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ILI Newsletter

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Editorial

Acts of terrorism violate the human rights of victims. The effects of terrorism are wide-ranging, and there is no human right that is exempt from the impact of terrorism. Terrorism in contemporary times is a matter of great concern for all nations because it targets the civilians and government institutions to create fear or terror in the minds of the people. In the wake of series of serious incidents of terrorism, the United Nations has also been addressing the grave threat of terrorism. The terrorist attack on twin towers of World Trade Centre on September 11, 2001 in New York City of the United States (US) had shifted the focus on counter terrorist strategy. The military action launched by the US in Afghanistan in October 2001 to detain the members of Al Qaeda and Taliban had opened a new chapter to deal with counter terrorist strategy. The Afghan intervention raised interesting questions regarding state complicity in trans-boundary harm cause by non state entities operating within the state's territory, and use of force in response to such harm. The Security Council of the United Nations adopted the Resolution 1368 on September 12, 2001 which recognises terrorist attacks as "threat to international peace and security" and that the state has inherent right of individual or collective self- defence in accordance with the UN Charter. Another Security Council Resolution 1373 suggested steps to "combat terrorism" and established the Counter- Terrorism Committee (CTC). CTC consists of 15 Security Council members and was tasked to monitor the implementation of Security Council Resolution 1373. It urged countries to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home, in their regions and around the world. The unwilling or unable rationale seems to be the new development put forward by the Americans that if a state is either unwilling or unable to prevent its territory from being used as a base for terrorist organisations, another state may be authorised military action to prevent such an act of terrorism. The primary objective of counter terrorist strategy is prevention of further attacks through the disruption and dismantling of terrorist networks. We need today a combined and concerted effort by the international community to tackle the problem of terrorism which poses danger to the peace and security of all states.

Manoj Kumar Sinha

Inside

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The Editor, ILI Newsletter, The Indian Law Institute, Bhagwan Dass Road, New Delhi- 110001,
Ph: 23073295, 23387526, 23386321, E-mail : ili@ili.ac.in, Websit : www.ili.ac.in

ACTIVITIES AT THE INSTITUTE

Workshops

Workshop on Death and Sex in Criminal law

The Indian Law Institute organised a workshop on "Death and Sex in Criminal Law" at the Institute from September 26 to October 1, 2016. Criminal Law seeks to regulate and discipline the most uncanny aspects of human discipline. Death and sex govern the criminal law thought more than any other theme. Conceptualised within this backdrop the workshop focused to explore the various dimensions of these two categories of criminal law. The Inaugural Address was delivered by Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India. Eminent speakers like Prof. Shiv Visvanathan, Professor, Jindal School of Government and Public Policy, O.P Jindal University Haryana and Professor Anup Dhar, Associate Professor, Ambedkar University, New Delhi addressed the participants on different themes like trafficking, homosexuality and transgender laws, sexual violence, legal conundrums and death penalty in India.

The workshop helped the participants to approach law from the point of view of sociology, philosophy, history and psychoanalysis including contemporary debates on euthanasia, suicide, *santhara* within the parameters of law.

All the participants were required to make presentations on the final day of the workshop followed by a film screening and discussion.

Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India lighting the lamp at the inaugral programme of the workshop

Participation certificates to the candidates were awarded on the successful completion of the workshop.

Dr. Jyoti D. Sood and Latika Vashist were the course coordinators and moderators for this event.

Workshop on Financial Literacy Awareness

The Indian Law Institute in collaboration with Securities and Exchange Board of India(SEBI) organised a workshop on 'Financial Literacy Awareness' on August 26, 2016 at 4.00 p.m. in ILI. The intended purpose of holding the workshop was to spread awareness about protection of the interests of investors as well as common man so that they can take their financial decisions in a more prudent and meaningful manner and also to make them aware about the intricacies of the market and the risks involved in different financial products.

National Conquests 2016

Indian Law Institute in partnership with Centre for Laws and Policy Research organised, India's first national level quiz on the "Indian Constitution, History and Politics", the ConQuest 2016 on August 20, 2016 at Indian Society of International Law (ISIL).

Nepal Delegation

The Indian Law Institute organised a programme, for the Members and Officials of Legislative Committee, Legislature, Parliament of Nepal August 21- 31, 2016. The programme was inaugurated by Hon'ble Dr. Justice Arijit Pasayat, Former Judge, Supreme Court of India.Mr. Govind Goel, Advocate, Supreme Court was also present on the occasion.

The programme comprised of talks by senior advocates and Constitutional law experts, as well as interaction with Hon'ble judges of the Supreme Court to provide an overview of the Indian judicial system

and the process of removal of judges in India in the light of the ongoing constitutional drafting process in Nepal.

It was a 10 days full time programme for the delegates including lectures by renowned speakers Hon'ble Mr. Justice P.S. Narayana, Former Judge, High Court of Andhra Pradesh, Professor S.C. Raina, Dean, Faculty of Law, University of Delhi, Professor (Dr.) B.T. Kaul Professor, Faculty of Law, Delhi University and Chairperson, Delhi Judicial Academy, Delhi, Dr. Anurag Deep Associate Professor, ILI addressed the delegates on different areas of criminal law, sentencing and punishment in India and the interface between Constitution of India and criminal law. The members also visited National Law School, Bangalore, High Court of Karnataka and the Karnataka Legislative Assembly. The delegates had fruitful interactions with the Governor of Goa; officials of the Ministry of External Affairs and the Supreme Court of India.

Library Committee

The meeting of the Library Committee was held at the Institute on July 2, 2016 and August 6, 2016 under the Chairmanship of Hon'ble Dr. Justice Kurian Joseph, Judge, Supreme Court of India. The other distinguished members included Hon'ble Mr. Justice Badar Durrez Ahmed, Judge, High Court of Delhi, Hon'ble Dr. Justice Vineet Kothari, Judge, Rajasthan High Court, Hon'ble Mr. Justice B. Rajendran, Judge, Madras High Court, Mr. Chava Badri Nath Babu, Advocate, Prof (Dr.) Ashwini Kumar Bansal, Dean and Professor, Faculty of Law, University of Delhi, Prof. (Dr.) Manoj Kumar Sinha, Director, ILI and Mr. Shreenibas Chandra Prusty, Registrar, ILI.

The committee approved the procurement of new books in the library with the view to encourage book borrowing facilities to Ph.D. students and enhance quality research in critical and contemporary issues. It was also decided by the committee that the weeded out books and journals from the library may be offered on first come first basis to the ILI State Units, Government Colleges, State Universities and Law Departments and ILI students.

