmed after hearing the parties and the defendants (including Mrs. Masooda Jabeen) were temporarily restrained from alienating/ transferring the suit property/ house to any 3rd party or from raising any new construction on the suit house/ property till the disposal of the suit.

(v) Aggrieved by these orders passed by the learned Additional District Judge, Jammu, the defendant no.1-Mrs Masooda Jabeen, filed an application seeking permission to assail the order dated 4th June, 2018 passed on the application filed by her under Order 7 Rule 11 CPC as also the order dated 20th July, 2018, before the Srinagar Wing of the High Court by filing a revision petition and a miscellaneous appeal.

(vi) The above application was placed before me on the administrative side and was allowed by an order dated 16th August, 2018.

(vii) Pursuant to this permission granted by me, on the administrative side, Mrs. Masooda Jabeen filed the appeal which has been registered as MA No.54/2018 in this Wing of the Court.

I am informed that in this appeal an order dated 14th September, 2018, has been passed by a learned Single Judge of this Wing directing that the impugned order shall not come in the way of appellant in effecting the repairs or renovation of the suit property or to take such other steps as may be necessary for making the house habitable. It has been directed that to this extent, the impugned order shall stand varied at this stage.

03. The applicants have filed the present application seeking transfer of MA No.54/2018 along with connected application from the Srinagar Wing to the Jammu Wing of this Court.

04. The learned Registrar Judicial submitted a memo dated 15 th October, 2018 before me on the administrative side for hearing of the transfer application by video conferencing, which was permitted. As such the applicant has been heard on video conferencing from Jammu while Mrs Masooda Jabeen has been heard through counsel at Srinagar as well as in person.

05. It is noteworthy that as per the report of the Registrar Judicial, the original record of the application was lying with the Jammu Wing of the Court and the learned Registrar Judicial, has submitted a photo copy of the same along with cause list and notice. In this background this application was listed before me on 22nd October, 2018, when a request for adjournment by Mrs. Masooda Jabeen was made on the ground that her counsel was not available. The same situation obtained on 25th October, 2018, when with the consent of the non- applicant- Mrs. Masooda Jabeen, submissions of Mr. Sunil Sethi, learned senior counsel for the applicants, were heard. The matter was adjourned for hearing Mr M. A. Qayoom, learned counsel for the non-applicant to 26th October, 2018, when detailed submissions on behalf of Mrs. Masooda Jabeen, non-applicant, were made and heard.

Mr L. K. Sharma, learned senior counsel, was heard on behalf of the applicants in rejoinder.

Applicants Contentions 6.1 So far as the factual challenge to the administrative order dated 16th August, 2018 is concerned, it rests on the following submissions placed by Mr Sunil Sethi, learned senior counsel before me:-

(i) that the suit asserting the right for prior purchase was filed in the year 2016 and that it was pending for over two years.

(ii) there is no dispute that the suit was being hotly contested by Mrs Jabeen in the court so much so that the respondent, Mrs Masooda Jabeen, has filed an application under Order 7 Rule 11 CPC for rejection of the plaint and also contested the prayer made in the interim injunction application.

(iii) it is further submitted that, though the applicant concedes that the Chief Justice has the power to permit filing of a case in a particular Wing, however, the prayer for filing the application in Srinagar in the instant case lacks bonafide and no factual details of the apprehensions justifying the filing at Srinagar have been set-out.

(iv) even in the application for permission to file the revision and appeal, it was Mrs Masooda Jabeen's case that she was going to reside in the house/ suit property at Jammu and also that her lawyers from Srinagar have come to argue her matter at Jammu.

There was therefore no justification at all for filing the matter in Srinagar.

(v) that the application for permission to file a revision and appeal before the Srinagar Bench was a case of forum shopping by the appellant, non-applicant herein.

(vi) no notice was issued to the applicants prior to the passing of the order dated 16th August, 2018, whereby permission to file in the Srinagar Wing was given to the respondent, Mrs Masooda Jabeen, on the administrative side. It is contended that the applicant was awaiting filing of the appeal in Jammu.

(vii) in this manner, Mrs Jabeen caused an interim order dated 14th September, 2018, to be passed by the learned Single Judge at the Srinagar Wing behind the back of the applicant, which has gravely prejudiced the applicant.

6.2. Mr Sunil Sethi, learned senior counsel, submits that the Circular no.6 of 2010 only permits 'filing' of a case at a Wing other than the Wing to which it pertains in 'exceptional cases' or 'if it is not practicable to file such matter' at the particular Wing. Mr Sethi has submitted at length that the proviso does not permit the hearing and decision of a case which was required to be filed at a particular Wing in the other Wing where it is filed. 6.3. The further submission of Mr Sethi is that even if it could be held that the facts placed by Mrs Jabeen were exceptional or if it could be held that it was not practicable to file the appeal in Jammu, even then the matter could only have been filed in Srinagar and that it had to be sent for hearing and decision at Jammu Wing.

