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Research Papers

Book Review

Case Comments

Pragyaan: Journal of Law

From the Chief Editor

It gives us great pleasure to present to readers, the Volume 10, Issue 1 of the Pragyaan: Journal of law, which is the product of our correspondence, collaboration and contribution over the years by the esteemed scholars whose scholarly research articles are published in our Journal.

This Volume of the Pragyaan is fully immersed with publications which have attracted high quality submissions with variety of research topic undertaken by Indian legal fraternity. We are pleased to present eleven articles which in themselves are putting forth better understanding of a range of issues which are of contemporaneous importance.

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We offer scholars to contribute their research work, either individually or collaboratively for their own development and simultaneously for making the journal a leading journal among legal fraternity.

We acknowledge the support of our faculty advisors, the hard work of editorial staff and the interest shown by the contributors and readers that we have been able to come out successfully year after year with each volume . I express my sincere thanks to all our contributors, members of Advisory board and referees whose untired efforts made the publication of the journal possible

Prof. (Dr.) R.N. Sharma

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CONTENTS

Case Comments

Admissibility and Relevancy of Electronic Evidence in India: A Dynamic March

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ABSTRACT

In the present era the societal correspondence occurs through the exchange of contemplations shape physical world to electronic world. The virtual world rotates around the utilization of data and correspondence mechanical gadgets, for example, PCs, cell phones, printers, computerized cameras and so on. Not at all like, true, the virtual world, causes numerous open doors for the commission of offenses, for example, phishing, fraud, youngster explicit entertainment and hacking and so on. Electronic data is regularly significant in demonstrating or discrediting a reality or actuality at issue, the data that constitutes confirm under the steady gaze of the court. According to Black's Law Dictionary, evidence is "something that tends to prove or disprove the existence of an alleged fact."Electronic evidence, for the purpose of this paper, may simply be defined as a piece of evidence produced by some electronic or mechanical processes. It includes but is not restricted to emails, text documents, spreadsheets, hard drives, tape drives, CD-ROMs, images, graphics, database files, deleted files, data back-ups, located on floppy disks, zip disks, PDAs, cellular phones, microfilms, pen recorders and faxes etc. As far as Indian Law of Evidence is concerned, it was not at par with modern technological enhancements. Hence, to recognize the transactions that are carried out through electronic data interchange and other means of electronic communication, it had become essential to regularly update the law.

Keywords: Electronic Evidence, Admissibility, Relevancy, Information Technology, Digital Evidence.

Introduction

Electronic Evidence has been included into a principal mainstay of correspondence, preparing and documentation, due to gigantic development in e-administration, all through the Public and Private Sector. These different types of electronic confirmation are progressively being utilized as a part of both Civil and Criminal Litigations. Amid trials, judges are frequently solicited to manage on the acceptability from electronic confirmation and it generously impacts the result of common claim or conviction/vindication of the denounced. The court keep on grappling with this new electronic wilderness as the one-of-a-kind sort of e-prove and also the straight forwardness with which it can be manufactured or adulterated, makes obstacle to tolerability not looked with alternate confirmations. The different classes of electronic proof, for example, site information, interpersonal organization correspondence, email, SMS/MMS and PC produced records postures one of a kind issue and difficulties for legitimate confirmation, provided a substitute disposition of perspectives. By the virtue of Section 92 of Information Technology Act, 2000 (before amendment), The Indian Evidence Act has been amended. Section 3 of the Act had been amended 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". With respect to the documentary evidence, as provided for in Section 59, for the words "Content of documents", the words "Content of documents or electronic records" have been substituted. To incorporate the admissibility of electronic evidence, Section 65A & 65B were inserted to it.

Enactment of IT Act, 2000 and Amendments with instances to Digital Evidence

This segment manages the standards overseeing suitability of electronic confirmation inside the lawful structure of the Indian law of proof. In the year 2000, Parliament enacted the Information Technology Act 2000 (IT Act) to allow for the admissibility of digital evidence,[1] which came to amend the Indian Evidence Act 1872 (IEA), the Indian Penal Code of 1860 (IPC) and the Banker's Book Evidence Act of 1891. In order to make the electronic evidence admissible, the definition of 'evidence' has been amended to include electronic records.[2]

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[1] The IT Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, 1996.

[2] Sec. 3, The Indian Evidence Act, 1872.

Proof and Admissibility of Electronic Evidence

The provision which deals with the issue of mode of proof of electronic evidence under the Law of evidence are:

a) Admission

The term "admission" includes a statement given orally, in a documentary or electronic form which hints to a speculation with any fact at issue or fact of relevance.[3] Unless the genuineness of the electronic record produced is in question, the oral admissions regarding the contents of electronic records are not relevant.[4]

b) Statements as part of electronic record

Where any statement is part of an electronic record,[5] the evidence of it must be given to the court as it deems it necessary in that particular case to understand the nature and effect of the statement and the situation under which it was made. This provision deals with statements which forms a part of a longer statement, a conversation or a part of an isolated document, or statements that are contained in a document which constitutes part of a series of letters or papers or book.

c) Admissibility of electronic evidence

Under the Laws of Evidence, an evidence can be given regarding only facts in issue or of relevance.[6] Whereas, section 65A of the Act lays down that the contents of the electronic records may be proved, keeping in mind the provisions laid down in Section 65B. Section 65B provides that notwithstanding anything contained in the provisions of the Act, any information which is contained in an electronic record, i.e., the contents of a document or communication printed on paper that has been stored, recorded and copied in optical or magnetic media produced by a computer output, is deemed to be a document and is admissible as evidence without further proof of the original's production, provided that the conditions laid down in Section 65B (2) to (5) are satisfied.

D) Conditions for the admissibility of electronic evidence

Before a computer output is made admissible in evidence, the following conditions as are set out in Section 65(B) (2) needs to be complied with:

i. the computer output containing the knowledge was produced by the computer during the period over which the computer was used regularly to store or process information for the needs of any activities regularly carried on over that period by the person having lawful control over the utilization of the computer;

ii. during the said period, information of the type contained within the electronic record or of the type from which the information so contained springs was regularly fed into the computer within the standard course of the said activities;

iii. throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period during which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

iv. The information contained within the electronic record reproduces or springs from such information fed into the computer during the ordinary course of the said activities.

Section 65B (4) provides that in order to fulfill the conditions set out as above, a certificate of authenticity signed by a person occupying a responsible official position is required, recognizing the electronic record carrying the statement; describing the manner in which it was produced; providing such particulars of any device involved in the production of the record by a computer and which deals with any of the matters to which the conditions for admissibility apply to.[7]

Presumptions regarding electronic evidence

A fact which is material and admissible need not be understood as a proven fact. The exception to this general rule is the existence of certain facts specified in the Evidence Act that can be presumed by the court as mentioned below:

a) Gazettes in electronic form

Under the law of Evidence, the court assumes the genuineness of the electronic records purporting to be from the Official Gazette or any legally governed electronic record. The electronic record is to be essentially kept in the form required by law and to be produced from proper custody.[8]

b) Electronic agreements

Under the law of Evidence, a contract has been concluded where the parties' digital signatures are affixed to an

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3 Sec. 17, The Indian Evidence Act, 1872.

4 Sec. 22A, The Indian Evidence Act, 1872, Inserted by Information Technology Act, 2000.

5 Sec. 39, The Indian Evidence Act, 1872.

6 Sec. 5, The Indian Evidence Act, 1872.

7 The Indian Evidence Act, 1872 (As amended in 2000)

8 Sec. 8I-A, The Indian Evidence Act, 1872 (as amended in 2000).

electronic record that purports to be an agreement.[9]

c) Secure electronic records and digital signatures

The Evidence Act lays down that where a security procedure has been applied to an electronic record at a specific time, the record shall be deemed to be a secure from such time until the time it is verified.[10] The court is to presume that a secure electronic record has not been altered since obtaining secure status, unless it is proved contrary. The provisions relating to a secure digital signature are also set out in Section 15, the Information Technology Act. In the Information Technology Act, it is presumed that by affixing a secure digital signature the subscriber intends to sign or approve the electronic record. In respect of digital signature certificates, it is presumed that the information listed in the certificate is correct, with the exception of information specified as subscriber information that was not verified when the subscriber accepted the certificate.[11]

d) Electronic messages

The Evidence Act provides that an electronic message forwarded by a sender through an electronic mail server to an addressee corresponds with the message fed into the sender's computer for transmission. However, there is no presumption about the person who has sent the message.[12]

e) Five-year old electronic records

The Evidence Act provides that where an electronic record is produced from the custody which the court considers to be proper and purports to be or is proved to be five years old, it may be presumed that the digital signature on the document was affixed by the signatory or a person authorized on behalf of him. An electronic record can be said to be in proper custody if it is in its natural place and under the care of the person with whom it would naturally be. The same rule also applies to the evidence presented in the form of an electronic copy of the Official Gazette.[13]

Changes in Banker's Book Evidence Act, 1891

The definition of 'banker's book'[14] includes the printout of data stored on a floppy disc or any other electro-magnetic device. Further it is provided that the printout of an entry or a copy of a printout must be accompanied by a certificate stating that it is its printout by the branch manager or principal accountant, along with a certificate from a person in charge of the computer system, containing a brief description of the computer system and the particulars of its safeguards.[15]

a) What is permissible as evidence?

A certified copy of any entry in a banker's book shall in all legal proceedings be received as evidence of the original entry itself.[16]

b) Is banker's book in electronic form?

A banker's book is said to be in an electronic form if any record is stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism, either onsite or offsite location including a back- up or disaster recovery site of both.[17]

c) How a certified copy of electronic record be obtained?

- A copy obtained through mechanical process can be certified, if it is a certified by the principal accountant or the manager of the bank.
- In accordance with Section 2A, a printout containing a certificate.

d) Nature of certificate for a copy obtained through mechanical process:

- A certificate from principal accountant or branch manager that the mechanical or other process adopted to obtain the copy has ensured the accuracy of the copy.
- Certificate of Authenticity from branch manager or principal accountant , and
- Certificate from person- in-charge of computer system regarding safeguard to protect computer system and data

Amendments in Indian Penal Code, 1860

With the adoption of the IT Act, 2000, a number of offences were introduced under the provisions of the First Schedule of the IT Act which amended the Indian Penal Code (IPC) with respect to offences which dealt with the production of documents amended, to include electronic

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9 Sec. 84-A, of The Indian Evidence Act, 1872.
10 Sec. 85-B, The Evidence Act, 1872.
11 Sec. 8, The Evidence Act, 1872.
12 Sec. 88-A, The Indian Evidence Act, 1872.
13 Sec. 90-A, The Indian Evidence Act, 1872.
14 Sec. 2(3), The Bankers Book Evidence Act,1891.
15 Sec. 2-A, The Bankers Book Evidence Act,1891 as amended in 2000.
16 Sec. 4 The Bankers Books Evidence Act, 1891.
17 Sec. 2(3), The Bankers Books Evidence Act, 1891.

records. The range of additional offences includes absconding to avoid the production of a document or electronic record in a court;[18] intentionally preventing the service of summons, notice or proclamation to produce a document or electronic record in a court;[19] intentionally omitting to produce or deliver up the document or electronic record to any public servant;[20] fabricating evidence by making a false entry in an electronic record, intentionally causing the false entry or statement to appear in evidence in judicial proceedings;[21] the destruction of an electronic record of a person's secrets, obliterates or renders the whole or part of electronic record illegible, with an intention of preventing the record from being produced or used as evidence;[22] making any false electronic record.[23]

Electronic Evidence and Judicial Response in India

Despite the admissibility of electronic records in evidence, the courts are finding it difficult to cope up with the issue of integrity and authenticity of the electronic evidence to attach weight to it.

1. Admissibility of printout prior to IT Act

In TADA Court (Mumbai)– Bombay Bomb Blast Case regarding Sanjay Dutt's call records, the court observed that the print-outs are not a copy of the magnetic tape because the tape by itself cannot be termed as a document. It does not come within the ambit of the definition of a document provided under Ssection 3 of the IE Act. It was, therefore, ruled that the print-outs formed primary evidence.

2. Admissibility

In *State of Gujarat v. Shailendra Kamal Kishor Pande & Ors.,*[24] the Supreme Court held that the CD itself is a primary and evidence which are direct and are admissible. For consideration of the CD as evidence, it has to be proved that the same has been prepared and preserved safely by independent authority like police. In another case, *M/s V. S. Lad and Sons v. The State of Karnataka & Ors,*[25] the satellite sketches' which had been produced for the allegations made were held to be admissible as evidence. It would be appropriate to mention that the Hon'ble Supreme Court in the case of *P. Padmanabh v. M/s Syndicate Bank Ltd*[26] disbelieved the extract of the transaction in the ATM machine for want of compliance with the provisions of Sec. 65 B (4) of the Indian Evidence Act and held thereby that unless clear admission of malfunctioning of either ATM machine or computer….. provisions of Ssection 65B cannot be pressed into service by plaintiff". In *M/s. P. R. Transport Agency v. Union of India*[27] it was held that the acceptance of the tender, communicated by the respondents to the petitioner by e-mail, will be deemed to be received by the petitioner at Varanasi or Chandauli, where the petitioner has his place of business. In *Nestle S.A. and Anr. v. Essar Industries and Ors,.*[28] the plaintiffs sought to prove the electronic data already on record and the updated electronic data under Sub-section 1 of Section 65B after complying with the provisions of Sub section 4 by filing affidavit along with the required certificate.

3. Tape Recordings

In the case of *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra,*[29] the Supreme Court of India has observed that tape recorded speeches constitute a document as defined by section 3 of the Evidence Act, which stand on the same footing as photographs, and they are admissible in evidence on satisfying certain conditions with respect to identification, accuracy and relevancy of the voice recording.

Thus prior to the amendment, the court used to fall back upon on the basic provisions to decide the admissibility and value of such record.

Following are the judicial trends, after the amendment regarding admissibility and appreciation of digital evidence has been done in to the Indian Evidence Act, 1872.

4. Search and seizure

In the matter of State of Punjab v Amritsar Beverages Ltd,[30]

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18 Sec. 172, The Indian Penal Code, 1860.
19 Sec. 173, The Indian Penal Code, 1860.
20 Sec. 175, The Indian Penal Code, 1860.
21 Sec. 192, The Indian Penal Code, 1860.
22 Sec. 204, The Indian Penal Code, 1860.
23 Karia D. Tejas, Digital Evidence: An Indian Perspective, 214 (5 Digital Evidence and Electronic Signature Law Review 2008).
24 State of Gujarat v. Shailendra Kamal Kishor Pande & Ors, 2008 CRI.L.J. 953.
25 M/s V. S. Lad and Sons v. The State of Karnataka & Ors 2009 CRI.L.J. 3760.
26 P. Padmanabh v. M/s Syndicate Bank Ltd AIR 2008 Karnataka 42.
27 M/s. P. R. Transport Agency v. Union of India AIR 2006 ALLAHABAD 23.
28 Nestle S.A. and Anr v. Essar Industries and Ors I.A.No.3427/2005 in CS(OS) No.985/2005.
29 Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra AIR 1975 SC 1788.
30 State of Punjab v Amritsar Beverages Ltd 2006 IndLaw SC 3911.

it was held that the proper course of action for officers in such circumstances was to make copies of the hard disk or get a hard copy, affix their signatures or official seal on the hard copy and produce a copy to the dealer or the person concerned."

5. Evidence Recorded on CD

In *Jagjit Singh v State of Haryana,*[31] it was held that the electronic evidence that were placed on record were admissible as reliance was placed by the speaker on the recorded interview while reaching a conclusion. It held that, the voices recorded on the CD were those of the persons taking action, hence upholding its reliability. In *Anvar P.V. v. P.K. Basheer and others*,[32] the appellant sought the direction to set aside the election of the elected candidate on account of corrupt practice and produced CDs which were made by recording of the announcements, speeches, and songs using other instruments and by feeding them into a computer. It was held that since the CDs produced were not admissible as secondary evidence since they were not certified.

While, deciding the admissibility of the secondary evidence pertaining to electronic evidence, the ruling of the Court in *State (NCT of Delhi) v. Navjot Sandhu*[33] was overruled by the 3-judge bench of R.M. Lodha, CJ and Kurian Joseph and R.F. Nariman, JJ, to that extent. The Court in the aforementioned case took note that the bench had omitted to take note of Sections 59 and Section 65A of the Evidence Act of 1872 and hence erred in holding that there is no bar in adducing secondary evidence, under Sections 63 and 65 of the Evidence Act, of an electronic record, irrespective of its compliance with the requirements of Section 65B, which is a special provision dealing with its admissibility.

While, overruling the legal position as to electronic evidence as laid down in Navjot Sandhu Case, the Apex Court, applying the principle of generalia specialibus non derogant (special law will always prevail over the general law), held that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read along with Section 65 of the Evidence Act that shall yield to the same.

6. Admissibility of Intercepted Telephone Calls

The case of *State (NCT of Delhi) v Navjot Sandhu*[34] (overruled), dealt with the proof and admissibility of mobile telephone call records. On behalf of the accused, a submission was made that no reliance could be placed on the mobile telephone call records, since the prosecution had failed to produce the relevant certificate as required under Section 65B(4) of the Evidence Act. The Supreme Court held that a cross-examination of the competent witness would constitute to be a sufficient proof of all the call records if he was familiar with the functioning of the computer during the time and the manner in which the printouts of the call records are taken.

In the case of *Ravi Kant Sharma and Ors. v. State*[35] It was held that call details record is not a direct computer printout of the data available in the computers/servers of the telephone company. As the telephone data has been tampered with, it cannot be relied upon to base conviction of the accused persons.

7. Digital Signatures

In *Bodala Murali Krishna v.Smt. Bodala Prathima*,[36] the court was of the opinion that Section 67-A and Section 73-A of the Act were introduced as regards proof and verification of digital signatures. Sections 85-A, 85-B, 85-C, 88-A and 90-A were added as regards the presumption to be drawn about such records. These provisions are to recognize the electronic records and digital signatures, as admissible pieces of evidence…"

8. Deleted Files on Hard Disk

In *Dharambir v. Central Bureau of Investigation*[37] the judgment significantly notes that, even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain the information which would indicate that some text or file in any form was recorded on it at a time which was removed subsequently. By the assistance of software programmes it is possible to find out the exact time when such changes had occurred in the hard disc. To that extent even a blank hard disc which once had been used in any manner, for any purpose would contain some information and would therefore constitute an electronic record for the purposes of the Act.

9. Admissibility of SMS:

In *Rohit Vedpaul Kaushal v. State of Maharashtra*[38] the Bombay High Court, after examining the SMS messages sent by the accused held: "that some of the SMS sent by the

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31 Jagjit Singh v State of Haryana AIR2007SC590.

32 Anvar P.V. v. P.K. Basheer and others CIVIL APPEAL NO. 4226 OF 2012, DOD: 18.09.2014.

33 State (NCT of Delhi) v. Navjot Sandhu AIR 2005 SC 3820

34 State (NCT of Delhi) v Navjot Sandhu AIR 2005 SC 3820

35 Ravi Kant Sharma and Ors. v. State 2011 V AD (Cr.) 75

36 Bodala Murali Krishna v. Smt. Bodala Prathima 2007(2) ALD 72

37 Dharambir v. Central Bureau of Investigation 148(2008) DLT 289

38 Rohit Vedpaul Kaushal v. State of Maharashtra 2007 INDLAW MUM 755

accused certainly came within the ambit of Section 67 of the IT Act"

10. Email as E-Evidence

In *Mrs. Nidhi Kakkar v. Munish Kakkar*[39] the issue before the court was whether; text of emails produced in Court was admissible evidence. It was held by the Hon`ble court that if a person produced text of information generated through computer, it would be admissible as evidence, provided proof was tendered in a manner brought through Evidence Act. It was held that the printed version produced by wife that contains text of what was relevant for case is admissible.

11. Supply of documents in Digital form:

In *Ujjal Dasgupta v. State*[40] it was held by the High Court of Delhi that "…the accused has right to be provided with the copies of sSupply of documents relied upon by prosecution which are in digital form in pen drives and hard discs to the accused..."

12. IP Address

In *Sanjay Kumar Kedia v. Narcotics Control Bureau & Anr.,*[41] it was held by the court that the below mentioned firms namely the Xponse Technologies Ltd and Xponse IT Services Pvt. Ltd were not acting merely as a network service provider but were actually running an internet pharmacy and dealt with prescription drugs like Phentermine and Butalbital. In such a situation, Section 79 of the Act would not have granted immunity to an accused who had been held guilty of violation of the provisions of the Act."

13. Pornography Material and Intermediator's liability

In the case of Avnish Bajaj v. State,[42] it was held by the court that by not having appropriate filters the website ran a risk of having imputed to it the knowledge that such an object was in fact obscene that could have otherwise detected the words in the listing or the pornographic content of what was being offered for sale. The proliferation of the internet and the possibility of a widespread utilization through instant transmission of pornographic material, calls for a strict standard having to be insisted upon.

14. E-Evidence whether Primary or Secondary

Under the Evidence Act, the contents of documents may be proved either by primary or secondary evidence. Section 62 of the Act defines "Primary evidence" as the document itself that is produced for the inspection of the Court". The Act, also defines, "Secondary Evidence" [section 63(2)] as the "certified copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies". In the case of *State(NCT of Delhi) v. Navjot Sandhu*[43] it was held that the question of the information being contained in the call records, stored in huge servers which cannot be easily moved and produced in the court, is not in dispute. Hence, printouts which are taken from the computers/ servers by mechanical process and further certified by an official of the service providing company can be held to be as evidence. The witness can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of section 65B of the Indian Evidence Act, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act.

15. Evidence as per Banker`s Book Evidence Act

In *State Bank of India v. Rizvi Exports Ltd (DRT, Allahabad),*[44] the SBI had filed a case to recover money from certain persons who had borrowed loans and submitted printouts of statement of accounts maintained in SBI's computer systems as a part of evidence. The relevant certificates as have been mandated by the Bankers Books of Evidence Act had not been attached to these printouts. The Court held that the documents presented were not admissible as evidence.

16. Need of hour to relook at Section 65B of IEA

In the recent case of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.,[45] Honorable Supreme Court of India held that most of the countries around the globe have modified themselves with the change of time and the development of technology and finetuned their legislations. Therefore, it is the need of the hour to relook at Section 65B of the Indian Evidence Act, which was introduced 20 years ago, by Act of 2000, and which has created a huge turmoil, with the law swinging from one extreme to the other in the past 15 years from *Navjot*

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39 Mrs. Nidhi Kakkar v. Munish Kakkar (2011)162PLR113

40 Ujjal Dasgupta v. State 150 (2008) DLT 60

41 Sanjay Kumar Kedia v. Narcotics Control Bureau & Anr Para 8 and 9 Appeal (crl.) 1659 of 2007, DOD: 03/12/2007

42 Avnish Bajaj v. State 116 (2005) DLT 427, also see Sharma Vakul, Information Technology – Law & Practice (Universal Law Publishing, 2009).

43 https://main.sci.gov.in/judgment/judis/27092.pdf DOD:04/0/2005. accessed on 19th October 2020 at 10:00 am.

44 II (2003) BC 96, Debt Recovery Appellate Tribunal, Allahabad T.A. No. 1593 of 2000 Decided On: 01.10.2002

45 https://main.sci.gov.in/supremecourt/2017/39058/39058_2017_34_1501_22897_Judgement_14-Jul-2020.pdf DOD: 14/07/2020. accessed on 17th October 2020 at 09:00 am.

Sandhu[46] to *Anvar P.V.*[47] to *Tomaso Bruno*[48] to *Sonu*[49] to *Shafhi Mohammad.*[50]

CONCLUSION

Once digital/ electronic evidence is admitted, the presiding officer has to decide what evidential weight to attach thereto. The following cautionary observations of the Law Commission of England are relevant here "if computer output cannot relatively readily be used as evidence in criminal case, much crime would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction."[51] In spite of the fact that the Indian Evidence Act can't be wilted away in the time of new innovative advancements, as appropriate changes have been joined; the need of great importance is to fill the holes where no law exists and to lessen it into composing where legal professions have held up the framework up until now. Hence one must be careful while acknowledging digital/ electronic records.

Section 65B is now mandatorily to be complied strictly for persons who intend to rely upon e-mails, websites or any electronic record in a civil or criminal trial in Indian Courts. In order to ensure that the credibility and evidentiary value of electronic evidence is provided for, his outlook of the Supreme Court of India has been adopted since the electronic record is more susceptible to alterations and tampering. Kurian J. in its judgment observed, that the Electronic records being more receptive to tampering, transposition, excision, alteration, etc. without such safeguards, can lead to travesty of justice with the whole trial based on proof of electronic records.'

The computer-generated electronic record therefore cannot be solely relied upon, because there could be an opportunity of it's been tampered. At least for the purposes of presuming prima facie authenticity of the evidence of the electronic record, the Indian Evidence Act could be further amended to rule out any manipulation- by way of addition of a condition that the record was created in the usual way by a person and not a party to the proceedings and the supporter of the record did not control the making of the record. Where it can be proved that the record was being used against the adverse party by ensuring that the record was created by a party who was adverse in interest to the proponent of the record, the risk of the manipulation of the records would be reduced significantly. It is arguable that no party who is disinterested would want to certify the authenticity of the record which to his knowledge had been tampered with. The law needs to creatively address the requirement of the burden being imposed so as to provide, on the proponent, as to the author of a document to determine whether there has been any manipulation or alteration after the records were created. Also, the reliability of the computer program that generated the records and whether the records are complete or not. The courts also have to bear in mind the fact that data can be easily forged or altered, and these contingencies are not addressed by section 65B of the Evidence Act. For instance, when forwarding an e-mail, the sender can edit the message before sending. Such alterations are often not detectible by the recipient, hence a third party to the dispute may not always be a reliable person to provide for the authenticity of the document.

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[46] State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

[47] Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473.

[48] Tomaso Bruno v. State of UP, (2015) 7 SCC 178.

[49] Sonu v. State of Haryana, (2017) 8 SCC 570.

[50] Shafhi Mohammad v. The State of Himachal Pradesh, (2018) 2 SCC 801.

[51] Hon'ble Justice P. Sathasivam, Supreme Court of India, Appreciation of Evidence including Evidence recorded through Electronic Media for Sessions Cases: Lecture delivered during Training Programme for District Judges Under the aegis of 13th Finance Commission Grant at Tamil Nadu State Judicial Academy on 26.03.2011

Minimum Wages-The Road Ahead

Dr. Vibha Sharma*

ABSTRACT

Recently labour reforms in India have come in focus as the Wage Code, 2019, the first of the four Codes, has been assented to by the President of India, and is likely to be brought in force soon. The Draft Rules were also made and circulated for objections and suggestions. Wage Code, 2019 has replaced four labour regulations viz. the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. The past experiences have shown that enacting a legislation howsoever good intentioned it may be, is not enough. The implementation of enactments specially those pertaining to the vulnerable sections of society remains a challenge. This paper is an attempt to analyse those provisions of the Wage Code along with the rules made thereunder which relate to Minimum Wages, one of the salient features of the Code. The focus of the paper is on fixation and revision of Minimum Wages. However, the task has been undertaken also keeping in view the needs of the changing times which calls for a transparent, efficient and effective system to be in place ensuring payment of reasonable minimum wage to the workers on one hand while balancing the employer's interests on the other. The international standards, goals and concerns also form a part of this paper.

Introduction

The Wage Code, 2019 is the single legislation which covers the organised as well as the unorganised sector, excluding the workers under the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and the likes and brings within its fold almost all the labour workforce of India. In the sphere of employment relationship, the wage policy constitutes one of the four central policy area -working-time arrangements; occupational safety and health (OSH); and maternity protection are the other three. Keeping up with the provisions of the International Labour Organisation's Minimum Wage Fixing Convention, 1970 (No. 131) and provide minimum guaranteed income for all workers is a measure expected to go a long way towards improving workers' living standards and help India achieve many of its socio-economic goals, including the United Nations Sustainable Development Goals (SDGs). Though the criteria of social security benefits and the relative standards of other social groups, economic factors etc. still remain a distant dream as per the international standards.[1] One of the ideals of justice, social, economic and political as contained in the Preamble of the Constitution of India, find expression in Directive Principles of State Policy, particularly in Articles 38[2] and 43[3]. While debating on Article 43 (which was Article 34 in the Draft) on 23.11.1948 one of the members observed that economic and social democracy were prerequisites for the success of political democracy and that, "Political consciousness and patriotism will come only when they are economically contended"[4] However, the actual state of affairs is reflected in the observations based upon the implementation reports submitted by the State parties, including India that were made at International Labour Conference, 103rd Session, 2014,[5] on Minimum Wage Systems where it was observed, "In some cases, it has considered that the minimum wage in force does not allow workers and their families to live in dignity".

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1 Minimum Wage Fixing Convention, 1970 (No. 131), Article 3-The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;(b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

2 Article 38 - (2) The State shall, in particular, strive to minimisethe inequalities in income, and endeavour to eliminateinequalities in status, facilities and opportunities, notonly amongst individuals but also amongst groups ofpeople residing in different areas or engaged in different locations.

3 Article 43 -The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

4 Constituent Assembly Debates On 23 November, 1948

5 Report III(1B), General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Conference Paper, At page 12

Interpreting the provision contained in Article 21, the most organic and progressive provision in the Constitution of India, the Hon'ble Supreme Court[6] observed it (Article 21) to be the heart of fundamental rights and held that: "It is the fundamental right of everyone in this country… to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief…These are the minimum requirements which must exist in order to enable a person to live with human dignity and neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials." The legislations which are now being enacted, though much awaited revamps and a heart-warming gesture by the State, begs the inquiry whether the same serve the aspirations which started with the independence of India and strengthen the march forward.

Wage Policy

The Wage Policy in India had started taking shape as early as in 1929 with the Royal Commission on Labour, culminating in the Payment of Wages Act, 1936. In 1943, the Labour Investigation Committee was established, on the recommendation of the Labour Standing Committee and the Indian Labour Conference, to look into the issues of labour conditions and minimum wages and submit proposals. Thus, the Minimum Wages Act was enacted, which came into force in 1948 and which had set a framework for fixing minimum wages in certain employments. However, the criteria to determine minimum wages was shaped by the Indian Labour Conference, 1957 recommendations and also the guidelines issued by the Supreme Court in 1992 in the case of Workmen Represented by Secretary v. Management of Raptakos Brett. & Co. Ltd. and Anr.[7] The wage policy was also shaped by the Five Years Plans, National Commissions on Labour[8] and other bodies from time to time. Later, the minimum wages were linked to the Consumer Price Index for industrial workers thereby addressing the changes in the cost of living[9]. In 1996, though not legally binding, the National Floor Level Minimum Wage was implemented to cover the disparities in various scheduled employments in and across the States. The concern to cover all the workers and provide them with the National Floor Level Minimum Wage, which was being discussed at by various authorities for the past decade or two, has found expression in the form of the Wage Code of 2019 which is applicable to all the workers and includes the provisions relating to the National Floor Level Minimum Wage thereby making it binding.

Minimum Wages in the Wage Code

According to the International Standards the collective bargaining between the employer and the employee is to be respected, but then the study shows that many of the developing countries provide protection to vulnerable workers. To the question, "Why do governments intervene in the labor market?" it has been observed that,"The theory underlying most interventions is that free labor markets are imperfect, that as a consequence there are rents in the employment relationship, and that employers abuse workers to extract these rents, leading to both unfairness and inefficiency. For example, employers discriminate against disadvantaged groups, underpay workers who are immobile or invest in firm-specific capital, fire workers who then need to be supported by the state, force employees to work more than they wish under the threat of dismissal, fail to insure workers against the risk of death, illness or disability, and so on. In response to the perceived unfairness and inefficiency of the free market employment relationship, nearly every state intervenes in this relationship to protect the workers".[10] Thus it becomes apparent that the primary object of the State intervention is to provide the requisite means and security, at least, according to the changing market and the conditions, economic as well as social.

Essential Features and Areas of Concern

Undoubtedly, by bringing all the workers within its ambit, the divide between organised and unorganised sector labourers have been done away with, thereby broadening

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6 Bandhua Mukti Morcha v. Union of India, 1984 AIR 802, 1984 SCR (2) 67

7 Workmen Represented by Secretary v. Management of Raptakos Brett. & Co. Ltd. and Anr., 1992 AIR 504

8 First and second National Commissions on Labour – 1969 and 1999–2002

9 The Labour Ministers' Conference held in 1988

10 Roe [2000] and Pagano and Volpin [2001] argue that the political power of labor has been central to legal and regulatory design of the twentieth century - The Regulation of Labor Juan C. Botero Simeon Djankov Rafael La Porta Florencio Lopez-de-silanes Andrei Shleifer… 2004 by the President and Fellows of Harvard College and the Massachusetts Institute of Technology. The Quarterly Journal of Economics, November 2004

the coverage of the Code.[11] However, the explanation in respect of having the two definitions on the work force may have to wait till the time the other Codes are in place or the courts interpret them[12]. Interestingly, the expressions 'Contractor' and 'Contract Labour' are defined[13] by the Code but they do not feature anywhere else in the Code.

The term 'Wages' defined under the Act is three-fold, viz. Meaning of the term, Inclusive and Exclusive. In the definition of Wages House Rent Allowance was included[14] in the Minimum Wages Act, 1948 whereas it is now specifically excluded.[15]

The criteria for fixing of minimum wage generally remains the same as was provided under the Minimum Wages Act, 1948 with some additions[16] with the reference that, "the provisions of the rule 3 are based on the criteria declared in the judgment of Workmen represented by Secretary vs. Management of Reptakos Brett. and co. ltd. and Anr., 1992 AIR 504, pronounced by the Hon'ble Supreme Court and of the recommendations of the 15th Indian Labour Conference (ILC)".[17]

Minimum Wage Fixing Convention, 1970 (No. 131) offered broader protection than the Minimum Wage Fixing Machinery Convention, 1928 (No. 26) and interalia provided for a system of minimum wages which is based on the principle of full consultation with social partners; involves social partners on an equal footing, as well as independent experts in the design and operation of the system; sets minimum wage levels that take into account the needs of workers and their families, as well as economic factors; includes appropriate measures to ensure the effective application of minimum wages. Minimum Wage Fixing Recommendation, 1970 (No. 135) further provides that, "In determining the level of minimum wages, account should be taken of the following criteria, amongst others: (a) the needs of workers and their families; (b) the general level of wages in the country; (c) the cost of living and changes therein; (d) social security benefits; (e) the relative living standards of other social groups; (f) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."

The Expert committee appointed by the government in 2019, had recommended Evidence Based Methodology for fixation of Floor Wage in its report. Still, the Wage Code and the rules made thereunder, neither lay down the exact criteria nor the methods of fixation of National Floor Level Minimum Wage rates. Expert committee had also recommended shifting towards a nationally representative and culturally palatable balanced diet[18] approach for fixing National Floor Level Minimum Wage, however, this recommendation was also not taken up by the Legislature.

It needs to be noted that National Floor Level Minimum Wage has been statutorily provided for the first time, though, National Floor Level Minimum Wage was being implemented since 1996 which was not binding. However, under the Wage Code, 2019, it shall be fixed by the Central Government who may consult it with the Advisory Board.[19] Interestingly, under Rule 11 the Central government shall consult the Advisory Board as well as obtain the views of all State governments on Board's advice before fixing the floor wage. But, Rule 12 makes mandatory only consultation with such State governments as considered necessary by the Central government. The criteria for the selection of such State governments has not been disclosed.

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11 Section 2 (k) and (z), Wage Code, 2019

12 43rd Report, Standing Committee On Labour (2018-19) submitted on 18.12.2018

13 Section 2 (f) and (g) , the Wage Code, 2019

14 Section 2 (h), Minimum Wages Act, 1948

15 Section 2 (y) (f) the Wage Code, 2019

16 Rule 3, Draft Rules, 2019 (GoI2020) - 3. Manner of calculating the minimum rate of wages. – (1) For the purposes of sub-section (5) of section 6, the minimum rate of wages shall be fixed on the day basis keeping in view the following criteria* , namely:- (i) the standard working class family which includes a spouse and two children apart from the earning worker; an equivalent of three adult consumption units; (ii) a net intake of 2700 calories per day per consumption unit; (iii) 66 meters cloth per year per standard working class family; (iv) housing rent expenditure to constitute 10 per cent. of food and clothing expenditure; (v) fuel, electricity and other miscellaneous items of expenditure to constitute 20 percent of minimum wage; and (vi) expenditure for children education, medical requirement, recreation and expenditure on contingencies to constitute 25 percent of minimum wages; (2) When the rate of wages for a day is fixed, then, such amount shall be divided by eight for fixing the rate of wages for an hour and multiplied by twenty six for fixing the rate of wages for a month and in such division and multiplication the factors of one-half and more than one-half shall be rounded as next figure and the factors less than one-half shall be ignored.

17 Page 50, Draft rules, 2019 (GoI 2020)

18 Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage at page 67 The balanced diet approach for floor wage-setting allows for a minimum recommended intake of 2400 calories, 50 grams of protein and 30 grams of fat per adult person per day for 3.6 consumption units per family. As far as non-food costs are concerned, the Expert Committee divided them broadly into two categories: essential non-food items and other non-food items. It recommended that the required expenditure on essential non-food items be equal to the median class of the expenditure distribution, and that on the other non-food items be equal to the expenditure for the sixth fractile (25–30 per cent) of the distribution in the NSSO-CES 2011/12 survey data. (GoI 2019a: 33-52)

19 Section 9, the Wages Code, 2019

And, the scheme provided in the Act is, the central government will set the national floor rate for wages after taking into account the minimum living standards of a worker in the prescribed manner, varying across geographical areas. State governments will fix the minimum wages for their region which cannot be lower than the national floor rate for wages and where existing minimum wages are higher than the floor wages, the same shall be retained.[20] The code also provides that there would be a review/ revision of minimum wages at intervals not exceeding five years.[21] Further, the rate of wages for overtime work shall not be less than twice the rate for normal wages.[22] The standard for fixing the National Floor Wage Rate as well as the Minimum Wages is dependent on the criteria of the Standard Working-Class Family.[23] The revision of the Floor Wage and Minimum Wage Rate by the Central Government / State Governments is discretionary which ordinarily will not exceed five years, and it is to be noted that for the revision in the cost of living, no specific period has been laid down.[24] Elsewhere in the rules it is laid down that endeavour shall be made so that cost of living allowance and the cash value of the concession in respect of essential commodities at concession rate shall be computed once before 1st April and then before 1st October in every year to revise the Dearness Allowance payable to the employees on the Minimum Wages.[25]

It is also noted by International Labour Organisation's Decent Work Technical Support Team for South Asia and Country Office for India,[26] "the wage rules must provide conceptual clarity regarding the "manner of calculating minimum rates of wages" under Rule 3. They need to recognise that a "minimum rate of wages" is the total of its two components as per the wage code, that is the "basic rates of wages" and the "dearness allowance". Hence, changes in the minimum rate of wages can be effected by changing either of these two components. The wage rules for the first time include a provision to adjust the dearness allowance concerning inflation every six months, which is a significant step that prevents any deterioration of workers' purchasing power. Therefore, the other component that needs to be set initially and revised ordinarily within every five years is the basic rate of wages. This confusion in the wage rules, which has persisted for the last 72 years, needs to be corrected. Wage earners have borne the cost of this confusion, as many states, by taking advantage of this situation, do not revise their basic rates of wages for many years altogether, a practice that is essential for improving workers' living standards. For instance, the Delhi and Maharashtra Governments revised their basic rate of wages after 22 and 9 years respectively. By delaying the process, these two state governments did not violate the minimum wage regulation as they effected changes in the overall minimum rate of wages through the dearness allowance and not through the basic rate of wages. This defeats the very purpose of having such a regulation and is one of the reasons for the prevalence of a low level of minimum wages in many states."

As further noted by the by International Labour Organisation's Decent Work Technical Support Team for South Asia and Country Office for India[27], "Notwithstanding the enabling provisions in the wage code and the wage rules, past experience suggests various problems associated with the functioning of advisory boards and committees formed thereunder. Some of the important issues with advisory boards are as follows: (a) constituted on an ad-hoc basis, meet infrequently, with wide variations in their functioning across states; (b) not adequately backed by technical experts to undertake evidence-based enquiry and wage fixation; (c) do not undertake studies on monitoring and impact of minimum wages and their enforcement across sectors, occupations and states; (e) lack of co-ordination and interaction between central and state advisory boards; and (e) inadequate funding for boards' functions, no independent technical secretariat for record-keeping and smooth functioning of the board. Therefore, the Committee on the Functioning of the System of Wage Boards (1968) reported that a majority of the wage boards had not found it feasible to fix the "need-based minimum" of the 15th ILC. Similarly, the National Commission on Rural Labour (NCRL) in 1991 enquired into this issue and observed that wide disparities in minimum wages reflect the varied perceptions of the concept of the minimum wage in the states and at the Centre (GoI, 1991)."

The Advisory Board which will be constituted under the Code[28] consists of four categories of members nominated

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[20] Section 9, the Wage Code, 2019

[21] Section 8, the Wage Code, 2019

[22] Section 14 the Wage Code, 2019

[23] Rule 3, Draft Rules, 2019, (GoI 2020)

[24] Rule 11, Draft Rules, 2019, (GoI 2020)

[25] Rule 5, Draft Rules, 2019, (GoI 2020)

[26] International Labour Organisation, Discussion Paper: Wage code and rules – Will they improve the welfare of low-paid workers in India? August 2020

[27] International Labour Organisation, Discussion Paper: Wage code and rules – Will they improve the welfare of low-paid workers in India? August 2020

[28] Section 42, the Wage Code, 2020

by the Central Government representing employers, employees, independent persons and five representatives from the State Governments. The rules provide for quorum of minimum 1/3rd of members. If at any meeting the quorum is not complete the chairperson may adjourn the meeting to a date not later than seven days from the date of the original meeting. At such second meeting it shall be lawful to dispose off the business at the first adjourned meeting irrespective of the number of members present. Provided date, time and place of such adjourned meeting shall be intimated to all the members electronically or by a registered post[29] The rule as drafted creates administrative problem.

Period of limitation for filing claims, from the date on which the claim arises, have been increased to three years and the burden of proving the payment of the amounts etc. claimed by the employee, is on the employer.[30]

Provision for inspectors-cum-facilitators has been made, who will have dual function of providing compliance advisory to employers as well as workers and conducting inspections, according to the inspection scheme, which may contain web-based inspection processes, laid down by the appropriate authority.[31]

Compounding of offences can be done by a Gazetted Officer specified by the appropriate Government.[32] The provision also contains certain guidelines as to the conduct of such officer, however sub-section (3) of the section lays down that such officer shall exercise the powers to compound an offence subject to the directions, control and supervision of the appropriate government. The purpose of delegation of the powers to compound is thus, more or less defeated.