Membership Committee

The meeting of the Membership Committee was held at the Institute on August 11, 2015 under the Chairmanship of Hon'ble Mr. Justice J. Chelameshwar, Judge, Supreme Court of India, Hon'ble Dr. Justice B.S Chauhan, Chaiman Law Commission of India, Prof. (Dr.) Ranbir Singh Vice Chancellor, National Law University Delhi, Prof. (Dr.) Manoj Kumar Sinha, Director, ILI and Mr. Shreenibas Chandra Prusty, Registrar, ILI.

The committee approved the admission of 28 new members of ILI which included 13 ordinary members, 14 life members and 1 corporate member. The Committee admitted National Law University, Delhi as a corporate member of the Indian Law Institute.

SPECIAL LECTURES

Hillel I. Parness founder of Parness Law Firm (PLCC)**,** Commercial Litigator and Trial Attorney, US also serving as an adjunct faculty of the Columbia Law School teaching Internet and Intellectual Property Law since 2002 visited the institute on July 25, 2016. He delivered a special lecture to LL.M students on the topic "Copyright Enforcement in the Digital Environment".

Taslima Yasmin, Assistant Professor, Department of Law, University of Dhaka, Bangladesh delivered a special lecture to LL.M students on the topic "Judicial Trends in Child Custody Cases in Bangladesh: Traditional Sharia Law Principles versus Welfare Consideration" on July 26, 2016.

Professor J. Danixia, Cuevas, Professor, Miami Dade College, a Fullbright Scholar and teaches in an

American Bar Association Paralegal Studies Department within the Miami Dade College Law Center visited the institute on August 4, 2016. She delivered a special lecture to LL.M students on the topic "Ethics in Legal Profession".

R. R. Kishore, Advocate, Supreme Court and President, Indian Society of Health Laws paid a visit to the institute on August 8, 2016. He is also a Member, Editorial Board of the International Journal 'Medicine and Law' and Ethics. He delivered a special lecture to LL.M students on the topic "Health Law" .

Professor Christiana Ochoa, Professor of Law, Maurer School of Law, Indiana University, US delivered a special lecture to LL.M students on the topic " Business and Human Rights" on August 10, 2016.

Shubhankar Dham, Associate Professor, University of Hong Kong delivered special lectures to LL.M students on the topics "Comparative Public Law" and "Separation of Powers in India" on August 11 and 19 2016.

RESEARCH PROJECTS

Project from Ministry of Panchayati Raj, Government of India

The Ministry of Panchayati Raj (MoPR) has entrusted a project to the Indian Law Institute on "*A Study on Case laws Relating to Panchayati Raj in Supreme Court and Different High Courts*". The study includes a gist of various high court and Supreme Court cases on the Panchayati Raj System in India. Report on the "Compilation of Judicial Pronouncements on Panchayati Raj System in India" has been submitted and follow up action in many cases has been initiated by the institute.

Project from the National Investigation Agency

The National Investigation Agency (NIA), Ministry of Home Affairs, Government of India has entrusted a project to the Indian Law Institute to prepare a Compendium of Terrorism Related cases in order to draft a Model Investigation and Procedural Manual.

The project was divided into two phases. The first phase included analysis of all the State High Courts and Supreme Court decisions on terrorism. The second phase included the analysis of all the trial court decisions followed by scrutiny. A draft of the Compendium has been submitted to the NIA officials.

Project from Ministry of Law, Department of Justice

The Ministry of Law, Department of Justice has entrusted a project to the Indian Law Institute on "*Infrastructure Facilities for Subordinate Judiciaries*".

ACADEMIC ACTIVITIES

Admission for the Academic Session 2016-17

The admission process for LL.M. (One Year) and Post Graduate Diploma programmes started as per the schedule approved by the Academic Council i.e., on May 1, 2016. The Common Admission Test (CAT) for admission to the LL.M. Programme was conducted on June 11, 2016 at Indian Law Institute . The CAT result was notified on June 20, 2016. The details regarding the total number of admission made for academic year- 2016-17 is as under:

LL.M. (One Year):	26 Students
Post Graduate Diploma Courses:	252 Students
Total Number of students admitted:	278 Students

The classes for LL.M. (1 Yr.) commenced from 20 July, 2016 and the classes for Post Graduate Diploma Courses commenced from 1 August, 2016.

Admission to Ph. D. Programme – 2016

The viva/voce presentation of the candidates (22 from exempted and 9 from Non exempted category) for admission to the Ph.D. Programme- 2016 is scheduled to be conducted on November 17, 2016.

EXAMINATION

All India Test for Admission to Ph. D. Programme 2016-2017

All India Entrance Examination for admission to Ph. D. (2016-2017) session was conducted on August 22, 2016 at the Institute. A total of 56 candidates applied, 22 from exempted category and 34 from non exempted category. 31 candidates were shortlisted who will be invited to give presentation of their research plan before the Admissions Committee.

RESEARCH PUBLICATIONS

Released Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (2) (April–June 2016).
- *ILI Law Review* 2016 (Summer Issue). E-Journal is available at the ILI website

Forthcoming Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (3) (July – September 2016)
- Book on *" Environment :Sustainable Development and climate Change"*
- *ILI Law Review* 2016 (Winter Issue)
- Book on *Legal Research and Methodology.*

E-LEARING COURSES

Online Certificate Courses in "Intellectual Property Rights Law" and "Cyber Law"

Cyber Law

Admission to 25th batch of three months duration started on July 20, 2016. A total of 90 students were enrolled for this batch.

Intellectual Property Rights Law

Admission to 36th batch of three months duration started on August 22, 2016. A total of 83 students were enrolled for this batch. Result for the 35th batch was declared on August 30, 2016.

LIBRARY

- Library added 182 books on various subjects such as Banking Law, Commercial Law Common Law, Constitutional Law, Criminal Law, Environmental Economics, Human Rights, Intellectual Property Rights, International Law, Jurisprudence, Minorities etc. The books were also added in Library software (Libsys).
- E-books of Cambridge University Press and Oxford University Press were procured and are available on the library page of Institute's website.
- Around 52 students of Hooghly Mohsin Law College, Chinsurah, West Bengal visited the library and received a brief introduction about the facilities and web based open access resources available at the library page of Institute's website.

VISITS TO THE INSTITUTE

Student's visit at ILI

Students of Hooghly Mohsin Law College, Chinsurah, West Bengal visited ILI on September 29, 2016.

Prof. (Dr.) Manoj Kumar Sinha Director, ILI with students of Hooghly Mohsin Law College.

FORTHCOMING ACTIVITIES

- Workshop on "Understanding the Copyright and Related Rights" from November 21st - 26th, 2016. Last date of receipt of application form is November 5, 2016.

- National Human Rights Commission and ILI is jointly organising two day tranning programme for Police Personnel on "Police and Human Rights: Issues and Challenges" on November 19-20, 2016.

