Escalation of prices- Impact on agreement to sell and damages

Vibha Yadav*

It is well settled that the relief of specific performance is an equitable remedy. It is a discretionary function that is exercised by the courts. Section 20 of the Specific Relief Act, 1963, provides that the power of the courts to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.

In ***Satya Jain vs. Anis Ahmed (2013) 8 SCC 131***, the Hon'ble Apex Court observed that the discretion to direct specific performance of an agreement to sell and that too after elapse of a long period of time has to be exercised judiciously. The parameters of the exercise of discretion will depend on the facts and circumstances of the case. The ultimate guiding factor will be the principles of fairness and reasonableness. The efflux of time and escalation of price of property cannot, by itself, be a valid ground to deny the relief of specific performance.

Similarly, in ***Nirmala Anand vs. Advent Corporation Limited (2002) 8 SCC 146***, it was held that the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase in prices during the litigation. It may be one of the reasons to deny the decree of specific performance. However, while balancing the equities, one of the considerations to be kept in view is, as to who is the defaulting party. It is also to be seen whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which the parties may not have their control. The totality of the circumstances is required to be seen.

Further in ***K. Prakash vs. B. R. Sampath Kumar (2015) 1 SCC 597***, Hon'ble Supreme Court observed that subsequent rise in prices shall not be treated as hardship entailing total refusal of the decree of specific performance as rise in prices is a normal change of circumstance.

The equitable discretion of the court to grant or not to grant the

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relief of specific performance depends on the conduct of the parties. It requires the plaintiff's readiness and willingness to perform his part of the contract also, if the defendant does not come to court with clean hands and suppresses a material fact/ facts and evidence and misled the court, then such discretion should not be exercised by refusing to grant specific performance. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the facts and circumstances of the case, the court while granting the decree of -specific performance can impose such conditions which may compensate the defendant/owner of the property.

Inflation as an assessment factor in awarding damages for breach of contract-

It is through money's role as a measure of value with regard to compensation or damages that inflation poses a problem for the court. Inflation becomes an issue for the court in three situations:-

1. Pre-performance inflation
2. Pre-assessment inflation
3. Inflation affecting future losses

In the first instance, inflation prior to the performance of the contract may make such performance unprofitable for one party to the contract. In this instance, the party whose performance has become more burdensome due to inflation asks the court to rescind or alter the contract on the ground of changed circumstances and conditions.

In the second situation, when inflation occurs between the time of the breach of a contract and the date of judgment awarding damages, then it alters the measurement of damages. The court is asked to determine whether the plaintiff or defendant should bear the risk of price change.

In the third situation, when inflation affects the future losses, the court is asked to decide how the losses should be ensured and compensated.

Inflation may be taken into account while awarding damages for breach of contract in cases where pre-assessment inflation or inflation affecting future losses occurs but not in cases where pre-performance inflation occurs.

While assessing the damages for breach of contract, the court may adopt the following approaches:

(a) Establishing a measurement value

Courts may consider the factors which are within the contemplation of the parties while entering into contract. Causation of loss, remoteness of damage and the plaintiff's duty to mitigate damage may also be some of the pointers.

(b) Establishing an assessment value

The courts may determine what the defendant is to pay. Considerations can be interests, litigation charges, compensatory costs etc. It is here that the escalation in prices may be considered, a total denial of which may frustrate the aim of adequate compensation.

The general philosophy underlying law of contract/ mercantile law is not to protect the contracting parties from their own unwise decisions but to leave them with the result of their bargains. With future inflations virtually certain, a party who fails to provide for its effect cannot credibly claim that inflation was so unanticipated that he should be relieved of his duty to perform the contract. There has to be a presumption that the parties have anticipated sudden change in prices in their contract.

The courts may consider inflation when inflation occurs between the breach of contract and the assessment in computing damages for breach of contract, a total ignorance towards the escalation of prices subverts the compensatory ideals on which such damages are based.

Where the inflation is persistent for many years, the parties should reasonably be deemed to have contemplated the effects of inflation. In this regard, very recently, the Hon'ble Supreme Court in ***Zarina Siddiqui vs. A. Ramalingam*** (2015) 1 SCC 705, observed that though efflux of time and escalation of prices of the property by itself is not a valid ground to deny the relief of specific performance, however, the court in its discretion may impose reasonable conditions including payment of additional amount to the vendor.

Thus, to conclude, in order to compensate a plaintiff in a case where the judgment is rendered in his favor long after the breach occurs or when the damages are awarded for future losses, the inflation factor may be applied to compensate the plaintiff for the decreased purchasing power under the disputed contract.

Balancing Constitutional Pillars

Shama Nargis*

Our Constitution provides for separation of the three organs of governance as each of them have been entrusted with separate responsibilities and are masters in their own spheres. The role for which they have been purposefully created is limited till the point when it actually interferes or overlaps with other's jurisdiction.

The three pillars of the Constitution are:-

1. The Legislature
2. The Executive
3. The Judiciary

Now the question arises:

A. What is the limit of functionality of each?

B. Who will establish the extent of what has been exceeded and by how much?

C. Who will take the corrective action?

It may be understood that the architects of the Constitution and subsequent judicial pronouncements have made the separation of the three organs viz. Legislature, Executive & Judiciary not on the basis of their non-functionality; instead they have carved out this distinction assuming that each and every organ shall play its distinctive role in full, limited to their sphere of jurisdiction.

The separation of powers is a balancing act and tries to establish equilibrium by reinforcement. The social structure is dynamic and so are the people involved in it. The changing needs, dimensions & character of the social components are demanding more of responsibility and accountability from each organ of the constitution.

The legislature has been entrusted to make laws. The executive will implement the laws. The judiciary will interpret the laws. This means that any action which is not in consonance with the constitution of India, is liable to be declared unfit, through judicial pronouncements. Further, this also means that the unlawful act of either Legislature or Executive is open for

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judicial scrutiny. The legislature is again not entrusted with making laws of any kind and form which suits to the political sentiments only. The judiciary tends to rectify any such amalgamation which is not as per the desired laws and object.

Is the role of judiciary limited to the interpretation of laws? Who will rectify the errors created by the executive or the legislature? Who would see that peoples' rights are not affected due to non performance of the executive or the legislature?

Past precedence has carved out the extension of work of the judiciary, which is mainly concerned with the constitutional security and also the people's right.

Although, there is an effective mechanism present in the executive for redressal of complaints of the individuals at different levels of the hierarchy, still the unsatisfied complainant goes to the judiciary for redressal of his complaint, which then provides a sort of satisfaction to him. Similarly, when there is need to address the peoples' problem at large, the legislator gets directions from the judiciary to enact a law concerning to the redressal of the problems.

The main reason for such an extended form of judicial work is non-performance either by the Executive or the Legislature. Similarly, the lack of accountability is also the important reason for Judiciary coming for such pronouncements.

To exemplify, it is pertinent to mention a few judicial pronouncements:-

A. The case of ***Vishaka vs State of Rajasthan AIR 1997 SC 3011*** was an appreciable step to provide a formal protection against sexual harassment at work place, was the outcome of a judicial action deserting the vacuum created by the legislature. Guidelines were provided by the court to prevent the sexual harassment at work place, till the legislation in this regards is enacted. Consequent upon this, the Prevention of Sexual Harassment at Work Places Act, 2013 was enacted.

B. Creation of Disaster Mitigation Fund by the center, is again an action taken by the Apex Court to materialise the functioning of the legislature for prompt action for the sufferers of the drought, wherein a short deadline was provided to establish the same.

It would seem that the judicial actions are being criticised at various levels, wherein the judicial actions have been blamed as the actions taken by the judiciary exceeding its limit of jurisdiction. But once we talk about the accountability and non-performance of the executive or the legislature, the judiciary has to come into play so as to protect and sustain the rights of the individuals, after all the balancing has to be maintained and accountability has to be established.

The recent uproar created in the Karnataka Assembly, against the decision of the Hon'ble Supreme Court, is again an example where the Legislature has crossed its boundary and have acted in excess. A brief is given below:-

Hon'ble Supreme Court ordered the State of Karnataka to release 6,000 cusecs of Cauvery river water every day to Tamil Nadu for three days.

A resolution was passed by houses of Karnataka against the courts' order.

Former Supreme Court judges have termed the resolution passed by the two Houses of Karnataka to deny Tamil Nadu Cauvery water merely an ill-advised misadventure.

Former Supreme Court judge, Justice K.T. Thomas said the "*resolution is only to fit to be kept in the records of the Karnataka Legislature and has no authority*."

"At best, the Karnataka Legislature resolution can be treated as an expression of opinion or a criticism of the Supreme Court order. Everyone has the right to criticise a court order. *But the Supreme Court is the final authority in resolving inter-State water disputes*," Justice Thomas said.

"*The Supreme Court's mandate to be the final arbiter of inter-State water disputes is derived from the Indian Constitution itself, and not even the Parliament. The Constitutional makers gave the Supreme Court this power to prevent a situation by which one State will pass a resolution against the other and a constitutional crisis will ensue*," former Supreme Court judge Justice K.S. Radhakrishnan explained.

In observing the sanctity of the Constitutional principle of Separation of Powers, the Mullaperiyar judgment declared "*a law enacted by the legislature may apparently seem to be within its competence, but yet in*

substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers".

'The legislature, cannot by a bare declaration, directly overrule, reverse or override a judicial decision, exceeding its own limit'

The existence of the rights depends upon the remedy of its enforcement. The judiciary is the custodian of the citizens' right.

It seems from the above discussion that judiciary has been assuming the greater role of judicial activism, which is the result of ignorance of individuals' rights along with non-performance of the executive or the legislature.

If all the organs function in an effective and responsible way, there is no reason to produce or fortify such judicial pronouncements. After all, the constitution is supreme, and the custodian of the constitution shall ensure that peoples' right don't get ruined.

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Declaratory decree under the Specific Relief Act, 1963

Alok Ram Tripathi[*], *Mithilesh Pandey*[#], *Ravindra Dev Mishra*[Ψ]

Abstract:

The general power vested in the courts in India under the Civil Procedure Code is to entertain all suits of a civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force. However Courts do not have the general power of making declarations except in so far as such power is expressly conferred by statute. The utility and importance of the remedy of declaratory suits are manifest, for its object is 'to prevent future litigation by removing existing cause of controversy.' It is certainly in the interest of the State that this jurisdiction of court should be maintained, and the causes of apprehended litigation respecting immovable property should be removed. However, a declaratory decree confers no new right; it only clears up the mist that has been gathering round the plaintiff's status or title.

In this paper an attempt has been made to examine the scope of declaratory decrees.

It is in the interest of the individual and also for the development of economy that there should be smooth transactions with regard to property. However, there is always a possibility of casting a cloud upon the legal character or right to property of the citizens. It is manifestly for the interest of community that conflicting claims to the property should be settled. In such cases the Section 34 of the Specific Relief Act, 1963 enables a person to have his right or legal character declared by a Court of law and thus get rid of the cloud from his legal character or right. It has been held that it was merely to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks might not weaken it.[1] But this does not mean that the section sanctions every form of declaration, but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property.[2] Provision regarding declaratory decree has been provided in

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\# *Judicial Magistrate, Pauri Garhwal.*
Ψ *Addl. Civil Judge (J.D.), Haridwar*

1. *Naganna v Sivanappa 38 Mad. 1162*
2. *Devkali v Kedar Nath (1912) I.L.R.39 Cal. 704.*

Sections 34 and 35 of the Specific Relief Act, 1963. Section 34 of Specific Relief Act reads as:

"*Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation:

A trustee of property is a "person interested to deny "a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

Section 34 provides for "a suit against any person denying or interested to deny the plaintiffs' title to the legal character or right to any property". So it is clear that the plaintiff's task is not over once he proves that he is entitled to the legal character or right to property, it is for him to convince the court that the defendant has denied or interested to deny that legal character or right of the plaintiff. Then only he can succeed in obtaining the declaration sought. The provision is a verbatim reproduction of Section 42 of the Specific Relief Act, 1877. It ensures a remedy to the aggrieved person not only against all persons who actually claim an adverse interest to his own, but also against those who may do so.

Requisites:

Section 34 of the Specific Relief Act, 1963 contemplates certain conditions which are to be fulfilled by a plaintiff. In the ***State of M.P. vs. Khan Bahadur Bhiwandiwala and co.***[3] the court observed that in order to obtain the relief of declaration the plaintiff must establish that (1) the plaintiff was at the time of the suit entitled to any legal character or any right to any property (ii) the defendant had denied or was interested in denying the character or the title of the plaintiff, (iii) the declaration asked for was a declaration that the plaintiff was entitled to a legal character or to a right to property (iv) the plaintiff was not in a position to claim a further relief than a

3. A.I.R. 1971 M.P., 65

bare declaration of his title. It is to be submitted that the fourth requisite is not correct as the section only says that if any further relief could be claimed it should have been prayed for. Since declaration is an equitable remedy the court still has discretion to grant or refuse the relief depending on the circumstances of each case.

Thus a person claiming declaratory relief must show that he is entitled

1. to a legal character, or
2. to a right as to property, and that
3. the defendant has denied or is interested to deny his title to such character or right
4. he has sought all reliefs in the suit.

The object of this Section is obviously to provide a perpetual bulwark against adverse attacks on the title of the plaintiff, where a cloud is cast upon it, and to prevent further litigation by removing existing cause of controversy. The threat to his legal character has to be real and not imaginary.[4] The Section does not lay down any rule, that one who claims any interest in the property, present or future, may ask the Court to give an opinion on his title.[5] It does not warrant any kind of declaration that the plaintiff is entitled to a legal character or to any right as to any property, and it warrants this kind of remedy only in special circumstances.[6] The plaintiff has to prove that the defendant has denied or is interested in denying to the character or title of the plaintiff. There must be some present danger or determent to his interest. So that a declaration is necessary to safeguard his right and clear the mist. The denial must be communicated to the plaintiff in order to give him cause of action.

Legal Character:

A man's status or legal status or 'legal character' is constituted by attributes, which the law attaches to him in his individual or personal capacity, the distinctive mark or dress as it were, with which the law clothes him. Legal character means a position recognized by law.[7] According to Holland the chief variety of status among natural persons may be referred to the following causes: sex, minority, mental defect, rank, caste, official position, civil death, illegitimacy, profession, etc.

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4. Life Insurance Corporation of India vs. Smt. Iqbal Kaur., A.I.R., 1984 J&K 5.
5. Bhujandra Bhusan vs. Trigunath, I.L.R. 8 Cal. 761
6. Sheoparsan Singh vs. Ramanandan Singh, A.I.R. 1916, P.C. 78
7. Hiralal v Gulab, 10 CPLR, 1

Person Entitled to a Right to any Property:

The second requirement is that the person who seeks the remedy must have a right to any property. A right in Holland's proposition is a man's capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or the force of society. The Bombay High Court has observed that every interest of right which is recognised and protected by the State is a legal right. The courts have made a distinction between "right to property" and "a right in property" and it has been held that in order to claim a declaration the Plaintiff need not show a right in property. The Madras High Court held that an agreement to sell certain property in favour of a person certainly gave him a right to property but not a right in the property.[8] In ***Mohammed Akabar Khan vs. Parsan Ali***[9] a suit for a mere declaration that one person is related to another was held as not a suit to establish a legal right or any right as to any property and such suit would be incompetent. In a Calcutta case,[10] it was observed that a declaration might be sought with regard to a contingent right. It was held that the Court had absolute discretion to refuse relief if considered the claim to be too remote or the declaration, if given, would be ineffective. It was observed that the term 'right as to property' showed that the plaintiff should have an existing right in any particular property. The only limitation is that nobody can approach the Court for a declaration on a chance or a mere hope entertained.

Cloud upon title:

A dispute between the parties may relate either to a person's legal character or rights or interest in the property. A cloud upon the title is something which is apparently valid,[11] but which is in fact invalid. It is the semblance of the title, either legal or equitable, or a claim of an interest in property, appearing in some legal form, but which is in fact in founded, or which it would be inequitable to enforce.

Consequential Relief:

There may be real dispute as to the plaintiffs legal character or right to property, and the parties to be arrayed, yet the court will refuse to make any declaration in favour of the plaintiff, where able to seek further relief than a mere declaration, he omits to do so. The object of the proviso is to avoid

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8. Moharala Pitchayya vs. B. V. Krishnaiyya, A.I.R., 1943 Mad.497
9. A.I.R. 1930 Lah. 793.
10. Tarak Chandra Das vs. Anukul Chandra Mukherjee, A.1.R. (1946) Cal. 118.
11. Bicell vs. Kellogg, 60 Barbout 629

multiplicity of suits. What the legislature aims at is that, if the plaintiff at the date of the suit is entitled to claim, as against the defendant to the cause some relief other than and consequential upon a bare declaration of right, he must not vex the defendant twice; he is bound to have the matter settled once for all in one suit.

It is a discretionary relief

Even though if the essential elements are established, yet it is a discretion of the court to grant the relief. The relief of declaration cannot be claimed as a matter of right. In cases where the necessary parties are not joined the court can reject the suit for declaration.[12] Under Section 34, the discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well-settled principles. The court has to consider the nature of obligation in respect of which performance is sought. No hard and fast rule can be laid down for determining whether this discretionary relief should be granted or refused. The exercise of the discretion depends upon the chances of each case.[13] A remote chance of succeeding an estate cannot give a right for obtaining a declaration that alienation by a limited owner is void.[14]

Negative Declarations

A suit for a negative declaration may be maintained in a proper case, e.g., where it relates to a relationship. Thus, a suit for a declaration that a person was not, or is not, the plaintiff's wife, and the defendant not her son through him, may be maintainable.[15] Similarly, a suit lies for obtaining a negative declaration that there is no relationship of landlord and tenant between the plaintiff and defendant.[16] But where the rights of the plaintiff are not affected or likely to be affected, suit *simpliciter* for a negative declaration is not maintainable. Such a suit would be regarding the status of the defendant which, in no way, affects the civil rights of the plaintiff.[17]

Effect of Declaration-

Section 35 makes it clear that a declaration made under this section does not operate a judgment *in rem*. Section 35 says:

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12. Maharaja Benares vs. Ramji Khan, ILR 27 All. 138.
13. Ram Tawaklal Tewari vs. Dulari, AIR 1934 All. 469.
14. Faryad Fatima vs. Mujahid Abbas, AIR 1931 All. 1064.
15. Jagatram vs. Basanti, AIR 1959 Pun. 581.
16. Lakshman Das vs. Arjun Singh, 1962 Cr L J 528.
17. Mool Raj v. Atma Ram, AIR 1986 J&K 24.