6.4. Mr Sethi also contends that Rule 23 of the Jammu & Kashmir High Court Rules, 1999 relied upon by Mrs. Masooda Jabeen, only enables assignment of the roster of sittings by the Chief Justice regarding cases filed in a particular Wing. The contention of learned counsel is that it nowhere enables transfer of the case from one Wing to the other.

6.5. In support of the submissions on behalf of the applicants, Mr Sunil Sethi, learned senior counsel, has placed reliance on the pronouncement of the Division Bench of the Jammu & Kashmir High Court reported at 1994 KLJ 304: AIR 1995 J&K 7 : H. S. Rainal v. Union of India and others.

Respondents Contentions 7.1. On the other hand, Mr M. A. Qayoom, learned counsel for the non-applicant, Mrs Masooda Jabeen, has staunchly contested the above submissions. 7.2. It has been submitted that the applicant is a lawyer who is regularly appearing before the High Court at Srinagar. Mr Qayoom has explicitly contended that Mr Johal has 15 cases at the Srinagar Wing for which he regularly appears in the Srinagar Wing and that therefore the applicants have no difficulty in pursuing the case in Srinagar.

7.3. Mr. Qayoom has placed the following grounds on which the applicant prayed for permission to file the revision petition and miscellaneous appeal at Srinagar.

(i) that the Court of learned Additional District Judge, Jammu, had passed an ex parte order of status-quo which was wrongly confirmed to the prejudice of his client.

(ii) that the applicant is having no legal assistance available at Jammu as no lawyer is ready to accept her brief and contest the case at Jammu against the other side, a local lawyer.

(iii) that initially the applicant engaged a lawyer from Srinagar for contesting the matter at Jammu. However, due to the influential conduct of the opposite party, the lawyer so engaged became reluctant to go to Jammu for pursuing the case;

(iv) that the applicant is a lady and a victim of militancy, whose husband was murdered in Srinagar, finds it difficult to contest the case in Jammu;

(v) that Ms Jabeen sold her property in Srinagar to purchase the suit property in Jammu.

(vi) that she is being unfairly hindered in her efforts to make the Jammu property habitable;

(vii) Mr Qayoom has submitted Mrs Jabeen is a widowed senior citizen who has been involved in unwarranted litigation, is not in a position to file and contest the case at Jammu;

7.4. In support of his submissions, Mr Qayoom, has placed reliance on judicial precedents reported at (1998) 1 SCC 1 : State of Rajasthan v. Prakash Chand and others, AIR 2017 SC 5334 : Kamini Jaiswal v. Union of India & anr and 2006 (II) SLJ 439 : Ghulam Nabi Shaida v. Chandan Mitra & anr.

Rule Framework relied on by the parties 8.1 So far as the jurisdiction to permit filing of the appeal in a Wing other than that to which the matter relates, is concerned, both the parties have placed reliance on the Circular No. 06 of 2010 dated 18th December, 2010 issued by this Court which may usefully extracted and reads as follows:-

"Circular No.6 of 2010, dated 18-12-2010 High Court of Jammu and Kashmir at Jammu.

All Writ Petitions/ Public Interest Litigations/ Appeals/ Arbitration Applications/ Misc. Applications etc. related to Jammu Wing of the High Court shall be filed, heard and decided at Jammu Wing. Similarly, such matters related to Srinagar Wing shall be filed, heard and decided at Srinagar Wing.

Provided that in exceptional cases or if it is not practicable to file such a matter pertaining to a particular Wing at that Wing, it may be filed at the other Wing with the leave of Hon'ble Chief Justice or in his absence, [1] [the senior most available Hon'ble Judge of the Court].

This order shall take effect immediately and supersede all earlier orders in this regard."

(Emphasis by me) 8.2. For expediency, Rule 23 of the Jammu & Kashmir High Court Rules, 1999 also placed before me, is reproduced hereunder:

"23. Constitution of Benches.--(1) Judges shall sit alone or in such Benches as may be constituted from time to time by the Chief Justice and do such work as may be allotted to them by the Chief Justice or under his directions.

(2) Whenever a Judge is shifted from one wing to another wing of the Court, the cases assigned to him including part heard matters shall stand released and may be listed before any other available Judge(s)/ Bench(es)."

(Emphasis by me) Discussion 9.1. There is no dispute at all before me that the appeal in question ordinarily was required to be filed in Jammu Wing of the High Court. 9.1. So far as the jurisdiction to permit filing of such appeal in the Srinagar Wing is concerned, both the parties have placed reliance on Circular No.06 of 2010 dated 18th December, 2010 issued by this Court. 9.3. The issue which really arises for consideration before me is a construction of the powers conferred by Circular 6 of 2010. It also becomes necessary to consider difference between the conferment of powers under the Circular No.6 and the power conferred by Rule 23 of the J&K High Court Rules, 1999.

