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Introduction

The well-known Latin legal maximum '*non debet alteri per alterum iniqua conditio inferri'* endorses moral, legal and philosophical ideology of human society. It spells out that 'the condition of one man ought not to be worsened by the act of another.'[1] Though this principle is analysed by the scholars in consonance with civil wrongs, it is equally applicable to the crimes. Crime being a wicked deed of the offender, uproot the stability of the society and hampers the comfortableness of the victim.This misdemeanour ingrained with polluted motive of criminals is criminalised across all the civilised nations.[2]Virtually, this age-old phenomenon is distinctive feature of society since earliest period.[3]Penalising a criminal is

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1 JOHN GEORGE PHILLIMORE, PRINCIPLES AND MAXIMS OF JURISPRUDENCE. 35(1856)

2 For meaning, definition and nature of the crime *see,* W.M.L. CLARK. HANDBOOK ON CRIMINAL LAW. (1894)

3 *See generally*, LUKE OWEN PIKE. HISTORY OF CRIME IN ENGLAND (1873); III JAMES FITZIAMES STEPHEN. A HISTORY OF CRIMINAL LAW OF ENGLAND (1883)

a fundamental task of the State.[4]Criminal law is an instrumental for this task. As an essential ingredient of the administration of justice system, CJS should implant basic tenets of the justice in a vibrant manner.[5]It should be organised in such a way that various stakeholders of the CJS should feel that the system is matured enough to address their grievances. It should radiate canons of justice in a flowery and extravagant manner. In fact, CJS operates to achieve noble goals encapsulated under theories of punishment[6]and should be consistent with established standards ,and respect liberty, human dignity and morals of the Constitution.[7] All these principles are to be upheld and maintained rigidly from the perspective of all the stakeholders of the CJS such as accused, witnesses, and victim of crime. However, grossly disproportionate practices are practiced for considerable period providing meagre concern to the rights of victim of crime.[8]The countries ensuring rights of victim of crime are also varied in nature and substance of law.[9]

4 IMMANUEL KANT. THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (1887)

5 *See*, for *e.g*., Mike C Materni. *Criminal Punishment and the Pursuit of Justice* ,2(1) BR. J. AM. LEG. STUDIES 263-304 (Spring 2013)

6 Theories of punishment include Utilitarianism, Deterrence, Incapacitation, Rehabilitation, Retribution, Reparation and restitution. *See generally*, ROGER HOPKINS BURKE ,CRIMINAL JUSTICE THEORY: AN INTRODUCTION (2012)

7 For general standards of the criminal justice system *see,*United Nations*, Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*. A/CONF.187/4/Rev.3.(April 15, 2000); United Nations, *Draft Bangkok Declaration: Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice.*, A/CONF.203/L.5 (April 23, 2005); *See also*, UN Convention against Transnational Organised Crimes, 2003,2225 UNTS 209; United Nations. *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. E/CN.15/2012/L.14/Rev.1. (April 25, 2012); Rome Statute of the International Criminal Court, 1998, 2187 UNTC 3; Council of Europe. *The Convention on Preventing and Combating Violence against Women and Domestic Violence*. (May 11, 2011); United Nations. *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power 1985*., (November 29, 1985)

8 HENRY CAMPBELL BLACK. BLACK'S LAW DICTIONARY. .232 (2d ed. 1910)

9 For *e.g.,*following countries have adopted specific legislations relating to rights of

Indian legal system is one of the examples for deplorable conditions of the victim of crime. The miserable conditions of the victim of crime is rightly expressed by the prominent judge *V.R. KrishnaIyer* in following words "It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the Legislature. We can only draw attention to this matter. Hopefully, the welfare state will bestow better thought and action to traffic justice in the light of the observations we have made. We dismiss the special leave petition.'[10]

Similarly, "*In Omnibus quidem maxim tamen in jure aequitas spectanda sit'* symbolizes equity as a bedrock principle of modern jurisprudence since ancient times.[11]In fact, right to compensation is based upon this equitable principle intrinsically connected with the common law.[12] This non-statutory norm exists since time immemorial.[13]We often speak of crime as being the oldest of the human history, but in the backdrop of the historical enquiry, this is hardly in keeping with the truth. Compensating victim of a crime is considered as a new proposition. It is believed that it represents a recent

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victims of crime; Criminal Injuries Compensation Act, 1995 of the United Kingdom; The Victims of Crime Assistance Act, 1996 of Victoria; In U.S.A., the Victims and Witnesses Protection Act, 1982, the Crime Victim Rights Act, 2004 and Victims of Trafficking and Violence Protection Act, 2000; Victims Compensation Act, 1996 of New South Wales; In Canada, Manitoba's Justice for Victims of Crime, 1986 and Ontario Victim's Bill of Rights, 1995; New Zealand Criminal Injuries Compensation Act, 1963. However, in India, there are no such legislations

10 Ratan Singh v. State of Punjab, 1980 AIR 84, 1980 SCR (1) 846.*See also* WEMMERS M JO-ANNE. VICTIMS OF IN THE CRIMINAL JUSTICE SYSTEM, (1964). (putting in a nutshell status of victims, policies and practices relating to victim of crime)

11 It means'Equity is to be kept in view in all things, but especially in the administration of the law.'For analysis of the principle, *supra* note 1 at 265

12 *See generally*, BUKLAND W.W., EQUITY IN ROMAN LAW. 16(1911)

13 *Supra* note 2

phase of CJS and still under embryonic stage. Protection of victims against wrongful act forms an age-worn problem of the modern society. All but a few civilisations across the globe had designed their CJS in line with victims' rights. "Attempts to understand and to expound legal phenomena' as rightly pointed by Roscoe Pound "lead togeneralizations which profoundly affectthose phenomena, and criticism of those generalizations, in the light of the phenomena they seekto explain and to which they give rise, enables usto replace them or modify them or supplementthem and thus to keep the law a growinginstrument for achieving expanding human desires.'[14]In view of the above observation of Roscoe Pound, the present article endeavours to show the historically built compensatory jurisprudence and its role in streamlining and rationalising existing wings of CJS.

Historicising Law – Rationale

This part of the paper provides a backbone for the author views on how historical jurisprudence helps to better understand rationality of legal theory. It situates legal principles within the domain of consistency and reliability with the manifesto of history. Legal history is not a sub discipline of either history or law, but instead as a mode of critical analysis of law.[15] This part of the paper is an effort to portray the distinctive ways of nexus between law and history in the backdrop of existing scholarly works.

Legalistic Approach

According to Markus D Dubber critical analysis of law through legal history are of two fold. It facilitates critical analysis of law and assist legal scholars to criticaly analyse law. The former contextualises law and later study the law itself in its substantive sesne. [16] Healso proposerelevance of

14 ROSCOE POUND. AN INTRODUCTION TO THE PHILOSOPHY OF LAW 145 (1921)

15 Markus D Dubber. *New Historical Jurisprudence & Historical Analysis of Law* 2(1) CRITICAL ANALYSIS OF LAW.1-18 at 10 (2015)

16 *Id*

legal history to understand why and how law evolved in a society.[17] He further explore internal as well as external critical analysis of law. Internal test, similar to substantive analysis, examine law in its essence and external test, symbolises contexual analysis, assess law in context of law.[18]Wherefore, compensatory jurisprudence, which is still embroyonic in nature and evidentially thin in development, is to be accessed in the backdrop of its historical evolution.

Linguistic Approach

It is not only history which could help us to familiarise ourselves about prudence of law, the methodological approach of legal historian further boosts benefits of the legal history. Approach of legal historian working with methods of social science contrary to legal historian focusing on language may explore inherent nature of the anatomy of law. It helps us to understand intricacies of the legal system by answering fundamental questions. [19]

Amalgamative Approach

Author has developed this approach in the backdrop of analysis of *Constantin Fasolt* Professor of history, University of Chicago, intersecting legal history and jurisprudence. It is named as amalgamative approach in view of the fact that history would be instrumental in understanding core objectives of the various legal philosophies. He argues that "Debates about law and the history of law rely on any number of basic distinctions. Examples include distinctions between facts and norms, objective values and subjective opinions, public and private, law and morality, natural and positive law, legislation and jurisdiction, state and church, empirical

17 *Id*, at 3.For contextual analysis of legal history -Marianne Constable. *Law as Claim to Justice: Legal History and Legal Speech Acts*, 1(3) UC IRVINE L. REV 634(2011)

18 *Id*

19 Marianne Constable, *Speaking Imperfectly: Law, Language and History*, 5(2)UC IRVINE L REV 349, 364 at 350 (June 2015)

observation and theoretical explanation, rules and principles, legal doctrine and legal practice, and the like. Without such distinctions, the differences between legal positivism, legal realism, natural law theory, human rights theory, critical legal theory, law and economics, legal formalism, legal pragmatism, legal feminism and other schools of thought on law and legal history would be impossible to understand.'[20]

Anthropological Approach

Anthropological Approach: Primitive society witnessed a very few laws. Anthropological study of law based on historical evolution of the society would be the stepping stone to understand evolution of law. Anthropological study on cultural practices of a segment of society can shed a light on cultural dynamics resulted in legal principles. Similarly, a comparative study of these cultural dynamics of different clan at different phases assist legal scholar to understand role played human behaviour in the development ordered society.[21] If we test the compensatory laws with help of context test of Markus D Dubber, we could understand the fundamental reason for the weak development of compensatory laws during primitive society. A study undertaken by Hoebel on the Andaman's tribe people reveals that the absence of a compensatory desire is due to the fact that property is so mobile among the Andamanese and possession of goods was not valued.[22]

Moralistic Approach

The origin of concept of victim compensation is closely connected with moral duty of the individual. It seems quite reasonable that the duty to compensate victim had its genesis' in a moral duty. Moral duty to pay compensation to the victim seems to have been associated with the idea that

20 Constantin Fasolt, *History, Law and Justice: Empirical Methods and Conceptual Confusion in the History of Law*, 5(2)UC IRVINE L REV 413–62 at.415(June 2015)

21 ADAMSON E HOEBEL., THE LAW OF PRIMITIVE MAN. vii. (1954)

22 *Id* at 297

one who committed wrongful act and caused mysterious conditions for another should reconstitute the same. No consideration of victim right to compensation would be complete without an analysis of the moral principles, which are not mandatory part of modern legal system, but gave rise to development of social norms to pay compensation to victim of crime. Morality cannot be subservient to law. It shall not equivocate to law. It is the aspiration of the Dharma.[23] Concept of Dharma has given central place to moral principles. A worthy jurisprudence demands sustained reflection of moral principles. The basic premises and fundamental dilemmas of the legal system are settled with the competency of morality. The point here is not to dismiss the proficiency of law but to test the inherent quality and implicit assumptions of the laws. The application of law in adjudicating the claims shall regard with. Dharma based adjudication involve comparative analysis of righteous and wrongful acts with emphasis on their interconnections as well as their consequences.

> Law cannot be devoid of morality. Law is trade and enforced to ensure morality. Morality is inseparable from law and when even the contracts against public policy and morality are void, legislatures cannot make laws against public morality. Courts of law are never immoral Courts' and would never interpret law against morality. Courts of law are proverbially "temples of justice' and neither any temple nor justice call exist against morality, and without morality. Morality and law, though not synonymous are complimentary and supplementary brie leased on' the other and one enhancing and protecting the other. In the above broader sense, the Courts cannot become blind, to morality, as should refuse to interpret law so as to put premium

23 Chronologically, the term *Dharma* indicates Vedic period- 4000 B.C to 1000 B.C ; *Srautasutras* – 800 B.C to 400 B.C; *Dharamsatras*– 600 B.C to 300 B.C; *Arthasastra of Kautilya* – 300 B.C to 100 A.D; *Manu's* Concept of law- 200 B.C to 100 A.D; *Yajnavalkya* concept of law- 100 A.D to 300 A.D; *Katyanasmriti* – 400 A.D to 1500 A.D; *Nandapandita* – 1590 A.D – 1630 A.D; *Nirnayasindhu* – 1610 A.D. to 1640 A.D; *Vyavaharamayukha* – 1615 A.D- 1645 A.D; *Dharamsindu* – 1790 A.D are the Dharma.*See*, 1-5 P. V. KANE. HISTORY OF DHARMASHASTRA (1930)

on, immorality. A court should refuse to administer law so as to lead to immoral, unethical consequences always interpret law for enhancing protecting morality.[24]

Meaning of Victim Compensation

Compensation is an exciting area.[25]Though the term compensation is used analogous to monetary form of assistance provided to a victim, it doesn't essentially attach to monetary form of benefit. It is more than pecuniary form of satisfaction. Law dictionaries hanging on various case laws define it to payment for loss, injury, or damage,[26] consideration,[27]satisfaction,[28] indemnification or reparation[29] Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.[30] An act a Court orders to be done, or money which Court orders to be paid by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss or be made whole in respect of his injury.[31]

The Supreme Court of India in *State of Gujarat* v. *Shri Shantilal Mangaldas & Ors*[32] termed the word compensation as follows "In ordinary

24 Gagan Raj Singh Nagori v. Union of India, 1979 WLN 634

25 MARC J.WALLACE & CHARLES H.FAY. COMPENSATION THEORY AND PRACTICE (2000)

26 DANIEL ORAN. ORAN'S DICTIONARY OF LAW 103 (3rd ed. 2000)

27 WILLIAM C. ANDERSON. A DICTIONARY OF LAW 216 (1889)

28 FREDERIC STROUD. THE JUDICIAL DICTIONARY OF WORDS AND PHRASES: JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS 355(1903)

29 HENRY CAMPBELL BLACK. BLACK'S LAW DICTIONARY 232 (2nd ed. 1910)

30 JOHN BOUVIER. BOUVIER'S LAW DICTIONARY – A CONCISE ENCYCLOPAEDIA OF THE LAW 572 (1914)

31 P. RAMANATHA AYER. THE LAW LEXICON OF BRITISH INDIA 218(1940)

32 1969 AIR 634, 1969 SCR (3) 341

parlance the expression compensation means anything given to make things equivalent; a thing given to or to make amends for loss, recompense, remuneration or pay; it need not therefore necessarily be in terms of money.' In, *The Divisional Controller, KSRTC* v. *Mahadeva Shetty*,[33] the Court has clarified the expression compensation as follows –

> Compensation is an act which a Court orders to be done, or money which a court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss; or be made whole in respect of his injury; something given or obtained as equivalent; rendering of equivalent in value or amount; an equivalent given for property taken or for an injury done to another; recompense in value; a recompense given for a thing received; recompense for whole injury suffered; remuneration or satisfaction for injury or damage of every description.