The Wage Code authorizes an officer not below the rank of Under Secretary in the Government of India or State Government, if so, appointed in this behalf to hold inquiry and impose fines[33] and also provides for hearing of the Claims etc. by an officer not below the rank of a Gazetted Officer[34]. However, the Minimum Wages Act, 1948 vested power to settle Claims[35] etc. in the Labour Commissioners or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority.

The above observations display a step forward and a step back.

Conclusions

Seventy years have passed since the Constitution of India came into force. The economic inequality persists and the gap between the rich and poor has widened. The rich continue to grow richer and the poor have grown poorer. While the Wage Code may be a step in the right direction but the step is tentative and half hearted. Glaringly, even now the Code does not provide for taking help from specialist and technical persons, which is the need of the hour. There is a clear over dependence on executive officers. The Code has not incorporated the principles laid down in International Labour Organisation's Minimum Wage Fixing Convention, 1970 (No. 131) and (135). The Code also does not include the recommendations of the Government of India's own Expert Committee. Neither the Code nor the Rules shed any light as to how these provisions shall apply to members of unorganised labour force. The Code and the Rules also do not indicate a way forward to reach the living wage.

Suggestions

Reforms by way of legislation helps in the betterment of the people for which it has been enacted. Labour reforms are not only expected to widen the coverage but need to be approached with human sensitivity also. This vulnerable section of the society needs support as well as encouragement to enter the main stream in the real sense of the term, wherein they can enjoy the bundle of Fundamental Rights with the freedom that is necessary in present day scenario. The following suggestions are made:

1. The definitions of "Employee" and "Worker" needs a revisit as otherwise most of the provisions contained in Chapter II which deals with Minimum Wages will not only create confusions but also may not be available to some categories of persons intended to be benefitted.
2. Definitions of 'Contractor' and 'Contract Labour' should be omitted as neither they are used or referred or included anywhere in the complete Code nor do they (definitions), in the present form, clarify the purpose of their inclusion, nor does the Statement of Objects &Reasons and Notes on Clauses throw any light on the issue.
3. House Rent Allowance must be treated as a component of a Wage. Neither the Statement of

[29] Rule 33, Draft Rules, 2019 (GoI 2020)
[30] Section 59 of the Wage Code, 2019
[31] Section 51 of the Wage Code, 2019
[32] Section 56 (1) the Wage Code, 2019
[33] Section 53, the Wage Code, 2019
[34] Section 45, the Wage Code, 2019
[35] Section 20, Minimum Wages Act, 1948

Objects and Reasons nor the notes on clauses provide any clue as to why the House Rent Allowance was excluded in this Code when the Minimum Wages Act, 1948 included it. In the present form it appears that part of a thing given by the left hand is being taken away by the right hand.

4. There must be a mechanism to review the periodical functioning of this Code in respect of organised as well as unorganised labour so that steps wherever necessary may be taken for its better implementation.

5. The provision relating to the periodicity of the revision of National Floor Level Minimum Wage are vague. Revision should be made mandatory after a specified period.

6. The Minimum Wages (Basic wage) must be mandatorily revised at least at the completion of five years on the lines of a Pay Commission. This aspect needs to be addressed and clarified to all the stakeholders.

7. The revision of cost of living allowance linked to the cost of living index number must also be regularly undertaken twice a year.

8. Consultation with all State governments before fixing the National Floor Level Minimum Wage must be mandatory.

9. Keeping in view the interplay between the National Floor Level Minimum Wage and the Minimum Wages fixed by different States, it is desirable that the periodicity of the revision of National Floor Level Minimum Wage is preferably two years, which will be less than five years (Revision period for State Minimum Wages). Otherwise the purpose of fixing or revising the National Floor Level Minimum Wage will stand defeated.

10. A nationally representative and culturally palatable balanced diet approach for fixing National Floor Level Minimum Wage as well as Minimum Wage should be provided in the Code.

11. The criteria given in Rule 3 for the purpose of fixing Minimum Wages and National Floor Level Minimum Wage has continued to operate since 1992 after the decision was pronounced by the Honourable Supreme Court of India.[36] Much water has flown since then, the society has undergone a sea change. Clinging to the same criteria is not in keeping pace with today's requirements.

12. In conformity with the recommendation of the International Labour Organisations' Minimum Wage Fixing Convention, 1970 (No. 131), there is a need of balanced list of elements to be considered when setting the Minimum Wage. While emphasising the needs of the workers and their families it urges consideration of economic factors too, along with the levels of productivity and need to promote employment.

13. In Rule 4 wherein norms for fixation of Minimum wages are provided, at least one technical expert each from the trade unions and employers in the technical committee for determination of skills categorization should be included.

14. Dieticians, nutritionists and other experts who are specialists in quantifying the wages according to Rule 3 must necessarily be a part of Committees to fix / revise the Minimum Wage.

15. The Advisory Board must have power to incorporate such experts wherever needed.

16. The membership of the Advisory Board / committees should not be at the discretion of appropriate governments' nominations. Fixing of Minimum wage must be a consultative process between the employers, employees and the government as equal partners. As such, the collective bargaining has to be promoted by the Governments if the idea of removal of inequality is to be realized earnestly.

17. Second proviso to Rule 33[37] deals with the intimation of the date, time and place of the meeting adjourned for want of quorum to the members. It is not clear that the Rule actually is talking about the reassembly of the adjourned meeting. This needs clarification, otherwise this proviso has no meaning and needs to be suitably amended.

18. First proviso to Rule 33 lays down that a meeting adjourned for want of quorum may reassemble on a date not later than seven days from the date of original meeting. As long as the expression used is not later than seven days, meeting can technically be assembled even after one day, in which case provision

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[36] Workmen Represented by Secretary v. Management of Raptakos Brett. & Co. Ltd. and Anr., 1992 AIR 504

[37] Rule 33. Quorum. - No business shall be transacted at any meeting unless at least one-third of the members and at least one representative member each of both the employers and an employee are present: Provided that, if at any meeting less than one-third of the members are present, the Chairperson may adjourn the meeting to a date not later than seven days from the date of the original meeting and it shall thereupon be lawful to dispose of the business at such adjourned meeting irrespective of the number of members present: Provided further that the date, time and place of such adjourned meeting shall be intimated to all the members electronically or by a Registered post.

for intimation of date, time, place of such reassembly by registered post really doesn't serve any purpose.

19. Second proviso to Rule 33 calls for intimation electronically or by a registered post. Communication by a registered post should be by way of confirmation only and the word 'or' should preferably be replaced by the word 'and'.
20. If the members which are absent at the meeting adjourned for want of quorum include all the members of any four categories (specially employees), efforts must be made to determine the cause of such enbloc absence before reassembling the meeting.
21. A web portal should be brought in place where the data relating to the fixing, revision, payments etc. of Minimum Wage is mandatorily entered, to bring about transparency and better monitoring.
22. The need to have surveys conducted and carrying out the studies etc. relating to the various aspects of the Code is much needed, as doing so will go a long way in effective implementation of the Code.
23. The provisions of the Code should be given wide publicity. In this regard raising awareness of the various provisions of the Code among workers and employers should be taken up on priority basis by the Inspector-cum-facilitator.
24. Collection of statistical information regarding implementation of the Code should be maintained.
25. The research units should be created to provide necessary information, evidence-based studies and minimum wage impact analysis to Advisory Boards.[38] ILO Recommendation No. 135 also calls for the use of timely information especially statistics and other data needed for the analytical studies of the relevant economic factors etc.

On 25th November 1949, Dr. B. R. Ambedkar in his last speech in the Constituent Assembly said: "On 26th January 1950, we are going to enter into a life of contradiction. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril."Hopefully it has not been too long for India, and the Indian State will have the impetus on its own to enlarge and improve upon the present-day legislative structure. Indian Labour force shall slowly but certainly continue its onward march to a living wage and eventual economic equality.

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[38] Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage, Ministry of Labour and Employment, Government of India, January, 2019 The Committee recommends the creation of a research unit in the Ministry of Labour and Employment to support the Central Advisory Board and State Advisory Boards at the time of formulating recommendations to set and adjust minimum wages. This research unit should provide information, evidence based studies and minimum wage impact analyses to pave the way for the discussion on the revision and adjustment of the minimum wage level.

Decriminalization of Same-Sex relation between consented adult in India: Prospective Issues and Challenges

Dr. Mithilesh Narayan Bhatt*

ABSTRACT

Homosexuals are one of the part of the society. On the account of social morality their relationship had been considered as criminal act under Section 377 of IPC but in July 2018 Indian Apex judiciary decriminalized Section 377 IPC as to relationship between consented adults. This judgment was historic as constitutional morality considered higher than social morality. Perhaps this judgment only removed criminality and only talks about other rights which shall be the result of this decriminalization. This paper is humble attempt to discuss the issues and challenges which shall come in front of Legislature as well as Judiciary. The paper is also aims to throwlights on brief concept of homosexuality, journey of judiciary. In the last suggestions for providing a small change as to make some laws gender neutral have been provided.

Introduction

The Constitution of India provides the different rights to people of India. At the same time it disallows discrimination including on the basis of Sex/Gender. Law constructs identity by making, limiting, and defining possibility for different groups and cross-sections of people. Sex/Gender and Sexual Orientation is one of the factor in the eyes of law which constructs identity.

Prior to *Navtej Joharv. Union of India*[1] judgment by Supreme Court of India, Indian legal mechanism only recognised heterosexual relationship and it denied same sex relation (Section 377, Indian Penal Code) among consenting adults. At the core of the problem of this recognition was the law demanded that a person must prove essential sexual orientation subjectivity which exists and which should be opposite but homosexuals are failed to do so.

Supreme Court of India declared the Section 377 of the IPC, unconstitutional where same sex relationship between consenting adult is crime. The judgment has discussed the ancillary rights as prospective issue in judgment. Since this judgment has not provisioned anything about other civil rights apart from decriminalization of same sex relation, thus holistic equal status of homosexuals are still far fetched reality.

This study is humble attempt to discuss the future challenges and possible amendments which shall come in front of Legislature as well as before Judiciary in India due to this judgment.

Homosexuality, Concept and Science

Sexual orientation is an integral part of homosexuality. According to the American Psychological Association,"Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions".[2] Similarly, the Yogyakarta Principles defines the concept of Sexual Orientation.[3]

In the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM)[4] published in 1952, homosexuality was labelled a mental disorder.[5] Later American Psychiatric Association (hereinafter APA) Board of Trustees discarded its classification of homosexuality as a mental illness on Dec. 15, 1973[6] and opined that the expression of sexual attraction is natural condition towards persons of the opposite sex, or same sex.[7]

International Classification of Diseases in the publication of ICD-10 in 1992 had removed homosexuality from the

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1 Navtej Singh Johar v. Union of India, WP (Crl.) No. 76/2016, order dated 12-07-2018

2 American Psychological Association, Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality, 2008 available at https://www.apa.org/topics/lgbt/orientation

3 Yogyakarta Principles, 2006. each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender

4 Supra 2

5 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-I) 38 (1st ed. 1952).

6 William Eskridge, Jr., Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981, 25 Hofstra L. Rev. 817, 934-39 (1997)

7 Jack Drescher, Out of DSM: Depathologizing Homosexuality, 5(4) Behavioral Sciences (2015), at p. 565

list of disease.[8] The Indian Psychiatric Society is not considered sexual orientation as psychiatric disorder. It was noted that, "…there is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person."[9]

Homosexuality and Judicial Process in India

Before *Navtejsingh Johar*[10] case many attempts were made to decriminalize Section 377 with extent to consenting adults. In this Section all such cases shall be discussed on periodical basis.

In December 2001, the *Naz Foundation* filed a writ petition contesting the constitutional validity of Section 377 in the Delhi High Court. In 2004, the High Court dismissed the petition, along with subsequent review petition. The *Naz Foundation* challenged this decision before the Supreme Court. Eventually, the Supreme Court directed the High Court to hear the case afresh.[11]

After direction of SC, in 2009, *Naz Foundation* challenged the constitutionality of Section 377. In a reportable judgment, the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*[12] ruled that criminalization under Section 377 IPC i.e. consensual sexual acts between adults violated theIndian Constitution. The Court saw sexual orientation as analogous to sex and violated equality, privacy, liberty and dignity, and relevant international law standards. However, the Delhi High Court also ruled that Section 377 would continue to criminalize nonconsensual penile non-vaginal intercourse and sex with minors.

Several groups, including religious groups, challenged the *Nazjudgment*. In *Suresh Kumar Koushalv. Naz Foundation,*[13] in 2013, the Supreme Court overruled the Delhi High Court judgment (2009). The Supreme Court held, " the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and … this cannot be made sound basis for declaring that Section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution".

The Supreme Court decision was challenged by the original petitioners in the Nazcase, and the Central Government, filed replies.[14] However, these review petitions were dismissed by the Supreme Court on 28 January 2014 and found no reason to interfere with the December 2013 judgment.[15]

The petitioners then filed curative petition.[16] Supreme Court granted the curative petition on 2 February, 2016,[17] and passed an order to constitute a Constitution Bench,[18] to hear the curative petitions.

In between a positive development happened on 24 August 2017, in the case of *Justice K. S. Puttaswamyv. Union of India*, where the a nine-judge bench of Supreme Court decided guaranty of the constitutional right to privacy and referring to sexual orientation as core to privacy. The decision held that, "privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation…"[20]

In SC, Justice Chandrachud, has opined that sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on

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8 The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines, World Health Organization, Geneva (1992) available at http://www.who.int/classifications/icd/en/bluebook.pdf

9 Indian Psychiatry Society: "Position statement on Homosexuality" IPS/Statement/02/07/2018 available at http://www.indianpsychiatricsociety.org/upload_images/imp_download_files/1531125054_1.pdf, Navtej Singh Johar v. Union of India, WP (Crl.) No. 76/2016, order dated 12-07-2018, page 66

10 Navtej, Supra 1

11 Orinam, "Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012 Supreme Court of India", available at http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf

12 Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.

13 Suresh Kumar Koushal and another v. Naz Foundation and others, 2014, 1, SCC 1

14 5 As per Article 137 of the Indian Constitution, a review petition is filed by the petitioners who are aggrieved by a Supreme Court order, where the Supreme Court has the power to review any judgment pronounced by it, assess whether their decision disclosed any "errors apparent on the face of the record".

15 Supra 13

16 A curative petition is a petition through which a Supreme Court decision may be challenged, after the review petition has been dismissed. See International Commission of Jurists, "Briefing Paper: The Section 377 Curative Petition" (2016) available at https://www.icj.org/wp-content/uploads/2016/03/India-QA-art-377-Advocacy- Analysis-brief-2016-ENG.pdf (last visited May 30, 2020)

17 Supra 13

18 See International Commission of Jurists, "Briefing Paper: The Section 377 Curative Petition" (2016) available athttps://www.icj.org/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf (last visited May 30, 2020)

19 Justice K.S. Puttaswamy (Retd.) &Anr. v. Union of India and Ors., Writ Petition (Civil) No. 494/2012 available at http://supremecourtofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf (last visited May 30, 2020)

20 Supra 19, Para 2(f).

majoritarian favour or acceptance.[21] Justice Kaul, in his concurring opinion, referred to the decision in Mosley v. News Group Newspapers Ltd.[22] highlighted that the importance for individual's freedom to carry out his sex life and personal relationships as he wishes, subject to the acceptable exceptions, countervails public interest.[23]

This judgment was the primary impetus for the Supreme Court to reconsider their decision in the Koushal judgment, which upheld the constitutional validity of Section 377.

After Suresh Kaushal[24] judgment, the first petition being *Navtej Singh Joharv. Union of India*, which was admitted on 8 January, 2018, along with five other petitions i.e. *Dr. Akkai Padmasali and Ors. v. Union of India, Keshav Suri v. Union of India* [27], *Arif Jafarv. Union of India,*[28] *Ashok Row Kavi and Ors. v. Union of India*[29]*, Anwesh Pokkuluri and Others v. Union of India*[30]

In the case of *Navtej Singh Johar,*[31] the petitioners argued that Section 377, if retained in its present form, would involve the breach of not one but several of the fundamental rights of LGBT people, namely the right to privacy , the right to dignity, equality , freedom and freedom of expression. Sexual orientation and privacy are also urged to be at the center of the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution, and it has become imperative that Section 377 be repealed in extent to consensual sex between consenting adult in the light of the *Puttaswamy*[32] verdict. It is argued that the right to privacy must take every person's right, including LGBTs, within its scope and sweep it.

The Supreme Court agrees, in the Navtej Singh Joharjudgment, that sexual orientation is an inherent element of rights, dignity, privacy, human autonomy and equality. The state does not have a valid interest in relationship between consenting same-sex couples.[33]

The Supreme Court also ruled that by punishing a subset of the population for their sexual orientation, sodomy laws violate equality. Such a law perpetrates prejudices, gives social prejudices the legitimacy of the State and has a distressing impact on the exercise of expression. For a culture that believes in equality under a civil order based on rights, the right to love and a partner to find fulfillment in a same-sex relationship is necessary. Sexual identity means that the state has responsibilities in both positive and negative ways. It is important that the State not to discriminates, but it also require that the state accept protections that offer true fulfillment to same-sex relationships.[34]

All five judges in this judgment unanimously reached on same conclusion but 2 jointly wrote the judgment and rest of 3 separately. In first part of judgment which was jointly written by Justice Deepak Mishra and Justice A.M. Khanwilkar hold and recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay.[35]

The Indian Constitution was regarded as living and organic document, which means that it is capable of transforming according to society's need. When the rights that are affected belong to a class of citizens or a minority community who have been deprived of even their fundamental rights since time immemorial, the responsibility of the courts becomes more important. Constitutional democracy is intended to gradually and inclusively transform the society.[36] The Supreme Court does not allow constitutional morality to be overridden by social morality. Social morality should not be used to disregard even a single individual's human rights.[37]

In the case *Suresh Koushal,*[38] the SC found the argument erroneous, where the court found that LGBT represented just a small portion of the total population and that the presence of Section 377 IPC shortens the fundamental

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21 4 (2017) 10 SCC 1
22 5 [2008] EWHC 1777 (QB)
23 Navtej, Supra 1 at page 13
24 SureshKoushal, Supra 13.
25 Navtej, Supra 1
26 AkkaiPadmasali&Ors. v. Union of India and Ors., Writ Petition (Civil) No.572/2016.
27 KeshavSuri v. Union of India Writ Petition (Criminal) No. 88/2018.
28 ArifJafar v. Union of India Writ Petition (Criminal) No. 100/2018.
29 Ashok Row Kavi and Ors. v. Union of India Writ Petition (Criminal) Diary No. 16238/2018.
30 AnweshPokkuluri and Others v. Union of India Writ Petition (Criminal) No. 121/2018.
31 Navtej, Supra 1
32 Justice K.S. Puttaswamy (Retd.), Supra 19
33 Navtej, Supra 1, Part J, at 142
34 Navtej, Supra 1, Part J, at 142-143
35 Navtej, Supra 1, at 156
36 Navtej, Supra 1, at 157-158
37 Navtej, Supra 1, at 158-159
38 Navtej, Supra 1,

rights of a very minuscule percentage of the total population. Whenever there is a breach of human rights, the courts must step in, even if the rights of a single person are at risk. Autonomy is individualistic and establishes individuality, and that individuality becomes part of an individual's integrity in the ultimate case.[39]

Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, is not subject to Section 377 IPC. The expression against the order of nature "has neither been defined in Section 377 IPC nor in any other provision of the IPC. Therefore, if coitus is not performed for procreation only, it does not per se make it against the order of nature.[40] The SC considered Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy (Articles 14 and 19 of the Indian Constitution)[41]

Section 377 IPC does not distinguish between non-consensual and consensual sexual acts of adults in private space that are neither harmful nor contagious to society in so far as it criminalizes even consensual sexual acts between competent adults.

Therefore, in view of the law laid down in *Shayara Bano*[42], Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.[43]

The review of Section 377 IPC, in private space, of consensual carnal intercourse between adults, whether homosexual or heterosexual, does not affect public decency or morality in any way. Thus Section 377 of the IPC, in its present form, is also in violation of Article 19(1) (a) of the Constitution.[44]

Section 377 IPC cannot be regarded as constitutional in so far as it penalizes any consensual sexual relationship between two adults, whether homosexuals (man and man), heterosexuals (man and woman) or lesbians (woman and woman). However, if any human, meaning both a man and a woman, engages in any kind of sexual activity with an animal, that part of Section 377 is constitutional and, pursuant to Section 377 IPC, remains a criminal offence. Any act of definition covered by Section 377 of the IPC committed between two persons without the permission of any of them will, under Section 377 of the IPC, call for penal liability.[45]

Justice *R.F. Nariman,*[46] opined that the Union of India shall take all steps to ensure that this judgment is widely publicized on a regular basis across public media, including television, radio, print and online media, and to launch programs aimed at reducing and eventually removing the stigma associated with such persons. Above all, in the light of the observations contained in this judgment, all government officials, including, in particular, police officers and other officers of the Union of India and the States, shall undergo cyclic sensitization and awareness training on the plight of such persons.[47]

Justice *Dr. Dhananjaya Y Chandrachud*,[48] decided that, Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution without discrimination, and to the equal protection of law;[49] and in the last, JusticeIndu Malhotra in her separate piece of judgment[50] concluded that:

i. This judgment shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

ii. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.[51]

The decision in *Suresh Koushal*[52] thus overruled. Plain reading of all these conclusion of Judges, it is evident that repercussions of this judgment, shall lead towards more complex challenges, which shall have to be addressed in upcoming time.

Prospective Issues and Challenges

At International level, several Constitutions explicitly

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39 Navtej, Supra 1, at 160-161
40 Navtej, Supra 1, at 162-165
41 Navtej, Supra 1, at 162-165
42 ShayaraBano and others v. Union of India and others
43 Navtej, Supra 1, Part J, at 162-165
44 Navtej, Supra 1, at 162-165
45 Navtej, Supra 1, Part J, at 165
46 Navtej, Supra 1
47 Navtej, Supra 1 at page 95 para 98
48 Justice Dr. Dhananjaya Y Chandrachud in Navtej Singh Johar, Supra 25, Part M, at page 180
49 Ibid
50 Justice Indu Malhotra in Navtej, Supra 1 at page 51
51 Navtej, Supra 1
52 SureshKoushal, Supra 14

prohibit discrimination based on sexual orientation.[53] Some jurisdictions have interpreted the general equal protection and/or non-discrimination wording in their respective constitutions to include sexual orientation. In Canada, the Supreme Court affirmed that the anti-discrimination provisions of the Canadian Charter of Rights and Freedoms (section 15) applied to discrimination based on sexual-orientation.[54]

Legislation providing explicit national statutory guarantees of non-discrimination based on sexual orientation has been implemented in Denmark, Finland, France, New Zealand, The Netherlands, Norway, and some of the states and provinces of Australia, Brazil, Canada, and the United States.[55]

Most of the African States outlaw homosexuality through a variety of laws derived largely from European models.[56] South Africa has become the first country in the world to enshrine equality for lesbians and gay men in its Constitution.[57]

In India, on the basis of the constitutional principles *Navtej Johar*'s[58] judgment, disallows the legal base to criminalize same-sex relationships. Same time no positive steps has been taken to achieve equal protection.

This judgment paved the way for many challenges, mainly in personal law, civil rights and laws related to sexual offences.

On the basis of available literature, legal challenges shall come on issues like:

? Registration of marriage

? Regulations of live-in relationship

? Adoption

? Surrogacy

? Protection against Domestic violence

? Equality in Job

? Attitudinal changes in stakeholders of Civil and Criminal Justice system

? Protection from torture, inhuman and degrading treatment.

? Discrimination in school, college, Society, home, denial from rented house, denial from use of public space and festivals.

? Lack of wider knowledge by Public Authorities on the issues related to homosexuality also make these people vulnerable.

On next, discussion which is on the laws which need to be amended so that rights of same sex can also be protected. Following legally unclarified issues may have significant impact on socio-legal status of LGBT thus need to be addressed.

Marriage Laws

At present, 30 countries and territories have enacted national legislation allowing homosexual people to marry. Northern Ireland, Ecuador, Taiwan and Austria recognized same-sex marriage in 2019; Australia, Malta and Germany in 2017; Colombia in 2016; United States of America, Greenland, Ireland and Finland in 2015; Luxembourg and Scotland in 2014; England and Wales, Brazil, France, New Zealand and Uruguay in 2013; Denmark in 2012; Argentina, Portugal and Iceland in 2010; Sweden in 2009; Norway in 2008, South Africa in 2006; Spain and Canada in 2005; Belgium in 2003 and The Netherlands in 2000.[59] The 123 UN Member States where consensual same-sex sexual acts are not criminalised.[60]

In United Kingdom, Section 1(1) of the Marriage (Same-sex Couples) Act 2013 (in force since 2014) simply states that "marriage of same-sex couples is lawful". This Act is only applicable in England and Wales, where it repealed the Civil Partnership Act 2004.[61] The Scottish Marriage and Civil Partnership (Scotland) Act of 2014 defines 'spouse' as being both different as well as same-sex.[62]

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53 ILGA Report 2019, available atwww.ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf (last visited May 25, 2020)

54 Ibid

55 James D. Wilets, International Human Rights Law and Sexual Orientation, 18 HastingsInt'l& Comp. L. Rev. 1 (1994).Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol18/iss1/1(last visited May 25, 2020)

56 Int'l Lesbian and Gay Ass'n, World Legal Survey, available at http://www.ilga.info/Information/Legal_survey/Africa/1world_legal_survey__africa.htm , last visited on 24, April ,2020

57 See Eric C. Christiansen, Note, Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process, 32 N.Y.U. J. Int'l L. & Pol. 997 (2000).

58 Ibid

59 Same-Sex Marriage Around the World, October 28, 2019, https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/last visited on 24, April ,2020

60 Supra 53

61 Supra 53.

62 British parliamentary committee calls for overseas territories to legitimise same sex marriages", National News, 22 February 2019.

In Australia, the Marriage Amendment (Definition and Religious Freedoms) Act, 2017 legalized marriage between two persons of marriageable age, regardless of their gender. In New Zealand, Marriage (Definition of Marriage) Amendment Act of 2013 amended the Marriage Act 1955 to allow for marriage between 2 people "regardless of their sex, sexual orientation, or gender identity". This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).[63] Schedule 2 of the Marriage (Definition of Marriage) Amendment Act of 2013 amended the Adoption Act 1955 to allow for joint adoption by same-sex married couples.[64]

Laws in India are yet to recognize the same set of rights and responsibilities for married homosexual couples that they do for heterosexual married couples. In India, two consenting adults of any sexuality or sexual orientation can have a 'social marriage; but there are no legal safeguards of their rights. These couple does not have any legal rights such as registration of marriage, inheritance, succession, and adoption, maintenance of the spouse and children, and guardianship among others.

Hope always lies on courts. A married gay couple from Thrissur, have moved the Kerala High Court challenging the provisions of Special Marriage Act, 1954 [Act of 1954] to get the permission to register their marriage. High Court has agreed to examine their plea.[65]

Before filing the petition in the High Court, the District Administration refused to register their marriage under the 1954 Act.[66] According to petitioner, "the decisions of the apex court would be "meaningless and incomplete unless the sexual minorities are afforded equal access to the institution of marriage and by enabling them to profess love in the way they deem fit".[67]

The Madras High upheld the marriage between a man and a trans-woman. This is said to be the first time that Article 21 of the Constitution (Right to Life and Personal Liberty) was affirmed in the case of a trans-person.[68]

Laws related to divorce and maintenance will also have to be changed in India. Since in same-sex marriage, differentiation as husband and wife not possible and then grounds of divorce and maintenance are not gender neutral thus ensuring individual rights in case of same-sex couples shall be tough and need to be changed accordingly.

Adoption Laws

In United States of America, the availability and conditions for second parent adoption for same-sex couples varies by state. An NGO report states that about 29 states permit second parent adoption while 10 others have limited or prohibited adoption.[69]

In United Kingdom, Sections 144 and 150 of the Adoption and Children Act, 2002 that entered into force in England and Wales in 2005, establish that joint adoption applies to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 in Scotland defines civil partners as subject to the law, and in 2013 in Northern Ireland, the Court of Appeal mandated that civil partners can jointly adopt. Several British Overseas Territories recognise joint adoption by same-sex couples.[70]

In Australia, Joint adoption by same-sex couples is currently possible in all Australian States and Territories: Australian Capital Territory (2004); New South Wales (2010); Queensland (2016); South Australia (2017); Tasmania (2013); Victoria (2016); Western Australia (2002); Northern Territory (2018).[71]

In South Africa, Section 231(1)(c) of the Children's Act, (2005) stipulates that married persons or those in life partnerships are eligible to adopt, and the Civil Union Act (2006) confers those status to persons of the same-sex.[72] In December 2018, Singapore's High Court exceptionally allowed a gay man to adopt a child born via surrogacy in the United States.[73]

According to an article, 20 Million kids are living without Family in India.[74] Since Same-sex marriages cannot be

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63 Ibid

64 Ibid

65 NishantSirohi, 'LGBTQ+: Petition for marriage equality filed in Kerala High Court Despite the decriminalisation of homosexuality, married homosexuals not entitled to matrimonial rights, , January 29,2020

66 Ibid

67 Ibid

68 AnganaChakrabarti, Queer Freedom : A Year After Section 377 Verdict, LGBT Community Still Don't Have These Rights, A report by the Vidhi Centre for Legal Policy found that a queer person's rights were still deficient in the domains of identity, violence, family and employment, September 6, 2019,https://www.news18.com/amp/news/buzz/queer-freedom-a-year-after-section-377-verdict-lgbt-community-still-dont-have-these-rights-2299373.htmllast visited on 24, April ,2020

69 Adoption by LGBT Parents", National Center for Lesbian Rights (website), accessed January 22, 2019.

70 Ibid

71 Supra 69

72 Ibid

73 Sandi Sidhu and Lauren Said-Moorhouse, "Gay Singaporean man can adopt son born via surrogacy, court rules". CNN. 17December 2018.

74 PrashastiAwasthi , India's Adoption Policy Discriminative Against LQBTQIA+, 20 Million Kids Remain Without Family, 2019-11-10 08:41

registered in India, therefore homosexual couples are not allowed to adopt a child together. The law debars the homosexual community from adopting children together demonstrate that homosexual couples aren't equal before the law.

Adoption has no uniform law in India, but there are some legislation related to adoption that is divided into two categories: 1. Hindu Adoption and Maintenance Act, 1956; 2. The Guardians and Wards Act, 1890. The Hindu Adoptions and Maintenance Act, 1956 states that while "unmarried" females can adopt, males only fulfill the prerequisite "if he has a wife living".

Under Hindu Adoption and Maintenance Act, 1956,The Hindu female[75] who is not a minor and not married but is of sound mind can adopt. She cannot be a joint petitioner with her husband but can only be a consenting party in the child's adoption. A Hindu male[76] who is not a minor and is of sound mind can adopt.

However the situation will be different when both couple will be from same-sex especially obtaining consent.[77] Further the law provides certain mandatory conditions[78] while person is going adopt the child. These rules are for both, who is going to adopt and also who is going to adopted. The complexities created when couple of the same-sex relation move for adopting a child of opposite sex and that child will leave with parents who will be of same-sex. Legislature will have to find out the answers of these questions as early as possible because sexual orientation is not have much concern as heterosexual relationship only exist. There is a possibility that individual from same-sex union can misbehave with opposite sex child.

The Guardians and Wards Act, 1890[79] authorizes the court to appoint the guardian for the person and the property minor. This act may provide some relief to same-sex couple but in limited manner. This will not serve the purpose of those same-sex couples who will want to be parents as the only be guardians or wards. Thus law require to be changed and same sex couples should be considered.

In private sector, on positive node, Tech Mahindra introducedsame-sex adoption leave and extended bereavement leave to expand its diversity-and-inclusion policy.[80] At Tech Mahindra, same-sex couples are eligible to get 12-weeks of paid adoption leave and three days of bereavement leave.

Employment Issues

In the 2014 World Bank Survey, the country was reported to have lost 0.1-1.7% of GDP due to homophobia.[81] The World Bank reports that, due to lower educational achievements, loss of labor efficiency and the added costs of providing healthcare to LGBT people who are sick, stressed, suicidal or HIV positive, homophobia costs India $31 billion a year.[82]

The Mission for Indian Gay and Lesbian Empowerment (MINGLE), an advocacy organization, found in a 2016 survey of 100 Indian LGBT workers that 40 percent had been abused at work and most were not protected by LGBT workplace safety policies.[83]

The general attitude in the Indian workplace is highlighted by findings from a 2018 Times Jobs survey. As many as 57 percent of respondents reacted in the negative to a suggestion that their businesses publicly employ LGBTQ and disabled candidates. More than 55 percent said they still face gender, ethnicity and sexual orientation prejudice at the workplace.[84]

The Vidhi Centre for Legal Policy report highlights that "the laws on discrimination in the workplace and the laws on maternity benefits do not account for LGBTQ individuals." For example, the 2013 Sexual Harassment at Workplace Act only takes a female into account, fully declining "victim neutrality.[85] On the other hand a review petition requesting various civil rights, including marriage, adoption and surrogacy, was rejected by the Supreme Court.[86]

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75 Hindu Adoption and Maintenance Act 1956, section 8.

76 Ibid

77 Ibid

78 Ibid

79 The Guardians and Wards Act 1890, Section 7.

80 Tech Mahindra offers same-sex adoption leave, ShilpaPhadnis, Dec 27, 2019, https://m.timesofindia.com/business/india-business/techm-offers-same-sex-adoptionleave/amp_articleshow/72987808.cmslast visited on 24, April ,2020

81 Economic Cost of Homophobia and the exclusion of LGBTIQ people: A case of India, https://www.indiatoday.in/amp/india/story/india-set-to-get-first-dedicated-lgbt-hiring-consultancy-1571782-2019-07-21last visited on 24, April ,2020

82 Annie Banerji, From sniggers to abuse: 'visibly different' LGBT Indians struggle for jobs,https://in.mobile.reuters.com/article/amp/idINKCN1LG0YZlast visited on 24, April ,2020

83 Ibid

84 India Inc is not creating inclusive workplace for LGBT employees Colleagues with disabilities and LGBTQ communities usually find little space in companies' HR strategies. ET Bureau, Nov 24, 2018, https://m.economictimes.com/news/politics-and-nation/india-inc-is-not-creating-inclusive-workplace-for-lgbt-employees-people-with-disabilities/amp_articleshow/66778071.cmslast visited on 24, April ,2020

85 Ibid

86 Ibid

Right to Education

Two reports published on the experiences of sexual and gender minority youth in India's schools. UNESCO, the United Nations education agency, and the International Commission of Jurists, a non governmental organization, have each published harrowing in-depth reports on the plight of LGBT Indians.[87]

The International Commission of Jurists has found that LGBTQ people are frequently denied educational and training opportunities because of abuse, intimidation, and violence. LGBT people face abuse and bullying, and they frequently miss classes or drop out of school entirely to escape embarrassment and violence. Most educators are not qualified or encouraged to respond to anti-LGBT bullying.[88]

UNESCO surveyed 371 young people of sexual and gender minorities and obtained in-depth information from more than 60 young people through focus groups in the state of Tamil Nadu. Eighty-four percent of respondents reported being harassed, often by other students, but by a male instructor in one-fifth of those instances. But just 18% of those who were harassed said that the incident was reported to school authorities.[89]

There have been some promising strides across Asia in recent years to protect LGBT youth. In the Philippines, for example, a 2013 law instructs schools to combat bullying, which applies to sexual orientation and gender identity. In 2017, in order to specifically protect LGBT students, the government of Japan changed its national bullying prevention strategy. This came on the heels of a guideline from the Education Ministry that instructed schools to allow students to use toilets and wear uniforms according to their gender identity, a policy that schools have begun to enforce.[90]

India should have security measures for these sexual minorities and to combat homophobic behavior in all kinds of educational institutions.

Surrogacy Laws

On July 15, 2019, the Surrogacy (Regulation) Bill, 2019 was introduced in Lok Sabha. The Bill describes surrogacy as a procedure where a woman gives birth to a child for an intended couple[91] in order to give the child to the intended couple after the birth.

Commercial surrogacy is prohibited by the Bill, although it permits altruistic surrogacy. Altruistic surrogacy requires no monetary benefits other than medical costs and health coverage during pregnancy for the surrogate mother. Commercial surrogacy requires surrogacy or its associated treatments carried out in excess of basic medical costs and insurance coverage for a monetary gain or compensation (in cash or kind).The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.

A certificate of essentiality will be issued upon fulfillment of the following conditions: (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board; (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court; and (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.

The certificate of eligibility to the intending couple is issued upon fulfillment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and (iv) other conditions that may be specified by regulations.

Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.[92]

In this bill the right to surrogacy also remains a far-off distance for the LGBT community as they don't fit as intending couple.

Neutrality in Gender Law: Need of hour

Gender neutrality emphasizes on equal treatment of men and women socially, economically and legally with no discrimination. While, gender-neutral laws are not a new gloom that India has never seen. Section 2(d) of The

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87 Kyle Knight, Section 377 is History but Young LGBT Indians Need Concrete Policies to Protect them from Bullying, June 24, 2019, https://www.hrw.org/news/2019/06/24/section-377-history-young-lgbt-indians-need-concrete-policies-protect-them-bullyinglast visited on 24, April ,2020

88 Ibid

89 Ibid

90 Ibid

91 "Intending couple" means a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy. Section 2r

92 Surrogacy regulation bill-2019, https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019

Protection of Children from Sexual Offences Act, 2012 defines "Children" as "any person" and not limited to being a Male or a Female specifically.

Several provisions under IPC and special laws need to be gender neutral like:

i. Rape (Sec. 376 IPC)

ii. Kidnapping and Abduction for different purposes (Sec. 363-373)

iii. Homicide for Dowry, Dowry Deaths or their attempts (Section 302/304-B IPC)

iv. Torture, both mental and physical (Section 498-A IPC)

v. Sexual Harassment, Voyeurism, Stalking, outrage of modesty etc. (Section 354 IPC)

vi. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

vii. The protection of women from Domestic Violence Act, 2005

viii. The Dowry (Prohibition) Act, 1961

ix. The Immoral Traffic (Prevention) Act, 1956

The above list is only indicative where protection given to only females within span of heterosexual relationship. Mere decriminalization of homosexual relationship excluding civil and ancillary rights shall not be serving the purpose. The common solutions for these problems are lies in gender neutrality in Laws. Instead of protecting female from male, law should be amended with the intent to protect any person. That means term ANY PERSON should be used rather MALE and FEMALE.

The last proposed criminal amendment 2019 paved the way for transgender where according to section 10 , The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age; and the word "others" denotes a human being including but not limited to transgender of any age."[93] Through this change, only members of transgender community can be protected.

But on the basis of sexual orientation protection from inhuman treatment, torture is still a far reality. At International sphere, India maintained its past position on LGBTQ rights by abstaining from voting at the UN Human Rights Council on a resolution moved by Latin American states seeking to renew the mandate of independent expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity (SOGI).[94] (India preserved its previous stance on LGBTQ rights by abstaining from voting on a resolution moved by Latin American states to renew the mandate of an independent expert on the defense against abuse and discrimination based on sexual orientation and gender identity (SOGI) at the United Nations Human Rights Council.)

The inclusion of sexual orientation and gender identity specifically in non-discrimination ground can protect homosexuals.

Conclusion

Under the current Indian law, homosexuals are legal outsiders, but judicial intervention has given some recognition through decriminalizing same sex relation between consented adult. As discussed above several other socio-legal issues related to this need to be addressed for proper inclusion in mainstream society. Judicialverdicts[95] alone shall not completely serve the purpose of homosexuals, they require equality in all respect as per the mandate of human rights, which for all without any barrier.

Legislature must create spaces; insert new amendments in existing legal frame work i.e. related to marriage, adoption, inheritance etc. to give equal rights and status to LGBTQ community instead of relying on Judiciary.

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[93] The Criminal Law (Amendment) Bill, 2019, available at http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdflast visited on 24, April , 2020

[94] Geeta Mohan, India abstains from voting for LGBTQ rights at UN Human Rights Council Despite India decriminalising homosexuality, it abstained from voting in favour of LGBTQ rights at the United Nations Human Rights Council. New Delhi July 12, 2019, https://www.indiatoday.in/amp/india/story/india-united-nations-lgbtq-rights-1567935-2019-07-12

[95] Supra

Amendment of Section 6 of Income Tax Act: Pros and Cons

Bineet Kedia*
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ABSTRACT

In India, residential status of an individual is decided on the basis of his physical stay in India, irrespective of whether he is citizen of India or not. There are certain basic conditions in order to be resident of India. These basic conditions may be relaxed in case of Person of Indian Origin (POI) and Citizen of India (COI). There are certain other categories also for employees working outside India. This paper covers only Person of Indian Origin (POI)[1] and Citizen of India (COI)[2] because the amendments made by the Finance Act, 2020 are for inbound employees only.

India like other countries across the world categories the residence into two categories, i.e.,

- Resident and Ordinary Resident (ROR), and
- Resident but not Ordinary resident (RNOR)

Generally in the world residential status is determined on the basis of physical stay ony. However, there are certain exception to the same like USA and Eritrea. These are the two countries who levy income tax or who treat residence status on the basis of citizen of person. So, irrespective of where the person resides, if he is a citizen of USA or Eritrea he will be considered as residence of their respective countries for the purpose of tax law.

The Finance Act, 2020 has brought this citizenship criterion in Indian law also. Apart from that they have also restricted relaxation that was granted to Person of Indian Origin (POI) and Citizen of India (COI). Since there is change in residency, government also amended the provision with respect to resident but not ordinary resident.

Introduction

Section 4, the charging section of income tax, levies tax on every categories of person[3]. Section 5 discuss about the scope of total income. Since the scope of total income is based on person's residency, section 5 informs on what income a person is liable to pay tax when the residential criterion comes into play. So, determining the residential status of an individual becomes important for the purpose of tax.

If the person is paying tax in some other country and wants to claim the cresit or any other benefits under Double Taxation Avoidance Agreement (DTAA), it can be done only if he is resident of India. There are also certain compliances which is based solely on residential status.[4]

Thus, unless and until we determine the residential status, we cannot determine the quantum on which we are required to pay the tax; whether we will be able to take the benefit of DTAA or not; whether we are required to do a particular compliance or not.

Section 6 (till 31st of March, 2020)

As already discussed, till March 2020, India was solely having a physical stay criterion for residence of an individual. The social and economic connection of an individual with India was never taken into consideration. The law which was there till 31st March 2020, there were two basic conditions to determine tax residency:

1. The individual must stay in India for minimum period of 182 days during the previous year, or

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1 As per clause e of section 115C of the Income Tax Act, a person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

2 Indian citizen is not defined in Income Tax Act. We need to take clue from Citizenship Act, 1955.

3 Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person:
Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

4 FA Schedule is not required to be filed by an individual who is 'Resident but not Ordinary Resident'.

2. The individual must stay in India for minimum period of 60 days during the relevant previous year and 365 days during the 4 previous years immediately preceding the relevant previous year.