- Annual Conference on *Legal Research and Methodology: Issues and Challenges* on December 17-18, 2016

LEGISLATIVE TRENDS

The Central Agricultural University (Amendment) Act, 2016

(August 22,2016)

The Central Agricultural University (Amendment) Act, 2016 was passed to amend the Central Agricultural University Act, 1992 (the Act herein after). The Amendment Act provides for the establishment of a Central University in the north eastern region for the development of agriculture and advancement of research in agriculture and allied sciences. It states that the university is responsible for teaching and research in the field of agriculture for the north eastern states. The definition of the north eastern region under the Act as comprising the states of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Sikkim and Tripura is amended by this Amendment Act to include the state of Nagaland.

The National Institutes of Technology, Science Education and Research (Amendment) Act

(August 10, 2016)

The Amendment Act was passed to establish the National Institute of Technology (NIT), Andhra Pradesh as an institute of national importance under the National Institutes of Technology, Science Education and Research (NITSER) Act, 2007. The NIT will be deemed to have been an institute of national importance as on August 20, 2015, the day the central government approved its establishment.

The Institutes of Technology (Amendment) Act, 2016

(August 9, 2016)

The Amendment Act passed to amend the Institutes of Technology Act, 1961 (the Act herein after), which declares certain Institutes of Technology as institutions of national importance. The Amendment Act adds six new Indian Institutes of Technology (IITs) in Tirupati, Palakkad, Goa, Dharwar, Bhilai, and Jammu. It also brings the Indian School of Mines, Dhanbad within the ambit of the Act and provides for the incorporation of IIT (Indian School of Mines), Dhanbad. It states that until the statutes in relation to IIT (Indian School of Mines), Dhanbad are made under the Act, the statutes applicable to IIT Roorkee will apply to it.

The Lokpal and Lokayuktas (Amendment) Act, 2016

(July 29, 2016)

The Amendment Act amends the Lokpal and Lokayuktas Act, 2013 in relation to declaration of assets and liabilities by public servants. The provisions of the Amendment would apply retrospectively, from the date of the coming into force of the 2013 Act. A public servant was required to declare his assets and liabilities, and that of his spouse and dependent children to the competent authority within 30 days of entering office under the Act. Further, the public servant was required to file an annual return of such assets and liabilities by July 31st of every year. The Act also mandated publication of such declarations be published on the website of the relevant Ministry by August 31 of that year.

The Amendment Act replaces these provisions to state that a public servant will be required to declare his assets and liabilities. However, the form and manner of making such a declaration shall be prescribed by the central government.

FACULTY NEWS

Manoj Kumar Sinha delivered a lecture on "Law and Justice in a Globalizing World' to LL.M. students of National Law University Delhi on September 30, 2016.

Invited as Chief Guest to release the first issue of the *Law Journal* published by Faculty of Law, Jamia Millia Islamia and also delivered a talk on *Business and Human Rights* to the participants on September 7, 2016 at Jamia Millia Islamia, New Delhi.

Delivered lectures on International Humanitarian Law, to the Judicial Magistrates of North East State, organised by Assam Judicial Academy and the International Committee of the Red Cross, Gauhati, Assam on August 27, 2016.

Invited as a Chief Guest to the National Workshop on 'Legal Research Methodology' at University School of Law and Research, USTM, Meghalaya to deliver inaugural address on "Trend of Legal Research in India" on August 26, 2016.

Anurag Deep moderated a session on '*Capital Punishment*' for a workshop on 'Death and Sex in Criminal law' on September 29, 2016 at the Indian Law Institute, New Delhi.

Participated as a member of Jury in Henry Dunant Moot Court Competition on September 23, 2016 at ISIL, New Delhi.

Participated as a panelist with Subhash Chandra Agrawal in All India Radio for F.M. Gold programme on "Soochna ka Adhikar aur Nayalaya" on August 23, 2016.

Participated as a member expert body in PESA [Panchayats (Extension to Scheduled Areas) Act 1996] in Panchayati Raj Ministry on July 8,2016.

Deepa Kharb was **i**nvited to judge the Preliminary and Quarter-Final Rounds of the 4th KIIT National Moot Court Competition, 2016 organised by School of Law, KIIT University, Bhubaneswar on September 16 and 17, 2016.

Participated in the National Workshop on "Doctrinal Legal Research" at National Law University Delhi on August 8-10, 2016.

Susmitha P Mallaya was invited to judge the 4th KIIT National Moot Court Competition organised by School of Law, KIIT University, Bhubaneswar on September 16 and 17, 2016.

LEGAL JOTTINGS

Judicial process provides remedies for constitutional or legal infractions. Public interest litigation allows a relaxation of the strict rules of *locus standi*. However, the court must necessarily abide the parameters which govern a nuanced exercise of judicial power. Hence, where an effort is made to bring issues of governance before the court, the basic touch stone on which the invocation of jurisdiction must rest is whether the issue can be addressed within the framework of law or the Constitution.

While there can be no dispute about the need of providing value-based education, what form this should take and the manner in which values should be inculcated ought not to be ordained by the court. The court singularly lacks the expertise to do so. The jurisdiction of the Supreme Court under article 32 is not a panacea for all ills but a remedy for the violation of fundamental rights.

Santosh Singh* v. *Union of India (2016) 8 SCC 253 decided on July 22, 2016.

CASE COMMENTS

Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India

AIR 2016 SC 3400

Decided on July 8, 2016

In this case the petitioner demanded an inquiry into 1528 deaths in Manipur which resulted in counter-insurgency operations carried out by Manipur Police and members of armed forces. It is highlighted in the petition that during the period May, 1979 to May 2012, 1528 people were killed in Manipur in fake encounters or extra-judicial execution. The allegations were made against the Manipur police and members of armed forces of union. Though the police and security forces defended that the encounters were genuine and the victims were militants or insurgents or terrorists and killed in anti terrorist operation. It is interesting to note that the court took strong view in this case and made it amply clear that in cases of gross violations of human rights, all court should adopt an 'open door policy'. It also went on to add that the law is very clear that if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court.' The two judge bench comprising of Madan B Lokur and Uday Umesh Lalit JJ held that rule of law would apply even when dealing with the enemy and any excesses committed by the armed forces or Manipur police which do not have a connection with official duty would be liable to be proceeded against. The principal contention of the attorney general in opposing any investigation or inquiry into the alleged extra-judicial killings was on the defence of a war like situation prevailing in Manipur. Reliance was placed on *State NCT of Delhi* v. *Navjot Sandhu*[1] in which the court moved from the traditional definition of war under section 121 of IPC and held that even organising and joining an insurrection against the Government of India is a form of war. However, the court rejected the above contention and held that an internal disturbance is not equivalent to a war like situation. The court reiterated that the view expressed by the Constitution Bench of this court in *Naga People's Movement of Human Rights* v. *Union of India*[2] that an allegation of excessive force resulting in the death of any person by the Manipur Police or the armed forces must be thoroughly enquired into. However, it left it open for decision on who should conduct the inquiry for the time being. The court held that an allegation of excessive force resulting in the death of any person by Manipur police or the armed forces must be thoroughly enquired into. The court observed that truth has to be found out however inconvenient it may be for the petitioners or for the respondents.