The phraseology of the above definition clearly indicates prominence of judicial test in determining nature and scope of the compensation. Having regard to the nature and importance of the yardsticks to be followed in determining compensation, the Law Commission of India reports also substantially moulded compensatory jurisprudence of the country.[34] Therefore, the expression 'compensation' is to be applied and interpreted in its multidimensional sense instead of confining it to the ways paid in

33 (2003) 7 SCC 197

34 LAW COMMISSION OF INDIA, 62nd REPORT ON WORKMAN COMPENSATION ACT. (1923);LAW COMMISSION OF INDIA,51st REPORT ON COMPENSATION FOR INJURIES CAUSED BY AUTOMOBILES IN HIT-AND-RUN CASES (1972); LAW COMMISSION OF INDIA, 85TH REPORT ON CLAIMS FOR COMPENSATION UNDER CHAPTER VIII OF THE MOTOR VEHICLE ACT, 1939 (1980); LAW COMMISSION OF INDIA, 134TH REPORT ON REMOVING DEFICIENCIES IN CERTAIN PROVISIONS OF THE WORKMEN'S COMPENSATION ACT,1923(1989)

terms of money.[35] The multifaceted compensation may vary as per various branches of laws under which same is to be determined.[36]

V. Historical Accounts

Right thought is necessary for right conduct. All the old abuses in society, the great and universal and pretty and particular, all unjust accumulations of property and power are avenged in the same manner.[37]The great religions across the globe are similar in terms of ethical and philosophical ideas.[38]History being a prime source of law provokes reflection on justice in law.[39]It reorients perceptions and practices of law.[40]According to Salmond it is an informal source of law.[41]India had deep and abiding legal system. History of the ancient Indian laws seems that it made a very little impression at global level due to inadequate exposure. However, it does not mean that ancient Indian legal system was completely impotent in maintaining law and order in the society. One gets a sense of the richness of the Indian legal system in the earliest period by looking at the code of conduct prescribed by the ruler for individual and society. It is striking feature of the ancient legal system that *Dharma*[42] was seen as a central part

35 For useful discussion on the principles and practices relating to compensation *see*, Rathi Menon v. Union of India ,2001 AIR SCW 1074*;* Kerala State Electricity Board v.Kamalakshy Ammal, 2001(2) KLT 12 *;* K..C.Gajapati Narayana Deo v. The State of Orissa ,AIR 1953 SC 375*;* Kamalabai Harjivandas Pareka v.T.B.Desai and Anr, AIR 1966 Bom 36*;* Assistant Collector, Thana v. Jamnadas Gokuldas, (1958) 60 BOMLR 1125*;* Polavarapub Somarajyam & Ors v. Andhra Pradesh Road Transport, AIR 1983 AP 407

36 For *e.g.,*Land Acquisitions Cases, Motor Vehicles Cases, Workman Compensation Cases

37 LEWIS NATHANIEL CHASE. EMERSON'S ESSAY ON COMPENSATION 17(1906)

38 ANNIE BESANT. THE ANCIENT WISDOM 2 (1897)

39 *Supra* note 19 at 631

40 *Id* at 633

41 SALMOND. JURISPRUDENCE 117 (1902)

42 A.S.Narayana Deekshitulu v. State of Andhra Pradesh &Ors, AIR 1996 SC 1765

of the legal system. In the context of public law, this *Rajadharam* was considered as guiding power of the king and ruling class. Another concept played an important role in the societal context was *Dharma*[43] regulating attitude and behaviour of the society and individual. It was the mixture of both public as well as private law. A study of ancient Indian jurisprudence shows that compensating victim was age old practice amongst Hindus.

Manusmruti

Coming to the chronological study of compensation to victim of crime in India, we can find reference in *Manusmriti* . Some of the hymns of Chapter VIII of *Manusmriti* are descriptions of the victim compensation and explain payment of compensation to the victim. The *Manusmriti* was extremely liberal so far as duty of the State is concerned.[44]Notwithstanding allegations against legitimacy and integrity of 'Justice' as contemplated by Manu, paramount regard was given for justice under *Manusmriti*. Following was the fundamental principle of *Manusmriti*' Justice, being violated, destroys; justice, being preserved, preserves: therefore justice must not be violated, lest violated justice destroy us.'[45] Manu asserts vigilance of justice by the judges and cautioned them with horrific consequences of the injustices, if they failed play their role in an appropriate manner. He says '....where justice, wounded by injustice, approaches and the judges do not extract the dart, there (they also) are wounded (by that dart of injustice)'.[46] He further says –'Where justice is destroyed by injustice or truth by falsehood, while the judges look on, there they shall also be destroyed.'[47] He cautioned the king that 'as a hunter traces the lair of a (wounded) deer by the drops of

43 *See* SRISA, CHANDRA VIDYARNAVA. YAGNAVALKYA SMRITI WITH COMMENTARY OF VIJNANESWARA 257(1918)

44 B. N. Srikrishna, *Pre-British Human Rights Jurisprudence*,3(2) NUJS L. REV. 137,129-42 (June 2010)

45 25 F.MAX MULLER, THE SACRED BOOKS OF THE EAST. LONDON 255 (1886)

46 Rule 12, *Id* at 254

47 Rule 14, *Id* at 255

blood, even so the king shall discover on which side the right lies, by inferences'.[48]

Criminal centric approach was fundamental characteristic of Manu period. During this era some of the crimes were considered so severe which cannot be compensated with apology or compensation. According to Manu, as explored by Gautama, intentional murder of a *Brahmana*, drinking *sura* and violation of *guru's* bed can't be expiated. "If a limb is injured, a wound is caused or blood flows, the assailant shall be made to pay to the sufferer the expenses of the cure, or whole both the usual amercement and expenses as a fine to the king.'[49] The offender was under obligation to repatriate victim for the consequences of the crime. "He who damages the goods of another, be it intentionally or unintentionally, shall give satisfaction to the owner and pay to the kind a fine equal to the damage.'[50]*Manu* had enlisted exhaustive duties of the king. His fundamental duty was to vigilantly guard the subjects.[51] In addition, there are ample instances as to the compensation for the loss or damage of the property. According to *Manusmriti* "He who steals the rope or the water-pot from a well, or damages a hut where water is distributed, shall pay one *masha* as a fine and restore the (article abstracted or damaged) in its (proper place).[52] Compensation for causing damages to the property was also well recognised. According to *Manu*, "On him who steals more than ten *kumbhas* of grain corporal punishment shall be inflicted; in other cases he shall be fined eleven times as much, and shall pay to the owner the value of his property.'[53] He further contemplated that "For damage in other fields each head of cattle shall pay a fine of one *pana* and a quarter, and in all cases the value of the crop destroyed shall be made good to the owner of the field; that is the settled rule.'[54]

48 Rule.41, *Id* at 261

49 Rule.287, *Id* at 304

50 Rule.288, *Id at* 305

51 Rule. 142, *Id* at 238

52 Rule.319, *Id* at 309

53 Rule.320, *Id* at 310

54 Rule. 241, *Id* at 311

Kautilya's Arthashastra

One of the finest sources of prehistoric Indian legal system is *Kautilya's Arthashastra.*[55] It comprises detailed text relating to politics, jurisprudence, economics and international relations. Criminal justice system is given due weightage. In addition to penal provisions, wide compensatory provisions to compensate victim against loss of life and property has been ensured under *Arthashastra.*'Causing hurt in the thigh or the neck, wounding the eye, or hurting so as to impede eating, speaking, or any other bodily movements shall not only be punished with the middlemost amercement, but also be made liable.'

Similarly, "Destruction of articles of small value shall be punished with a fine equal to the value of the articles besides the payment (to the sufferer) of an adequate compensation. Destruction of big things with a compensation equal to the value of the articles and a fine equal to twice the value was the law. In case of destruction of such things as clothes, gold, gold-coins, and vessels or merchandise, the first amercement together with the value of the articles shall be levied.'[56] For causing pain with sticks, etc., to minor quadrupeds one or two *panas* shall be levied; and for causing blood to the same, the fine shall be doubled. In case of large quadrupeds, not only double the above fines, but also an adequate compensation necessary to cure the beasts shall be levied. There are thirteen kinds of criminals who, secretly attempting to live by foul means, destroy the peace of the country. They shall either be banished or made to pay an adequate compensation according to severity of their guilt. If the wounded man dies within a fortnight, the offender shall be punished with the highest amercement. If the wounded man dies within a month, the offender shall be compelled to pay not only a fine of 500 *panas*, but also an adequate compensation (to the bereaved).

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55 *Kautilya,* also called as *Vishnugupta*, was a Minister of *Chandragupta Maurya* emperor of *Maurya* dynasty. The book *Arthasashtra,* written in Sanskrit is believed to be written during 300 BC

56 SHAMASASTRY R, KAUTILYA'SARTHASASTRA 221(1929)

Hammurabi Code

Hammurabi Code is a predominant ancient legislative document abundantly referred by the scholars in a qualified sense to explore efficacy of the existing laws.[57] This unique primordial text comprised certain provision relating to the development of elementary principles of administration of justice system and operation of criminal law.[58]Compensation to victim of crime was essential and necessary component of criminal code of the period. The author would like to refer victim compensation to this pre-historic source for the reason that comparative ethnology of archaic societies may throw considerable light on the primitive evolutionary stages of the scheme.

In order to impose liability, status of the offender was accurately followed. There was a remarkable difference between noble classes and labour classes as to the liability paying quantum of compensation to the victim. Prof. Martha T. Roth, University of Chicago has analysed this with the caption of Shame and Honour analysis. He says:

> Shame and honour are two extremes of one social continuum that has been amply demonstrated to be of paramount importance in Mediterranean cultures from antiquity through to modern times. In the assessment of an individual's conduct, not only the act itself but also the social standings of both the actor and the person with whom he interacts are evaluated. The assessment of these social standings are conditioned both by the value of the person in his own eyes and also in the eyes of others in the group. These assessments place the individual on the continuum which then has a tangible effect on conduct concerning the family, marriage patterns, status mobility, economic transactions, moral actions, and other matters.[59]

57 *See* for *e.g.,*Martha T Roth. *Mesopotamian Legal Traditions and the Laws of Hammurabi* , 71(1) CHI.KENT 13-39 (1995)

58 For translated version of Hammurabi Code, *see* JAMES B.RITCHARD. ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT (1906)

59 *Supra* note 57 at 25

Accordingly, stealing of ox, sheep, ass pig or ship from a temple or a house by a patrician resulted in thirtyfold of the value of the animal, on the other hand if it is by the plebeian, it was tenfold.[60]Every act of the individual takes away the physical integrity of a plebeian by knocking out of the eyes,[61]tooth[62] or limb[63] of victim attracts fiduciary liability. In Hammurabi Code, we find that if a man struck another in a quarrel resulted in permanent injury of the victim, he shall bear medical expanses of the victim.[64]When the blow of a man results in death of victim, he shall pay one-half mina of silver and if the same crime is by plebeian one-third of a minaof silver. Where a free woman with child subjected struck and pregnant woman exposed to miscarriage, she entitles to ten shekels.[65] Although some of criminal codes of the Hammurabi may not fit neatly within the framework of standards of contemporary criminal law theories, as a prehistoric practice, this Code has widely referred to understand the early development of codification of criminal law. The wide range of scholarly and legal discourse on criminal law of Hammurabi Code clearly indicates broadening scope of the compensatory jurisprudence and ideal responses towards the pitiable conditions of the crime victims.

Sumerian Code of Lipit-Ishtar

Sumerians are well-known for their material progress, technological resourcefulness, ideals, values and unique ideas.[66] According to Sumerian Code entry of a man orchard of another and seized there for stealing was liable to pay ten shekels of silver[67] and one-half mina of silver for cutting

60 Sec.8 of the Code Cited in; JAMES B.RITCHARD, 1906 ,*supra* note 58, at 166

61 Sec.198,*Id* at 175

62 *Id*

63 Sec.201, *Id*

64 Sec.206, *Id*

65 Sec.209, *Id*

66 SAMUEL N KARMER,THE SUMMERIANS - THEIR HISTORY CULTURE AND CHARACTER. 4(1963)

67 Sec. 8*, Lipit-Ishtar* Law code. Cited in; JAMES B RITCHARD, *supra* note 58 at 160

down of a tree in the garden of another man.[68]Damage caused to the rented ox was considered as serious misdemeanour and resulted in financial liability towards the owner of the ox.[69]Laws of *Eshnunna* had considered serious civil and criminal wrong for compensation. Biting of various parts of a man was compensated with predetermined amounts. If a man bites the nose of another man 1 mina of silver, eye, 1 mina of silver, a tooth 2 mina of silver, a slap in face 10 shekels of silver.[70] Breaking of finger[71] and foot[72] were compensated with two-thirds mina of silver respectively. Similar sort of compensation was stipulated for throwing of a man to the floor in an altercation and breaking his hand,[73] assaulting another,[74] and hitting a man accidently.[75]

Islamic law

Quran principles are embodiment of justice.[76] Prehistoric law was completely based on tribal practices.[77] Traits of tribalism significantly

68 Sec. 9, *Id*

69 Sec.34: If a man rented an ox (and) injured the flesh at the nose ring, he shall pay one third of (its) price. Sec.35: If a man rented an ox (and) damaged its eye, he shall pay one half of (its) price. Sec.36: If a man rented an ox (and) broke its horn, he shall pay one fourth of (its) price. Sec.37: If a man rented an ox (and) damaged its tail, he shall pay one fourth of (its) price. *Id*

70 Sec.42, Laws of *Eshnunna*, cited in; JAMES B RICHARD, *supra* note 58 at 163.

71 Sec.43, *Id*

72 Sec.45, *Id*

73 Sec.44, % mina of silver, *Id*

74 Sec.46 two thirds of a mina of silver, *Id*

75 Sec.47, 10 shekels of silver, *Id*

76 *See generally*, Mutaz M Qafisheh, *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System*, 7(1) IJCJS. 487–507 (June 2012) (Explains status of restorative justice under Islam); Timur Kuran , *On the Notion of Economic Justice in Contemporary Islamic Thought*, 21(2) INT. J. OF MIDDLE EAST. STUD. 171–91 (May 1989). (status of economic justice under Islam); Haider Ala Hamoudit Muhammad, *Social Justice or Muslim Cant? Langdellianism And The Failures Of Islamic Finance*, 40(1) CORNEL INT'L. L.J. 89–134 (Winter 2007) (Analyses status of social justice under Islam).

