On Judgment Writing – II

By Justice M. Jagannadha Rao

In this second article by me, I propose to cover certain aspects not covered in my first article, which was written in 1996 and published by the U.P. Judicial Training and Research Institute, Lucknow (pp.1-4), when I was Chief Justice, Delhi High Court (1994-1997).

I shall first refer to the question of absence of reasons. An occasion arose to consider such a case when I was in the Supreme Court and we said something on judgment-writing. We were dealing with an order in a writ petition disposed of by the High Court with the cryptic words 'dismissed'. That was in Hindustan Times Ltd. v. Union of India 1998 (2) SCC 242. We observed as follows:

> "In an article on Writing Judgments, Justice Michael Kirby (1990) 64 Austr L.J. p. 691) of Australia, has approached the problem from the point of view of the litigant, the legal profession, the subordinate Courts/tribunals, the brother Judges and the Judge's own conscience. To the litigant, the duty of the Judge is to uphold his own integrity and let the losing party know why he lost the case. The legal profession is entitled to have it demonstrated that the Judge had the correct principles in mind, had properly applied them and is entitled to examine the body of the judgment for the learning and precedent that they provide and for the reassurance of the quality of the judiciary which is still the centre-piece of our

administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy Judge, the Judge prone to errors of fact, etc. The reputational considerations are important for the exercise of appellate rights, for the Judge's own-self discipline, for attempts at improvement and the maintenance of the integrity and quality of our judiciary. From the point of view of other Judges, the benefit that accrues to the lower hierarchy of Judges and tribunals is of utmost importance. Justice Asprey of Australia has even said in Petit v. Dankley (1971)(1) NSWLR 376 (CA) that the failure of a Court to give reasons is an encroachment upon the right of appeal given to a litigant."

We finally stated:

"In our view, the satisfaction which a reasoned judgment gives to the losing party or his lawyer is the test of a good judgment. Disposal of cases is no doubt important but quality of the judgment is equally, if not more, important. There is no point in shifting the burden to the higher Court either to support the judgment by reasons or to consider the evidence or law for the first time to see if the judgment needs a reversal."

In that case, the order of dismissal of the writ petition by the High Court was affirmed by us but the task fell on the Supreme Court, to inform the appellant why it had lost the case in the High Court.

While the problem of absence of reasons in a judgment is a common one, there are a good number of judgments which are too lengthy and prolix disproportionate to the issues involved. The habit of writing long judgments is found abroad too and is not peculiar to India. Prof. Enid Campbell of Monash University, Australia, has dealt with this aspect in his 'Reasons for Judgment: some consumer perspective' (2003) 77 Austr L.J. 62. He quotes the observations of Doyle J. on "Judgment Writing: Are there Needs for change?" (1993) 73 Aust. L.J. 738, to say that

> "The increasing length of Judgments, it has been suggested, stems in part from excessive citation of previous cases and other writing, from prolixity in argument, from presentation of several separate opinion in cases in which a single opinion would, or might have been, sufficient, and even from excessive reporting of Judgments."

Doyle J. suggests greater self-discipline on the part of Judges of a Bench consisting of two or more members when exercising their freedom to deliver separate reasons for judgment,…"

He also says that the vast number of law journals that have proliferated are also a cause and refers to an anomaly:

> "We even have reports of unreported judgments, a curious oxymoron."

Doyle J. conducted a survey of law reports to find the average length of judgments each year, over a 60 year period and finds that in the Commonwealth Law Reports, while in 1935, the average length was 18 pages, it had reached 73 pages in 1950. He quotes Ms. Eva Sallis who said about lengthy judgments as follows:

> "Judges do not have to worry about sustaining the interest of the readership. They have a captive readership, both within the profession and amongst the litigants before them. Many judgments are repetitions, laboured and long……"

There are different types among the lengthy judgments. Some extract the pleadings extensively and then refer to the arguments of counsel on both sides in extenso almost till the end of the judgment and the ultimate conclusion follows soon thereafter without adequate reasons. Paragraph after paragraph would start with the words: "It is contended by…." and one would neither get the facts nor the reasoning anywhere.