There was certain relaxation given to two categories of person, i.e., Citizen of India (COI) and Person of Indian Origin (POI) who were visiting India. The 60 days criterion was relaxed and enhanced to 182 days.

Section 6 – Controversies

Password is taken as evident. In case of loss of passport, notarized copy of passport can be basis. Now certain questions were raised in the past, i.e.,

1. Whether day of arrival as well as day of departure should be considered.
2. Whether on day of arrival should be excluded.

There are various decisions and diverse rules to with regard to above controversies. Few decisions are saying that both the days of arrival and departure should be considered,[5] whereas few decisions are of the view that day of arrival should be excluded. Third view says that day of arrival should be excluded only if it is not a complete day.[6] By a large, Consensus seems to be in favor of third view, i.e., day of arrival should be excluded only if it not a complete day.

Now what is the meaning of complete day is not given anywhere. However, it can be said that if assessee can work on the day of arrival and can devote a good number of time for the purpose for which he has arrived, that will be treated as a complete day.

Another question which comes to mind is that whether forced stay in India can be considered to count the number of day for residential status of an individual. There was a case where a person's passport was impounded and he could not leave India. In the case, the Delhi High Court said that since the individual's stay in India was not voluntarily, his stay in India will not be counted for residency.[7]

CBDT issued Circular 11/2020 which provides certain relaxation to person visiting India and could not leave India because of lockdown.[8] There are various problems in the circular:

1. The relaxation is allowed only to individual who is visiting India. So, if an individual who is already present in India and wants to leave India for the purpose of maintaining non-residential status, will not be relaxed even if he could not do so due to lockdown.
2. What is the meaning of visit is also litigated before the court. Consensuses are of the view that the visit should be temporary and not permanent. Thus hypothetically speaking, if an individual working in other country comes to meet his family member after taking leave, it will be considered as visit and will be eligible to seek relaxation; whereas if the individual comes to India after termination/resignation from job, it will not be considered as visit and will not get any relaxation.

Section 6 (Post Amendment)

The Finance Act, 2020 has three sets of amendment with regards to individual's residence:

- First amendment is with respect to Person of Indian Origin (POI) and Citizen of India (COI),

<table>
<tr><th>Particulars</th><th>COI/POI visiting India</th><th>COI/POI/Total income (other than foreign sources) is less than or equal to Rs. 15,00,000</th><th>COI/POI/Total income (other than foreign sources) is more than Rs. 15,00,000</th></tr>
<tr><td rowspan="3">Number of days in India</td><td>182 days or more during the previous year</td><td>No Change</td><td>No Change</td></tr>
<tr><td colspan="3">OR</td></tr>
<tr><td>182 days or more during the previous year
+
365 days or more during 4 yrs, immediately preceding previous year</td><td>No Change</td><td>120 days or more during the previous year
+
365 days or more during 4 yrs, immediately preceding previous year</td></tr>
</table>

[5] Advance Ruling P. No.7 of 1995, In re 919970 90 Taxman 62 (AAR – New Delhi)

[6] Walkie v. IRC 919520 1 AER 92

[7] CIT v. Suresh Nanda (2015) 233 Taxman 4 (Delhi)

[8] Lockdown of India due to Covid – 19.

- Second amendment is with respect to deemed residency, and
- Third amendment is with respect to 'Resident but not Ordinary Resident'.

Person of Indian Origin (POI) and Citizen of India (COI)

We have already seen that there are two basic conditions for individual's residence of India. Either of the two basic conditions was required to be fulfilled. There is still no change in the first condition. The other condition where Person of Indian Origin (POI) and Citizen of India (COI) used to avail certain relaxation, changes has been done. The criterion of 60 days which was enhanced to 182 days is now curtailed. The relaxation is now curtailed and 182 days has been brought down to 120 days. We can better understand the amendment with the help of following chart:

The above chart shows that in order to determine the residential status of Person of Indian Origin (POI) and Citizen of India (COI) visiting India during previous year, we need to see his total income with his stay in India. Thus as per the amendment, it can be concluded that Person of Indian Origin (POI) and Citizen of India (COI) whose total income (excluding foreign income)[9] exceed fifteen lakh and he visit to India for 120 days or more during the relevant previous year and 365 days in 4 previous years immediately preceding the relevant previous year will become resident of India.

The rationale behind the same is that a large number of people who are running business in India and are economically and socially closely related to India, but they were managing their stay in India in such as way that they will become non-resident. As a result there was tax leakage. Government viewed this as tax avoidance and thus curtailed the relaxation.

Now there is dispute between the meanings of the term 'total income'. One school of thought are of the view that total income shall be calculated as per section 2 (45) reads with section 5 of the Income Tax Act; whereas other school of thought are of the view that section 2(45) cannot be referred. They argues that section 2(45) starts with 'unless the context otherwise requires'. This amendment demands different situation. Thus, threshold should be calculated on standalone basis.

Deemed Residency [Section 6(1A)]

This is the most talked amendment with regard to individual's residency in India. As it is already said that unlike USA or Eritrea, India have always followed stay based criterion to decide tax residency. This criterion has been amended and brought something new for the individual who is citizen of India. The Finance Act, 2020 introduced section 6 (1A) which says

An individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

The rationale behind the amendment is to address the issue of stateless person.[10] The problem of stateless person

Particulars	Before Amendment (till 31/03/2020)	After Amendment (01/04/2020 onwards)
COI/POI stays in India for 182 days or more during the previous year	No change – Can be ordinary resident as well as not ordinary resident - It depends whether the individual satisfies both the additional conditions of section 6 or not	No change – Can be ordinary resident as well as not ordinary resident - It depends whether the individual satisfies both the additional conditions of section 6 or not
COI/POI ➢ stays in India for 120 days or more but less than 182 days during relevant previous year ➢ total income (excluding foreign income) is more than Rs. 15,00,000	No Change – Shall be non -resident of India	Change – Shall be resident but not ordinary resident – irrespective of that the individual s atisfies both the additional conditions of section 6.

[9] Foreign income means income which accrues or arises outside India, expect income from business or profession which controlled in or set up in India.

[10] Stateless person is an individual, who arrange his affairs in such a fashion, that he is not liable to tax in any country or jurisdiction during a year.

was bothering the tax world for quite some time and accordingly, India as part of BEPS commitment amended the law.

Resident but not Ordinary Resident

There are only two changes which have been made with regard to 'Resident but not Ordinary Resident'.

1. If an individual is deemed to be residence of India solely on the basis of his Indian citizenship, he will always be considered as not ordinary resident only,
2. If amendment is that if Citizen of India (COI) and Person of Indian Origin (POI) becomes resident of India because his total income (excluding foreign income) exceeds fifteen lakh and he stayed in India during the previous year for 120 day or more but less than 182 days, than he will also be considered as not ordinary resident only.

However, if the above person stays in India for a period of 182 days or more during the previous year, than he can be ordinary resident of India. It can be better understood with the help of following chart:

Conclusion

It is always the duty of government to make such fiscal laws through with tax avoidance could be removed. However, in the process of making any amendment in the fiscal laws to remove the tax avoidance, it should also be seen that it does not create any hardship to the people. Though the inclusion of section 6(1A) was mostly welcomed by economic expert, as it removes the tax avoidance intestinally created by stateless person, there was always a issue whether deemed resident only covers 'stateless person'? What is the meaning of liable to tax? In case of a country who does not levy income tax on individual, can it be said that individuals are not liable to tax? As per the Supreme Court of India, 'liable to tax' is a legal situation; 'payment of tax' is a fiscal fact. Merely because exemption is granted in respect of taxability of a particular source of income, it cannot be postulated that entity is not 'liable to tax'. The above amendment takes into counts not only the stateless person, but also the person who is resident of other country but not liable to pay tax. For example, An Indian citizen who is doing job in UAE and becomes resident of that country, will not liable to pay tax in UAE for his income from salary,[11] but he will become resident of India if he earns more than fifteen lakh in India. This may create hardship and injustice to such citizen as the individual was neither stateless person and nor was staying in UAE to avoid tax liability. Hope in the upcoming time, the Indian Government will come with more clarification with regards to section 6(1A) so that any injustice is not done.

Few more clarification is required from the government of India, especially with regard to counting of day of arrival. Leaving any issue for litigation cannot be termed as good in the eye of law.

[11] UAE does not levy any income tax on Individual.

A Comprehensive Study on the Efficacy of Section 498-A Indian Penal Code

Shalini Saxena*

ABSTRACT

A few laws and arrangements have been sanctioned during the last a few decades to address the worries of freedom, poise and equivalent regard for ladies dependent on the network's recognition that ladies endure viciousness or are denied of their established rights because of a few social and social components. A progression of discussions and influences have prompted these institutions. The addition of Section 498A IPC is one such advance and it punishes hostile direct of the spouse and his family members towards the wedded lady. The arrangement along with partnered arrangements in Cr. P.C. are so planned as to give a component of prevention. In course of time, a spate of reports of abuse of the section by methods for bogus/overstated claims and ramifications of a few family members of the spouse have been coming in. Although there are far reaching protests and even the legal executive has taken perception of huge scope abuse, yet it is still on the resolution book to bargain with the instances of brutality in wedding cases. Present paper talks about importance of brutality through legal mediations and attempts to inspect its importance in its support on the rule book.

Key words: Cruelty against women, Protection vis a vis Bargaining and Role of Judiciary.

Introduction

Matrimony is recognized as a communal establishment where two submissive adults concur to tie the knot and form a relation. It is societal institution where the spouse has certain duty towards his significant other. However, this dilemma arises when there is insistent of dowry form the husband, his parents and his relatives and due which they ill-treat the women, and she is subjected to torture. Section 498A was introduced to protect the women from the brutality of conjugal society.

This section was inducted to battle the probability against the dowry death. This section was introduced in the Criminal law (Second Amendment) Act, 1983 (Act 46 of 1983) and by Section 113A was introduced under the ambit of Indian Evidence Act to raise the supposition of abetment to suicide by married women. However, now it is been held by the Hon'ble Supreme Court and different High Courts that section

498-A is more than once being physically abused by the women culture for their compensation and the women's are video recording bogus bodies of evidence against their better half and his relations are likewise being constrained in all way just to infuriate the spouse. Hence, one might say that section which was proposed to favour for the ladies and was purchased in to give wellbeing to women who are subjected to viciousness by spouse and his relatives, is utilized as a mace by a few ladies who neglect the arrangement of section and involve false charges against husband and his relatives.

Object of the Section 498-A of IPC

The most important purpose of this act is to penalize the husband and his relatives who persecute and hassle the wife which an aim to compel her or her relatives in view to attain illegal demands satisfied or with a more criminal intention to constrain her to commit suicide.

In B.S.Joshi v. State of Haryana[1], it was held by the High Court that the entity of Section 498A was, „that there was appropriate anticipation of agony and brutality to the women by her husband or relative in connection to claim of dowry.

Ingredients of Section 498-A

"498A. Husband or relative of husband of a woman subjecting her to cruelty–Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. -For the purpose of this section, "cruelty" means-

(a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause

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[1] 1986 Cri. L.J. 1510 (Del.)

grave injury or danger to life, limb or health (whether mental or physical) of woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand

The essentials to attract this section are:

a. The women mentioned in this section must be married.

b. Women must be subjected to cruelty or harassment; and

c. the cruelty or harassment in relation to the section must be done by the husband or the relatives of the husband

A bare glance of the section shows that the word "cruelty? covers any or all the following elements:

i. "Any wilful" conduct in such a manner that will drive the women to commit suicide,

ii. Any "wilful" conduct which will cause grave injury to the women,

iii. Any "wilful" act which is likely to cause „danger to life, limb or health whether physical or mental of the woman '

Moreover, criminality annexed to word "harassment" is at no cost of "cruelty" and punished by in the subsequent instances:

i. Wherever the annoyance of the woman is with a purpose to coerce her or any person related to her to meet any illicit condition for any possessions or valuable security or

ii. Where the harassment is on report of let-down by her or any persons connected to her to meet such claim. It is evident that neither every brutality nor aggravation has criminal responsibility for the purposes of Section 498-A.

In matter of bodily brutality and infliction of injure likely to cause grim hurt or peril to life, limb or physical condition, the facts articulate for themselves. So, we can see that this law deals with four types of cruelty:

i. Any act which will likely cause the women to commit suicide,

ii. Any act which will lead to grave injury to the life, limb or health of the woman,

Any act of harassment for the purpose of seeking valuables from the women or her relatives,

iii. Nuisance because the woman or her relatives are either unable to capitulate to the requirement for more wealth or do not give some share of the assets.

Meaning of relative under Section 498A

The term relatives have been carefully used in the section 498A but has not been defined anyplace so we must come within reach of the judicial assertion to find out its proper meaning.

In V. Seevetha v. State by Inspector of Police and another[2] it was held that, "in the deficiency of any constitutional definition of the word," Relatives' of companion, the term relative must be assigned a connotation as is generally silent. Customarily it would include mother, father, wife or husband, daughter, son, sister, brother, niece, nephew, granddaughter or grandson of a personality. It includes a person associated by marriage, adoption or blood.

Necessity for Section 498A

Throughout the Nineteen Eighties, dowry deaths were steady rising in India. Dowry death is that the murder of a young woman; committed by the in-laws, upon non-fulfilment of their powerful demands for cash, articles or property, ordinarily referred to as dowry. The Cases of nastiness by the husband and his relatives show the way to death or murder of guiltless powerless women even though they represent a minute division but however a exhausting part of cases are linking cruelty. With the mounting variety of Dowry deaths in India, the issue shall be dealt in an efficient mode and modus operandi. Organizations across the country are controlling and urged the Government to produce legislative protection to women against force and dowry. The target was to permit the state to intervene and stop the murders of young ladies who were unable to satisfy the dowry demands of their in-laws. With this agenda, the Government amended the Indian Penal Code, 1860 (IPC) by approach of the Criminal code (Second Amendment) Act, 1983 and inserted a replacement section 498 (A) below Chapter XX-A, Of Cruelty by Husband or Relatives of Husband on twenty sixth December, 1983. The modification focuses not solely on dowry deaths however conjointly cases of cruelty to

[2] (2009) 3 Cr.LJ. 2974 (S.C.)

married women by their in-laws. Section 498 (A) IPC is the section within the IPC that acknowledges violence against women as against the law. The amendments were conjointly created within the Code of Criminal Procedure, 1973 and also the Indian Evidence Act, 1972 by an equivalent modification on order to effectively affect cases of dowry deaths and cruelty to married women by their husband, in laws and relatives.

Reference to Domestic Violence in context of Cruelty under Section 498A of IPC, 1860

In the widest situation in our nation today thousands of women are subjected to being killed in the state of domestic violence, cruelty, honours and what not. "According to the 2012 statistics by the National Crime Records Bureau, 8233 incidences of dower deaths were reported below Section B of the Indian Penal Code and 106527 incidences of cruelty by husband or his relatives below section 498 A of IPC"[3]. India's constitution guarantees protection to measure a lifetime of dignity and regard to all its voters, specially the marginalized one is by virtue of Article 15. Also, Asian country has legal International Conventions like Convention for Elimination of all varieties of Discrimination against ladies (CEDAW). Hence, Asian country created special provisions for ladies to handle this difference. Legislations like Sections 113 B, 498-A & 304-B of the Indian legal code, 1860, Dowry Prohibition Act (DPA), Protection of Women against Violence (PWDVA) address violence against women. These conjointly lay the position that the establishments of marriage and family are not insulated from state interventions, significantly wherever there's violence against women.

Applicability of Section 498A of IPC

In the case of Suvetha v State by Insp. of Police & Anr.[4] Supreme Court held that the clause a deal with the aggravated forms of cruelty which causes grave injury. The wilful conduct of such grave conduct is likely to move the women to commit suicide which will fall under the jurisdiction of the clause a. The second part of clause (a) says that the conduct wilful in manner caused grave injury or danger to life, limb or health, be it physical or mental to be treated as cruelty towards the women. The clause b of the explanation relates to dowry related harassment. The FIR when filed and coupled with the compiled statement of the women reveals the quantum of cruelty and the Police or executive authority has to act promptly and swiftly if there is especially need of some particular evidence of physical violence. Then in this instance firstly medical assistance shall be provided to the women as well as counsellor's assistance shall be given to the aggrieved woman and the investigation process shall begin without any improper waste of time. punishment extending to 3 years and

fine as been given under the act. The word cruelty has been stated in terms which include physical harm and mental harm to the health as well as body and mind including acts of harassment by the husband or relatives in purpose to coerce her or her relations to ask and meet for unlawful demands for any property or valuable security. The concept of harassment for seeking dowry demands falling within the later ambit of the section. A situation created which drives the women to commit suicide is also the ingredients to cruelty. The offence of section 498-A is cognizable, non-compoundable and non-bailable.

The Supreme Court in the famous case of Ramesh Dalaji Godad v. State of Gujarat,[5] that the Section 498A of IPC is not that important to prove or put forth that the women was subject to beating as well as verbal abuse, thereby denting her the marital rights or not talking to her in appropriate manner would fall under the category of mental cruel

In another famous case of Srinivasulu v. State of Andhra Pradesh[6] Supreme Court held that the consequences which relates to cruelty are most likely to drive the women to commit suicide or to cause grave injury or danger to body parts or the health, whether physical or mental of the women is required to be established in order to get the application of Section 498A back to home.

To appropriately understand the functioning of this section, following provisions also need to be discussed:

1. Section 113B of the Indian Evidence Act, 1872.

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation. —For

[3] http://pib.nic.in/newsite/mbErel.aspx?relid=132454
[4] 6 May 2009
[5] II (2004) DMC 124
[6] 2007

the purposes of this section, dowry death shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).[7]

It is a presumptive section which was inserted in the Indian Evidence Act by the Criminal Law (Second amendment) Act, 1983 side by side the insertion of Section 498A to the IPC. The operational period of this section is seven years. Therefore, in this section the presumption arises when the women in question commit suicide within a period of seven years from the date of Marriage.

2. Section 306 of the Indian Penal Code

Abetment of suicide. —If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[8]

In the case of Sushil Kumar Sharma v. Union of India[9] and ors, the Supreme Court said that the very basic differentiation between the two related Section, i.e. 306 & 498A of IPC is mainly including intention. Under the anon, commission of cruelty by the husband or his relatives push women to commit suicide, and while under the other provision suicide formally intended and abetted. The main point to be noted that the both Sections 304B and 498-A,IPC cannot be declared to be mutually inclusive. Both the provisions deal with two distinct offences.

In the case of State of Himachal Pradesh v Nikku Ram and Ors.,[10] while taking the main provisions of Sections 304B, 498A, 306 and 324 of IPC the High Court said that the pestering has to represent the offence of brutality under Section 498A explanation (b), must have a suitable nexus with the dowry claim and if this element is missing then the case will fall away from the compass of Section 498A.

Pre-conditions for impending the main provisions of Section 498A is mainly the demand and when the demand itself is missing and the cruelty is just for the sake of giving torture to the women, without any relation to the demand then such cruelty will not be covered under the ambit of explanation b of Section 498A of IPC.

Development of Section 498-A of Indian Penal Code

The actual enactment of this Section was done with the aim to protect the women in India from the heavy harassment related to dowry and domestic violence. In the Landmark case of Sushil Kumar Sharma v. Union of India[11], the Supreme Court held this section to be condemned to be "Legal Terrorism", because cruelty is a basic ground for Divorce under Section 13(1) (ia) of the Hindu Marriage Act, 1955 where the spouse threaten the husband using this provision of the said Act.

The Supreme Court in the matter of Preeti Gupta v. State of Jharkhand,[12] "delivered that tough reinvestigation of the entire provision is needed by the Legislature. It is a matter of common knowledge that has increased the versions of the incident is shown in numerous complaints. It has been shadowed by the numerous cases.

The question which substantiates around the complaint is that even the innocent person who is said to be accused under Section 498-A of IPC, doesn't get the opportunity of achieving quick justice because the offence itself being non-bailable and cognizable.

As we believe in the context of "Justice delayed is Justice denied", there must be changes made in order to remove the flaws in the section 498-A of IPC. A stringent legislature shall be passed by the Parliament of India against those who do something falsely against this section and try tomisguide the executive system of law. It shall not act as an appliance of tyranny and counter-harassment.

Misuse of Section 498-A By The Executive Authorities

The autocratic actions of the legislature and the disintegration of the marital relationship has another facet. Filing of cases with the offense against women cell may not be indisputable. Marital discords unrelated with dowry demands or harassment related to dowry is often given the image of dowry by the spouse to get level with their husbands.

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7 https://indiankanoon.org/doc/1906/
8 https://indiankanoon.org/doc/92983/
9 19 July 2005
10 30 August 1995
11 (2005 (6) SC 266)

A functional analysis of the section 498-A portrays that a section which was formerly constructed to save the women from being harassed and physically harmed by the husbands or relatives regrettably has been tortured to annoy the husband and his family.

Section 498A IPC, 1860 is stated to be "Gender-biased? law since current research reveals that the section provides safety only to women in the brawl against spouse and his relatives. Numerous matters have been lodged in the police station which forms the foundation for the executive stats of dowry harassment cases, which or else implicate that only the women are entitled to lodge harassment cases with an infinite scope of fabricating facts and false without even giving any penalty to pay damages or any kind of compensation. It is factual that a vigilant analysis of the provision exposes some real problems which can affect the social order.

As evident that only the female society is framed to lodge cases related to harassment then for this there must be an abuse of this section ensuring the harassment of the husband and his family. The legislature at the point framing this provision did not take into consideration that this section will cause injustice to men and women both. Thereby due to such reason the main victims of such cases are being ill-treated to state accusation and frivolous claims. Either the family of the husband or the husband itself is sent to jail irrespective of their status, health and age.

A study performed by the researcher lays down that the literate women are taking benefit of the provisions of 498-A in order to live separately, apart from the husband and his family right after the family of the husband has fulfilled all the demands of cash and kind and the Section of section 498A is such that the husband cannot even lodge a complaint or even if they do they are not enforced solely on the point that the law is applicable only for the safety of women and not men. That's why the provision incurs the notoriety of legal terrorism since it has the custom of leaning towards the woman and becomes a malevolence section when fall into erroneous hands.

Reasons for misusing Section 498-A of IPC, 1860:

1. Legal extortion is the easiest way to get large sum of money so that one may get rich.
2. In today's world previous relationship has been the major ground for misusing of the section, so that women can obtain easy divorce.
3. Section 498A is used as tool to bargain adultery and hide the offence committed by the women.
4. Domination is another reason which this section is used to gain control over the family and finance.
5. To gain over illegal custody of the children and deny the same to the father Section 498A is used as a misusing weapon.

Misuse of Section 498-A in Modern World: A violation of this section, its goals and its aims is on the rise with the woman frivolously making false allegations against their husbands with the purpose of getting rid of them or simply hurting the family.

The abuse of this section is rapidly increasing and the women often well- educated know that this section is both cognizable and non-bailable and impromptu works on the complaint of the woman and placing the man behind bars.

Like in the case of Savitri Devi v Ramesh Chand & Ors[13], the court held clearly that there was a misuse and exploitation of the provisions to such an extent that it was hitting at the foundation of marriage itself and proved to be not so good for health of society at large. The court believed that authorities and lawmakers had to review the situation and legal provisions to prevent such from taking place.

This section was made keeping in mind protection of the married woman from unscrupulous husbands but is clearly misused by few women and again this is strictly condemned in Saritha v R. Ramachandran[14] where the court did notice that the reverse trend and asked the law Commission and Parliament to make the offence a non-cognizable and bailable one. It is been a duty of the court to condemn wrongdoings and protect the victim but what happens when the victim turns into the abuser? What remedy does the husband have here?

On this ground, the woman gets to divorce her husband and re-marry or even gain money in the form of compensation. Many women rights' groups go against the idea of making the offence a non-cognizable and bailable one thinking that this gives the accused a chance to escape conviction. But what this would do is that it would give a fair chance to the man and above all help meet the ends of justice. Justice must protect the weaker and ensure that the wronged is given a chance to claim back his/her due.

[12] AIR 2010 SC 3363
[13] I (2003) DMC 328
[14] I (2003) DMC 37 (DB)

When women accuse their husbands under S.498A IPC by making the offence non-bailable and cognizable, if the man is innocent, he does not get a chance quickly to get justice and 'justice delayed is justice denied'. Therefore, the lawmakers must suggest some way of making this section non-biased to any individual such that the guilty is punished and the person wronged is given justice.

The position of the women in India is still bad. They still need rights to alleviate themselves in society, but many a times fail to notice others' rights as long as their rights are ensured. The educated woman of today must agree with the mantra of equality and demand the same but the trend is slowly getting reversed. Women are taking due advantage of the fact that they are referred to as the 'weaker sex' and on the foundation of rights ensured to them are violating others' rights.

In context to curb this nuisance the Supreme Court in 2007 in the case of Srinivasalu v. State of A.P.[15], declared that the chain of brutality that is moreover likely to move the women to do suicide or cause grievous hurt or endanger her life which must be constructed before the arrest of the husband and his relatives. The FIR must only be taken into consideration when there is enough point to believe that there is hefty amount of violence caused by the husband his relatives towards his wife.

There has been immense misuse of this penal section by the women society as them making false and frivolous allegation against the husband just for the reason of getting away from them and mentally hurting the family. There is high rise in the abusive nature of the section, speedily increasing and the women society very well knows that the provisions of this section are both non-bailable and cognizable and such complaints directly works towards putting the husband behind the bar.

Likewise in the famous case of Savitri Devi v. Ramesh Chand & Ors[16], the court clearly stated that there is gross misuse and mistreatment of the section to such a point that it is destabilizing the marital foundation and such has to be proved for the welfare of the society at large. The court here believes that the legislature has to revisit the present scenario and the section to prevent such happening to take place.

So, the question here is that it is the formal duty of the Judiciary to stop the wronged and save the victim and what is next when the victim himself becomes the abuser? Does the husband have any remedy here?

The Court in the case of Sarita v. R. Ramachandran[17] did take note of the matter of the trend which is reverse in nature and further directed the Parliament and Law Commission to change the offence to a Bailable and non-cognizable one.

The weaker must be protected by Justice and the wrong doer is entrusted to get back his/her due. The concept of justice delayed is justice denied comes into account when the woman accuses her husband when the husband himself is innocent and he is denied justice. The section shall be made unbiased for every individual so that the person wronged is provided with justice and the punishment is given to the guilty.

The Supreme Court in the case of Kamaraj vs. State of Punjab[18], delivered that due to the wrong of the husband the relatives cannot be held to liable. The cruelty act of the accused and his relatives must be proved beyond reasonable doubt. Sheer conjectures and implication cannot lead to arrest. The concept of roping in the husband's relatives has to be curbed by the executive authority.

The Punjab and Haryana High Court in the case of Jasbir Kaur vs. State of Haryana[19], observed that the alienated spouse shall reach any extent to pull in as many husband's relatives in a fighting commitment to bring to end the remaining of the marital relationship.

The main question in relation to the fact lays that doe's one spouse commit cruelty to another spouse. The after effect of the registered complaints or allegations mounting on a particular individual rests on different factors like the status, education, sensitivity of the falsely accused victim and the societal background. The gravity of mental cruelty depends on human to human concerning its sensitivity, its endurance power and courage instilled. The various cases in relation to cruelty must be decided on the merits by ensuring whether physical or mental cruelty is made out or not.

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15 Appeal (Crl.) 11 of 2002

16 II (2003) DMC 328

17 I (2003) DMC 37 (DB)

18 2000 Cri LJ 2993

19 (1990)2 Rec Cri R 243

Judicial Approach Towards Section 498-A of IPC

Recently the Supreme Court of India issued new guiding principle to avert the exploitation of 498-A of I.P.C in Rajesh Sharma vs. State of Uttar Pradesh[20].

In the case the two judges bench explicitly Justice A.K.Goel and U.U. Lalit said that societal connection in the delivery of justice can be one of the method, apart from the executive authorities and the lower courts being sensitive in manner, it is so important to smooth the progress of closure of trial where a authentic agreement has been reached settled of parties being required to move High Courts only for that underlying principle.

The Supreme Court observed "It is a substance of severe apprehension that large numbers of cases continue to be filed under Section 498-A alleges persecution of married women. This court had previously noticed the reality that most of such complaints are filed in the heat of the moment over minor issue. Many such complaints are bonafide. At the occasion of filing of the complaint, implications and cost are not visualized. At times such complains are lead to uncalled for aggravation not only to the accused but also to the plaintiff. Uncalled for arrest may devastate the chances of defrayal. This court had earlier experienced that a serious analysis of the provision was reasonable".

The Bench sought backing from the Senior Advocate V Giri as amicus curiae and Additional Solicitor General (ASG) Atmaram Nadkarni. The court deliberated the area under discussion of roping in family members to reconcile a conjugal dispute.

The Bench stated, "Compilation allegations against all relatives of the husband cannot be in use at same value when in ordinary path it may only be the husband or at his parents who may be accused of asking dowry or causing nuisance. To check abuse over implications, clear sustaining material is needed to continue against other relative of a husband".

Directions in Rajesh Sharma's Case

i) (a) In every district one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members. The constitution and working of such committees may be reviewed from time to time and at least once in a year by the District and Sessions Judge of the district who is also the Chairman of the District Legal Services Authority.

(b) The Committees may be constituted out of para legal volunteers/social workers/retired persons/wives of working officers/other citizens who may be found suitable and willing.

(c) The Committee members will not be called as witnesses.

(d) Every complaint under Section 498A received by the police or the Magistrate be referred to and investigated by such committee. Such committee may interact with the parties personally, or by means of telephone or any other mode of communication including electronic communication.

(e) Report of such committee be given to the Authority by whom the complaint is referred to it latest within one month from the date of receipt of complaint.

(f) The committee may give its brief report about the factual aspects and its opinion in the matter.

(g) Till report of the committee is received, no arrest should normally be affected.

(h) The report may be then considered by the Investigating Officer or the Magistrate on its own merit.

(i) Members of the committee may be given such basic minimum training as may be considered necessary by the Legal Services Authority from time to time

(j) The Members of the committee may be given such honorarium as may be considered viable.

(k) It will be open to the District and Sessions Judge to utilize the cost fund wherever considered necessary and proper.

ii) Complaints under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area. Such designations may be made within one month from today. Such designated officer may be required to undergo training for such duration (not less than one week) as may be considered appropriate. The training may be completed within four months from today.

iii) In cases where a settlement is reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer nominated by him in the district to dispose of the proceedings including closing of the

[20] CRIMINAL APPEAL NO. 1265 OF 2017

criminal case if dispute primarily relates to matrimonial discord;

iv) If a bail application is filled with at least one clear day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected. Needless to say, that in dealing with bail matters, individual roles, prima facie truth of the allegations, requirement of further arrest/ custody and interest of justice must be carefully weighed;

v) In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine.

vi) It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and

vii) Personal appearance of all family members and particularly outstation members may not be required, and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

viii) These directions will not apply to the offences involving tangible physical injuries or death. According to Report of National Crime Report Bureau in 2005, for a total 58, 319 cases registered under section 498-A IPC, a total of 1, 27,560 people were held, and 6,141 cases were declared false on account of mistake of fact or law. According, to Report of Crime in India, 2013, the National Crime Records Bureau further pointed that out of 4,66,079 cases that were pending in the start of 2013, only 7,258 were convicted while 38, 165 were acquitted and 8, 218 were withdrawn. The conviction rate of cases registered under section 498-A IPC was also a staggering low at 15.6%.

In case of Social Action Forum for Manav Adhikhar & Ors v UOI,[21] Supreme Court of India has modified its directions issued in Rajesh Sharma case for preventing misuse of Section 498A of Indian Penal Code. A three judges' bench led by CJI has withdrawn the earlier direction issued by two judges bench that complaints under Section 498A IPC should be scrutinised by Family Welfare Committees before further legal action by police. Though the bench acknowledged that there was misuse of the provision leading to social unrest, it said that Court cannot fill in legislative gaps.The Court observed that there were inbuilt mechanisms in criminal procedure to check misuse of provisions. "We have protected pre-arrest or anticipatory bail provision in dowry harassment cases, there is no scope for courts for constitutionally filling up gap in penal law". The Bench was delivering the Judgment in petitions seeking reconsideration of the directions to check abuse of Section 498A of the IPC laid down in the 2017 apex court judgment in Rajesh Sharma v. UOI.

In Chandra Bhan Case (2008)[22], Court direct that, No case under sec 498-A/ 406 IPC should be registered without the prior approval of ACP/DCP; and arrest of foremost accused should be made only after methodical investigation has been conducted and with prior authorization of the ACP and DCP.

In Arnesh Kumar vs. State of Bihar Court[23] intended as follows: Police Officers not to mechanically arrest when a case u/s 498-A IPC is registered but to gratify themselves about the inevitability for arrest under the parameter laid down under section 41 of CrPC; all police officers be provided with a check list containing particular sub-clauses under section 41(1)(b)(ii); the police officer shall further shift the check list duly filed and deliver the reason and essence which necessitate the arrest, while forwarding the accused before the Magistrate for further imprisonment,: failure to act in accordance with the track aforesaid the police officer concerned legally responsible for departmental disciplinary action, they shall be accountable to be punished for contempt of courts to be instituted before High Courts having territorial jurisdiction. The Magistrate while authorizing imprisonment of accused shall pay meticulous attention to the report settled by the police authority in terms aforesaid and onlyafter recordingits contentment, the Magistrate will authorize arrest; authorizing custody without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental disciplinary action by the appropriate High Court.

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21 WRIT PETITION (CIVIL) NO. 73 OF 2015

22 1510 DLT 691

23 ((2014)8 SCC 273)

In Lalitha Kumari vs. State of Uttar Pradesh[24], the Supreme Court directed the arrest of relative other than Husband could only be after authorization from the concerned Magistrate; There should be no detaining of relatives aged above 70 years; Power to police officers to directly arrest must be prohibited. While conceding permission the court must determine that there is prima facie substance of the accused having done some explicit and stealthy act. The offence should be compoundable and bail capable; the duty of each complainant must be precise in the complaint must be accompanied by the signed affidavit; the copy of the prelude enquiry report should be given to the accused.

In Rajesh Sharma vs. State of Uttar Pradesh[25] the Supreme Court held some guidelines which are as follows:

1. In every constituency one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members.
2. The Committee members will not be called as witnesses; Every complaint u/s 498A of IPC received by Police or the Magistrate be forwarded to and looked into by such family welfare committee.
3. Such Committee may have communication with the parties individually or by means of Telephone or any other mode of interactions including electronic communication.
4. Report of such committee should be given in one month from the date of receiving of complaint.
5. The committee may give brief account about the factual aspect and its opinion in the issue
6. Till the report of the committee is established no arrest should formally be affected.
7. The report may be then considered by the Investigation Officer or the Magistrate on its own pro.
8. The complaints registered u/s 498-A and other related offences shall be investigated only by the designated investigating officer of that area.
9. In cases where a resolution is reached it will open to the District and Session Judge or any other Senior Judicial Officer nominated by him in the District to dispose of the trial including ultimate closing of the Criminal Case if dispute principally related to matrimonial discord.
10. Personal manifestation of all family members and particularly outside members may not be required and authorize appearance by video conferencing without unfavourably affecting the proceedings; these directives will not apply to the offences concerning tangible physical harm or leading to death.

All the directions of the Supreme Court in different cases in different times relating to Family disputes with the ultimate object of every legal system is to punish the guilty and protect the innocents.

In the case of Paniben vs. State of Gujrat[26], the Supreme Court observed that -

"Each instance of a case concerning to dowry related death arises, it causes ripples in the puddle of the principles of this Court. Nothing could be furthermore barbarous' nonentity could be more atrocious than this genus of crime. The origin cause of murdering a young bride or daughter-in-law is cupidity and voracity. All affectionate feelings, which alone make humanity noble, fade away from the heart. Kindness, which is the trait of human culture, is obscured. Compassion to the fairer sexual category, the minimum consideration is not even revealed. The seeding which is uprooted from its unique soil and is to be planted in another soil to grow and bear fruits is compressed. "

"These above judgments underline the factual status that it is not enough to pass the law against social evils. Until it is always supported by executive authorities or officers, who can make a fool proof case, and a judge whose intellect reflect the social context in which we live, it is difficult to implement social welfare laws".

Section 498A of Indian Penal Code, 1860 is intended to protect not the rights of the wife, but those of her husband, and so prima facie the consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredients of the offence under section 498 of IPC.

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[24] ((2014 2 SCC1))

[25] Criminal Appeal No. 1265 OF 2017

[26] 1992 AIR 1817, 1992 SCR (2) 197

Findings and Suggestions

The major findings of the paper according to the researcher are that:

1. The researcher opines that the whole Section is sheltering the mere possibility of huge social commotion in large quantum. At present it is a massive assignment for all the courts to make out differences between the accusations which are false and the real defending victims since the whole of the section focuses towards harbouring the women who are subject to cruelty from their husbands or relatives.

2. The legislation prepared under the ambit of Indian Penal Code is totally being miscarried or misused. In relation to it many other issues or matters are being worked out as the ancillary portion of such exploitation such as high level corruption among the Executive and Police authority as well as the law enforcement officers who duly take illegal gratification from one party to simply harass the other party; corrupt politicians taking undue advantage of such situations in pretext of knowing that there are numerous number of false complaints being filed by women just for the objective of harassing the in-laws, as they get support in the form of securing vote banks; to the surprising facts the lower judiciary also disposes these case in fast track mode instead of going deep into the main facts of the case properly and carefully.

3. After conduction thorough research the researcher finds out that the Supreme Court had laid down this problem to be called as the "Legal Terrorism" and has also give various guidelines in context to the phrase used.

In the light of aforesaid finding the following suggestions are opined towards the research problem by the researcher: -

1. The proceedings of serious nature criminal cases in India continue for around 8 to 10 years that also depending upon the quantum of that crime. So, a speedy trial is suggested so that the victims who are innocent and get trapped under the ambit of 498A get quick justice. It is therefore of most important that besides being effectual the judiciary must ensure quick advancement of the proceedings regarding the cases related to 498A.

2. An enforcement shall be formulated in context to the investigation of cases under Section 498A that such cases is under the operation of Civil Authorities and after finding of evidences which are reasonable in manner, then shall establish the crime and the investigation authority shall duly take proper action against the same.

3. There is an immediate requirement for the amendment of the provisions laid down under Section 498A of IPC and this shall be the most major concern for the Legislature in the modern period.

4. In India we shall have an organization who shall agree to offer Family Counselling. The establishment of such organization is so necessary that individuals can easily vent their anger out and can also seek the advice of legal practitioners and experts.

5. The NGO's in collaboration with other Human Right Organization shall play the lead role to educate the society in relation to not lodging of criminal cases in minor matters or issues. 6. The cases registered under Section 498-A of IPC must be continued as bailable offence and not as non bailable offence just for the purpose of preventing the innocent from falling into police custody.

7. As the lodging of false cases for dowry are rising at an alarming rate, the Judiciary shall start acting appropriately by imposing penalty and strict action towards the individual for making of such false implications and accusations.

8. If there is enough evidence to prove that is enormous negligence on the part of the police and investigating authority then stringent actions shall be initiated against such dishonest and corrupted personnel. They must also be suspended from their respected posts.

Conclusion

The legislature has always tried to come up with the laws that could benefit the society and upgrade those who are lacking and need to be brought at the front. This is the reason that the specific laws regarding a particular section of the society is introduced so that those in the need of it can benefit from it, but the problem occurs when these people forget the true essence of the law and start misusing it for their own selfish purposes. The intention of the legislature while the laws related to dowry practice was to eradicate this evil practice from the society and to help women acquire an equal status, their intention was to bring

a nexus between the legal and thesocial current. Before the introduction of this act, the social current was inclined towards the men and their family; this law gave a sense of fear among them that if they indulge in such practices they would have to suffer severe negative consequences due to it. It is not that this law has not achieved its purpose; there has been certain decline in the dowry rates. The issue that arose in the recent decade is the introduction and increase in the number of false cases of dowry, as per the statistics almost 10,000 complaints of dowry harassment were false. This is the reason that there is a demand to make the Section 498-A of IPC as compoundable, which is for now as non-compoundable in nature.

The abuses to these laws have reduced the authenticity of the genuine cases. The judiciary is working in order to remove this trend, the recent judgment of the Supreme Court where they directed that there must be no arrest in the dowry cases, till the time the charges has been proved in the court. The trend that has been set in the dowry laws, that the onus of innocence lies with the wife needs to be changed now, the basic essential of the criminal law that was changed for the purpose of dowry law, i.e. in these cases the accused is assumed to be guilty on the first hand and he has to prove his innocence in the court of law, while in all other cases other than this there is a presumption that that the accused is innocent until not proved guilty. The change can only be brought when the thinking of the society changes, the equality on the documents can never be assumed to have been achieved in the real sense. Still there are places where dowry is prevalent, the reason is that it has been in built in the mindset of the girl's family as well that there is nothing wrong in giving or taking dowry, so the girl's themselves build this sort of mindset that if they are bringing a huge amount of money and valuables with them after the marriage, then they can do and live in whatever way they want without any intervention, it now becomes an issue of ego. So, when that does not happen, they tend towards taking revenge and thus they use this law as a tool for they own purpose of ego satisfaction. Hence, the basic requirement of today's scenario is to eradicate this mindset that women are the weaker section of the society and they are the only ones who can be on the victim position.

Viability of Court's Proceedings through Video Conferencing during Covid-19 Pandemic

Dr. Shoaib Mohammad*

ABSTRACT

The ongoing flare-up of COVID-19 (Coronavirus) in a few nations, including India, has required the quick reception of measures to guarantee social distancing to forestall the transmission of the infection. The Supreme Court of India and High Courts have initiated measures to curtail the actual presence of advocates, parties, court staff, para legal workers and agents of the electronic and print media in courts across the nation with ensuring guarantee of the administration of equity. Each person and establishment are these days participating in following measures intended to curtail the Covid-19 infection. Alternatively reducing the regular activities inside the of courts is a measure toward that path. Equity is key to safeguard the standard of law in the popular government imagined by the Constitution of India, which cannot be taken away anyhow. The difficulties occasioned by the flare-up of COVID-19 must be tended to while safeguarding the conveyance of and ensuring equity to the individuals seeking it as constitutional obligation. It is equally significant for the courts to guarantee justice while observing social distancing rulesframed now and again by different experts, healthcare persons, Government of India, and the Provinces.

Introduction

Current innovation has empowered courts to upgrade the quality and viability of the organization of equity. Innovation has encouraged advances in speed, availability and network which empower the regulation of equity to occur in different settings and circumstances without bargaining the center lawful standards of mediation. Indian courts have been proactive in grasping headway in innovation in legal procedures.