77 *See*, Daniel Pascoe, *Is Diya a Form of Clemency ?* ,34(1) B.U.Int'l L.J.149-79(Spring 2016).

contributed for pre-Islamic laws. Criminal justice system of the society was designed with retaliation and revenge based on personal practices instead of consolidated rules.[78] It is evident from the following words "Humble him who humbles thee, close tho' be your kindredship:If thou canst not humble him, wait till he is in thy grip. Friend him while thou must; strike hard when thou hast him on the hip.' [79] These words might serve as evident to understand nature of criminal law practice of the pre-Islamic period. It epitomises obligation as well as necessity of the victim against loss of dignity and honour due to the crime inflicted on him.[80]

Concept of 'blood money' is vehemently used under penal practices of Islamic law.[81]The fact that the compensation to victim of crime was initially asserted as *diyat*which is prevalently termed as 'blood money'.[82] According to *Siti Zubaidah Ismail* "*diyat* is a generally accepted form of punishment that has existed throughout the centuries. It originates from pre-Islamic practice as an alternative for revenge; *diyat*gives a chance for the victim's family to pardon the offender and accept a monetary form of

78 HANIF N, ISLAMIC CONCEPT OF CRIME AND JUSTICE 43(1999).

79 REYNOLD A NICHOLSON, A LITERARY HISTORY OF ARABS 92(1907).

80 Siti Zubaidah Ismail, *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries*, 26(3) ARAB LAW Q. 364,361-80 (2012).

81 *See* for *e.g.,*AHMED AFFI AND HASSAN AFFI. CONTEMPORARY INTERPRETATION OF ISLAMIC LAW. 77-78(2014); ELLA LANDAU TASSERON. "ALLIANCES IN ISLAM.' IN PATRONAGE AND PATRONAGE IN EARLY AND CLASSICAL ISLAM.1–49(2005); Mehrangis Kar, *Law in Iran*. in RADICAL ISLAM'S RULES: WORLDWIDE SPREAD OF EXTREME SHARI'A LAW 41–64, 56 (2005); MOHAMAD V.A ASHROF, ISLAM AND GENDER JUSTICE - QUESTIONS AT THE INTERFACE. 224 (2005); MAULANA MUHAMMAD ALI , THE RELIGION OF ISLAM: A COMPREHENSIVE DISCUSSION OF THE SOURCES, PRINCIPLES AND PRACTICES OF ISLAM 553(1994).

82 Siti Zubaidah Ismail , *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries*.,26(3) ARAB LAW Q. 361-379,362.

compensation as a substitute for equal punishment.'[83] *Diyat* being a compromising formula between offender and victim or victim family is similar to punitive damages and imitate restitution. It facilitated settlement of the cases out of court and contributed for the development of arbitration process. Utility of the punishment was taken over by the *diyat* and widely accepted in the Arab society. Though the practice was quiet contrary to very inherent objectives of the criminal law i.e, inflicting punishment on criminal as social control, the pardoning power of the victim or victim family conditioned with 'blood money' infused concept of compensatory jurisprudence.

According to pre-Islamic tribal traditions *diyat* valued at "a hundred camels' for a free Muslim male.[84] It also varied according to nature of persons such as non-Muslims, slave, women and according to various schools of Islam such as Hanafi, Maliki, Shafi, Hanbali and Shia.[85] According to Michael James "...the adoption during the nineteenth century of modern, secular principles of liability entailed a reassessment of the needs of society and of the assumption upon which the law was in future to be based. The later history of the institution of blood money provides indeed a striking illustration of the impact of Western notions upon the established customs of another society, as well as of the difficulty with which one legal system will usually adjust itself to procedures taken from a different cultural background.'[86]

The dominant force of the *Diyat* can be viewed from the contemporary practices of the considerable number of the nations. Thirteen major Muslim countries have adopted *Diyat* parallel to punishment for the Murderer.[87]

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83 *Id*

84 Daniel Pascoe, *supra note* 77 at 156.

85 *Id*, at 157.

86 MICHAEL JAMES & LANGLEY HARDY,BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST 10 (1963).

87 Daniel Pascoe, *supra* note 77 at 158

Even countries whose culture and tribal practices were not adopted such *Diyat* practices have made informal arrangement to settle cases through this age-old blood money concept.[88]By changing the hundred camels scale as *Diyat*, the modern countries have set different standards and principles.[89] The study of greater details of practices of the countries reflects historical importance of Islamic practice in moulding compensatory jurisprudence and reconstituting conditions of the heirs of the victim of crime.

Antiquities and historical accounts are material resources which provide an insight to the social norms prevalent since ancient times. The progress made for the enrichment of the legal philosophy by tracing out of the history of civilization is immense. When we combine the insights of historical school of jurisprudence with contemporary legal complexities to articulate a rational and convincing principle of law, we could notice that historical jurisprudence remarkably connected and deeply ingrained with prehistoric practices. Among primordial social norms the duty to pay compensation was not necessarily by the State to the victim, but, on contrary by the wrong doer. Modern practice of the State duty to pay compensation was almost unheard and extremely rare in primitive societies. Liability had largely been bound up with moral duties. The spearheading role of the State, to some extend raise duty of the State to take care of the victim of crimes and gave rise to claim against the State.

The gradual evolution of the State on the basis of welfare policies substantially accelerated duties of the State. This situation resulted in the development of responsibility of State which had no such bounden duty to pay compensation earlier. The development of doctrine of *parens patriae*[90] considerably changed philosophy of State. At such a point of evolutionary social responsibilities, it became inevitable for the State to answer the claim of victims. But the systematic development of law relating to compensation,

88 *Id*

89 *Id* at 159

90 It says that "State should act as parent or guardian of the citizen"

similar to law developed for the protection of interest of the accused of a crime, was something less than required during earliest period. This tendency imbalanced the level of protection provided for victim of crime and accused. Notwithstanding, enactment of various legislations for the protection of rights of the victim and the stipulations as to the liability on criminal to pay compensation to victim of crime amply demonstrate the evolutionary status of compensatory jurisprudence. It is evident from these historical accounts that these primordial primitive moral standards and ethical principles, which are root causes of the compensatory jurisprudence, were well developed with holistic sense.

VI. Present Status of Victim Compensation

It is understood that in the context of societal need and stability of the society criminal justice system of the nations across the globe are moving towards well-structured victim compensation scheme. Indian legal system has made incremental efforts in this regard. The constitutional symptoms of the right to compensation under Indian Constitution can be witnessed under the tortious liability of the State. The Constitution recognizes the right to compensation for the tortious acts of the public servants serving for the government for their acts during the course of official services.[91] The SCI in its series of the cases reiterated the liability of the government to secure the rights and entitlements of the victims against tortious acts.[92]

In India, compensatory jurisprudence of the country goes back to enactment of the Code of Criminal Procedure (Cr.P.C) 1973.Keping in view the interest of the victim of crime, Code of Criminal Procedure introduced

91 Art.300 of Constitution of India

92 Bhim Singh v. State of Jammu and Kashmir , AIR 1986 SC 494; State of Rajasthan v. Smt.Vidyavati,1962 AIR 933, 1962 SCR Supl. (2) 989; Kasturilalv. State of U. P,1965 ,AIR 1039, 1965 SCR (1) 375; N.NagendraRao&Company v. State of A.P, 1994 AIR 2663, 1994 SCC (6) 205; Peoples Union for Democratic Rightsv.Police Commissioner, Delhi Police, 1990 ACJ 192, (1989) 4 SCC 730

certain provisions relating to compensation to victims.[93] These provisions were incomplete and inadequate so far as liability of the State to pay compensation is concerned. There was a need of reformation and restatement of the compensatory jurisprudence in view of the reports of the commissions[94] and decisions of the Supreme Court.[95] In this background Criminal Law (amendment) Act, 2008[96] was passed and Sec. 357A was inserted to define rights of the victim and set obligation on State to pay compensation.[97]This

93 *See* for *e.g*., Sec.250, Sec.357, Sec.358 of Code of Criminal Procedure, 1973

94 *See* for *e.g.,* LAW COMMISSION OF INDIA., 152nd REPORT ON CUSTODIAL DEATH 44-47(1994); II LAW COMMISSION OF INDIA.,164th REPORT ON THE CODE OF CRIMINAL PROCEDURE, 1973 19 (1996); Law Commission of India ,226TH REPORT ON THE INCLUSION OF ACID ATTACKS AS SPECIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME 16-21(July 2008); GOI, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAWS(JUSTICE J.S.VERMA REPORT) 34,125,129 (January 2015)

95 *See* for *e.g.,*Delhi Domestic Working Women's Forum v. Union of India ,(1995) I SCC 14; Manohar Singh v. State of Rajasthan and Ors, 2015 (89) ACC 266 (SC); Ankush Shivaji Gaikwad v.State of Maharashtra, (2013) 6 SCC 770; Suresh and Anr.v.State of Haryana, 2015 (2) SCC 227; Maru Ram &Ors. v. Union of India and Ors , (1981) 1 SCC 107; Laxami v. Union of India , (2014) 4 SCC 427; Mahommad Haroon v. Union of India, (2014) 5 SCC 252

96 No.5 of 2009

97 Sec.357 A of Cr.P.C. runs as follows;

1. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents, who have suffered loss or injury as a result of the crime and who, require rehabilitation
2. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)
3. If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation
4. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation

amendment to the Cr.P.C followed by the compensation schemes introduced by the various State governments substantially altered the conditions of the victims of the crime.[98]In addition, the enactment of certain criminal as well as civil laws injecting victim compensation components to legal system is one of the decisive developments. These legislations have largely contributed for the development of compensatory jurisprudence in India.[99]

VII. Conclusion

Antiquities and historical accounts are material resources which provide an insight to the social norms prevalent in ancient period. The progress made for the enrichment of the legal philosophy by the tracing out of the history of civilization is immense. Comparison of the insights of historical school of jurisprudence with contemporary legal complexities to articulate

5. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months
6. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

98 The Government of Karnataka adopted this scheme in the year 2012. See, Government of Karnataka, Vol.4A, No.283, (April 2012), *See also*, GO.No.HD 1 PCB 2011, Bangalore, dated:19/09/2013 (amending the schedule to the scheme)

99 For *e.g.,*The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation And Resettlement Act, 2013; The Protection of Children from Sexual Offence Act, 2012; The Maintenance and Welfare of Parents and Senior Citizens Act, 2007; The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006; The Commissions for Protection of Child Rights Act, 2005; The Protection of Women from Domestic Violence Act, 2005; The Juvenile Justice (Care and Protection of Children) Act, 2000;The Dowry Prohibition Act, 1961; The Immoral Traffic (Prevention) Act, 1986; The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; The Indecent Representation of Women (Prohibition) Act, 1987; The Information Technology Act, 2000; The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

a rational and convincing principle of law, it is evident that historical jurisprudence remarkably connected and deeply ingrained with prehistoric practices. Among primordial social norms the duty to pay compensation was not necessarily of the State to the victim, but, on contrary by the wrong doer. Modern practice of the State duty to pay compensation was almost unheard and extremely rare in primitive societies. Liability had largely been bound up with moral duties. The spearheading role of the State ,to some extent raised the duty of the State to take care of the victim of crimes and also gave rise to claim against State.

The gradual evolution of the welfare policies has substantially accelerated duties of the State towards weaker sections.[100]The protection, rights and welfare of victims has become priority of the State.[101]The severity of the constitutional mandates has resulted in exemplification of the welfare measures.[102]This situation amplified the responsibility of State in paying compensation and restoring the status of victims of the crimes. The emerging trends of *Parens patriae* principle requires intervention of the State for the betterment of deprived. At such a point of evolutionary social responsibilities, it becomes inevitable for the States to answer the claim of victims. But the systematic development of law relating to compensation, similar to law developed for the protection of interest of the accused of a crime, was something less than required during earliest period. This tendency imbalanced the level of protection provided for victim of crime and accused.

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100 *See* for *e.g*., Art.38 of the Constitution of India, 1950, Art.12 (1) (1) of the Austrian Constitution, 1920, Art. 21 (1) of the Constitution of Greece 1975, Art.33 and Art.34 of the Constitution of Indonesia, 1945, Art. 45 of the Constitution of Ireland, 1937

101 Art.43 (11) of the Constitution of Gambia, 2019

102 For *e.g.,* Art.40 of Latvian Constitution 1922 has plugged oath of the president of the nation with welfare of the people. It says: The President, upon taking up the duties of office, at a sitting of the Saeima, shall take the following solemn oath: "I swear that all of my work will be dedicated to *the welfare of the people of Latvia*. I will do everything in my power to promote the prosperity of the Republic of Latvia and all who live here. I will hold sacred and will observe the Constitution of Latvia and the laws of the State. I will act justly towards all and will fulfil my duties conscientiously"

Notwithstanding, enactment of various legislations for the protection of rights of the victim and the stipulations as to the liability of the criminal to pay compensation to victim of crime, there are ample opportunities to demonstrate that compensatory jurisprudence of the country is still under evolutionary status.