9.4. Light is shed on the issue under consideration by the judicial pronouncement reported at 1994 KLJ 304 : AIR 1995 J&K 7 : H. S. Rainal v. Union of India & Ors. This judgment was rendered prior to the framing and issuance of the Circular no.6 of 2010 and consequently may not strictly apply to the present case. However, the discussion and the principles laid down lend guidance to this adjudication and deserve to be considered in detail. 9.5 In H.S. Rainal v. Union of India & Ors., the appellant had filed SWP No.947 of 1991 in the Srinagar Wing of the High Court while he was posted in Jammu. The writ petition stood admitted to hearing by the learned Single Judge at Srinagar, when an application for transfer of the case was moved by the respondents at the Jammu Wing before the then Chief Justice. The transfer of the writ petition was, inter alia, sought on the ground that the militancy situation prevailing at Srinagar rendered it impossible for the respondents to contest the writ petition there. This application was opposed by the writ petitioner who contended that it was easy for him to contest the petition only at Srinagar. The application was couched under the then extant rule being Rule 8 of the Rules. By an order dated 11th February, 1994, passed on the administrative sides, this petition was transferred by the Chief Justice along with connected applications and contempt petition, to the Jammu Wing. This order was challenged by the appellant on the judicial side contending that there was no provision under the Constitution and rules of the Court for "transfer" of cases from Srinagar Wing to Jammu Wing and vice versa and, therefore, the order of the Chief Justice on the administrative side transferring the case from the Srinagar Wing to the Jammu Wing was bad in law. The challenge was repelled by the learned Single Judge. The appeal therefrom was placed before a Division Bench comprising of the then Chief Justice Syed Saghir Ahmad and M. L. Koul, J, who rejected the same, recording separate concurring opinions. 9.6 In the judgment delivered by Justice M. L. Koul, J, the learned Judge has referred to the source of the power under the then Rule 8 observing as under:

"10. It is thus clear that Rule 8 of the J. and K. High Court Rules 1975, and other connected rules, which have conferred power upon the Chief Justice for preparation of the Cause List and to allot the work to different benches, both at Srinagar and Jammu, owes its origin to Section 101 of the Constitution of Jammu and Kashmir and these rules are directly in consonance and within the authority contained in Section 101 of the Constitution of Jammu and Kashmir.

11. Both from Section 101 of the Constitution of Jammu and Kashmir, read with Rules 8 to 11 of the Jammu and Kashmir High Court Rules, 1975, it is established that the Chief Justice is the final authority to determine the number of the Judges, who shall sit from time to time at Srinagar and Jammu, for such period as may be deemed necessary and it is the Chief Justice alone, who can allot and provide judicial work to such Benches, to be done by them, either directly or under his directions."

(Emphasis by me) 9.7. So far as shifting a case from one Wing to another is concerned, in para 12, Koul, J observed as follows:

"12. In the case on hand the learned single Judge has been correct to hold that Section 8 of the Jammu and Kashmir High Court Rules confers ample powers upon the Chief Justice to constitute Benches and provide work to be done by them either under his written orders by way of the Cause List or even under his directions by the Registry. Rule 8 of the Jammu and Kashmir High Court Rules confers wide powers upon the Chief Justice even to transfer a case from one Wing to another Wing of the High Court, for it is the Chief Justice alone, who, in his wisdom, can see as to what work can be allotted to a particular Bench by him, for disposal of the cases."

(Emphasis supplied) 9.8 In the concurring judgment, the then Chief Justice ruled as follows:

"48. Under Chapter III as also under Chapter V and the Rules of the Court especially under Rule 8, the Chief Justice has the power to allot work to the Judges. The "allotment of work "includes work allotted to the Judges sitting at Srinagar and the Judges sitting at Jammu. Work available at Srinagar may be allotted to the Judges sitting at Jammu and vice-versa. It is true that the word "transfer" has not been used either in the Constitution or the Rules of the Court, the fact remains that the Chief Justice has been empowered to allot work to Judges and to specify the cases which would be heard by them. Thus, as pointed out earlier, "Allotment"

would also include shifting of cases from Srinagar and allotting it to Judges at Jammu.

49. Usually, transfer of a case envisages transfer from one Court to another. Since the High Court is one indivisible court with two places of sitting, there cannot be a "transfer of case" in the strict sense of the word. Nevertheless, Chief Justice can suo-motu or on the application of a litigant decide as to which case would be heard by which Judge and at what place of sitting.