"A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees"

Thus a declaratory decree binds-

(a) the parties to the suit;

(b) persons claiming through the parties;

(c) where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

It is only the parties to the suit and the representatives in interest, but not the strangers who are bound by the decree.[18] By virtue of this Section, a judgment is binding only if it is *inter partes*, which is not *in rem*, and does not operate as *res-judicata*, may be admissible under Section 13 of the Evidence Act.[19]

Court Fee-

The Court fee when a declaratory decree is sought is a fixed amount.[20] When the plaintiff claims a further relief, the court fee payable is determined by the amount at which relief sought is valued in the plaint.[21] The Hon'ble Supreme Court in ***Shailendra Bhardwaj & Ors vs. Chandra Pal & Anr***.[22] held that

"....Article 17(iii) of Schedule II of the Court Fee Act is applicable to cases where the plaintiff seeks to obtain a declaratory decree without any consequential relief and there is no provision under the Act for payment of fee relating to relief claimed. If there is no provision under the Court Fee Act in case of suit involving cancellation or adjudging/declaring void or voidable a will or a sale deed on the question of payment of court fee, then Article 17(iii) of the Schedule II will be applicable. But if such relief provision is covered by any other provisions of the Court Fee Act, then Article 17(iii) of the Schedule II will not be applicable……"

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18. Ram Lal vs. Secretary of State, ILR, Cal. 304
19. Dinomoni vs. Brojo Mohini, ILR, 29 Cal. 187
20. Article.17 Schedule II, The Court Fee Act, 1870
21. The Court Fee Act, 1870, Section 7, sub-section (iv), clause (c) Life Insurance Corporation of India vs. Smt. Iqbal Kaur, A.I.R., 1984, J&K, 5-6
22. Civil Appeal No. 8196 of 2012

The jurisdiction of Courts to grant a declaratory decree is salutary, and its recognition fills a real want. Section 34 of the Specific Relief Act, 1963 is wide enough in its scope as contemplates to settle not only conflicting claims to property, but also of disputes as to legal status. However, it must always be remembered that this provision is not a panacea of all types of legal disputes. The Courts must exercise their discretion while granting a declaratory decree and only in proper and fit cases this legal remedy should be granted so as to avoid multiplicity of suits and to remove clouds over legal rights of a rightful person.

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Sanction for Prosecution of Public Servants

By- Ravi Ranjan[*], Shama Parveen[#], Abhay Singh[Ψ]

"Be you ever so high, the law is above you. Investigation into every accusation made against each and every person on a reasonable basis, irrespective of the position and status of that person, must be conducted and completed expeditiously".

- Vineet Narain Vs. Union of India[1]

1. Sanction for prosecution

Section 197 of Code of Criminal Procedure, 1973 and Section 19 of Prevention of Corruption Act, 1988 bars the Court from taking cognizance of the offence alleged to have been committed by the public servant except with the previous sanction of the Government A. Constitution Bench of the Supreme Court upheld the Constitutional validity of S.197 Cr.P.C in ***Matajog Dobey vs. H.C.Bhari***[2] and a Two Judge Bench cleared the vires of S.19 of PC Act in ***Manzoor Ali Khan vs. Union of India***.[3]

The relevant extract of Section 197(1) of Criminal Procedure Code (Cr.P.C.) is reproduced below:

"**197. Prosecution of Judges and public servants.** (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013

(*a*) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(*b*) in the case of a person who is employed or, as the case may be,

** Civil Judge (J.D.), Didihat, Pithoragarh, # 2nd Additional Civil Judge (J.D.), Kashipur, Udham Singh Nagar, Ψ Judicial Magistrate, Vikas Nagar, Dehradun.*

1. *AIR 1998 SC 889*
2. *AIR 1956 SC 44*
3. *(2014)7 SCC 321*

was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: …".

It is clear from the above provisions that sanction under Section 197 Cr.P.C. is not necessary in respect of every public servant. Other than for a Judge or Magistrate, this sanction is required only in respect of a public servant who is not removable from his office save by or with the sanction of the Government. Here, Government implies "Governor" or "President", as the case may be. If a public servant can be removed from his service by an authority lower than the Governor or the President or by any other authority (such as in a bank), then this sanction is not required for prosecution of such public servant.

Secondly, even in respect of such a public servant who is not removable from his office save by or with the sanction of the Government, sanction would be needed only if the alleged offence was committed by him while acting or purporting to act in the discharge of his official duty. If the offence was committed in his personal capacity or in any other manner (which is not while acting in discharge of his official duty or purporting to act so), then again this sanction would not be required.

Therefore, if any offence is committed, whether under the Indian Penal Code (IPC) or under any other Act, which was committed by him while acting or purporting to act in the discharge of his official duty, sanction may be needed if such public servant can be removed only by or with the sanction of the Governor or President.

It should thus be noted that sanction under Section 197 of Cr.P.C. is not required in respect of every public servant and that it may be needed in respect of IPC offences also, provided that such offences were committed while acting in the discharge of official duties.

2. Official capacity

The sine qua non for the applicability of section 197 is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him.

There has to be reasonable connection between the omission or commission and the discharge of official duty or the act committed was

under the colour of the office held by the official. If the acts, omission or commissions, is totally alien to the discharge of the official duty, question of invoking Section 197 CrPC does not arise.

In ***Hori Ram Singh vs. Emperor***[4], Court held :

"It is not therefore every offence committed by a public servant that requires sanction for prosecution under S. 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by S. 197 of the Criminal Procedure Code will be attracted. An office may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection".

In a recent decision in ***Rajib Ranjan and others vs. R. Vijaykumar***,[5] at paragraph- 18, the Hon. Supreme Court has taken the view that ...

"even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted".

3. Whether an order directing further investigation under Section 156(3) of the Cr.P.C. can be passed in relation to public servant in the absence of valid sanction

Hon'ble Supreme Court in ***L. Narayana Swamy vs. State of Karnataka & Ors*** (decided on 6 September, 2016) held that once it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) CrPC. The above legal position has also been clearly spelt out in ***Paras Nath Singh [(2009) 6 SCC 372 : (2009) 2 SCC (L&S) 200] and Subramanian Swamy [(2012) 3 SCC 64 :*** **(2012) 1 SCC (Cri) 1041 :**

4. *1939 FCR 159 (AIR 1939 FC 43)*
5. *(2015) 1 SCC 513*

(2012) 2 SCC (L&S) 666] cases. But it certainly raises a question that Is it legal to set different standards for setting the criminal law in motion like if the complainant goes to the police, there is no need of sanction; if he goes to the Magistrate, there must be sanction?...

4. Decision as to proper sanction

Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regards sanction may be determined at an early stage. Ordinarily, the question as to whether a proper sanction has been accorded for prosecution of the accused persons or not is a matter which should be dealt with at the stage of taking cognizance. But in a case of this nature where a question is raised as to whether the authority granting the sanction was competent therefor or not, at the stage of final arguments after trial, the same way have to be considered having regard to the terms and conditions of service of the accused for the purpose of determination as to who could remove him from service.[6]

5. Relevant time for deciding the question of 'sanction' is the date on which the cognizance is taken

The relevant time, as held in ***S.A. Venkataraman vs. State***,[7] is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction.[8]

6. Whether sanction is required after retirement of the public servant?

In the case of ***R. Balakrishna Pillai vs. State of Kerala***,[9] the Supreme Court has held that in the case of a person who is or was a public servant not removable from his office save by or with the sanction of the Government

6. (2005) 8 SCC 370
7. AIR 1958 SC 107
8. (2011) 7 SCC 141
9. AIR 1996 SC 901

and who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, sanction under S. 197 of Cr.P.C. is required for the prosecution of a public servant even after his retirement. The Supreme Court further pointed out that now S. 197(1) Cr.P.C. itself uses the language "When any person who is or *was* … a public servant …".

7. Principles governing the grant of sanction for prosecution[10]

- It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.
- The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution.
- The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.
- Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.
- The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.
- If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.
- The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity.

10. State of Maharashtra vs. Mahesh G. Jain (2013) 8 SCC 119]

8. Rationale behind the protection

In ***Subramanian Swamy vs. Manmohan Singh and another***,[11] at paragraph-74, it has been held that the provisions dealing with Section 197 CrPC must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote:

> *"74. ... Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption."*

The requirement of previous sanction is intended to afford a reasonable protection to a public servant, who in the course of strict and impartial discharge of his duties may offend persons and create enemies, from frivolous, malicious or vexations prosecution and to save him from unnecessary harassment or undue hardship which may result from an inadequate appreciation by police authorities of the technicalities of the working of a department. The prosecution of a Government servant for an offence challenging his honesty and integrity has also a bearing on the morale of the pubic services. The administrative authority alone is in a position to assess and weigh the accusation against the background of their own intimate knowledge of the work and conduct of the public servant and the overall administrative interest of the State

The sanctioning authority has an absolute discretion to grant or to withhold sanction after satisfying itself whether the material placed before it discloses a prima facie case against the person sought to be prosecuted. It is the sole judge of the material that is placed before it. If the facts placed before it are not sufficient to enable to exercise its discretion properly, it may ask for more particulars. It may refuse sanction on any ground which

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11. (2012) 3 SCC 64

commends itself to it if it considers prosecution as inexpedient. However, a public service who is alleged to have committed an offence should be allowed to be proceeded against in a court of law, unless on the basis of the facts placed before it the sanctioning authority considers that there is no case for launching a prosecution. That a case might lead to an acquittal will not be enough reason for withholding sanction. Whether the evidence available is adequate or not is a matter for the court to consider and decide. For the sanctioning authority to be guided by such considerations will not be proper and may lead to suspicion of partiality and protection of the guilty person. Therefore, normally sanction for prosecution should be accorded even if there is some doubt about its result.

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Hostile Witness

Sachin Kumar*

The role of a witness is paramount in the criminal justice system of any country. According to Bentham, witnesses are the "eyes and ears of justice".

Given the importance of witnesses in the trial process, any law, aiming to redress the problem of "hostile witness" should be comprehensive, with a view to eradicate the menace.

In systems of proof in English common law tradition, almost all evidence must be sponsored by a witness, who has sworn or solemnly affirmed to tell the truth.

The bulk of law of evidence regulates the type of evidence that may be sought from witnesses and the manner in which the interrogation of witnesses is conducted during direct examination and cross examination of witnesses.

Who Is a hostile witness?

Hostility is one of the form of perjury. A hostile witness is one who is a witness of a criminal event or other information to help the prosecution built a case but has later turned in court, giving a different version of the event to contradict information. A witness is said to be turned hostile when he gives a certain statement in his knowledge about commission of a crime before the police but refuses it when called as a witness before the court during trial.

Why do witnesses turn hostile?

Today, the main cause for the high acquittal rate in our criminal justice system is the witnesses turning hostile. But why do the witnesses turn hostile? Generally, the reason is an unholy combination of money and muscle power, intimidation and monetary inducement. There are number of reasons for a witness turning hostile, the major one being:-

- The absence of police protection during and after the trial. The witnesses are afraid of facing the wrath of convicts who may be influential in the system
- Another reason is inordinate delay in disposal of cases. It protracts the witnesses' ordeal.

**Judicial Magistrate- 2nd, Rudrapur, Udham Singh Nagar*

- Intimidation is also one of the causes of witnesses turning hostile.

But it is difficult to accept that what they perceive as harassment from the long trial and the way they are treated in court can make them hostile. Inducement in cash and kind appear to play an important role in witnesses turning hostile. It was observed by WADHWA J. *"here are witnesses who are harassed a lot. A witness is not treated with respect in the court, he is pushed out from the crowded court room by the peon. He waits for the whole day and then finds the matter adjourned. He has no place to sit and no place even to have a glass of water, and when he does appear in the court, he is subjected to prolonged and in-checked examination and cross examination and find himself in a helpless situation. For all these reasons, a person abhors becoming a witness.*

The witnesses in a large number of cases are under constant threat from criminals. Psychological studies carried out on witnesses seems to suggest that grueling cross examination, frequent adjournments, court room intimidation are some of the major reasons that force a witness to turn hostile.

Judicial Remedy

The malady afflicting our criminal justice system is much more deep-rooted. Cosmetic changes just won't do much to deliver justice. The system requires a comprehensive revamp. The V.S. MALI MATH Committee on reforms of criminal justice system prepared outline for such a wide ranging correction in 2003. For a situation like the "Jessica Lal case" where witnesses refused to support the prosecution case, the committee has suggested the following measures:-

1. Holding in camera proceedings;
2. Taking measures to keep identity of witness secret;
3. Insuring anonymity, and
4. Making arrangements to ensure their protection;
5. Witnesses in courts should be treated as guests of honors;
6. They should be adequately compensated for spending money on travel and accommodation;
7. Comfort, convenience and dignity of witnesses while deposing in the court of law should be ensured and

8. A law for protection of witnesses should be enacted as there is no such law in India;
9. Constitution of a national security commission at national level and state security commission at state level.

Conclusion

We need to enact strict laws on witness protection keeping in mind the needs of the witnesses in our system. The plain fact is that the level of professionalism demanded by the witness protection is considered to be beyond the capability of our police in the existing system, making it susceptible to extraneous influences. Today, stringent laws against person giving false evidence and against witnesses that turn hostile are very much the need of the hour.

The Jessica Lal murder case provoked a public outcry against miscarriage of justice that compelled the authorities to reopen the case. The distortion in the case was so brazen that even middle class empathy with the murdered victim finally aroused public opinion. But it would be facile to conclude that India is on the way to reform its criminal justice system. This is just the first half step, the media too has a tremendous responsibility. Instead of sensationalizing issues they must endeavor to present a constructive and analytical account of such situation. Besides, there may be similar situation in future and in order to ensure justice is delivered, the courts and the law should make provision for guaranteeing the safety of witnesses.

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Rent Control Legislations- The Paradigm Shift

Meenakshi Sharma*

The courts these days are flooded with litigations between landlords and tenants. The landlords fighting litigation for release of their own property is not a very uncommon sight. There are tenants who are in possession of properties at a rent of amount as meager as Rs. 2.50/- where the property could have fetched an amount of more than Rs.50, 000/- at the same location. It is the landlord who suffers most in this situation. Firstly it is his property which is trapped in unnecessary litigation without any fault of his. Just because he had rented his property out to someone in need for an accommodation seems to have taken away his right to enjoy his own property and he is thrown away at the mercy of the court to claim a right which has always been his own. This situation even worsens when the landlord is a widow, minor or an old aged person depending solely on the income received from the property in the form of rent. The Rent Control Legislations governing the same were enacted mainly for protecting the weak tenants from falling prey at the hands of greedy landlords. But with time the situation has very much changed. The tenants are no longer a weaker section of society that would need a legislative shell to protect them. Too much protection being provided by the legislations to the tenants had started resulting in getting the landlords in a somewhat disadvantaged position. The property of the landlord sometimes gets perpetually in the grab of the tenants without any hope for a return even in pecuniary form. The application of these rent control legislation need to be addressed with a new approach having regard to the changed scenario of the society.

WHY RENT CONTROL LEGISLATIONS WERE NEEDED?

The history of legislations relating to rent control in the country would show that rent control acts were enacted to regulate & control tenancies with the primary aim to protect the tenants. Because of the scarcity of accommodation which arose primarily due to the growth of industrialization and commercialization and inflow of population to the urban areas, demands for rental accommodation increased, consequently appreciating landlords' demand for rent. The landlords were found to be in a position to exploit the situation for their unjustified personal gains which

* *2nd Add. Civil Judge (J.D.), Haridwar*

were consequently detrimental to the helpless tenants who were subjected to uncalled for litigation against eviction. It thus became imperative for the legislation to intervene to protect the tenants against harassment and exploitation by the landlords. For this purpose appropriate legislations were passed by almost all the States in India with the paramount object of essentially safeguarding the interest of the tenants. The Rent control laws enacted by the States drastically curtailed the landlord's power of enhancing the rent and evicting the tenant. The question whether this curtailment of landlords' power was justified in law or not was raised in large number of cases. The challenges were turned down by the courts on the ground that these restrictions were necessary having regard to the economic condition of the country at that time. There are also umpteen pronouncements of the courts which clearly indicate that the tilt of the rent laws was more towards the tenants than it was intended by the legislations.

The strain of the last World War, Industrial Revolution, the large scale exodus of the working population to the urban areas and social and political changes brought in their wake social problems of considerable magnitude and complexity and their concomitant evils. The country was faced with spiraling inflation, soaring cost of living, increasing urban population and scarcity of accommodation. Rack renting and large scale eviction of tenants under the guise of ordinary law exacerbated those conditions making the economic life of the community unstable and insecure. To tackle these problems and curb these evils, the legislatures of the States in India enacted rent control legislations.

LEGISLATIONS MAINLY FOR THE PROTECTION OF TENANTS

The Rent control Legislations were enacted to provide protection to tenants against the illegal and unscrupulous eviction by the landlords. The rights of the landlords in this regard were curtailed to a great extent. Prohibition of private letting and regulation of rent were a few examples. The courts also were inclined in favour of the tenants considering them a sufferer in the situation.

Nootan Kumar vs. Additional District Judge, Banda (1993) 22 ALR 437 (SC)

Having prohibited private letting of any building the legislature has imposed a ban on the occupation of such building either on behalf of the

tenant or the landlord vacating the same otherwise than in pursuance of an order of allotment or release U/S-16. Such a ban on occupation of a vacant building without an order of allotment or release was imperative in order to completely check the private letting thereof by the landlord. An analysis of the legal position makes it clear that the legislature has attempted to use all possible safety valves so that unscrupulous landlords cannot defeat the purpose of the Act by resorting to private letting.

The courts used to adopt a strict approach while interpreting the "bonafide need" as given in Sec 21 of U.P. Act 13 of 1972. The landlord has to prove his bonafide need in order to get his property released. Mere assertion that he needs his property back was not considered a proper cause to pass a release order.

Muthulal vs. Radheylal 1974 SC 1596

Mere assertion of the landlord that he requires the accommodation is not decisive. The word "required" signifies that mere desire on the part of the landlord is not enough but there should be an element of need and the landlord must show the same as the burden of proof is upon him that he genuinely requires the accommodation.

REFORMS IN THE LEGISLATIONS

Over the period, it was found that the owners preferred to keep their accommodations vacant & were not willing to let the same as because of such Rent control laws they were not getting return for their investments in constructions. Providing too much protection to the tenants under these rent control legislations was having an adverse effect on the interests of the landlords. Thus, various representations had been received by the govt. about the hardships and injustice caused by the provisions of the rent act. An Economic Administration Reform commission set up under the chairmanship of Mr. L.K. Jha went into this question and its report presented to the govt. in 1982, suggested a number of changes in the Rent control laws. The Commission pointed out that freezing of rentals at old historic levels, the excessive protection of tenancy rights and extreme difficulty in recovering possession even for the owner's own use had :-

(a) Hit hard the house owner of modest means;

(b) Depressed property values and affected adversely the revenues of municipal bodies and the State and Central govt;

(c) Imposed onerous burdens on the administration and the judiciary and led to large number of pending cases;

(d) Rendered investment in housing for rental unattractive, inhibited the letting out of available accommodation, brought about deterioration of the existing stock of housing through neglect of maintenance, and thus have aggravated the acute scarcity of accommodation for hire;

(e) Encouraged various malpractices and abuses such as on-money (pugree), partial receipts of rent, capital consideration (in black money) for tenancy transfers etc.; and

(f) In general tending to protect the haves against the have-nots, i.e., the tenant (even if affluent) as against the landlord (even if not so affluent) and the sitting tenant as against the prospective tenant who was looking for accommodation on rent.

The Commission in the background of aforesaid findings made inter alia the following recommendations:

(i) There is a case for confining rent control to relatively modest premises occupied by the less affluent though it is difficult to draw a suitable dividing line for the purpose. We would urge the State Governments to consider this possibility.