The Indian judiciary has integrated Information and Communication Technology systems via the e-Courts Integrated Mission Mode Project (e-Courts Project) as phase of the National e-Governance Plan (NeGP). The strong infrastructure in place has decreased traditional impediments and legal uncertainty surrounding the use of digital courts. ICT enabled infrastructure is accessible throughout all courts together with the district judiciary which constitutes the initial interface of the court system with the citizen.

The use of science and technology received judicial attention in precedent of the Court in State of Maharashtra v. Praful Desai[1] whereby Supreme Court held that the expression 'evidence' consists of electronic evidence and that video conferencing can also be used to record evidence. It opined that trends in science and technology have opened the opportunity of digital courts which are like physical courts. The Court held :

"Advances in science and technology have now, so to say, contracted the world. They now allow one to see and hear events, taking place far away, as they are truely taking place…Video conferencing is an development in science and technology which allows one to see, hear and speak with any individual far away, with the identical facility and ease as if he is present before you i.e. in your presence. In fact, he/she is present before you on a screen. Except for touching one can see, hear and have a look at as if the party is in the same room. In video conferencing both parties are in presence of each other. Recording of such evidence would be as per "procedure mounted via law"."

With the uncommon and unprecedented flare-up of a pandemic, it is vital that Courts at all levels react to the call of social separating and guarantee that court premises don't add to the spread of infection. This doesn't involve carefulness yet of obligation. For sure, Courts all through the nation especially at the degree of the Supreme Court and the High Courts have utilized video conferencing for allotment of Justice and as watchmen of the Constitution and as defenders of individual freedom administered by the standard of law. Taking discernment of the measures embraced by this court and by the High Courts and District Courts, it is important for this court to give headings by taking plan of action to the ward gave by Article 142 of the Constitution.

Therefore, in exercise of the powers conferred on the Supreme Court of India by Article 142 of the Constitution

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[1] (2003)4 SCC 601

of India to make such orders as are necessary for doing complete justice, the Supreme court directed that:[2]

i. All measures that have been and shall be taken via this Court and by means of the High Courts, to minimize the need for the bodily presence of all stakeholders inside courtroom premises and to protect the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;

ii. The Supreme Court of India and all High Courts are licensed to undertake measures required to ensure the strong functioning of the judicial mechanism using video conferencing technologies; and

iii. Consistent with the peculiarities of the judicial mechanism in each and every country and the dynamically growing public health situation, each and every High Court is accredited to decide the modalities which are appropriate to the temporary transition to the use of video conferencing technologies;

iv. The concerned courts shall keep a helpline to make sure that any grievance in regard to the quality or audibility of feed shall be communicated throughout the proceeding or without delay after its conclusion failing which no complaint in regard to it shall be entertained thereafter.

v. The District Courts in every State shall undertake the mode of Video Conferencing prescribed by the concerned High Court.

vi. The Court shall duly notify and make accessible the amenities for video conferencing for such litigants who do no longer have the potential or get right of entry to video conferencing facilities. If necessary, in appropriate instances courts may additionally appoint an amicus-curiae and make video conferencing amenities accessible to such an advocate.

vii. Until appropriate regulations are framed through the High Courts, video conferencing shall be basically employed for hearing arguments whether or not at the trial stage or at the appellate stage. In no case shall proof be recorded barring the mutual consent of both the parties through video conferencing. If it is imperative to record proof in a Court room the presiding officer shall make certain that suitable distance is maintained between any two persons in the Court.

viii. The presiding officer shall have the power to prevent entry of people into the court room or the places from which the arguments are addressed through the advocates. No presiding officer shall stop the entry of a client to the case until such client is suffering from any infectious illness. However, where the number of litigants are many the presiding officer shall have the power to preclude the numbers. The presiding officer shall in his discretion adjourn the court cases where it is no longer viable to restrict the number.

The above bearings are given by the Supreme Court in encouragement of the pledge to the conveyance of equity. The alliance of all the courts, judges, prosecutors, gatherings, staff and different stakeholders is imperative in the successful implementation of the above guidelines to guarantee that the judicial executives to confront the exceptional situation introduced by the episode of COVID-19.

[2] In re, Guidelines for court functioning through video conferencing during Covid-19 pandemic, 2020 SCC Online SC 355

India's Manoeuvres towards Universal Health Coverage: A Discourse from Governmental Schemes

Sougata Talukdar*

ABSTRACT

Universal Health Coverage (UHC) has recently become a top item on the global health agenda pressed by multilateral and health organizations, as disenchantment grows with vertical, disease-specific and population centric health programs all over the world.[1] Many scholars utter that UHC can be described as "the single most powerful concept that public health has to offer" under the flagship of the World Health Organization.[2] As a scheme, it ensures that people do not suffer financial hardship while paying for healthcare services. The UHC not only has a direct impact on people's health but also enables people to be more productive and declines the possibility of being pushed into poverty and uncertainty. Thus, UHC is one of the targeted component of sustainable development.[3] India approached this scheme with some of its already existing programs and also with some of the newly drafted programs. Among these programs, Pradhan Mantri Swasthya Suraksha Yojana, Janani Suraksha Yojana, Rashtriya Swasthya Bima Yojana and Ayushman Bharat can be treated as four pillars of Indian approach. In this background, this paper tries to explain UHC as a concept and also tries to make detail discussion regarding India's instrumentalities to achieve the UHC for securing better health for its citizens in the near future.

Universal Health Care: The Concept

Out-of-pocket payments and lack of access to healthcare create FInancial barriers for thousands of people that stop them from seeking and receiving required healthcare services.[4] To solve this pan-globe issue, the World Health Organization propounded a new recommendation with the nomenclature "Universal Health Coverage" (UHC). Thus, from the inception, the UHC has become a focal point in global health conversations. As per the WHO's scheme, UHC means "all people receiving quality health services that meet their needs without exposing them to financial hardship in paying for them.[5] "However, this definitional scheme of the UHC varies with the requirement of time and as the frame of the social structure. The 58th World Health Assembly, 2005 indirectly defined UHC as "access to key promotive, preventive, curative and rehabilitative health interventions for all at an affordable cost."[6]

Somewhat differently from the earlier definitions, the World Health Report in 2010 specified the UHC as a goal under which "all people have access to services and do not suffer financial hardship paying for them".[7] Thus, the 2010 World Health Report offered UHC as an objective and a policy for its member States to reform their healthcare systems according to the needs of their people.[8] Since then, most definitions have had an a like framework with some variation in phrasing. Among these variations, at least four kinds of phrasing are major. Firstly, some definitions declare that everybody must have "access" to healthcare services as opposed to "receiving" healthcare services. Secondly, some definitions refer to "needed services," "key

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1 Ashley M. Fox and Michael R. Reich, The Politics of Universal Health Coverage in Low- and Middle-Income Countries: A Framework for Evaluation and Action, Vol 40(5) Journal Of Health Politics, Policy And Law 1023 (2015).

2 David Holmes, Margaret Chan: Committed to Universal Health Coverage, Vol 380(9845) LANCET 879 (2012); Judith Rodin, and David de Ferranti, Universal Health Coverage: The Third Global Health Transition?,Vol 380(9845) LANCET 861 (2012).

3 Arti Gupta et. al.,India Strive to Provide Universal Health Coverage, Vol 3(3) Journal Of Pharmacy Practice And Community Medicine 92 ().

4 A. Wagstaff and E. Van Doorslaer, Catastrophe and Impoverishment in Paying for Health Care: With Applications to Vietnam 1993–1998, 12 Health Economics 921 (2003); C. Hjortsberg, Why Do the Sick Not Utilise Health Care? The Case of Zambia,12 Health Economics 755 (2003).

5 WHO, Making Fair Choices On The Path To Universal Health Coverage 1 (WHO, 1stEdn., 2014).

6 Fifty-eighth World Health Assembly, Social Health Insurance: Sustainable Health Financing, Universal Coverage and Social Health Insurance, Report by the Secretariat (WHO, 2005) available at https://apps.who.int/iris/handle/10665/20302. (Last visited on May 2, 2020).

7 WHO, The World Health Report 2010: Health Systems Financing: The Path To Universal Coverage (WHO, 1stEdn., 2010).

8 David B. Evansa and Carissa Etienne, Health Systems Financing and the Path to Universal Coverage, Vol 88 Bulletin Of World Health Organization 402 (2010).

services," or "necessary services," as opposed to "services that meet people's needs." Thirdly, some definitions denote to "financial catastrophe," or "poverty" rather than "financial hardship".And fourthly, all definitions do not explicitly link the financial damage with the requirement of payment for services.

Therefore, in general, the UHC broadly means that all people and communities can use sufficient quality of thepreventive, promotive, rehabilitative, curative and palliative health services they need, and also ensure that the access to these services does not expose them to financial hardship. In the spirit of previous unifying concepts related to health such as Health for All, Basic Health Needs etc., the UHC offers a vision in which all individuals will enjoy (i) a strong and efficient healthcare system that widths preventive and curative medicine, (ii) affordable access to that required healthcare system, and (iii) get support from sufficient human resources for the healthcare system.[9]

Hence, the detail scheming of the UHC reveals that the concept of the UHC symbolizes broadly three related objectives: (i) equal access to health services – every individual who needs services should get them, and thus, healthcare services should not be available only for those who can pay for them; (ii) quality of healthcare services should be good enough to improve the health condition of those who are receiving it and should have the capacity to satisfy their needs, and (iii) people should be protected against financial hardship. Thus, reducing people's responsibility towards the paying for healthcare services out of their pockets will also reduce the probability that people will be pushed into poverty because of the unexpected illness which requires them to use up their life savings or borrow financial supports and ultimately destroys their futures with regard to the financial support system. Thus, accordingly in 2015, the Sustainable Development Goals fixed achieving UHC as one of the targets.

In totality, the UHC has been endorsed as a social welfare strategy that can strengthen healthcare systems, raise revenue for healthcare, and improve social risk protection in low and middle-income countries.[10] From the definitional scheme, it is clear that UHC incorporates two complementary dimensions in addition to FInancial risk protection, those are: (i) the extent of population coverage (who is covered) and (ii) the extent of healthcare service coverage (what is covered).[11] A broader answer to these questions is always the welcome step from the national perspective. Therefore, if any country achieves the UHC successfully with all its dimensions and corners, then the health scenario of the people of that country will obviously change.

India's Response to Universal Health Care

Traditionally in India, the budget allocation in health is very low which causes the failure of the government sector to provide healthcare services to such a vast population. It compels patients to seek care in the private healthcare sector and thus, the chance of exploitation increases. Evidence suggests that a dynamic interaction between five factors forces patients towards private healthcare sector in India: (i) healthcare arrangements dominated by private sector, (ii) high share of private investment as compared to public investment in the healthcare, (iii) scarcity of public services in critical areas, (iv) lack of efficiency and accessibility in the public healthcare sector and (v) better infrastructural availability in the private sector. As a result, by paying high-cost,individuals agree to move towards the private healthcare sector and thus, generally, patients have to pay more than three-quarters of health expenditure out of their pocket. Even the competitive attitude among the healthcare section sometimes forces the public healthcare sector to act similar to the private sector.[12] However, India's commitment towards achieving the UHC is clearly reflected in recent policy makings and institutional mechanism building, which are dedicated towards increasing healthcare coverage for its people.[13] To attain these goals, India has initiated various policies like National Health Policy, National Rural Health Mission, National Urban Health Mission etc. Along with these, there are various schemes of the Central Government which are also beneficial to include poor people within the health coverage mechanism. Majorly, four schemes are there to address these issues: (i) Pradhan Mantri Swasthya Suraksha Yojana, (ii) Janani Suraksha Yojana, (iii)

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9 Scott L. Greer and Claudio A. Mendez,Universal Health Coverage: A Political Struggle and Governance Challenge, Vol 105(S5) American Journal Of Public Health 637 (2015).

10 Julio Frenk and David de Ferranti,Universal Health Coverage: Good Health, Good Economics, Vol 380(9845) LANCET 862 (2012).

11 Guy Carrin et.al., Universal Coverage: A Global Consensus in Scaling Up Affordable Health Insurance 101, 102 (Alexander S. Prekeret.al., 2013).

12 Maureen Mackintosh et. al., What Is the Private Sector? Understanding Private Provisionin the Health Systems of Low-income and Middle-income Countries, Vol 388(10044) LANCET 596, 597 (2016).

13 Sanjay Zodpey and Habib Hasan Farooqui, Universal Health Coverage in India: Progress Achieved and the Way Forward, Vol 147(4) Indian Journal Of Medical Research 327 (2018).

Rashtriya Swasthya Bima Yojana and (iv) Ayushman Bharat - National Health Protection Mission. For a better understanding of India's initiatives towards UHC, a detail deliberation of these abovementioned schemes is very much required.

A. Pradhan Mantri Swasthya Suraksha Yojana

Among these schemes, the Pradhan Mantri Swasthya Suraksha Yojana (PMSSY) was declared in August 2003 to correct regional imbalances in the availability of affordable or reliable tertiary healthcare services. It also includes the aim of attaining self-sufficiency in graduate and post-graduate medical education and training in India.[14] Primarily, the PMSSY has two components (i) setting up of AIIMS like institutions, and (ii) up-gradation of Government Medical College Institutions (GMCIs) for securing health for all as stated in Alma Ata Declaration in 1978. In March 2006, the Phase-I of the PMSSY was permitted by the Central Government which contained (a) setting up of 6 AIIMS like institutions (later re-named as new AIIMS), and (ii) up-gradation of 13 existing State Government Medical Colleges or Institutions.[15] Upgradation of GMCIs envisaged improvement in healthcare infrastructure through the construction of Super Specialty Blocks or Trauma Centers.[16] Further in Twelfth Five Year Plan, the Government again decided to increase the number of new AIIMS and to elevate other the GMCIs in subsequent phases.[17] As a consequence, over the years, the scheme has been expanded. As of March 2017, the Government decided to setup twenty new AIIMS and to promote 71 GMCIs in six-phases. The Cabinet Committee on Economic Affairs approved the PMSSY for Rs. 332 crores per institution in March 2006. The cost, however, escalated to Rs. 820 crores per institution in March 2010.[18]

The PMSSY Division of the Ministry of Health and Family Welfare is entrusted with the overall task of implementation and monitoring of PMSSY. Committees at Central, State and Institute levels has formed for monitoring the implementation of the scheme. In January 2004, the Ministry constituted a Project Management Committee (PMC) under the Chairmanship of the Secretary (Health) with representatives from the Ministry of Finance, Prime Minister Office, Planning Commission, Airport Authority of India and AIIMS Delhi. The PMC was the apex steering body and was responsible for guiding and monitoring activities relating to the establishment of new AIIMS and for up-gradation of GMCIs in the States in the primary stage. Further, for proper implementation of this policy, in November 2007, the Central Ministry of Health and Family Welfare asked the State Governments to set up State Project Monitoring Committees headed by the Principal Secretary of Health or Medical Education of the respective State Government for monitoring the up-gradation of GMCIs. Thus, by providing bust to the educational sector, the PMSSY tries to upgrade the health scenario as a whole and wants to secure the flow of health personals in public healthcare institutions. However, all these efforts to make the PMSSY a success story fails to achieve its glory in reality. Lack of any operational guidelines, engagement of inefficient staffs, lack of synchronization and coordination, insufficient infrastructure put this scheme under the scanner.

B. Janani Suraksha Yojana

The Janani Suraksha Yojana (JSY) is a nationwide safe motherhood intervention scheme, under the National Rural Health Mission, framedto reduce maternal and neonatal mortality by promoting institutional delivery among the poor pregnant women. This maternal health-centric scheme was launched on April 12, 2005.[19] The important features of the JSY scheme are to motivate, counsel and ensure safe institutional delivery particularly among women belonging to BPL category and Schedule Castes and Scheduled Tribes and identifies them for antenatal care, delivery, postnatal care, immunization and family planning services.[20] Notably, JSY was proposed by the Central Government by modifying the National Maternity Benefit Scheme (NMBS). While NMBS is linked to the provision of better diet for pregnant women from BPL families, the JSY scheme integrates cash assistance with

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14 Seema Agency v. Union of India, II (2018) BC 364 (Chhattisgarh).

15 Anita Nath, India's Vision for Health: Perspectives from the XIIth Five-Year Plan (2012-2017), Vol 4(1) International Journal Of Medicine And Public Health 46 (2014).

16 Public Accounts Committee, Pradhan Mantri Swasthya Suraksha Yojana, One Hundred And Thirty Fourth Report6 (Lok Sabha Secretariat, 1stEdn., 2018).

17 Raman Kumar, Healthcare and Medical Education Reforms in India: What Lies Ahead? 2(2) Journal Of Family Medicine And Primary Care 123 (2013).

18 Planning Commission, Report Of The Working Group On Tertiary Care Institutions For 12th Five Year Plan (2012-2017) 28 (Government of India, 1st Edn., 2011).

19 Laxmi Mandal v. DeenDayalHarinagar Hospital, 172 (2010) DLT 9.

20 R.V. Deshpande, Is Janani Suraksha Yojana (JSY) Contributing to the Reduction of Maternal and Infant Mortality? An Insight from Karnataka, Vol 57(1) Journal Of Family Welfare 1, 2 (2011).

antenatal care during the pregnancy period, institutional care during delivery and the immediate postpartum period in a health centre by establishing systems of coordinated care by the field-level health workers and government welfare mechanism.[21] Therefore the JSY scheme has brought together functional maternity-nutrition benefit scheme and referral transport scheme for poor women into a single package and fixed the focus of this scheme on assuring institutional delivery. From the monetary aspect, JSY is a centrally-sponsored scheme. Some States, for example, Andhra Pradesh make their own similar scheme thereby increasing the amount of cash assistance for institutional deliveries by summing up with the scheme of the Central government. Tamil Nadu has introduced a separate scheme for providing poor mothers with Rs. 1000/- per month as cash assistance for six months i.e. three months before the delivery and three months after for securing institutional delivery.[22]

Further, the JSY recognizes the Accredited Social Health Activist (ASHA) as an actual link between the Government device and the poor pregnant women mainly in the eight Empowered Action Group (EAG) States (Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Odisha, Rajasthan, Uttrakhand and Uttar Pradesh), in addition to Assam, Jammu and Kashmir and the remaining North-eastern States. All together these States are also known as the Low Performing States. In rest of the States or the High Performing States, along with ASHA activists, Anganwadi Workers and Trained Birth Attendants also have been engaged with JSY.[23] ASHA women usually work under an Auxiliary Nurse Midwife and her work has to be supervised by a Medical Officer. The aim of appointing these ASHA people is to make a bridge between the provider and the client and thereby motivating women and their families to seek delivery care under a healthcare facility.[24] Performance-based cash payments along with other allowances are also offered to this ASHA workers. Therefore, in totality, the larger institutional framework of National Health Mission complements the JSY by providing comprehensive healthcare, including ante-natal and post-natal services, transport to facilities, and support services from ASHAs. It also includes several support services administered by community health workers to encourage pregnant women to use institutional healthcare facilities for childbirth, along with at least three ante-natal check-ups.[25]

In the Low Performing States, all women are within the ambit of the Scheme and the cash incentives are higher than in the remaining States. In other States, women are eligible for the cash benefit only for their first two live births, and only if they have a government-issued BPL card or if they are from Scheduled Caste or Tribe of the State.[26] In case a poor woman does not have a BPL card then she can access the benefit upon certification by Gram Panchayat or Pradhan provided the delivery takes place in a government institution. The disbursement of cash assistance is made at the time of delivery. In the case of the High Performing States, cash assistance of Rs. 700 in case of the rural area and Rs. 600 in case of the urban area is given for institutional delivery, whereas in case of Low Performing States cash assistance of Rs. 1400 in case of the rural area and Rs. 1000 in case of the urban area is given for institutional delivery. In rural areas, cash assistance for transportation to the nearest health centre for delivery of the child is also provided under the scheme. Along with the pregnant women under the JSY, a new born child is also entitled to emergency care including integrated management of neonatal and childhood illness, care of routine childhood illness, essential newborn care, promotion of exclusive breast feeding for 6 months.

After launching in 2005, the annual number of JSY beneficiaries grew rapidly, from 7, 39,000 per year in 2005-2006 to more than 11 million in 2010-2011.[27] Thus, undoubtedly, institutional delivery in India has increased and the maternal mortality ratio has reduced over time as a result of socio-economic development coupled with advancement in healthcare infrastructure.

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[21] Kirtiman Mahanta et. al., JSY- Janani Suraskhya Yojana and Its Impact on Women- A Case Study on VSS Institute of Medical Sciences Burla, Sambalpur, Odisha, Vol 3(6) Research Review 155, 156 (2018).

[22] People's Union for Civil Liberties v. Union of India, AIR 2008 SC 495: (2009) 16 SCC 149.

[23] Lopamudra Paul and Ramesh Chellan, Impact of Janani Suraksha Yojana on Institutional Delivery in Empowered Action Group States, India, Vol 3(2) south East Asia Journal Of Public Health 4, 5 (2013).

[24] M. E. Khan et. al., Impact of Janani Suraksha Yojana on Selected Family Health Behaviors in Rural Uttar Pradesh, Vol 56 Journal Of Family Welfare 9 (2010).

[25] Sukumar Vellakkal et. al., A Qualitative Study of Factors Impacting Accessing of Institutional Delivery Care in the Context of India's Cash Incentive Program, Vol 178 Social Science Medicine 55, 56 (2017).

[26] S. Lim et. al., India's Janani Suraksha Yojana, A Conditional Cash Transfer Programme to Increase Births in Health Facilities: An Impact Evaluation, Vol 375(9730) LANCET 2009 (2010).

[27] Natalie Carvalho and Slawa Rokicki, The Impact of India's Janani Suraksha Yojana Conditional Cash Transfer Programme: A Replication Study, Vol 15 Journal Of Development Studies 1, 3 (2018).

However, to date, the JSY scheme fails to reach all part of India in equal force. As a result, there is a disparity with regard tothe success of the scheme. Further, lack of manpower, inadequate training, transportation responsibility on ASHA people, the improper survey also creates hurdles in the path of the JSY scheme implementation. Moreover. the scheme should also include the nutritional aspect of women during pregnancy and the post-delivery period within its ambit.

C. Rashtriya Swasthya Bima Yojana

To address the issue related to out-pocket payment for accessing quality healthcare services, the Rashtriya Swasthya Bima Yojana (RSBY) is an ambitious public health insurance scheme for the needy people of India. It was launched in August 2007. The RSBY is the result of the report of High-Level Expert Group of the Planning Commission on UHC, which advocated for the integration of individual policies into a National Health Package, emphasizing the need for more supply-oriented resources. This report also encouraged the promotion of private healthcare in certain localities where public health care delivery is inadequate.[29] RSBY aims to improve access to quality healthcare involving hospitalization and surgery through an identified network of healthcare providers for below poverty line families.[30] By allowing the hospital to bill directly to the insurance company for the cost of treatment, the RSBY made it attractive for private and public hospitals so that they can be enthusiastic to provide healthcare facilities and by subsidizing the annual premium, the scheme makes healthcare nearly free for beneficiaries.[31] The RSBY generally provides for annual coverage of up to Rs. 30,000 per house hold with a maximum of five members, for inpatient treatment in more than 8,000 empanelled hospitals. The Scheme explains these "five members" including the head of a household, spouse and up to three dependents. An important feature of the scheme is its national portability which has been made possible by the standard enrolment card and beneficiary identification process.

The scheme also covers hospitalization, related tests, consultations, day-care treatment and medicines along with the pre and post-hospitalization expenses for some 700 medical and surgical conditions and procedures. Pre-existing diseases are also included within the paraphrenia of the scheme and there is a provision for transport allowance maximum upto Rs. 1,000 per year.[32] The Central Government will bear 75% and State Governments will bear 25% of the beneficiary's premium to the insurer and the State Government has to select the insurer following a competitive bidding process.[33] It is noteworthy that while in health schemes, generally, the Ministry of Health and Family Welfare plays the pivotal role, under this scheme, the Ministry of Labour and Employment (MOLE) plays a major role in decisions making and implementation. The RSBY is implemented at the state level through the State Nodal Agency (SNA). The choice of which department should form the SNA depends on the decision of State Governments. The SNA is involved in contracting insurance companies in accordance with the guidelines issued by the MOLE. The eligibility criteria for these insurance companies include a valid license from the Insurance Regulatory and Development Authority at the time of application. The insurance companies are accountable for empanelment of hospitals and ensuring that their institutional infrastructure meets scheme empanelment criteria. These insurance companies are also responsible for ensuring the enrolment of beneficiaries, which is conducted by the insurance company's representatives in the presence of a government functionary assigned the role of a "Field Key Officer." These officials are supervised by the District Key Manager. In addition to their role in authorizing the beneficiary enrolment, the District Key Managers are also responsible for monitoring and evaluation of the scheme in their jurisdiction.[34] By using all these stages of connecting machinery, RSBY rapidly and successfully expanded inpatient benefits to more than 142 million people in India.

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[28] Rajesh Kumar Rai and Prashant Kumar Singh, Janani Suraksha Yojana: The Conditional Cash Transfer Scheme to Reduce Maternal Mortality in India - A Need for Reassessment, Vol 1(4) WHO South-east Asia Journal Of Public Health, 362 (2012).Sanjeev Gupta et. al., Impact of Janani Suraksha Yojana on Institutional Delivery Rate and Maternal Morbidity and Mortality: An Observational Study in India, Vol 30(4) Journal Of Health Population And Nutrition 464 (2012).

[29] Arindam Nandi, The Need for Better Evidence to Evaluate the Health and Economic Benefits of India's RashtriyaSwasthyaBima Yojana, Vol 142 Indian Journal Of Medical Research 383, 348 (2015).

[30] Sulakshana Nandi et. al., A Study of RashtriyaSwasthyaBima Yojana in Chhattisgarh, India, Vol6(Suppl 1) BMC Proceedings 5 (2012).

[31] D. Rajasekhar et. al., Implementing Health Insurance: The Rollout of Rashtriya Swasthya Bima Yojana in Karnataka, Vol 46(20) Economic And Political Weekly 56 (2011).

[32] Id., at 57.

[33] Prateek Rathi, Evaluation Of Rashtriya Swasthya Bima Yojana (RSBY): A Case Study Of Amravati District 9 (Indian Institute of Management, 1stEdn., 2012).

[34] Gerard La Forgia and Somil Nagpal, Government-sponsored Health Insurance In India: Are You Covered 299 (The World Bank, 1stEdn., 2012).

However, these strong infrastructures and this ambitious scheme failed in many sectors in case of practical implementation. The RSBY only provides insurance coverage for secondary care that is generally provided at Community Health Centers, District Hospitals, but it excludes both primary care and tertiary care.[35] Further, the RSBY does not include expenses related to outpatient treatment also. Moreover, the poor condition of the RSBY hospitals and the previous bad experience of the patients and their relatives also creates hurdles for the fullest utilization of the RSBY scheme.[36] The low awareness about the benefits of the scheme is also evident from various studies.[37]

D. Ayushman Bharat

Under the modern health structure, India cannot realize its demographic dividends without its citizen being healthy. Thus, the Central Government conceived "Ayushman Bharat - National Health Protection Mission" (Healthy India) on September 23, 2018, as a shift from traditional health planning tactics towards a comprehensive healthcare vision. The Ayushman Bharat Program aims to build a New India by 2022 and ensure enhanced productivity, well-being and avert wage loss and impoverishment. It warrants access to healthcare for all, specifically the poorest and most vulnerable section of the Indian society by utilizing core technology as its backbone. NITI Aayog highlights the imperative need to completely redesign the flow of people, money, and information, as well as introduces a layered approach to provide comprehensive foundational health functions for all the States through Ayushman Bharat Program.[38]

The 2011 Socio-Economic Caste Census is the basis for determining the eligibility for this scheme. Thus, the benefits will eventually bea pan-India basis. This means that a beneficiary will be allowed to take cashless healthcare support benefits from any public or empanelled private hospital across the country. State Government will lead the implementation of this Ayushman Bharat Program. In addition to this, State Governments are free to continue to provide existing programs alongside the national program or integrate them with the new scheme. State Governments are also free to pick their own operating model to pay a private insurance provider to cover services or provide services directly (like Chandigarh and Andhra Pradesh), or a mix of these two (like Gujarat and Tamil Nadu). Expenditure for running this scheme will be shared between the Central and State Governments in a prespecified ratio depending on the legislative arrangements and relative wealth of the States, covering between 60% - 100% of the expenditure. In case of structural area, the Ayushman Bharat Program combines two initiatives: (i) delivering comprehensive primary health care by establishing 1,50,000 Health and Wellness Centers (HWCs) by the year 2022, and (b) providing financial protection for secondary and tertiary level hospitalization as part of National Health Protection Scheme (NHPS). Both of these are aiming for increased accessibility, affordability, availability and quality of primary, secondary and tertiary level healthcare services in India. The HWCs were proposed by the task force on strengthening primary healthcare in India in 2016 and first declared in the Union Budget of 2017-18, whereas the National Health Protection Scheme was first announced in Union Budget of 2016-17.However, subsequently, the National Health Protection Scheme has been renamed as Pradhan Mantri Rashtriya Swasthya Suraksha Mission. The Ayushman Bharat Program with these two components intends to bring back the attention on the delivery of the entire range of preventive and protective care. Thus, Ayushman Bharat Program is a public health scheme, the source of finance is from Government revenue, service providers are hospitals, and people at large are policyholders or beneficiaries.

Further, the combination of UHC and 'Ayushman Bharat Program' has the potential to place health higher in position in future public, social and political discourses in India. Ayushman Bharat Program aims to provide coverage of Rs. 50,000 per family annually, benefiting more than 10 crore poor families. It includes the beneficiaries beyond the traditional approach of levelling 'below poverty line' population like RSBY. Inclusion of

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[35] Primary care refers to health care services that act as a first point of consultation for all patients within the health care system. Secondary care refers to health care services provided by medical specialists and other health professionals who generally do not have the first contact with patients. Tertiary care is specialized consultative healthcare, usually for inpatients and on referral from a primary or secondary health professional, in a facility that has personnel and facilities for advanced medical investigation and treatment, such as a tertiary referral hospital.

[36] Shikha Gupta, Awareness and Utilization of Rashtriya Swasthaya Bima Yojana and Its Implications for Access to Health Care by the Poor in Slum Areas of Delhi, Vol 6(3) Health Systems 242, 252 (2017).

[37] Ramachandra Kamath et. al., Determinants of Enrolment and Experiences of Rashtriya Swasthya Bima Yojana (RSBY) Beneficiaries in Udupi District, India, Vol 4(1) International Journal Of Medicine And Public Health 82, 86 (2014).

[38] S. A. Tabish, Transforming Health Care in India: Ayushman Bharat-National Health Protection Mission, Vol 7(12) International Journal Of Scientific Research 16, 17 (2018).

'vulnerable and deprived population' identified through socioeconomic and caste census will nearly double the number of people to be benefited.[39] Hence, if this scheme lives up to its potential, then it presents a unique opportunity to institutionalise quality healthcare, free at the point of service, for the most marginalised Indians, to improve the health of the population and drastically to reduce medical-related impoverishment.[40] However, the lack of willingness to adopt this Central Program by the State Governments creates the biggest obstacle in the path of implementation. Furthermore, there should be adequate financial support from the Central Government to avoid resource constraints in implementing this Program by the State Governments. In addition, the existing and interrelated structural deficiencies of the Indian health care system such as issues of public and private sector governance, stewardship, quality control, and lack of control on health care organisations will also put the success of this scheme far behind.[41] Thus, whilst these weaknesses pose a threat to the ability of proposed reforms to meet their ambitious objectives, Ayushman Bharat Program, as a step towards UHC, presents Indian healthcare structure a chance to tackle long-term and embedded shortcomings in governance, quality control, affordability and access related issues.

Conclusion

Like the international health arena, the Indian structure also focusing on the UHC to provide equal access to healthcare and to secure quality healthcare for all. The abovementioned schemes and programs are trying to take forward steps towards that end. However, though these initiatives majorly concerned with the healthcare, they failed to address the out-pocket costing for medicine and surgical instruments within its ambit. Further, the progress towards attaining UHC is hindered by the lack of strength of the health workforce and the absence of adequate skills among the workforce to deliver quality services to the entire population.[42] Thus, in the long run, the healthcare system has to shift from the pricing and hospitalization to viability and sustainability. The balance between the expansion of coverage and utilization of the nation's resources will be the major concern for policymakers in the coming days. Yet, the government initiatives to achieve UHC within 2030 should not be stopped as this is the only goal that can help us to see a better healthy future.

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[39] Chandrakant Lahariya, Ayushman Bharat Program and Universal Health Coverage in India, Vol 55 Indian Pediatrics 495 (2018).

[40] Blake J. Angell et.al., The Ayushman Bharat Pradhan Mantri Jan Arogya Yojana and the Path to Universal Health Coverage in India: Overcoming the Challenges of Stewardship and Governance, Vol 16(3) Plos Medicine 1 (2019),available at https://doi.org/10.1371/journal.pmed.1002759 (Last visited on May 7, 2020).

[41] Ibid.

[42] Angelica Sousa et. al., Comprehensive Health Labour Market Framework for Universal Health Coverage, Vol 91(11) Bulletin Of World Health Organization 892, 892 (2013).

Mental Healthcare Act 2017: An Analysis

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ABSTRACT

In the year 2017 Indian Parliament passed "Mental Healthcare Act" [Act 10 of 2017] which came into force on 07th April 2017, and thereby the erstwhile "Mental Health Act 1987" was repealed. Law is always enacted and promulgated for everyone with the changing scenario of society. From time to time, it may undergo major/minor changes by way of Amendments etc., but at the same time sometimes looking to the radical societal changes, the already existing Law (Statute) is repealed, and a new Legislation in Form of the Statute is brought in by the respective Legislatures viz. Parliament (Rajya Sabha & Lok Sabha) and the State Legislative Assembly & State Legislative Council.

The Mental Healthcare Act was promulgated in 2017 in view of the tremendous changes in societal outlooks. Its "Statement of Objects & Reasons" clearly speaks that this new Act recognizes different kind of mental illness, emotional and social burden of providing the treatment, financial hardships in serving a person who is mentally ill, and the kind of discrimination & insults he faces in society. The new Act was necessary in view of the factual & legal position that the erstwhile Act 1987 was proving to be insufficient to protect the rights of mentally ill-persons, and it started failing in passage of time to provide conducive atmosphere for facilitating the recovery, rehabilitation and exhaustive participation of mentally ill-person in our Society. Not only this, the new Act is having substantial objects to protect, promote, ensure, fulfill and regulate the rights of mentally ill-person in all the spheres of life.

Even otherwise, the mentally ill-persons and their families have been experiencing the life-long impact due to such illness, and permanent tendencies of hiding many things relating to mental illness; and their eventual exploitation, insults, abuse, neglect, and marginalization at the behest of the society. The depression could be seen glaringly, and gradually in its spreading form in India. We lacked the infrastructure badly, and the number of Institutions undertaking the overall welfare of mentally ill persons is yet not in commensuration with what is needed in our country. We had to get along with the Commonwealth norms, and also to go for the active role for upbringing the conditions of mentally ill persons recognizing the fact that the "World Health Organization" (WHO) has already been quite serious for such upliftment.

Our "National Institute of Medical Health & Neuro-Sciences" (NIMHANS, Bengaluru) although has been functioning in this regard, but at the same time this institution also needed its functional overhauling. The Parliament remained conscious that new Legislation/Statute becomes more and more "patient-centric". Hence it goes without saying that we needed for new legislation by repealing of the erstwhile Act 1987 in view of its glaring shortcomings.

Introduction

"Mental Healthcare" stands defined in Section 2(1)(o) of the Act, which includes analysis and diagnosis of a person's mental condition, treatment, care and rehabilitation. Further "mental illness" is defined in its Section 2(1)(s), which inherently includes substantial disorder of thinking, mood, perception or memory which grossly impair his judgment, behavior, and capacity. This definition is quite an inclusive one.

This Act's other provisions under the different Chapters are quite important for us all to know. Under the Chapter II Sections 3 & 4 are meant for "determination of mental illness" and "capacity to make the decisions on mental healthcare and also its treatment".

Chapter III and the provisions thereunder (Sections 5 to 13) circumvent around the most important right of mentally ill persons, which is named as "Advance Directive". This important right firstly stands defined under Section 2(1)(a) of this Act 2017. Section 5 enlarges this Term in a manner that every major person with mental illness shall have a right to make an "Advance Directive" in writing with the specifications the way such person wishes to be cared for and treated for; and he shall also have the right to express his wishes if he wants not to be cared for and treated for in particular manner/s. He is also conferred the right to appoint his "Nominated Representative". Such right can be modified by him, and the last modification shall prevail over the previous one/s. Other provisions under this chapter III are of regulatory and administrative in nature regarding his aforesaid right of "Advance Directive".

Chapter IV speaks for the appointment, revocation, alteration in appointing the "nominated representative". Its last Provision (Section 17) relates to the "duties of nominated representative".

Various rights of mentally ill person are under the umbrella of chapter V, which are quite detailed & exhaustive, as a mentally ill person has been given the right to access for the

mental healthcare, right to community leaving, right to protection from cruel, inhuman and degrading treatment, right to equality and non-discrimination, right to information, right to confidentiality, right of the restriction on the release of information pertaining to his mental illness, right to access medical records, right to personal contacts and communications, right to legal aid, and lastly the right of making complaints about deficiencies in the provision/s of services. Suffice it to say that this new statute gives very wide coverage of the rights of mentally ill Person, which were otherwise not there under the earlier erstwhile Act 1987.

Subsequent chapters no. VI, VII, VIII, IX, X and XI and the provisions thereunder are regulatory in nature, which speak for providing "duties of appropriate government", "Central Mental Health Authority", "State Mental Health Authority", "Finance, Accounts & Audit", "Mental Health Establishments", and "Mental Health Review Boards" to further the rights of mentally ill person under this statute. Subsequently chapter XII is meant for "admission, treatment and discharge"; and chapter XIII is for "responsibilities of other agencies"; and chapter XIV puts restriction to discharge functions by professionals not covered by the profession. Chapter XV covers "offences and penalties", and lastly chapter XVI covers miscellaneous and remaining aspects. The last provision i.e. Section 126 of this statute (new Act 2017) is for "repeal and saving", and thereby the erstwhile Mental Health Act, 1987 (Act 14 of 1987) stands repealed.

The importance of Section 121 of this new Act 2017 cannot be overlooked. Vide this provision, central government and state governments have been conferred with the power to make rules and notifications, for carrying out the provisions of this Act. While exercising powers under this the central government has already made/framed "The Mental Healthcare (Rights of Persons with Mental Illness) Rules, 2018"; "The Mental Healthcare (Central Mental Health Authority and Mental Health Review Boards) Rules, 2018"; and "The Mental Healthcare (State Mental Health Authority) Rules, 2018". Thus, it can be inferred that the central government has already taken up its duties qua this new statute quite seriously.

Judgment in "Common Cause"

Time and again, the matters pertaining to the "mental illness" issues came up for consideration/adjudication before Supreme Court of India, and other High Courts also. In the case of *Common Cause Vs. Union of India,*[1] five judges bench while explaining important aspects of "euthanasia" (active & passive; and voluntary & non-voluntary) also considered the aspect of the mentally ill persons health. The concept of "euthanasia" i.e. "intentional premature termination of life of another person at his/her request" is meant for, and to cause "good & smooth death". In my view such concept is in fact immensely needed in India.

We have to admit that "mental health" is significantly different from "general health". The time has come that the "mental health" be given due recognition", by coming out from unintended discrimination thereof, so that the august and literally religious legislative intentions behind the Mental Healthcare Act, 2017 can be furthered, and enriched for the time to come.

[1] (2018) 5 SCC p.1

Tribes in India and Human Rights Jurisprudence

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ABSTRACT

Human rights are as old as human understanding. The idea of the inalienable rights of the human being was often articulated by poets, philosophers and politicians in antiquity. Indian culture was also having the concepts of human rights in their culture from its inception and continued till the date through its cultural heritage. The British ruled India and introduced their laws here and tried to show to the world as the universal law givers to all the ruledcountries.

Tribes, who are the original people (aborigines) from the forests are the most vulnerable group of people in India. India had the largest concentration of tribal people anywhere in the world except perhaps in Africa. They constitute 8.6% of the population living here with a maximum concentration of population seen in the north eastern parts of India. This group is recognized as the "weaker" section by the Constitution of India. Presently, the prominent tribal areas constitute approximately 15% of the total Geographical area of the country, the main concentration being in the central tribal belt in the middle part, and in the north-eastern states. Their presence, however, is significant in all states and Union Territories.

The history speaks that the most privileged and most disadvantaged groups was always full of struggle in mankind history; and they always fought to get justice in all times and climes. There is a history of marginalization and forcible assimilation of the most disadvantaged group also.

The founding fathers and the framers of the Indian Constitution wilfully made certain provisions to facilitate the weaker sections of the society to come up to the level of the general body of citizens. The scheduled tribes, one of the constituents of the weaker section, numbered about 41.1 million as per 1971 census and constituted 8.1% and 8% of the total population according to 1991 census and 2001 census respectively. These scheduled Tribes people are sometimes also referred to as "Adivasi' and 'Banjati'.

The Constitution of India, enacted on 26thNovember, 1949 and commenced on 26thJanuary, 1950, came in to existence after the Universal Declaration on Human Rights, 1948, already incorporated the concepts of human rights in it. The author tried to find out the human rights jurisprudence with special reference to tribal's in India in the light of ancient practices to the present legal position and prospects.

Introduction

Human rights are as old as human understanding. Elain Pagels has said , "Like the ideas of Parliamentary Democracy or Marxist Political Theory, like the ideas of science and technology, or of racial equality, the idea of human rights is gaining momentum and is increasingly becoming a master of political priorities throughout the world"[1]. The idea of the inalienable rights of the human being was often articulated by poets, philosophers and politicians in antiquity.

In 1940, *Mr. Winston Churchill and Mr. Franklin Roosevelt* met in board a battleship in the *Atlantic*. They formulated a statement of principles which were shared by England and United States. It was called the Atlantic Charter. These principles were stated eloquently in speech by Roosevelt on 6thJanuary, 1941:

"In the future's day's, which we seek to make secure, we look forward to a world founded upon four essential human freedoms:

The first is freedom of speech and expression everywhere in the world.

The second is freedom of every person to worship God in his own way - every where in the world.

The third is freedom from want. The fourth is freedom from fear."[2]

Human Rights in Indian Culture

We, in India, from time immemorial, believe in "oI/kodVEcde!" meaning there by we consider the whole

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1 Elaine Pagels : "The Roots and Origin Of Human Rights" in Alice H. Henkin (ed.) , 'Human Dignity : The Internationalisation of Human Rights' , (1997) , p.8.