The courts issued the following directions: (i) petitioners representative and amicus curiae to prepare a tabular chart to find out whether judicial enquiry or NHRC inquiry was conducted regarding 62 cases submitted by the petitioners;

(ii) regarding remaining cases out of 1582, similar exercise will be undertaken by amicus later on.

Remarkable advances have been made in the field of human rights by the Supreme Court and this judgment has further enriched and enlarged the human rights jurisprudence.

Manoj Kumar Sinha

Swami Achyutanand Tirth* v. *Union of India

2016(7) SCALE 583

Decided on August 5, 2016

A writ petition was decided by a three judges' bench comprising of T.S. Thakur, CJI, R. Bhanumathi and Uday Umesh Lalit, JJ. on August 5, 2016. This petition was related to right to health guaranteed by the Constitution to every citizen of India and its sphere has been widened by the Supreme Court in some decisions. The issue was related to the sales of

[1](2005) 11 SCC 600.

[2](1998) 2 SCC 109.

adulterated and synthetic milk in different parts of the country. Based on a report dated 02.01.2011 titled "*Executive Summary on National Survey on Milk Adulteration, 2011*" released by Foods Safety and Standards Authority of India (FSSAI) the petitioners claimed the violation of fundamental rights under article 21 and sought a relief that Union of India and the concerned state governments should be directed to take immediate and serious steps to rule out the sale and circulation of synthetic/adulterated milk and the milk products like ghee, mawa, cheese, etc.

The Union of India took the plea of fair mechanism for dealing with food safety and standards and for checking adulteration. Sections 50 to 65 of Food Safety and Standards Act, 2006 deal with punishment for contravention of the provisions. Section 59 of the Act provides for punishment for unsafe food. As per section 89 of the Food Safety and Standards Act, 2006, provisions of the Act shall have overriding effect over all other food laws. Section 97(2) repeals any other law for the time being in force in any state at the time of commencement of the Act.

As far as the statutory position of states is concerned, Union of India further argued that the State of Uttar Pradesh had amended section 272 of the Indian Penal Code, 1860 (IPC) by enhancing the sentence to imprisonment for life and also fine. Similar amendment had been made by the States of West Bengal and Orissa. State of Madhya Pradesh had also decided to amend section 272 of IPC by enhancing the sentence to imprisonment for life with or without fine and consequential amendments to schedule II to the Criminal Procedure Code, 1973.

Now, in this case, the issue before the apex court was whether the issuance of writ of mandamus in order to prohibit sale and circulation of adulterated milk and milk products was justified. The Supreme Court disposed of the case in affirmative manner directing Union of India and the state governments to take appropriate steps towards effective implementation of the Food Safety and Standards Act, 2006, warn dairy owners, operators and retailers of stringent action in cases of non-compliance, conduction of periodical short surveys, and, to evolve a complaint mechanism to check corruption among food authorities.

The court also directed the state food safety authority to ensure identification of high risk areas, adequate lab testing and maintenance of laboratories, special measures for sampling of milk and milk products through mobile food testing vans, setting up of websites specifying functioning of authorities, maintenance of toll-free online and telephonic complaint mechanism, and spreading general awareness regarding detection of common adulterants in food by conducting workshops for school children.

The court further directed that to curb milk adulteration, an appropriate state level committee headed by the chief secretary or the secretary of dairy department and district level committee headed by the concerned district collector be constituted as is done in the State of Maharashtra.

The court also referred to its previous orders when the similar issue had come up before it, where, *vide* its orders dated December 5, 2013 and January 30, 2014 the court had directed to make the punishment for food adulteration more vigorous by amending the Food Safety and Standards Act, 2006, in other states as well. *Vide* its order dated December 10, 2014 the Supreme Court also directed Union of India to come up with necessary amendments in Food Safety and Standards Act, 2006 and also in the IPC to make penal provisions at par with state amendments.

The active participation of Supreme Court in order to root down food adulteration tactics is commendable and a torch-bearer to save the health of stakeholders and affirm the right to food and right to health as a part of right to life.

Furqan Ahmed

Nabam Rebia* v. *Deputy Speaker

2016 SCC OnLine SC 694

Decided on July 13, 2016

In this case the power of Governor to summon and pre pone assembly (article 174(1)), power to set agenda of the house in the name of 'may send messages to the Houses' [under article 175(2)] and exemption of his decision from judicial review [article 163(2) –'decision of the Governor in his discretion shall be final and validity of anything done by the Governor shall not be called in question'] was in issue. As article 163(1) and (2) uses expression 'in his discretion', 'as he thinks fit' in article 174(1) and 'Governor may from time to time' in 174(2) does that mean that the constitution grants the Governor to exercise his power without the 'aid and advice' of chief minister in certain circumstances.

The facts pertaining to the present case are that the schedule date of Arunachal Pradesh Legislative Assembly Session was January 4, 2016. Meanwhile, there were certain representations made to the Governor and news reporting regarding some discord in ruling congress party and forceful resignation of their MLAs. It was claimed that the government lacks majority and allegations of horse trading, and letters with forge signature of stake holders were in the news. The Governor, to resolve the issue at the earliest, issued an order dated December 09, 2015 to pre-poned the assembly session. He also set agendas to be discussed in the assembly. Agenda was the role of speaker. The Governor did everything without any advice of the chief minister. This order of the Governor was challenged being violative of the provisions of the constitution.

The constitution bench took support from provisions and principles of the constitution, the intent of the framers of the constitution, judicial precedents and professional opinion in this regard. It unanimously decided that the Governor has no power to pre pone and set agenda without the aid and advice of the chief minister. Governor has not been assigned any significant role, either in the executive or the legislative functioning of the state. Neither provision nor purpose of the framers was to assign to him a dominating position, over the state executive and the legislature. He cannot act as a super-constitutional authority.

The five point conclusion of the court is that Firstly, the measure of discretionary power of the Governor is limited to the scope postulated under article 163(1). Secondly, under article 163(1), the discretionary power of the Governor extends to situations wherein a constitutional provision expressly requires the Governor to act in his own discretion. Thirdly, the Governor can additionally discharge functions in his own discretion, where such intent emerges from a legitimate interpretation of the concerned provision, and the same cannot be construed otherwise. Fourthly, in situations where this court has declared, that the Governor should exercise the particular function at his own and without any aid or advice, because of the impermissibility of the other alternative, by reason of conflict of interest. Fifthly, the exercise of discretion under article 163(2) is not final and not beyond the scope of judicial review. Firstly, because we have rejected the submission advanced by the respondents, that the scope and extent of discretion vested with the Governor has to be ascertained from article 163(2), on the basis whereof the submission was canvassed. And secondly, any discretion exercised beyond the Governor's jurisdictional authority, would certainly be subject to judicial review.