(ii) Considering the urgent need for the new housing and as an incentive for the construction of houses, there should be an exemption from rent control on all the new construction for a period of five years from the date of completion.

The National Commission on Urbanisation also made a report in which following points were made:

(i) Housing has been recognized as a basic need, ranked next only to food and clothing. But resources allocated and policies pursued have not yielded the expected results. Forty million people (about one fourth of the population of India) live in slums and under conditions of multiple deprivation illegal land tenure, deficient environment and kutcha shelter. In addition a significant number live in inner city neighbourhood with decaying buildings and deficient services. The supply of new shelter units is not adequate to meet incremental needs leave

aside the backlog. Nearly sixty percent of the households cannot afford a conventional pucca house and the lowest 10-15 % cannot afford even a serviced site. Furthermore given the resources constraint it is not possible to provide new pucca houses for all in the near future. The emphasis of housing policies therefore has to be on increasing shelter supply, improving and upgrading slums and conserving the existing housing stock.

(ii) There are always some households which are either not interested in owning a house or just cannot afford to own one. For such households rental housing is the only option. The main factors inhibiting investment in rental housing and in the maintenance of rental stock are the various rent control laws.

The Commission had made extensive recommendations regarding reforming rent laws in its interim report.

AMENDMENTS IN THE UP ACT XIII OF 1972

Even the legislatures took cognizance of the fact about the change in circumstances in the society & amended the Rent Control Act to limit the same to economical weaker section by reducing its applicability

(i) to the accommodations where the agreed rent is not more than Rs. 2000/- per month & exempted the accommodations agreeably fetching rent more than Rs. 2000/- per month from the ambit of Rent Control Act.

(ii) With advent of global business in India, a provision for exemption was also included to exempt accommodation let out to MNCs from Rent Control Act for the benefit of the landlords.

(iii) It was also observed the Rent Control laws were hampering the use of the properties of religious & charitable institutions as such exemption was also provided to the accommodations owned by religious & charitable institutions.

(iv) Above all the age of accommodation which attracted Rent Control Act was increased by amendment from initial 10 years to 20 years & now it is 40 years in UP & Uttarakhand.

Such & other such incentives were thus extended to the landlord to lure them to throw their vacant properties for letting to meet the scarcity of urban accommodation.

This change in legislation not only woke up the society but also changed the views of the courts to become liberal towards landlords ironically against the tenants who become parasite & start considering themselves as owners on petty rent. With the brief exception under section 21(8) of UP Act XIII of 1972 there is no provision for any enhancement of rent. It is my ardent view that this subsidy of Rent Control Act should also be wiped as is there effort to finish of the other subsidies.

PRESENT DAY POSITION IN COURTS

With the passage of time the position of tenants in the society has undergone a sea change. The social scenario in the light of which the Rent Control Legislations were enacted does not exist anymore. The legislations and the courts' pronouncements have been providing too much protection to the tenants thus making the landlords getting trapped in a disadvantaged position with their properties not fetching the potential returns.

The courts are coming out of their comfort zone now in granting relief to the landlords thus breaking the stereotype of being the "tenant protectors". For example, while deciding on the question of "bonafide need", the courts are now adopting the view that the landlord is the best judge of his need and no one not even the court can dictate the landlord to use his property in any particular manner. The courts are now quite liberal in their approach making clear that even having an alternative accommodation is no ground for denying the bonafide need of the landlord.

KamlaTripathi vs. KanchanAggarwal&anr. 2007 (1) ALJ 352

Sec 21(1)(a) Expln 1 of UP Act 13, 1972 prescribes for the bonafide need of the landlord. Where the tenant purchased a plot, constructed flats on it and sold them later, it clearly shows that alternative accommodation was available to him. Therefore, it is not open for the tenant to challenge the bonafide need and comparative hardship of landlord by taking advantage of fact that landlord owns any other house besides premises in dispute.

Raghvendra Kumar vs. Firm Prem Machinery & Co. (2000) 1 SCC 679

M.P.Accommodation and Rent Control Act, 1961 as regards with bonafide requirement of landlord the settled position of law, held, is that landlord is the best judge of his requirement for residential or business purposes and has complete freedom in the matter.

Even the long period of tenancy is not considered a sufficient ground for denying any relief to the landlord. If the tenancy has existed for a long period of say more than 50 years that is not a ground for depriving the landlord from enjoying his right to his property.

Shamshad Ahmad and ors.vs. Tilak Raj Bajaj 2009 (1) UAD 64 (SC)

UP Act 13, 1972 comparative hardship of landlord and tenant when no attempt being made by tenant to find out alternative accommodation, it leads to an inference that the tenant did not make such attempt for the fact that he might have to pay more rent. Such consideration of hardship of tenant would not preclude the landlords from getting possession of the suit-shop once they have proved the genuine need of the property. If the requirement of the landlord is bonafide and reasonable even the longevity of tenancy of fifty years should not be a ground for depriving the landlord for doing business.

The courts even went to the extent of holding that not even courts can dictate the landlord as to how and in what manner the property is to be used. It is solely the prerogative of the landlord.

Prativa Devi v. T.V.Krishnan (1996) 5 SCC 353

Delhi Rent Control as regards bonafide requirement of landlord, the landlord is the best judge of his residential requirement. Whether an alternative accommodation was actually available would depend upon landlord's right to such accommodation.

> *"landlord is the best judge of his residential requirement. He has complete freedom in the matter. It is no concern of the courts to dictate to the landlord how and in what manner he should live or to prescribe for him a residential standard of their own. There is no law which deprives the landlord of the beneficial enjoyment of his property."*

The court emphasized the need for social legislations like the Rent Control Act striking a balance between rival interests so as to be just to law. *"The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society."*

While the shortage of accommodation makes it necessary to protect the tenants to save them from exploitation but at the same time the need to protect tenant is coupled with an obligation to ensure that the tenants are not

conferred with a benefit disproportionately larger than the one needed. Socially progressive legislation must have a holistic perception & not a short sighted parochial approach. Power to legislate socially progressive legislation is coupled with a responsibility to avoid arbitrariness and unreasonabilty. A legislation impregnated with tendency to give undue preference to one section at the cost of constraints by placing shackles on the other section, not only entails miscarriage of justice but may also result in constitutional invalidity ***(Malpe Vishvanath Acharya vs. State of Maharashtra and anr (1998) 2 SCC 1).***

Speaking in the context of reasonable requirement of landlord as a ground of eviction, the court guarded against any artificial extension entailing of language so as to make it impossible or extremely difficult for landlord to get a decree for eviction. The court warned that such a course would defeat the very purpose of the Act which affords the facility of eviction of the tenant to the landlord.

The Rent Control legislations are heavily loaded in favour of the tenants treating them as weaker sections of the society requiring legislative protection against exploitation and unscrupulous devices of greedy landlords. The legislative intent has to be respected by the courts while interpreting the laws. But it is being uncharitable to legislatures if they are attributed with an intention that they lean only in favour of the tenants and while being fair to the tenants, go to the extent of being unfair to the landlords. The legislature is fair to the tenants and landlords both. The courts have to adopt a reasonable and balanced approach while interpreting rent control legislations starting with an assumption that an equal treatment has been meted out to both the sections of the society. In spite of the overall balance tilting in favour of the tenants, while interpreting such of the provisions as take care of the interest of the landlord the court should not hesitate in leaning in favour of the landlords. Such provisions are engrafted in rent control legislations to take care of those situations where the landlords too are weak and feeble and feel humble. (***Bega Begum vs. Abdul Ahad Khan 1979 AIR SC 272***)

MODEL RENT CONTROL LAW

The National Housing Policy, 1992 ('NHP') of the Central Government envisages amendment of the State Rent Control Laws for

bringing uniformity in their application throughout the country. The Central Government has formulated a suitable Model Rent Control Law incorporating the features outlined in the policy paper. On the basis of series of consultations with State Governments and various experts, the Ministry of Urban Development had prepared a paper suggesting the basic features of a model rent control law. The policy paper was considered in the Chief Ministers Conference, where the broad frame work of the Model Rent Control Legislation was endorsed.

DRAFT MODEL TENANCY ACT 2015-A BALANCED APPROACH

(i) The Draft Model Tenancy Act, 2015, is an improvement on its obsolete predecessor; it will make things much easier for landlords who were short-changed by the previous law. Property owners have been skeptical about renting out their houses as they fear that their tenants may refuse to vacate on time.

(ii) The new Draft seeks to balance the needs of both tenants and landlords. For instance, as per the provisions of the Rent Control Act, rent of properties were capped and landlords could not raise rents despite the jump in property rates. Thus, many tenants ended up paying a paltry rent of about Rs 100 despite living in prime locations. The Draft proposes reforms that will enable landlords to charge market rates and make it easier for landlords to evict tenants who default on rent without getting into long drawn out legal proceedings.

(iii) The Draft also has provisions to protect the interests of the tenants. Currently, the security deposit paid by tenants is an ad-hoc amount. As per the draft, the security deposit cannot exceed three times the monthly rent. Besides, tenants can claim a reduction in rent if the quality of services deteriorates.

(iv) Among the many reforms included in the Draft are the proposal for an independent authority for registration of all tenancy agreements and a separate court for rent related disputes and litigation cases. The rent agreements need to be registered with the Rent Authority. Further, the Draft has proposed that all disputes will be heard at the Rent Courts set up by the states. The Civil Courts will no longer hear rent related cases

. *(v)* The new draft on the other hand will ensure that landlords are able to charge market rates for their residential or commercial properties, get the rents revised periodically, and also get their premises vacated easily without getting into long-drawn legal proceedings. With these changes, a large number of properties lying vacant can be used to not only generate additional income for home-owners, but also solve the housing problem in the country.

(vi) Another plus point for tenants is that they can claim a reduction in rent if the quality of services available to them deteriorates in any way.

But an increased willingness on the part of property owners to rent out their properties might not happen overnight. A lot will depend on the execution of the rules mentioned in the Act to help landlords raise the rent and get trouble-making tenants evicted.

A LONG WAY TO GO

As compared to the Rent Control Enactments around the world, the Rent Control legislations in India have a long road to travel ahead. To be at par with the developments in this area internationally there is a dire need to bring uniformity in the rent control legislations of different states and bring about a common infrastructure for implementation of the same. Below are some suggestions that can be brought into practice to fulfill the main objective of the rent Control Legislations:

- Online registration and search facility for those who want to register their houses for rental purpose and those who are in need for an accommodation.
- Cap on the tax on rental earning can be introduced to encourage the landlords to rent out the properties.
- Unpaid rent can be insured like proposed in new Rent Control Legislation in France. Both tenants and landlords will pay into a government run insurance fund against unpaid rent. If a tenant defaults, landlords will no longer have to chase them through the courts, but simply apply to the fund for reimbursement. This fund will pay the landlord upfront, and then investigate the claim

themselves. If the tenant has defaulted due to unemployment, illness or low income, they'll receive rent relief (a system already in place in France). If they're just negligent or taking advantage, however, they'll get sued.

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Victim Compensation Scheme- Shortcomings & Recommendations

Bharti Manglani*

I am no longer a victim.
I have always hated that word !
I am now a survivor.
The road from one to the other
was a long journey,
which has no end, only new beginnings.
A victim lives in fear
A survivor endures.
A victim is weak and powerless,
Paying for what was not her doing
A survivor has grown strong
Because she knows the price is not hers to pay
The sin is not hers to atone.
God will extract the price from the right person
On the day when no lie can be told.
So do not call me a Victim.
I have always hated that word.

Introduction :

The compensation to victims of a crime is a matter of concern, throughout the world. The condition of the victims of crime is no better and for a quite long time, the victim was not the concern for traditional criminology. The purpose of compensation is straight forward, compensation serves to right what would otherwise count as wrongful injuries to person or their property. More than four decades ago **Krishna Iyer, J.** highlighted the continued apathy of the Criminal Justice System**:**

"It is the weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, victim reparation is still the vanishing point of our criminal law.

* Judicial Magistrate, Hardwar

The Criminal Justice System in India would ensure efficacious and expeditious justice once the law recognizes the right of victims and adequately provides for the compensation of victims. Reforms towards a restorative criminal justice system hinged on the amendments made to the Criminal Procedure Code of 1973 in 2009. These amendments were undertaken by the government in order to reform India's archaic criminal laws. The major thrust of the victim related amendments was on defining 'victim' and recasting existing defunct laws related to the provision of compensation to the sole discretion of the Judge; something that has been rarely exercised of their own accord in the past.

The prime focus of the article would be victim compensation law and its interface with criminal justice and outlining the recently amended law that deals with victim compensation and shortcomings of the same.

Evolution of concept of compensation to victim

In the pre-independence period, the criminal justice system remained largely pre-occupied with the crime control oriented policy that viewed criminal justice in terms of a state monopoly with a narrow focus of justice, confined to the State and the accused. However, in the pre-independence period it expanded beyond the reformation and rehabilitation of the offender to acknowledge the plight and concerns of the victims.

The right of compensation to the victim was finally crystallized on 29 Nov. 1985 at its 96th plenary session. The General Assembly of the United Nations, adopted the U.N Declaration of Basic Principles of Justice for victims of crime and abuse of power. This brought the dawn of a new era by emphasizing the need to set norms and minimum standards in international law for the protection of victims of crime. The U.N. declaration recognized four major components of the rights of victims of crime i.e-

1. Access to justice and fair treatment;
2. Restitution;
3. Compensation;
4. Assistance;

Indian Position

The present criminal justice system is based on the assumption that the claims of victim of crimes are sufficiently satisfied by the conviction of

perpetrator. The Committee on reforms of criminal justice system, chaired by Justice Dr. V. S. Malimath, by the Ministry of Home Affairs, in its report submitted to the Government of India in March 2003 perceived that "Justice to victims" is one of the fundamental imperatives of criminal law in India. It suggests a holistic justice system for the victims by allowing, among other things, participation in criminal proceedings as also compensation for any loss or injury.

In India there are five possible statutory provisions under which compensation may be awarded to victims of crime namely:

- Fatal Accidents Act, 1855
- Motor Vehicles Act, 1988
- Criminal Procedure Code, 1973
- Probation of Offenders Act, 1958; and
- Constitutional remedies for human rights violation

A .Position Prior to the Amendment

A careful glance at the Cr. P.C. 1973, reveals a highly fragmented legislative scheme for compensating victims. In pursuance of the recommendation of the law commission in its Forty-First Report (1969), a provision was made for the victims of crime that has been provided in section 357 of the Cr. P.C.

Although the principles underlying section 357 is similar to that envisaged in the U.N. Basic Principles of justice for victims of crime, its application is limited to where-

(1) The accused is convicted and

(2) The compensation is recovered in the form of a fine. When it forms a part of the sentence or a Magistrate may order any amount to be paid to compensate for any loss or injury by reason of the act for which the accused has been sentenced and

(3) In awarding the compensation, the capacity of the accused has to be taken into account by the Magistrate practically, given the low rates of conviction in criminal cases, the long drawn out proceedings and the relatively low capacity of the average accused to pay, one needs to question whether an effective victim compensation scheme exists.

B. Position Post Amendment

To address the absence of a definition of a victim, sub section (Wa) has been inserted in section 2 of the amended Cr. P.C. (via Criminal Amendment Act , 2009) as below:-

" 2 (Wa) 'Victim' means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."

Given the propensity of a narrow interpretation of "loss or injury" suffered by the victim we believe that an expansive delineation of what constitutes loss or injury should be added by the legislature. This will also check the varied interpretations made and ensure uniformity in the dispensation of compensation. Explicit inclusion of compensation to victims of criminal abuse of power should also have been made. Additionally, there is a need to include persons who have suffered harm while intervening to assist victims in distress or to prevent victimization. It is important that along with victims, the police personnels are also entitled to compensation. Thus, these provisions encourage both the police and people at large, to curb crime.

C. Analysis of Section 357-A

Under the amended Indian law, sub section (1) of section 357 A CrPC the preparation of a scheme to provide funds for the compensation of victims or his dependents who have suffered loss or injury as a result of a crime and who require rehabilitation.

Sub-section (2) of sec. 357-A Cr.P.C. states that whenever the court makes a recommendation for compensation to the District or State legal service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the above mentioned scheme. It is significant that the legal service Authority, comprising of technical experts, has been entrusted the task of deciding the quantum of compensation , since they are better equipped to calculate the loss suffered by a victim. However, the provision lose its teeth because the discretion remains with the judge to refer the case to the Legal Services Authority. The problem is compounded by the fact that traditionally, Indian judges have been hesitant to invoke this provision.

It is a positive development that in sub-section (3) of Sec. 357-A CrPC, the trial Court has been empowered to make recommendation for compensation in cases where-

- either the quantum of compensation fixed by Legal service Authority is found to be inadequate; or
- where the case ends in acquittal or discharge and the victim has to be rehabilitated.

However, there is scope to further extend compensation to victims in those cases that end in acquittal or discharge beyond rehabilitation to compensation for loss.

Sub- section (4) of sec. 357-A Cr. P.C. states that even where no trial takes place and the offender is not traced or identified but the victim is known, the victim or his dependents can apply to the State or District Legal Services Authority for award of compensation. We see a shift towards State funded victim compensation as has been established in the United Kingdom and the United State. This is an extremely progressive development that takes into account practical reality of an overburdened criminal justice system, which is unable to identify all offenders and prosecute them.

Sub-Section (5) of Sec. 357-A Cr. P.C. says that on receipt of the application, the State or District Legal Services Authority shall after due enquiry award adequate compensation by completing the enquiry within two month. It is pertinent that a time frame of two months would ensure speedy delivery of justice to the victim and specification of a time period would create accountability and prevent dilatory measures.

Further sub-section (6) of Sec. 357-A Cr. P.C, states that in order to alleviate the suffering of the victim, the State or District Legal Service Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief as the appropriate authority deems fit. It is a positive step that the section speaks of "alleviating the suffering" of the victim and seeks to help the victim recover in the aftermath of the crime and ensure that the victim does not have to wait till the end of the trial to recover these costs. The statutory recognition of the right to interim relief is an important step and an urgent need of the hour.

Shortcomings and Recommendations regarding victim compensation scheme

The policy of our criminal justice system is victim oriented and we have, to a certain extent, incorporated the idea of compensatory criminal jurisprudence. The problem arises in implementation of this policy. The provisions being discretionary, it neither imposes a legal obligation on the judge to order compensation in all suitable cases to the victim of crime nor does it require reasons to be recorded for not doing so. Similarly, these provisions do not vest in the victims a legal right to be compensated either by the accused or the state for loss or injury caused by the commission of the offence. The victim remains at the mercy of the discretion of the judge for the award of compensation, this being the vanishing point of victim compensation in India. Here punishment to the accused though it may exhaust the primary function of criminal law, is not fulfillment of the Rule of Law.

Even though almost a period of 7 years have expired since the enactment of sec. 357-A CrPC, the award of compensation has not become a rule and interim compensation which is very important, is not being granted by the Courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the objective of the legislation.

It is imperative to convert the discretionary power of the court into a legal mandate requiring it to, in all suitable cases, pass compensation orders and when it decides not to do so, make it obligatory to record reasons for not doing so.