The Constitution of India injected welfarism to State to a great extent.[103] In fact, this welfare policy was the integral part of the ancient India.[104] As added efforts to the mandate of Cr.P.C,[105] the victim compensation jurisprudence has been stretched by the government to address the grievances of the victims of crime in true sense. The Central Victim Compensation Fund (CVCF) Guidelines, 2016 notified by the Ministry of Home Affairs; government India prefigure the commitment of the federal government in complementing State government efforts.[106] These guidelines are intended to support, supplement State schemes and to reduce disparity in quantum of compensation. The scheme furthered the endeavour of the State government by providing financial support to victims of sexual offences such as rape, acid attacks, crime against children and human trafficking etc.In the backcloth of observation of Hon'ble Supreme Court of India in *Nipun Saxena* v. *Union of India*,[107] the NALSA framed comprehensive rules to Compensation Scheme for women Victims/ Survivors of Sexual Assault/other Crimes, 2018 and same is remarkably contributed in strengthening status of woman against sexual offences. The subsequent order of the Supreme Court in *Nipum Saxena*[108] case in sensitising the Special Court under POSCO in considering the compensation

103 *See* part IV, Art.36 to 51 A of the Constitution of India, 1950

104 *Supra* note 57 at 35

105 *Supra* note 97

106 No.24013/94/Misc./2014-CSR.III, Government of India/Minister of Home Affairs, 13th July 2018

107 WRIT PETITION (CIVIL) NO. 565 OF 2012, order dated 11th May 2018

108 *Id*, order dated 5th September 2018

for victims of crimes under POSCO has topped up the compensatory jurisprudence in India.

Despite all these developments and achievements, absence of special law, the statistics, success and crisis rates, lethargic attitude on the parts of the implementing authorities clearly indicate the stalemate of the system in mapping existing civilised system with prudent historical accounts. That's where our system shall be sensitised and streamlined in view of the rich heritage and legacy of the victim compensation jurisprudence.

International Legal Framework for Search and Rescue at Sea: Scripting New

Dr. Binu Mole K*

Introduction

The marine environment constitute more than 70% of the surface of the earth[1]. The duty of seafarers on board vessels while traversing the oceans to provide assistance and help has been recognized since time immemorial. Similar obligation has received recognition as an international principle under generally accepted measures adopted by the global community and International Maritime Organization (IMO), the specialised agency of United Nations for regulation of Shipping. Many casualties of the seas that happened during the beginning of 19th and 20th Centuries led to deliberations on studying existing arrangements in this regard. It was found that the existing duty to render assistance need to be redefined and an international Search and Rescue system need to be formulated in order to organise, co-ordinate and conduct rescue measures at sea involving Coastal states and flag states.

The main focal point of international efforts is to make search and rescue operations based on effective co-ordination plans. Hence the UN

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1 Button, Rick, *International Law and Search and Rescue,*(2017) 70(1) NAV. WAR COLL. REV 9(2017) https://digital-commons.usnwc.edu/nwc-review/vol70/iss1/4 (last visited May 24,2022)

Convention on Law of the Seas, or the "Constitution of the Seas' supplemented by special measures for promoting Safety of life at sea[2], for rendering salvage services[3], globally accepted search and rescue norms[4] and prevention of collisions[5]lays down the basis for the current regulatory scheme. Moreover, the international plan for coordinating the conduct of maritime lifesaving operations Some maritime regions did have coastal states that implemented robust, effective, national SAR systems, while others had very limited or no SAR resources or coordinating structures to render assistance to persons in distress. Even though the duty to render assistance to people in distress in sea has been recognised as an international norm underlying the law of the seas and it has developed through specific obligations relating to salvage operations, collisions and search and rescue initiatives, still the limitations with the present framework thwarts the noble intention to save lives which is a moral duty also[6]. This paper is an attempt to study and analyse the current legal framework which is outspread in different international documents in an effort to bring forth the limitations of the scheme and suggest improvements.

Regulatory framework for search and rescue at sea : An Overview

Vessels or ships traversing the seas are considered as the eyes and ears of the global SAR system. Within the seas, it is ships that receive first hand information of casualties and persons in distress. As a matter of practice, the crew usually respond quickly to extend lifesaving services every day in the world's oceans, and generally welcome the opportunity to save lives

2 International Convention on Safety of Life at Sea,1974 UNTS 1184 https://www.refworld.org/docid/46920bf32.html (last visited July 7, 2022]

3 International Convention o Salvage, 1989 Treaty Series No. 93 (1996) https://www.pravo.unizg.hr/_download/repository/1989_Salvage_convention.pdf

4 International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS https://www.refworld.org/docid/469224c82.html (last visited July 7, 2022]

5 Convention on the International Regulations for Preventing Collisions at Sea, UNTC.1050-I-15824

6 *Supra* note 7, at 18

and as such they are treated as first in the array of people to render assistance. The international conventions addressing the issue of search and rescue also formally acknowledge and envisage this important duty of ships and ship masters to render assistance to persons in distress at sea. Compliance with this duty is essential to preserving the integrity of the global SAR system[7]. These major regulatory measures buttressed by international customary law[8] prescribing obligation to render assistance lay the foundation of the legal framework on search and rescue at sea. This duty can be studied with respect to the framework for governance of the seas established under the United Nations Convention on the law of the seas (UNCLOS) and specific international conventions adopted by the IMO to give effect to the duty to render assistance.

The UNCLOS, 1982 & Obligations to render SAR Assistance

The United Nations Convention on the Law of the Sea (UNCLOS) is the basic international framework that prescribes for the duty of ship masters to render assistance to persons in distress[9]. As per the convention, every State shall require the master of a ship flying its flag, in so far as he can do so without rendering serious danger to the ship, its crew and passengers, to render assistance to any person found at sea in danger of being lost. The mandate under UNCLOS requires vessels intending to do service to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; and after a collision, to render assistance to the other ship, its crew

7 *Id*

8 For an overview of international Customary law , *see* United States v Hasan and ors, No 2:10cr56, ILDC 1586 (US 2010) www.unicri.it/(last visited July 10.2022)

8 See Felicity G Attard "*Limitations on the Duty to Render Assistance at Sea under law of the sea International Law'* in 1 ASCOMARE YEARBOOK ON THE LAW OF THE SEA (2021)

9 See Felicity G Attard *"Limitations on the Duty to Render Assistance at Sea under law of the sea International Law'* in 1 ASCOMARE YEARBOOK ON THE LAW OF THE SEA (2021)

and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

The obligations under the UNCLOS are addressed to the flag state; which must ensure that any ship flying its flag renders assistance to persons in distress at sea. Moreover, UNCLOS does impose this obligation on the flag state to require masters to comply with the duty to render assistance. The ship master has the duty to render assistance "so far as he can do so without serious danger to the ship, the crew or the passengers'. The duty to assist in distress is widely considered to represent the customary international law and therefore also binds states that have not ratified the treaties in question[10]. Second, Article 98(2) UNCLOS obliges coastal states to organise search and rescue services and capacities (in the following 'SAR services') and to enter into regional arrangements wherever necessary. A laudable part of UNCLOS is that it also create an a duty for the flag states to require masters of ship under its flag to comply with article 98.

The Search & Rescue Convention, 1979 - A Specific International Initiative

In addition to UNCLOS, more meticulous obligations are laid down in the International Convention on Maritime Search and Rescue (SAR Convention), 1979[11]. The SAR Convention established an internationally constituted system to co-ordinate and conduct SAR operations and to regulate SAR processes and procedures. The convention was brought in to make maritime search and rescue services more comprehensive and extend it to all maritime regions[12]. Towards this end, oceans and seas are divided into Search and Rescue Regions by agreement among the states who are

10 See also Commander's Hand Book(US) at 20; ICJ Statute, Article 38(1) (b), describes customary international law as "a general practice accepted as law' www.icj-cij.o. (last visited Sept 25, 2022)

11 *Supra* note 4

12 International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS https://www.refworld.org/docid/469224c82.html (last visited Set 25,2022)

parties to the convention. These agreements are to be sent to the International Maritime Organization (IMO) which then publishes them as Search and Rescue Circulars. Under the SAR Convention, each coastal state is also duty bound to establish a search and rescue service within their Search and Rescue Region. Apart from basic elements like search and rescue resources (e.g. rescue vessels and equipment) and communication facilities in order to receive distress calls and coordinate search and rescue operations, a SAR service must also initiate measures to adopt a legal framework which clarify the authorities who are responsible for search and rescue and which rules apply to their organization and operations[13].

The IMO has also developed IAMSAR manual[14] in association with ICAO to assist vessels and aircraft in the performance of a search, rescue that pertain to emergencies. It is intended to be carried on board rescue units, aircraft and vessels used in rendering services during SAR operations. This is in addition to Guidelines on the Treatment of Persons Rescued at sea adopted in 2004.These Manual and Guidelines in effect lay own the common standards for the enforcement of SAR convention in the member states.The SAR Convention provides for a framework for organization, co-ordination and conduct of SAR operations within SAR maritime regions. Even though effective SAR services cannot be stipulated severally it is indispensable that coastal states must work closely and develop region based SAR plans and cooperative arrangements inn such a manner to implement regional SAR systems based on the foundation scheme prescribed in the SAR Convention.

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13 International Convention on Maritime Search and Rescue, Art 2 27 April 1979, 1403 UNTS https://www.refworld.org/docid/469224c82.html (last visited July 2, 2022) Art 2

14 IAMSAR Manual cscc.org.cn/upload/file/20190102/Doc.9731-EN%20IAMSAR%20Manual%20%20International%20Aeronautical%20and%20Maritime%20Search%20and%20Rescue%20Manual%20Volume%20III%20-%20Mobile%20Facilities.pdf(last visited July 2, 2022)

SAR Obligations as part of Maritime Safety Operations

The Safety of Life at Sea (SOLAS) Convention of 1974 is yet another international measure adopted by the IMO which proved instrumentalin the moulding of SAR responsibilities[15]. The Convention lays down that the master of a ship at sea which is in a position to be able to provide assistance, on receiving any information from that persons are in distress at sea, is duty bound to proceed with all speed to their assistance, if possible conveying them or the search and rescue service that the ship is initiating an assistance. This obligation to provide assistance should be initiated regardless of the nationality or status of such persons or the circumstances in which they are found. In circumstances where the ship receiving the distress alert is unable or, in the special conditions of the case, believe it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the explanation for failure on their part to proceed to the assistance of the persons in distress, taking into account the advice of the Organization to inform the appropriate search and rescue service accordingly.

SAR Obligations as Part of Salvage Operations & Collision Regulations

Further the value of search and rescue operations as part of the Salvage operations have[16] also been emphasized as the duty on the part of every master of ship to be bound so far as he can do so without danger to his own vessel and persons on board, to render assistance to any person in danger of being lost at sea. Duties regarding enforcement of similar duty addressed in early conventions are set out in the Salvage convention also. The owner of the vessel will not incur any liability for a breach of the duty of the master to render assistance in circumstances where there is a chance for the ship and crew to be placed in undue peril if attempt is made to render assistance.

15 Chapter V, regulation 33, SOLAS Convention, IMO, SOLAS, 268 (2009)

16 Article 10 , Salvage Convention, 1989

The Collision regulations[17] also prescribe duties on the part of master of ships in the event of collision between two ships to render assistance to crew and passengers[18]. Here also the duty of master is to render assistance without endangering his ship, crew and passengers, if any and render to the other ship, its master, crew and passengers (if any) such assistance as may be practicable and necessary to save them from any danger caused by the collision[19]. The master is also duty bound to stand by the other ship till such time it is ascertained that no further assistance is required by her.

Challenges of International Search & Rescue Mechanism-

Absence of Sanctions to guarantee SAR assistance by Military and State owned Vessels

The fundamental concern here is that, in actual practice the the SAR operations are set in and controlled by the state owned vessels and military vessels. The law concerning SAR and the shipmaster's duty to render assistance to persons in distress try to carve insist on the same duty of vessels under governmental control. The complex nature of military operations at sea means that diverting a warship to assist in a SAR operation and embark survivors can pose a challenge, particularly when attempting to coordinate survivor disembarkation with a coastal state's SMC and while conducting a maritime SAR operation can be difficult for a warship during peacetime, it can be even more complicated during armed conflict.

In national law dealing with SAR responsibilities, the state of law strikes a quite different cord[20]. Under US law, the duty for shipmasters to

17 International Regulations for Preventing Collisions at Sea, (COLREGS) 1972

18 Cockroft, N. *'Collision Regulations: the Argument Against Radical Changes at the Present Time*' in MARITIME COLLISION AND PREVENTION (Zhao, J. et. al.eds,1996)

19 S.MANKANBADY, THE LAW OF COLLISION AT SEA 275(1985); *See generally Some Facts and Figures*' in MARITIME COLLISIONS AND PREVENTION (Zhao, J. et. al.eds,1996)

20 United States Code (USC); 46 USC § 2304(a)(1)

render assistance requires a master or individual in charge of a vessel to render assistance to people in distress in sea does prescribe additional penalty and imprisonment for deviating from this duty to render SAR assistance.[21] The Navy regulations in US also prescribe for similar obligations[22].But these regulations does not apply to military vessels and ships owned by the sates, at the same time ensure compliance by providing for sanctions for non compliance.[23]

In addition to military authorities, in national jurisdictions, enforcement of laws of the seas in areas or waters is largely a matter falling within the jurisdiction of Coastguard authorities.[24] These authorities shoulder the primary duty to give assistance to persons in distress. At the same time the different authorities of coastal states will also be roped in to render SAR services in the event of an incident demanding the SAR assistance.[25] Many often the success rate of such services is dependent on the effectiveness of Co-ordination among the authorities involved with the service[26] and the adequateness of efforts to co-ordinate national legislation and authorities yielding power from them.

In UK for instance the responsibility of SAR operations is a combined responsibility of many institutions established under different statutory provisions. The responsibility for the overall provision of national civil aeronautical and maritime SAR and its policies in UK is exercised by Department for Transport (DFT)initiated through its Aviation Airspace

21 United States Code (USC); 46 USC § 2304

22 U.S. Navy Regulations (1990), article 0925 (Assistance to Persons, Ships and Aircraft in Distress)

23 *Id*

24 46 CFR Chapter1 (US), Coast Guard Act (India),Sec, 1978, Coast GuardAct, 1925

25 See Strategic Overview of Search And Rescue in The United Kingdom of Great Britain& Northern Ireland https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593127/mca_uksar.pdf (last visited July 3, 2022)

26 *Id*

Division (AAD) and Maritime and Coastguard Agency (MCA)[27]. However the designation of adequate resources to respond to civil aeronautical and maritime SAR, and the co-ordination of response, falls primarily on maritime coast guard agency acting through HM Coastguard.Her majesty's Coastguard share its responsibility for the initiation and co-ordination of civil maritime and aeronautical SAR.But the inspiring part of UK approach is that in overall, there is clear integration with police authorities, fire and rescue authorities and other agencies whose role is quite integral to the resounding of an effective SAR response[28].