The court accepted some of the views of Sarkaria Commission (1983-88) and M.M. Punchhi Commission (2007-10) which enumerated the Governor's discretionary powers. They are- to give

assent or withhold or refer a Bill for Presidential assent under article 200; the appointment of the chief minister under article 164; dismissal of a government which has lost confidence but refuses to quit, since the chief minister holds office during the pleasure of the Governor; dissolution of the House under article 174; Governor's report under article 356; Governor's responsibility for certain regions under article 371-A, 371-C, 371-E, 371-H etc.

The controlling provision of power of Governor is article 163(1) where he is required to exercise these powers with 'aid and advice of Chief Minister'. "There is, however, an exception in the latter part of the clause in regard to matters where he is by or under the Constitution 'required' to function in his discretion. The expression "required" signifies that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been held that the expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. Moreover such necessity may also arise from rules and orders made "under" the Constitution."

The court also referred from seven judges bench judgment in *Shamsher Singh*[3] which declared, that wherever the Constitution required the satisfaction of the President or the Governor, for the exercise of any power or function, as for example under articles 123, 213, 311(2), 317, 352(1), 356 and 360, the satisfaction required by the Constitution was not the personal satisfaction of the President or the Governor. "… but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government …"

One of the strong argument was in context of article 174 that the Governor is granted discretion to decide when to summon the house. The court repelled this arguments quoting reference from Constituent Assembly Debates. It found that the draft article for 174 was 153 which indeed contained a third clause which provided that "the functions of the Governor with reference to sub-clauses (a) and (c), namely, the power to summon and dissolve the House or Houses of the State Legislature … shall be exercised by him in his discretion." This clause was dropped later so that the Governor could not use his discretion. Another basis for the decision was based upon the democratic principle that Governor is not an elected representative. He is an executive nominee. Such a nominee, cannot have an overriding authority, over the representatives of the people. It would be against the strong democratic principles and negate the concept of responsible government. Governor does not have any legislative responsibility.

This principle, however, does not hold good in case of NCT Delhi where Lieutenant Governor is a boss over most of the decision of a democratically elected government because the law provides so. In other words, a principle can be modified by a provision of law. The Supreme Court accepted that there seem to be certain fraudulent transactions. The horse trading was also apparent. The court however passed no obiter remarks either for the conduct of speaker, chief minister or for apparently unconstitutional order of governor. Probably Supreme Court did not doubt the *bona fides* of governor while his mala fide was not a top secret. Nothing on conduct of speaker, chief minister etc, because they were involved in forged sign, court did not address the moral aspect of the transaction. The judgment further and rightly clipped the wings of center which is a relief for states especially after *Union of India* v. *Sriharan @ Murugan* (decided on December 2, 2015 by a Constitution bench) where remission power of state was denied in case of an investigation by CBI etc and decided in favour of center. Doctrine of original intent

[3] *Shamsher Singh* v. *State Of Punjab* 1975 SCR (1) 814.

was followed by the court but can the court follow the doctrine in case of appointment of judges? The judgment however is welcome as it reestablishes the previous position of law with fresh arguments. It checked the conscious disregard of constitutional provision and it will further help in throwing article 356 in the dead letter box. Professional or expert opinion is secondary source of law but the portion on power of Governor mentioned in Sarkaria Commission (1983-88) and M.M. Punchhi Commission (2007-10) as accepted by court in its ratio(that too unanimously) becomes primary source of law under article 141.

Anurag Deep

Muthuramalingam* v. *State

(2016) SCC OnLine SC 713.

Decided on July 19, 2016.

The legislative framework regarding imprisonment for life suffered a setback when in *Swami Shraddananda*[4], a three judge bench of the Supreme Court decided to put the punishment of imprisonment for life beyond remission, when awarded as a substitute for death penalty. After this decision, a trend started of giving life imprisonment for 21,25, 30 years and so on without remission. The Malimath Committee had also recommended for inserting, in the IPC, a punishment similar to the one that was propounded in *Shraddananda*. However, the legislature did not respond to the recommendation and when the matter came up before the constitutional bench in *V. Sriharan*[5], the majority upheld this new sentencing! Having settled the position that it is within the judicial competence to circumscribe life imprisonment to the number of years beyond the pale of remission, the issues relating to life imprisonment seemed more or less settled. But then, recently, a three judge bench referred to the Chief Justice a question: "whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial". And a constitution bench deliberated on the issue in *Muthuramalingam* v. *State.*

The appellants, in the instant case, were found guilty and sentenced to suffer varying sentences, including 'life imprisonment for life' for each one of the murders committed by them. And importantly, the sentence of 'imprisonment for life' for each one of the murders was directed to run consecutively. The outcome of this punishment meant that the appellants would have to undergo 'imprisonment for life' ranging from two to eight, depending on the murders committed by them. Every human being has only one "life" but the retributivist psyche of the state wanted one life each for one murder! Interestingly the courts used the precise words in section 53 of the IPC - "imprisonment for life" while awarding the sentence. Could it be that the courts perhaps expected the man to rise like a phoenix every time to pay with his (new) life for every murder committed by him. The courts, no doubt, have the power to pronounce sentences for offences in a single trial which may run consecutively or concurrently. However, there is a legal impossibility of 'imprisonment for life' to run consecutively to another 'imprisonment for life'.

Life imprisonment is currently the most severe penalty (leaving aside the 'rarest of rare' capital punishment) in the Penal Code. Its severity is due to the fact that it entails the end of freedom in a convict's life. How the procedural law operates is a different domain altogether. The convict may earn remission and may be considered for early release before his 'end of life', but legally speaking, as has been reiterated in so many cases, life imprisonment lasts 'until the last breath of the convict'. In the face of such authoritative pronouncements as precedents, it is

[4](2) (2008)13 SCC 767.
[5](2014) 11 SCC 1.

indeed mind boggling that the courts pronounce sentences which are 'legally impossible' to be carried out. For example, in *State of Rajasthan* v. *Jamil Khan*[6] the court gave life imprisonment for murder and another life imprisonment for rape and ordered the sentences to run consecutively.

In the *Muthuramalingam* case, the apex court through a constitution bench rightly stressed that life being one; no two life imprisonments can be carried out by the convict. The courts may award life imprisonment for different offences but they would have to be super imposed on one another and made to run concurrently. Even in cases where the commission of the offences is in different transactions the accused remaining the same, only one life imprisonment can be served by him – as that is the law of nature – he/she only one life to live.

As far as the question whether life sentence and term sentence could run consecutively, the court was of the opinion that it was legally tenable as the convict can be directed to undergo the fixed term first and the life imprisonment can run consecutively. The court's observation is keeping with the spirit of section 31, Cr PC.