The court should be liberal in utilizing the discretion vested in them in granting compensation to the injured in a criminal case even in cases where the claim of compensation ordinarily lies in the domain of the civil court. Victim should be spared the time and expense of bringing civil suits, claiming compensation: as well as the emotional strain of enduring a second trial.

Interim compensation ought to be paid at the earliest so that immediate need of victim can be met for determining the amount of interim compensation. The court may have regard to the facts and circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. The establishment, strengthening and expansion of national funds for compensation to victim should be encouraged.

To effectuate any progressive victim compensation reforms, there is a need for a sensitized judiciary that recognizes the importance of victim compensation. Though, justice has been meted out to the victim through judicial creativity at the appellate level, these instances are few and far between.

In the recent ruling of ***Suresh and another vs. State of Haryana (2015) 2 SCC 227***, the Hon'ble Apex Court held that the courts below appear to have remained oblivious to the provisions of Sec. 357 CrPC. It is paradox that victim of a road accident gets compensation under no fault theory but the victim of crime does not get any compensation, except in some cases where thee accused is held guilty which does not happen in a large Percentage of cases.

The Apex Court in this case recommended to all courts to exercise this power liberally so as to meet the ends of justice in a better way. It is imperative to indicate the investigating agency as well as trial judges about the need to provide access to justice to victims of crime. National Judicial Academy should impart requisite training to all judicial officers in the country to make the provision operative and meaningful.

CONCLUSION

Unlike western countries, the victims of crime in India do not have a statutory right to be compensated. There is no compulsion on the Court to record reasons for not invoking its power to provide compensation. Ultimately, the efficacy of the law and its social utility depends largely on the manner and the extent of its application by the courts. A good law badly administered may fail in its social purpose and if overlooked in practice, will fail in purpose and utility. Section 357-A Cr.P.C. has a social purpose to serve and has to be applied in appropriate case.

It would not only be unjust from the point of view of victims of crimes but it would also result in the negation of the Rule of Law**. D. P. Wadhwa, J**, of the Supreme Court of India reminded us that in our efforts to look after and protect human rights of a convict, we should not forget a crime victim.

It is believed that compensation will at least provide some solace to the victim, even if his lost honour cannot be fully recompensed.

The victim compensation law as it stands after the 2009 Amendment to the Cr. P.C. is more holistic in its approach of addressing the plight of

victims. However, the infrequency with which these provisions are invoked by judges in a bid to achieve victim justice and to alleviate the suffering of the victim would render these provisions redundant and be the vanishing point of Indian victim compensation.

At last, I would like to quote the powerful poem narrated by Amitabh Bachchan in the movie " Pink", which encourages women to stand up for themselves and assert their personality without having to fear judgment. It inspires confidence among women and inspires them to grow. It also encourages women to use the chains that held her back as an ornament. These lines are-

Tu khud ki khoj mein nikal

Tu kisliye hatash hai
Tu chal, tere wajood ki
Samay ko bhi talash hai…… samay ko bhi talash hai
Jo tujhse lipti bediyan…… samajhna inko vastra tu
Ye bediyan pighal ke…… Bana le inko shastra
tu…… Bana le inko shastra tu
Charitra jab pavitra hai……toh kyun hai ye dasha teri
Ye papiyon ko hak nahi…… ki lein pariksha teri……
ki lein pariksha teri
Jala ke bhasm kar use jo krurta ka jal hai
Tu aarti lau nahi …… tu krodh ki mashal hai ……
Tu krodh ki mashal hai..
Chunar ko udaa dhwaj bana gagan bhi kap-kapayega
Agar teri chunar giri…… Toh ek bhukamp aayega……
ek bhukamp aayega
Tu khud ki khoj main nikal
Tu kisliye hatash hai
Tu chal, tere wajood ki
Samay ko bhi talash hai…… samay ko bhi talash hai.

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Default Bail and Charge-Sheet

Parul Thapaliyal*

"Our faith in freedom does not rest on the forseeable results in particular circumstances but on the belief that it will, on balance, release more forces for the good than for bad."

Friedrich Hayek

Introduction:

Default Bail, also known as compulsive bail, is provided under Section 167(2)[1] of the Criminal Procedure Code. Section 167 of the Code while enunciating the law on remand also affords protection to accused against detention during inordinate delay in completion of investigation. It provides that, wherein the investigation is not completed within the prescribed period of 60 or 90 days, as the case may be, thereafter the accused can avail his right of default bail on the expiry of the said period. In other words, where the investigation agency has not filed a charge-sheet within a period of 60 days (or 90 days in the case of offences punishable with death or imprisonment for not less than 10 years) of the investigation then the accused becomes entitled to be released on bail. Thus, where no charge-sheet has been filed within the stipulated period the accused can no longer be detained in custody, on the expiration of such period. Hence on 61st or 91st day of remand, the right to seek default bail accrues in favour of the accused.

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1. *Section 167 (2) states:*
The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused person in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a magistrate having such jurisdiction.
Provided that:

(a) *the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding:*

(i) *ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;*

(ii) *sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.*

Conditions for grant of default bail :-

In ***Hitendra Vishnu Thakur vs. State of Maharashtra***[2] Hon'ble Apex Court held that *"Parliament has introduced the amendment to Section. 167(2) Cr.P.C prescribing the outer limit within which the investigation is to be completed. If the same is not completed, the accused would acquire a right to be released on bail and such release on bail shall be deemed to be under Chapter XXIII of the Code."*

Though the accused becomes entitled to be enlarged on bail, in a situation contemplated by Section167, however it is essential that following conditions are met out:

1. Application by the accused: Though the accused becomes entitled to be released on bail where the charge-sheet has not been filed within the prescribed period of 60 or 90 days, however, in order to avail the benefit of default bail it is mandatory that the accused should file an application before the Court praying for his release on bail. The Court cannot exercise its jurisdiction and grant default bail merely on the completion of period in absence of an application by the accused. It often happens that the advocate of the accused orally apprise the court with the expiry of remand period and makes submission for grant of default bail however the mandate of Section 167 requires the advocate of the accused to formally file an application stating that since the period of remand has expired and no charge-sheet has been filed, the accused is liable to be released on bail. Default bail is an indefeasible right of the accused but in order to enjoy the same the accused is required to approach the court in the procedure prescribed. Mere expiry of the period does not suffice the requirement of the grant of default bail and the accused will not be automatically released. In other words on the lapse of the period and non-filing of the charge-sheet the right of default bail becomes operative however to exercise the same an application before the magistrate is a must. This aspect was explicitly dealt in **Hitendra Thakur case**[3] wherein the Hon'ble Supreme Court observed that *"thus we find that once the period for the charge-sheet has expired and either no extension of has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted*

2. *AIR 1994 SC 2623*
3. *Ibid*

to bail under sub-section (4) of Section 20 read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA with section 167 of the Code, the Court must on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating prosecution agency…"

It was further held that the Desiganted Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail as directed by court.

Thus, it is imperative that the accused has to move an application to realize his right of default bail. Mere oral submission of the expiry of period and non-filing of challan will frustrate his right.

2. Investigation should be pending: Filing of charge-sheet under Section 173 of the Code results into culmination of investigation. Once the charge-sheet is filed the provision of Section 167 is no longer applicable since it is a pre-cognizance stage. Therefore the accused can avail the benefit of default bail only if the charge-sheet has not been filed within the prescribed period. Default bail is available only during the pendency of the investigation. Thus it is important that the application for default bail should be filed before the filing of charge-sheet. If the accused fails to do so and charge-sheet is filed meanwhile then his right extinguishes. This proposition was clarified by the Hon'ble Supreme Court in the landmark judgement of ***Sanjay Dutt vs. State***[4] in the following words:

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filling of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after filing of the

challan. The custody of the accused after the challan is filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because section 167 ceases to apply."

The Court further said, *"The indefeasible right of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage."*

Thus, as soon as the period of remand expires i.e the 61st or 91st day, the accused has to move an application under Section 167(2)CrPC if the charge-sheet has not been filed. Where he fails to do so and on 62nd day charge-sheet is filed then his right extinguishes. Thereafter he cannot approach the court under Section 167(2) as that stage has been crossed. Post filing of charge-sheet the remand of accused is taken under Section 309 of the Code, therefore, the benefit under Section 167 cannot be re-visited.

In ***State vs. Mohd. Asrafat Bhat***[5] the Hon'ble Apex Court reiterated the settled position *"such right (right of default bail) is enforceable only prior to the filing of the charge-sheet. But the accused did not avail himself of the right and charge-sheet in the meantime been filed, his right to obtain statutory bail under Section 167(2) proviso (a) or (b) has been extinguished."*

Thus, if an accused falls short of asserting his claim to be enlarged on bail for the failure of investigating agency to file challan within time permissible by law, then the accused cannot emphasize that he had an

4. (1994) 5 SCC 410

indefeasible right to exercise at any time notwithstanding the fact that in the meantime the charge-sheet is filed.

Furthermore, where once the default bail is allowed then subsequent filing of the charge-sheet does not ipso facto result into cancellation of default bail. For the cancellation of the same the law regarding cancellation of the bail will have to be satisfied.

Hon'ble Supreme Court enunciated the above mentioned proposition in ***Mohammed Iqbal Madar and others vs. State of Maharashtra***[6] wherein the Court held, *"It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of such accused who has been released, because of the default on the part of the investigating officer to complete the investigation, can be cancelled, but only on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA. For cancelling the bail, the well-settled principles in respect of cancellation of bail have to be made out."*

Availed of:

Now after discussing the conditions it is pertinent to discuss one more aspect i.e when is accused is said to have 'availed of' his right of default. Is it when he applies or when he furnishes bond or when he is released on bail? It is important to discuss this very aspect to understand as to filing of charge-sheet in which stage bars the right of default bail. In **Sanjay Dutt case**[7] the Court held that if the right of seeking default bail have not been already availed of prior to filing of the charge-sheet, by the accused, then this right no longer stays enforceable after filing of the chargesheet. Thereafter in ***Uday Mohanlal Acharya vs State of Maharashtra***[8] case Hon'ble Apex Court interpreted the term "availed of". It was held that:

"Does it (availed) mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him

5. *(1996)1SCC 432*
6. *(1996) 1 SCC 722*
7. *Supra 4*
8. *(2001) 5 SCC 453*

released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose to Section 167 (2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not….an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of arrest of the accused."

The above interpretation have been reiterated by Supreme Court in ***Union Of India Through CBI vs. Nirala Yadav @Raja Ram Yadav@Deepak***[9] and thus when the accused files an application for default bail within permissible time, willing and prepared to furnish bail bonds and no charge-sheet has been filed till that time, then it will be held that the accused has availed his right. Now if after this a charge-sheet is filed then the right of accused will not extinguish.

Charge-sheet and Application on same day:

Situation where application and charge-sheet is filed on the same day can it be said that the accused has availed of his right and is entitled to default bail. From the above discussed case laws it is a settled position that when accused files application and is prepared to offer bail on being

9. *(2014) 9 SCC 457*

directed then it is deemed that the accused has availed of his right. But the Magistrate while entertaining the application has to satisfy himself that one, the statutory period for filing of charge-sheet has expired and second, that the charge-sheet has not been filed. It has already been discussed that as soon as the charge-sheet is filed the provision of Section 167 cease to apply. The magistrate cannot ignore the charge-sheet in order to grant default bail. Where both are filed on the same day the Magistrate will not entertain the application of the bail as the stage cease to exist. In **Sanjay Dutt case**[10] Court held that:

"if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation…both of them should be considered together."

This means that the application for extension will be considered, mere filing of application for bail does not make court to ignore application for extension. If an analogy is drawn from this, it can be safely held that if charge-sheet and bail applications are filed on the same day the Court cannot ignore the charge-sheet and go on to decide the application presuming absence of the charge-sheet. In fact, the Court has to consider the charge-sheet and not the bail application as by filing of the charge-sheet the stage for application of bail has expired. In this scenario however the accused has availed of his right but by filing of charge-sheet at the very same day, the application fails in satisfying all the conditions necessary for the grant of bail.

Similar contingency was discussed by Hon'ble Justice B.N Agrawal in his dissenting opinion expressed in **Uday Mohalal Acharya** case[11] wherein he said:

"What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? ...such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed."

10. *Supra 4*
11. *Supra 7*

Thus, even if we abide by the majority view that the accused has availed of his right by filing the application but in the given circumstance where both application and charge-sheet are filed on the same day, the dissenting opinion justifies that the stage for entertaining the application is over.

Similar situation was discussed by Hon'ble High Court of Delhi in ***Sanjay Bhatia vs. State***[12] wherein the charge-sheet and application for default bail was filed on same day i.e 31.1.2014. The Court held that: *"The right under section 167 (2) of Cr.P.C to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of charge sheet…after the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits."*

However, this is the view only when both applications and charge-sheet are filed on the same day. Once the application for bail is filed and charge-sheet has not been filed, the application needs to be disposed off without undue delay. It is not at all intended that the application is to be kept pending in order to provide opportunity to investigation agency to frustrate accused's right by filing a charge-sheet subsequently. Subsequent filing of charge-sheet has no bearing on default bail if already 'availed of'.

Thus, in order to conclude, it can be said that though liberty is the most sacrosanct right, however, to have a more cohesive society, it is required that individual liberty is regulated in the interest of all. The Constitution of India also subscribe to this idea wherein it provides that liberty can be curtailed by the procedure established by law. Rejection of default bail after filing of charge-sheet is under a well-established procedure laid down in Section 167 of the Code of Criminal Procedure, 1973.

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12. Supra 7

विद्यार्थी से न्यायाधीश की ओर

कृष्टिका गुन्जियाल*

एक व्यक्ति अपने जीवन काल में अनेक अवस्थाओं से गुजरता है, यह अवस्थायें है बाल्य, किशोर, वयस्क एवं वृद्ध जीवन की ही इन अवस्थाओं में व्यक्ति विभिन्न पात्र निभाता है।

क्रमागत उन्नति से ही मनुष्य ने अपने आप को समाज रुपी ढाँचे में विकसित किया है, वासुदेव कुटुम्बकम जैसी भावना से अपना सकल निर्माण किया है। समाज जिसका हम सभी एक अभिन्न अंग है उसमें अपने द्वारा अर्जित की हुई विद्या से ही अपना जीवन निर्वाह करते हैं। समाज में सदभाव, शान्ति व परस्पर उन्नति के लिए प्राचीन परम्पराओ, प्राकृतिक, नैतिक व सामाजिक दृष्टिकोण को ध्यान में रखते हुए समाज में रह रहे बृद्विजीवियों द्वारा अनेक नियम व कानून बनाये गए हैं। जिनका पालन करना किसी व्यक्ति विशेष के हित में न होकर पूरे समाज के हित में है।

विद्या से मिले ज्ञान का किसी भी व्यक्ति विशेष के जीवन में अत्यंत महत्वपूर्ण स्थान है, विद्या अर्जन के द्वारा ही व्यक्ति अपना व्यक्तिगत एवं सामाजिक कल्याण करता है। जिस काल अवस्था में व्यक्ति विद्या अर्जित करता है प्रायः ही उस काल अवस्था में उसे विद्यार्थी की संज्ञा दी जाती है। एक आदर्श विद्यार्थी की परिभाषा कई जगह परिभाषित हैं परन्तु विद्यार्थी की मूलतः कोई परिभाषा नहीं है। साधारणतः बाल एंव किशोर अवस्था में ज्ञान अर्जन करने वाले व्यक्ति को विद्यार्थी कहा जाता है। जिसका ध्येय स्वाध्याय नियम पालन व्यक्तिगत निर्माण करना होता है। इसी प्रकार न्यायाधीश की कहीं कोई परिभाषित भाषा नही है। जब एक विद्यार्थी अपने द्वारा अर्जित की हुए विद्या का प्रयोग अपने जीवन निर्वाह के लिए करता है तो प्रायः ही उसके विद्यार्थी जीवन का क्रियान्वयन हो जाता है। परन्तु एक व्यक्ति अपने जीवन काल में किसी न किसी रुप में विद्यार्थी ही रहता है।

विद्यार्थी के पथ से न्यायाधीश का पथ निःसदेह अलग है, परन्तु उसका मूल स्वभाव एक ही है। जिस प्रकार एक व्यक्ति अपने विद्यार्थी जीवन में कठिन परिश्रम एवं नियम का पालन कर सफलता अर्जित करता है, उसी प्रकार किसी

* *2nd Addl. Civil Judge(JD), Roorkee, Hardwar*

भी व्यक्ति को किसी भी पथ या पद में सफल होने के लिए उससे जुड़े सभी कर्तव्यों एवं दायित्वों का पूर्ण ईमानदारी एवं निष्ठा से पालन करना चाहिए।

न्यायपालिका समाज का एक अभियोज्य एवं आवश्यक अंग है, जिसके निर्माण का दायित्व उसके सभी सदस्यों पर है। न्यायाधीश होना विद्यार्थी जीवन का विस्तार है। व्यक्ति एवं न्यायाधीश का पद समान होते हुए भी एक दूसरे से पृथक है। व्यक्ति द्वारा किसी भी पद का सदुपयोग कर उस पद को गौरवान्वित किया जाता है, या उस पद का दुरुपयोग किया जाता है। पद से व्यक्ति की गरिमा है, व्यक्ति से पद की गरिमा नहीं। यह बात सदैव स्मरणीय है।

विद्यार्थी से न्यायाधीश बनना विद्यार्थी जीवन की सफलता को दर्शाता है, परन्तु सही मायने में हर न्यायाधीश सदैव एक विद्यार्थी ही रहता है। मूल रुप से न्यायाधीश बनने के बाद सामाजिक दृष्टिकोण से व्यक्ति को सफल देखा जाता है, परन्तु व्यक्ति के न्यायाधीश की परीक्षा में सफल होना तो मात्र एक अन्य पथ की शुरुआत भर है। जिसमें सफल होने के लिए उससे जुड़े सभी कर्तव्य एवं दायित्वों का सम्पूर्ण ईमानदारी एवं कर्तव्यनिष्ठा से निर्वाहन करना आवश्यक है। इसलिये यह कहना गलत न होगा, कि हर विद्यार्थी न्यायाधीश नहीं होता, पर हर न्यायाधीश के अंतःमन में एक अंश विद्यार्थी की अवश्य होता है।

जिस प्रकार कोई व्यक्ति जब अपने विद्यार्थी जीवन की शुरुआत करता है, व विद्यार्थी की संज्ञा लेता है, उसी प्रकार न्यायाधीश की परीक्षा उत्तीर्ण करना न्यायाधीश के पद की संज्ञा प्राप्त करना है। एक सफल न्यायाधीश बनने व न्यायाधीश के पद से न्याय करने के लिए व्यक्ति को निरंतर स्वाध्याय में लीन रहना चाहिए। न्यायाधीश के पद को पाकर, गौरवान्वित होने के पश्चात व्यक्ति को उस पद से जुड़ी गरिमा का सदैव स्मण रखना चाहिए। अपने द्वारा किये गए सभी कृत्यों को उस पद से निर्माण एवं गरिमा को बढ़ाने के लिए करना चाहिए।

एक विद्यार्थी अपने विद्यार्जन काल में अनेक लोभ एवं प्रलोभन से अपने आप को वंचित रखता है, व निरंतर परिश्रम एंव तपस्या से सफलता प्राप्त करता है। एक विद्यार्थी अपने को सामाजिक कुरितियों एंव गलत संगत से दूर रखकर अपने पथ पर निरंतर अग्रसर होता है। विद्यार्थी द्वारा की गई तपस्या की इतिश्री किसी भी परीक्षा के पूर्ण होने से पूर्ण नहीं होती, यह सदैव निरंत चलने वाली प्रक्रिया है जिसका दायरा बढ़ जाता है। प्रायः एक विद्यार्थी का सामाजिक दायरा

अपने साथी विद्यार्थी व गुरुजनों तक सिमित रहता है, विद्यार्थी अपने इसी सामाजिक दायरे में रहकर अपना विद्यार्जन करता है। किसी भी व्यक्ति के सामाजिक दायरे व संग से भी उसका मानसिक स्तर तय हाता है। इसी प्रकार एक न्यायाधीश का सामाजिक दायरा भी अपनी न्यायपालिका व उससे जुडे सभी सदस्यों तक ही सीमित रहना चाहाए।

विद्यार्थी से न्यायाधीश बनना किसी भी व्यक्ति के लिए अत्यंत गरिमामयी है, परन्तु न्यायाधीश की परीक्षा उत्तीर्ण करना एक अन्य पथ की शुरुआत भर है, जिसमें सफलता प्राप्त करने के लिए व्यक्ति को निंरतर अपने जीवन काल में अनुशासन, कर्मप्रधान व ईमानदार होने की आवश्यकता है। इसलिए यह कहना गलत न होगा कि विद्यार्थी से न्यायाधीश होना विद्यार्थी जीवन का सफल विस्तार है।

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Appropriate Procedure for Remand of Accused under Protection of Children from Sexual Offences Act:

Rakesh Kumar Singh*

Parliament with a view to provide more deterrent effect on the offenders of sexual offences legislated a new Act called Protection of Children from Sexual Offences Act in the year 2012 which came into effect from 14.11.2012. The Act provides for stringent punishment. However, it seems that the Act suffers from bad drafting and the same is giving tough time to judicial establishment which naturally will result in irregular/illegal orders being passed by the judiciary. The most glaring defect is in respect of production and remand of arrested accused. The question being raised is about the authority who is competent to remand such accused. The Act does not have any direct provision in this respect and the Code prescribes (so far as subsequent remand is concerned) for the magistrate having jurisdiction. Whereas the Act does not give jurisdiction to the Magistrate. In such circumstances, courts are facing problem as in some areas Magistrates are compelled to remand the accused, in some areas Magistrates are voluntarily remanding the accused without any discussion and in some areas the Special Courts are making remand orders. Meaning thereby that same provisions are being interpreted differently in Delhi by different courts which can not be said to be a healthy practice. The present paper is a humble attempt to prepare a correct procedure for such cases.