2 Lord Denning : "What Next in Law" (1982) p.277.

worldas our family; weal so believe in "lokHkofUr lf[ku] lo% lUrfujke;k --------"means-"All remain happy, all remain healthy….". These concepts speaks of welfare of all animal kingdom, plants, environment, ecology and everything in this cosmos world; it was never confined to only humans and human rights only.

If we look in to the Indian mythology then we find, in *Sat-yuga* the story of *Sagar Manthan*

- Churning of Sea is a story of human rights, an effort for the betterment of the life free from illness and health problems, to get Amrit (Nector).

The story of Narsimha Avatar, an incarnation of *Lord Vishnu* to kill the demon *Harinyakashyap*, and protect the human rights of *Bhakt Prahaldand* the people from his cruelty and in human behaviour.

In *Treta-yuga, Devarshi Narad* seems to be the propounder & pioneer, who preached and taught a tribal man, for the first time his and others for the human rights. He preached the human rights to the cruel, brutal, the wild killer and a demonly inhuman ferocious dacoit *Ratna,* who was a tribal man, and he, as a result, became *'Aadi Kavi Maharshi Valmiki'* who wept on the killing of pairof "*Krounch*", and the *first Shlok of Sanskrit,* the moment of the evolution of *Sanskrit from Devvani*, came out from his tongue. Such a drastic change occurred by virtue of the inspiration of

Devarshi Narad which completely changed a dacoit into a Saint, poet, philosopher and many more.

Ekkfu"kkn ifr"Bkre lexg ··v'orhLe%

y tkrounchmi thunA dEkmokmvdhlmkA mm0hi tm!!

;r Økš¥p feFkukn de lkde vof/ke dkeekfgre !!

Means - *"O Nishad, You who have killed one of the birds engaged in the act of love, thus, may you not yourself suffer the separation from spouse!"*

The next person who can be quoted, during *Treta-Yug*, as the key man for the establishment of the principles of human rights, was *"Lord Ram".*

Ram is known as *"Maryada Purushottam"* i.e. the *Ideal Man of Ideal Principles*. He established by his work and conduct, the ideal things for any human during his life span in all circumstances, and became *"Maryada Purushottam"*. He was the first person, who recognised tribes as human and worked the maximum for the protection of human rights of tribes. He not only protected the human rights of mankind but devoted his whole life for the establishment of it.

By referring to Ramayan, we can see, right from his childhood to death, he fought for it. When he was near about 14 years old, he went with *Maharshi Vishva-Mitra* to save the *Rishi-Munis* from the cruelty and inhuman behaviour with them by the Rakshash/Rakshashies of demons *Rakshash Ravana*.

He was the first person, who understood and felt human rights of women, and took 'Ek Patni - Vrat' - means, keeping a single wife only, on the vow given to *Sita.*

During *Vanvaas* (i.e. living in forest), his conduct (*Aacharan*), which were revolutionary and never thought for according to that time and gave messages to the then society and to the generations of future, like:-

- *Kripa* on *Kevat*- Behaviour with Kevat, a tribal men, while crossing the Saryu river;
- Acceptance of hospitality of *Shabari* - treatment with a tribal lady by eating herhalf
  - tasted wild Berries (*Jhuthe Jangli Ber*) of *Bhilani Shabri* from her hands; later
- *Jatayu - Seva* - after the kidnapping of Sita by Ravanaand Jatayu, who was also a tribal person (Gridh), was injured by Ravana, the behaviour and treatment by Ram with Jatayuu; then
- *Hugging Hanuman*, who was also a tribal man (Vanar- means Monkey), hugged him, and treated him as his real brother[3] 6, who was in his the most confidence through-out hislife;
- helping *Sugreeva*, again a tribal man (Vanar) by punishing Bali, who has snatched the wife of Sugreeva (i.e. his younger brother) and kicked him out from the house;
- treating *Jamvant as Mantri*, a tribal person (Riksha- means Bear) as his friend and guide, made him, his one of the Mantri, an advisor;
- gave shelter to *Vibhishan*, who was kicked by Ravana and left Lanka due to inhuman behaviour with him by his brother Ravana; and
- War of *Raksha Sanskriti vs Sabhya Sanskriti*- over all the Ram-Ravana-War - War with Ravan for entirehumanity;,

were the basic steps taken for the re-establishment of the human rights.

During all his entire *Vanvaasto* till the war with demon *Rakshash Raavana*, only tribal people viz. Gridh, Vanar,

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[3] RaghupatiKinhi Bahut Badai, Tum Mum Priya Bharat sam Bhai, … (j?kifr dhuh cgr c<kb] re ee fi; Hkjr leHkkbA)" - Hanuman Chalisa, authored bySant Tulasidas.

Riksha, etc. helped him due to his utmost loving and friendly behaviour towards him. It is important to note here, that not a single man and even Devata, who showered flowers on his victory or tried to help him under-cover, came for his help or assistance due to terror of demon *Rakshash Raavana*.

Later, after victory over demon *Rakshash Ravana*, he returned to Ayodya, sworn as the *King of Ayodyagave* also ears to the down trodden common man, and took decision to shift, his wife Sita, from palace to Jungle on the well-known principle of fair justice '*Caesar's wife must be above suspicion*', a renowned principal of Natural Justice for the good administration of justice; and gave message to his people that every common man's voice will be heard and his human rights will be protected at any cost. And we know that his Ruling Regime known as "*Ram - Rajya*" is considered to be the ideal regime of all time, for any kind of administration of justice and for the welfare of the people till theday.

There are many glaring examples which tells us that Ram sacrificed his life for the establishment of human rights.

Ravana was a '*Rakshas*' i.e. demon and was founder of the '*Raksha-Sanskriti*'. To eat human flesh is the basic course of his culture i.e. '*Raksha-Sanskriti*' (demon culture). He was man eater, and relished with the *Nar & Vanar* (i.e. Humans and Monkeys) as food. In other words, Rakshas, they were habitual man-eaters. So it was the fight of vegetarians (e.g. '*Nar-Vanar*') versus non-vegetarians (e.g. demons) and ultimately it was the victory of humanrights.

Then come to *Dwaper-Yug, Lord Krishna*, who from the childhood fought for the establishments of the human rights. There was a sound principle behind him becoming of "*Makhan-Chor*" i.e. the stealer of butter. In fact Kanswho was not only cruel but was inhuman in his behaviour also and the people were terrorised, including his sister Devaki (the mother of *Krishna*), who faced the cruel murders of her seven children before her eyes by her brother *Kans* and hence *Kansen* couraged the inhuman culture as well as the people of thelike.

The milk and butter used to go to *Mathura* to *Kansa* as tax from the cow-tamers, a kind of tribe. *Krishna* and his friends under the leadership of Krishna opposed the inhuman behaviour of *Kans* and feeding by the village. So to stop the supply to *Kans* he opted the method of loot and destruction because the only available weapon in the hands of those children was that one.

Lord Krishna as Dropadi Cheer Haran Uddharak, increased the Sari of *Dropadi* while her *Cheer - haran* in Rajya - Sabha of Kouravas, and protected her dignity and human rights and in Bhagvad Gita, specifically emphasised that his approach and Bhakti is not confined to only Brahmins and Kshatriyas man, which was the societal practice at that time; but also available to all Varna including Vaishya and Shudra, all Sex (including women), all Yoni (including Paap Yoni) and can be in every Asharam.

Lord Krishna always advocated the victim's rights over accused rights[5] -

After that, the *Mahabharat* was fought only on the issue of establishment of the settled norms of human rights. Although the Pandvas were equally entitled in the dynasty but they were not given a single inch of land for their minimum livelihood which resulted in *Mahabharat* and *Krishna* took active part in establishing the settled principles of human rights.

In *Kal-Yuga*, *Lord Buddha*, who showered the blessings on the world and gave the principles of *Ahinsha*, which is solely based upon the principles of human rights.

The first man, who codified the human rights in the form of Law, was Manu. He, first time, made provisions of "*Danda*" i.e. punishment for the crime i.e. wrong against the society or human being in *Manu-Smriti*.

Human Rights and Constitution of India

In International Law, after II World War there was the *Universal Declaration of 1948 on Human Rights* was absolutely useless for one decisive reason. There was no means of enforcing it there was no court to give orders. There were no police to arrest offenders.[6]

Indian Constitution very much has the concept of human rights and ways to save it by means of law.

Under part III of the Constitution the fundamental rights are guaranteed to the people and citizens of India which very well cover the concept of human rights.

In short I must summarised these provisions :-

Articles 14-18 - Rights to Equality; Articles 19-22 - Rights to Freedom;

Articles 25-27 - Rights against Exploitation; Articles 29-30 - Cultural & Educational Rights.

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[4] "Jheöxonxhrk&^^ ek fgikFk;ikfJR; ;|fiL;%iki;ku;%A fL=;ko';kLrFkk 'knkLr|fi ;kfUrijkxfreAA** v/;k; 9 'yksd 32AA " ,o ^^ ;r% iofRrHkkrkuk ;ulofen rreA Lode kk reH;P;flf)fonfUrekuo%AA v/;k; 18 'yksd 46AA**

[5] "Jheöxonxhrk& ^^;nk;nkfg/keL;]XykfuHkofrHkkjrA vH;RFkku v/keL;] rnkRekuel tkE;geAAv/;k; 4 'yksd 6 AA ifj=k kk; lk/kukfouk'kk; pn"drkeA /kel LFkkiukFkk; lEHkokfe ;x ;xAA v/;k; 4 'yksd 7 AA** "

[6] Lord Denning : "What Next in Law" (1982) pp.277-278.

All these rights can be enforced by invoking the power of Supreme Court conferred u/A 32, and of High Courts conferred u/A 226 of the Constitution.

Article 13 declares the laws inconsistent with or in derogation of fundamental rights ultra- vires and void.

Justice Bhagwati has said -

"Right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State, neither the Central Government nor any State Government, has right to take any action which will deprive a person of the enjoyment of these basicessentials"[7].

In S.C. Legal Aid *Committee v. State of Bihar*[8] ,the Supreme Court directed State of Bihar to pay Rs. 20,000/= compensation on the death in police custody and there was negligence in not providing medical aid to the person.

In *Unnikrishanan v. State of A.P.*[9] , it was held by the Apex Court that the right to education is implicit in Article 21. Every child up to 14 years has a fundamental right to free education. After that it is subject to limits of economic capacity and development of the State.

Olga Tellis v. Bombay Municipal Corporation[10], is an important pronouncement on Article

21. The action arose as the Bombay Municipal Corporation sought to remove the pavement dwellers. Their contention was that evicting a pavement dweller from his habitat amounts to depriving him right to livelihood which is guaranteed by Article 21.

The Supreme Court has ruled in the first place, that there can not be estoppel against, or waiver of fundamental rights. Secondly, the Court has ruled that the '*right to life*' guaranteed by Article 21 includes '*right to livelihood*'. No person can live without the means of living i.e. the means of livelihood. The Court said:

"If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation."[11]

In *Hussain Ara Khatoon v. State of Bihar*[12], the right of speedy trial , concept of Habeas Corpus; instant medical aid by saying all doctors, including private doctors obliged to render immediate medical aid in injury cases[13], etc. are considered to be the fundamental rights under Article 21. The Supreme Court, for right to free legal aid to poor or indigent accused who are incapable of engaging lawyers, said that State is bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time. Such right can not be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. The Magistrates and Sessions Judges must inform the accused of such rights.[14]

Violation of Rights of Scheduled Tribes

The Scheduled Tribes, who are the original people (aborigine) from the forests are the most vulnerable group of people in India. They constitute 8.6% of the population, as per Census 2011[15], living here with a maximum concentration of population seen in the north eastern parts of India. This group is recognised as the "weaker" section by the Constitution of India. The violation of rights which began from the time of the British are still found. The main problems of the tribal's are as follows:

- Land Alienation: The tribal's have been alienated from their native lands owned by their forefathers for generations together. This is not a post Independence phenomenon, but it was common even during the colonial days. The Forest laws not only alienated the Forest Dwellers (as know today) but further pushed them to the brinks of poverty and vulnerability .They no more live contented lives and their art and culture that was know to proliferate throughout the world, does not exist any longer.

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7 Bandhua Mukti Morchav. UOI , (1984) 3 SCC 161, 183, 184; &Badhua Mukti Morchav. UOI (1991) 4 SCC177.

8 (1991) 3 SCC 482.

9 (1993) 1 SCC 645; Mohini Jain case, (1992) 3 SCC 666 limited.

10 AIR 1986 SC 180

11 Ibid

12 AIR 1979 SC 1360, 1369.

13 Pt. Parmanand Katara v. UOI, (1989) 4 SCC 286; see also Pashim Banga Khet Mazdoor Samity and orsv. State of West Bengal &anr, 1996 SCC (4) 37.

14 Khatri (II) v. State of Bihar, (1981) 1 SCC627,630-32.

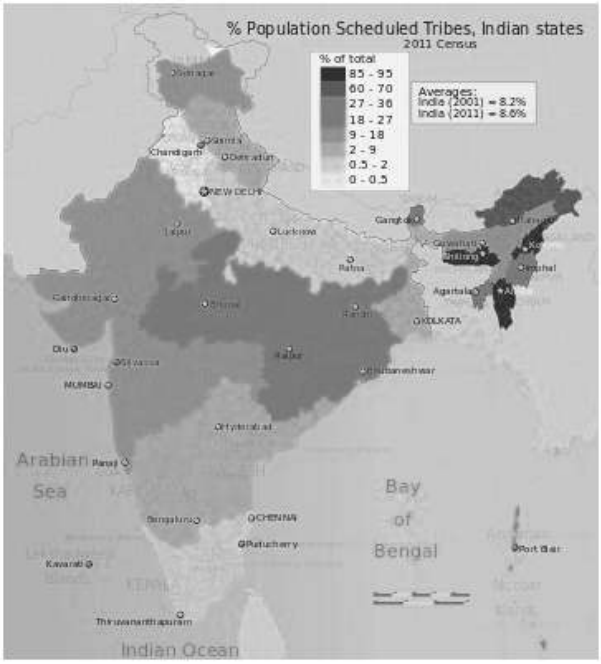
15 Demographic Status of Scheduled Tribe Population of India, Census 2011, Table 1.7 - Statewise Percentage of Scheduled Tribes to total population :2001-2011.

- Forest Land Loss caused due to environmental degradation: The Scheduled Tribes are landless and usually face discrimination. They are further deprived of land which is, today used for commercial purposes. Further, the forest cover has been soon depleting in India that has caused severe damages to the environmental conditions in which the tribal's lived.
- Displacement: Development induced displacement has been a regular feature amongst tribals and there has been large scale migration to cities and townships on account of this.
- Economic Exploitation and Bonded Labour: On account of being landless there is a need to work as agricultural labourers in the farms to earn a living for themselves .This however, takes a brutal turn and the indebted poor are made to work as bonded labourers where they are expected to work for long hours without being paid and it is the employee who decides the tenure and the nature of such work. Matters worsen when the families are attacked for not obeying orders.
- Lack of Basic Amenities: The tribals lack all basic necessities required to live a life in a sufficiently decent life. Right from malnutrition, disease, lack of proper food, excess intake of liquor, lack of schooling, the tribals face a larger set of problems and the government which lacks in an adequate monitoring sector finds the entire exercise of spending on their amenities, a very difficult exercise. Large scale corruption has not only led to deprivation but today the tribals are more into insurgent movements and are ready to sacrifice their lives demanding for seperate states.

Constitution of India and Tribes

The history speaks that the most privileged and most disadvantaged groups was always full of struggle in mankind history; and they always fought to get justice in all times and climes. There is a history of marginalisation and forcible assimilation of the most disadvantaged group also.

The founding fathers and the framers of the Indian Constitution will-fully made certain provisions to facilitate



the weaker sections of the society to come up to the level of the general body of citizens. The scheduled tribes, one of the constituents of the weaker section, numbered about 41.1 million as per 1971 census, now it is about 104.3 million as per 2011 census[16]; and constituted 8.1%, 8% and 8.6% of the total population according to 1991 census, 2001 census and 2011 census respectively. These scheduled Tribes people are sometimes also referred to as "Adivasi' and 'Banjati' as it is evident from the speech of Jaipal Singh, then a member of the Constituent Assembly, who while addressing the first President of India, Dr. Rajendra Prasad, spoke:

> *"I wish that you would issue instructions to your translation committee that the translation of Scheduled Tribes should be 'Adivasi', literally meaning original inhabitants or indigenous peoples). The word Adivasi has grace. I do not understand why this old abusive epithet of Banjati. (forest dwellers) is being used in regard to them*
>
> *- for till recently it meant uncivilised barbarians … In my opinion, it should be Adivasi I am an Adivasi, I call*

[16] Total population of Scheduled Tribes in India is 10,42,81,034 as per 2011census. The share of the Scheduled Tribe population in urban areas is a meager 2.4%. Madhya Pradesh, Maharastra, Orissa, Gujrat, Rajsthan, Jharkhand, Chhatishgarh, Andhra Pradesh, West Bengal, and Karnataka are the State having larger number of Scheduled Tribes These states account for 83.2% of the total Scheduled Tribe population of the country. Assam, Meghalaya, Nagaland, Jammu & Kashmir, Tripura, Mizoram, Bihar, Manipur, Arunachal Pradesh, and Tamil Nadu, account for another 15.3% of the total Scheduled Tribe population. The share of the remaining states / Uts is negligible. Lakshdweep, Mizoram, Nagaland, Meghalaya, Arunachal Pradesh, Dadra & Nagar Haveli, are predominantly tribal States /Union territories where Scheduled Tribes population constitutes more than 60% of their total population. No Scheduled Tribes is notified in Punjab, Chandigarh, Haryana, Delhi, and Pondicherry.

myself an Adivasi. I cannot understand why you wish to give us another name. The fact is that the name Adivasi would be welcome to us".[17]

Since the President of India issued the first notification to recognise the Scheduled Tribes in 1950, India had no policy to deal with indigenous and tribal peoples of the country even though it had the largest concentration of tribal people anywhere in the world except perhaps in Africa. Presently, the prominent tribal areas constitute approximately 15% of the total Geographical area of the country, the main concentration being in the central tribal belt in the middle part, and in the north-eastern states.[18] Their presence, however, is significant in all states and Union Territories. There are nearly 533 tribes (with many overlapping types in more than one state) as per noticed

Schedule under Article 342 of the constitution of India in different states and Union Territories of the country, with the largest number of 62 being in the state of Orissa.

The Constitution of India nowhere and in fact there is no satisfactory definition anywhere, which defines the term 'Tribe'.

However, Article 366 (25) refers to Scheduled Tribes as those communities who are scheduled in accordance with Article 342 of the constitution. According to Art 342 of the constitution, the Scheduled Tribes are the tribes or tribal communities or; part of or groups within these tribes and tribal communities that have been declared as such by the President of India through a public notification.[19]

The Draft National policy on Scheduled Tribes provides that thecharacteristics considered by the President for notifying any tribe as "Scheduled Tribe " are the tribes' primitive traits, distinctive culture, shyness with the public at large, geographical isolation and social and economic backwardness.[20]

"While the constitution has abolished representation on communal lines, it has included safeguards for the advancement of the backward classes amongst the residents of India, so that the country may be ensured of an all-round development. 'These provisions fulfill the assurance of "Justice, social, economic and political" which has been held out by the very Preamble of the Constitution.[21] These include: reservation of seats in the legislature, educational institutions, services and posts, a tribal development programme, recognition of their right of land and forest and provisions for autonomy.[22] The significant Constitutional provisions and safeguards existing for the STs, are mentioned below :

Constitutional Provisions/Safeguards for Scheduled Tribes, can be divided into two parts First - Protective and, Second -Developmental.

Constitutional Provisions speaks of Tribes are:

Constitutional Provisions for Scheduled Tribes

1. Article 15(4): Promotion of Social, Economic and Educational interests[23]

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[17] Quoted from 'The weakly commentary and analysis of the Asian centre for Human Rights (ACHR) on Human Rights and Governance issues, Embargoed for 14 July 2004, Index : Review / 29/2004.
Quoted by Singh, Dr. Upendra Kr., "Constitutional Safeguard and The Role of Judiciary for the Scheduled Tribes", <http://jocipe.com/jocipe5.html >

[18] As per Census 2011:-
State with highest proportion of Scheduled Tribes - Mizoram (94.5 %); State with lowest proportion of Scheduled Tribes - Goa (0.04 %);
UT with highest proportion of Scheduled Tribes - Lakshadweep (94.5 %);
UT with lowest proportion of Scheduled Tribes - Andaman & Nicobar Islands (8.3 %). The share of the Scheduled Tribe population in urban areas is a meager 2.4%. Madhya Pradesh, Maharashtra, Orissa, Gujrat, Rajasthan, Jharkhand, Chhattisgarh, Andhra Pradesh, West Bengal, and Karnataka are the State having larger number of Scheduled Tribes These states account for 83.2% of the total Scheduled Tribe population of the country. Assam, Meghalaya, Nagaland, Jammu & Kashmir, Tripura, Mizoram, Bihar, Manipur, Arunachal Pradesh, and Tamil Nadu, account for another 15.3% of the total Scheduled Tribe population. The share of the remaining states / UT's is negligible. Lakshadweep, Mizoram, Nagaland, Meghalaya, Arunachal Pradesh, Dadra & Nagar Haveli, are predominantly tribal States /Union territories where Scheduled Tribes population constitutes more than 60% of their total population.
No Scheduled Tribes is notified in Punjab, Chandigarh, Haryana, Delhi, and Pondicherry.

[19] Article 342 of the Constitution of India.

[20] The Draft National policy on Scheduled Tribes.

[21] D.D. Basu, Shorter Constitution of India.

[22] Singh, Dr. Upendra Kr., "Constitutional Safeguard and The Role of Judiciary for the Scheduled Tribes", <http:// jocipe.com/jocipe5.html>

[23] Article 15(4): Promotion of Social, Economic and Educational interests
" This article empowers "the state to make any special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes".
This clause has been especially incorporated to prevent any special provision made by a state for the advancement of socially or educationally backward classes of citizens from being challenged in the law courts on the ground of discrimination.

2. Article 16 (4A) & 16 (4B) :[24] Provision for reservation in matters of promotion to any class or classes of posts in the services under the state in favour of the scheduled castes and the Scheduled Tribes.
3. Article 19(5): Safeguard of Tribal Interests[25]
4. Article 29: Cultural and Educational Rights[26]
5. Article 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections[27]
6. Article 164[28]: Provides for a Minister-in-charge of tribal welfare in the states of MP, Chattisgarh, Orissa and Jharkhand.
7. Articles 330, 332 and 334[29]: Provision of reservation for Scheduled Castes and Scheduled Tribes in legislative bodies.
8. Article 335[30]: the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in making the appointments to services and posts in connection with the affairs of the Union or of a State.
9. Article 338-A[31]: National Commission for Scheduled Tribes
10. Article339(1)[32]: Appointment of Commission to report on the administration of

Scheduled areas and the welfare of the Scheduled Tribes in the states.

11. Article 371, 371 A, 371 B, 371 C[33]:- special measures and provisions with respect to the states of Maharashtra and Gujarat, Nagaland, Assam, and Manipur

Besides, provisions are also made in the Fifth and the Sixth Schedule of the Constitution regarding the administration of the tribal areas.

Social Safeguards by Constitution

Article, 15, 16, 17 and 23 of the constitution grants social safeguards to the Scheduled Tribes. Article 17 provides "Untouchability" is abolished and its practice in any form is forbidden. However, Tribes were never treated as untouchable, but was not treated as of lower caliber and was not equally treated as compared to Brahmins and

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[24] Article 16(4A): This article provides; that "nothing in this Article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the state in favour of the scheduled castes and the Scheduled Tribes which, in the opinion of the state, not adequately represented in the services under the state.

Article 16 (4B): This article says, "(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year."

[25] Article 19(5): Safeguard of Tribal Interests "While the rights of free movement and residence throughout the territory of India and of acquisition and disposition of property are guaranteed to every citizen, special restrictions may be imposed by "the state for the protection of the interests of any Scheduled Tribe". (For example state may impose restrictions on owning property by non tribals in tribal areas.)

[26] Article 29: Cultural and Educational Rights According to this article a cultural or linguistic minority has right to conserve its language or culture. 'The state shall not impose upon it any culture other than the community's own culture."

[27] Article 46 This article provides for Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and states:

"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

[28] Article 164 It provides for a Minister-in-charge of tribal welfare in the states of MP, Chattisgarh, Orissa and Jharkhand.

- These states have substantial tribal population and special provision of a Minister looking after tribal welfare is an evidence of the concern of the framers of the constitution for safeguarding the interests of Scheduled Tribes. Earlier it was MP, Orissa and Bihar (MOB) but the new list is mp, Chattisgarh (after 2000), Orissa & Jharkhand (after 2000) Bihar removed.

[29] Articles 330, 332 and334 According to these articles seats shall be reserved for Scheduled Castes and Scheduled Tribes in legislative bodies. There are provisions for reservations of seats in the parliament as well as legislative Assembly ofevery state (Article330,332). Such reservations were cease to be effective after a period of 10 years from the commencement of the constitution (Article 334) but after every ten years its being extended through constitutional amendments.

[30] Article 335 The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in making the appointments to services and posts in connection with the affairs of the Union or of a State.

[31] Article 338-A National Commission for Scheduled Tribes, has been established under 338A.

[32] Article 339(1) The President may at any time and shall at the expiration of 10 years from the commencement of the constitution by order appoint a Commission to report on the administration of Scheduled areas and the welfare of the Scheduled Tribes in the states.

[33] Article 371, 371 A, 371 B, 371 C Provides for the special measures and provisions with respect to the states of Maharashtra and Gujarat (371), Nagaland (371 A), Assam (371 B) , and Manipur (371C).

Kshatriyas. To give effect to the Article, Parliament made Untouchability (offences) Act, 1955, herein after said as POA, more stringent and passed Prevention of Atrocities Act, 1989. The said Act was amended in 1995 and 2006 again to bring better results. POA is a powerful and precise weapon for preventing atrocities on Scheduled Tribes. Article 23 speaks, "Traffic in human beings, begar and other similar forms of forced labour are prohibited". This Article does not spell the word Tribe anywhere, but is a very significant provision so far as Scheduled Tribes are concerned.

Directive Principles of State Policy

Article 46 of the 'Directive Principles of the State Policy' which are fundamental in the governance of the country, states:

"The state shall promote with special care the educational and economic interests of the weaker section of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

This article is a comprehensive one comprising both the developmental and regulatory aspects.

Educational and Cultural Safeguards

Article 15 (4) empowers the state to make any special provision for the advancement of any socially and educationally backward classes of citizens or for SCs and STs. It means that if special provisions are made by the state in favour of the members of Scheduled Tribes, other citizens shall not be entitled to impeach the validity of such provisions on the grounds that such provisions are discriminatory against them. However, judicial exposition of the provision brings home the fact that the reservation in excess of 50% of available seats may not be upheld. On this point, the decision in the case of Abdul Latif V. state of Bihar, and Anil V. Dean. Govt. Medical College, Nagpur, can be seen.

In the Article 15 (4) as well as in Article 16 (4) the term 'backward classes' is used as a generic term and comprises various categories of backward classes, viz, Scheduled Castes, Scheduled Tribes, other backward classes, denotified communities (vimuktajatiyan) and nomadic and semi-nomadic communities.

Political Safeguards

Article 330 as amended by the Constitution (Fifty-one Amendment) Act, 1984 provides for reservation of seats for Scheduled Castes (SC) / Scheduled Tribes (ST) in the Lok Sabha in every state except the scheduled Tribes in the autonomous districts of Assam.

Similarly, Article 332 provides for reservation of seats for the SC/ ST in the state legislative Assemblies. Previously, the seats were not reserved for the SC / ST in the tribal areas of Assam, Nagaland and Meghalaya. Now seats are reserved in everystate.

Article 334 originally laid down that the provision relating to the reservation of the seats for SC / STs in the Loksabha and state Vidhan Sabhas (and the representation of the Anglo- Indian community in the Loksabha and state Vidhansabha by nomination) would cease to have effect on the expiration of a period of ten years from the commencement of the constitution. This article has since been amended five times, extending the period by ten years on each occasion. Last time, it was amended by the Constitution (seventy- ninth) Amendment Act, 1999 (w.e.f. 25.1. 2001). Thus, this provision is yet to expire in2010.

Service Safeguards

Article 16 (4) empowers the sate to make "any provision for the reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the state, in not adequately represented in the services under the state.

Similarly, Article 16 (4A) provides; that "nothing in this Article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the state in favour of the scheduled castes and the Scheduled Tribes which, in the opinion of the state, not adequately represented in the services under the state.

Article 335: A general direction to the Union and the state governments, under Article 335, is given for giving special consideration to the members of these communities in the services consistent with the maintenance of efficiency in administration. It means that candidates from the scheduled tribes should satisfy at least the minimum educational and other qualifications prescribed for various posts of the different services under the state.

Article 320 (4) provides that, nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision under Article 16 (4) & 16 (4A) may be made or the manner in which effect may be given to the provisions of Article335.

Constitutional Provisions for Tribal Self-Rule

Geographical areas designated as fifth and sixth scheduled areas by independent India are identical to those already delineated by the British as scheduled areas. Article 244 (1) provides for a Fifth Schedule that can be applied to any state other than those of North - East India. This schedule has been termed a "Constitution within the constitution". Under schedule the governors of the states in question have been given extensive powers, and may prevent or amend any law enacted in the Parliament or the state Assembly that could harm the Tribal's interests. The

Sixth Schedule is supposed to be informed by the ethos of self-management. The schedules currently operates in the tribal dominated areas of North-East India : Karbi, Anglong and North Cachar districts in Assam, Khasi Hills, Jaintia Hills and Garo Hills districts in Meghalaya ; Chakma, Lai and Mara districts in Mizoram; and Tripura tribal areas in Tripura states. Each Scheduled Tribe areas governed by the sixth schedules have an autonomous District Council with legislative, executive and judicial powers.

The National Commission for Scheduled Tribes

Article 338 (A) of the constitution provides that there shall be National Commission for Scheduled Tribes. It shall consist of a chairperson, vice-chairperson and three other members - all to be President of India. The Commission shall investigate and report to the President on all matters relating to the constitutional safeguards on Scheduled Tribes.

Forest Right Bill

In December 2006, a Forest Rights Bill has been passed by the parliament. This bill recognises the right of scheduled Tribes and other forest dwellers to the land and forest resources that they used (not to any new resources), which were not recorded when the forest laws were put into force. This Bill enables the Scheduled Tribes people to farm on small plots and to sell forest produce such as honey, wax, medicinal plants and herbs, in a letter written to the Chief Minister of all States and UTs, written on 8 January, 2008, The Prime minister Dr. Manmohan Singh remarked, "This is a landmark legislation in independent India that seeks to provide rights over land in their occupation to forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing there for generation but whose rights could not be recorded." [34]

Role of Judiciary in Protecting the Rights of the Scheduled Tribes

Andre Betteille observed, "India has one of the oldest and most extensive programmes of positive discrimination or affirmative action."[35] In such circumstances, the role of Judiciary becomes more important in ensuring the objective of equality and protecting the human rights of those who are depressed and deprived for centuries. The following observation of the Supreme Court in *Samanthas V. State of A.P.*[36], be speak of the performance of Indian Judiciary in protecting the rights - and in particular in the context of exploitation of mineral resources from the land owned by peoples not belonging to the dominant society :

"Agriculture is the only source of livelihood for scheduled tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality and permanent place of abode and work and living… The land, on which they live and till, assures them equality of status and dignity of person and means to economic and social Justice and is a potent weapon of economic empowerment in a social democracy"[37]

The symbiotic relationship of the tribal people with their land echoed in the afore-said observation. Further, the court observed:

"The fifth and sixth schedules constitute an integral scheme of the constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve natural endowment of their land for their economic empowerment to cognate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat."[38]

The court again emphasised:

"Since the executive is enjoined to protect social, economic and educational interest of the tribals and when the state leases out the lands in the scheduled area to the non- tribal for exploitation of mineral resources, it transmits the correlative constitutional duties and obligation to those who undertake exploitation of the natural resources, that they should also improve social, economic and educational empowerment of the tribals."[39]

The former Chief Justice of India K.G. Balakrishnan , while delivering the Dr. K.R. Narayanan memorial lecture, referred to various Judgments related to the socially excluded strata of the Indian society. Elaborating on the role of Judiciary in ensuring the objectives of equality, he, however, cautioned that judicial intervention is restrained by law of the land. Nevertheless, such intervention, whenever made, can always lead to the sensitisation of the legislature and the popular opinion.

In a country like India where scheduled tribes constitute 8%

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[34] India Business world-January 1st-January15th -2008 http://news.helplinelaw.com/0108/echo46.php

[35] Andre Betteille, "The Ideas of Indegenous People", current Anthropology, volume 39 no-2,April 1998, p-187.

[36] (1997) 8 SCC191

[37] Ibid

[38] Samantha v. State of A.P., (1997) 8 SCC191.

[39] Ibid

of total population, merely constitutional provisions for their emancipation, however greater in number or powerful in nature these might be, could not produce the desired results in a limited time. For a greater understanding of the problem and exact ways of getting solution one should remember the words of *Dr.Ambedkar*:

"… As a result, the tribals and non- tribals can politically come together, influence each other, associate themselves with each other and learn something from one another." [41]*44*

It is interesting to note, in this context that the constitutions and the different governments established under it at the Centre as well as in the States played a role of signal importance to translate Ambedkar's word into reality. While the achievement so far has been significant, there is still a long way to go to eradicate completely the deep-seated social prejudices, the economic backwardness and political handicaps of the Scheduled Tribes.

Conclusion

The human rights are basically the rights given to us by the nature but now a day we have forgotten all those values under the garb of self-centeredness.

In a country like India where scheduled tribes constitute 8.6% of total population, merely constitutional provisions for their emancipation, however greater in number or powerful in nature these might be, could not produce the desired results in a limited time.

So by all this discussion I can say that the concept of human rights is present in our National Culture from the beginning of the society as well as present in the Law of Land i.e. the Constitution of India and hence there is no need to enact further more legislation for the implementation of the Human Rights with special reference to Tribes.

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[40] K.G. Balakrishnan, 'Problems of Social Inequalities and Possibilities of Judicial Intervention', Dr. K. R. Narayanan Memorial Lecture, 14 November, 2007, at Jamia Milia University, NewDelhi.
See <http// www.daily excelsior.com/web1/07/Nov15/national.htm>

[41] Constituent Assembly Debates (CAD), Volume IX. P.1024

Human Rights and Role of Voluntary Organizations

Dr. Mahendra Singh Meena*

ABSTRACT

Human Rights are not required to be claimed by the human beings. It is the duty of the welfare State as well as courts to protect human rights. In India, the Legislature, in its wisdom, has taken note of protecting the human rights and for that purpose, first of all, in the Criminal Procedure Code, Section 482 has been inserted whereby all the High Courts have inherent jurisdiction to interfere in any criminal matters at any stage to secure the ends of justice. similarly, under Section 151 of the Code of Civil Procedure it is specifically provided that every Civil Court and High court can exercise its power in the interest of justice. Likewise, under Article 226 of the Constitution of India, extraordinary jurisdiction has been conferred upon the High Courts to exercise power by way of issuing various writs. Thus, at every stage, the Legislature has specifically and expressly taken serious note of granting and protecting human rights of the citizens and duty has been cast upon the Courts, and so also, upon the bureaucrats that civil administration must be fair and should be transparent in all respects for maintaining the dignity of human rights. Not only the above substantive provisions, so many Acts have been enacted recently seeking to protect the human dignity. In the prevention of Domestic Violence Act, Section 12 has been inserted which gives inherent power to the Magistrate to protect the basic rights of women.

Keywords: Human Rights, Domestic Violence, Sexual Harassment.

Introduction

For protection of the human rights, human welfare and human dignity, international concern has evolved over the years with the evolution of the State system and the process of organizing the international system State. As human civilization marched along the path of development and betterment of human life on this planet, the process of concern for individual human rights equally kept grew up throughout human history and although there have been drawbacks at the hands of powerful groups in the communities trying to self-interest, the evolution never came to halt and brotherhood and Vasudhaiva Kutumbakam in spired human mind to respect the dignity of human life on this earth. The result is the religious prayers which ultimately seek peace and prosperity for all being of the universe. Violation of basic human rights is universally condemned, irrespective of cultural differences of Western and Asian countries. Human rights are of universal importance as they are available to the entire humanity irrespective of race, religion, color, sex or domicile, etc. Torture, rape, racism, arbitrary detention, ethnic cleansing and politically motivated disappearances are not tolerated by any faith or culture, which respects humanity. Human rights cut across political, social, ideological and cultural domains.

Human rights are as old as human civilization. Ever since man came on this earth there has been an intrinsic tendency of human nature to save his person and property. It means the protection of one's person and property is inherent in the nature of human being. Human rights are those rights which any human being must enjoy because of his being a human being. The most important human rights which would truly imbibe and flourish the culture of human rights civilization in the world is the rights to be humane. The problem of human rights order begins with the human being himself, be it slavery, child abuse, custodial deaths, bonded labor, women subordination or other social evils. The problem of human rights essentially the problem of two classes of people, the one dominating and the other dominated, the one exploitive and the other exploited. In other words, one can call them as 'haves' and 'have nots'.

Pandit Jawahar Lal Nehru, the then prime Minister of India identified the problem of diehard poverty and its attendant ills as a danger to the progress. If people cannot solve this problem soon, all the paper Constitutions will become useless and purposeless. At the end of the second world war the people at the united Nations reaffirmed "faith in fundamental human rights, in the dignity and worth of human persons" and agreed that one of the major purpose of the organization would be to achieve co-operation in promoting and increasing human rights and for fundamental freedom for all without any distinction based on sex, language and religion.

The Supreme court of India, since early 1980s has evolved a procedure which helps any citizen or a social activist to mobilize judicial sympathy on behalf of the weaker sections of the society. The method through which this could be achieved is called "Public Interest Litigation" (PIL). Public interest litigation in India has developed through distinct

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social, political and historical forces. These days, PIL matters to focus predominantly on issues concerning environment, consumerism, governmental accountability and political governance. Today PIL is more confined to the problems of the poor and oppressed classes of the society.

Public interest Ligation was propounded to protect the human rights of the poor, the ignorant and oppressed people who were unable to seek legal remedy due to lack of financial resources or knowledge of law. PIL has emerged as the most dynamic process in the judicial system which has no parallel in world's legal systems. Through this mechanism the court in India protect human rights in the following ways –

- The Supreme Court of India and the High Courts of different States create new regime of human rights by means of expanding the constitutional rights to equality, life and personal liberty. In this process dignity of individual, means of livelihood, right to education, housing, medical care, right to speedy trial, right against torture, sexual harassment, exploitation and many other such reliefs have emerged as basic human rights.
- Courts have relaxed the traditional rules of locus-standi by demarcation of access to justice. In this process any conscious spirited citizen or social action group can approach the court on behalf of the weaker sections of the society. The attention of the court can be invited even writing a letter or sending a telegram.
- Court can grant any other relief under its writ jurisdiction. To illustrate, the court can award interim relief or compensation to victims of State tyranny or lawlessness. This is just opposite to Anglo- Saxon model of judicial process wherein interim relief is confined to preserve the status quo pending final decisions. Thus, in PIL matter the court evolves any relief to the aggrieved person.
- The Court can monitor institution of the State such as prisons, women's protective homes, juvenile homes, mental asylums and so on. In this process the court makes supervisions, seeks gradual improvements in their management and administration. Thus, the court takes over administration of these institutions for protecting the human rights.
- The court sometime devises new technique of fact finding. Generally, court appoints some socio-legal Commissions of Inquiry. Sometimes courts depute their own officials for the purpose of investigation. Sometimes the help of National Human Rights Commission and Central Bureau of Investigation to inquire into human rights violations is also sought.

One of the serious problems currently faced by developing countries is violation of human rights by individuals and institutions having political, social or administrative authorities. The problem assumes major significance when human rights are violated in respect of persons who have been denied personal liberty under the custody of the State. It has been universally accepted that denial of freedom of movement to a personal liberty under the custody of the State. It has been universally accepted that denial of freedom of movement to a person for ensuring general social peace and tranquility does not automatically or necessarily deprive him of his residuary fundamental human rights. In a politically organized and civilized society, therefore, it is essential to ensure that human rights are protected and conserved in respect of persons in custody, whether they are men, women or children, and whether they are mentally retarded or socially handicapped.

Violation of human rights in custodial institutions assumes several forms and could be attributed to various reasons. Lack of co-ordination in between various wings of the criminal justice system, improper training to custodial and other staff, lack of legal awareness among persons in custody, defective legislation, mis-interpretation of legislative provisions, slackness in administrative supervision and human weaknesses with which employees are naturally endowed, all contributed to such violations.

A person in custody is to a large extent physically cut off from his social obligations and social behavior. He cannot exercise the same amount of free and frequent communication with his friend and relatives as he could enjoy before such custody.

In Delhi Domestic Working Women's Forumv. Union of India,[1] the PIL arose out of indecent sexual assault by seven army personnel against six domestic servants travelling in train from Ranchi to Delhi. The Supreme Court, with a view to assisting rape victims, has laid down various board guidelines. These guidelines include legal assistance, anonymity, compensation and rehabilitation to rape victims. The National Commission for Women was directed to evolve a scheme for providing adequate safeguards to these victims.

In another significant pronouncement in Vishaka v. State of Rajasthan[2], the Supreme Court declared that sexual harassment of women at workplace

[1] 1995 SCC (1) 14
[2] AIR 1997 SC 3011

constitutes violation of gender equality and right to dignity which are fundamental rights. Taking note of the fact that the existing civil and penal laws in India did not provide adequate safeguards against sexual harassment at work place the court laid down twelve guidelines to be followed by every employer to ensure prevention of sexual harassment.

In the Rajasthan High Court, there are various judgments delivered by the court wherein orders have been made for protection of basic human rights. In the case of Mahavir Nagar Vikas Samiti, Pali v. State of Rajasthan & Other[3], where a very serious pollution problem posed hazard to the residents of Pali in Rajasthan where 12000 industrial units located at both sides of the river Bandi. The citizen of Pali preferred writ petition through Mahavir Nagar Vikas Samiti and highlighted the grave danger of pollution generated by the effluents and emission released by the industrial units. A prayer was, therefore, made for shifting the industrial units to a place outside the city where the said industrial units would not create pollution hazard for the city dwellers. The Division Bench of the High Court took very serious view while issuing directions to protect human rights; and, after considering all aspect of the matter, including the development of industrial sector, passed order whereby certain directions were issued to the Pollution Control Board and Industrial Department of the State. The Pollution Control Board was directed to make fresh inspection of the textile processing units at Pali and surrounding area and to furnish report of the units which were creating pollution in the area. The industrial units which were discharging the pollutants over the land or the river were ordered to be closed forthwith and the State Government was directed to employ experts to assess the damage caused by the pollution. Further it was ordered that on assessment, the question of payment of compensation shall also be considered and compensation shall thereafter be paid.