Yet another form of a lengthy judgment is the 'tonsorial and agglutinative' as described by Justice Cardozo (Law and Literature (1925) p.10 of 1986 reprint). It is 'shears and paste-pot which are its implements and emblem'; it consists of long extracts from judgments, one after the other, in unending succession. Every paragraph starts: "In Avs B, it was held" and the mechanical long extract starts. There is no emphasis on a particular aspect nor to the distinctive facts of the cases

cited. The cases are not even grouped in relation to identity or close proximity of facts or reasons. After long pages of quotations, towards the end, the result suddenly appears. There is no connecting link between the extracts and the result. In fact, the cited quotations may not all be uniform and the Judge does not say which precedent he follows or which precedent he distinguishes. The judgment is naturally reported because of the quotations it contains but it has no precedential value.

Justice Sir Frank Kitto in his article "Why Write Judgments" (1992) vol. 66 Aust. L.J. 787 states that the reasons for writing reasoned judgments are many. First, to explain to the parties how and why the result was reached. It is particularly important that the losing party should understand why that party lost. Secondly, the judgment should expose the Judge's reasoning, on matters of fact and law, so that if there is an appeal, the appellate Court can examine the soundness of the judgment. A third purpose that he identifies is an aspect of the process of justice. It is to expose a defect in the law or in its administration. A fourth purpose, which is closely related, is to expose any error or deficiency in the area of public administration. A fifth purpose is to expose individual wrongdoing, when that is strictly necessary to decide the issues in the case. A sixth purpose is to expose the administration of justice to the public gaze, an essential attribute of our system of justice.

Sir Harry Gibbs in the article already referred to (1993 vol. 67 Aust LJ 494), says that in the Common Law tradition, the requirement of reasons was always assumed to be part of the judicial decision-making

process. In the US, judgments are described as ‘opinions’ and this is so even in the House of Lords, since the Law Lords have ceased to make ‘speeches’ orally. He says that the Court must give reasons because ‘justice’ must be done in public and must be also be ‘seen’ to have been done. A judgment, according to Gibbs, may have a particular audience in mind, as when the Court is endeavouring to set right the misconceptions of the lower Court or tribunal, or is pointing to the Legislature to correct injustice or error in a statute. What is however clear is that the judgment should not be written with a view to obtaining publicity in the media.

I next come to the mode of actual preparation of a judgment. There are some Judges like Judge Learned Hand of the US who used to write judgments by his hand, while “thinking through his fingers”. Lord MacMillan too advocated preparation of a handwritten draft. He explained (the Writing of Judgments, see 1948, vol. 26 Com Bar Rev. 491) (see article printed in Art of Law edited by Dr B. Malik, University Book Agency, Allahabad) that the drawback to a procedure of first dictating and then revising the transcript is that it has a tendency to ‘diffuseness’. He said:

> “to write a judgment in one’s own hand prompts conciseness by the automatic operation of economy of labour”

On the same question, Chief Justice Gibbs also quotes Justice Sir Frank Kitto who advocated preparation of a draft by hand and then a dictation. Sir Gibbs method was also the same, he says:

> "For what it is worth, my own method was to rough out a draft by hand, using abbreviations wherever possible and referring to marked passages in transcripts or judgments rather than writing them out and then dictating that draft. I would treat the product as a further draft which I would revise and sometimes rewrite on a number of occasions."

He quoted Justice Brandis of the US Supreme Court who said that 'rewriting' was necessary. He said:

> "There is no such thing as good writing. There is only good re-writing."

I shall now refer to yet another common problem with judgments or orders dictated orally in Court. The question is about the extent to which, when the draft of the dictated version comes back to the Judge, he could make corrections or modifications or additions. Sir Harry Gibbs said:

> "There is often need to revise reasons which were given ex tempore to make them express what the Judge had meant to say and although this is permissible, litigants do not always understand why

> the judgment that they read differs, perhaps widely, from that which the Judge pronounced in Court. The Judicial Commission of New South Wales in its recent report, has pointed out that a number of complaints made to it resulted from the fact that the published version of a judgment differed from what the litigant had heard in the Court (Report of Judicial Commission of NSW 1991-92, p.26)"