2. In the normal course, following provisions deal with the after effect of the arrest of any person. Section-56 Cr.PC reads as under:

> **"56. Person arrested to be taken before Magistrate or officer in charge of police station**.-
>
> A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station."

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Section-57 Cr.PC reads as under:

"57. Person arrested not to be detained more than twenty-four hours.- No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."

Article-22(2) of the Constitution of India reads as under:

"22(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

2.1. Clearly, an arrested person has to be produced before a Magistrate within 24 hours and there cannot be any escape from it. What will be the procedure after production of the accused has been dealt with in Section-167 Cr.PC which to the extent of relevancy in present context reads as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the **nearest Judicial Magistrate** a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention

unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:"

2.2. Police is obliged to produce the accused before the nearest Magistrate. In the context of Delhi, the nearest Magistrate is bound to be the Ilaqa Magistrate or on holidays, the duty Magistrate and the police is not required to search any other executive magistrate as the administrative policy adopted in Delhi does not allow absence of Magistracy on any occasion.

2.3. In the present paper, however, we will see that in the context of POCSO Act, we have to read "Special Court" instead of "Magistrate" in Section-167. Therefore, nearest magistrate can also be the nearest special court for POCSO Act.

2.4. From the above provisions, it appears that when the accused is produced before such Magistrate, he has discretion to remand the accused to such custody as he thinks fit for a total period of 15 days irrespective of the jurisdictional competence.

3. Proceeding in respect of offences under other laws is governed by Section-4 and Section-5 of Cr.PC and Section-42A of POCSO Act which read as under:

"4. Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provision hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

"5. **Saving**.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

"42A. **Act not in derogation of any other law** : The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

3.1. Clearly, unless the POCSO Act provides some different procedure, we have to follow the provisions of CrPC. The present discussion is about the remand proceeding for an offence punishable under a special Act i.e. POCSO Act. We have to see whether POCSO Act provides any other procedure for production or remand of accused or not.

4. **CHAPTER-V:** of the Act is titled as PROCEDURE FOR REPORTING OF CASES and its Section-19 to the relevant extent reads as under:

"19. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who apprehends that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, (a) the Special Juvenile Police Unit; or (b) the local police. (2) Every report given under sub-section (1) shall be (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit. ***** (6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard."

4.1. Pertinently, Section-157 Cr.PC obliges the police to send the report to the Magistrate empowered to take cognizance, whereas Section-19(6) of POCSO Act obliges the police to send a report to the Special Court. To this extent procedure prescribed in the special Act is different and therefore by virtue of subject clause of

Section-4(2) and Section-5, the same has to be followed.

4.2. However, there is no provision in the POCSO Act corresponding to or similar in nature of Section-56, 57 and 167 Cr.PC. Therefore, by virtue of Section-4(2) Cr.PC, the procedure prescribed in the Cr.PC for production and remand of accused have to be followed.

5. Such procedure has already been discussed above. As such, even for the offences under POCSO Act, the arrested accused has to be produced before the Ilaqa/Duty Magistrate as the case may be so far as Delhi is concerned. Such Ilaqa/Duty Magistrate may remand the accused for first 15 days.

5.1. However, Section-167(2) Cr.PC further provides that if such Magistrate does not have jurisdiction to commit or try the case, he may forward the accused to the Magistrate having such jurisdiction. Certainly, this prescription is not for the first production of the accused as provision provides in the starting phase that Magistrate may authorize detention irrespective of jurisdiction (for convenience this Magistrate may be called as "Initial Magistrate"). It is clear that such Magistrate has to consider jurisdictional prescription upon first remand. Though seemingly, the forwarding part uses an expression "may" and therefore some fertile mind can contend that the Magistrate is not required to forward the accused to the Magistrate having jurisdiction (for convenience this Magistrate may be called as "Jurisdictional Magistrate"). It however seems that such a contention can not be accepted. If this was the intention of the legislature, there was not even a need for enacting such prescription. It is well settled law that in certain circumstances even an expression "may" can be deemed to be mandatory. The "Initial Magistrate" has to forward the accused to the "Jurisdictional Magistrate" upon the expiry of the first 15 days.

5.2. **Who will be the "Jurisdictional Magistrate"?** A Magistrate who has jurisdiction to commit the case or to try the case may be called "Jurisdictional Magistrate" for Section-167. Which Magistrate can try a case? A Magistrate who has taken

cognizance of an offence or a Magistrate to whom a case has been transferred or made over in accordance with the law can try the case. Transfer and making over concept can not apply at the initial stage and therefore we are required to consider the cognizance part. Which Magistrate can take cognizance? The Magistrate who has power to take cognizance under section-190 Cr.PC can take cognizance. The same Magistrate shall also have the jurisdiction to commit the case.

5.3. For any trial or committal, the pre-requisite is cognizance. And for taking cognizance there must be a power to take cognizance. If there is no such power available with the Magistrate, he can not take any cognizance. If he can not take cognizance, he can not commit the case or try the case. And therefore he can not be a "Jurisdictional Magistrate".

6. We have to see whether Ilaqa Magistrate has jurisdiction to commit or try the case under POCSO Act or not. Generally, in Delhi all Ilaqa Magistrates do have jurisdiction to commit or try the case by virtue of relevant provisions in the Cr.PC. However, for offences under other laws such as POCSO Act, the procedure prescribed in Cr.PC can only be followed if such law does not provide any other procedure. We have to see whether POCSO Act provides any other procedure for cognizance, committal or trial.

7. Section-31 of POCSO Act would be relevant which reads as under:

"33. (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts."

7.1. Clearly, power to take cognizance lies with the Special Court. The first and foremost power of the special court is to take cognizance of offence without any committal of the accused. Since the provision is having a non-obstinate clause vis a vis Cr.PC, the restriction of Section-193 thereof can not come in the way of such sessions court while exercising power of special court. Some fertile mind can contend that since the provision uses an expression "May", it can not restrict any other court from taking

cognizance. However, this contention can not be accepted. Pertinently Section 190 Cr.PC also uses the expression "May" but no one is saying that any other court can take cognizance under Section-190 Cr.PC. In fact, the expression "May" has been provided only as a discretion to the Court to take cognizance of the matter or not to take cognizance. The expression "May" in Section-190 Cr.PC and in Section-31 POCSO Act is indicative of making of choice on merits and not on making of choice on forums.

7.2. Though, there is now a decision of Hon'ble Supreme Court in ***State vs. V Arul Kumar*** (2016) SCC OnLine SC 582 holding as under:

"Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-bye. Both the alternatives are available. In those cases where chargesheet is filed before the Magistrate, he will have to commit it to the Special Judge."

7.3. The aforesaid cannot be treated as precedent as the same runs contrary to the earlier dictum in ***Essar Teleholdings Ltd. vs. Delhi High Court***, (2013) 8 SCC 1 where the Hon'ble Supreme Court had taken the following view:

*"The Special Judge **alone can take the cognizance** of the offence specified in sub-section (1) of Section 3 and conspiracy in relation to them. While trying any case, the Special Judge may also try an offence other than the offence specified in sub-section (1) of Section 3, in view of sub-section (3) of Section 4. A **Magistrate cannot take cognizance** of offence as specified in Section 3(1) of the PC Act."*

7.2. It has to be accepted that Section-31 POCSO Act excludes the jurisdiction of Magistrate so far as taking cognizance is concerned. Further, since a Special Court can take cognizance without committal of an accused, the necessity of committal can not be insisted upon. And therefore, the Magistrate can also not have any jurisdiction for committal. Even otherwise, for any committal proceeding, the per-requisite is taking of cognizance which is not available for the Magistrate in POCSO Act. So he can not exercise any committal jurisdiction.

8. Special court can take cognizance upon complaint or police report and that too without committal. Clearly, there is no necessity that a Magistrate first looks after the police report or complaint. Means, complaints and police reports are not required to be filed before the Magistrate because he cannot do anything on such complaints or police reports. So the complaints or police reports should be filed with the special court.

9. It is at this stage the basic problem comes into picture. As discussed earlier, in POCSO Act cases, a Magistrate does not have any jurisdiction. Then where would the accused be forwarded to by the initial Magistrate upon expiry of first 15 days? The answer lies some where else.

10. POCSO Act only provides that a Special Court can take cognizance of offence upon complaint or police report. But it does not provide anything as to what will happen thereafter or who will comply with pre-cognizance formalities if any. Section-4 (2) Cr.PC provides that offences even under any other law shall be dealt with according to the provisions of Cr.PC subject to any other law providing separate provisions. Section-5 Cr.PC further saves the special procedure provided by any other enactment.

10.1. POCSO Act does not provide anything about the procedure to be adopted after/before taking cognizance by the Special Court. As such by virtue of Section-4 (2) Cr.PC, the procedure prescribed in Cr.PC has to be followed.

10.2. In a complaint case, Cr.PC requires that procedure prescribed in Section-200 to 204 has to be complied with. There is no doubt that a Special Court under POCSO Act can take cognizance upon a complaint. As such it has to follow the procedure prescribed in Section-200 to 204 Cr.PC. These sections however use the word "Magistrate". Is anyone going to say that since these sections use the word "Magistrate", the Special Court is not required to follow the procedure prescribed in Section-200 to 204? I think, the answer has to be in negative. The Special Court has to follow the procedure. And therefore we have to read "Special Court" in section-200 to 204 instead of "Magistrate".

10.3. Even upon taking cognizance on police report, a process (summons or warrant) has to be issued under Section-204 Cr.PC. Even this section uses the expression "Magistrate". Since the Special Court has to follow the same procedure, we have to read "Special Court" in all such sections instead of Magistrate.

10.4. It is relevant to note that the General Clauses Act, 1897 Section 32 defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word "Magistrate" may include Magistrates who are not specified in the section. Read alongwith the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for several provisions of CrPC.

11. At this stage, some fertile mind is bound to quote some other sections of the POCSO Act to contend that jurisdiction must be exercised by the Magistrate. And one of these, Section 33 reads as under:

"31. Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

11.1. At the first blush, a contention is bound to arise that since provisions of Cr.PC are applicable and Special Court has to be treated as the Court of Sessions for those provisions, it should not be equated with the Magistrate and therefore, the Special Court can not exercise any power under Section-167 Cr.PC for remand of the accused. However, a deeper scrutiny goes to show otherwise. The special court is not a Court of Sessions. It has only been provided with the position by a deeming fiction and therefore it can not stretch such deeming fiction to create a non-existing jurisdiction in some other person or to destroy the other provisions of the Act. Secondly, even this deeming fiction is subject to other provisions of the Act. Certainly, the other provision will include Section-31of the POCSO Act which empowers the Special Court to take cognizance upon complaint or police report. Meaning thereby that for the purpose of Section-31of the POCSO Act, the deeming fiction will not apply and the Special Court can not be treated as the Court of Sessions. Further, in the absence of any contrary provision, the procedure prescribed in Section-200 to 208 Cr.PC have to be followed by the Special Court on taking cognizance. But those sections of the Cr.PC do not talk about the Sessions Court and relate to the Magistrate. However, on the other hand, by virtue of Section-33 of the POCSO Act, the Special Court is a deemed Sessions Court for the provisions of Cr.PC.

11.2. In such circumstances, we can not apply the literal rule of construction. We can not say that Special Court is equivalent to Magistrate for any provisions of the Cr.PC as it would go against the deeming fiction. However, we also can not say that Special Court being a deeming Court of Sessions is not required to follow

the procedure prescribed in Section-200 to 207 Cr.PC as it would go against the Section-4(2) Cr.PC. We have to harmonize the deeming fiction with cognizance power and other applicable procedure. As such, we have to read an expression "Special Court" in Section-200 to 208 Cr.PC instead of "Magistrate".

11.3. Similar stand has been taken by a three judges bench of Hon'ble Supreme Court in ***Harshad S. Mehta v. State of Maharashtra***, (2001) 8 SCC 257though in the context of Criminal Law Amendment Act, 1952. Following extract may be relevant:

"We may note an illustration given by Mr Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section 157 of the Code will have to be sent to the Special Court though the section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of other provisions of the Code. ***If the expression "Special Court" is read for the expression "Magistrate"****, everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation."*

12. Now if we are reading the expression "Special Court" in place of "Magistrate" in several provisions of Cr.PC on the basis of jurisdictional competence of taking cognizance, there seems to be no reason as to why we should not read the same expression "Special Court" in Section-167 Cr.PC when it talks about the jurisdictional competence.

12.1. We should and have to read section-167 Cr.PC as if it uses "Special Court" instead of "Magistrate". Once read in such manner, no doubt will remain on the board. Upon expiry of first 15 days, the "Initial Magistrate" has to forward the accused to the "Special Court" having jurisdiction.

12.2. Hon'ble Supreme Court was once dealing with special judge's power to remand under Section-167 CrPC in the context of Criminal Law Amendment Act 1952 and made following observations in ***State of T.N. v. V. Krishnaswami Naidu,***(1979) 4 SCC 5:

"We will now examine the provisions of Section 167 of the Criminal Procedure Code. Section 167 of the Criminal Procedure Code requires that whenever any person is arrested and detained in custody and when it appears that the investigation cannot be completed within a period of 24 hours the police officer is required to forward the accused to the Magistrate. The Magistrate to whom the accused is forwarded if he is not the Magistrate having jurisdiction to try the case may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. If he has no jurisdiction to try the case and if he considers that further detention is necessary he may order the accused to be forwarded to any Magistrate having jurisdiction. The Magistrate having jurisdiction may authorise the detention of the accused person otherwise than in custody of the police beyond the period of 15 days but for a total period not exceeding 60 days. In the present case the accused were produced before the Special Judge who admittedly is the person who has jurisdiction to try the case. The contention which found favour with the High Court is that the words "Magistrate having jurisdiction" cannot apply to a Special Judge having jurisdiction to try the case. No doubt the word "Special Judge" is not mentioned in Section 167 but the question is whether that would exclude the Special Judge from being a Magistrate having jurisdiction to try the case. The provisions of Chapter XII CrPC relate to the information to the police and their powers of investigation. It is seen that there are certain sections which require the police to take directions from the Magistrate having jurisdiction to try the case. Section 155(2) requires that no police shall take up non-cognizable case without an order of the Magistrate having power to try such case or commit the case for trial. Again Section 157 requires that when the police officer has

reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Section 173 requires that on the completion of every investigation under the chapter the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence a police report as required in the form prescribed. Section 8 of the Criminal Law Amendment specifically empowers the Special Judge to take cognizance of the offence without the accused being committed to him. In taking cognizance of an offence without the accused being committed to him he is not a Sessions Judge for Section 193 CrPC provides that no Court of Session Judge shall take cognizance for any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Strictly he is not a Magistrate for no Magistrate can take cognizance as a Court of Session without committal. The Criminal Law (Amendment) Act being an amending Act the provisions are intended to provide for a speedy trial of certain offences. The Criminal Law (Amendment) Act is not intended to be a complete Code relating to procedure. The provisions of the CrPC are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. Thus read there could be no difficulty in coming to the conclusion that the CrPC is applicable when there is no conflict with the provisions of Criminal Law (Amendment) Act. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiry of the period if the Magistrate having jurisdiction to try the case does not include the Special Judge, it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be a Magistrate having jurisdiction, a charge-sheet

under Section 173 cannot be submitted to him. It is relevant to note that the General Clauses Act, Section 32 defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word "Magistrate" may include Magistrates who are not specified in the section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167."

12.3. The aforesaid ratio and reasoning has been accepted by a three judges bench in ***Harshad S. Mehta vs. State of Maharashtra***, (2001) 8 SCC 257 when it stated "Mr Jethmalani, of course, contends that to the aforesaid extent, *Krishnaswami Naidu case* is not correctly decided. We are unable to accept the contention".

12.4. In view of the above, it is clear that we have to read "Special Court" instead of "Magistrate" in Section-167 CrPC. So even the nearest special court can be treated as nearest magistrate under Section-167 apart from the fact that it has to be treated as jurisdictional magistrate.

13. However, there is one more provision in the POCSO Act which prima facie gives trouble to any interpretation. Section-25(2) of POCSO Act provides as under;

"25(2) The magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code."

13.1. On the basis of this provision, one will say that it casts a duty upon the Magistrate to provide copy of certain document to the victim upon final report being filed and therefore the final report should be filed before the Magistrate.