In harbour and ports, the overall burden for maritime SAR response and coordination is vested with HM Coastguard[29].And in the event of an alert or notification by a harbor Authority, the HM Coastguard will involve closely with support and aid from the harbor authority in coordinating the SAR phase of any Distress incident within the harbor limits.

Place of Safety & Scope for Minimization of impact to saving Ships -Some Hurdles

Cordial relationship between the shipmaster and the coastal state is another factor that occupies a critical position as far as the strength of the global SAR system is concerned. While the shipmaster has the duty to render assistance to persons in distress, the coastal statesare obligated to coordinate the SAR operation effectively without posing any hindrance to the shipmaster and the responding vessel. In the absence of such a harmonious and co-operative relationship, a ship has limited incentive to render service in situations of similar nature in future also. In solidarity with this, the SAR

27 https://committees.parliament.uk/publications/9005/documents/159002/d (last visited July 3, 2022)

28 Id, UK report p.9 seeFire and Rescue Services Act 2004; Fire (Scotland) Act 2005; the Fire and Rescue Service Northern Ireland Order 2006; the Fire and Rescue Services (Emergencies) (Wales) Order 2007; and the Fire and Rescue Services Emergencies (England) Order 2007 for the duties of Fire and rescue authorities in these states

29 WANG C. PRINCIPLES AND PRACTICES TOWARDS SAR [SEARCH AND RESCUE] SERVICES: A COMPARATIVE STUDY ON STATES APPROACHES TO IMPROVING MARITIME SAR. (2006)

convention also mandate that Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by rendering assistance and embarkation of persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea.The state authorities responsible for the search and rescue region in which such assistance is rendered shall also take lead role and play active part in such coordination and co-operation, so that survivors of the operation are disembarked from the assisting ship and delivered to a "place of safety'.[30] The "place of safety' mentioned here is also an important concept in the global SAR system for the coastal state and also the ship master. 'Place of Safety as per the IAMSAR Manual is a location where rescue operations are considered to terminate; where the survivors' safety of life is no longer threatened and where their basic human needs such as food, shelter and medical needs can be met; and, a place from which transportation arrangements can be made for the survivors' next or final destination. A place of safety may be either on land, or it may be on board a rescue unit or other suitable vessel or facility at sea which can serve as a place of safety until the rescued survivors are disembarked at their final destination[31].

Another obligation that is discernible while identifying a place of safety is that it should be coordinated between the shipmaster and the coastal-state authorities responsible for coordinating the SAR operations. It must always be noted that priority should be to minimize the impact on the ship which rendered rescue services and the survivors on board.Considering the mitigation of delay and deviation necessitated following the SAR operations, a place of safety need not be necessarily a location that is most advantageous to the survivors but it must be an appropriate one considering the interests

30 Annex to SAR Convention, 1979; *See* also Rick Button, *International Law and Search and Rescue* 70(1) Nav. War Coll. Rev**.** (2017) https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1032&context=nwc-review (last visited July 21,2022)

31 *See* for definition of "Place of safety" 1THE IAMSAR MANUAL xiii

of salvage rendering vessel an salvage operations. But real facts support that the international mandate in SAR convention and its manual tends to keep the obligation and also authority on the Coastal States and service rendering vessel most often lack the potential to assert their say in this respect and they are put to jeopardy. The coastal state should be cordial in coordinating disembarkation, should also take into account the number of survivors rescued, the ship's estimated time of arrival at its next port of call, the survivors' condition, and other factors relevant to facilitate hassle free sailing for the rescuing vessel. In fact, the coastal state need to respect the shipmaster's decision and coordinate disembarkation of survivors in an expedient manner.[32]Governments have to coordinate and cooperate to ensure that Masters of ships providing assistance by rescuing persons in distress at sea are released from their obligations with minimum procedures and delay as further deviation from the ships intended voyage, delay will create issues for them.[33]

Having analysed the role of vessels, place of safety and state interests in the SAR scheme it is disappointing to note that the present legal framework does not offer any safeguards to ensure its prompt compliance. According to the scheme incorporated under the SAR convention & operating Manuals, if either the coastal state or the shipmaster fails to carry out its obligations under international law, the global SAR system will become ineffective.And there is no sanction if shipmaster ignores persons in distress because of the potential time delay and logistical challenges associated with rescuing the survivors, or if the coastal state does not fulfill its obligation to coordinate SAR operations within its maritime SAR region. Hence even though both the shipmaster and the coastal state are responsible

32 International Chamber of Shipping *Shipping Industry Calls on Governments to Address Migrants at Sea Crisis* www.ics-shipping.org/ (last visited June 24, 2022)

33 *See* also UNHCR,*Rescue At Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants* (2015) https://www.unhcr.org/publications/brochures/450037d34/rescue-sea-guide-principles-practice-applied-migrants-refugees.html (last visited June 24,2022)

for saving lives at sea and giving effect to SAR schemes, there is lack of sanctions to ensure its prompt compliance.

Under the scheme established under the SAR Convention, a state has the responsibility to implement the global SAR system.[48] To accomplish this mandate, the coastal state has to formulate a national SAR system that effectively co-ordinating SAR operations to render assistance when information regarding persons in distress is given to them. If it is found that the most effective SAR resource available in a compelling situation necessitating SAR operation is a merchant ship or any other ship best appropriate to render the assistance and aid The SMC shall issue a direction to divert the ship to rescue lives. As the shipmaster fulfills this duty to render assistance to persons in distress, he has an expectation that the coastal state will execute its own obligation to assist in coordinating the landing of survivors rescued at sea to a 'place of safety' or refuge at the same time try to minimize the impact on his ship and its further proceeding on voyage. During the handling of the operations the SMC should do everything possible to limit the deviance of a ship from its usual course to assist persons in distress.In circumstances where a particular ship is the only SAR resource available the authorities must take utmost care to reduce the difficulties to saving vessel and allow it to resume duties. However, diversion of a merchant ship in particular should be limited, if at all possible. Additionally, the SMC should always reconsider ever diverting a merchant ship from its intended port of call to a different port to disembark rescued survivors. Because such a diversion can cause significant logistic and liability challenges for the ship, shipping company, and shipping agent. Usually SAR exercises may be challenging for the SMC, because of necessity for efforts to coordinate survivor landing and disposition with another coastal state.And the global SAR system will benefit when the shipmaster is assured that the SMC will take efforts to minimize the impact on his ship's intended voyage in the event of assistance events.

State domination/ Orientation of SAR Related Operations under Current SAR Framework & its Implications

International Law relating to maritime search and rescue operations is much dominated by state oriented measures as states are considered as the epitome of the SAR scheme. The merit of this practice underlying SAR operations is a real issue now-a-days, considering the overwhelming responses from Non Governmental Organizations while states often fail to extend effective response. The United Nations Convention on the Law of the Sea that forms the bedrock of ocean governance also presupposes this approach towards responses to casualties[34]. Moreover UNCLOS scheme consider states as competent entities throughout its provisions and consider states duty to invoke response measures related to search and rescue operations. This stance to consider state as the subject of international law and the epitome of all marine related operations is also supported by evolving trends in judicial reasoning in this regard[35].Under international law the scope of areas of operation as well as means at their disposal are attributed to states and activities concerning rescue operations are usually a monopoly of the State. And, the benchmark governing the operation of such agencies is determined by considering ordinary marine activities.

Further the entire SAR regime is planned to guarantee to achieve effective search and rescue results. The solemn objective underlying SAR framework remains to mitigate loss of life. This necessitates speedy arrival and response to distress calls[36]. The UNCLOS provisions also require captains to proceed with all possible speed to the rescue of persons in

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34 Javier A. Gonzalez Vega, *In the Name of Solidarity and Human Values: Rescue Operations at High Seas by NGOs vs. the International Legal Order* 23 SYBIL 248-262,250(2019) https://www.researchgate.net/publication/338836125_IN_THE_NAME_OF_SOLIDARITY_AND_HUMAN_VALUES_RESCUE_OPERATIONS_AT_HIGH_SEAS_BY_NGOS_VS_THE_INTERNATIONAL_LEGAL_ORDER/citation/download (last visited July 22,2022)

35 Transarctic and Fast Independence Incidents.

36 II IAMSAR Manual (n 14), sections 1.6.1 and 3.1

distress, if informed of their need of assistance[37]. The mandate of SAR Convention also obliges any search and rescue unit to take immediate action. But the existing legal framework designed to retain dominating status to state authorities and control restricts them from acting once instructions are issued by them. This can further result in swift response to SAR calls in the absence of effective co-ordination efforts. Such instances frequently are reported. As in a case involving NGO vessel Sea Watch which arrived at a distress scene in response to a call from MRCC Rome and took on the on-scene coordination of all assets present with an Italian and a French warship, an Italian helicopter under agreement. However, the Libyan Coast Guard issued counter instructions interrupting on-scene rescue coordination and execution by the NGO, which actually led finally to loss of life[38].

Effectiveness of SAR operations must always attach importance to prevention of loss of life. The concern or this objective seldom stands appreciated in law governing SAR operations and practices followed by coastal states. The IAMSAR Manual advises that the person in charge of the first search and rescue resource to arrive at the scene and assume the lead in co-ordination of SAR operations[39]. But his guideline has undergone change in 1998 to further strenthen the role of coastal and governmental authorities. In ordinary circumstances compared to government vessels and mechanism NGO vessels are mostly the first ones to arrive and appear to be most suited to assume on-scene coordination because of their preparedness and commitment to human safety.NGO crews typically have the operational expertise and capabilities to take on on-scene coordination responsibilities. On the other hand, experiences with coastal state authorities very often make media headlines for lack of proper capabilities, expertise, and professionalism in dealing with on on-scene coordination of SAR measures.

37 UNCLOS, art 98(1)(b)

38 Comprehensive video footage of the incident <www.Youtube.com/watch?v=/_phI-f_yFXQL> (last visited June 26, 2022)

39 *Supra* note 31 at section 2.6.1.;*Supra* note 36 at section 1.2.4

Conclusion

As long as shipping and seafaring exist, there is need to extend lifesaving services to those who need assistance. The Article has examined the legal framework of their search and rescue activities. The international law of the sea sets out an obligation to render assistance to persons in distress at sea. There exist obligation to render assistance to those in distress at sea under the governance framework and other specific conventions adopted to ensure safety of life at sea, prevention of collissions and for rendering salvage.

Despite the existence of these initiatives international SAR system promotes uncertainty. However it is commendable to note that the current scheme developed does provide a mechanism for notification and initiating responses to persons in distress at sea. But recent practices pertaining to current legal framework support and facilitate domination by state-owned military vessels and warships. The uncertainty in the legal norms for state co-ordination and initiation of assistance actually works to impede the scope for immediate response to marine incidents and requests for humanitarian help by distressed seamen. It is high time that considering the value of human life, the present legal framework particularly UNCLOS and SAR convention should transform and evolve to accept the role of NGO's in the task of rendering assistance and rescue services. The SAR framework need to undergone paradigm shift by redefining the responsibility of authorities to include nongovernmental organization as well. Another outstanding feature of SAR framework and also the vice of existing SAR system is the undue sate domination of activities starting from co-ordination to culmination state of SAR operations is the state domination.

Ships plying the world's oceans are largely the key contributors to the global SAR system. They are normally enthusiastic and willing to come to the aid of those in distress. When ships render assistance in a SAR operation, the SMC must work with the ship master to coordinate the response and delivery of the survivors to a place of safety, thereby limiting the impact on

the ship master. Additionally every effort should be made by the nation's maritime authorities coordinating such assistance to provide for the easy sailing of service rendering vessels without much hassles so that vessels and their masters will be motivated to render assistance to distressed people at sea. Further place of refuge or safety is yet another matter to receive priority among coastal states towards augmenting the duty to extend helping hand to those in distress. Coastal states must also be encouraged as of now the requirement to provide for and notify place of refuge or safety is effected only few states like the UK. If the suggestions carved out from the discussions made are made definitely, the current scheme of SAR services can be changed to make it a prospective and bountiful exercise for saving life of people in distress at sea.

The PMLA, 2002 in the context of Vijay Madanlal Choudhary Case

Dr. Krishna Murari Yadav*

Introduction

The Vienna Convention, 1988 encouraged the world to prevent money laundering laws .The Financial Action Task Force (FATF) is an independent inter-governmental body which makes policies and takes actions to prevent money laundering.[1] This body was constituted in 1989. Political Declaration and Global Programme of Action[2] was adopted by General Assembly on February 03, 1990.[3] It was mainly related to narcotics drugs and psychotropic substances. There was a demand for the cooperation of all countries to tackle such problems. UN General Assembly adopted the 'Political Declaration' in its Special Session from June 08 to 10th, 1998 and requested Members to adopt money laundering legislations and programs in their country.

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1 The FATF Recommendations, 2022. https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last visited October 10, 2022)

2 https://www.unodc.org/documents/commissions/CND/Political_Declaration/Political_Declaration_1990/1990_Political_Declaration_and_Programme_of_Action.pdf (last visited October 10, 2022)

3 Upendra Baxi, *PMLA and its Discontents*, THE INDIAN EXPRESS, August 03, 2022

India, in compliance of these international conventions, enacted the Prevention of Money-Laundering Act, 2002. Parliament enacted this law by using powers conferred under Article 253. Money laundering is a threat to the financial systems of countries and to their integrity and sovereignty.[4]

India has amended its laws many times on the recommendation of the FATF.[5] The United Nations Convention against Transnational Organized Crime was convened in Palermo, Italy, on 12-15 December 2000. It came into force in 2003.