Jyoti D. Sood

International Confederation of Societies of Authors and Composers* v. *Aditya Pandey

2016 (9) SCALE 89

Decided on September 20, 2016

The issue involved in the case was when the lyrics written by the lyricist and the music is composed by the composer are used to make a sound recording, then if an event management company has to secure a license for playing the song, do they have to take the license only from the producer of sound recording or they are required to seek a license also from the lyricist and composer? This case was an appeal from the Delhi High Court where it was decided that the defendants (that is the event management company) do not have to secure a license from the plaintiffs (the copyright societies on behalf of lyricist/authors and composers) for playing the songs in their events. Also it was further decided by the high court that only in case the musical works are to be communicated or performed in the public independently through an artist, the license of IPRS (Indian Performing Rights Society) is required. In case the event management company wants to hold a programme which involves both performance of the musical work by a artist as well communication of the sound recording in public, a license of IPRS (for performance) and PPRS (for sound recording) both will be required.

The case of the appellant is that authors of literary work and composers of musical work are the first owners of copyright in lyric and musical work respectively under the Copyright Act, 1957 and as such they have the right to restrain the respondent from infringing their copyright, and licence given to sound recording company does not affect the rights of lyricist or the musician. The appellant further stated that the judgment by the high court deprives them of their exclusive right to collect royalty in cases of communication of sound recordings to the public and hence has an adverse direct impact on its members (authors and composers) and the creative community for their interest. The respondent on the other hand pointed out that with the 2012 amendment made in the Copyright Act, 1957 the producer of sound recording has an independent copyright of his work. Also it was pleaded by the respondents that the appeals filed by societies not registered in India, on behalf of the lyricists and musicians is not maintainable.

[6] (2013) 2 SCC 721.

The Supreme Court agreed with the decision of the high court and held that the event management company need not secure license from lyricist and composers once it has secured license from the sound recording company to communicate the song to the public. The decision may be appreciated on the ground that they made a single window for securing a license for communicating a sound recording to the public. However, the decision seem to be prejudicial for authors/lyricists and composers who are the primary copyright owner in such musical works. Perhaps in future a better stance be arrived at, which gives equal rights to owners of both primary as well derivative copyright work.

Jupi Gogoi

Sasan Power Limited* v. *North American Coal Corporation India Private Limited

2016 SCC OnLine SC 855

Decided on August24, 2016

A crucial question that came before the Court for consideration in the present appeal against the decision of Madhya Pradesh (M.P. hereinafter) High Court was whether the two companies domiciled in India could have "*made an agreement referred to in Section 44*" of the Arbitration and Conciliation Act, 1996 (the Act herein after), so as to confer jurisdiction and authority on the District Court of Singrauli, Madhya Pradesh to refer the parties to ICC arbitration in London under section 45 of the Act. The court was called upon to decide whether two Indian parties can choose a foreign seat for arbitration or agree to a foreign governing law in arbitration. The question was answered in the positive by the Madhya Pradesh High Court where party autonomy was held to be paramount in deciding the seat for arbitration. The Supreme Court in the appeal, however, did not answer this question, instead concluded that a since a foreign element is involved in the agreement and hence, arbitration can be under foreign law as per section 2(f) of the Act.

The appellant, herein a company registered under the laws of India and an American company North American Coal Corporation (NACC herein after) entered into an agreement (hereinafter referred to as "AGREEMENT-I") on January 1, 2009 for mine and development operations wherein NACC agreed to provide certain consultancy and other onsite services for a mine to be operated by appellant in Madhya Pradesh. This agreement contained provisions for dispute resolution and assignment. Later on, a tripartite agreement (herein after referred as Agreement-II) was signed under section 15.6 of the Agreement-I by NACC with appellant and respondent to assign all its rights and obligations with the consent of the appellant to the Indian Company (respondent-the subsidiary of NACC) with effect from April 1, 2011.

The apex court observed that so long as the obligations arising under the AGREEMENT-I subsist and the American company is not discharged of its obligations under the AGREEMENT-I, there is a 'foreign element' therein and the dispute arising therefrom. The Supreme Court considering the facts of the case, held that NACC is an American company and being a party to Agreement-I as well as Agreement-II along with two Indian companies, satisfies the foreign element under section 2(f) of the Act which, in clear terms, provides that if one of the parties to the agreement is a foreign company then such agreement would be regarded as "international commercial arbitration". Therefore, Agreement-I and Agreement-II become an "international commercial arbitration" within the meaning of section 2(f) of the Act. The autonomy of the parties in such a case, to choose the governing law, is well recognised under section 28(1) (b) of the Act.

The two judges' bench further held that the scope of enquiry for the judicial authority under section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract. Therefore, for the purpose of deciding whether the suit is maintainable or impliedly barred by section 45 of the 1996 Act, the court is required to examine only the validity of the arbitration agreement within the parameters set out in section 45, but not the substantive contract of which the arbitration agreement is a part. The words "shall" and "refer the parties to arbitration" in the said section makes it legally obligatory on the court to refer the parties to the arbitration once it finds that the agreement in question is neither null and void nor inoperative and nor incapable of being performed.

Even though the Madhya Pradesh High Court decision has been upheld by the Supreme Court, the grounds for allowing it were entirely different and the uncertainty on the position as to whether two Indian parties can have a foreign seat of arbitration still continues.

Prior to the *Sasan* High Court decision, this issue was also discussed in the case of *TDM Infrastructure*[7] where the Supreme Court held that the legislature's intention appeared to be that Indian nationals should not be permitted to derogate from Indian law as this is part of the public policy of India. The decision in TDM infrastructure was followed by the Bombay High Court in *Addhar*[8] where the court directed the arbitrating Indian parties to conduct their arbitration in India with Indian law as the substantive law of the contract even though the parties had contractually agreed to arbitration in India or Singapore" with English law as the substantive law.

There were reasonable expectations from the Court to provide a conclusive ruling on it while deciding the appeal in this case. In the absence of any clear provision under the Act and conflicting decisions of various courts, the issue has been a matter of debate for a long time. However, the issue under discussion was not even considered by the apex court in the present appeal.

Earlier in *Reliance Industries*[9] also the Supreme Court did not come out with any specific finding on this issue even though it upheld the award in a foreign seated arbitration between Indian parties on *pre-BALCO* jurisprudence (following Bhatia judgment) whereby the parties expressly agreed to exclude part I of the Act.

Arbitration as an alternative dispute resolution mechanism is premised on the principle of party autonomy. Some jurisdictions like England and Singapore laws, giving a progressive interpretation to article 20(2) of the UNCITRAL Model Law, have extended the autonomy to the parties to choose a foreign seat in order to promote international trade. In India, however, the position is somewhat unclear. The recent amendment of 2015 in section 2(f) adding requirement of foreign element has made the situation more complicated. However, arguments of public policy and apprehensions of forum shopping in this case are also not completely baseless.