13.2. I however consider that such interpretation will destroy the other

provisions of the Act. If the final report is to be filed before the Magistrate, he has to act on such final report. The initial act on any such report can only be the consideration of the report for taking or not taking the cognizance. By virtue of Section-28, only Special Court is empowered to try the offence and the same is a deeming sessions court under Section-31, therefore, the Magistrate has to commit the case. But the committal is not required for the trial of offences under POCSO Act and power of cognizance has been given to the Special Court by virtue of Section-33. Therefore, the Magistrate can not take the cognizance neither commit the case. As such, the Magistrate can not act upon the final report filed before it. But the Cr.PC does not leave any discretion with the Magistrate not to act upon the final report. Both the situations can not exist at the same time. So the final report can not be filed before the Magistrate.

13.3. If final report can not be filed before the Magistrate, he obviously can not have any document with him to be provided to the victim. At this stage, nature of provision is required to be understood. This particular provision falls in the Chapter-VI titled as Procedures for Recording Statement of the Child and is a sub-section included after sub-section-(1) of Section-25 which talks about recording of statement of child by the Magistrate under Section-164 Cr.PC.

13.4. Section-25(1) and 25(2) POCSO Act have used an expression "The Magistrate". Use of definite article "The" is indicative of singularity and specification. Section-25(1) starts with a condition "If" and provides for the condition for applicability of the Section. The condition prescribed is the form "If the statement of the child is being recorded under Section-164".

13.5. Pertinently, Section-164 Cr.PC provides that any Metropolitan/ Judicial Magistrate can record the statement irrespective of jurisdictional competence. Since, there is no contrary provision in the Act on this specific issue, by virtue of Section-4(2) Cr.PC we have to accept that even under POCSO Act, any Metropolitan Magistrate in Delhi can record the statement of child.

13.6. From the above, it is clear that for the initial part of Section-25(1) POCSO Act the Magistrate may be any Metropolitan/Judicial Magistrate. But then this sub-section thereafter starts using a definite article "The" before "Magistrate" and has obliged the Magistrate to record the statement as spoken by the child. Clearly, once a Magistrate has been chosen from "Any", he has to become "The Magistrate".

13.7. Second sub-section of Section-25 again uses an expression "The Magistrate". If we take into account the fact that this second sub-section falls in the same section-25 and in the Chapter relating to the recording of statement of child, we can arrive at a conclusion that expression "The Magistrate" appearing in Section-25(2) is indicating the same Magistrate who is recording the statement of the child under Section-25(1). Otherwise without existence of "a Magistrate", there cannot be "The Magistrate" and in Section-25 only one Magistrate exists i.e. the Magistrate who is recording the statement of the child.

13.8. Now if any Metropolitan/Judicial Magistrate irrespective of jurisdiction can become "The Magistrate" for the purposes of Section-25 POCSO Act, how can we expect that he will supply the copy of document to the child? But the provision says so. What to do? There can not be any doubt that the provision has been very badly drafted. But we can not do anything on such drafting causalities. Therefore we have to construe the provision in a manner which fulfills its purpose.

14. Inclusion of this provision in the Chapter-VI titled as Procedures for Recording Statement of the Child and after the sub-section-(1) of Section-25 POCSO Act of which talks about recording of statement of child shows the intention of the Parliament in enacting the provision. Clearly it relates only to the statement of the child. Therefore, the only thing which is to be provided under section-25(2) of the POCSO Act to the child is a copy of the statement. In this light if we see this provision, use of the expression "document" will become significant. There are several documents specified in Section-207 Cr.PC and one of the specified documents is the statement recorded

under Section-164. Absence of plural expression in relation to the document in Section-25(2) indicates that the same does not talk about other documents mentioned in Section-207 Cr.PC in the contextual sense.

14.1. Now, if only one document is to be provided to the child, the same can be done in certain ways. We have already noted that the provision is a result of bad drafting and we are dealing with the situation for providing purposive construction to the provision. Therefore we have to fill the gaps until the Parliament chooses to re-draft the provision. The ways of providing copy may be indicated as following:

i. The Magistrate recording the statement may prepare a copy of the same and send to the Special Court in separate envelope with the original proceedings with a request to provide the same to the child at appropriate stage so that upon filing of final report the copy can be given to the child. After all, the provision does not say that the Magistrate has to give the copy to the child by his own hand;

ii. The Magistrate recording the statement may prepare a copy of the same and retain with his office with a direction that whenever intimation of filing of the final report is received, the same may be given to the child;

iii. The Magistrate recording the statement may prepare a copy of the same and may provide the same then and there to the child as the purpose of the provision is to provide the copy and not to implement a strict "stage wise requirement".

☞ 14.2. The second way is clearly not feasible and practicable. First and third ways may be adopted. The first way does not have any problem. All the requirements of Section-25(2) would be fulfilled by adopting the first way. So far as third way is concerned, this can also not give much trouble if we read a judgment of ***Division Bench of Hon'ble High Court of Delhi in Court on Its Own Motion vs State WP(Crl.) No.-468/2010 decided on 06.12.2010.*** The said judgment held that copy of FIR should be given to the accused even prior to the stage of Section-

207 Cr.PC. Otherwise, the only stage at which an accused was entitled to get a copy of FIR was the stage of Section-207 Cr.PC which comes only after filing of final report by the police. However, the Hon'ble Division Bench made the accused entitled to get a copy of FIR even prior to Section-207 Cr.PC. If we follow the same line, there can not be any hesitation to adopt the third way indicated above for providing a copy of the statement recorded u/s-164 to the child even prior to filing of final report. Be that as it may. Achievement of purpose is more important than the way adopted for it so long as the way is not illegal. The Parliamentary purpose behind enacting Section-25(2) seems to be providing a copy of statement made u/s-164 to the child and the same may be achieved by adopting the first or the third way indicated above.

15. Hon'ble High Court of Bombay in ***Km. Shraddha Meghshyam Velhal vs. State*** (Criminal Application No. 354 of 2013 in High Court of Judicature at Bombay, dated 08.07.2013) has taken a view that all the remand proceedings have to be dealt with only by a special court and magistrate has no jurisdiction at all. It took support from the statement of objects and reasons for enacting the POCSO Act which says that special court is to be established for trial of such offences and for matters connected therewith or incidental thereto and that the Act is enacted for safeguarding the well being of child at every stage of the judicial proceeding. This can hardly be accepted for holding that it provides different procedure for remand so as to bring the same within the exception of Section-4 and 5 CrPC. The aforesaid judgment therefore cannot be followed.

16. From the discussion held above, we can safely say that a person arrested for the offence under POCSO Act has to be produced and dealt with in the following manner:

    a. If Special Court of the area is available, the first production shall be before only such court and remand shall be dealt with by such court only;

    b. Any remand after first one shall be dealt with only by the Special Court;

c. If Special Court is not available for first production, the accused shall be produced before the Illaqua MM/Duty MM as the case may be treating him as the nearest Magistrate and irrespective of any jurisdiction;

d. Such MM can grant remand upto 15 days but thereafter has to forward the accused to Special Court;

e. If Special Court grants remand for a period less than 15 days on first production and for further remand, it is not available for any reason, MM cannot extend the custody. Reason is obvious. Only first production can be made irrespective of jurisdiction and not further production. It is for the system to arrangement for such situation by making a link roaster of appropriate judges who in the absence of presiding officer of Special Court can deal with his work; Similarly, if Special Court after some remand is not available, MM cannot extend the custody.

17. There are several other laws which provides for similar situations such as Electricity Act, MACOCA (applicable to Delhi), UAPA, NIA Act etc. It is learnt that in such laws, the Special Courts are dealing with all or further remand proceedings. There seems to be no reason as to why the same procedure should not be adopted for POCSO Act.

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Recent trends in admissibility of electronic evidence: challenges for legal fraternity

Prem Pratap Singh Chauhan*

Advanced technology and evolution of communication systems have substantially transformed the process of exchanging information in all spheres. The use of digital media in unlawful activities has increased so dramatically that investigation of any criminal activity nowadays produce electronic evidence. However, the rapid growth in the number of cases involving electronic evidence has all-too-often found law enforcement and the judiciary not advanced enough to deal with the new issues evolving out of such evidence. The gathering, conservation, communication and presentation of the digital evidence must fulfil legal requirements for the admissibility of the evidence.[1] Electronic evidence which has been collected during investigation that is not in conformity with the law would be declared inadmissible and be ruled out of court.

Electronic Evidence and the Indian Evidence Act 1872

The kinds of evidence that we are dealing with in this article has been variously described as 'electronic evidence', 'digital evidence' or 'computer evidence'. Digital Evidence is "information of probative value that is stored or transmitted in binary form".[2]

Section 3 of Indian Evidence Act, 1872 fundamentally describes two types of evidence -

a) the evidence of witness i.e. oral evidence, and

b) documentary evidence which includes *electronic records produced for the inspection of the court.* Section 3 of the Evidence Act was amended by virtue of Section 92 of Information Technology Act, 2000 and the phrase "All documents produced for the inspection of the Court" was substituted by "All documents including electronic records produced for the inspection of the Court".

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1. Olivier Leroux, Legal admissibility of Electronic Evidence, 18 IRLCT. 193, 202 (2004).

2. Eoghan Casey, Digital Evidence and Computer Crime 7-8 (3d Ed, 2011).

Electronic Record-

As per Section 2(t) of the Information Technology Act, 2000, the wider connotation has been given to an electronic record. Sec 2(t) defines 'electronic record' as meaning, "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro film".

Legal Recognition of Electronic Records (Section 4 of the IT Act)

Where any law provides that information or any other matter shall be in writing or typewritten or in printed form, then not withstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is- (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference.

Admissions in Electronic Form-

The definition of admission (Section 17 of the Evidence Act) has been changed to include statement in oral, document or electronic form which suggests an inference to any fact in issue or of relevant fact.

Relevancy of Oral Evidence regarding Electronic Evidence-

Section 22A of Evidence Act provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question.

In the context of documentary evidence, in Section 59 of Evidence Act, for the words "Content of documents" the words "Content of documents or electronic records" have been substituted.

Admissibility of Electronic Evidence

New Sections 65A and 65B of Evidence Act are inserted to incorporate the admissibility of electronic evidence in the Evidence Act under the Second Schedule to the IT Act, 2000. Section 5 of the Evidence Act defines that evidence can be given regarding only facts that are at issue or of relevance. Further, ***Section 136 empowers a judge to decide on the matter of the admissibility of the evidence.***

Section 65A of Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B .

Section 65B of Evidence Act provides that notwithstanding anything contained in the Evidence Act, any information contained in an electronic record, is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that all conditions set out in Section 65B are satisfied.[3]

Conditions for the Admissibility of Electronic Evidence

Section 65B (1)

States that if any information contained in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record that has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65B(2) being satisfied.

Both in relation to the information as well as the computer in question such document 'shall be admissible in any proceedings when further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.'

Section 65B (2)-

(a) At the time of creation of the electronic records, the computer that produced it must have been in regular use;

(b) The kind of information contained in the electronic record must have been regularly and ordinarily fed into the computer;[4]

(c) The computer was operation properly; and,

(d) The duplicate copy must be a reproduction of the original electronic record.

Section 65B (4) -

Regarding the person who can issue the certificate and contents of certificate, it provides the certificate doing any of the following things:

(a) Identifying the electronic record containing the statement;

(b) Describing the manner in which the electronic record was produced;

3. Smt. K.B. Agarwal, Admissibility of Electronic Record, Video Recording,, Computer Outputs, Maharastra Judicial Academy (Jun. 20, 2017, 10:04 AM), http://mja.gov.in/Site/Upload/GR/final.html.
4. Vivek Dubey, Admissibility of Electronic Evidence: An Indian Perspective, FRCIJ, Mar. 2017, at 1, 3.

(c) Furnishing the particulars of the device involved in the production of that record.

(d) Dealing with the applicable conditions mentioned under Section 65B (2) of the Evidence Act; and

(e) Signed by a person occupying a responsible official position in relation to the operation of the relevant device.

By referring to the above mentioned definitions in the light of the provisions incorporated under section 65A & 65B of the Evidence Act, **electronic evidence** is now another kind of documentary evidence which is *if duly proved in the manner provided in Sec 65-B*, can be considered as a strong evidence.

Compulsory authentication of Digital Evidence

Over the years, with increased exposure to electronic evidences, there has been a progression from an age of treating electronic evidences as ordinary documents. However, it took the period of nine years before the Supreme Court conclusively decided that documentary evidence in the form of an electronic record can be proved only in conformity with the procedure set out under section 65B of the Evidence Act.

A path breaking case law on electronic evidence is discussed below providing an insight into the proof of electronic evidence.

Anvar P.V. vs. P.K. Basheer & Ors[5]

Fact- Mr. P.V. Anwar filed an appeal, who had lost the previous Assembly election in Kerala, and contended that respondent Mr. Basheer was involved in tarnishing his image and his character by producing songs containing defamatory content on Compact Disk (Cds).

Issue- Can courts admit electronic records as prima facie evidence without authentication?

Held- The Supreme Court declined to accept the admissibility of the electronic records as prima facie evidence without authentication in the court of law. It was held that in regard to any electronic record, for instance a CD, VCD, chip, etc., the same must be accompanied by the certificate according to the terms of section 65B obtained at the time

5. Anvar P.V. vs..P.K. Basheer & Ors, (2014) 10 SCC 473 (India).

of the taking the document, without which, the secondary evidence pertaining to that electronic record is inadmissible. Hence, strict compliance with section 65B is now mandatory for admissibility of the e-mails, web sites or any electronic record in a civil or criminal trial before the courts in India.

Analysis-

(1) In this case, the Supreme Court overruled the decision in the case of ***Navjot Sandhu***,[6] and redefined the evidentiary admissibility of electronic evidences to correctly reflect the letter of the Evidence Act by reinterpreting the application of sections 63, 65 and 65B of the Evidence Act.

(2) This view of the Supreme Court of India is to ensure that the credibility and evidentiary value of electronic evidence is provided for, since the electronic record is more susceptible to tampering and alteration. In its judgement, Kurian J observed, at, that :

"Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice."

(3) This progressive and disciplined approach of Indian courts is a consequence of a proper recognition and appreciation of the nature of electronic records itself. This is landmark decision as it will not only save the courts time wasted in parties attempting to prove the electronic records through secondary oral evidence in form of cross examinations, but also discourage the admission of forged and tampered electronic records.[7]

Recent Trends in Admissibility of the Electronic Evidences

1. Admissibility of Interviews as Evidence: All digital evidence presents the possibility of alteration or fabrication. From an evidentiary standpoint, a traditional authentication foundation, however minimal, likely will suffice for admissibility.[8]

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6. State (N.C.T. Of Delhi) vs. NavjotSandhu@ Afsan Guru, (2005) 11 SCC 600 (India).
7. TejasKaria. et al,The Supreme Court of India re-defines admissibility of electronic evidence in India, 12 DEESLR. 33, 36 (2015).
8. Fredric Lederer, The New Courtroom: the Intersection of Evidence and Technology; Some Thoughts on the Evidentiary Aspects of Technologically Produced or Presented Evidence, 28 SWUL. 1, 5 (1999).

In several recent rulings, our superior courts, by interpreting **Section 273 of the Criminal Procedure Code** in the light of the technological advancements, held that recording of evidence through **video conferencing** would be perfectly legal in the court of law.

In ***State of Maharashtra vs. Dr. Praful B Desai,***[9] the question whether a witness can be examined by means of a video conference was discussed. The Apex Court observed that:

"Video conferencing is a real advancement of science and technology which permits seeing, hearing and talking with someone who is non-physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence".

This *A*pex *C*ourt decision has been followed as precedent in other *H*igh *C*ourt rulings (e.g. ***Amitabh Bagchi vs Ena Bagchi)***[10] more recently, the High Court of Andhra Pradesh ***in Bodala Murali Krishna vs. Bodala Prathima,***[11] held that necessary precautions must be taken to identify the witness and ensure the accuracy of the equipment being used. In addition, any party wishing to avail itself of the facility of video conferencing must meet the entire expense.

In ***Jagjit Singh vs. State of Haryana,***[12] the Hon'ble Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel and determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The comments in this case indicate a trend emerging in Indian courts: **judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.**

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9. State of Maharashtra v. Dr.Praful B Desai, AIR 2003 SC 2053 (India).
10. State of Maharashtra v. Dr.Praful B Desai, AIR 2005 Cal 11 (India).
11. BodalaMurali Krishna v. BodalaPrathima, 2007 (2) ALD 72 (India).
12. Jagjit Singh v. State of Haryana, (2006) 11 SCC 1 (India).

2. Admissibility of Skype as Evidence:

In **Dasam Vijay Rama Rao v. M. Sai Sri**,[13] the Hon'ble High Court of Telangana and Andhra Pradesh permitted the use of skype technology for appearance of party in court. It held as follows:

> *"Technology, particularly, in the information sector has improved by leaps and bounds. Courts in India are also making efforts to put to use the technologies available. Skype is one such facility, which is easily available. Therefore, the Family Courts are justified in seeking the assistance of any particular case. For that purpose, the parties can be permitted to be represented by a legal practitioner, who can bring a mobile device. By using the skype technology, parties who are staying abroad can not only be identified by the Family Court, but also enquired about the free will and consent of such party.*
>
> *This will enable the litigation costs to be reduced greatly and will also save precious time of the Court. Further, the other party available in the Court can also help the Court in not only identifying the other party, but would be able to ascertain the required information."*

3. Admissibility of e-mail as Evidence:

In ***Abdul Rahaman Kunji vs. The State of West Bengal***,[14] the Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B read with Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication.

Their Lordship further observed, inter alia, that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65B are satisfied as observed in the P.V. Anvar case.

4. Admissibility of Cell-phone recording- Evidentiary Value as Evidence:

In ***State (NCT of Delhi) vs. NavjotSandhu @ Afsan Guru,***[15] there was

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13. Dasam Vijay Rama Rao vs. M. Sai Sri, C.R.P. No. 1621 of 2015 (India).
14. Abdul RahamanKunji vs.The State of West Bengal,MANU/WB/0828/2014 (India).
15. State (NCT of Delhi) v. NavjotSandhu @ Afsan GAIR 2005 SC 3820 (India).

an appeal against conviction following the attack on Parliament on December 13, 2001. This case dealt with the proof and admissibility of call records of the mobile telephone. While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the call records of the telephone records, because the prosecution had failed to produce the relevant certificate under Section 65B (4) of the Indian Evidence Act. The Supreme Court held as follows:

> *"150. ... irrespective of the compliance with the requirement of section 65B, which is a provision dealing with admissibility of the electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, section 63 & 65. It may be that the certificate containing the details in Sub-section (4) of section 65B is not filed in the instance case, but that does not mean that secondary evidence can't be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 & 65 of the Evidence Act".*

5. Admissibility of Telephone call in a CD and CDR:

In ***Jagdeo Singh vs. The State and Ors,***[16] the Hon'ble High Court of Delhi, while considering with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate under section 65B of the Evidence Act, the court observed that the secondary electronic evidence without certificate under section 65B of the Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever.