This is a ticklish question but is one which occurs day in and day out in the Courts. I would, therefore, think it necessary to express my views. When the dictated material is typed and it comes back, the Judge, in my opinion, has the freedom to break longer sentences into separate short sentences, or use the active voice rather than the passive for the purpose of greater clarity or he may, if the judgment imposes conditions, put them in numerical order, or he may add an extra reason or a citation of the Supreme Court or of a High Court at the end of a sentence in support of his reasons. Modifications of the dictated draft which are made to remove vagueness and provide greater clarity are welcome because they are innocuous and they obviate the need for parties to file applications for clarification. However, I may add a word of caution that the Judge must ensure that he does not modify the result announced in open Court nor the fundamental basis upon which the case was decided.

I shall next turn to a new and much appreciated development in judgment-writing. The use of headings in judgments of the High Court and Supreme Court, is a welcome trend. This method was widely used

by Lord Denning and then by the House of Lords and is now followed in most countries. Sir Harry Gibbs says:

> "…the recent practice of the House of Lords as well as Australian Courts of using headings to indicate the contents of various parts of a judgment has proved very useful, particularly when a judgment is lengthy or deals with a number of different issues."

On this aspect, Michael Kirby (1990) Vol. 64 Austr. L.J. 691) says:

> "A second change that is occurring in Australian judgments is the introduction of headings in reasons both at first instance and on appeal…. I do so from the outset, following the conventions brought with me from the Law Reform Commission….
> Sub-headings provide an especially useful means of taking the reader efficiently to that section of the judgment which he or she wishes to read…. Presentation to the reader of unbroken passages of judicial prose,…. and uninterrupted by headings which provide the guideposts for the journey, displays, in my opinion, a want of real concern about the processes of communication…. Disclosure of headings reveals, even to the most cursory reader, the plan followed by the judicial writer."

Next, I have to say something about 'delays' in delivery of judgments. For the subordinate Courts, the procedure Codes prescribe time limits. For the High Courts and Supreme Court, consistent with the

dignity and self-discipline expected of the Judges, there is no time limit prescribed. In the subordinate Courts it is sometimes the practice to relist the case formally if the Judge wants a further extension of time and normally, it is recorded that some clarification is sought from Counsel. This is not very much off the mark. But the problem is serious in the superior Courts where there are no rules or conventions. Counsel do not want to embarrass a Judge by mentioning in Court about the long delay. By convention, Judges also do not normally attempt to remind their brother Judges in the case about the delay, except when, after a long delay, they feel a reminder is called for. I agree that there can sometimes be good reasons for delays but the delay must be reasonable, not months or years. It is pointed out by Prof. Enid Campbell in the article already referred to:

> "When a Court has reserved its judgment, the parties cannot expect judgment to be delivered within a few days. They can, however, expect judgment to be delivered in reasonable time. What is reasonable time will, of course, depend on a variety of factors: whether the case has come before a single Judge or before a Bench of two or more Judges; whether the case has been heard at first instance or on appeal: and the complexity of the issues to be decided.
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> If a case has been heard by a Bench of several Judges, the time taken for judgment to be delivered may be unnecessarily prolonged if each of the Judges insists on writing a separate opinion. It may even be prolonged if each of the Judges insists on writing a separate

opinion. It may even be prolonged if one of the Judges insists on writing a separate opinion (whether it be as one of a majority or as a dissenting opinion) and that Judge is tardy in the completion of his or her opinion. It is, of course, possible for a Court to pronounce judgment with provision of written reasons at a later date."

I agree that there may be good reasons for some reasonable delays. I may add that sometimes it happens with a Judge known for pronouncing judgments in reasonable time, in an important case, that he wants to do some research and write a good judgment and he keeps it back for a while. But then, he finds that other judgments reserved thereafter have to be completed and in that process the earlier judgment remains unattended on his table for quite long. The temptation to write a good judgment is understandable but it must be matched by extra hours of work to see that the desire is fulfilled without much delay.