The Prevention of Money-laundering Bill was introduced in Lok Sabha on August 04, 1998. Hon'ble Speaker referred the matter to the Standing Committee on Finance. After incorporating the recommendations of the Standing Committee, the Government introduced the Prevention of Money Laundering Bill 1999 in Parliament on October 29, 1999. It came into force on July 01, 2005.[6] This Act has been to a certain extent influenced by the Criminal Justice Act of the United Kingdom.[7] Offences under the PMLA are independent and as well as continuing offences. It can be inferred from section 2(p).[8]

The Act was amended in 2005, 2009, 2013, 2015, 2016, 2018 and 2019. Finance Act, 2019, amended this Act. Rajya Sabha MP Mr. Jairam Ramesh challenged this in High Court. High Court rejected this and he filed an appeal to Supreme Court.[9] The matter is pending before Supreme Court.

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4 Ramaraju v. Union of India, 2011 SCC Online AP 152

5 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.2022 LiveLaw (SC) 633 at para 36

6 Nikesh Tarachand Shah and Ors. v. Union of India and Ors., (2018) 11 SCC 1https://main.sci.gov.in/supremecourt/2017/13393/13393_2017_Judgement_23-Nov-2017.pdf (last visited March 21, 2022)

7 Orissa High Court decided Mohammad Arif v. Directorate of Enforcement, Govt. of India on July 13, 2020

8 *Id*

9 Krishnadas Rajagopal, *Prevention of Money Laundering Act: Supreme Court seeks Centre's view on Jairam Ramesh's petition*, THE HINDU, July 02, 2020

Mr. Chidambaram submitted that prior to 2015, the PMLA was amended on various occasions through the procedure for Ordinary Bills as defined under Article 109 of the Constitution. However, post-2015, the Act has been amended through Money Bills.[10] This is not good for a healthy democracy.

The Act is a special law.[11] The total sections are 75. There is one Schedule. There are three parts of this Schedule, namely: Part A, Part B and Part C. These Parts have been divided into Paragraphs. Part A contains the name of 29 laws. It is applicable to some parts of these enumerated laws. Part B contains only one Act. The name of this Act is The Customs Act, 1962. Part C covers offences related to laws mentioned under Part A that have cross-border implications. For example, if an offence is related to the NDPS Act and it is wholly related to India, it will come under Part 1. But if it has related to other countries, it will become under Part C.

Objects of the PMLA, 2002 can be assessed with the help of the Statement of Objects and Reasons of the Act, Preamble of the Act and leading judgments. These objects of the Act are to prevent money-laundering, confiscate proceeds of crime to fulfil international obligations[12] and to protect financial systems of the country and its integrity and sovereignty.[13]

The problems related to black money is increasing day by day. This provoked the Supreme Court to pass an order in Ram Jethmalani and Ors v. Union of India[14] for constitution of SIT headed by Hon'ble Justice Mr.

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10 *Id*

11 Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, E.D., (PMLA) Govt. of India, Division Bench , Supreme Court: Date of Judgment – December 16, 2015, https://main.sci.gov.in/judgment/judis/43201.pdf (last visited March 20, 2022)

12 Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, E.D., (PMLA) Govt. of India, Division Bench , Supreme Court**:** Date of Judgment –December 16, https://main.sci.gov.in/judgment/judis/43201.pdf (last visited March 20, 2022)

13 *Supra* note 6

14 Ram Jethmalani and Ors. v. Union of India (2011) 9 SCC 761. https://main.sci.gov.in/judgment/judis/38154.pdf (last visited Mar 21, 2022)

B.P. Jeevan Reddy as Chairman. Thus SIT was constituted on the grounds that the Government had totally failed to implement the PMLA, 2002 properly and effectively.

Politics and its negative face has worsen the situation in India and this is evident from the various information processed and revelaed.[15]There are allegations that often leaders of opposition parties are harassed by Central Agencies in the guise of the PMLA. Cases have risen fourfold during the present regime, and out of these cases, 95% of cases are against leaders of the opposite party.[16] Enforcement agencies must perform for the protection of economic growth and integrity of the nation rather than as a political worker of a party. The time has come to implement this law professionally.

Money laundering is always in news. Actions were taken under this Act against Mr. P. Chidambaram and Maulana Saad Kandhalvi, leader of Tablighi congregation. Mr. P. Chidambaram and his son were arrested in INX Media Case. Supreme Court granted regular bail to Mr. P. Chidambaram on December 04, 2019 and reminded the E.D. that bail is still the rule and jail is an exception.

Rhea Chakraborty was booked under PMLA in the *Sushant case*.[17] Officials said the Enforcement Case Information Report (ECIR), equivalent to the police FIR, has been registered in the case related to the actor's death and alleged irregularities suspected to have been committed to divert his finances. The E.D. registered ECIR against Rhea and her family members on July 31, 2020 for suspicious transactions worth rs. 15 crore.[18]

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15 Deeptiman Tiwary, Since *2014, 4-fold jump in E.D. cases against politicians; 95% are from Opposition*, THE INDIAN EXPRESS, September 21, 2022. Available at: https://indianexpress.com/article/express-exclusive/since-2014-4-fold-jump-in-ed-cases-against-politicians-95-per-cent-are-from-opposition-8163060/ (last visited Oct 01, 2022)
Rhea booked under PMLA in Sushant case, THE TRIBUNE, July 31, 2020

16 *Id*

17 *Id*

18 https://www.theleaflet.in/why-is-rhea-chakraborty-being-questioned-under-the-prevention-of-money-laundering-act/ (last visited Nov 21, 2020)

Arrest of Mr. Nawab Malik, NCP Leader and Cabinet Minister, under Money Laundering case is the most recent arrest by E.D. under Money Laundering in February 2022.[19]

Supreme Court in *Vijay Madanlal Choudhary & Ors v. Union of India & Ors*.[20] upheld the constitutional validity of many provisions of the Prevention of Money-Laundering Act, 2002. A review Petition had been filed against this judgment and it is pending before the Supreme Court now.

Need for Combating Money-Laundering

Economic offences are more serious than murder.[21]Several times, crimes are committed for money. The illegal business of drugs, human trafficking, arms dealing, poaching, and adulteration of foods illegally involves the collection of huge amounts of money. Terrorism and wage war depend upon black money. In several times, it has been observed that black money is used for winning elections, and it is a direct attack on basic tenets of democracy. It is also a threat to the Indian economy and sovereignty of a nation. It leads to bribery. In the case of money laundering, Government deprives of the collection of taxes. If Government is unable to collect taxes, it will hamper the development of the nation. For example, Government will be unable to provide scholarships, salaries, and subsidies for food, agriculture, oil etc.

Demonetization of Indian currency was done on November 08, 2016 to break the chain of money laundering. From the above discussion, it becomes very clear regarding the need for combating money laundering.

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19 Khushboo Narayan & Sadaf Modak, *Nawab Malik arrested by E.D. in connection with money laundering case against Dawood Ibrahim',*INDIAN EXPRESS, February 24, 2022. https://indianexpress.com/article/cities/mumbai/nawab-malik-ed-dawood-ibrahim-money-laundering-case-7786639/ (last visited Mar 20, 2022)

20 https://main.sci.gov.in/supremecourt/2014/19062/19062_2014_3_1501_36844_Judgement_27-Jul-2022.pdf (last visited Oct 09, 2022)

21 State of Gujarat v. Mohanlal Jitamalji Porwal & Anr.(1987) 2 SCC 364

In *Nikesh Tarachand Shah and Ors.v. Union of India and Ors*.[22]the Supreme Court cited the "Statement of Objects and Reasons' of the Act and observed that money laundering is a serious threat not only to the sovereignty and integrity of the nation but also an economic condition of the country.

There are several problems arise due to money laundering. These are – (1) Governments become unable to trace the source of such money. So it is not in a position to impose a tax. The Government of any country runs by taxes. (2) It helps illegal activities and the commission of crimes. (3) Finally, it destroys the economic condition of the country.

The preamble of The Prevention of Money-Laundering Act, 2002[23] itself denotes the reason of the enactment of the Act. This Act was enacted to fulfill international obligations aroused from the 'Political Declaration and Global Programme of Action' 1990 adopted by the U.N. General Assembly on February 23, 1990. Special Session was conducted in June 1998, and all countries were requested to enact laws to prevent money laundering in their respective countries.

Salient features of the PMLA, 2002

The Supreme Court in the case *Binod Kumar v. State of Jharkhand*[24] decided on March 29, 2011 decided that the PMLA would spring into action if there was any issues relating to money laundering. In this case, the matter was registered under the IPC, 1860 and the P.C. Act, 2002 against the former Chief Minister and Ministers on the direction of a Special Judge (Vigilance). CBI started an investigation. This case was registered for misusing public office and getting huge amounts of unaccounted money, and investing in multi-states and multinationals. An investigation by CBI was challenged in

22 *Supra* note 6

23 https://www.indiacode.nic.in/bitstream/123456789/2036/1/A2003-15.pdf (last visited Mar 20, 2022)

24 (2011)1 SCC 463, https://main.sci.gov.in/judgment/judis/37801.pdf (last visited November 25, 2020)

Jharkhand High Court through Writ Petition. The High Court dismissed the writ petition. In this case, Supreme Court upheld the decision of the High Court and held that CBI could make investigations in such cases. The reason for the decision of the case was that there was unaccounted money, but there was no involvement in money laundering. There are the following salient features of the PMLA, 2002 which are following –

1. The PMLA, 2002, applies to the whole territory of India. It was enacted in 2003 and came into force on July 01, 2005. The total sections are 75. There is one Schedule. It is a special law.

2. Parliament amended the Act by the Finance Act, 2019.[25]After Amendment in 2019, money-laundering is an independent offence. Before 2019 Amendment, search, and seizure was not possible under this Act unless other agencies submitted FIR or charge sheet. This was pre-requisite. By the Finance Act, 2019,sub-section (1), the proviso of section 17 was omitted. Before 2019 Amendment, a search of persons was not possible under this Act unless other agencies submitted FIR or charge sheet. This was a pre-requisite. By Finance Act, 2019, the proviso of section 18 was omitted.

   This Amendment omitted provisos of Sections 17 (1) & 18 (1). The effect of this is that there is no pre-requisite for registration of an FIR or charge sheet by other agencies for taking actions under Section 17 and Section 18.[26]

3. Section 24 provides a rebuttable presumption of law regarding a person charged for an offence under Section 3 of the PMLA that proceeds of crime are involved in money laundering. In the case of any other person, there is a rebuttable presumption of fact. There is a presumption of guilt, and the burden of proof lies on the accused to prove his innocence. According to Section 45, offences under this

25 http://egazette.nic.in/WriteReadData/2019/209695.pdf (last visited Nov 21, 2020).

26 Devesh K Pandey, *Changes in PMLA Act empower E.D.*, THE HINDU, August 09, 2019.

Act are cognizable and non-bailable offences. It contains a 'twin test' for getting bail.

4. According to Section 44, offences under this Act are tried by Special Courts. The procedure of trail will be like the procedure of session trial under the CrPC. If a prosecution is based on a scheduled offence, and the accused had been discharged from that scheduled offence, such an accused cannot be prosecuted under the PMLA. Supreme Court discussed this point in *Parvathi Kollur & Anr. v. State by Directorate of Enforcement*.[27] In this case, accused no. 1 was prosecuted under the Prevention of Corruption Act, 1988. During the pendency of trial, E.D. registered a case against the accused, his wife and his son. Special Judge (Lokayukta) acquitted Accused no. 1 from the Prevention of Corruption Act charges. The Trial Court discharged the wife and son from charges under the PMLA. The Court said that the commission of scheduled offence is a pre-condition for prosecution under the PMLA. High Court set aside the discharge order of the trial court. Wife and son, i.e. appellants approached to the Supreme Court. The Court applied the ratio of *Vijay Madanlal Choudhary Case*[28] upholding the decision of the trial court and setting aside the decision of the High Court.

   The PMLA, 2002 is a special law. In case of inconsistency with general law for example, IPC and CrPC, PMLA will prevail.[29] Combined reading of Sections 65 and Section 71 of PMLA, 2000 and Section 5, CrPC, PMLA will prevail over CrPC.[30] Combined reading of Section 71, PMLA and Sections 5 and Section 41, IPC, PMLA will prevail over IPC.

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27 Parvathi Kollur & Anr. v. State by Directorate of Enforcement , 2022 LiveLaw (SC) 688

28 Vijay Madanlal Choudhary & Ors v. Union of India & Ors., 2022 LiveLaw (SC) 633, at Para 187

29 Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, E.D., (PMLA) Govt. of India , Division Bench, Supreme Court**:** Date of Judgment –December 16, 2015 https://main.sci.gov.in/judgment/judis/43201.pdf (last visited Mar 20, 2022)

30 *Id*

5. Any confession made to senior E.D. officers will be relevant. Such confession will not be irrelevant under section 25 of the Indian Evidence Act. The reason of this is that E.D officers are not police.[31]

Meaning of Money Laundering

Launder means washing and ironing clothes. Laundering means to conceal the origins of (money obtained illegally), typically by transfers involving foreign banks or legitimate businesses. Money laundering is a process of concealing or disguising the identity of the proceeds of crime so that it appears that such money has come through a legal process.[32] Money laundering is a process in which black money is converted into white money. In other words, tainted money is converted into untainted money. It is a way to hide illegally obtained money. It is frequently a component of other, much more serious ones.[33] Money laundering words became very famous when criminals in the USA started to convert illegal businesses into legal businesses at large levels in 1980.

Standing Committee on Finance (2008-09) in its 18th Report[34] said that the process of money laundering involves the cleansing of money earned through illegal activities like extortion, drug trafficking and gun running etc. The tainted money is projected as clean money through intricate processes of placement, layering and laundering.