6. Admissibility of Interview telecasted on TV channels as Evidence:

The Apex Court has added a new, and significant, chapter to the conservative criminal jurisprudence and given a role to the media in criminal trials by ruling that interviews given by an accused to TV channels could be considered evidence by courts, whereby enhancing the power of the already powerful media. No doubt such a decision is a fabulous step in the direction of curtailing the misuse of the freedom of speech, which in the recent years has been used to mislead the investigation process. Still there are serious issues that need to be deliberated as to how such a scenario will fit into the existing evidence mechanism.

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16. Jagdeo Singh v.The State and Ors, MANU/DE/0376/2015 (India).

In ***Sharad Yadav and Ors. v. Union of India (UOI) and Anr,***[17] Shri Sharad Yadav in an interview recorded in Hindi, had admitted having received a sum of Rs. 3 lac from one Jain and the said interview was telecasted on Doordarshan after due editing. Hindi version of said interview has been produced before the Court, which is as follows:

"MUJHE CHMMAN BHAI PATEL KE SAATH EK JAIN AIYA THA USNE TEEN LAKH RUPEEYE DIYE HAIN AUR WOH TEEN LAKH RUPEEYE JO CHANDE KE AIYE HAIN WOH MAIN NE KISKO DIYE HAIN PARTY KI TARAF SE WOH BHI LIKHA HUWA HAI"

In this case, it was observed that , the aforesaid video recorded interviews of Shri SharadY adav do not amount to confessions and can't, therefore, be used to complete the offence, with which Shri Yadav was charged. In this case, considering the dicta as observed in ***Palvinder Kaur v. State of Punjab***[18] **and** ***CBI v. V.C. Shukla and Ors*****,**[19] it was further observed that "it would be unfair to admit only the statements against interest while excluding part of the same interview or series of interviews."

In ***Sajid beg Asif beg Mirza v. State of Gujarat,***[20] the Supreme Court dismissed Mirza's petition saying, There is no merit in it. However, it said, "it goes without saying that the relevance and admissibility of the statement, if any, given by accused before the media persons shall be considered at the appropriate state in the trial." Once the "shall" word is used in the direction, then the trial court will definitely consider the admissibility.

Analysis:

The Supreme Court verdict saying that TV interviews can be used as evidence in a case where it has been given, gives more weight to the saying 'Think before you speak'. While this verdict gives more muscle to the media, will it deter the accused from make controversial statements to media. In this light, the Apex Court's order that the trial court could consider admissibility of statements given by an accused to the media, is not only a significant leap in law but also a trend-setter.

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17. SharadYadav and Ors. vs. Union of India (UOI) and Anr, 1999 (51) DRJ 371 (India).
18. PalvinderKaur v. State of Punjab, AIR 1954 SC 354 (India).
19. CBI v. V.C. Shukla and Ors, (2000) 52 DRJ 247 (India).
20. Sajidbeg Asifbeg Mirza v. State of Gujarat,(2007) 1 GLH 400(India).

Challenges to Legal Fraternity

The different categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS and computer generated documents poses unique problem and challenges to legal fraternity for proper authentication and subject to a different set of views. Some of the major challenges are as follows:

(1) Authentication of electronic evidence:

The authentication of digital evidence is one of the biggest challenges that courts have to deal. It has to make sure that the records were not manipulated, altered or damaged between the time they were created and put forward in courts. Justice Muralidhar in one of his speeches, once pointed out:

> "One of the advantages of electronic evidence is the ease with which it can be replicated, but the challenge is how to preserve it and how to make back up records. The possibility of originals getting lost, damaged, or destroyed is a very real one."

Providing the reliability to the evidence from social networking sites sometimes become a questionable task for the courts because firstly establishing the author of the document can be difficult since there are number of people writing on one page of social media sites.

(2) Lack of Readiness:

It is one of the multidimensional concepts that includes technical infrastructure, the process for receiving, playing, storing, retaining and accessing digital evidences. Mainly each court has its different level of readiness in order to handle digital evidence. Many Indian courts do not have essential readiness as it was recognised by the Supreme Court in the ***State of Punjab vs. Amritsar Beverages Ltd.***,[21] -

> *"There are a lot of difficulties faced by investigating officers due to lack of scientific expertise and insight into digital evidences techniques. The court also noted that IT Act does not deal with all types of problems and hence the agencies are seriously handicapped in some respects."*

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21. State of Punjab vs. Amritsar Beverages Ltd, AIR 2007 SC590 (India).

(3) Privacy:

Despite being long struggled with the issue of privacy in other areas, a new concern has been raised by the digital video evidence. It regularly captures the video of those parties that are not even parties to the case. Though individual may not necessarily have an expectation of privacy in public places, but many may feel being included as a bystander in video evidence violates cultural expectations of reasonable anonymity. In solution to this, in most of the cases**,** the privacy concerns used to redecorate or blur out the faces of bystanders before the video being present in court as evidence. But for handling the increasing work load of such issue, the strict redaction policies are needed.

(4) Transporting and storing digital evidence:

Proper considerations should be taken on the methods by which any electronic evidences should **be** transported and stored which is **a** challenge for most of the courts due to lack of proper infrastructure and readiness. While transporting and storing the information, full security should be taken to ensure **that it is not** altered or manipulated. Proper and appropriate storage conditions should be provided in order to protect the hardware and digital evidences from dirt, fluids, humidity, temperature and strong magnetic fields.

How far is it successful?

1. Delivering Simple and Speedy Justice System

In a decision reported in ***Mohd. Hussain @ Julpikar Ali vs. State (Government of NCT of Delhi)***, Hon'ble Supreme Court has observed as follows:

> "A speedy justice and fair trial to a person accused of a crime are integral part of Article 21; they are imperatives of the dispensation of justice".

Thus, the admissibility of digital/ electronic evidence has accelerated the proceedings of the courts in bringing the justice mainly in most complicated cases.

2. Making Criminal Prosecution Easier

Talking about terrorism, recent terrorist attack are caused by using

highly sophisticated technology. For prosecution, it becomes much easier to produce electronic evidence in courts as compared to the traditional forms of evidence which may not even exist.

Conclusion

In 21st Century, we saw rapid rise in the field of information and communication technology. The expanding horizons of science and technology have thrown new challenges to the legal fraternity. Storage, processing and transmission of data on magnetic and silicon medium become cost effective and also easy to handle whereas the conventional means of record and data processing become outdated. Therefore, law had to respond and gallop with the technical advancement.

The appropriate amendments in Evidence Act, incorporated by Indian judiciary show pro-activism. Now, it is needed that the law enforcement agencies and investigating officers have to update themselves with the authentication process prescribed by the court regarding the admissibility of electronic evidences so that impediments in trial procedures can be successfully overcome. The foremost requirement of recent times is the proper training of law enforcement agencies in handling cyber related evidence and correct application of procedure and sections of Evidence Act while presenting such evidence in court.

India has to go a long way in keeping pace with the developments globally. It is clear that India has yet to devise a mechanism for ensuring the veracity of contents of electronic records, which are open to manipulation by any party. The court has to see that the correct evidence is presented and administered so as to facilitate a smooth working of legal system. Sound and informed governance practices along with scrutiny by the courts must be adopted to determine whether the evidence fulfils the three essential legal requirements of authenticity, reliability and integrity. With an optimistic view, the Supreme Court having re-defined the rules, the Indian courts should adopt a consistent approach, and will execute all possible safeguards required for accepting and appreciating electronic evidence.

Let me conclude this paper with a suggestion that there must be a Digital Evidence Act for regulation on incident response.

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Secularism vis-a-vis uniform civil code with reference to triple talaq

Praveen Pratap Singh Tomar*

India is a country of people from diverse religions and backgrounds. As there are many religions, so there are number of personal laws too, that govern the people of different religions. Every religion has its own personal law relating to marriage, divorce, maintenance and succession. There is no uniform civil code in India.

One of the undesirable practices prevailing in our society is divorce. Supreme Court of India recently remarked that the practice of triple talaq (divorce) is the "worst" and "not desirable" form of dissolution of marriage among Muslims under Islamic law.[1] But sometimes, due to existence of some physical and mental defects or according to the condition stipulated in separate binding contract, one of the parties has given the right to the other party to dissolve the marriage. The women have fewer rights than the men under the personal laws.[2] The personal laws give rise to many taboos; for instance patriarchy, early marriage, dowry, domestic violence etc. The society has plonked verdicts on the women. The women not only feel inferior but also helpless. Though the government has made efforts to lift the status of women via implementing civil code, yet there is need to change the thinking pattern of people to give sense of credence to women about their potential.

Divorce under Islamic Law

Islamic law provides four kinds of dissolution of marriage, which are at the initiation of husband, or the wife, or by mutual agreement, or by judicial process. Under Muslim law in general and the Hanafi law in particular, divorce at the instance of husband is prominent and rather simple. One such type is Talaq-ul-Biddat, popularly referred to as Triple Talaq.

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1. Sidharth Pandey, Triple Talaq is 'Worst, Undesirable' way to end Marriage, NDTV (Jul. 6, 2017, 10:04 AM), http://www.ndtv.com/india-news/triple-talaq-is-worst-undesirable-way-to-end-marriage-supreme-court-1692703

2. Archana Parashar, Gender Inequality and Religious Personal Laws in India, BJWA, Spring/Summer 2008, at 103, 105.

Talaq-ul-Biddat (Triple Talaq)

It is a disapproved and sinful form of Talaq.[3] It was introduced by Ommeyyads in order to escape the strictness of law. To be a valid Triple Talaq, it must satisfy the following conditions:

(1) Three pronouncements may be made during a single tuhr in sentence form (e.g. "I divorce thee thrice".) or in three sentences (e.g. I divorce thee, I divorce thee, I divorce thee.).

(2) A single pronouncement made during a tuhr clearly indicating an intention to dissolve marriage irrevocably (e.g. "I divorce thee irrevocably".).

Talaq-ul-Biddat becomes irrevocable when it is pronounced irrespective of the period of iddat. Thus once pronounced, it cannot be revoked.

In ***Saiyyad Rashid Ahmad vs Anisa Khatoon,***[4] one Ghayas Uddin pronounced triple Talaq in the presence of witnesses though in the absence of the wife. Four days later a Talaqnama was executed which stated that three divorces were given. However, husband and wife still lived together and had children. While the husband treated her like a wife, it was held that since there was no proof of remarriage, the relationship was illicit apart from it also conforms the validity of the outcomes. It has been said that this type of Talaq is theologically improper.

In ***Fazlur Rahman vs Aisha*** ,[5] it was held that Quran verses have been interpreted differently by different schools. Thus, it is legally valid for Sunnis but not for Shias.

Triple Talaq: A Clash between Rights and Traditions

Triple Talaq is a recognised but a disapproved form of divorce. It is considered as an innovation within the fold of Shariat by the Islamic jurists. It commands neither the sanction of Holy Quran nor the approval of the holy Prophet.[6] At the present time, much inconvenience is being felt by the Muslim Community, so far as this law of 'triple talaq' is applied in India.

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3. Fazlur Rahman vs Musammat Ayasha And Ors. (1929) 115 Ind Cas 546 (India).
4. Saiyyad Rashid Ahmad v. Anisa Khatoon, (1932) 34 BOMLR 475 (India).
5. Fazlur Rahman v. Aisha, (1929) 115 Ind Cas 546 (India).
6. Parul Chaudhary, Gender Inequality in Hindu and Muslim Personal Laws in India, IJHS, Apr. 2015, at 34, 35.

Triple Talaq Infringes the Rights of Muslim Women

1) Against the progressive spirit of Quran

Holy Quran, the paramount source of Islamic jurisprudence has not ordained that three divorces pronounced in single breath would have the effect of three separate divorces.[7] Instead Quran provides that in case of conflict between husband and wife, it should be referred to arbitration and the result of failing of peaceful settlement, divorce is permitted but subject to observation of the period of iddat which keeps open the possibility of reconciliation between both.

This idea is expressed in ***Chapter II Verse 229*** of Quran

"Either retain them with humanity or dismiss them with kindness"[8].

In *Dagdu Chottu Pathan v. Rahimbi Dagdu Pathan*,[10] a full bench of Bombay High Court took the view that a Muslim can give talaq but subject to certain conditions:

a) On a reasonable ground

b) Has to follow the provision of arbitration or reconciliation

In ***A. Yusuf Rawther vs. Sowramma***, V.R. Krishna Iyer, J. (as His Lordship then was), observed that:

> *"It is a popular fallacy that Muslim men enjoy unbridled authority to liquidate their marriage under Quranic law and the view that Muslim men enjoy an arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunctions. It was also observed in this case that commentators on the Holy Quran have rightly observed that the husband must satisfy the Court about the reasons for divorce, which view tallied with the law administered even at that time (almost five decades ago) in some Muslim countries like Iraq. Although Muslim law as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy Quran propounds and the same misconception also vitiates the law dealing with a wife's right to divorce."*[11]

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7. Frances Raday, Traditionalist Religious and Cultural Challengers- International and Constitutional Human Rights Responses, ILF, Mar. 2009, at 595, 601.

8. S.N. Balasundaram, The Conflict Between Tradition and Modernity – the Desire for a Common Civil Code in India, , DJRP, Mar. 1986, at 236, 242.

9. Dagdu Chottu Pathan v. Rahimbi Dagdu Pathan, (2003) 1 BomCR 740 (India).

10. A. Yusuf Rawther v. Sowramma , JT 2010(10) SC 202 (India).

11. A G Noorani, Uniform Civil Code vs. Triple Talaq, T. I. EXPRESS, December 15, 2016, at 13.

2) Ultra Vires the Constitution

The practice of Triple Talaq gives a unilateral and absolute right to Muslim men to give irrevocable talaq even without the consent of their wives. This practice is highly discriminatory in nature because it deprives the Muslim women of their protection, economic security and marital status within a matter of seconds. This practice not only disturbs the social fabric of the society by making the institution of marriage extremely fragile but also diminishes the status of women in the society by taking away their right to equality and right to live a dignified life. Strangely, the wife would have to go to Darul Qaza and prove the atrocities committed by her husband in order to get a divorce while the husband can pronounce talaq as and when he wishes even without any reasonable cause. Thus, it is evident that in such situations the wife is under the constant fear of being divorced which compel her to accede to all the demands of her husband.

In ***Praveen Akhtar vs. Union of India***,[12] the Madras High Court observed that:

> *"The inequality and arbitrariness of the provision of Triple Talaq clearly reflects in the fact that the woman was not even told directly by the husband about the talaq but was informed by her father".*

Therefore, this practice of triple talaq is a clear violation of the fundamental rights of the Muslim Women as enshrined under Article 14, Article 15 and Article 21 of the Indian Constitution. As reference to the practice of religion, the courts have ruled in many cases that only those practices of whichever religion, as are its essential parts must be legally protected. In other words, protection of non-essential religious practices would be the discretion of the state and can't be claimed to be protected on the name of fundamental rights.[13]

3) Triple Talaq violates CEDAW to which India is signatory

India has ratified many International Conventions and human right treaties and have committed to securing equal rights and protection of women in all spheres of life. One of such convention is Convention on Elimination of All Forms of Discrimination against Women (CEDAW) which was ratified by India in 1993. Under this convention India is obliged to observe the Article

12. Praveen Akhtar v. Union of India, (1979) 2 SCC 316 (India).
13. Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388 (India).

51(A) (e), 15 (i), 15 (3), 39 (a) & 39 (d) of its Constitution and endeavour to make special provisions for the upliftment of women.

4) From a Human Right Perspective

It is evident that some of the very basic human rights of the Muslim women are being violated by the practice of Triple Talaq in India. When referring to the brief format of the **United Nations Declaration of Human Rights**, Article 2-7 states that,

> "*Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language,* ***religion****, political or other opinion, national or social origin, property, birth or other religious status…Everyone has the right to life, liberty and security of person...No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…Everyone has the right to recognition everywhere as a person before the law…All are equal before the law and are entitled without any discrimination to equal protection of the law…*".[14]

Further, Article 16, 1 states that,

> "*Men and women of full age, without any limitations due to race, nationality or religion, have the right to marry and to found a family. They are entitled* ***rights as to marriage, during marriage and at its dissolution***".[15]

Thus **United Nations Declaration of Human Rights** provides for rights of women, however, it fails to take note of the oppression that women face due to religious and cultural practices. Therefore, this UNDHR document does not address the underlying issue of religion used as a means to deny basic human rights.

Uniform Civil Code (UCC) and Secularism

The debate for Uniform Civil Code, with its diverse implications, is one of the most controversial issues of the Indian politics in twenty-first century. The Apex Court of the Country in its various judgements has pressed the legislature for framing the Uniform Civil Code which will regulate all the religions with the same yardstick.

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14. United Nations, United Nations Universal Declaration of Human Rights 1948, UN, (Jul. 7, 2017, 10: 18 AM), http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf
15. Id.

Meaning of Uniform Civil Code (UCC)-

Uniform Civil Code means that all sections of the society irrespective of their religions shall be treated equally with regards to the personal matters (i.e. marriage, divorce, maintenance, inheritance, adoption etc.)**.** It is based on the premise that there is necessarily no connection between religion and personal laws in a civilized society. In simple terms, Uniform Civil Code is a proposal to replace the personal laws based on the scriptures and customs of each major religious community in India with a set of governing laws for every citizen.

Constitutional Provisions for Uniform Civil Code

Part IV, Article 44 of the Indian Constitution states that,

> "*The State shall endeavour to secure the citizen a Uniform Civil Code throughout the territory of India*".[16]

Further, Article 37 of the Constitution itself makes it clear that the Directive Principles of the State Policy "*shall not be enforceable by any court*". Nevertheless, they are "*fundamental in the governance of the country*". This indicates that although our Constitution itself believes that a Uniform Civil Code should be implemented in some manner, but it does not make this implementation mandatory.[17]

Once during the Constituent Assembly debates, K.M. Munshi, a member of the Constituent Assembly, said by quoting the examples of Egypt and Turkey,

> "*Nowhere in advanced Muslim countries has the personal laws of each minority been recognized as so sacrosanct as to prevent the enactment of a Civil Code".*[18]

Changing Perceptions of Secularism

Secularism has become an accepted notion universally, but time and again due to religious institutional framework of mala-fide intention, the world peace is threatened over the years. *"*Secular*"* could be equated to

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16. Sattwik Shekhar, Has The Time Come For A Uniform Civil Code In India?, MANUPATRA (Jul. 7, 2017, 11: 02 AM), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=77d942f9-1b04-4418-9c7b-78d495455b3d&txtsearch=Journal:%20www.mightylaws.in

17. M.P. Singh, On Uniform Civil Code, Legal Pluralism and the Constitution of India, JILS, Monsoon 2014, at 5, 8.

18. Shalina A. Chibber, Charting a New Path Towards Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code, ILJ, Spring 2008, at 695, 708.

'mercury' which could adapt to the shape of container, thus people and government interpret the term at their whims and fancies.