(Emphasis by me) 9.9 So far as the reasons for the conferment of the power is concerned, it was observed thus:

"50. Since the Chief Justice has the administrative power apart from his powers on the Judicial side, and since he has to run a big institution which is an ever growing institution, he had to be conferred with wide powers as had been done under Constitution as also under the Rules of Court. Wide amplitude has to be conceded to the Chief Justice or else, it would hamper the proper running of the institution which, in its turn, would adversely effect the course of justice and the interest of litigants for whose benefit the Courts have been created."

(Emphasis supplied) 9.10 This judgment, therefore, unequivocally declares the legal position that apart from the powers on the judicial side, the Chief Justice has wide administrative powers as conferred under the Constitution and under the rules of the Court. It has also been specifically held that under Rule 8 of the Jammu & Kashmir High Court Rules, 1999, the Chief Justice has the power to allot work to the judges and that "allotment" would include shifting of a case from one Wing of the High Court and allotting it to a judge at the other Wing of the Court.

9.11 It is noteworthy that the present Rule 23 corresponds to the earlier Rule 8 of the J&K High Court Rules, 1975. Therefore by the reasoning as above, by virtue of Rule 23 of the J&K High Court Rules, 1999, the Chief Justice of the Court is adequately empowered to shift (or transfer) hearing of a case from one Wing of the High Court to the other.

9.12 Mr M.A. Qayoom, has placed reliance on the Constitution Bench judgment reported at (1998) 1 SCC 1 : State of Rajasthan v. Prakash Chand and others. This judgment was rendered on the construction of Rule 54 of the Rajasthan High Court Rules, which is similar to the provisions of Rule 23 of the Jammu & Kashmir High Court Rules. Mr Qayoom, has drawn my attention to the following paragraphs of the said judgment.

"9. By virtue of the powers conferred by the Rajasthan High Court Ordinance, 1949 read with article 115 of the Constitution of India, the High Court of Rajasthan, with the approval of the Governor of the State, framed Rules of the High Court of Judicature for Rajasthan, 1952. Chapter V of the Rules deals with the constitution of Benches. Rules 54 provides:

"54. Constitution of Benches.-Judges shall sit alone or in such Division Courts, as may be constituted from time to time and do such work, constituted from time to time and do such work, as may be allotted to them by order of the Chief Justice or in accordance with his direction."

10. A careful reading of the aforesaid provisions of the Ordinance and Rule 54 (supra) shows that the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be

constituted: which Judge is to sit alone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice.xxxxxxxxxxxxx... Though, on the judicial side the Chief Justice is only the 'first amongst the equals', on the administrative side in the matter of constitution of Benches and makes of roster, he alone is vested with the necessary powers. That the power to make roster exclusively vests in the Chief Justice and that a daily cause list is to be prepared under the directions of the Chief Justice as is borne out from Rule 73."

(Emphasis by me) 9.13 After a detailed discussion, the Supreme Court had summarized the principles in para-59, the relevant extract whereof reads as under:-

"59. From the preceding discussion the following broad CONCLUSIONS emerge. This, of course, is not to be treated as a summary of our judgment and the conclusion should be read with the text of the judgment:

(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals. (2)"

(Emphasis Supplied) There can be no dispute with regard to this well settled principle so far as power of the Chief Justice is concerned. However, the instant case is not concerned with assignment of rosters by the Chief Justice but with the working of Circular 6 of 2010 and powers under Rule 23 of the J&K High Court Rules, 1999.

9.14 Mr M. A. Qayoom, learned counsel for the non-applicant, has also placed reliance on the pronouncement of the Supreme Court reported at AIR 2017 SC 5334 : Kamini Jaiswal v. Union of India and another. In paragraph no.10 of the judgment, reliance was placed on the Constitution Bench pronouncement in the above case State of Rajasthan v. Prakash Chand & Ors, and the Supreme Court had observed as follows:-

"10.....Though the Hon'ble Chief Justice is the first among equals as far as the roster is concerned, the Hon'ble Chief Justice of India has the prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted....."

Given the above discussion, so far as the present consideration is concerned, this judgment, which was concerned with roster allocation, would have no application in the present case so far as construction of the jurisdiction under Circular 6 of 2010 or Rule 23 is concerned.

9.15 Lastly, my attention has been drawn by Mr M. A. Qayoom, learned counsel for the non-applicant, to the judgment reported at 2006 (II) SLJ 439 :

Ghulam Nabi Shaida v. Chandan Mitra & anr. This judgment was concerned with an application for transfer of a private complaint from the Jammu Wing to the Srinagar

Wing of this Court. Placing reliance on the enunciation of the law in H. S. Rainal, in para-4 of the order, the court had observed on the Cr.TA No.43/2005 as follows:

"4. The first issue would not detain us because it is no more *res integra*, The Chief Justice enjoys the requisite power to transfer a "case" from one Wing to the other Wing of the Court and vice-versa on the strength of power conferred on him by Rule 23 of Jammu & Kashmir High Court Rules, 1999 (new Rules) corresponding to old Rule 8 of the J&K High Court Rules, 1975. The legal position in this regard stands already settled by a Division Bench judgment of this Court in H.S. Rainal v. Union of India 1994 KLJ 304, holding broadly that the Chief Justice possesses the power to transfer cases from one Wing of the High Court to the other in terms of powers conferred on him under Rule 8 (old Rules) corresponding to new Rule 23 of the High Court Rules."