In the way of protection human rights, suo moto cognizance was taken by the Division Bench of the Rajasthan High Court when a German tourist lady Mrs. Petra Woost, an employee of the Lufthansa Airline was raped by auto rickshaw driver and his associate. Instead of dropping her to the hotel she was taken in the auto to a place outside the city. She filed FIR with the police and the police immediately took action and soon the auto driver and his associate were nabbed. Thereafter, the matter was investigated and statement of the victim was recorded.

The said German lady was shattered physiologically, physically and psychologically and no longer wanted to stay in India even for a day. The Division Bench of the High Court exercised jurisdiction under Article 226 of the Constitution of India and not to sit as a silent spectator took serious view in the matter to protect human rights of the tourist lady that she was not citizen of the country. By an ad interim order, the Division Bench directed for speedy investigations to the State Government and police authorities. So also, to the victim to be paid for her overstay on account of the incident. Ultimately completed charge sheet under Section 173(8), Cr. P.C was field within a period of 48 hours.

The case eventually came to be tried by the Additional Sessions Judge (Fast Track), Jodhpur and examination in chief of the victim was completed in the presence of the Public Prosecutor on 17.05.2005. All the witnesses were examined within 15 days from the date of filling of the challan. The accused persons were convicted in that case after the trial and sentenced to imprisonment for life.

Both the above cases are illustrations for protecting human rights. Not only these two cases but in various cases Rajasthan High Court exercised its jurisdiction under Article 226 for protection of Human Rights and faced the challenges emerging at present with regard to problems coming in the way of protection of Human Rights.

The aforesaid facts specifically speak that at present every human being is required to make efforts for protection of the human rights. The challenges posed are equally being faced by the judiciary and judiciary have played wholesome and effective role to give new dimensions to the awareness of human rights.

[3] D.B. Civil writ petition no. 759/2002, decided on 09.03.2004

Legal Effect of Death, Marriage and Insolvency of Parties on Suit under Civil Proceedings: A Theoretical Perspective

Nimita Aksa Pradeep*

ABSTRACT

When a suit is filed in court, it will usually not come to an end until and unless a judgement, decree or order is passed resolving the issue in conflict. However, if the plaintiff ordefendant dies, marries or becomes insolvent during the pendency of the suit, then there is a high likelihood that the suit may be affected. The possible effect of such death, marriage or insolvency on part of the parties to the suit has been explained in detail in Rules 1-9 and 10A of Order 22 of the Civil Procedure Code, 1908. On these lines, it can be said that death of either of the parties to the suit will not cause the suit to be abated as long as the "right to sue" survives, in which case the suit will be continued by the legal heirs or representatives of the deceased party. Furthermore, marriage of either the plaintiff or defendant will not cause the suit to abate or in fact have any impact on the suit at all. However, though insolvency of the plaintiffwill not affect the suit in any manner, insolvency of the defendant will cause the suit to be stayed by the court. This purely theoretical paper will discuss all this and morewith the help of case laws and illustrations. Furthermore, the concept of "devolution of interest" will also be explained in detail.

Keywords: Death, Marriage, Insolvency, Plaintiff, Defendant, Civil Suits, Legal Effect

Introduction

Each and every suit that is filed in the court of law is between at least two parties: namely, the plaintiff and the defendant. The plaintiff to the suit is the person who instituted the suit and the defendant to the suit is the person against whom the suit has been instituted. There is also a possibility that a particular suit has more than one plaintiff or more than one defendant, i.e., that the suit has been instituted by more than one person or that the suit has been instituted against more than one person at the same time. Once a suit is filed by the plaintiff against the defendant in the court of law, the suit will usually not come to an end until and unless the judge adjudicating the case passes a judgement in this regard.

However, if either of the parties to the suit dies, marries or becomes insolvent during the pendency of the suit, i.e., after the suit has been filed but before the judgment has been passed, there is a possibility that the proceeding of the suit may be affected.[1] The effect of such "death, marriage or insolvency" of either of the parties to the suit has been explained in detail in Order 22 of the Civil Procedure Code, 1908. Rules 1-6 along with 9 and 10A of Order 22 of the Code explain the effect of death of either of the parties, Rule 7 of Order 22 of the Code explains the effect of marriage of either of the parties and Rule 8 of Order 22 of the Code explains the effect of insolvency of either of the parties on the suit.[2]

If in case either the plaintiff or the defendant to the suit dies after the institution of the suit but prior to the passing of the judgment in that case, then the suit will not be abated as long as the "right to sue" of the legal heirs or representatives of the deceased party survives.[3] The "right to sue"of the legal heirs or representatives of the deceased party will survive only if the "cause of action" of the suit survives.[4] If the "right to sue" survives, then the suit will move forward taking into consideration the legal heirs or representatives of the deceased party.[5] If in case either the plaintiff or the defendant to the suit is a female and she gets married during the pendency of the suit that has been instituted, then that will not cause the suit to be abated.[6] The marriage of the plaintiff or the defendant will hence not have any effect on the proceeding of the suit in the court of law.[7]

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1 C. K. Takwani, Civil Procedure With Limitation Act, 1963(Eastern Book Company, 8thEdn., 2018)
2 Ibid
3 Avtar Singh, The Code of Civil Procedure (Central Law Publications, 5thEdn., 2018)
4 Ibid
5 Bhagwati Dan Charan, No Abetment by Parties Death if Right to Sue Survives, Legal Service India, available at http://www.legalservicesindia.com/article/498/No-abetment-by-parties-death-if-right-to-sue-survive.html, (Last visited on March 1, 2020)
6 Singh, Supra 3
7 Ibid

If in case the plaintiff to the suit becomes insolvent after the institution of the suit but prior to the passing of the judgement in that case, then this will not have any effect on the proceeding of the suit in the court of law, i.e., it will not cause the suit to be abated.[8] However, if the defendant to the suit becomes insolvent during the pendency of the suit, then the suit against the defendant may be stayed by the court of law.[9] If in case interest in the suit moves from either of the parties to any other person, then the suit may continue, taking into consideration such other person as long as this occurs with the prior permission of the court of law.[10]

Legal Effect of Death of Parties on Suit

In case of death of a party to the suit, the main question that needs to be answered is whether or not the "right to sue" of the legal heirs or representatives of the deceased party survives. This is because "abatement of the suit" depends upon the "right to sue" of the legal heirs or representatives of the deceased party. If the "right to sue" of the legal heirs or representatives of the deceased party survives, then the suit will not be abated but if the "right to sue" of the legal heirs or representatives of the deceased party does not survive, then the suit will be abated. Rules 1-6, 9 and 10A of Order 22 of the Civil Procedure Code, 1908 deal with this aspect in detail. Even though the "right to sue" has not been properly defined anywhere, it can be understood to mean the "right to seek relief". Another point to be noted is that the "right to sue" of the legal heirs or representatives of the deceased party in a particular suit will survive, only if the "cause of action" of the suit survives.[11]

In the cases of *Ibrahimbhai v. State of Gujarat*[12] and *Phool Rani v. Naubat Rai Ahluwalia*[13], the court opined that despite the fact that the "right to sue" had not been defined anywhere in Civil Procedure Code, 1908, the term can be understood to mean the "right to seek relief".

Examples in which the "right to sue" of the legal heirs or representatives of the deceased party survives include suits that have been filed for re-possession of property, suits that have been filed for acquiring equal share in ancestral property, suits that have been filed for the performance of a business contract, etc. Examples in which the "right to sue" of the legal heirs or representatives of the deceased party does not survive include suits that have been filed in order to obtain compensation for battery or assault, suit that have been filed for the dissolution of a marriage, suits that have been filed for the performance of a promise that requires personal skill such as singing, dancing, etc.

In general, any suit in favour of or against the deceased party will continue even after his or her death, taking into consideration the legal heirs or representatives of the party.[14]

In the cases of *Ambalika Padhi v. Radhakrishna Padhi*[15] and *M. Veerappa v. Evelyn Sequina*[16], the court opined that all "actions and demands" in favour of or against the deceased party would in the general sense survive in favour of or against the legal heirs or representatives of the deceased party.

However, with regard to "personal actions", it is not possible for the "right to sue" to survive because the relief sought in these cases is intrinsically connected to the deceased person to such a large extent that it is not possible for anyone else to take his or her place. In such a scenario, the maxim "action personal is moritur cum persona" which basically means that "a personal action dies with the person" will be made applicable. It is also important to note that this maxim would be made applicable not only if the plaintiff to the suit dies during the hearing of the suit but also if the plaintiff to the suit dies during the appeal of the suit.[17]

In the case of *Karan Kaur v. Jalandhar Improvement Trust*[18], the court opined that the maxim "action personalismoritur cum persona" would apply not only in case of death of the plaintiff during the trial but also in case of death of the plaintiff during the appeal.

In the cases of *Girijanandini Devi v. Bijendra Narain*[19], *Hazari v.Neki*[20], and *Koodalmanickam v. Thachudya Kaimal*[21], the court opined that the maxim "action personalismoritur cum persona" would not apply in cases where relief had been sought on the basis of "personal actions" of the deceased party. Due to this reason, the "right to sue" of the legal heirs or representatives of the

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8 D. N. Mathur, The Code of Civil Procedure (Central Law Publications, 4thEdn., 2017)
9 Charan, Supra 5
10 Takwani, Supra 1
11 Mathur, Supra 8
12 Ibrahimbhai v. State of Gujarat, AIR 1968 Guj 202
13 Phool Rani v. Naubat Rai Ahluwalia, (1973) 1 SCC 688
14 Singh, Supra 3
15 Ambalika Padhi v. Radhakrishna Padhi, AIR 1992 SC 431
16 M. Veerappa v. Evelyn Sequina, AIR 1988 SC 506
17 Dr. S. R. Myneni, Code of Civil Procedure And Limitation Act(Asia Law House, 4thEdn., 2019)
18 Karan Kaur v. Jalandhar Improvement Trust, (2014) 6 SCC 409
19 Girijanandini Devi v. Bijendra Narain, AIR 1967 SC 1124
20 Hazari v. Neki, AIR 1968 SC 1205
21 Koodalmanickam v. Thachudya Kaimal, (1996) 2 SCC 680

deceased party would not survive.

In the cases of *Melepurath Sankunni v. Thekittil Geopalankutty*[22] and *Yallawwa v. Shantavva*[23] , the court opined if the relief sought was intrinsically connected to the deceased person to such an extent that it is not possible for anyone else to take his or her place, then the maxim "action personal is moritur cum persona" would apply and the "right to sue" of the legal heirs or representatives of the deceased party would not survive as a result thereof.

However, it is not possible to make Order 22 of the Civil Procedure Code, 1908 applicable in the case of "executive proceedings", "writ petitions" or "revisions".[24]

In the case of *Ghanteshar v. Madan Mohan*[25], the court opined that the rules provided in Order 22 of the Civil Procedure Code, 1908 are not applicable in the case of "executive proceedings".

In the case of *Puran Singh v. State of Punjab*[26],the court opined that the rules contained in Order 22 of the Civil Procedure Code, 1908 cannot be made applicable in the case of "writ petitions" that have been filed in the High Court under Article 226 of the Constitution or filed in the Supreme Court under Article 32 of the Constitution.

In the cases of *Swastik Oil Mills Ltd. v. CST*[27], *Mohd. Saddat Ali v. Corpn. of City of Lahore*[28] and *Narpatisingh v. Gokuldas*[29], the court opined that the rules provided in Order 22 of the Civil Procedure Code, 1908 are not applicable in the case of "revisions".

It is possible for a suit to be abated as a whole or in part when either of the parties to the suit dies. The suit will be abated as a whole when one of the parties to the suit dies if the relief claimed or sought is based on tort. However, the suit will be abated in part when one of the parties to the suit dies if the relief claimed or sought is based on contract. In the second scenario, the part of the suit that is based on tort will be abated but the part of the suit that is based on contract will not be abated.[30]

In the case of *State of Andhra Pradesh v. Pratap Karam*[31] , the court opined that if a suit is based on tort as well as contract, then only that part of the suit that is based on tort will be abated, the part of the suit that is based on contract will not be abated.

In the case of *Kanta Rani v. Rama Rani*[32] and Collector of *Parganas v. Lalith Mohan*[33], the court opined that the abatement of a suit would depend on whether the suit was based "wholly on tort" or "wholly on contract" or "partly on tort" or "partly on contract".

The death of the plaintiff to a "representative suit" will not cause the suit to be abated as in this case, it would be possible for the remaining aggrieved parties to carry on with the suit.[34]

In the cases of *Charan Singh v. Darshan Singh*[35] and *Gujarat SRTC v. ValjiMulji Soneji*[36], the court opined that if the plaintiff of a "representative suit" dies, then that would not cause the suit to abate.

If a suit was abated as per the provisions of Order 22 of the Civil Procedure Code, 1908 due to the legal heirs or representatives of the deceased party not being "brought on record" within the stipulated period of time, then another suit cannot be filed by the legal heirs or representatives of the deceased party on the same "cause of action" due to which the abated suit had been instituted.[37] It is, however, possible for the legal heirs or representatives of the deceased party to get this abatement set aside if they are able to prove that they had had "sufficient cause" for the same.[38]

If in case the deceased party does not have any legal heir or representative and the other party to the suit files an application in the court of law in this respect, then the court may either continue with the hearing or trial of the suit disregarding the fact that the deceased party and his or her property as a result thereof is not being represented or defended by any legal heir or representative; or the court may appoint a court official or anybody else of the court's choosing to represent or defend the deceased party and his property. In such a scenario, the judgement that would be passed in the suit would have the same effect as if the

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22 Melepurath Sankunni v. Thekittil Geopalankutty, AIR 1986 SC 411
23 Yallawwa v. Shantavva, AIR 1997 SC 35
24 Suranjan Chakraverthi and Boleshwar Nath, Cases and Materials on Code of Civil Procedure (Eastern Book Company, 5thEdn., 2011)
25 Ghanteshar v. Madan Mohan, AIR 1997 SC 471
26 Puran Singh v. State of Punjab, AIR 1996 SC 1092
27 Swastik Oil Mills Ltd. v. CST, AIR 1968 SC 843
28 Mohd. Saddat Ali v. Corpn. of City of Lahore, AIR 1949 Lah 186 (FB)
29 Narpatisingh v. Gokuldas, AIR 1966 AP 384
30 Consequences of Death, Marriage or Insolvency of Parties, Law Times Journal (September 17, 2017), available at http://lawtimesjournal.in/consequences-death-marriage-insolvency-parties/, (Last visited on March 4, 2020)
31 State of Andhra Pradesh v. Pratap Karam, (2016) 2 SCC 82
32 Kanta Rani v. Rama Rani, AIR 1988 SC 726
33 Collector of Parganas v. Lalith Mohan, AIR 1988 SC 2121
34 Sir Dinshaw Fardunji Mulla, The Code of Civil Procedure (Lexis Nexis, 16thEdn., 2013)
35 Charan Singh v. Darshan Singh, AIR 1975 SC 371
36 Gujarat SRTC v. ValjiMulji Soneji, AIR 1980 SC 64
37 Rule 9(1), Order 22, Code of Civil Procedure, 1908
38 Rule 9(2), Order 22, Code of Civil Procedure, 1908

legal heir or representative of the deceased party had been a part of the suit.[39]

Effect of Death of Plaintiff

The death of the only plaintiff to the suit will not cause the suit to be abated as long as the "right to sue" of the legal heirs or representatives of the deceased plaintiff survives.[40] In that case, it would be possible for the legal heirs or representatives of the deceased plaintiff to carry on with the suit after filing an application in the court of law requesting the court to make them a party to the suit.[41] It is also important to note that if this application is not made within a period of ninety days, then the suit will be abated. In such a scenario, if the defendant to the suit files an application in this respect, then the court may order costs to be paid to him or her from the property of the deceased plaintiff.[42] However, if the "right to sue" of the legal heirs or representatives of the deceased plaintiff does not survive, then the suit will be abated.[43]

In the case of *Amba Bai v. Gopal*[44] , the court opined that if a particular suit has only one plaintiff and that plaintiff dies; and his or her legal heirs or representatives have not been "brought on record", then the suit would be abated.

In case of death of one of the plaintiffs to the suit where there exist several others, the suit would not be abated as long as the "right to sue" of the remaining plaintiffs survive. In this scenario, the suit would carry on after the court makes an entry in this respect.[45] However, if the "right to sue" of the remaining plaintiffs does not survive, then it would be possible for the suit to carry on in the court of law only if the legal heirs or representatives of the deceased plaintiff file an application in this respect.[46] It is important to understand that the suit will be abated if no such application is filed within a period of ninety days. In that case, if the defendant to the suit files an application in this regard, then the court may order costs to be paid to him or her from the deceased plaintiff's property.[47]

If the plaintiff dies after the completion of the "court hearing" but before the passing of the judgement, then this will not cause the suit to be abated. In this scenario, the judgment would have the same effect as if the death had not occurred.[48]

In the case of *N. P. Thirugnanam v. Dr. R. Jagan Mohan*[49], the court opined that if the death of the plaintiff in a particular case occurs after the completion of the "court hearing" but before the passing of the judgement, then this would not cause the suit to be abated.[50]

Similarly, death of the plaintiff after the preliminary decree has been passed but before the final decree has been passed, would also not cause the suit to be abated.

In the case of *Jitendra Ballav v. Dhirendranath*[51], the court opined that the death of the plaintiff of a particular suit before the final decree but after the preliminary decree would not cause the suit to be abated.

Another point to be understood is that in case of the death of the plaintiff after the passing of the judgement, this will not cause the suit to be abated. This is because after the judgement has been passed, only execution of the same would be left. However, in case of appeal, the suit would be abated on the death of the plaintiff if the "right to sue" of the legal heirs or representatives does not survive.[52]

In the case of *Ramagya Prasad v. Murli Prasad*[53], the court opined that the suit could be abated not only in case of trial, but also in case of appeal as well.

Effect of Death of Defendant

The death of the only defendant to the suit will not cause the suit to be abated as long as the "right to sue" survives.[54] In such a scenario, the suit would carry on against the legal heirs or representatives of the deceased defendant. However, an application would have to be filed requesting the court to make the legal heirs or representatives of the deceased defendant a party to the suit.[55] It is also important to understand that this application has to be made within a period of ninety days, otherwise the suit would be abated.[56]

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39 Rule 4A(1), Order 22, Code of Civil Procedure, 1908
40 Rule 1, Order 22, Code of Civil Procedure, 1908
41 Rule 3(1), Order 22, Code of Civil Procedure, 1908
42 Rule 3(2), Order 22, Code of Civil Procedure, 1908
43 54th Report of the Law Commission of India (1973)
44 Amba Bai v. Gopal, AIR 2001 SC 2003
45 Rule 2, Order 22, Code of Civil Procedure, 1908
46 Supra 41
47 Supra 42
48 Rule 6, Order 22, Code of Civil Procedure, 1908
49 N. P. Thirugnanam v. Dr. R. Jagan Mohan, AIR 1996 SC 116
50 Mulla, Supra 34
51 Jitendra Ballav v. Dhirendranath, AIR 2004 Ori 148
52 M. P. Jain, The Code of Civil Procedure(Lexis Nexis, 5thEdn., 2019)
53 Ramagya Prasad v. Murli Prasad, AIR 1972 SC 1181
54 Supra 40
55 Rule 4(1), Order 22, Code of Civil Procedure, 1908
56 Rule 4(3), Order 22, Code of Civil Procedure, 1908
57 Naveen Nini, Death, Marriage and Insolvency of Parties, ACADEMIA, available at

However, if the "right to sue" does not survive, then the suit will be abated.[57]

In the cases of *Jayaram Reddy v. Revenue Divisional Officer*[58] and *Shri Krishna Singh v. Mathura Ahir*[59], the court opined that in a particular case, if the "right to sue" survives, then then suit will not be abated, but rather would carry on taking the legal heirs or representatives of the deceased party into consideration but if the "right to sue" does not survive, then the suit will be abated.

In the cases of *Union of India v. Ram Charan*[60], *Zilla Singh v. Chandgi*[61] *and Chaudhry Ram v. State of Haryana*[62], the court opined that if the application requesting the court to make the legal heirs or representatives of the deceased party a part of the suit is not filed within the time period that has been stipulated, then the suit will be abated.

In case of death of one defendant from amongst several others, the suit will not be abated if the "right to sue" of the other defendants survive and for this, the court will have to make an entry in this regard.[63] If the "right to sue" does not survive, then the suit will be abated unless an application is filed in the court of law requesting the court to make the legal heirs or representatives of the deceased defendant a party to the suit.[64] This application has to be made within ninety days, otherwise the suit will be abated.[65]

If the plaintiff had not filed an application to make the legal heirs or representatives of the deceased defendant a party to the suit within the stimulated period of time due to the fact that he or she had not known about the death of the defendant, then the suit will be abated. However, it would be possible for them to seek the "abatement of the suit" to be set aside by filing an application in the court of law in this regard.[66]

In the cases of *Banwari Lal v. Balbir Singh*[67]and *Lanka Venkateswarlu v. State of Andhra Pradesh*[68], the court opined that if "sufficient cause" is shown and the court is satisfied with the same, then any delay that had been made in "bringing on record" the legal heirs or representatives of the deceased party may be condoned by the court. The court further opined that in case of a suit that had been caused to be abated, it is possible to set aside this abatement after showing "sufficient cause".

The death of the defendant to the suit will not cause the suit to be abated if the death occurred after the "court hearing" but before the passing of judgement in the suit. In such a scenario, the judgment will have the same effect as if the death had not occurred.[69]

In the case of *Shiv Dass v. Devki*[70], the court opined that if a party to the suit dies after the "court hearing" but before the passing of the judgement in the suit, then that would not cause the suit to be abated.

In case of "pro forma" or "non-performing" defendant, the court of law may pass their decision in the suit despite the fact that the defendant to the suit had died, thereby providing an exception to the plaintiff in not making the legal heir or representative of the deceased defendant a party to the suit. In this scenario, the judgment passed in the suit would be effective as if the death of the defendant had not occurred.[71] It is also important to understand that the suit will not be abated due to an unnecessary party dying during the course of the suit.[72]

In the cases of *Radha Rani v. Hanuman Prasad*[73] , *Sri Chand v. Jagdish Prasad*[74] and *Upper India Cable Co. v. Bal Kishan*[75], the court opined that the death of a party who was unnecessary to the suit would not cause the suit to be abated.

In the cases of *Mangal Singh v. Rattno*[76], *Kanhaiyalal v. Rameshwar*[77] and Union of India v. Avtar Singh[78], the court reiterated the same as sated above and opined that a suit

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https://www.academia.edu/36566797/ORDER_XXII._Death_Marriage_and_Insolvency_of_Parties, (Last visited on March 2, 2020)

58 Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578

59 Shri Krishna Singh v. Mathura Ahir, 1981 3 SCC 689

60 Union of India v. Ram Charan, AIR 1964 Sc 215

61 Zilla Singh v. Chandgi, AIR 1991 SC 263

62 Chaudhry Ram v. State of Haryana, 1994 Supp (3) SCC 675

63 Supra 45

64 Supra 55

65 Supra 56

66 Rule 4(5), Order 22, Code of Civil Procedure, 1908

67 Banwari Lal v. Balbir Singh, (2016) 1 SCC 607

68 Lanka Venkateswarlu v. State of Andhra Pradesh, (2011) 4 SCC 363

69 Supra 48

70 Shiv Dass v. Devki, 1995 Supp (2) SCC 658

71 Rule 4(4), Order 22, Code of Civil Procedure, 1908

72 Mayank Shekhar, Death, Marriage and Insolvency of Parties, Legal Bites: Law and Beyond, available at https://www.legalbites.in/death-marriage-insolvency-parties/, (Last visited on March 4, 2020)

73 Radha Rani v. Hanuman Prasad, AIR 1996 SC 216

74 Sri Chand v. Jagdish Prasad, AIR 1996 SC 1427

75 Upper India Cable Co. v. Bal Kishan, AIR 1984 SC 1381

76 Mangal Singh v. Rattno, AIR 1967 SC 1786

77 Kanhaiyalal v. Rameshwar, (1983) 2 SCC 260

78 Union of India v. Avtar Singh, AIR 1984 SC 1048

79 Rule 10A, Order 22, Code of Civil Procedure, 1908

would not be abated merely due to the death of a party who was not necessary to the suit.

Duty of the Pleader and Duty of the Court in case of Death of Parties

In case a party to the suit dies, then the advocate or lawyer who had been representing him or her in the court of law has the duty to inform the court about the death of the party that he or she had been representing[79]. In general, the duties of the legal practitioner with regard to his or her client come to an end as and when the client dies. However, Rule 10A of the Code of Civil Procedure, 1908 has created a duty to be fulfilled by the legal practitioner with respect to his or her client even after the death of the said client. The idea behind this is that the other party to the suit also has a right to know about the death of this party. In furtherance of this, along the same lines, Rule 10A of the Code also created a duty to be fulfilled by the court of law. This duty involves informing the other party about the death of the deceased party.[80]

In the cases of *O. P. Kathpalia v. Lakhmir Singh*[81] and *Gangadhar v. Raj Kumar*[82], the court opined that the legal practitioner representing a party to the suit in the court of law has the duty to inform the court about the death of the party that he or she had been representing.

In the case of *Bhagwan Swaroop v. Mool Chand*[83], the court opined that the other party had the right to be informed about the death of their opposing party. They should not be "caught unaware" in this regard.

Legal Effect of Marriage of Parties on Suit

Just like death, it is important to consider whether the marriage of either of the parties to the suit, i.e., the plaintiff or the defendant, would affect the suit in any manner or not. Rule 7 of Order 22 of the Civil Procedure Code, 1908 deals with the concept of marriage of either party to the suit in detail.[84]

Effect of Marriage of Plaintiff

If the plaintiff to the suit is a female and she marries during the pendency of the suit, then this will not have an effect on the suit in any manner whatsoever. This will not cause the suit to be abated either. If a decree is passed by the court of law with regard to the female plaintiff who has married during the pendency of the suit, then it would be possible to execute this decree only in favour of or against her and not in favour of or against her husband or anybody else.[85] This is irrespective of whether the decree was in favour of or against the plaintiff. However, if in case, the husband of the female plaintiff also has a legal right or legal liability regarding the matter on which the decree had been passed, then it would be possible for the decree to be executed in favour of or against him as well and not only against her.[86]

Effect of Marriage of Defendant

If the defendant to the suit is a female and she marries during the pendency of the suit, then this would not have any effect whatsoever on the suit. This would, in no manner, cause the suit to be abated. If the court of law has passed a decree with respect to the female defendant who married during the pendency of the suit, then the decree would be executed in favour of or against her alone and not in favour of or against her husband or anybody else for that matter.[87] This is regardless of whether the decree was in favour of or against her. However, if in case, the husband of the female defendant also has a legal right or legal liability in respect of the matter on which the decree had been passed, then it would be possible for the decree to be executed in favour of or against him as well and not against her alone.[88]

In the case of *Bindabun v. Makintosh*[89], the court opined that if after the death of a man, his wife is made a party to the suit and while the suit is pending in the court, she remarries, then it would not be possible to execute the decree that results against the man whom she had married while the suit was in progress.

Legal Effect of Insolvency of Parties on Suit

Just like death and marriage, it is important to consider whether the insolvency of either of the parties to the suit, i.e., the plaintiff or the defendant, would affect the suit in any manner or not. Rule 8 of Order 22 of the Civil Procedure Code, 1908 deals with the concept of insolvency of either party to the suit in detail.[90]

Effect of Insolvency of Plaintiff

If the plaintiff to the suit becomes insolvent during the pendency of the suit, then the suit will not be abated as

80 Myneni,Supra 17
81 O. P. Kathpalia v. Lakhmir Singh, AIR 1984 SC 1744
82 Gangadhar v. Raj Kumar, AIR 1983 SC 1202
83 Bhagwan Swaroop v. Mool Chand, AIR 1983 SC 355
84 Diya Rai, Death, Marriage and Insolvency of Parties Under CPC, IPLEADERS(January 21, 2020), available at https://blog.ipleaders.in/death-marriage-and-insolvency-of-parties/, (Last visited on March 3, 2020)
85 Rule 7(1), Order 22, Code of Civil Procedure, 1908
86 Rule 7(2), Order 22, Code of Civil Procedure, 1908
87 Supra 85
88 Supra 86
89 Bindabun v. Makintosh, 9 W. R. 442
90 Shekhar, Supra 72
91 Rule 8(1), Order 22, Code of Civil Procedure, 1908

long as the "assignee or receiver" of the plaintiff carries on with the suit so as to benefit the creditors of the plaintiff. However, if the "assignee or receiver" of the plaintiff refuses to carry on with the suit or refuses to deposit the cost amount as a security in the court of law, then it would be possible for the court to dismiss the suit as long as this was not due to any "*special reason*".[91] In such a scenario, the court of law may dismiss the suit if the defendant files an application in the court in this regard stating the insolvency of the plaintiff. On receiving this application, the court of law may also award costs to the defendant to be paid from the plaintiff's property.[92]

Effect of Insolvency of Defendant

The above stated provision of Rule 8 of the Civil Procedure Code, 1908 would not be applicable if the party to the suit that became insolvent was the defendant instead of the plaintiff. This is because if the defendant to a suit becomes insolvent, then the court of law in most cases would stay the hearing of the suit. In this scenario, Rule 10 of the Civil Procedure Code, 1908 would apply instead. As per this Rule, if during the course of trial, the interest of the defendant in the suit has moved from the defendant to someone else, then the suit would be carried on by that other person to whom the interest had so moved with the prior permission of the court in which the suit is being carried out.[93] This is because the suit cannot be abated merely due to the fact that the interest of the defendant in the suit had moved from the defendant to someone else.[94]

In the case of *Kala Chand Banerjee v. Jagannath Marwari*[95], the court opined that if the defendant to a suit became insolvent, then the court would stay the "court procedure" or "court hearing" in that case.

Devolution of Interest

"Devolution of interest" basically refers to the interest of one of the parties to the suit moving from him or her to someone else. This is possible in case of both the plaintiff and the defendant. This concept has been explained in detail in Rule 10 of the Civil Procedure Code, 1908.[96]

Devolution of Interest from Plaintiff

If during the course of the trial, the interest of the plaintiff in the suit moves from him or her to another person, then the suit would be carried on by that other person with the prior permission of the court of law.[97] The main idea behind this is that the suit cannot be abated just because the interest of the plaintiff in the suit had moved to someone else. This concept is known as "devolution of interest". [98]

In the cases of *Rikhu Dev v. Som Dass*[99], *Ghafoor Ahmad v. Bashir Ahmad*[100], *Pavitri Devi v. Darbari Singh*[101] and *Karuppaswamy v. C. Ramamurthy*[102], the court opined that if the interest of the defendant or plaintiff in the suit moves to someone else during the course of trial of the suit, then in that case, the suit would not come to an end but rather would be carried on by the person to whom the interest had moved from the defendant or plaintiff.

Devolution of Interest from Defendant

During the course of the trial, if the interest of the defendant in the suit moves from him or her to someone else, the suit would then be carried on by that other person after taking the permission of the court of law.[103] The main idea behind this is that the suit cannot be abated just because the interest of the defendant in the suit had moved to someone else after a particular point of time. This is known as "devolution of interest".[104]

In the cases of *Thomas Press (India) Ltd. v. Nanak Builders and Investors (P) Ltd.*[105], *Kirpal Kaur v. Jitendra Pal Singh*[106] *and Sharadamma v. Mohd. Pyrejan*[107], the court opined that if the interest of the defendant or plaintiff in the suit moved to someone else during the course of trial of the suit, then the suit would be carried on by the person to whom the interest had moved from the defendant or plaintiff.

Conclusion and Recommendations

When a suit is filed by a plaintiff against a defendant, the suit will usually not come to an end until the judge adjudicating the case in the court of law passes a

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92 Rule 8(2), Order 22, Code of Civil Procedure, 1908
93 Rule 10, Order 22, Code of Civil Procedure, 1908
94 Nini, Supra 57
95 Kala Chand Banerjee v. Jagannath Marwari, AIR 1927 PC 108
96 Supra 30
97 Vedula Srinivas and R. N. Hemendranath Reddy, The Code of Civil Procedure, 1908 (Alt Publications, 5thEdn., 2015)
98 Myneni, Supra 17
99 Rikhu Dev v. Som Dass, AIR 1975 SC 2159
100 Ghafoor Ahmad v. Bashir Ahmad, AIR 1983 SC 123
101 Pavitri Devi v. Darbari Singh, (1993) 4 SCC 392
102 Karuppaswamy v. C. Ramamurthy, AIR 1993 SC 2324
103 Supra 93
104 Chakraverthi and Nath, Supra 24
105 Thomas Press (India) Ltd. v. Nanak Builders and Investors (P) Ltd., (2013) 5 SCC 397
106 Kirpal Kaur v. Jitendra Pal Singh, (2015) 9 SCC 356
107 Sharadamma v. Mohd. Pyrejan, (2016) 1 SCC 730

judgement, decree or order in this regard. However, if either of the parties to the suit dies, marries or becomes insolvent after the suit has been filed but before the judgment has been passed in that case, then there is a possibility that the suit may be affected in some manner or the other.[108] The legal effect of such death, marriage or insolvency of either of the parties to the suit, i.e. the plaintiff or the defendant, has been explained elaborately in Order 22 of the Civil Procedure Code, 1908. Rule 1-6, 9 and 10A of Order 22 of the Code explain the effect of death, Rule 7 of Order 22 of the Code explains the effect of marriage and Rule 8 of Order 22 of the Code explains the effect of insolvency of either of the parties on the suit. [109]

If either the plaintiff or the defendant to the suit dies after the institution of the suit but prior to the passing of the judgment in that case, then that will not cause the suit to be abated as long as the "right to sue" survives.[110] If the "right to sue" survives, then the suit will be taken care of by the legal representatives of the deceased party.[111] If in case either of the parties to the suit is a female and she gets married during the pendency of the suit, then that will not cause the suit to be abated.[112] Marriage of either of the parties will not have any effect on the proceeding of the suit.[113] If in case the plaintiff to the suit becomes insolvent after the institution of the suit but prior to the passing of the judgement in that case, then that will not cause the suit to be abated. [114] Insolvency of the plaintiff will not affect the suit in any manner.[115] However, if the defendant to the suit becomes insolvent during the pendency of the suit, then the suit against the defendant may be stayed by the court of law.[116]

An application has to be made to the court of law by the legal heirs or representatives of the deceased party requesting the court to make them a party to the suit in several cases. This may lead to unnecessary delay of the trial process and delay of justice as a result thereof. Hence, it is advisable that making the legal heirs or representatives of the deceased party a part of the suit should be done by the court of law by merely passing an entry in this respect as the court does in certain cases. This would be better in the interest of both the parties to the suit. Another fact that needs to be taken into consideration is that parties as well as their advocates or lawyers always try to make use of the loopholes prevalent in the law. For example, "condonation of delay" for filing the applications after the stipulated period may be filed by the parties to the suit on false grounds. It is hence necessary that the court thoroughly scrutinises all the applications that are filed before them. The last point is that in India, even though several statutes and provisions exist, a majority of the rules and regulations are not followed properly. With respect to the topic at hand, even though the provisions are followed to a considerable degree, proper implementation of these provisions should remain a prime concern.

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[108] Nini, Supra 57
[109] Ibid
[110] Mulla, Supra 34
[111] Myneni, Supra 17
[112] Ibid
[113] Ibid
[114] Mathur, Supra 8
[115] Chakraverthi and Nath, Supra 24
[116] Nini, Supra 57

Predation of Price – A Strategy Under Competition Law: A Comparative Study

Kshitij Kumar Rai*

ABSTRACT

In Competition Law, it is presumed that there will be fair and proper competition among enterprises but some or the other they differ with each other's ideology and adopt unnatural tactics to harm others and eliminate them from market. Such tactics are mostly used by those enterprises who want their business to go ahead of others in every manner. Among those 'Predatory pricing' is one of the popular and very often used practices of enterprises which give them edge over the others and create a stiff competition. It is practices whereby one enterprise provides goods or services at low cost price by way of discounts or promotional offers or incentives to influence and attract consumers. This strategy is in practice since19th century and even now it is in use. The practice of predation is an illegal offence under competition laws, but it has been found difficult to prove on record and therefore courts have provided relevant factors to determine such predation of price. This paper will examine such factors where the Court has held such practice anti-competitive in nature.

Through this paper, the researcher will:

a. Understand the concept of price predation in Competition Law,
b. Analyze why it is an abuse of dominant position,
c. How such practice can have appreciable adverse effect on market and competition,
d. Understand the anti-trust legislations of United States and European Union including India, and
e. Examine the decisions passed by the Tribunals and Courts both at national and international levels. The study is limited to Predatory Pricing, an anti-competitive practice, in competition law. The research method of the researcher is doctrinal in nature.

Keywords: Predatory Pricing, Anti-competitive, Abuse of Dominant Position, Adverse effect, Eliminate Competitors, Strategy, Influence Consumers.

Introduction

The term "Predatory Pricing" is one of the ways by which any business entity misuses its market power. It normally occurs when an enterprise with substantial high market power, sets its prices at a low level to eliminate its competitor and to prevent the entry of a new competitor into that or any other market. In such a situation, an enterprise using such a mechanism can have lessor competition thereby disregarding market forces, raising prices and exploiting consumers. It has been found that such cutting in price or valuing insufficiently the competitors is not necessarily predatory and, in numerous cases, when the prices are lowered down then it is has been taken as promotion of competition in market.[1] Thus, by sustaining very low pricing and with an intention of anti-competition, it turns into predatory pricing.[2]

In practice, a sign of predation can occur when the price of a product or service, slowly becomes lower, like a situation of price war. In court, it is quite difficult to prove such predation as it can be treated as a price competition and not as an intentional act. Thus, for a shorter period, such lower price and price war can benefit consumers, but in the long run, it cannot as beneficial, as the enterprise which wins such price war, will effectively push its competitors out of the business and create a situation of monopoly where by setting any price it wants. In other words, it is a situation of anti-competitive event where an enterprise, sell their products below market value price to force competitors out from the market[3] which may lead to a position where one enterprise can create a monopoly in a certain sector.

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1 Patrick Bolton, Joseph F. Brodley and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, US Department of Justice (2015), available at https://www.justice.gov/atr/predatory-pricing-strategic-theory-and-legal-policy (Last visited on October 15, 2020).

2 Predatory Pricing, *Organisation for Economic Co-operation and Development*, The Organisation for Economic Co-operation and Development (1989), available at https://www.oecd.org/competition/abuse/2375661.pdf (Last visited on October 15, 2020).

3 Mark E. Berger, Scott Davis and Akshay R. Rao, *How to Fight a Price War*, Harvard Business Review (2000), available at https://hbr.org/2000/03/how-to-fight-a-price-war (Last visited on October 12, 2020).

The Antitrust or competition laws, forbid predatory pricing in many countries such as the U.S. and the European Union. It has become a common practice in a never-ending venture capital money market[5], like Ola and Uber in the Radio Taxi market, Flipkart and Amazon in the electronic commerce market and Reliance and Airtel in Telecom market etc., can engagein 'predatory pricing' thereby charging consumers below costs, to discriminatelyeliminate the competitors, control the market and eventually raise prices and recover losses in future.[6]

Purpose and Implications of Predatory Pricing

As said, the price predation is a strategy where one entity temporary price its product or services, below the cost, to harm the competition and get high earnings in the long run. The preliminary objective behind such move is to control and misuse the market. Though the predator can recover the loss in the long run, but has to sacrifice a lot in the initial phase, like Reliance Jio being a new entity, had to invest a lot in initial phase to influence and attract consumers.[7] Further, the returns of such arrangements are also uncertain. The research argues that it practically not possible for new entrant as it involves high risk and is more convenient for dominant players only. Thus, such practice is a part an abuse of dominance in the market.

In the claims of predatory pricing, the real question is the suitability of market structure, financial strength and position of the alleged entity in the market.[8] The number and size of the participants in the relevant market in different sector plays a material role in deciding predation claims.[9]

In current competitive markets, the attainment of market power through artificial means is a myth. The acquisition, merger and amalgamation of enterprises has become a normal practice to attain dominance in different sectoral markets and mostly, it is reasonable for those entities to agree to merge.[10] The researcher opines that the predatory pricing though illegal, still preferred more than mergers. But it has been a complex issue to detect the predatory pricing and proving the same before the court.[11] It is not that dominant entity always does predatory pricing, even an entity who is not dominant in market, can adopt such mechanism if it is financially sound and has finance backup but the same cannot be held liable if not proved.[12]

In numerous cases, it has been seen that proving an allegation which is alleged against an enterprise is very difficult in practice. To prove that a business of an enterprise involves predation of price is quite complex in nature as the initial signs of predatory pricing can be shown as a promotion of competition and consumer welfare and no proper evidence of an anti-competitive intention is present.[13]

In Bharti Airtel v Reliance Jio (Reliance Jio case), there was an allegation made by *Bharti Airtel against Reliance Jio*[14] that it is indulging in practice of predatory pricing by giving free voice and data service to consumers where the "Competition Commission of India (CCI)"dismissed the information on the ground that Jio not being in dominance position thus, abusing such position does not arise.[15] Thus, the charges of predation of price becomes relevant, only when an enterprise is dominant in market. Therefore, the said enterprise should necessarily be an incumbent with relevant market power and high market share which can be analyzed by degree of market power compared to competitors and accessing its resources.[16]

In this research paper, the researcher will make an attempt to understand the concept of Predatory Pricing and its

4 Ibid

5 Glossary of Competition Terms, *Predatory Pricing,* Concurrences: Antitrust Publications & Events(1993 & 2002), available at https://www.concurrences.com/en/glossary/predatory-pricing (Last visited on October 12, 2020).

6. Aditya Bhattacharya, *Predatory Pricing in Platform Competition: Economic theory and Indian Cases*, Springer (2018), available at https://link.springer.com/chapter/10.1007/978-981-13-1232-8_11 (Last visited on October 12, 2020).

7. Yannis Katsoulacos & Frederic Jenny, *Excessive Pricing and Competition Law Enforcement*, Springer (2018) available at https://link.springer.com/book/10.1007%2F978-3-319-92831-9#editorsandaffiliations (Last visited on October 18, 2020).

8. Baris Yuksel, Nabi Can Acar, Mehmet Salan, *Competition Authorities to Investigate Mobile Allication Store Dominance*, Kluwer Competition Law Blog, (2019), available at http://competitionlawblog.kluwercompetitionlaw.com/2019/10/15/competition-authorities-to-investigate-mobile-application-store-dominance/ (Last visited on October 12, 2020).