The concept of secularism was imported from Europe by Jawahar lal Nehru. Although the term 'secularism' was not included anywhere in the Constitution as it was originally passed in 1949, the framers of the Constitution had in their mind as to what they meant by secularism. Dr. B.R. Ambedkar, Chairman of the Drafting Committee, while participating in the debate in Parliament on the Hindu Code Bill in 1951, explained the concept of secularism as follows:

> "*It (Secular State) does not mean that we shall not take into consideration the religious sentiments of the people. All that a Secular State means is that this Parliament shall not be competent to impose any particular religion upon the rest of the people. This is the only limitation that the Constitution recognises".* [19]

Constituent Assembly Debates concluded with 'Equal respect' theory and Jawaharlal Nehru formulation of secularism was followed i.e. ***Sarvadharma Sambhava*** (Goodwill towards all religion) and ***Dharma Nirpekshata*** (religious neutrality). However, secularism in India has strayed from the stipulated path. Nehru did not define secularism properly and politicians took advantage of his failure to elucidate the concept. Instead of shedding religious partisanship, the pseudo-secularists fomented it in order to capture vote banks.[20]

Therefore, The Preamble of the Constitution of India was amended by the 42nd Amendment Act 1976 to incorporate the term 'Secularism'. But Goa Uniform Civil Code upholds the Indian Secularism.

In ***S.R. Bommai vs. Union of India,***[21] B.P. Jeevan Reddy, J., observed:

> *"...while the citizens of this country are free to profess, practise and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e. from the point of view of the state, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally."*

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19. M.V.Pylee, Our Constitution, Government and Politics 52 (Universal Law Books 2000).
20. Anand Shankar Pandya, Indian Secularism: A Travesty Of Truth And Justice 10 (Aswad Prakashan Pvt. Ltd., 1st ed. 1998).
21. S.R. Bommai v. Union of India, AIR 1994 SC 1918 (India).

In ***Sardar Taheruddin Syedna Saheb vs. State of Bombay***[22] wherein Ayyangar, J., explained:

> *"Article 25 and 26 embody the principle of religious tolerance that has been the characteristics feature of Indian civilisation from the start of history. The instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasise the secular nature of the Indian democracy which the founding fathers considered to be very basis of the Constitution".*

In ***Kesavananda Bharti vs. State of Kerala***,[23] Sikri, C.J. named '*secular character of the Constitution*' since independent India was to be democracy, secularism was a *fait accompli* it was further observed:

> *"It is essential for the proper functioning of democracy that communalism should be eliminated from Indian life."*[24]

Further, in *T.M.A. Pai Foundation case*,[25] Ruma Pal, J., artistically distinguished Indian secularism from American secularism by calling Indian secularism "a salad bowl" and not a "melting pot".[26]

Finally in ***A.S. Narayan Deekshitulu vs. State of A.P.***,[28] A Ramaswamy, J. quoting extensively from the scriptures states:

> *"The word 'Dharma' or 'Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well being and progress of mankind; whatever conduces to the fulfilment of these objects is Dharma, it is Hindu Dharma and ultimately 'Sarwa Dharma Sambhava'. Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat".*[29]

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22. Sardar Taheruddin Syedna Saheb v. State of Bombay, AIR 1962 SC 853, 871 (India).
23. Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 292 (India).
24. B Shiva Rao, The Framing of India's Constitution: Select Documents, GOIP, Apr. 1968, at. 585, 593.
25. T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 (India).
26. Christian Medical College Vellore & Ors v. Union of India And Ors., LNIND 2013 SC 662 (India).
27. Khusheer Ahmed Khan v. State of UP & Ors, (2015): Civil Appeal No 1662, SC (India).
28. A.S. Narayan Deekshitulu v. State of A.P, 1996 AIR 1765 (India).
29. Vikramjeet Banerjee and Sumeet Malik, Changing Perceptions of Secularism, EBC (Jul. 7, 2017, 11:07 AM), http://www.ebc-india.com/lawyer/articles/9807a1.htm

The Judiciary has with minor deviations, stuck to its original stance of 'secularism' not being a wall between the Church and the State, but a sense of toleration between people of different religions through "*Sarva Dharma Sambhava'*.

Judicial Pronouncement in Favour of the Implementation of Uniform Civil Code

Sarla Mudgal and Others vs. Union of India[30]

In this case, the question was whether a Hindu husband married under the Hindu law, by embracing Islam, can solemnise second marriage. The Court held that the Hindu marriage solemnized under the Hindu law can only be dissolved on any of the grounds as specified under Section 13 of the Hindu Marriage Act 1955. Conversion into Islam and marrying again would not by itself dissolve the Hindu marriage under the Act and thus, a second marriage solemnized after converting into Islam would be an offence under Section 494 of the Indian Penal Code.

Justice Kuldeep Singh, while delivering this landmark judgement remarked:

> *"When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of 'Uniform Civil Code' for all citizens in the territory of India".*[31]

Arguments in Favour of Uniform Civil Code

(a) Since Indian society is patriarchal and misogynistic in nature, by allowing old religious rules to continue to govern the family life, we are condemning the Indian women to subjugation and mistreatment. Therefore, uniform civil code will help in *improving the conditions of women* in India.

(b) Personal laws have loopholes. By allowing personal laws, we have constituted an alternate judicial system which operates according to thousands of years old values. Therefore, uniform civil code would change that.

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30. Sarla Mudgal and Others v. Union of India,1995 AIR 1531 (India).

31. Mr. K G Balakrishnan, Individual Rights in India: A perspective from the Supreme Court, IRC, Apr. 2007, at 1, 14.

(c) Uniform civil code doesn't mean that it will limit the freedom of people to follow their religion, it just mean that every person will be treated same and all citizens of India have to follow the same laws irrespective of their religions. Therefore, it will *promote real secularism.*[32]

(d) Since *change has been law of nature*, minority people should not be allowed to pick and choose the laws under which they want to be administered. These traditional personal laws were framed in specific spatio-temporal context and should not stand in a changed time and context.

(e) The unification and codification of the variegated personal laws will produce a more coherent system of laws. UCC will reduce the existing confusion and enable easier and more efficient administration of laws by the judiciary.

Challenges

(1) The task of actually devising a set of rules that will govern all communities is a very formidable and tedious one considering the vast range of interests and sentiments to be accounted for.[33]

(2) Misinformation about UCC the content of UCC has not been spelt out leading minorities to believe that it is the way of imposing majority views on them.

(3) Lack of political will due to the complexity and sensitivity of the issue.

The opponents of the Uniform Civil Code argued that personal laws are derived from their religious beliefs. It may be prudent not to disturb them by enacting a common code, as this runs the risk of engendering a great deal of animosity and tension between various religious communities. Since, India being a secular country guarantees its minorities the right to profess and promote their religion, culture and customs as enshrined under Article 29 and 30 of its Constitution. Therefore, implementing a Uniform Civil Code will hamper India's secularism. Thus, the implementation of the uniform civil code has become next to impossible.

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32. Amrita Tripathi, The Uniform Civil Code in India, LAW FIRM BLOG (Jul. 7, 2017, 10:09 AM), https://lawfarm.in/blogs/the-uniform-civil-code-in-india--analysis-of-the-pros-and-cons

33. Werner Menski, The Uniform Civil Code Debate in Indian Law; New Development and Changing Agenda, GLJ, Mar. 2008, at 211, 216.

Conclusion- The way forward

India is a unique blend and merger of codified personal laws of Hindus, Muslims, Christians and Parsis. There exists no uniformity in family related laws in a single statutory book for all Indians which are acceptable to all religious communities who co-exist in India. However, majority of them believe that uniform civil code is definitely desirable and would go a long way in strengthening and consolidating the Indian nationhood but differ at its timing and the manner in which it should be realized. Instead of using it as an emotive issue to gain political advantage, political and intellectual leaders should try to approach a consensus on this sensitive issue.

"Religion is a matter of belief, belief is a matter of conscience, and freedom of conscience is the bedrock of modern civilization. In a multi-religious country like India which has opted for a secular State, it is the right of every citizen to elect to be governed by secular laws in matters personal and it is the duty of the State to provide an optional secular code of family laws. But, the Indian Parliament is adopting an ambivalent attitude due to political compulsions".[34]

Here, the question is not of minority protection, or even of national unity, it is simply one of treating each person with the dignity that he deserves; something which personal laws have so far failed to do.

The **Kochi High Court** recently very well remarked:

> ***"The need for common civil code though it is debated at different levels still it remains a mirage for want of agreement among different groups. There are many areas in which religious laws can be reconciled with secular law without there being a conflict of each other. It is possible to have a common code at least for the marriage law in India"***.

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34. S A Kader, Muslim Law of Marriage and Succession in India 45-55(Eastern Law House 1998).

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35. Mahir Haneefi, Kerala HC wants talaq power taken away from Muslim Men; Recommends Uniform Marriage Code, TOI, December 17, 2016, at 2.

Nature as a Legal Person-Recent Judicial Developments

Pramod Kumar Kushwaha

INTRODUCTION

On March 20,2017,the Hon'ble Uttarakhand High Court passed a remarkable judgement, in the case of ***Mohammad Saleem vs. State of Uttarakhand,*** wherein it was held that river Ganga and Yamuna are living entity/legal person/juristic person. It is important to point out that the High Court has not recognised 'rivers' per se as living being. It has recognised only rivers Ganga and Yamuna and its tributaries as living entity/legal person. So the first question comes in mind that who is juristic person/legal entity/ legal personality? According to Salmond:-

> *"Person is any being whom the law regards as being capable of rights and duties. This being doesn't always have to be a human."*[1]

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases like corporate personality, body politic, charitable unions etc. Legal persons have rights and co-relative duties; they can sue and be sued, can possess and transfer property. A person has different connotations in different countries like in Roman laws; slaves were not considered as persons thus devoiding them of basic rights.

Before India declared the rivers Yamuna and Ganga as legal or juristic persons and enjoying all the rights, duties and liabilities of a living person, a court in New Zealand declared its third longest river, the Whanganui, as a legal person.

Similar to the way corporate personality works in some countries, these rivers can now conceivably incur debts and own property, but more importantly, it means these rivers can petition courts (with the help of legal guardians, of course) to protect themselves from pollution and misuse. But by granting personhood status to something that is so clearly not a person, have the courts set both New Zealand and India down a path where literally anything could be afforded the same incongruous status. What will be the effects of these judgements in the future?

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1. Salmond, J. W., & Fitzgerald, Salmond on jurisprudence. Bombay: Tripathi. 1985

JURISPRUDENTIAL APPROACH OF LEGAL PERSONALITY/ ENTITY

A person is juridically classified in two groups: natural persons and legal persons. The first group refers to a human being, who is an individual being capable of assuming obligations and capable of holding rights. The second group refers to those entities endowed with juridical personality who are usually known as a collective person, social person, or legal entity. According to Francisco Carnelutt

> *"The person is the "meeting point of two elements ((economic element and legal element), that is, the crux of the matter where both converge." Carnelutti clarifies that the juridical person is not only the man considered in his individuality. Instead, Carnelutti affirms that where collective interest exists, i.e. leading several men as one, unity is allowed to emerge, and personality as a unit will be acquired*"

The collective juridical person, as Carnelutti expresses, is created when the economic element and the juridical element of the relationship is the meeting point of more than one man, which is the fundamental principle of this unification of the collective interest. For Carnelutti, a juridical person is a natural or individual person as well as a collective or compound person, and both hold a common characteristic: they are the meeting point of the economic and juridical element. The latter differs from the fact that it is not a single individual in that position; instead it is two or more individuals who are united by a collective interest.

Julien Bonne case on the other hand, defines the juridical personality law as a set of rules and institutions that apply to the person itself, in its individuation and its power of action. For him, the personality law is classified in three parts:

1. The existence and individuation of persons, which means the set of elements that allow on one hand social distinction of the person, and on the other hand, a determination of juridical effect. The elements that allow for further distinction are its name, its legal status, and its address.
2. The legal capacity of natural persons and their variations: on one hand the guidelines of the organization in regard to capacity of natural persons and their variations (capacity to enjoy and

exercise capacity with their limits), and on the other hand the study of the legal bodies which substitute for the incapacity of natural persons.

3. The existence, individuation, and capacity of legal entities or juridical persons, which is the subject matter of this paper. M.F.C. de Savigny is the strongest proponent of the traditional theory, better known as the theory of fiction.

CHARACTER OF LEGAL A PERSON: MODERN APPROACH

1. Legal persons are also termed "fictitious", "juristic person", "artificial" or "moral person".
2. Legal person is being, real or imaginary whom the law regards as capable of rights or duties.
3. According to the law, idiots, dead men, unborn persons, corporations, companies, idols, etc. are treated as legal persons.[2]
4. The legal persons perform their functions through natural persons only.
5. There are different types of legal persons, like- Corporations, Companies, President, Universities, Societies, Municipalities, Gram Panchayats, etc.
6. Legal person can live more than 100 years. Example: (a) the post of "American President" is a corporation, which was created some three hundred years ago, and still it is continuing. (b) "Tata Iron and Steel Industry" was established in eighteenth century in India, and now still is in existence.

It may have come as a surprise to many when God, Bhagwan Sri Ram Virajman, fought litigation for the last 21 years before the Lucknow Bench of Allahabad High Court through his representative, Deoki Nandan Agarwal and has now won ownership rights over the disputed site in Ayodhya.

Can a deity, like a normal human being, fight a legal battle? The High Court replied in the affirmative. The Court is of the view that place of birth that is Ram Janmabhoomi, is a juristic person. In the Indian judicial system, deities have always been regarded as legal entities that can fight their case

2. S.N.Dhyani, Jurisprudence (Indian Legal Theory), Central Law Agency, 2010, p. 245

through the trustees or managing board in charge of the temple in which they are worshiped. The ancient Indian system of law recognized Gods as legal entities. Many of the lands around Chidambaram temple, for example, were registered as property of "Nataraja." Alas, under the British, many men named Nataraja successfully claimed vast swaths of land as their own.

The Supreme Court, in ***Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi, vs. State of UP***[3] recognized, though not for the first time, the right of a 'Deity' to move court and said properties of endowment vest in the deity, Lord Sri Vishwanath. It dismissed the claim of the priests that they alone had the right to manage the temple on behalf of the deity and said management of the temple by mahant/pandas/archakas did not mean it became their property. It upheld the Act saying it was merely for better management of the temple.

RECENT DEVELOPMENT

In the month of March, 2017 the world has gained three notable new legal persons: the Whanganui River in New Zealand, and the Ganga and Yamuna rivers in India.

In New Zealand, the government passed legislation that recognised the Whanganui River catchment as a legal person. This significant legal reform emerged from the longstanding Treaty of Waitangi negotiations and is a way of formally acknowledging the special relationship local Māori have with the river. In India, the Uttarakhand High Court ruled that the Ganga and Yamuna rivers have the same legal rights as a person, in response to the urgent need to reduce pollution in two rivers considered sacred in the Hindu religion. This was then followed by a much wider order dt. 30.03.2017 passed in another unconnected public interest litigation, W.P.PIL No. 140 of 2015, ***Lalit Miglani vs. State of Uttarakhand***, which declared glaciers, including Gangotri and Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls as legal persons.

The Lalit Miglani PIL is an overarching one, dealing with pollution of the river Ganga. The Petitioner is an advocate practising before the Uttarakhand High Court and his petition essentially contended a gross failure by all the governmental authorities (both central and state) in

discharging their statutory duties to prevent pollution of the Ganga. In this PIL, the High Court had passed an extremely detailed Order date 02.12.2016 highlighting the desperate situation that had been reached in terms of the pollution of the river Ganga. In its order date 02.12.2016, the Court held that every citizen has a right to clean water under Article 21 of the Constitution, highlighted the importance of the river Ganga to the Hindus and noted the rapid deterioration of the quality of the river. The Court then proceeded to issue a whole host of mandatory directions which included the following:

(i) a direction to the Union of India to establish an inter-State Council under Article 263 of the Constitution for all the riparian states of the Ganga within three months for making recommendations for the rejuvenation of the river;

(ii) various directions towards the establishment of Sewage Treatment Plants;

(iii) directions for taking action against/closure of polluting industries;

(iv) directions to take actions against Ashrams and other establishments that let out untreated sewage into the river, etc. The Court also recommended that the Union of India frame a law exclusively for the Ganga to save it from extinction.[9]

Despite such an elaborate order being passed, the Court was faced with a situation of gross non-compliance of its directions.

Two other points are worth mentioning here. Firstly, the Court, in its order date 02.12.2016, recognized that the issue of pollution of the river Ganga involved many States, and suggested that an inter-State mechanism be evolved to solve the problem. Secondly, the Court stayed within the bounds of well-established principles of environmental law to justify the directions that it made.

EARLY RESPONSES TO THE MOHAMMAD SALEEM CASE:-

The Mohammad Saleem case directions attracted widespread attention for their novel approach, but some early commentators reacted,

9. Lalit Miglani vs State Of Uttarakhand And Others on 2 December, 2016 Writ Petition (PIL) No.140

rightly, with caution. Prominent environmental lawyer Mrs. Shibani Ghosh, in her article highlights how the Mohammad Saleem case transformed, in a succession of "logical leaps", from one pertaining to illegal encroachments to one concerning the protection of the health and well-being of two rivers. She points to the Court's failure to articulate how the grant of legal personhood to the rivers would be a sequitur that follows from the premise that rivers provide "physical and spiritual sustenance" to half of India's population. Finally, she concludes that the Mohammad Saleem orders can hardly be considered a game-changing development.

In my humble opinion, few points may be pondered over regarding the grant of personhood to a river. Firstly, the limited scope of the orders - the Court's protection did not extend to associated lakes or wetlands, catchment areas or other parts of the river basins. Secondly, how the orders did not envisage any role for the community in the protection of the Ganga and the Yamuna, but vested stewardship solely with the government authorities. Thirdly, the "human-centric" approach of the High Court which appeared to have recognized rivers' rights based on the value of rivers for "socio-political-scientific development" and the spiritual significance of the Ganga and Yamuna for Hindus, instead of the intrinsic identity or status of the river. Finally, why just these two rivers?

The Lalit Miglani Order is heartening as regards three aspects. Firstly, it acknowledges that other riparian states have stakes in the protection of rivers. Thus, the appointment of "persons in loco parentis" is restricted to the State of Uttarakhand. The implication seems to be that other states can appoint their own "persons in loco parentis" for the protection of resources within their territory. Secondly, the Order acknowledges the importance of community participation. Thirdly, it expands the personhood principle to a whole host of other natural geographical features other than the Rivers Ganga and Yamuna.

Conclusion

It is perhaps a good starting point to debate the conferral of personhood of important natural resources as a strategy for their conservation, but as ever, the devil lies in the details. The mere grant of legal personhood may not achieve much, without developing effective community based stewardship frameworks for the protection and

conservation of such resources, especially in the face of known government inaction and failure. Though the Court, in its latest order, has moved towards recognizing community participation, it is clear that a lot more calibration is needed in choosing the correct community representatives and ensuring that their participation is taken seriously.

In both cases, there are still big questions about the roles and responsibilities of the rivers' guardians. How will they decide which rights to enforce, and when? Who can hold them to account for those decisions and who has oversight? Even in the case of the Whanganui River, there remain biting questions about water rights and enforcement. For instance, despite (or perhaps because of) longstanding concerns about levels of water extraction by the Tongariro Power Scheme, the legislation specifically avoids creating or transferring proprietary interests in water. Ultimately, both of these examples show that conferring legal rights to nature is just the beginning of a longer legal process, rather than the end. Although legal rights can be created overnight, it takes time and resources to set up the legal and organisational frameworks that will ensure these rights are worth more than the paper they're printed on.

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