Deepa Kharb

[7] *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Ltd* (2008) 14 SCC 271.

[8] *Addhar Mercantile Private Limited* v. *Shree Jagdamba Agrico Exports Pvt. Ltd.*

[9] *Reliance Industries Limited* v. *Union of India* (2014) 7 SCC 603.

Shramik Adivasi Sangathan* v. *State of Madhya Pradesh

2016(7) SCALE 715

Decided on August 12, 2016.

Legally, the present case pertains to the doctrine of *res judicata* but in the course of the judgment it sheds and informs the readers about the issues related to forest in tribal areas of Madhya Pradesh and the proactive role the court played by issuing appropriate orders and directions to safeguard the interests and rights of tribal people. Chronologically, it so happened that the appellant organization Shramik Adivasi Sangathan which was formed by activists Shamim Modi and Anurag Modi as part of initiative of Tata Institute of Social Sciences (TISS) Mumbai for field level intervention to demonstrate effective models of creative development was working in Harda, Betul and Khandwa districts of Madhya Pradesh which have sizeable number of tribals.

During the course of the work Shamim Modi filed a writ petition in 2004 in the High Court of Madhya Pradesh at Jabalpur submitting inter alia that while working as project officer she had noticed illegal excavations by various private persons including contractors and violations of the Forest Conservation Act, 1980. In the aforesaid writ petition an interim application bearing certain number of the year 2007 was also filed highlighting an incident where a forest ranger had beaten up two tribals on July 11, 2007. It was alleged in the petition that information was lodged with Harda Scheduled Caste and Scheduled Tribe Police Station on of July 12, 2007 but no FIR was registered. On July 30, 2007, the high court took up the matter when the injured tribals appeared in person and recorded their statements. It asked the district judge (vigilance) to inquire into the allegations and directed that the injured tribals be given medical attention.

The above relief being interim in nature the actual writ petition was heard by the court on July 17, 2008. The high court expressed that the concerned authorities would look into the matter as aforementioned. As regards the grievance that the petitioner and her husband were being harassed by the forest and police officials, it was observed that no relief in that behalf could be granted in public interest litigation and that it was open to the petitioner to seek appropriate remedies in law, if advised. With these observations, the writ petition was disposed of.

The appellant organisation on January 22, 2010 filed a writ petition submitting that the activist role played by Shamim Modi and Anurag Modi through various public interest litigations to expose the nexus between bureaucrats and politicians have made them a subject of harassment and victimisation. It was further submitted that certain officers of forest and police department were functioning as feudal lords, considering adivasis as their subjects and that the adivasis were being implicated in false and frivolous cases. The state of Madhya Pradesh in response raised a technical plea for the dismissal of the aforesaid writ petition by submitting that it was barred by *res judicata* in view of the order on July 17, 2008 passed by the high court in writ petition bearing certain number of 2004. It was further submitted that pursuant to the order on July 30, 2007 passed in said writ petition 2004 an enquiry was conducted by district judge (vigilance) and the incidents alleged by the writ petitioner regarding the beating up of the tribals were not found to be correct. On issue of *res judicata* the high court noted that except one incident (filing of false cases against tribals) all the other incidents narrated in the present petition of 2010 had taken place prior to 17th July 2008, *i.e.,* all the issues raised in writ petition of 2010 with regard to alleged victimisation of tribals prior to the order passed in writ petition of 2004 were barred by principles of *res*

judicata and could not be permitted to be agitated. On the above grounds, the high court dismissed writ petition of 2010. It is this judgment and order passed by the high court, which is presently under challenge.

The Supreme Court while dealing with the plea of the doctrine of *res judicata* held that: The assessment made by the high court while dismissing writ petition no.1064 of 2010 was not correct. In the earlier petition, Shamim Modi had highlighted instances of illegal excavations and violations of the Forest Conservation Act, 1980 and by way of I.A. No.5550 of 2007 attention was invited to the incident which occurred on 11th, 12th and 13th of July 2007. None of the matters dealt with in the present petition were detailed in the earlier writ petition. Merely because those incidents had taken place before the order on July 17, 2008 was passed by the high court, it could not be said that the matters stood barred by principles of *res-judicata*. The instances highlighted in the present petition are completely independent of those projected in the earlier petition and as such are required to be considered on their own merits. The high court, in our view, was not right in dismissing the petition on the ground of *res-judicata*.

The Supreme Court seriously took the allegations raised in the 2010 writ petition and took the following steps through the exercise of its powers: It issued notices to the respondents and passed orders respectively on May 13, 2011 and August 13, 2012. The latter dealt with the constitution of a district level grievance redressal authority (hereinafter GRA) in the respective districts to look into the allegations thus made in the 2010 petition. The objective was to provide safeguards against implications of tribals in false cases and other mechanisms to protect their civil liberties. It is interesting to note that in the constitution of GRA and the functions and duties it is obliged to perform one finds mention of section 12 of the National Legal Service Authority Act, 1987, which provides for legal aid to scheduled castes and scheduled tribes under clause (a). As evident from the affidavit filed in 2016, on behalf of appellants by advocate Prashant Bhushan it seems according to the court that there were difficulties faced by the GRA. It was submitted in the affidavit that though GRAs have been set up no effective progress could be achieved and the grievances highlighted in the original petition still remain unaddressed.

On the reason and justification for the constitution of the GRA the court states that: Since the issues and grievances highlighted in the writ petition would in any case have required some assessment of factual aspects of the matter and since the persons alleged to be victims come from the disadvantaged and underprivileged strata, this court deemed fit to direct constitution of GRAs. Such authorities have since then been constituted and it is for the GRAs now to take up the responsibility and make appropriate recommendations.

The court further held that: In our view, ends of justice would be met if following directions are issued : GRAs for Harda, Betul and Khandwa constituted pursuant to the order August 13, 2012 passed by this court shall look into every case highlighted in writ petition no.1064 of 2010 filed by the appellant and such other similar grievances and make their report/reports to the concerned district judges as early as possible and in any case not later than three months from the date of this judgment. In conclusion, the court made it clear that it has not and shall not be taken to have expressed any opinion on the merits of any of the cases highlighted by the appellant which are required to be dealt with by GRAs. In fact the court held that the said cases must be dealt with purely on merits.