According to Section 2 (p) of the Prevention of Money-laundering Act, 2002, "money-laundering' has the meaning assigned to it in section 3 of the Act. The Explanation was inserted in 2019. The person who manipulates this money is called a "launderer'. Section 3 covers not only those persons

31 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.,2022 LiveLaw (SC) 633, Para 176. Supreme Court decided this case on July 27, 2022

32 https://www.interpol.int/Crimes/Financial-crime/Money-laundering (last visited Nov 21, 2020)

33 *Id*

34 https://www.prsindia.org/sites/default/files/bill_files/scr1229936804_SCR_Prevention_of_Money_Laundering_Bill.pdf (last visited Nov 20, 2020)

who are directly and knowingly involved in concealment, possession, acquisition etc., of proceeds of crime but also who are indirectly and unknowingly involved. Parliament amended the Act in 2019 and inserted an Explanation. This Explanation makes clear that projection as untainted property is not necessary. Word 'or' has been used in Explanation after use and before projecting as untainted property. Supreme Court in *Vijay Madanlal Choudhary & Ors v. Union of India & Ors*.[35]discussed the meaning of money-laundering and said that projection of proceeds of crime as untainted property is not necessary. The Court further said that 'and' used in the definition must be read as 'or'. The Court said that if projection as untainted property will be makes requirement, the object of the Act will be frustrated. The Court said that if 'and' will be read to denote two requirements of Section 3, the whole Act will be frustrated. The Court gave one example. One person will possess property collected from committing a crime and his friend will project that property as untainted property, neither will be covered under Section 3 of the PMLA Act.[36]

The Supreme Court interpreted 'and' as 'or' and supported this interpretation with the help of ratio in *Sanjay Dutt v. State through C.B.I., Bombay (II)*[37],*Ishwar Singh Bindra & Ors. v. The State of U.P*.[38] and *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd*.[39].

Supreme Court in *the Sanjay Dutt Case* interpreted 'arms and ammunition' used in Section 5 of the TADA Act. The Court interpreted these words in the context of the object of the Act and said that conjoint reading of these words would frustrate the object of the Act. The Court held

35 https://main.sci.gov.in/supremecourt/2014/19062/19062_2014_3_1501_36844_Judgement_27-Jul-2022.pdf (last visited Oct 09, 2022)

36 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.,2022 LiveLaw (SC) 633, Para 41

37 Sanjay Dutt v. State through C.B.I., Bombay, (II) (1994) 5 SCC 410

38 Ishwar Singh Bindra & Ors. v. The State of U.P, (1969) 1 SCR 219

39 Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd , (2008) 4 SCC 755

that 'and' must be read as 'or. It means the Court substituted 'arms and ammunition' with 'arms or ammunition'. The Court said that otherwise one accused will carry arms, and another accused will carry ammunition, and both accused will escape from the provisions of the TADA Act.

The Government of India had also given assurance to FATF that Indian Supreme Court can interpret 'and' as 'or' in case of need. Explanation inserted in 2019 also makes clear that 'and' must be read as 'or'. It is the demand of the PMLA.

Process of 'Money-Laundering'

With the help of the Report and the decision of the Court, it can be said that there are three processes of 'Money-laundering'. Standing Committee on Finance, in its 18th Report, said that three steps are followed in money–laundering. These steps are placement, layering and laundering. In *Mohammad Arif v. Directorate of Enforcement, Govt. of India*[40] , Vijay *Madanlal Choudhary & Ors v. Union of India & Ors.*[41]and *B. Ramaraju v. UOI*, the Courts observed that act of money laundering involves the process of placement, layering and integration of "proceeds of crime'.

Collection of dirty money is called proceeds of crimes. Once this dirty money is placed in the banking system, it is called placement. Even investing such money in other places is called placement. There are many examples of this, but it is not possible to write every example. When money is withdrawn in a different mode, it is called layering. After layering of property, when the property is purchased with the help of such money, it is called laundering.

Constitution of SIT

Division Bench of Supreme Court decided on July 04, 2011.. Ram Jethmalani and many other eminent scholars filed a writ petition under

40 Orissa High Court decided this case on July 13, 2020

41 *Supra*, para 44

Article 32 on the grounds of violation of Article 14 and Article 21 of the Constitution, Petitioners quoted the name of Hassan Ali Khan and its allies against whom E.D. had closed the case in 2007. Petitioners argued that black money is a symbol of weaknesses in the governance and such money is a threat for security and integrity of India. Governments and their agencies are ignoring this.

The division bench of the Supreme Court in *Ram Jethmalani and Ors. v. Union of India*[42], did not discuss even a single provision of the PMLA, 2002. In this case, Supreme Court expressed its dismay over the Government for not taking proper actions for prevention and taking back black money. The Court passed an Order to establish a 'Special Investigation Team (SIT), and it was directed to disclose the name of persons who have deposited their money in foreign countries. The Court said that every account in another country should not be taken as dubious accounts. It was directed that names of those persons must not be disclosed with respect of which investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available. Hon'ble Supreme Court framed two issues in para 21 of the judgment. These two issues and their replies are the followings –

(i) Whether Special Investigation Team (SIT) should be appointed to investigate 'black money? The Court replies positively. The Court constituted SIT. Hon'ble Mr Justice B.P. Jeevan Reddy was nominated as its Chairman, and Hon'ble Mr. Justice M.B. Shah as Vice-Chairman. This Committee was to submit a report and be responsible to the Supreme Court. Members of the High-Level Committee constituted by the Government shall be its members.

(ii) Whether certain documents relied upon by the Union of India in its response should be provided/ disclosed to the Petitioners. The Court replies positively. But the Court said that name disclosure should be subject to certain conditions.

42 Ram Jethmalani and Ors. v. Union of India ,(2011) 9 SCC 761. https://main.sci.gov.in/judgment/judis/38154.pdf (last visited Nov. 24, 2020)

Relation between the PMLA and the CrPC

Division Bench of the Supreme Court delivered the judgement in *Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, E.D., (PMLA) Govt. of India*[43] on December 16, 2015. Hon'ble Justice Pinaki Chandra Ghose wrote the judgment. In this case, the Court observed that the PMLA is a 'special law' and the CrPC is a general law. Relation between the PMLA and the CrPC was discussed elaborately.

Gautam Kundu was the Chairman of Rose Valley Real Estate Construction Ltd., situated in West Bengal. This case was related to bail. Rose Valley Chit Fund Case is related to the collapse of the 'Ponzi Scheme'. This scam rocked West Bengal in 2013. Many politicians of TMC were arrested in connection with this case, including sitting M.P. Tapas Pal and Sudip Bandyopadhyay.[44]Enforcement Directorate (E.D.) estimated Rs 17,520 crore in this scam. The Appellant was arrested on March 2015 for a commission of an offence under section 3 of the PMLA.

Hon'ble Justice Pinaki Chandra Ghose observed at para 28 that the PMLA is a special law and the CrPC is a general law. According to Section 5 of the CrPC, it will not override the special law. Section 65 and Section 71 make clearer that PMLA will override general law. In this case, Supreme Court was dealing with the relation between Section 45, the PMLA and Section 439 CrPC. Section 45 of the PMLA starts with a non-obstante clause. A combined reading of Section 5 of the CrPC and Sections 45, 65 and 71 of the PMLA makes it clear that provisions of the PMLA have an overriding effect in case of inconsistency. But if there is no inconsistency between the PMLA and the CrPC, provisions of the CrPC will be applicable in matters of the PMLA. So provisions of section 45 of the PMLA will be applicable even if the bail application is given under section 45 of the CrPC.

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43 https://main.sci.gov.in/judgment/judis/43201.pdf (last visited March 20, 2022)

44 https://www.firstpost.com/politics/sudip-bandyopadhyay-arrested-all-you-need-to-know-about-rose-valley-chit-fund-scam-3187490.html (last visited Mar. 20, 2022)

The Court accepted that presumption under section 24 is constitutional and it is the responsibility of the appellant in this case to disprove this presumption. It means the presumption is against the accused and the accused has the option to disprove it.

Supreme Court in *Vijay Madanlal Choudhary & Ors v. Union of India & Ors*., para 137, discuss the relationship between the PMLA and the CrPC. and the basis of Sections 45, 65 and 71 of the PMLA and Section 5 of the CrPC and concluded that in case of inconsistency, the PMLA will prevail.

BAIL under the PMLA

Section 45 of the PMLA says that offences under this Act are cognizable and non-bailable offences. Supreme Court discussed section 45 of the PMLA and Section 439, the CrPC in *Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, E.D., (PMLA) Govt. of India*[45]. Many writ petitions and appeals were filed regarding the constitutional validity of Section 45 of the PMLA. Supreme Court heard these writ petitions and appeals in *Nikesh Tarachand Shah and Ors. v. Union of India and Ors.*[46]decided on November 23, 2017. In this case, Section 45[47]of the PMLA, Sections 437 and 439, the CrPC and Articles 14 and 21 of the Constitution of India were involved. Supreme Court discussed the statement of objects and reasons of the PMLA, the meaning of 'Money Laundering', history of bail. The Court declared two conditions mentioned in section 45(1) (ii) as a violation of Articles 13(2), 14 & 21 of the Constitution of India and directed Courts to release all persons whose bail had been rejected on the basis of these two conditions. Section 45 imposes twin tests if the offence is coming under Part A of the Schedule and is punishable for more than

45 https://main.sci.gov.in/judgment/judis/43201.pdf (last visited Mar. 20, 2022)

46 (2018) 11 SCC 1 https://main.sci.gov.in/supremecourt/2017/13393/13393_2017_Judgement_23-Nov-2017.pdf

47 Section 45(1) imposes two conditions for the grant of bail where an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule to the Act is involved

three years. The first condition is that the public prosecutor must be given opportunities to oppose the application and the second condition is that the Court must satisfy on the basis of reasonable grounds that the accused is not guilty of such offence and he will not commit an offence while on bail. The Supreme Court said that two conditions applied only to those offences which are punishable more than three years and mentioned in Part A of the Act. It had no nexus with the objects.

Parliament amended Section 45 in 2018[48]and removed the grounds on the basis of which the Supreme Court nullify some provisions of Section 45 in *Nikesh Tarachand and Ors. v. Union of India and Ors*. "Punishable for a term of imprisonment of more than three years under Part A of the Schedule' was substituted by 'under this Act' by the 2018 Amendment w.e.f. April 19, 2018. Now two conditions are applicable to all offences under the PMLA.[49]. This Amendment was challenged.

This case was thoroughly discussed in *Vijay Madanlal Choudhary & Ors v. Union of India & Ors.* In para 118 of the judgment, the Court observed that unconstitutional provisions had been validated by Amendment with retrospective effect. The anomalies noted in *Nikesh Tarachand Shah Case* have been removed by the 2018 amendment. It can be concluded that the ratio of *Nikesh Tarachand Case* had been overruled by the 2018 amendment. Supreme Court accepted this Amendment as constitutional in *Vijay Madanlal Case*. The Court further said in para 139 of the judgment that twin conditions of Section 45 of the PMLA would be applicable to ordinary bail as well as anticipatory bail.

Judgement in P. Chidambaram v. Directorate of Enforcement[50] was delivered on December 04, 2019 by the full bench comprising of Hon'ble

48 https://egazette.nic.in/writereaddata/2018/184302.pdf (last visited Oct 10, 2022)

49 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.,2022 LiveLaw (SC) 633, at. Para 121

50 P. Chidambaram v. Directorate of Enforcement ,(2019) 9 SCC 24 . https://main.sci.gov.in/supremecourt/2019/41156/41156_2019_5_1501_18764_Judgement_04-Dec-2019.pdf (last visited Nov. 20, 2020)

Justice R. Banumathi, Hon'ble Justice A.S. Bopanna and Hon'ble Justice Hrishikesh Roy. Mr. P. Chidambaram was arrested in INX Media Case. The Directorate of Enforcement registered the Enforcement Case Information Report [ECIR] under section 3 of the Prevention of Money Laundering Act, 2002, punishable under section 4 of the said Act.

Hon'ble Supreme Court granted bail and observed at Para 21 of the judgment, that bail is rule, jail an exception, is also applicable in PMLA cases. But power of anticipatory bail should be applied sparingly in economic offences.

Enforcement Directorate

Money-laundering effects the unity and integrity of India. It is a serious issue not only for India but also for other countries. It is increasing day by day. It was realized in post twenty century. The Government of India authorized Enforcement Directorate' to implement provisions of the Prevention of Money-laundering Act, 2002. Under Section 45 (1A) says that any police officer shall not investigate unless he is authorized by the Government of India by general or special order. This provision will prevail over the CrPC. There is no express provision to investigate offences under the PMLA, 2002 by 'Enforcement Directorate' (in short E.D.). Section 49 (1), the Act empowers the Government of India to authorize any agency to investigate offences under the PMLA. The government of India by using power given under section 49 (1) of the PMLA issued the Notification[51] on July 2005. The Notification says that the Director of Enforcement holding office immediately before the said date under the Foreign Exchange Management Act, 1999 shall work under the PMLA also. Supreme Court in *Binod Kumar v. State of Jharkhand*[52] observed the following important points -

1. Enforcement Directorate has sole and exclusive power to investigate offences under the PMLA.

51 This Notification is available at: https://dea.gov.in/sites/default/files/money launderingrule.pdf (last visited November 25, 2020)

52 Binod Kumar v. State of Jharkhand, (2011)1 SCC 463. https://main.sci.gov.in/judgment/judis/37801.pdf (last visited Nov 25, 2020)

2. In this case, CBI was investigating offences under the IPC and the P.C. Act, 2002. The CBI was not investigating offences under the PMLA, 2002. So there was no interference in the arena of E.D.
3. Facts of the cases related to corruption. In this case, there were corruption cases, but there was no involvement of laundering cases. There is a difference between getting money through corruption and laundering money through corruption.
4. Supreme Court justified the investigation by CBI and upheld the decision of the High Court. The appeal was dismissed.

Officers of the Enforcement Directorate are not police officers.[53] Confession made to officers of E.D. shall not be hit by section 25 of the Indian Evidence Act, 1872. Any statement under Section 50 to E.D. officers will not hit Article 20 (3).[54] Under Section 50, Authority has power as civil Court has power. At this stage, he is not accused.[55] The process envisaged under Section 50 is in the nature of inquiry rather than investigation in a strict sense.