9. Paul L. Joskow and Alvin K. Klevorick, *A Framework for Analysing Predatory Pricing Policy*, JSTOR, The Yale

10. Law Journal (1979), available at https://www.jstor.org/stable/795837?seq=1 (Last visited on October 15, 2020).

11. *Introduction to Competition Law*, Competition Commission of India, (2016), available at

12. https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf (Last visited on October 12, 2020).

13. *Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act – Chapter 4*, US Department of Justice (2015), available athttps://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4 (Last visited on October 05, 2020).

14. Madhurima Gadre, *Dominant Position A Precondition to Predatory Pricing: Tough to Catch the Predator*, Centre for Competition Law and Policy (2016), available at

15. https://competitionlawobserver.wordpress.com/2016/08/20/dominant-position-a-precondition-to-predatory-pricing-tough-to-catch-the-predator/ (Last visited on October 12, 2020).

16. Louis Kaplow, *Recoupment and Predatory Pricing Analysis,* Journal of Legal Analysis, Vol. 10, pp 46-112 (2018), available at https://academic.oup.com/jla/article/doi/10.1093/jla/lay003/5115749 (Last visited on October 12, 2020).

relevance in competition law. The Guidelines and policies of the CCI to control such anti-competitive practice, landmark decisions of CCI and other important foreign cases on predatory pricing will also be discussed. This paper willhelp in understanding the extent at which a practice of predatory pricing amounts to anti-competition and what factors relevant to prove such allegations including dominant nature of alleged entity.

Legal Framework Regulating Price Predation

For a fair competition in the relevant market amongst the entities, the Competition law, has been introduced by replacing the Monopolies and Restrictive Trade Practices Act, 1969, to ensure the promotion of competition, restrict anti-competitive practice and welfare of consumers. The predation as a risk to such fair competition and challenges it creates, the Act has made it as an abuse of dominance of enterprise which is illegal.

Indian Perspective

In India, the term 'Predatory Pricing' has been defined under the Competition law, as a means of sale of goods or services at a price which is below the cost of production, for the production of such goods or services to reduce or eliminate the competition.[17] It is one of the practices which the Competition Act, 2002, prohibits to do. Also, to prove such predatory allegations, such alleged entity has to be dominant in the concerned market. The Act declares price predation as a method of abuse of dominance, thus, here the dominance is a necessary condition, to sustain a predation claim under the law. In India, the concept of price predation has been borrowed from the English *Competition Act, 1998 and the Clayton Anti-Trust Act, 1914*.[18]

The major elements which can determine the predatory behaviour can be: a) establishing the dominance of the enterprise in the concerned relevant market, b) concerned price is below the cost of production, and c) presence of intention to reduce competition or eliminate competitors out of market.[19]

To ascertain an enterprise enjoys a dominant position or not, can be determined by assessing the factors provided under the Act[20] including its market share, material resources, economic power, vertical integration, competitors in relevant market, consumers dependency and technical advantage. Hence, being dominant is not illegal but its abuse is prohibited. The CCI has therefore, after having consultations with the ICWAI, enacted the Determination of Cost of Production Regulations 2008 to determine the reasonable cost in predatory pricing matters.[21]

United States Perspective

In the United States, the challenges to price predation has been stated under two federal statutes, firstly under *Section 2 of Sherman Act*[22] which makes monopoly or attempts to monopolize any part of interstate commerce with foreign countries, an illegal offence. *Secondly, Section 2(a) of the Clayton Act*[23], prescribes unfair priceas a method of restricting competition, or to create a monopoly or prevent competition with persons or their consumers, who grant or receive unfair prices. Particularly, in primary line discrimination, a price determination that a firm employs to injure its rivals can take a form of price predation.[24] The "Department of Justice" and the "Federal Trade Commission (FTC)"are duty bound for legal enforcement of antitrust laws in the US. As per, Section 5 of the FTC Act, if the enterprise involves in any unfair activity which is unlawful in competition, the FTC may seek injunctions orcease or issue orders for such violations of the Sherman or Clayton Act.[25] Also, the FTC may challenge price predation as a different offence as per Section 5 apart from other provisions of the Sherman Act or Clayton Act.[26] Also,

17. Bharti Airtel v Reliance Industries and Anr., Case No. 03 of 2017, Competition Commission of India.
18. *CCI Rejects Airtel's Complaint against Reliance industries, Reliance Jio*, The Economic Times (10 June 2017), available at https://economictimes.indiatimes.com/news/enterprise/corporate-trends/cci-rejects-airtels-complaint-against-reliance-industries-reliance-jio/articleshow/59073026.cms?from=mdr (Last visited on October 12, 2020).
19. Melorio Meschi, Montek Mayal, and Avinash Mehrotra, *Assessing the Importance of Market Power in Competition Investigation,* Competition Commission of India (2016), available at https://www.cci.gov.in/sites/default/files/whats_newdocument/2. Assessing%20the%20Importance%20of%20Market%20Power%20in%20Competition%20Investigations.pdf (Last visited on October 08, 2020).
20. Sec. 4(2) Expl. (b), The Competition Act, 2002.
21. Akash Krishnan and VK Unni, *Competition Regulation in Two-Sided Markets: The Indian Jurisprudence*, National Conference on Economics of Competition Law (2019), available at https://www.cci.gov.in/sites/default/files/page_document/Papers-presented-in-2019-Conference.pdf (Last visited on October 12, 2020).
22. Provisions relating to Abuse of Dominance, Advocacy Series, Competition Commission of India, at 9, available at https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf ((Last visited on October 12, 2020).
23. Sec. 19(4), The Competition Act, 2002.
24. Surrendra U kanstiya*, Role of Cost Accountants in Predatory Pricing Cases, Competition Act – Key Driver of Competitiveness*, The Institute of Cost Accountants of India, Vol. 52, No. 8, at 39 (2017), available athttps://icmai.in/upload/Institute/Journal/MA_Aug_2017_Revised.pdf (Last visited on October 12, 2020).
25. Sec. 2, The Sherman Act, 1890.
26. *Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act: chapter 5*, US Department of Justice (2015), available athttps://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-5 (Last visited on October 12, 2020).

in the monopolization it is not only necessary to have possession of monopoly power, but improper conduct and intention is also needed, as held in *United States v. Grinnell Corporation*[27] case.

By contrast, an attempt to monopolize requires three necessities: a) anti competitive conduct, b)purpose to control the prices or harm the competition, and c) possibility of success. The courts have tried to assure that firms have sufficient latitude to compete vigorously and aggressively. As has been noted by Supreme Court in one case that the mechanism by which a firm engages in lowering prices, is like a firm simulates competition.

Likewise, under Section 2(a) of the Clayton Act which prohibits such discriminatory price between two buyers of the same seller in subject of commodities of similar grade and quality and where such discrimination may actually damage the competition in any line of commerce.[29] The Act also provides certain protections, where price is discriminated to reach the competition by cost savings mechanism.

The dominant position of an enterprise shows its financial strength in the market and to determine such position, different elements must be present to prove dominance. In 1979, *Michael E. Porter*[30] gave certain conditions to ascertain the abuse of dominance: the buyers and sellers bargaining power, presence of threat from new competitors and substitution of products or services, and intensity of competitiveness. Such necessary elements have been used in several US antitrust cases, to conclude whether an enterprise has dominance in market or not.

European Union Perspective

The European Union (EU) law regarding predation of price is crisp and proper. In EU, the term 'Price Predation' is taken as an anti-competitive mechanism under the abuse of dominance provision (Article 82)[31], thus, here also dominance is a necessary condition to have price predation. In EU, it is taken as a practical and profitable strategy to expand the business.[32] Also, the European law works on the basis of Strategic theory which means belief of asymmetric information or access to financial resources.[33] It explains how a market power can be used by a dominant enterprise for excluding its rivals and thereby continue its dominance for a longer period. Based on demand side information and freedom from external financing, it is achievable for a market giant to delude and impair the growth of the competitors. Hence, to prove the predatory claim under this strategy theory, it has to be shown that there is a presence of: a) sufficient market structure, b)offer or scheme of predation with supporting evidence, c) probability of recovering such loss due to financial strength, d) pricing below cost of production, and e) non-appearance of justified business.[34]

In contrast to US, the EUhas an ease requirement inprice predation and the liability which can be defined under two schemes, firstly, such price is below the cost of production which is illegal and there cannot be any other reason but to harm the competition. Secondly, the intent of such pricing is to eliminate a competitor.[35] Thus, the condition of dominance is must in both the scenarios. If the intention with dominance must be proved that should be done with specific and proper evidence[36], however it is not required to show any likely effect of the pricing offer.

Judicial Responses

First time ever a case came on predatory pricing was in 1911 when Supreme Court of United States held one Oil Enterprise liable for manipulation of pricing[37]. In Standard *Oil v. United States*[38], the SC held the plaintiff guilty of creating monopoly in the petroleum industry with the help of certain abusive and anti-competitive activities. By using certain technologies, the plaintiff became successful in oil refinery business. Subsequently, it started expanded its enterprise by acquiring its competitors and controlled over 75% of the oil production in the US. Accordingly, the US

27. Samiksha Gupta, *Predatory Pricing: An Enigmatic Insertion*, International Journal of Law, Vol 5, Issue 1, pp 115-120 (2019).
28. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement and Rulemaking Authority*, Federal Trade Commission (2019), available athttps://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (Last visited on October 12, 2020).
29. *Predatory or Below Cost Pricing*, Federal Trade Commission (2018), available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost (Last visited on October 15, 2020).
30. United States v. Grinnell Corporation, 384 U.S. 563 (1966).
31. Utah Pie Enterprise Ltd. v. Continental Baking Co. 386 US 685 (1967).
32. Ralph Cassady, Legal Aspects of Price Discrimination: Federal Law.
33. Michael E. Porter, *Competition Advantage – Creating and Sustaining Superior Performance*, Harvard Business School Publishing (1985), available athttps://www.hbs.edu/faculty/Pages/item.aspx?num=34977 (Last visited on October 18, 2020).
34. *Working Group on Article 82 Enforcement on the DG Competition,Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, Comments of the International Bar Association, Antitrust Committee, Article 82, available at https://ec.europa.eu/competition/antitrust/art82/102.pdf(Last visited on October 12, 2020).
35. Robert Merkin, *Predatory Pricing or Competitive Pricing: Establishing the Truth in English and EEC Law,* Oxford Journal of Legal Studies, Vol 7, No. 2 (1987).
36. Pierre Barbaroux, *From Market Failures to market opportunities: Managing Innovation under Asymmetric Information,* Journal of Innovation and Entrepreneurship, Springer (2014), available at
37. https://link.springer.com/article/10.1186/2192-5372-3-5 (Last visited on October 12, 2020).
38. Elzinga, Kenneth G, Mills, David E, *Predatory Pricing and Strategic Theory*), Georgetown Law Journal (2001), available at http://findarticles.com/p/articles/mi_qa3805/is_200108/ai_n8992779/pg_11 (Last visited on October 12, 2020).

Federal Government made allegations against the plaintiff for engaging in an anti-competitive practice, threatening other distributors not to purchase its petroleum and initiated underselling of oil prices to make other enterprises leave the market.

The court held such combination as unreasonable and restraining trade in petroleum and thus, falls within the prohibitions of the Act. Hence, the plaintiff violated the Sherman Anti-Trust Act and thereby ordered to dissolve it into smaller enterprises.

India's competition regulator, the CCI, has investigated several complaints of price predation, some relevant decisions among them has been against Cement manufacturers, automobiles, radio taxi services, e-commerce enterprises and telecom sector. The concept of predatory pricing will be further explained by the judicial decisions in India and in International countries like USA and EU.

In *Fast Track v. Ola*[39], the CCI prima-facie held that the radio taxi service, Ola cabs, abused its dominant position within the meaning of Section 4 of the Competition Act, 2002. It was alleged that Ola being in dominance has abused the radio taxi services market in Bengaluru by indulging in price predation as it has spent huge amount son discounts and incentives to customers and drivers respectively, when compared with revenue earned.[40] The informant also referred some notable cases of European Commission (EC) like *United Brands v. Commission,*[41] *British Airways*[42], *Michelin*[43] etc. where the EC was more influenced by the lack of competitive constraints in the market. The EC found the competitor's marker shares in such cases importantly lower than the alleged dominant entity. Similarly, in *AstraZeneca case*[44], relied by the Informant, the EC faced the situation where the Astra Zeneca held the higher market share (much higher than of its competitors) for many years. After hearing all the arguments, the CCI observed that proving a case of predation is a difficult task and certain factors have to be taken into account, such as: (a) relevant market (b) its dominance in the such market, (c) enterprise provided goods/services below the cost of production, and (d) pricing was done with the intention to meet competition or tolesson the competition or eliminate competitors from the market.[45]

Similarly, in *Mohit Manglani v. Flipkart*[46] case, while hearing the allegations of "unfair trade practices" by some major online retail enterprises including Flipkart, the CCI found that online and offline retail marketplace are nota separate relevant market butjust a different channel of distribution which are somehow capable of being substituted.[47] Here also, the CCI determined the factors by which such allegations of predation can be proved.[48]

In *Meru Travels v. Uber*[49] the informant, Meru Cabs made an allegations against the Uber for price predation by way of offering huge discounts to consumers and high incentives to driver partners where it was incurring losses on each trip.[50] The CCI found Uber to be not in dominant position and thus no predatory pricing can be maintainable.[51] Then the matter went to Competition Appellate Tribunal (COMPAT) which set aside the decision of CCI and held Uber to be in a dominant position and indulging in predatory pricing.[52] Being aggrieved from such order of COMPAT, the Uber filed an appeal before the SC[53] where the Courtwhile upholding the decision of Appellate Tribunal, found the appellant in dominant form and by giving such huge discounts to consumers and drivers, it has abused such dominant position and thereby directed the CCI to initiate investigation against the Uber.[54] It has been such few cases where the apex court took the cognizance of predatory pricing and gave a landmark judgment for matters relating to predation of price. The SC provided three factors to determine the elements of predation: a) establishing dominance of the enterprise in the relevant market, b) price is below the cost for the relevant product in the relevant market, and c) intention to reduce or eliminate competitors.[55] Through this Judgment,

39. AKZO Chemie BV v Commission, [1991] ECR I-3359.
40. Tetra Park International SA v Commission, [1996] ECR I-5951.
41. Laura Philips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Harvard Business School (2019), available at https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf (Last visited on October 12, 2020).
42. Standard Oil Enterprise of New Jersey v. United States, 221 U.S. 1 (1911) (SC).
43. Fast Track Call Cab Private Limited v. M/s ANI Technologies Private Limited, Case No. 05 of 2015.
44. Id., at para 4.
45. United Brands Enterprise v Commission of the European Communities, 1976, Case 27/76.
46. British Airways v Commission of the European Communities, 2007, Case C-95/04 P.
47. Michelin v Commission of the European Communities, 2001, IP/01/873.
48. AstraZeneca v European Commission, 2012, Case C-457/10 P.
49. Fast Track Call Cab Private Limited. Para 97.
50. *Mohit Manglani v. Flipkart India Private Limited and Others, Case No. 80 of 2014.*
51. Id., at para 18
52. Id., at para 15
53. Meru Travel Solutions Private Limited v. Uber India Systems Private Limited, Case No. 96 of 2015
54. Id., at para 4
55. Id., at para 54 & 55

the apex court made it clear that such practice is prohibited under the Competition Act and abusing any dominant position will be illegal in nature. Thus, unlike the observation of CCI in Jio case, the SC in Uber, never focused at whether the below cost pricing (if there) done to reduce the competition or done to increase the competition or improving consumer welfare.

In *MCX v. NSE*[56], the allegations were made by MCX against NSE for abusing its dominance in the relevant market by engaging in predatory pricing (waiver of transaction fees, data-feed fees and admission fees to clients) to eliminate the MCX-SX from the market of currency derivative (CD) segment. Accordingly, the CCI found that NSE is dominant in CD market and thereby ordered NSE to change its zero price policy, cease from such activity and discontinue from its unfair pricing, exclusionary conduct and discriminately using its dominance in the other markets to safeguard its own CD market and imposed penalty of Rs. 55.5 crore on NSE.

In appeal, the COMPAT[57] upheld the CCI finding that the NSE had abused its dominance in the relevant market and validate the penalty and directions given in the CCI's order.[58] The COMPAT by placing down the test for price predation held that before concluding predation of price, the presence of under-pricing and some economic sense has to be established. The respondent's market share and its trend may be relevant to determine how it can eliminate competitors by alleged predation but that cannot be only reason. Thus, to establish the claim of predatory pricing, the claimant need to meet two test: firstly, a claimant must show that such lower price can eliminate the competitor out of market and secondly, such monopolist can raise prices in future to force consumers to pay for it and thereby recover its cost without drawing new entrants in the market.[59] Such decision set the standard to determine the price predation in market.

After getting appeal rejected from the COMPAT, the NSE has preferred an appeal before the SC with a prayer that it has not abused its dominance in market nor indulged in predatory pricing and all allegations against it are incorrect. The matter is still pending before the SC for final decision.

Thus, this case explained the principle on the basis of which predatory pricing can be proved although it is quite difficult to show the cost of production of the enterprise when it is indulging in predatory pricing. It is also hard to explain the predictability of increase in price in future. It was a relevant and landmark case on Predatory pricing.

The allegations of predatory pricing have not only been made exiting entities but also on new entities where they have been found not in dominance. One such matter came before the CCI in Reliance Jio[60] case, where the allegations arose that the Reliance Jio, subsidiary of Reliance Industries Ltd, since its inception in 2016, providing free voice and data services in the telecom sector thereby providing services below its average variable cost to disturb the market and eliminating the competitors. The CCI observed that such alleged predatory conduct can be proved and investigated only if, Reliance Jio is prima facie dominant in the relevant market and in the absence of such dominance, no case can be proceed with.[61] Also, the Bharti Airtel failed to show any reduction in competition or elimination of any competitors due to such scheme or promotional offer of Reliance Jio.[62] It further observed that being a new entrant in market, such competitive pricing is a short-term business strategy to penetrate the market and establish its identity. Also, if new entity is coming up with some technological upgradation in any sector then that work should be encouraged and appreciated.[63] Accordingly, the CCI dismissed the information.

Some notable monopolization case with a predatory element has been reached before the US Supreme Court. In *Utah Pie v. Continental Baking (1967),*[64] the frozen (sweet) pies market was the matter of the concerned. The enterprise made antitrust allegations in 1961 against three competitors who were selling pies in Salt Lake City (SLC) before 1957 i.e. when the informant entered the market. The others had no plant in SLC due to which Utah Pie was able to take advantage of its location and sale its product at a lower price. Subsequently, the three competitors started selling their products at lower price. Utah Pie also

56. Meru Travels Solutions Pvt. Ltd. V Competition Commission of India & Uber India Systems Private. Ltd., COMPAT, Appeal No. 31/2016, at para 13-20.
57. Uber India System Pvt. Ltd. V CCI & Ors., Civil Appeal No. 641 of 2017, (Judgment dated 03.09.2019), COMPAT, https://main.sci.gov.in/supremecourt/2017/2103/2103_2017_5_2_16524_Judgement_03-Sep-2019.pdf.
58. Basu Chandola, Supreme Court of India Upholds Investigation against Uber, Abuse of Dominance – Predatory
59. Pricing – India, Kluwer Competition Law, 2019, http://competitionlawblog.kluwercompetitionlaw.com/2019/09/18/supreme-court-of-india-upholds-investigation-against-uber/(Last visited on October 12, 2020).
60. Supra note 57, at3-5.
61. MCX Stock Exchange Ltd. v. National Stock Exchange & Ors., Case No. 13 of 2009, CCI.
62. National Stock Exchange v Competition Commission of India& Multi Commodity Exchange – Stock Exchange Ltd., Appeal No. 15/2011, Compat, available at http://compatarchives.nclat.nic.in/Judgements.aspx(Last visited on October 10, 2020).
63. Ibid
64. Id., atpara 123.
65. Id., at para 10.

lowered its price below them thereby resulting in price war. Such all-time low pricing in pies market might cost Utah Pie some business loss but it did not affect its market share or its profit margin[65].

The US Supreme Court held that there was a reasonable possibility that Utah Pie's three competitors behaviour injured competition, though no financial damage was suffered by Utah Pie but forcing the competitor to reduce the price at all time low price in a market of declining prices will result in less competitive force. Also, the possible damage to other firms will injure the competition. The Court finally held that as Utah Pie;s sales and profits continued to grow, it cannot be said to injured by such price war.[66] This case is extremely important in US Antitrust jurisprudence as it shows the consequences of plainly wrong economic thinking.

The predatory pricing was further dealt in *Matsushita. V. Zenith*[67]. In 1974, one Zenith Radio Corporation, the US manufacturing consumer electronic products, and National Union Electronic Enterprise (collectively referred to as Zenith) sued 21 Japanese-owned or -controlled manufacturers of consumer electronics and claimed that these enterprises conspired to drive the American enterprises out of the market. According to Zenith, the Japanese enterprises conspired to show high prices artificially for their products in Japan so as to offset the low prices of their products in US, which was somehowunfavourable to the US enterprises. The defendant claimed that suchis a violation of several anti-trust laws enacted to restrict price-fixing. Accordingly, the Japanese enterprises filed a motion petition before the District Court (DC) for summary judgment. After finding the bulk of Zenith's evidence inadmissible, the DC held that the admissible evidence does not raise any genuine issue on material fact and thereby granted in favour of the Japanese enterprises.[68]

The US Court of Appeals reversed the decision and held that most of Zenith's evidence was admissible. On the merits of the case, and in light of the greater amount of admissible evidence, it held that a reasonable fact finder could find evidence of a conspiracy and that the DC improperly granted the summary judgment in favour of the Japanese enterprises.[69]

In *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*[70], the A.A. Poultry Farms was alleging competitive injury from price discrimination and therefore, sued its competitor, the Rose Acre Farms under the Clayton Act, amended Robinson-Patman Act. The plaintiff with the other plaintiffs contended that the Rose Acre's lower-priced "specials" constituted price discrimination. Further, the plaintiffs alleged that Rose Acre priced its specials below its cost of production, which they claimed constituted predatory pricing. The jury returned a verdict for the plaintiffs, with treble damages amounting to $ 27.9 million. The federal district court, however, granted Rose Acre's motion for judgment notwithstanding the verdict and the plaintiffs appealed. The Seventh Circuit affirmed.[71]

The Seventh Circuit Court stated that SC precedents mandates a different analysis of predatory pricing claims under the Sherman Act than it does under the Robinson-Patman Act. This dual approach under the two Acts stands in stark contrast to a wave of judicial support to analyse predatory pricing claims under the Sherman and Robinson-Patman Act. Unless antitrust law or precedent mandates different analyses for these claims, a unified approach not only simplifies the analysis, but also provides a rational framework for applying the antitrust laws.[72]

In *United States v. AT&T CO.*[73], the Department of Justice made allegations against the AT&T for engaging in anti-competitive behaviour and concluded in breaking up the enterprise. The US Government by invoking the Sherman Antitrust Act, observed that AT&T had monopoly power over America's telecommunications, and such enterprise has to sell some its subsidiary enterprises, including its manufacturer co. 'Western Electric' and research arm 'Bell Laboratories', which would then cut into more smaller enterprises.[74]

Such action from the Government created a debate among people. As AT&T was providing very cheapest service possible, the Department of Justice argued that the breaking of AT&T would allow more enterprises to enter the market, which will provide more innovation and

66. *Reliance Jio case*, Case No. 03/ 2017, CCI.
67. Id., at para 21.
68. Id., at para 22.
69. Ibid
70. Utah Pie v. Continental Baking, 386 U.S. 685 (1967).
71. Keith Allen May, *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act*, University of Richmond Law Review, Vol 28, Issue 2, Page 513 available at https://core.ac.uk/download/pdf/232781507.pdf(Last visited on October 15, 2020).
72. Id., at 514.
73. Matsushita Electrical Industrial Enterprise v. Zenith Radio Corporation, 475 U.S. 574 (1986).
74. Brenda S. Levine, *Predatory Pricing Conspiracies After Matsushita industrial Co. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?,* Predatory Pricing Conspiracies, Vol. 22, No. 2, Page 529-530, available at https://core.ac.uk/download/pdf/216910943.pdf(Last visited on October 15, 2020).
75. Id., at 535.

competition. The arguments of the respondent was that the AT&T should be exempted from antitrust laws so as to maintain uniform standards in telecom services and cutting into smaller parts can shatter the telecom industry itself.[75]

After a long legal dispute, the AT&T eventually agreed on a US Government's terms and made settlement in the year 1982. As per such agreement, it was agreed that the AT&T can keep its long-distance operations, the Western Electric and Bell Laboratories in exchange for divesting from its 22 local phone monopolies. After such agreement, the AT&T was able to make incredible success in gaining back its business, as it was allowed to merge with Bell Sout, one of the Regional Bell Operating Enterprises that formed after AT&T had been forced to divest from its local phone services.[76]

Thus, on the basis of these judicial decisions discussed above, it can be said that predatory pricing has been used by enterprise whenever they thought of expanding their business or having a majority market share and thereby to eliminate competitors from the market. In India, USA and EU, the term predatory pricing has been well dealt with whether in giving principles on the basis of which it can be proved that a enterprise is involve in anti-competition or abuse of dominant position by way of predation of price or identifying relation between dominant position and abuse of dominant position. Hence, judiciary and regulators have done what is expected from them to protect the market and encourage for a fair competition by interfering whenever some fault or mischief is done by an enterprise in order to take undue advantage over the other.

In *Brook v. Brown*[77], the Supreme Court of US held that when the plaintiff is seeking to establish any competitive injury it has suffered due to competitors low pricing, then it must prove that the prices alleged are below the appropriate measure of its rival's cost of production. It also held that the certain competitive injury, predatory intention, and later recovering of loss must be proved against the allegations made by the plaintiff.[78] This case showed that the allegations of predatory pricing is difficult to prove before the Court and sufficient evidence is required to establish such predation. The alleged predator (Brown and Williamson) only had a 12% market share in the cigarettes manufacturing market. Whilst the market was fairly concentrated as a whole, there were no allegations of explicit agreements between the manufacturing, so that a predatory theory of harm based on tacit collusion was even harder to sustain. The allegation instead related to a fierce price war, which began after the Brooke Group introduced a "Vanilla", unbranded cigarettes pack, as a result, the Brown and Williamson introduced its own common version and started to compete aggressively on price.[79]

The SC without embracing the average variable cost rule of *Areeda and Turner*[80]- nevertheless stated that firstly, a finding of predation required specified evidence regarding below cost selling and Secondly, recoupment had to be shown to be a 'dangerous probability'.[81] The SC also stated the principle of recoupment sufficiency could the alleged predator truly recoup (at least) the entire sacrificed profits after the predation period.[82] In other words, there should be a quantitative exercise in addition to the qualitative one of determining that the predator has the common ability to raise the price above competitive levels post-predation. This imposed a very high standard of proof for the plaintiffs.

Conclusion and Suggestions

As the dominance from the western countries was observed in India and with that abuse of dominance was also on the rise, thus, there was a need felt to have such provisions to curb such abuse by way of price predation and accordingly, the legal provisions on price predation was introduced by the Competition Act, 2002.Before such enactment, predation was taken as a tool to eliminate

76. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., [1989] 881 F.2d 1396.
77. Id., available athttps://law.resource.org/pub/us/case/reporter/F2/881/881.F2d.1396.88-1426.html (Last visited on October 15, 2020).
78. Ibid
79. United States v. American Telephone and Telegraph Inc., [1982] 552 F. Supp. 131, (US District Court for the District of Columbia).
80. Id., available athttps://law.justia.com/cases/federal/district-courts/FSupp/552/131/1525975/(Last visited on October 15, 2020).
81. Ibid
82. John Pinheiro, *AT&T Divestiture & The Telecommunications Market*, High technology Law Journal, Vol. 2, No. 2, Page 303-355 (1985).
83. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., [1993] 509 U.S. 209 (US Court of Appeals for the Fourth Circuit).
84. Keith Allen May, *Brooke Group Ltd. V Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act*, University of Richmond Law Review, Vol 28, Issue 2, Page 518-519, available at https://core.ac.uk/download/pdf/232781507.pdf(Last visited on October 15, 2020).
85. Id., at 521-522.
86. Areeda and Turner proposed objective, cost-based rules for distinguishing between competitive pricing in Robinson-Patman Act "primary-line" cases which disregarded direct evidence of subjective intent and suggested that the only test should be whether the seller's price was above or below its 'average variable cost.'
87. May, supra note 71, at 523.
88. Id., at 520.

competitors out of the market. Through this paper we have observed that India's huge population serving as a big market, cheap labour and potential to boost the economy, made the enterprises misuse their dominance in the relevant market to force competitors out of market and create a monopoly.

To curb and control such abuse of dominance by way of predation, the special provision enacted. Although, the Indian law and foreign laws have tried to explain the concept of price predation where the elements like cost of production, average variable cost and average total cost has been defined. Butstill the difficulty continuesin taking out the basic inference from it. The only reason the CCI and the ECJ have stick to the average variable cost phenomena as the average total cost fluctuates too much and it only createproblems in coming to conclusion.

Through this paper, it has been found that even new entrants and small competitors are also being challenged, and not only the dominant enterprises, who are selling their products below their total manufacturing and production cost without incurring any profit. Although, it may be consumer friendly,but these are against the competition law norms as it affects the competitors who wants to do business free and fairly in the market. Therefore, there is a need to take strict action against those enterprises indulging in such activities. This will act as a catalyst for the existing and new and help in fostering competition in market and work for consumer welfare.

The Uber case, where the CCI found it not dominant entity but appellate tribunal and SC were of different view and due to its tactic of providing huge discounts to consumers by way of promotional offer on trip and huge incentives to drivers, found it to be abusing its dominant position by indulging in such practices. Thus, somehow it was providing services to attract consumers and eliminate its competitors out of market, which the court found anti-competitive and gave factors to determine such predation and prohibit it from occurring in future.

For every enterprise, the market has been a consumer centric business model provides the entrepreneurs to work as per their potential in a free,fair, and healthy competitive environment. There are other problems as well, but it is more important to abolish such system of concentration of power. If a consumer wantsto have value for money for the goods or services, then it is equally required that the enterprises have a fair platform to establish themselves as a dependable and honest entity and not otherwise. Although, the competitors in the market are working indifferentsectors, conditionsand having divergent economic financial investments, but principle of fairness still applies to each of them.

Interestingly,as per the developing affairs of the Indian Economy, the market is found to be endangeredfor new entrants who often struggle to establish themselves in market, however the same was not seen with the"Jio",subsidiary of Reliance Industries.Though what may have been appearing to be an act of predation in the relevant market, as wasalleged by Bharti Airtel, but being a new entity with new technology of 4G LTE services and consumer friendly upgradation saved it from allegations of price predation. Also, due to new entrant and being subsidiary Enterprise, the Commission found it not to be dominant in nature. But now the situation has changed, and its recent investments deals in different sectors, one can presumed it is in dominant position and any such tactics can bring it in trouble.

Hence, after examining various decisions and articles in this paper, it can be said that Predatory Pricing is an illegal activity in the market, but it is really hard to prove before the court as it involves technical and economic factors which are indeed difficult to define and prove. The CCI and Appellate body has rightly controlled the competition by imposing penalty on enterprises whenever it has found any predation or anti-competitive activity involved including Uber case or Flipkart case or Fast Track case, the Commission has obliged with its duty seriously and prevented such unnatural or illegal activities or behaviors in the Competition market.

Even in foreign jurisdiction, foreign regulators like FTC and European Commission have handled the predation of price in a strict manner and prevented anti-competition in every possible manner with a view to curb such practices.

Hence, it can be said that predatory pricing is although illegal and anti-competitive practice in Competition Law and entities use it as a strategy to expand their business by providing promotional offer or discounts to attract and influence consumers and eliminate its competitors but has been found difficult to prove. Also, to prove such practice, the informant must, firstly, prove that such alleged entity is dominant in nature as was held recently in OYO case and numerous other cases. It is not only in case of existing enterprises, but also new entities are indulging in such practices. The CCI, FTC and ECC has taken it as an abuse of dominant position and imposed penalty wherever they have found such practices in market. But with that, it has also been found difficult to prove such allegations. In that situation, the informantsmust establish certain ingredients or factors toprove their allegations and effectively secure their rights.

State Trading Enterprises: A Critical Study in Context of Agro Industry in India

Hardik Daga*

ABSTRACT

State trading enterprises (STE's herein) are defined as governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import. Article XVII of the GATT 1994 is the principal provision dealing with state trading enterprises and their operations.

There are several sectors which are being controlled by the STE's all over the world. The prominence of these institutions in international business offers two challenges: to identify and master the problems in international business management that are distinctive to such state-owned enterprises and to envisage the changes in existing international business practices that such enterprises are likely to produce.

India is a home to giant public enterprise system and with a few exceptions such as mining, insurance, coal, banking, insurance etc. State entrepreneurship is the main reason behind the presence of public enterprises. Soon after independence, the Industrial Policy Resolution of 1948 emphasised the state's role in economic development in these words: "The state could contribute more quickly to the increase of national wealth by expanding its present activities wherever it is already operating and by concentrating on new units of production in other fields, rather than on acquiring and running existing units." This policy was further refined in the Industrial Policy Resolution of 1956, when certain industries were reserved for public sector. The pursuit of this policy has resulted in the establishment of many public enterprises and an investment of huge financial, physical and human resources in them. Further, given the federal character of the Indian policy, it was natural that the governments at the centre as well as in the states would establish public enterprises within the specific areas assigned to them by the Constitution.

In this paper the author intends to explore workings of state trading enterprises in India and their relevance in recent times. The prime focus will be on agricultural related STE's, their performance and the obstacles faced by them. The author will also delve into the issues of private players in India and how they can work in association with STE's to better serve themselves and the economy.

Keywords- State Trading Enterprises, Agro Industry,Uruguay Round, Public Enterprise

Introduction

The role of State Trading Enterprises (STE's) is significant for international trade, prominently after the Uruguay Round. They account for large shares of world trade in certain products: about 40 percent for wheat and 30 percent for dairy products. This article examines the influence of STE's on the development of the agricultural sector in developing countries.[1]

The GATT Agreement of 1994, Article XVII, defines STE's

"*as non-governmental enterprises, including Marketing Boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.*"[1]

In this paper the authorintends to explore the working of state trading enterprises in India and their relevance in recent times. The prime focus will be on agricultural related STE's, their performance and the obstacles faced by them. The author will also delve into issues of private players in India and how they can work in association with STE's to better serve themselves and the economy.

In India, the idea of State Trading Enterprises (STE's hereinafter) came to light after the establishment of State Trading Corporation in the year 1956. The reason for forming this organization was to set about trade with east European countries.[3] The scenario has changed after market liberalisation of 1991, but before STE's played an important role in promotion of Indian manufactured goods across the globe and also helped in meeting the

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1. George Vlontzos, *The Role of State Trading Enterprises and Their Impact on Agricultural Development and Economic Growth in Developing Countries*, CAFRI: Current Agriculture, Food and Resource Issues (2006/01/01).
2. Article XVII, GATT, 1994.
3. Will Martin, *What Has the GATT/WTO Agricultural Agreement Actually Done: Discussion*, 82 American Journal of Agricultural Economics, pp. 729-730 (Aug.2000); available at https://www.jstor.org/stable/1244633

domestic demand. The question arises whether the glory days of such enterprises behind us?

The role STE's is not just to make sure the domestic demands are met in addition to surplus in export, but it also pushes the policy agenda of a nation. For a very long time there has been a discontent amongst the manufacturers and traders in India as STE's have alleged to be importing raw material from outside instead of seeking it from the local manufactures. Their policies have also acted as an impediment on export front. The policy of maximum governance and minimum government falls flat on ground as the very idea behind STE's is government owned, sanctioned, or otherwise supported enterprises which are authorised to operate trade. There are certain developed countries which authorise the STE's to exclusively deal with trade of certain restricted items.[4] Example of this is France and Japan in case of tobacco manufacturing and exporting. STE's hold the power to influence prices of goods sold, both domestically and internationally. As they can set tariff prices which acts as a restriction on import and helps increase price of such good in the domestic market.[5] Similarly due to subsidies provided to their own goods reduces the price of the same in international market.[6]

The Agro Sector

The trade in agricultural goods has been dependent on STE's for a long time now. An example of this would be a recent increase in importation of pulses, to counter the price rise, by the Metals & Minerals Trading Corporation of India on government's plea. Such steps of STE's help to keep prices of goods under check. Currently, every three out of four STE's notified under Article XVII of GATT are involved in trade of agro products. Like India, trade related aspirations of other countries have been (or at least tried to) met with the help of STE's. The goal of these countries is to have a domestic price support for their goods, increasing the efficiency of agro manufacturers and the market itself, and also to provide affordable food items to people coming from the low-income strata of the society. The government takes help of trade related tools such as subsidies on exports, quotas, tariffs, administered domestic prices etc. to achieve these goals.

STE'sin India

India had to face serious socio-economic problems after it got independent. Issues such as inadequate investments, abysmal infrastructure, low income, huge income disparity, high levels of unemployment, disparity amongst the different areas with regards to economic development, presence of minimal industrial base etc. were crippling this nation. An absence of reliable and developed private bodies was felt, which could participate in international trade and also look after the interests of local civilians. Imports from other countries became the only source to feed the poor of this country.[7] This is where the STE's came into picture to fill this huge economic void. Not only they have made sure that the domestic demands of essential commodities of this nation is met, but they have also expanded their exports to the various parts of this world.[8] These STE's bring certain special and unique value to the table due to its monstrous size and government's financial backing. STE's provide a certain guarantee of quality, delivery and price to foreign customers along with prospect of long term business relationship. Manufacturers who act as source of products to these STE's also benefit in terms of providing access to techno-commercial information and a superior price realisation.

Varied Expertise

In the last few decades the STE's have received the recognition of being efficient and quality oriented players in the international market.[9] Due to the sheer size and abundance of resources at their disposal, these public sector undertakings have become major exporters around the globe. They have developed the skills required to deal with mass international trade. They were initially perceived to have expertise in managing exports/imports of only agro related goods, but in the last few years, they have been successful in developing themselves in a manner that they can expand their business in other sectors as well.[10] Government undertakings such as State Trading Corporation (STC) and Metals and Minerals Trading Corporation of India (MMTC) have been able flourish themselves in different markets, with varied capacities such as; they export goods such as iron ore, steel etc., and on the other hand, import minerals, hydrocarbons, metals,

4. Raymond Vernon, *The International Aspects of State-Owned Enterprises*, 10 Journal of International Business Studies, Palgrave Macmillan Journalspp. 7-15 (Winter, 1979); available at https://www.jstor.org/stable/154527
5. M. M. Kostecki, *State Trading in International Markets*, 49 Southern Economic Journal pp. 1191-1192 (April 1983); available at https://www.jstor.org/stable/1058125
6. Ahmad Shariq Khan, STES- Are They Really Facilitating India's Trade, The Dollor Business (August 2016);available at https://www.thedollarbusiness.com/magazine/stes-are-they-really-facilitating-indias-trade/45832
7. B. L. Maheshwari, *State Level Public Enterprises: Issues of Autonomy and Performance*, Economic And Political Weekly pp. M165-M167+M169-M171(Nov. 28, 1981),; available at https://www.jstor.org/stable/4370428
8. Ziauddin Khan & Ramesh K Arora, *Public Enterprises in India - A Study of State Government Undertakings*, Associated Publishing House (1975).
9. K. P. E. Lasok, *Government Intervention and State Trading*, 44 The Modern Law Review pp. 249-269 (May, 1981); available at https://www.jstor.org/stable/1094937.
10. S.K.R. Bhandari, *Promotional Role of development corporations in Industrialisation*, Decision 3:2, May 1976, pp 103-24.

petrochemicals, fertilisers etc.[11] STE's have been entrusted with providing essential commodities and also to keep a check on price, and if the situation arises it also needs to arrange for imports of necessary goods such as sugar, pulses, edible oils etc.

Head to Head: Exports and Imports

With time, theSTE's have been successful in adding new consumer goods to the list of goods they export, but it's the imports which have taken the prominent share of all the trade. A good example of this could be found in the Financial Report of State Trading Corporation of the year 2018-2019, where it can be observed that of all the trade of Rs. 8,893crore, only 0.12% of it is exports and the rest 94.87% & 5.003% is imports and domestic sales respectively. It also has to be noted that most of this trade relates to agro products. Hence it can be concluded that even though STC has been successful in manufacturing diverse range of commodities, it still hasn't been able to deal with its shortcoming of dependency on imports of commodity goods. As a corporate entity and as a major player who can help Indian economy grow immensely, the performance of STC has been quite disappointing. India is in desperate need to increase its exporting capabilities to climb up the ladder in the international community.[13]

The Times, they are Changing

Over the past 29 years, since the first wave of economic reforms of 1991, there have been many private giants which have entered the market. Such private companies are indulged in exports and have been successful in developing the requisite skillset to manufacture products which until now had been under STE's' regime. The STE's have been challenged by the emergence of such players. Although officials working for STC claim that they have been making efforts to come at par, or may be overcome their success, by evolving their policies and strategies accordingly to adapt to ever-growing and ever-changing market. Whereas private corporations have expressed their dissatisfaction over the unfair treatment when it comes to certain sector or commodity over which STE's hold the authority to facilitate trade.

Purpose Behind Such Change

Canalisation of trade means import or export only facilitated through the agencies designated by the Central Government.[14] Lately several demands have been made by private traders of doing away with canalisation. These manufacturers and exporters feel that canalisati on has not been serving its aimed purpose. We could take an example of onion exports in India as it exports1.3 million tonnes every year. Earlier there used to exist restrictions over exports of onions as imposed by one and the only government agency, which was authorised to regulate trade in onion. As the time passed, there was a significant increase in production of onions which was more than the domestic demand. Due to this very reason an association of onion producing states, headed by Maharashtra, demanded liberalising of exports from such restrictions. As a result of this, from 2003 onion exports was freed by the Directorate General of Foreign Trade (DGFT). Under the new rules procuring 'No Objection Certificate' became mandatory for shipment of onions. This rule coupled with commission charged by STE's became a subject of dispute amongst the concerned STE's and exporters. Delay in issuing NOCs and not using collected commission money for the betterment of farmers were the major issues raised by such exporters.

Trade and manufacturers of agro commodities have suffered huge losses as canalising agencies are oblivious to intricacies of the market. This statement can be backed by one particular instance when the government in 2015 took a decision to raise the minimum price for exporting onion from $400 to $700 per tonne. The minimum export price is the minimum amount a trader is allowed to charge for export of a particular commodity. This new policy hampered the exports of these traders as other countries, like Pakistan, were exporting it for $300 a tonne. After few months' objections were raised by traders and this compelled the government to reduce MEP of onions and after some time it was completely done away with, but the damage was already done.