(Emphasis supplied) Thus, so far as, Rule 23 is concerned, it cannot be disputed that it also empowers and enables the Chief Justice to assign work amongst the judges and also to transfer cases from one Wing of the High Court to the other and is not concerned with fresh filing by a party in a Wing other than the Wing of the High Court which has the jurisdiction to entertain a particular case. 9.16 So far as the present case is concerned, it would appear that there are four aspects of the matter: the first relates to filing of a case and the competence of the Chief Justice to permit the filing of a case, which ought to be filed in a particular Wing, in the other Wing of the High Court. The second aspect relates to construction of the Circular 6 of 2010--that is as to whether the expression 'may be filed' as mentioned in the proviso thereof would include 'heard' and 'decided' as mentioned in the substantive part of the Circular? That is, to say, as to whether the permission to file the case in a Wing other than that to which the subject matter relates in accordance with proviso to Circular no.6 of 2010 encompasses jurisdiction to hear and decide by the Wing in which the filing has been permitted. The third aspect is that, if a case has been filed, or permitted to be filed, as in the present case, in one Wing of the High Court, would the Chief Justice have the power to transfer the case to the other Wing of the High Court? This aspect encompasses consideration of the scope of jurisdiction under Rule 23 of the Jammu and Kashmir High Court Rules 1999, which would be treated as the fourth aspect.

9.17 So far as the third and fourth questions with regard to the power of the Chief Justice to transfer a case from one Wing of the High Court to the other is concerned, given the judicial pronouncements which have been extracted above, especially in H.S. Rainal and the above discussion on the scope of Rule 23 of the Rules of 1999, there can be no dispute at all to the power of the Chief Justice to do so.

Therefore, the objection of Mr M. A. Qayoom, to the maintainability of the present application under consideration seeking transfer of the proceedings from the Srinagar Wing to the Jammu Wing has to be rejected. 9.18 I now come to the construction of Circular no.6 of 2010, i.e. the second issue.

9.19 Circular no.6 of 2010, as extracted above, prescribes that, inter-alia, appeals which relate to the Jammu Wing of the Court 'shall be filed, heard and decided at Jammu Wing'. A bare perusal of the

Circular would show that the main provision and the proviso stand crafted very carefully. Whereas the main provision clearly states that 'allappeals relate to the Jammu Wing of the High Court shall be filed, heard and decided at the Jammu Wing', so far as the proviso is concerned, it stipulates that only in 'exceptional cases' or 'if it is not practicable to file such a matter pertaining to a particular Wing at that Wing', it may be 'filed at the other Wing with the leave of the Hon'ble Chief Justice' 9.20 Filing or receipt of a filed pleading does not entail any application of mind. When a case is presented at the Registry of the Court, it does not entail any intervention by the Court or any judicial orders to be passed. It is only a matter of procedure.

9.21 A procedural or a mechanical act not involving the exercise of judgment/discretion is generally considered a ministerial act. This expression has been considered by a learned Single Judge of the Gujarat High Court in a judgment delivered on 1st of October, 2015 in Special Criminal Application (Direction) No.5665 of 2015, Devang Alias Devlo Sureshbhai vs. State of Gujarat and ors, wherein the learned Single Judge placed reliance on the definitions of "ministerial" in the Black's Law Dictionary and also quoted from the celebrated publication of Prof. De Smith in his book on "Judicial Review". The relevant extract of paras 28 and 29 of the pronouncement reads as follows:

"28. The expressions 'ministerial', 'ministerial office', 'ministerial act', and 'ministerial duty' have been defined by Black's Law Dictionary as under:

"Ministerial, Adj. (16c) of our relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill the court clerk's ministerial duties include recording judgments on the docket.

Ministerial office. An office that does not include authority to exercise judgment, only to carry out orders given by a superior office, or to perform duties or acts required by rules, statutes, or regulations. Ministerial act. An act performed without the independent exercise of discretion or judgment. If the act is mandatory, it is also termed a ministerial duty. Ministerial duty. A duty that requires neither the exercise of official discretion nor judgment."

29. Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet & Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasijudicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment."

(Emphasis furnished) 9.22 In para 38, the learned Single Judge placed reliance on the pronouncement of the Supreme Court pointing out the distinction between a judicial and a ministerial function as follows:

"38. Recently this Court in Jamal Uddin Ahmad v. Abu Saleh Najmuddin (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions

in the following words:

"14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization." "The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all State officials who are neither legislators nor judges." (See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p.13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is: If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially. (pp.