There are, however, several unpardonable delays. I know there are a few Judges who do not remember what cases they have reserved for judgment and when. The lawyers are afraid of reminding them and so are their own staff. The file lingers for months or sometimes years, unattended. Self-discipline requires that a Judge must check up his arrears constantly. The best thing is, that the files in cases of undelivered judgments be kept on the Judge's table rather than in his secretary's room, so that the very sight of the file can be a constant reminder everyday. Even where the judgment is allocated to a brother Judge in the Bench, one

must try to keep a track of his delays and it is advisable that those files are also kept within a visible distance in the Judge's room so that they will remind him about the delays of his colleague. I am mentioning these matters because superior Courts, which have to be examples for lower Courts and which frequently criticise lower Courts for delays in pronouncing judgments, should not give any scope for criticism. If there are delays by Judges in the superior Courts, they lose the moral authority to discipline the Judges in the lower Courts.

There is yet another type of an embarrassing situation. When a Judge in a panel or two or three Judges, to whom the judgment is allocated, prepares his draft and circulates it to the brother Judges who have heard the case, he gets no reply for weeks as to whether the recipient has agreed or whether he wants to discuss for a modification or if he wants to write a dissent. Courtesy requires a response within a reasonable time. I know of a case where the senior Judge who prepared and circulated the judgment got exasperated after a few months and had to personally go to the house of the brother Judge, sit with his secretary, search for the judgment, locate it and have it approved.

Hon'ble Justice Bryan Beaumont, in his article, 'Contemporary Judgment Writing: The problem restated' (1999) (vol. 73) Austr LJ 743, quotes the English Court of Appeal in Goose v. Wilson Sandford (CA) (Times Law Rep, 19th Feb., 1998):

"Compelling parties to await judgment for an indefinitely extended period prolonged, probably increased the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process.

Left unchecked, it would be ultimately subversive of the rule of law."

A similar view was expressed by our Supreme Court in Bhagwandas Fatehchand Daswani v. H.P.A. International: 2002 (2) SCC 13. Long delays, it was said, would give rise to speculations in the minds of the party. The Supreme Court had occasion to deprecate delay in delivery of judgments in R.C. Sharma v. Union of India: 1976(3) SCC 574. In a long discussion on the subject in Anil Rai v. State of Bihar, AIR 2001 SC 3173, the Supreme Court, after referring to the Report of the Arrears Committee (1989-90, Ch.VIII) laid down five guidelines and said that the Chief Justices could remind a Judge after two months and that parties could file an application after three months. If six months have passed, parties could request the Chief Justice to withdraw the case and list it before another Judge or Judges. But lawyers and litigants would feel that they would be rubbing the Judge on the wrong side if they file an application.

The point about delays is that the Judges lose the grip of the facts and submissions and, therefore, the reasons are unsatisfactory or sometimes it happens that the judgment under appeal is simply confirmed

with a brief order while the trend at the time of the arguments gave a legitimate expectation of a different result.

In an article on 'Judgment Writing' by Justice Roslyn Atkinson of the Supreme Court of Queensland (available on internet), the author advises: (i) avoid use of cliches; (ii) be precise and to the point; (iii) use the active voice rather than the passive; (iv) be particular rather than vague; (v) try not to use language that excludes; (vi) use simple and direct prose rather than abstruse wording; (vii) try to be interesting; (viii) avoid obvious errors. The following is a list of common errors:

(1) Subjects and verb always have to agree.
(2) Make each pronoun agree with their antecedent.
(3) Just between you and I, case is important too.
(4) Being bad grammar, the writer will not use dangling participles.
(5) Join clauses good, like a conjunction should.
(6) Don't write run-on sentences, they are hard to read, you should punctuate.
(7) Don't use double negatives. Not never.
(8) Mixed metaphors are a pain in the neck and ought to be thrown out the window.
(9) A truly good writer is always especially careful of practically eliminating the too frequent use of many adverbs.
(10) Avoid too many unnecessary redundant words that are actually not needed to convey the idea.
(11) Do not split infinitives.

(12) Use apostrophe’s correctly.

(13) Do not use a foreign term when there is an adequate English word.

There is still a lot to say on ‘Judgment Writing’ and those who want to know more can read the full text of the articles referred to by me in this presentation, for more guidance.