Stanzin Chostak

***Ms. X* v. *Union of India*[10]**

2016 (7) SCALE4 56

Decided on July 25, 2016

Termination of Pregnancy Act, 1971 is one illustration of law's violent control over women's bodies and emotions. According to the Act, abortion is legal until the 20th week in select cases of 'grave injury' to mental health of the woman or diagnosis of fetal impairment (section 3). With the development of technology in pre-natal diagnosis, the law has become starkly obsolete, if not down-right cruel. Many problems in fetal development can only be diagnosed around or after 18 weeks. Here it is important to mention that many fetal 'defects' not only reveal the 'difference' from normal standards (the contentious issue as pointed by the disability activists), but also severe anomalies which may lead to a life of immense physical pain. The legal bar of 20 weeks compels the pregnant woman to take the decision of termination within a few days, on many occasions without being given adequate time to understand the nature of the 'abnormality' and its implications, leave alone the time to process and accept the impending loss. After 20 weeks, the Act restricts termination only to cases where the woman's life is at risk (section 5). The provisions of this law thus not only divest a pregnant woman of any decision making power over her body (vesting the power with the medical practitioners) but in instances where the gestational period of 20 weeks is over subject her to deep emotional and physical harassment.

When the diagnosis of fetal impairment is post 20 weeks, there is no option but to either approach the courts (which many people are not in a position to do) or continue the pregnancy despite the suffering which the birthing decision may inflict on the child and parents. It cannot be overlooked that such situations would compel many women to seek help from illegal quarters. In the past, many pregnant women diagnosed with severe fetal impairment who had crossed the 20 weeks mark have been denied relief by the court. The 2008 decision of Bombay High Court comes to mind instantly. The petitioner in case was denied the permission to terminate even though the medical experts opined that the pregnancy if continued could result in fetal demise or lead to the birth of a child who would require multiple surgeries and may not have any quality of life.

In this backdrop, the present decision of the apex court comes as a relief. The petitioner, a rape victim, approached the court to abort her 'abnormal' 24-week-old foetus. The court constituted a board of medical practitioners who were of the opinion that owing to "severe multiple congenital anamolies, the fetus is not compatible with extra-uterine life" and that the "continuation of pregnancy can gravely engender [mother's] physical and mental health". It is to be noted that the doctor's report (as reproduced in the order) does *not* state that termination is necessary to save the life of the woman. The court however adopted an activist stance and relying on section 5 of MTP Act, allowed the petitioner to terminate her pregnancy. Since section 5 permits termination only "to save the life of the pregnant woman", court's reliance on this section opens up many questions. Has the court diluted the condition laid out in section 5 such that it would now mean "grave danger to physical and mental health of the mother"? In that case, would this expression be governed by the explanations of section3 (whereby pregnancy caused by rape or unwanted pregnancy owing to contraceptive failure constitute grave injury to mental health)? Or, is the court's interpretation restricted to the cases of diagnosis of fetal abnormality only which can produce deep mental anguish and would thus constitute a grave injury to the mental health of the woman?

[10]See observations of Jagdish Singh Kehar and Arun Mishra JJ.

This decision, though noteworthy for its sensitive approach in regard to the case in hand, leaves many questions unanswered for us. If the present decision is to be treated as a precedent, it is important for the court to clarify these issues at the earliest. It is also important, in the light of the MTP Bill 2014, to generate a wider discussion on abortion- a discussion not constricted by the rights discourse. The issue of termination of pregnancy is much more complex than what the pro-life/ pro-choice debate makes it out to be. How 'choice' is not inherently a progressive concept has been adequately shown by feminists in the context of choice of sex selective abortion of female foetuses- choices are 'manufactured' by economic-social-cultural milieu and there is nothing automatically freedom affirming about the choice discourse. Moreover, abortion in many cases is not an easy rational 'choice' but an emotionally fraught decision. The task of a feminist law on abortion would be to take into account all these considerations in all their complexity.

Latika Vashist

State Bank of Travancore* v. *R .Sobhana

2016(8) SCALE 542

Decided on September 2, 2016

Banking sector in India at present is facing lot of challenges. Recovery of loans advanced to the customers is crucial among them. In this scenario, humanitarian approach of apex court towards the defaulting customer of the bank in order to do complete justice is reflected in this case.

In this case the respondent availed a loan of Rs.15000 along with her husband from the petitioner bank by creating an equitable mortgage by deposit of title deeds in respect the property they owned. However, they failed to repay the loan amount to the bank. The bank filed a civil suit before the Subordinate Judge, Thiruvananthapuram for recovery of an amount due along with interest. The suit was decreed and as a result the property was put to auction in the execution petition filed by the bank. As none came forward, the bank bid for the property in the auction and a sale certificate was issued in favour of the bank. Later, after several years bank sold the said property by inviting tenders for Rs.10,10,001.

At this time when the bank made a huge profit by selling the property, the respondents approached the bank with a request to return the excess amount which the bank earned. They also sought for payment of rent that the bank earned by letting out the property. On the bank's failure to respond to their request, a mandamus writ was filed before the High Court of Kerala to return the excess sale amount in respect of the property along with the rent collected by the bank for the property. The bank stated that it became the absolute owner of the property after a sale certificate was issued and it relied upon section 65 of the Civil Procedure Code, 1908 to plead that it had perfected its right, title, interest and possession over the property covered by the sale certificate. They also pleaded that the petitioners i.e. the customers did not have any right over the property which was purchased by bank in the auction conducted by court. The single judge of the High Court of Kerala upheld the claims of bank and dismissed the writ filed by the petitioners. Aggrieved by this order a writ appeal was filed before the high court. A division bench of the High Court of Kerala took note of the fact that the first respondent was paralyzed on account of meningitis, one daughter was mentally retarded and another son was a psychiatric patient. In view of the misery faced by the respondent's family, the managing director of the bank was directed to consider sharing of a substantial amount of profit accrued to the bank by way of sale of

the property with the customer. However, the bank refused to share their profit with the customer. Hence, the high court directed refund of Rs.6.5. lakhs to the customer within a period of two weeks from the date of production of copy of the judgment.

This judgment of the division bench of the High Court of Kerala was challenged before the apex court assailing the legality and validity of the same. Apex court found that the bank has not indulged in any illegality either in purchasing the property in the auction conducted by the court or in the sale of the property. It remarked that Division Bench of High Court should not have made scathing remarks about the conduct of the bank and the adverse comments made by the court are unwarranted and deserve to be expunged. Apex court also found that the high court erred in directing the bank to pay Rs.6.5 lakh to the respondent customer towards their share in the proceeds of sale of property accrued by the bank. The court held in favour of the bank, however apex court considered the extreme adversity faced by the family of the respondent customer and directed bank to pay Rs.5 lakh as *ex-gratia* in order to do complete justice.

The compassionate approach of the apex court towards the distressed customer of the bank is remarkable. However, in the rising situations of the fraudulent financial transactions while availing loans and advances conducted by the customers towards the banking companies, later pleading innocence and approaching the courts for relief, a cautious approach is needed to be taken by the courts in the interest of financial institutions and national growth. This case should be treated as an exception and not as a rule to be followed by the courts throughout the country to deal with the cases relating to the recovery of loan proceeds by banks.

Susmitha P. Mallaya

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