1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties.

There is a duty to act judicially. The Judge may HC-NIC Page 10 of 14 Created On Sun Oct 04 01:17:39 IST 2015 R/SCR.A/5665/2015 ORDER construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, *ibid.*, p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty."

(Emphasis supplied) 9.23 Clearly in the light of the above, now it is clear that filing of a case in a Registry does not entail any adjudication and has to be treated as a ministerial function. Therefore, it is inherent in above stipulation as contained in the Circular 6 of 2010 that the 'other wing' (i.e., the Wing other than that to which the case relates), would stand conferred with the power only to receive the case for filing and nothing beyond. 9.24 Significantly, the main part of the Circular unequivocally notes the three stages of a case, being its filing, hearing and decision making, that is, all the stages of adjudication. As against this clear stipulation, the proviso confers the limited discretion to only permit filing of a matter pertaining to a particular Wing at the other Wing. The proviso does not permit hearing and decision making by a Wing other than the Wing to which the matter relates. The power conferred upon the Chief Justice by the proviso is restricted to permitting a matter only to be 'filed' at the other Wing and nothing more. 9.25 It is further essential that an application seeking to file a case in a Wing other than Wing to which it relates has to make out an 'exceptional case' or a case that 'it was not practicable to file such matter of a particular wing at the

other wing'.

9.26 There is yet another reason as to why the submission on behalf of Ms. Jabeen that the expression 'filed' in the proviso would include 'heard and decided' as appear in the main part of the Circular, cannot be accepted. This necessitates an examination of the limited area within which exceptions to a main provision are to operate. This issue is not res-integra. 9.27 In the pronouncement of the Supreme Court reported at AIR 1991 SC 1538 Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal & Ors., the Supreme Court was considering the impact of a proviso added to Section 88 (1) (b) of the Bombay Tenancy & Agricultural Lands Act (67 of 1948) which was incorporated by an Amendment Act of 1965. The Supreme Court was called upon to consider the effect of the 2nd proviso on the main provision. On this aspect, the Supreme Court had ruled thus :

"6. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect."

(Emphasis by me) 9.28 This principle stands reiterated by the Supreme Court in the pronouncement reported at AIR 1991 SC 1406 A. N. Sehgal & Ors. v. Raje Ram Sheoram & Ors. In para 14, the Supreme Court held as under :

"14. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a cause which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms."

(Emphasis supplied) In para 15, the Court reiterated the delineation of the position set out in Para 6 of Tribhovandas Haribhai Tambol (supra). 9.29 In the present case, the main part of the Circular 6 is clear and unequivocal. There is no ambiguity with regard to the powers conferred. In view of the above discussion, it is evident that after receiving the case at the filing counter by virtue of Circular No.6 of 2010, the same would require to be placed before the Wing to which it relates for hearing and decision. 9.30 I had put a query to Mr M. A. Qayoom, learned counsel for the non- applicant, as to how could the inconvenience caused to the other party by filing of the case in the other i.e. the Wing other than that to which the case relates, be addressed.

9.31 I had also put a question to learned counsel that if the matter had to be heard and decided in the 'other wing', why the party against whom such order was passed is not heard before the order so permitting is passed?

The only response to these queries was that there was no such practice of hearing the other side before such request for filing before other Wing was being considered.

9.32 This response fortifies the view I have taken that the power conferred the power of the Chief Justice under the proviso in Circular 6 of 2010 is restricted only to permit filing of a case in a Wing of the High Court other than to which it relates, and nothing more.

9.33 So far as transfer of a case for hearing is concerned, the opposite party may have objections on grounds of inconvenience which may result to it by such shifting. It needs no elaboration that forum non conveniens is an important common law doctrine, which has to be borne in mind while transferring a case. Therefore, it is essential that a prayer of transfer of a case is considered after issuance of notice to the opposite party and hearing it on the request as well and an evaluation undertaken of the balance of convenience. 9.34 The wording of the proviso show that it provides for important factors of extreme emergency necessitating the filing, say, for instance, a bar of the statutory period of limitation which could be raised if the party was prevented from even filing a case in the other Wing while the party seeking permission under Circular No.6 was prevented by pressing difficulties and reasons from filing the case.

9.35 I was informed that it has been a practice not to issue notice to the opposite side so far as memos seeking permission under Circular 6 of 2010 are concerned. This was the reason that order dated 16th August, 2018 was passed on the administrative side permitting Ms. Masooda Jabeen to file an appeal in Srinagar Wing.

9.36 For this reason as well, the use of the expression 'filing' in the proviso cannot be extended to include 'heard' and 'decide' as have been mentioned in the main part of the circular.