Private traders of canalised commodity have suffered largely because of two reasons:

a) The Commerce Ministry's incompetence to take decisions wisely. There is a frequent change of policies and it is done hastily.[15]

b) The same are based on imprecise information on workings of the market and its present conditions.

Equilibrium needs to be achieved by the government while trying to strike a balance between the concerns of consumers and exporters. In order to counter the abnormal increase in price of a commodity in the domestic market, the government agencies need to reduce or

11. 56th Annual Report, MMTC (2018-2019); available at https://mmtclimited.com/files/.pdf/29_MMTC_English%20Annual%20Report%2018-19.pdf
12. Annual Report, State Trading Corporation (2019-19); available at http://www.stclimited.co.in/content/annual-reports.
13. K. R. Gupta, *Organisation and Management of Public Enterprise,* 1 Atlantic Publishers pp 64-92 (1978).
14. Handbook on Foreign Trade Policy and Guide to Export & Import, The Institute of Chartered Accountants of India; available at http://nbaindia.org/uploaded/Biodiversityindia/Legal/6.%20Import%20and%20Export%20(Control)%20Act,%201947.pdf
15. T. L. Sankar, R. Nandagopal& R. K. Mishra, *State Level Public Enterprises in India: An Overview,* 24economic And Political Weekly pp. M33-M40(Feb. 25, 1989); available at https://www.jstor.org/stable/4394433

eliminate the import duty all together, or it can also restrict export by using quota system or by increasing export tariff. If price of the same commodity increases in international market then reducing import duty won't be of much help, and the government is left with only one choice; accepting little or accept nothing. Of late, the Government has removed a large number of items from state trading enterprises' list, and it will continue to do the same if required in future.[16]

Issues Plaguing Imports

There have been several complaints made by traders holding STE's responsible for bogging down imports of goods mainly by its;

a) Pricing policy

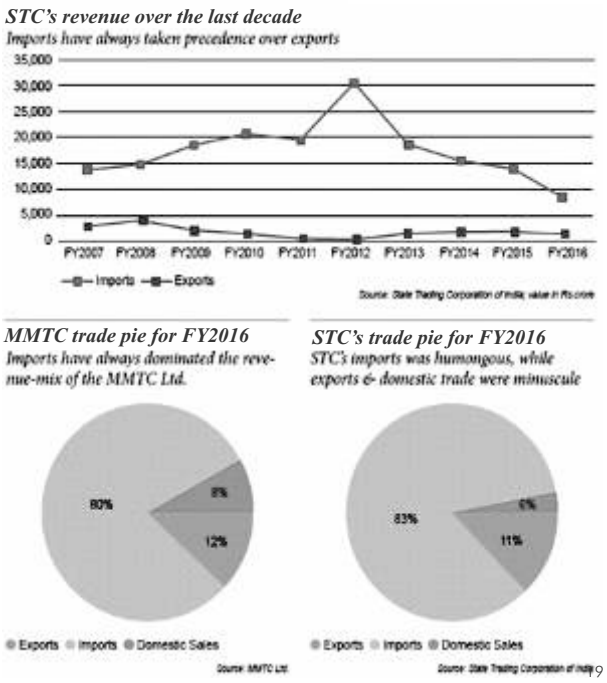
b) High service charges[17]

The import tariff charged on few products by STE's has proven to be excessive. Most of these over-charged commodities are actually raw materials and it becomes difficult to keep price of final/finished product low. Another issue is absence of a channel of communication between the traders and the STE's. The scope of understanding the reason behind these increased prices, as charged by the STE's, is pretty bleak due to the abovementioned reason. It is believed amongst the exporters of fertilisers that in order to benefit farmers, canalisation on import of the same fertilisers needs to stop. This seems to be the only way to achieve government's goal of doubling income of farmers in the next five years. Income of farmers primarily depends on fertilisers and in order to ensure this a nutrient based subsidy needs to be provided. Urea as we are aware is one important ingredient for producing fertilisers, its import needs to be kept aside from being canalised. As per the state trading policy, urea can be sold under a single brand and this is causing manufactures lose out to competitors as they don't have the advantage of critical branding. Such import restrictions on urea have allowed it competitive products, such as diammonium phosphate (DAP), grab most of its market.

When a certain product is in surplus to domestic demand, then it should be pulled out of STE's control and exported independently by the trader. This will make sure that there is no scarcity of it in domestic market and also benefit exporters by not entangling them in a web of unfair policies of trading enterprises. In order to achieve this there shall be a scientific evaluation of the demand and supply while taking into consideration the buffer stocks.[18]

Dependence of STE's on Subsidy

In the last few years there have been numerous occasions where the government has decided to import certain essential commodity in order to control the price and to meet domestic demand. Many a time such commodity has either been pulses or onions. But this move of government, quite often than not, has backfired as they have either imported it in surplus quantities or have ended up bearing remunerative loss. Example of this is when recently the Central Government had to approve a proposal of Food and Consumer Affairs asking to reimburse hundreds of crores in losses from the Price Stabilisation Fund of India. This request was made after PSUs such as MMTC, STC and NAFED imported pulses in excess during the interval of five years starting in 2006. This leads to a question as to how could the government and the concerned STE's be so oblivious of the market conditions before sanctioning such imports? Had they done their homework this situation would have never arisen.



Concerns of Private Corporations

Based on several interviews of highly positioned employees of large private corporations it can be

16. T. L. Sankar, R. K. Mishra and R. Nandagopal, *Can State Level Public Enterprises in India Earn a Rate of Return?*,25 Economic And Political Weekly pp. M169-M174 (Nov. 24, 1990); available at https://www.jstor.org/stable/4397024

17. T. L. Sankar, R. K. Mishra and R. Nandagopal, *Working of State-Level Manufacturing Public Enterprises: Promise and Performance*, 26 Economic and Political Weekly pp. M42-M46 (May 25, 1991); available at https://www.jstor.org/stable/4398054

18. Sumit K. Majumdar, *Comparative Organizational Characteristics of Indian State-Owned Enterprises*, 15 Review of Industrial Organization, Springerpp. 165-182 (September 1999); available at https://www.jstor.org/stable/41798880

19. Ibid 14.

concluded that the canalising agencies shall be made to device policies which are majorly focused on interest of private traders and manufacturers. Earlier everything was dependent on licenses and it only created a lacklustre environment in the market. But now in order to ensure a perennial rise in its economy the government has to prioritize the needs of private sector. Neither of them; the STE's or private corporations can do well without each other's help. Each other's assistance could only help them meet global orders.

Monopoly held by STE's is also a matter of concern. They have been given the sole authority to engage in export and import of certain commodities.[20] Due to lack of competition the efficiency of canalising agencies decreases as there is no pressure to outplay other players when it pertains to quality and it causes loss to both; STE and domestic buyers. There is no doubt about the relevance of STE's enterprises in certain sectors but in order to make most out of them certain conditions need to be met before picking out the list commodities to be canalised and the relevant STE's for the same;

a) The concerned STE should have a good understanding of the global market dynamics of thatparticular commodity and should be skilled enough to procure the same at a favourable price.
b) The concerned STE should also be able to provide the commodity at a price lower than what is prevalent in the international market (if consumers were allowed to import the same).

When it comes toSTE's exporting commodities, they should only be allowed to do so if there is an apparent need due to a sharp decline in exports and the government is confident that the concerned STE's involvement can help increase quality of that product and secure better price realization of the same.STE's may be helpful in attaining certain foreign policy objectives by exporting a particular commodity to a country to which private players have no affinity with.

Conclusion

While concluding this paper the authors would like to make an observation that STE's haven't unsuccessful in performingin the manner they were aspired to and there is ample work needed to bring them back on track. No successful economy can function without the help government agencies and they need to realise the expectations of its citizens. They have come a long way by reducing the list of canalised commodities. However, there is a need of policy makers' sound understanding of the market dynamics so that they could make STE model more efficient and profitable. The whole country would benefit from it, and not just few private players. The STE's are currently acting as impediments to international trade rather than a lubricant. From the outset India does not seem to be on the right path.

20. B. Jalan, *India's Economic Crisis: The Way Ahead. Delhi, India*: Oxford University Press (1991).

Book Review

"Human Values & Human Rights" Second Edition, 2017, Author Justice D M Dharmadhikari, Former Chairperson, MP Human Rights Commission Bhopal, Former Judge, Supreme Court of India, Former Chief Justice, High Court of Gujarat

Dr. Nitesh Saraswat[1]

The Book Titled "Human Values & Human Rights" Second Edition, 2017, has been, published by Universal Law Publishing, an imprint of LexisNexis with ISBN: 978-93-5035-892-4. This book has IV Parts along-with appendix 1 to 4 having total 494 pages.

The Human Values & Human Rights both goes together unless one has humanistic perspective and its value in mind one should not expect humanistic behavior from other side. Therefore the human values are sine-a-qua non for the proper implementation execution and availability of human rights. Both aspects, that is, human values and human rights have been discussed together by the author in a well-planned and in befitting manner.

In Part I, titled Human Rights, the author has discussed the development of Jurisprudence of Human Rights in India. He has emphasised importance of human values in constitutional governance. He has discussed all the facets of human rights including right to health, right to education, right to shelter, and right to property, rights of terrorist in relation to humanism etc. He has given more emphasis on the judicial pronouncements made by the High Courts and the Supreme Court of India. He has also discussed the concept of human rights in relation to Indian culture and religion. In this part he has also analyzed the provisions of the Protection of Human Rights Act 1993 and their implementation and effectiveness.

In Part II, titled Judiciary, the author has discussed the role of judiciary in ensuring the protection of human rights to the citizens of India. In this regard he has discussed that judiciary has to work fearlessly and independently without any interference of other organs of the State. He also emphasised that there is a need to make the judiciary accountable. He has also discussed the challenges which are being faced by the judiciary while discharging their duties as adjudicator in the present context. He has also discussed in detail the concept of justice as envisaged by the Constitution of India and the role of judiciary including subordinate judiciary in achieving the vision and mission of the Constitution of India.

In Part III, he has discussed the role of constitutional institutions towards fulfilling the vision given by the Mahatma Gandhi. He emphasised that the constitutional institutions can function properly and effectively only when they follow the ideas preached by Mahatma Gandhi like that of decentralization of the governance, (Hind Swaraj), spiritualistic approach and the idea of democracy. He emphasised that the executive branch of government should act as trustee of the nation, judiciary should work as watch dog and lawyers should render services as public service. This has been rightly explained in detail by Vinoba Bhave, when he says that:

> *"We have to build such a new society and a nation in which all shall work with use of their both hands. There shall be nobody high and nobody low. All shall live as brothers and sisters. All will be filled with love in their hearts, intellect in their heads and dedication and devotion in their souls. Each one of them shall recognize the should in him and will not worry for the body. They will keep their organs and senses within their control and would not be their slaves. They will discharge their duties towards others in such a way that their own rights will get naturally protected".*

The author emphasized that if we understand the Gandhi ji's philosophy his ways and his vision of India, we can easily understand what he expected of our constitutional institutions.

He has also discussed the concept of spiritualism and its applicability in administration of law and justice. According to him it seems that these terms appears to be contradictory to each other but in effect have a close and natural relationship. He referred to various efforts made by the government, judiciary and other constitutional institutions in this regard. He quoted

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Acharya Dada Dharmadhikari, a Gandhian thinker when he said that:

> *"for doing justice, one may require to use conscience and discretion but where one is merciful and shows compassion, there is no such necessity"*.

He summed-up by saying that we have great spiritual heritage and despite diversities and intermittent conflicts we have been able to remain united and pleaded that god shower blessings to us to make us competent enough to frame our laws and set-up our justice delivery system with aid of our spiritual knowledge and experience.

In Part IV, he has discussed five important judgements delivered by the author himself affecting the human rights of the citizens. The first judgement wherein he has discussed the human rights of earthquake victims wherein he appreciated the work undertaken by various service organizations, agencies, authorities and individuals who have worked in spirit of cooperation for providing relief, remedy and rehabilitation of earthquake victims.

In the second judgement, while emphasizing the importance of education institutionsin inculcating the sense of respect for all religions and to work for achieving the ideal of secularism. He also advocated that religious education if permitted should only to the extent of "understanding the child as he is without imposing upon him an ideal of what he thinks he should be". He emphasised that the education should create an environment where children can grow up without the hindrances, influences of beliefs and rituals, and hopes and fears. He concluded that the children should be matured to think about to enquire into the nature of reality and the education should lead the child to deep insight and understanding the nature of reality.

He appreciated the efforts made by the State through judicial intervention for safeguarding the interest of children, their parents and through them the nation as a whole.

He has explained the development of human rights and the role of judiciary in evolving human rights jurisprudence. He has also discussed the human values attached to secularism, religion and the human rights effecting the religious tenets and cultural rights. In the last judgement he has discussed thread bare the applicability of human rights on minority and majority communities and the measures to maintain the balance between their rights. He suggested that it is possible only by infusing human values in the people belonging to minority and majority communities. At the end he has appended four appendices relating to human rights vizThe Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and The Protection of Human Rights Act, 1993. In the end has given the status of ratification of Human Rights Instruments by India.

I have gone through this book in detail. I have also gone through its first edition. This edition is somewhat improvement over the first edition. This book has a critical approach and analyzed all the facets of human rights including its origin and development. He has tried to explain the jurisprudential perspective of human rights in Indian context. He has used practical aspects for this purpose. This book is very useful for those who work for analyzing the effectiveness of human rights in Indian context. In this edition he has also incorporated plethora cases and research articles on the subject to make the reader more aware about the human rights. The author has shared his own experience and tried to explain the ground realities which are needed for protection and redressal of human rights violation.

In my view this book is a must read not only for academician but for judges, lawyers, researchers, students pursuing specialization in human rights. It will also be useful for the general public who have a desire to understand the meaning, scope and jurisprudential perspective of human rights.

Book Review

Debarati Halder & K. Jaishankar, Cyber Crime and the Victimization of Women: Laws, Rights and Regulations (Information Science Reference 2012). Pp. 280.

Ms. Sakshee Sharma*

Cyber crime and victimization of Women: Laws, Rights, and Regulations, is one of the few contributions to the literature which is inclusive of the Indian perspective on cyber-victimization of women. The book exhaustively addresses a myriad of facets of gendered cyber-victimization by examining various cases of such victimization and reviewing the (lacunas of) legal provisions available at hand. With the aim of illuminating and identifying various (mostly) gender specific cyber crimes, the lead author of the book (who works as a counsellor for cyber crime victims) draws inspiration from her own personal experiences and the stories retold by the victims who approach her organisation seeking help.

The book, in the introductory chapter deals with the three foremost questions as to: What is it? How does it happen and why is it growing? The author claims that most of the factors that lead to such cyber victimization remain same as that of pre-internet era i.e., damaging the reputation of the woman victim and creating fear factor in the victim's mind. According to Citron, these attacks mostly originate as a retort to broken relationships, professional rivalry, male dominance and misogyny; or in certain cases due to sudden exposure to digital technologies and the mischievous intentions to experiment with online adult entertainment in a digital way.The chapter explores the historical aspects of cyber-victimization of women and claims that for long, the war against cyber crime has refused to recognize women as one of the most vulnerable prey of cyber crimes. As the subject is a multidisciplinary the book is intended for students and researchers of cyber crime and laws, cyber criminology, cyber psychology, victimology and information technology, practicing lawyers, the police, online private police agencies etc.

The book through its initial chapters investigates into the evolution of legal provisions against cyber crimes and establishes, that most of the conventions steered away their attention from cyber-crimes against women due to the absence of proper definitions as well as proper legal attention. The authors of the book made an enthusiastic effort to resolve this lacuna: Firstly,by endeavouring to propose an operational definition (which is inclusive of certain offensive acts which are currently not recognised under the legal regimen as criminal) of cyber-crime against women. Secondly, by categorizing and expounding such cyber-crimes against women into three types i.e., Non Sexual Crimes (Hate crimes, Emotional injuries, Hacking related crimes), Sexual Crimes (Obscenity, Forced Pornography, Cyber Sexual Defamation, Hacking related crimes, Hacking and Morphing) and Cyber Assisted offline crimes (Abetment to suicide, Cyber assisted offline invasion of privacy, Cyber assisted offline Physical harm, Cyber assisted rape, Cyber assisted murder). This categorization not only provides us with the specific nature of the mentioned crimes but also equips us to deal with these crimes in a manner which is exclusive and most potent to them.

The book further delves into important issues surrounding women cyber-victimization like, etiology, motives, and characteristics of the perpetrator and the victims, as once these features are explored exhaustively, it becomes convenient to seek effective solutions of the problem at hand. In the current times, it is imperative that the world today not just recognizes the issue of cyber victimization of women as an upcoming plague (if not prevented at this stage), but also to consider it as a massive violation of women's right to a free and safe cyberspace. For any person truly invested in the said cause can observe that the absence of a codified charter of rights and duties for the cyberspace creates a vacuum which is exploited by the cyber criminals for their ulterior motives. The worldwide movement for providing women, with equal rights and opportunities as men, will always fall short unless issues like cyber security and cyber rights of women are not taken up as crucial and urgent matters.

In the second half of the book, the authors have made a praiseworthy effort to provide us with a country wise analysis of the current legal provisions dealing with cyber crimesagainst women. While in the United States, various states like Michigan,

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California, Alabama, Alaska and the likes have taken measures to amend their penal codes related to harassment, in order to formally recognize cyber stalking, none of the Acts specifically mention the term "cyber-stalking". While it is a laudable start towards more defined and stricter legal provisions to curb the menace of cyber stalking, the authors don't shy away from criticising the fact that cyber stalking still remains defined with a practical meaning. Under the federal laws " Violence Against Women and Department of Justice Reauthorization Act, 2005" is the first law to penalize cyber-stalking and considered women as the vulnerable victims. However, unlike cyber harassment and stalking, other cyber offences like cyber-bullying hate speech and defamatory cyber speech against women tend to get some protection due to the elasticity of the First Amendment guarantees of free speech.Unlike the U.S., while Canadian legislation attempts to stretch the existing laws on harassment to cyber-stalking and cyber harassment, it still falls short of dealing with certain cyber offences like 'cyber-impersonation of individuals' in cases of non-economic issues.

In India, cyber crime against women is a relatively new concept and thus, despite efforts in the form of the Indian Information and Technology Act 2000 and its various amendments in 2008, the legal provisions still fall short of effectively tackling with the menace of women cyber victimization. Since cyber-stalking has no direct legal definition in Indian Laws, awareness among victims that they are being stalked remains relatively less which in turn results in lower rates of reporting of such incidents. The book extensively evaluates the IT Act and the various provisions related to various cyber offences to help understand the shortcomings of the act. The authors in the book, projects that the lack of awareness and willingness to report such crimes as a greater problem rather than lack of legal provisions in the Indian scenario.

In the last chapter the authors provide with a model charter which includes practical definitions of various terms and offences talked about previously in the book, the proposal for cyber rights for women and the proposal for the code of conduct in the cyber space. This model charter is expected to provide a fine blueprint for the legislatures to be taken into consideration while working on forming iron clad provisions on cyber offences against women.

The book though provides a remarkable insight into the issue of women cyber victimization there remain certain areas that were either not discussed or briefly brushed through in the book. Firstly, whilethe book remarkably describes the basics of the cyber victimization of women and why it is required for the world to look at it as a serious issue, it does not make any connection of such victimization of women to the various available theories of victimology which would help us better understand the victim's perspective. I believe it is important to first analyse the issue from a victimology perspective to better understand the various vulnerability factors of the victims. Secondly, the authors of the book seem to have over reliance, on criminal law as the hoped for legal response to such victimization. This is indicative of the author's assumption of dealing in a well functioning criminal justice system. The realities of the criminal justice system, however, have to be taken into account while stipulating for greater criminalisation of such cyber behaviours. Under such circumstances, one must resort to and root for civil remedies which are easier to procure and swift in providing relief.

Case Comment

Anuradha Bhasin and others v. Union of India, 2019 SCC Online SC 1725

Ms. Garima Trivedi*
Mr. Harsh Kumar**

As network disruptions became an increasingly common phenomenon around the globe, India rose to infamy as the internet shutdown capital of the world. This violated Article 19 of the Universal Declaration of Human Rights (UDHR), which states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." After the contentious abrogation of Article 370, Kashmir continued to struggle its way out of the Stone Age and was deprived of complete access to the Internet. However, this case recognized, the pivotal role of the Internet, have become a beacon of hope for the proponents of human rights and constitutional freedoms.

Facts:

Anuradha Basin, the executive editor of Kashmir Times had moved a petition. The petition was challenged for the curbing of media freedom in the state. The petition claimed that the media in the erstwhile state cannot practice their profession owing to the internet as well as telecommunications shutdown in the state. A similar petition was moved by Gulam Nabi Azad seeking issuance of an appropriate writ to set aside, quash any orders, notifications, directions or circulars issued by Government of India under which all/any modes of communication have been shut down. On August 4, 2019 internet services, mobile connectivity and landline were shut down in Jammu and Kashmir until further orders. On August 5, 2019, the Constitutional Order No. 272 was passed by the President of India applying all provisions of the Constitution of India to Jammu and Kashmir and stripped it from special status enjoyed since 1954.On the same day, due to prevailing circumstances, the District Magistrate passed the order restricting the movement and public gathering, apprehending breach of peace and tranquility under Section 144 of The Code of Criminal Procedure, 1973 (CrPC). Due to this, journalist movements were restricted, and this was challenged under Article 19 of the Constitution which guarantees freedom of speech and expression and freedom to carry any trade or occupation.On the same day, due to prevailing circumstances, the District Magistrate passed the order restricting the movement and public gathering, apprehending breach of peace and tranquility under Section 144 of CrPC. Due to this, journalist movements were restricted, and this was challenged under Article 19 of the Constitution which guarantees freedom of speech and expression and freedom to carry any trade or occupation.

Issues & holdings of court:

- Whether the Government can claim exemption from producing all the orders passed under Section 144, CrPC and other orders under the Suspension Rules?
- Whether the freedom of speech and expression and freedom to practice any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights under Part III of the Constitution?
- Whether the Government's action of prohibiting internet access is valid?
- Whether the imposition of restrictions under Section 144, CrPC were valid?
- Whether the Freedom of the Press of petitioner(Anuradha Bhasin) violated due the restrictions imposed on the State?

1. **Balance between Fundamental Rights & Internet access:**

   The Court did not gave its opinion on proclaiming the option to get to the "internet as a fundamental right as this was not peddled by the advice for the applicants. Nonetheless, the Court held that "the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under Art.19(1)(g), using the medium of internet is constitutionally ensured".

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2. **Requirement of publication:**

The Supreme Court observed that as imposition of S.144 of Cr.P.C is required to be notified , similarly the order passed under the Telecom Suspension Rules must also required to be notified. "This will ensure the guarantee that the interruption requests can be tested under constitutional law Article 226 under the watchful eye of the High Courts. Numerous requests under the RTI Act documented by SFLC were dismissed by experts in different states, involving the province of Jammu and Kashmir, referring to public reassurance as an explanation".

3. **Orders to be passed stating reasons:**

"The Court held that Rule 2(2) of the Telecom Suspension Rules, 2017 "requires each order passed by the competent authority to be an order with reasoning".

4. **Suspension taking into consideration proportionality of various factors:**

The Court held "that any suspension of basic rights ought to be corresponding and that the most un-prohibitive measures ought to be turn by the State. The Court opined that we cannot allow the state to issue an order for total internet blockage as such order will amount to completely obstructing/forbidding interminably. The Court additionally held that total suspension of telecom services, be it the Internet or something else, being an uncommon measure, must be considered by the State only when it is 'unavoidable' and as fa as possible the State should try to provide a substitute which is less obtrusive.

5. **Temporal nature of suspension order:**

"The Court held that suspending internet services is certainly impermissible. Court directed that the review committee should meet within 7 days of the post review and investigate consistency with prerequisites of Section 5(2) of the Telegraph Act just as the proportionality of orders".

6. **Requirement of stating the facts while passing order under section 144:**

The Court observed that powers conferred under section 144 of CrPC is preventive measure and can be practiced when there is both a current threat just as misgiving of risk. The risk ought to be in the idea of backup. Further, Section 144 can't be utilized to smother articulation of assessment.

Analysis:

In the light of the above observations to sum up, the Court held that the government can't guarantee a special case from creating any request under the watchful eye of the Court an order can be passed under Cr.P.C. referring Section 144 and if the legislature can guarantee exception involves actuality which is to be chosen by the Court for each situation as indicated by current realities and conditions. Additionally, the Court observed that these days the Internet has become a basic part of regular daily existence and "subsequently freedom of speech and expression, freedom to practice any profession, or to carry on any occupation, trade or business, over the Internet is an aspect of the fundamental rights under Part III of the Constitution".

The court also observed that restricting web access is substantial however prerequisite of "unavoidable conditions" must be fulfilled before passing the order in any case. Section 144 of CrPC comes up with the burden of limitations as anxiety of risk, yet it can't stifle genuine assessment of public and tedious requests of limitations prompts damaging of intensity. Yet, it is the responsibility of the government to deal with freedom of press in proper manner.

Taking into consideration the expanding number of internet closures in the ongoing occasions, the judgment genuinely set some hard boundaries on internet closures with an extraordinary accentuation being laid on the standards of proportionality, need and sensibility. Notwithstanding that Court pushed upon the citizens option to think about the activities of the legislature and finding some kind of harmony between the freedoms of citizens and public security. Through this judgment the Court laid down the guideline of proportionality and sensibility and discussed it in detail however the Court ignored the fact that sweeping prohibition on internet providers has been disastrous to the economy of the State, pounding development in the locale and prompting a mass migration of youngsters looking for new openings. Because closing the internet is the most effortless thing to be done by the government. The government should not fall back on utilization of such methods subjectively but instead should manage it through fair methods which don't hinder this essential privilege of the citizens. It would have been better if the Court would have considered two significant angles which were not canvassed for this situation, firstly, to declare web as a crucial right and secondly, legality of the suspension rule.

The court did not remove the restrictions on internet and movement of the citizens, however, the judgement widened the interpretation of freedom of speech and expression by including the right to access the internet which was an essential part of the Article 19 which could only be restricted in the case of national security.

The judgement did not provide immediate relief to the citizens affected due to these orders but laid down principles for future suspension orders and their procedure to prevent the state from abuse of power.

The Internet has become a necessary tool for spreading important news/messages or for a two-way conversation. It has become an integral part of the life of people in the present situation because of coronavirus lockdown, wherein the students all over the world can have access to education even after staying at home, people around the world can work and make money for their living, thus internet has now become an integral part of Right to Freedom of Speech and Expression enshrined under Part III of the Constitution of India.

Case Comment

Internet and Mobile Association of India v. Reserve Bank of India, MANU/SC/0264/2020

Ms. Maryanka*

INTRODUCTION

The domain of Virtual Currencies and cryptocurrencies is a very nascent addition to the digital cyber space as well as global financial system yet to be addressed and administered into the legal regime of many nations. The Bitcoin and crypto currencies attract multidimensional legal aspects for consideration. The currencies used for trading are mostly fiat currencies,[1] regulated and issued by a central regulatory body, the reason for which they are classified as centralized. These currencies usually are dependent upon an attached congruent value of gold and hence pose certain problems in concluding transactions. Therefore, the modern states have come to a position to choose, issue or trade in a form of currency independent of any connection for its value derivation.

The use of cryptocurrency has gained momentum and acquired its place in several controversial discussions by virtue of the mystery its legality entails. Bitcoins are a form of digital currency and are not considered to be legal tender. However, these are capable of functioning as a medium of exchange akin to money. The lack of a traditional government or bank-backed system to regulate its use makes cryptocurrencies the target of several concerns such as it being a conduit for black money or anonymously funding terrorism.

Facts of the case:

Since 2013, various warnings were issued by the RBI through its press releases regarding the potential risks of use of cryptocurrencies to the financial system of the country. The Inter-ministerial Committee on February 28, 2019 had also released a report recommending certain measures in relation to cryptocurrencies, which included a complete ban on private cryptocurrencies. This committee had also prepared a draft bill known as Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill, 2018 (the fate of which is currently unknown). However, the use of cryptocurrency per se, was never banned.

The statement dated April 5th, 2018 issued by Reserve Bank titled "*Statement on Developmental and Regulatory Policies*" wherein the central bank directed all the entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling cryptocurrencies and to exit the relationship, if they already have one, with such individuals/ business entities, dealing with or settling cryptocurrencies. The IAMAI on the behalf of Indian crypto startups filed a writ petition (Civil) in Supreme Court against the RBI on May 16, 2018. However, IAMAI wasn't the first one to knock the doors of the court on this matter. Once the matter arrived in the Supreme Court, in August 2018, it clubbed all the crypto cases pending across various Courts in India.

In its decision in *Internet and Mobile Association of India v. Reserve Bank of India*, the Supreme Court deliberated on cryptocurrency and struck down the circular. In this judgement, the crucial role played by RBI in managing currency, supply and interest rates were highlighted. The colourability of such currencies and its potential of being accepted as a valid mode of payment for purchase of goods and services was lamented upon by the court. The circular was also challenged on the grounds that denial of access to those who trade in cryptocurrency would tantamount to a denial of their constitutional right to carry on any trade or profession and thus would be violative of Article 19(1)(g). The Supreme Court upheld this contention by stating that "*There can also be no quarrel with the proposition that banking channels provide the lifeline of any business, trade or profession.*[2]" However, the Supreme Court drew a clear distinction between the three categories of persons those who trade in cryptocurrency as a hobby as opposed to those who engage in trading in cryptocurrency as their business/occupation. The Supreme Court held that the first category who buy and sell cryptocurrency as a mere hobby cannot base their claim on Article 19(1)(g) as it only covers trade, occupation, profession or business. The Supreme Court further held that the second category of citizens those who trade in cryptocurrency cannot also claim that the circular had the

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1 Fiat Currencies, usually issued by an authorised body, mostly the government and derived through a valuation equivalent of gold reserve that could be issued by the government in return of the currency value equivalent, if needed.

2 Rai Divya, Analysis of the Cryptocurrency judgment and way forward, April 13th, 2020, available at https://blog.ipleaders.in/analysis-cryptocurrency-judgment-way-forward/

effect of completely shutting down their businesses, as they could still continue trading in "crypto-to-crypto" pairs or use the currencies stored in their wallets to make payments for purchase of goods and services to those who are prepared to accept them, within India or abroad. Therefore, it is only the third category i.e., cryptocurrency exchanges that suffered due to the circular, as they had no other means of survival if they were disconnected from banking channels.

Though the RBI was held to be within its rights to issue the circular, the factor that led to the striking down of the circular was the lack of proof of the "proportional damage" suffered by RBI regulated entities in dealing with businesses operating in cryptocurrencies. The Supreme Court observed that the circular disconnected the banking sector from cryptocurrency exchanges despite the RBI not having found anything wrong with the functioning of these exchanges. It was also noted that before issuing the circular, the RBI did not explore the availability of alternative and less intrusive measures such as regulating cryptocurrency trading and cryptocurrency exchanges.

The Supreme Court held that the RBI was within its rights to issue the circular in fulfillment of its objective under law to safeguard the "*public interest, interests of depositors and interests of the banking policy*"[3]. The Supreme Court stated that "*Therefore, anything that may pose a threat to or have an impact on the financial system of the country, can be regulated or prohibited by RBI, despite the said activity not forming part of the credit system or payment system*."[4] As the circular was found to be issued in the interest of banking policy, the depositors and of the public at large, the Supreme Court rejected the contention that there had been excessive use of power by RBI. This judgment was a blessing for the crypto industry. The three-Judge bench comprising of Rohinton Fali Nariman Aniruddha Bose and V. Ramasubramanian brought some much-needed respite for India's cryptocurrency players. Having given the reference of over 50 cases from across the world in its judgement, the 180-page-long judgement has not only brought a clear understanding of cryptocurrencies, their legal standing in India, but the judgement is also bound to set a precedent across many other countries in the world — developing countries, in particular.

Test of Proportionality and 'Reasonableness'

Having held that the RBI was a specialized statutory body, which had been acting consistently and in good faith, the Supreme Court proceeded to examine whether the ban on virtual currency trading amounted to a 'reasonable restriction' to a fundamental right guaranteed under Article 19 (1) (g). To assess such reasonableness, the test of proportionality was deployed.Proportionality, as a standard of judicial review, has been recognized as far back as 1952 in State of Madras vs. VG Row,[5] where it was held that

"The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

In this case, the Supreme Court relied upon State of Maharashtra v. Indian Hotel and Restaurants Association[6] to hold that there must be at least some empirical data to evince harm suffered by the traditional economy on account of cryptocurrency. Applying this test, the Supreme Court held that a total ban on trading in virtual currencies was disproportionate and excessive. The RBI had failed to produce sufficient empirical data to establish the adverse impact of virtual currencies on the economy.[7] The Court reasoned that since virtual currencies themselves were legal, it would be punitive to place a ban on those who merely facilitate its trading. It also adverted to the EU Parliament July 2018 Report, (which recommended that a total ban on the linkage between cryptocurrency and the formal financial sector was not necessary), to hold that the RBI had failed to consider alternatives before placing a total ban.

The Supreme Court's decision has only provided a temporary respite to the nascent cryptocurrency industry in India. It has not deliberated on the issue of its legality as it was never in question. It was clear in the judgement that since the legislature had not yet passed the draft bill and no actual damage had been suffered by the financial entities regulated by RBI, thus, the ban was unreasonable. However, there is no denying the fact that the risks identified by RBI of anonymity, money laundering, the complexity of the KYC process, and the need for protection of users and investors persist.

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[3] The Crypocurrency A Contarian View, Malvika Kalra, May 22nd, 2020, available at https://www.barandbench.com/columns/the-bitcoin-judgment-a-contrarian-view

[4] 4See, The Payment & Settlement System Act, 2007. It assigns RBI as the authority that regulates and supervises payment systems in India.

[5] AIR 1951 Mad 147, (1951) IMLJ 628

[6] (2019) 3 SCC 429

[7] Aditi Shrivastava, "Cryptocurrency exchange Binance sets up $50 million Indian blockchain fund", ET Rise, March 17, 2020, available at https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/cryptocurrency-exchange-binance-sets-up-50-million-indian-blockchain-fund/articleshow/74665232.cms

Case Comment

Amish Devgan v. Union of India and others, 2020 SCC Online SC 994

Prof. (Dr.) R. N. Sharma*

Facts of the Case

The petitioner, Amish Devgan, is a journalist who, is presently the managing director of several news channels owned and operated by TV18 Broadcast Limited, including News18 Uttar Pradesh/Uttarakhand, News18 Madhya Pradesh/Chhattisgarh and News18 Rajasthan.

The petitioner hosts and anchors debate shows 'Aar Paar' on News18 India and 'Takkar' on CNBC Awaaz. On 15th June, 2020,at around 7:30 p.m., the petitioner had hosted and anchored adebate on the enactment (The Places of Worship (Special Provisions) Act, 1991) which, while excluding Ayodhya, prohibits conversion and provides for maintenance of the religious character of places of worship as it existed on 15th August, 1947.

After the telecast of the episode as many as seven First Information Reports(FIRs) concerning the episode were filed and registered against petitioner. The gist of the FIRs is almost identical. The petitioner, while hosting the debate, had described *Pir Hazrat Moinuddin Chishti*, as "*aakrantak Chishti aya... aakrantak Chishti aya... lootera Chishti aya... uskebaaddharambadle*". Translated in English the words spokenwould read – "*Terrorist Chishti came. Terrorist Chishti came. Robber Chishti came - thereafter the religion changed*," imputing that 'the *Pir Hazrat Moinuddin Chishti*, a terrorist and robber, had by fear and intimidation coerced Hindus to embrace Islam.' It is alleged that the petitioner had deliberately and intentionally insulted a Piror a pious saint belonging to the Muslim community, revered even by Hindus, and thereby hurt and incited religious hatred towards Muslims.

The prayers made in the writ petition to the Court are:

(a) for issue of writ of certiorari, quashing the FIRs referred to above or any other FIR which may be filed there after relating to the telecast in question dated 15th June,2020;

(b) in the alternative, transfer and club the FIRs mentioned above or elsewhere in the country with the first FIR, i.e. FIR No. P.S. Durgah, Ajmer, Rajasthan;

(c) issue a writ of mandamus to the effect that no coercive process shall be taken against the petitioner in the FIRs so lodged or subsequent FIRs on the subject broadcast; and

(d) direct the Union of India to provide adequate safety and security to the petitioner, his family members and his colleagues at various places in the country."

The points raised by the respondents are asunder:

- The petition ought to be dismissed as Article 32 has been invoked in a cavalier manner. Remedy under section 482 of the Code of Criminal Procedure, 1973 was available to the petitioner.
- The offending words were uttered thrice by the petitioner, which shows his ill intention and was to create disharmony between the two faiths/groups and to incited is order.
- The debate was a staged program, where no experts or historians were on the panel; the program was staged to malign the Muslims and to promote hatred.
- The themes of the programs hosted by the Petitioner are communal.
- The conduct of the petitioner was against norms of journalistic standards.

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- Petitioner uploaded an edited version of the video on Youtube, where he had removed the part containing the offensive speech. This was done after FIR was lodged as an attempt to tamper/destroy the evidence.

First Prayer – Whether the FIRs should be quashed?

The Court refused to accept the contention of the petitioner that criminal proceeding sarising from the impugned FIRs ought to be quashed as theseFIRs were registered in places where no 'cause of action' arose, as section 179 of the Criminal Procedure Code provides that an offence is triable only at the place where an act is done or its consequence ensues.

This is an exceptional circumstance where dominant group gives hate speech against a vulnerable and discriminated group, and also the impact of hate speech depends on the person who has uttered the words. Impact of their speech would be mere indifference, meet correction/criticism by peers, or sometimes negligible to warrant attention and hold that they were likely to incite or had attempted to promote hatred, enmity etc. between different religious, racial, language or regional groups.

Further, when the offending act creates public disorder and violence, whether alone or with others, then the aspect of 'who' and question of indulgence would lose significance and may be of little consequence.

Court emphasised that 'Hate speech' has no redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention.

The Court observed that the present case does not relate to 'hate speech' being causally connected with the harm of endangering security of the State, In this context, it is necessary to draw a distinction between 'free speech' which includes the right to comment, favour or criticise government policies; and 'hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference etc. Freedom to express and speak is the most important condition for political democracy. Law and policies are not democratic unless they have been made and subjected to democratic process including questioning and criticism. Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable.

Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of the accusation would not be sufficient to constitute criminal offence of 'hate speech'.

Without exciting those feelings which generate inclination to causepublic disorder by acts of violence, political views and criticism cannot be made subject matter of penal action. In consonance with the constitutional mandate of reasonable restriction and doctrine of proportionality in facts of each case it has to be ascertained whether the act meets the top of Clapham omnibus test and whether the act was 'likely' to lead to disturbance of the current life of the community so as to amount to disturbance of public order; or it may affect an individual or some individuals leaving the tranquility of the society undisturbed. The latter and acts excluded on application of the top of Claphamomni bus test are not covered. Therefore, anti-democratic speech ingeneral and political extremist speech in particular, which has no useful purpose, if and only when in the nature of incitement to violence that 'creates', or is 'likely to create' or 'promotes' or is 'likely to promote' public disorder, would not be protected.

On the aspect of truth or true facts, it cannot be given the widest meaning so as to fall foul of the requirement of reasonableness which is a constitutional mandate. Clause (b) of Section 153A, therefore, has to be read accordingly to satisfy the constitutional mandate. We would interpret the words 'public tranquility' in clause (b) would mean ordre publiquea French term that means absence of insurrection, riot, turbulence or crimes of violence and would also include all acts which will endanger the security of the State, but not acts which disturb only serenity, and are covered by the third and widest circle of law and order.

In the context of 'hate speech', including the offences related to promoting disharmony or feelings of enmity, hatred or ill-will, and insulting the religion or the religious beliefs, it would certainly require the actual utterance of words or something more than thought which would constitute the content. Without actual utterance etc. it would be mere thought, and thoughts

without over tact is not punishable.

Further, a 'hate speech' meeting the criteria of 'clear and present danger' or 'imminent lawless action 'would necessarily have long-term negative effect.

Lastly, we are dealing with penal or criminal action and, therefore, have to balance the right to express and speak with retaliatory criminal proceedings. We have to also prevent abuse and check misuse. We must act with the objective for promoting social harmony and tolerance by proscribing hateful and in appropriate behaviour. This can be achieved by self-restraint, institutional check and correction, as well as self-regulation or through the mechanism of statutory regulations, if applicable. It is not penal threat alone which can help us achieve and ensure equality between groups. Dignity of citizens of all castes, creed, religion and region is best protected by the fellow citizens belonging to non-targeted groups and even targeted groups. In a polity committed to pluralism, hate speech cannot conceivably contribute in any legitimate way to democracy and, in fact, repudiates the right to equality.

The Second Prayer- Validity of First Information Reports (FIRs)

The questions as to whether the report is true; whether it discloses full details regarding the manner of occurrence; whether the accused is named; or whether there is sufficient evidence to support the allegation are all matters which are alien to consideration of the question whether the report discloses commission of a cognisable offence. At the initial stage of the registration, the law mandates that the officer can start investigation when he has reason to suspect commission of offence. Ordinarily we would have relegated the petitioner and asked him to approach the concerned High Court for appropriate relief, albeit in the present case detailed arguments have been addressed by both sides on maintainability and merits of the FIRs in question.

Having given our careful and in-depth consideration, we do not think it would be appropriate at this stage to quash the FIRs and thus stall the investigation into all the relevant aspects.

D. The second prayer – multiplicity of FIRs and whether they should be transferred and clubbed with the first FIR registered at P.S. Dargha, Ajmer, Rajasthan

We would now examine the second prayer of the petitioner viz. multiplicity of FIRs being registered in the States of Rajasthan, Maharashtra, Telangana, and Madhya Pradesh (now transferred to Uttar Pradesh) relating to the same broadcast.

By applying the principle underlying sections 179 and 186 of Cr P C we accept the prayer made in the writ petition and transfer all FIRs listed at serial No. 2 to7 in paragraph 4 (supra) to police station Dargah, Ajmer, Rajasthan, where the first FIR was registered.

The third prayer

Regarding the third prayer made by the petitioner, following the ratio laid down in Arnab Ranjan Goswamiwe direct the State of Uttar Pradesh to examine the threat perception for the petitioner and his family members and take appropriate steps as may be necessary. Similar assessment be made by the State of Rajasthan and based on the inputs given by its agencies steps as may be necessary be taken on usual terms.

The distinction drawn by the Court between "hate speech" and "free speech" is the core point in the matter. This will be helpful to the people to raise their voice against the faulty policies of the government. The democratic right of criticism of the government has been accorded prime place subject to the condition that it should not be inflammatory and endangering the national security, in nature. In my opinion, it would have been better if the court would have laid down guidelines for the purpose.

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