9.37 The position which, therefore, emerges is that so far as Circular no.6 of 2010 is concerned, it mandates a writ, appeal, etc., can be filed only in the Wing to which the matter relates. The only exception permitted to this mandate by the proviso is that in case of exceptional hardship, or impracticability to file the case in a particular Wing, a party is permitted to submit a request which has to be placed before the Chief Justice who may permit only 'filing' of the case in the Wing other

than to which the case relates.

Permission to file vis-à-vis 'transfer' of a case 10.1 The question which remains to be answered is what will happen to the case after it has been permitted to be filed in the other Wing? 10.2 Here the distinction between permission to file a case in another Wing and an order transferring case for hearing and decision from one Wing of the High Court to the other Wing assumes importance, and has to be borne in mind. 10.3 So far as filing of a petition is concerned, it entails only the ministerial act of presenting a paper book (which could be paper book of writ petition, appeal etc.,) before the Registry of the Court which would scrutinize the same and, if in order, cause its registration and assignment of formal registration number as on the date of its filing. Hearing of a case takes place when the case is shown in the cause list before a Bench to whom the subject matter stands assigned as per the roster framed by the Chief Justice of the Court.

It would, therefore, appear that, upon exercise of discretion under the proviso of Circular 6 of 2010, after the case has been permitted to be so filed and received in the 'other' Wing of the High Court, it would have to be sent to the Wing to which the matter relates.

10.4 It is to be borne in mind that the exceptional circumstances, or, the impracticability, for which reason the permission under Circular 6 for filing was sought, may remain the same even after the filing of the case. Then what is the option available to the party? Given the fact that the Rule 23 of the Jammu & Kashmir High Court Rules, 1999 empowers the Chief Justice to transfer of cases from one Wing to the other, it would be open for the party concerned to seek transfer of the case from one Wing of the High Court to the other Wing. This would be the only permissible procedure.

10.5 On this application, principles of natural justice have to be complied with as the other party could also have a similar difficulty if the case was transferred and objections to be transfer. Notice of this application has to be given to the other side and an opportunity to place its opposition and the reasons why the application for transfer ought not to be entertained and of hearing before any order is passed.

10.6 The application for permission for filing under the proviso to Circular 6 of 2010 is at a stage before the matter has been registered as a case in the Registry. The request for transfer of the case to the other Wing under Rule 23 would be made after the case has been registered and is considered after notice to the other side and hearing it.

10.7 This is the procedure which ought to have been followed in the present case. However, after the matter was registered it was placed before the learned Single Judge, who has recorded the order dated 14th September, 2018. 10.8 I may note that there is, in law, no prohibition to a composite application being presented by a party making the prayer under the proviso of Circular No.6 for permission for filing and also incorporating a separate prayer for transfer of the case under rule 23 to the Bench where it was permitted to be filed. The Chief Justice could consider the prayer under the proviso of Circular 6 for filing the case ex parte and permit the same. However, on the prayer for transfer under Rule 23 in the application, it would be appropriate to issue notice and hear the other side before passing the formal order.

10.9 It needs to be remembered that an applicant under the proviso to Circular 6 may be seeking urgent ex-parte relief which may be rendered infructuous by delay or otherwise. Therefore, urgent hearing may be imperative. This difficulty can be obviated by the Registrar Judicial of the Wing where the case is received, digitally conveying the records of the case to the Wing to which the matter relates. So far as hearing of the case is concerned, on request of the party, the hearing by the concerned Court as per Roster, could take place on video conference. In such eventuality, the Registrars of the two Wings shall proactively engage to ensure expeditious hearing to the party seeking the same.

Present case 11.1 So far as the present case is concerned, after its registration, no application for transfer of the case has been filed by Ms. Masooda Jabeen and the other appellants seeking its hearing and decision at Srinagar. This may be probably because of the practice which obtains in this Court that, upon permission being granted by the Chief Justice in exercise of the power under the proviso to Circular 6, the cases are not only filed and registered but also heard and decided by the Wing other than that to which the case pertains. 11.2 Circular No.6 of 2010 was issued as back on the 18th December, 2010. One very important factor and development has intervened since the issuance of this Circular.

11.3 A very robust e-programme was put in place by the Court and very effective video-conferencing facilities stand made fully functional in both the Wings, that is, Jammu Wing and Srinagar Wing of this court. This has enabled even Full Court deliberations and meetings of the Court Committee on Video link without necessitating movement of the concerned Judges. On 22nd February, 2018, the first case was head on video conferencing between the two Wings. 11.4 So far as the record of cases is concerned, all necessary records stand digitized. So even if a case is filed in one Wing, it can be heard at the other Wing without physical movement of its records. The same can be accessed by the electronic mode in the other Wing as well.

11.5 In a short span of less than a year, there are several instances of cases/applications filed in one Wing, being routinely heard by it a Bench of the other Wing. There are also instances when lawyers in two different Wings, are heard by a Bench in one Wing without any difficulty. Therefore, the difficulties expressed by litigants because of unavoidable compulsions in pursuing litigation in a particular Wing because of the jurisdictional requirements, under law, are obviated on account of the fact that both the Wings of the High Court are able to facilitate hearing of party located in Srinagar in the Jammu Wing or vice versa. 11.6 Even on the present application, counsels for the applicant, Mr. Sunil Sethi, Senior Advocate and Mr. L K Sharma, Senior Advocate have been heard from Jammu on video-link while the non applicant, Ms. Masooda Jabeen and her counsel Mr. M A Qayoom, Advocate, have been heard in person by me sitting in Srinagar Wing.

11.7 Another important fact which has intervened in the present case is the circumstance that after the filing of the appeal in the Srinagar Wing, as per the practice which was being followed by the Court, the same has been heard in this Wing and interim orders have been passed.

11.8 I have no reason to disbelieve the applicant that she was unable to persuade her counsel from Srinagar to go to Jammu to argue her appeal any more or that the party on the other side being legal

counsel is able to wield substantial influence. At the same time, it would be unfair to close my eyes to the hard reality that Ms. Jabeen has been vigorously contesting the suit in the Jammu Wing without any difficulty or problem. However, in view of the subsequent and important development since 2010 when Circular 6 was implemented being that of digitization of the Court record, the installation and availability of video conferencing facilities in both the Wings of the Court, as well as for the view I am taking in this application, I am refraining from expressing any opinion on the merits of these factual assertions by either side.

Conclusions 12.1 On the request of a party of it being an exceptional case or that it is not practicable to file such a matter pertaining to a particular Wing at that Wing, the proviso to the Circular No.6 of 2010 dated 18 th December, 2010 enables the Chief Justice to permit its filing in the other Wing of the Court. This application would be considered ex parte.

12.2 After the case has been permitted to be filed, and therefore received in the other Wing, it would have to be sent to the Wing to which the matter relates. **12.3** In case the applicant under the proviso to Circular 6, is seeking urgent ex parte ad-interim orders, he may submit a request to the Registrar Judicial to make arrangements for an urgent hearing of his case in the Wing to which the matter relates on video conferencing. Upon receipt of such a request, the Registrar Judicial shall make appropriate arrangements with his counterpart in the Wing to which the matter relates, and both of them shall ensure the urgent hearing by the Bench as per Roster of the Wing to which the matter relates, by video conferencing.

12.4 By virtue of Rule 23 of the J&K High Court Rules, 1999, the Chief Justice is adequately empowered to transfer a case for hearing from one Wing of the High Court to the other i.e., transfer a case filed in the Jammu Wing, to the Srinagar Wing or vice versa.

12.5 It would, therefore, be open for the party who had sought the permission under the proviso in Circular 6, to seek its transfer for hearing and decision as well to the other Wing under Rule 23 of the Jammu & Kashmir High Court Rules, 1999.

12.6 On this application, notice has to be given to the other side as well as an opportunity of hearing before passing an order thereon. **12.7** It is open to the party to seek hearing of the case utilizing the facility of video conferencing.

12.8 The application for permission for filing under the proviso to Circular 6 of 2010 is at a stage before the matter has been registered as a case in the Registry. The request for transfer of the case to the other Wing under Rule 23 would be made after the case has been registered and considered after notice and hearing the other side.

12.9 It is open to a party to make a composite application making the prayer under the proviso of Circular No.6 for permission for filing and also incorporating a separate prayer for transfer of the case under rule 23 to the Bench where it was permitted to be filed. The prayers would be considered in the two stages in the above manner.

Result.

13.1 Keeping in view the above facts and circumstances, in the present case, in order to balance equities and for reasons of expediency, I refrain from directing that the records of the appeal be sent to the Jammu Wing for further hearing and decision of the appeal. Instead, given the fact that the matter has been considered for interim orders in Srinagar Wing, in exercise of the jurisdiction under Rule 23 of the J&K High Court Rules, 1999, it is directed by the present order that the appeal shall be treated as having been transferred to the Srinagar Wing. Given the urgency expressed by both sides, let hearings be expeditiously completed utilizing the facility of video conferencing and enabling hearing of counsels for the parties who may be located in either Wing.

13.2 The Registry shall henceforth proceed in all matters, wherein requests are received under Circular 6 and for expeditious hearing on video conferencing, in the manner afore detailed in the conclusions.

13.3 The Registry is also directed to place the matter on the Administrative Side for a fresh examination of the Circular 6 dated 18th December, 2010 in the light of the subsequent development of the video conferencing facility in the Court.

(GITA MITTAL) CHIEF JUSTICE Srinagar 29.11.2018 Abdul Qayoom, PS.