Attachment & Adjudicating Authority

Section 5 to Section 11A deals with attachment and adjudicating Authority. Section 5 makes a balance between the interest of the person and ensures that proceeds of crime must be available during the investigation/ inquiry.[56] There are many safeguards have been provided under section 5. Only a higher authority, i.e. Director or authorized Deputy Director, can issue a 'Provisional Attachment Order' (in short 'PAO'). He must satisfy the twin condition mentioned in sub-section (1) section 5. There must be a reason to believe that the person is in possession of the proceeds of the crime, and he is likely to transfer or conceal such proceeds. Such attachment is only for a fixed duration, i.e., one hundred and eighty days.[57]

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53 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.,2022 LiveLaw (SC) 633

54 *Id*

55 *Id*, at paras 153 & 154

56 *Id*, at para 187

57 *Id*, at para 287

There are two types of attachment, namely 'Provisional Attachment' (Section 5 & Section 8 deals with its adjudication) and 'Final Attachment'. E.D. issues a 'Provisional Attachment Order' (in short 'PAO') and makes a 'provisional attachment. Provisional attachment order continues during the investigation for up to 180 days. After making a provisional attachment, the Director of E.D. shall file a complaint to 'Adjudicating Authority' within 30 days from the day of the attachment.[58]Once 'Adjudicating Authority' confirms 'PAO', such attachment shall continue up to three hundred and sixty-five days during an investigation or till the pendency of the case.[59]

For this purpose, the Act provides a three-tiered process and procedure before an order of confiscation; (a) provisional attachment under Section 5(1) by Director or authorized officer by him; (b) confirmation of provisional attachment under Section 8 (3) by the Adjudicating Authority, and (c) a final order of confiscation under Section 8 (6) by the Adjudicating Authority.

During provisional attachment, a person is allowed to enjoy the immovable property. Interested persons shall not be deprived of enjoying the immovable property.[60] When the bungalow of Mr. P. Chadambaram was attached, his family members were allowed to continue residence.

PAO becomes final after the order of confiscation is passed by Special Court under section 8 (5) or (7) or section 58B or Section 60 (2A), the PMLA.

Andhra Pradesh High Courtdecided B. Rama Raju v. Union of India (UOI), Ministry of Finance, Department of Revenue and Ors.on March 04, 2011. This case is known as Satyam Computer Scam Case.In this case, the attachment of property and its adjudications were discussed.

B. Rama Raju @ B. Ramalinga Raju confessed on January 07, 2009. CBI registered FIR for a commission of offences under Section 120-B read with Sections Sections 406, 420, 467, 471, 477-A of the IPC.

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58 The Prevention of Money-laundering Act, 2002, Section 5 (5)

59 The PMLA, 2002, Section 8 (3)

60 The PMLA, 2002, Section 5 (4)

FIR registered by CBI revealed commission of offence i.e. Section 467, the IPC. Section 467, the IPC comes under the category of Scheduled offence. The ED registered case against Sri B. Ramalinga Raju and others under the PMLA. The Deputy Director, Enforcement, passed the provisional attachment order dated 18.8.2009, purportedly under Section 5 of the Act, in respect of immovable and movable properties, including shares of companies.

The Deputy Director, Enforcement, filed Application No. 38/2009 on 15.9.2009 before the Adjudicating Authority against 132 defendants. Adjudicating Authority issued notice to all accused on 15.9.2009. Adjudicating Authority passed an order on November 20, 2009.

In this case, Section 2 (1) (u), 5, 8, 23 and 24 of the PMLA were challenged on the basis of violation of Articles 14, 20, 21 and 300A of the Constitution of India. Six issues (A to F) were framed and replied to by the Court. High Court rejected all arguments and held that all these provisions were constitutional.

The property of a third person can be attached. Generally, a person hides his property by giving property to his close relatives or persons. Many times it may be that a relative or person may not know that property is proceeds of crimes. But there is a loss to the country. There are two types of proceeding under the Act. One is related to conviction of committing offences under Section 3 which is punishable under section 4. Another is related to attachment and confiscation, which proceedings have been mentioned under Chapter III of the Act. The first category of proceeding is related to crimes which cannot come into force with retrospective effect. The second type of proceeding is related to the civil nature. It can be applied with retrospective effects. The Court further said that for the purpose of attachment and confiscation, neither mens rea nor knowledge is necessary that property is proceeds of crime. The reason of this is that attachment and confiscation is of civil and economic nature, and it is not penal sanctions.[61]

61 B. Rama Raju v. Union of India (UOI), Ministry of Finance, Department of Revenue and Ors.on March 04, 2011

Supreme Court in *Vijay Madanlal Choudhary Case*[62] held that person can also enjoy between confirmation of a 'provisional attachment order' and formal order of confiscation of property. Direction under Section 8 (4) to take possession without passing formal order of confiscation should be an exception. It should not be a rule.[63] Whether a case is of exceptional nature or not will be decided by an appellate court rather than a court of writ jurisdiction.[64]

Section 8 (4) of the PMLA authorizes the Director or any other officer to take possession of the property to take possession against which 'provisional attachment order' has been passed. Rule 5 of the Prevention of Money Laundering (Taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority), Rules, 2013 provides that once the Adjudicating Authority confirms the attachment of immovable property, the authorized officer has to issue a notice of the eviction of ten days. If he does not evict, the authorized officer can dispossess him. A victim person can file an appeal against the decision of Adjudicating Authority under Section 26 of the PMLA within 45 days.

Section 8 (4) uses 'forthwith'. It denotes that authority can take immediate action, and there is no need to wait expiry period of appeal prescribed under Section 26. Order of confirmation passed by 'Adjudicating Authority' is like a decree of a civil court which is executable when it is drawn.[65]

ECIR *vis-a vis* FIR

Officer-in-charge of the police station is bound to register FIR under Section 154, the CrPC, regarding cognizable offences except in a few

62 2022 LiveLaw (SC) 633

63 *Id*

64 Syed Akeel Shah and Anr. v. Directorate of Enforcement & Ors, para 12. Jammu & Kashmir and Ladakh High Court decided this case on October 20, 2022

65 *Id* at para 11

cases.[66] There is no corresponding provision under the PMLA for the registration of information. The PMLA is sui generis legislation. [67] There is no comparison between the CrPC and the PMLA regarding prevention, investigation and trial. It is expected that before the attachment of property, Authority will make an inquiry. According to Sections 65 and 71, the special procedure will prevail over the CrPC and the police under chapter XII of the CrPC cannot register an FIR. In Vijay Madanlal case,[68] Supreme Court said that dispensation regarding prevention of money-laundering, attachment of proceeds of crime and inquiry/investigation of offences of money-laundering up to the filing of a complaint in respect of offence under Section 3 of the 2002 Act is fully governed by the provisions of the 2002 Act itself. Generally, the procedure mentioned under the CrPC will be applicable if they are not inconsistent with the PMLA. ECIR is an internal document created by the department before initiating penal action or prosecution. E.D. officers register it.

The Court observed the ECIR is not a statutory document. There are no provisions in the PMLA requiring Authority referred to in Section 48 to record ECIR or to furnish copy thereof to the accused, unlike Section 154, the CrPC. Non-recording of ECITR does not prevent Authority from investigating/inquiring for initiating civil action of attachment.[69]

The question is whether a copy of ECIR must be given during arrest or after arrest. Section 19, in compliance with Article 22, says that the ground of arrest must be informed.

Hon'ble Court in *Vijay Madanlal Choudhary Case* observed that the PMLA is a special law. The Court said that considering the complexity of

66 Lalita Kumari v. Government of Uttar Pradesh &Ors., (2014) 2SCC 1

67 Vijay Madanlal Choudhary & Ors v. Union of India & Ors.2022 LiveLaw (SC) 633, Para 176

68 *Id*

69 *Supra* note 67 at para 177

the inquiry/investigation both for the purpose of initiating civil action as well as prosection, the non-supply of ECIR in a given case could not be faulted.[70]

The Court said that the PMLA is special legislation which involves complexity of investigation / inquiry for initiating prosecution as well as civil action. So non-supply of ECIR cannot be faulted. The accused is presented within 24 hours. The Court may consider other points. Disclosure of ECIR will frustrate the object of attachment. A person may transfer property immediately.

Conclusion

Parliament enacted the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, the Fugitive Economic Offences Act, 2018, and amended the PMLA, 2002, to combat economic offences. Enforcement of the Directorate has been made more powerful by these amendments. Supreme Court decided *Vijay Madanlal Choudhary Case* and held that officers of the Enforcement of Directorate are not police. It means any statement, admission or confession can be used against the accused. The Court further held that E.D. is bound neither to give a copy of ECIR nor to upload it on the official website. The presumption under the PMLA is against the accused, and the burden of proof lies over the accused. Review petition is pending against this judgment in Supreme Court. Supreme Court followed ratio of this case in *Parvathi Kollur &Anr. v. State by Directorate of Enforcement*. Jammu & Kashmir and Ladakh High Court followed ratio of this case in *Syed Akeel Shah and Anr. v. Directorate of Enforcement &Ors.*

Economic offences are increasing day by day. Black money has become double in Swiss Bank. But the real accused are getting political patronage, and many opposition leaders are being harassed. It affects the conviction rate and gives the wrong message to the public. E.D. must act as a

70 *Supra* note 67 at Para 178

professional body. I hope that the Executive will follow suggestion of the Supreme Court given in *Vijay Madanlal Choudhary Case* and will fill the vacancies of the Appellate Tribunal .India is a source of inspiration for many developing countries. India must follow the international conventions and suggestions of FATF in letter and spirit.

Product Liablility and Consumer Protection in India

Shubham Srivastava* & Khushbu Sangwan**

Introduction

The right to Safety is one of the major consumer rights sought to be protected and promoted under the Consumer Protection Act. Every product entering the market has to meet the test of legitimate expectations of consumer safety. In cases where the product falls short of safety standards, the consequences can be very damaging. Product liability refers to the consumption accident that results from defects in a product. . Of late, the cases of defective products have been on the rise in all sectors-food and beverages, pharmaceuticals, personal care products, domestic appliances, motor vehicles, farm machinery, and many others. Traditionally, product liability cases have been taken up under the law of torts and contract law. The Indian Contract Act, of 1872 and the Sale of Goods Act, of 1930 have been the major legislations dealing with product liability to an extent. While there have been a few other sector-specific legislations as well dealing with product liability, there was no general legislation dealing with the issue. The recent Consumer Protection Act, of 2019 contains specific provisions laying down the liability for the manufacturers, sellers, and service

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providers.[1] This paper traces the historical evolution of the concept of product liability in India, discusses landmark cases and examines the provisions of product liability with reference to the Consumer Protection Act, 2019.

In simple terms, product liability is the liability of the manufacturer or a seller or service provider for an injury caused to the user which is foreseeable as a result of using the product. The law relating to product liability action not only compensates the victim but also provides accountability for retailers, manufacturers, distributors, etc. The two most important theories on which product liability action depends are a breach of warranty and strict liability.

The deliberations on product liability issues involve the basic concepts of law such as strict liability, negligence, battery, misrepresentation, breach of express and implied warranty. Product liability action is the situation where manufactured goods or services contain defects that cause harm or injury to the user. Such defective products lead to a product liability issue, wherein the injured party tries to recover compensation and damages for the loss sustained.

Any user of the defective product or service can initiate a product liability action. Anyone in the line of distribution can be considered as a proper defendant on whom the product liability action can be fixed. To make someone liable, the person should be in the process of manufacturing or selling the defective product. Every year, several people across the world are at the receiving end having incurred injury, sickness, or even death as a result of products not meeting safety standards. Though major court encounters on account of dangerous products have been mainly over tobacco products, prescription drugs, motor vehicles, and food items, the cases are not limited to these alone. The instances range from food and beverages, household appliances, toys, pharmaceutical and personal care products, sports equipment, farm machinery, and many others.

1 The CPA 2019 was passed by the Indian parliament on 6 August 2019 and received the Presidential assent on 9 August 2019

For example, *Liebeck v. McDonald's Restaurants*[2] case, one of the most talked about product liability cases in the United States, deals with failure to meet the safety standards. Stella Liebeck ordered a hot coffee from McDonald's restaurant. While she tried to open the cup to add sugar and cream, the hot coffee spilled on her, resulting in third-degree burns in her pelvic region. She had to undergo skin grafting and her treatment continued for two years. Initially, she was granted $200,000 as compensation, but as she had kept the cup against her skin and because the sweatpants she was wearing had absorbed the coffee, the compensation was later reduced to $160,000.

Nature and Scope of Product Liability Action

Before the enactment of the Consumer Protection Act, 2019 (CPA 2019), product liability as an aspect was not defined anywhere. The cases that came up before the court were decided on the principles of justice, equity, and a good conscience and in tune with English common law. One of the most interesting and landmark cases on product liability was *Donoghue v. Stevenson -*[3] *'Snail in the ginger beer' case.* The idea of product liability has been best illustrated in this case, wherein the entire chain of parties (manufacturer-wholesaler-retailer) involved in providing the product to the final consumer and their liability has been well enunciated. The case assumes great significance as it standardized the aspect of the duty of care and neighbourhood principle in cases of negligence. The case also breached the privity of contract rule and is widely regarded as a huge milestone in the development of law.

Product liability action might seem to be a new aspect incorporated within the consumer law, but in fact, it is for the first time that the law is specifically speaking of action under the title product liability. Before the

2 Stella Liebeck v. McDonald's Restaurants, New Mexico District Court1995 WL 360309 (1994)

3 Donoghue v Stevenson, 1932 SC (HL) 31

CPA 2019, the consumer interest concerning defective products and services was provided through various legislations. The High Court of Karnataka had observed that "the mere fact that there is no law on strict product liability in India cannot be taken as a hindrance to decide the claim.'[4]

The CPA 2019 consolidates all the aspects associated with product liability in one place, which is in addition to the measures present under various consumer-related legislations. The new law was enacted by taking into consideration the experience gained in the administration of the earlier CPA 1986 to meet new developments in the marketplace for products and services[5]. The scope of product liability action under the CPA 2019 is very wide. It includes liability for any harm caused due to defective products. The defect may be an inherent defect associated with the manufacturing of the product or associated with the defective service.

The CPA 2019 discusses the provisions elaborately associated with product liability. Sections 82 to 87 of the CPA 2019 discuss the nature and scope of product liability action. As per Section 82, the product liability action can be initiated by the complainant for any harm caused due to the use of the product which is defective. This section fixes the liability along with the manufacturers on the service providers also. The prerequisite for the product liability action is the harm caused by the use of the product or because of availing the services. Apart from these specific sections dealing with product liability, the definitions provided under Section 2 of the CPA 2019 determine the nature and scope of product liability action. Section 2 of the CPA 2019 defines various terms associated with product liability action, such as product, product liability, product liability action, product manufacturer, product seller, product service provider, service, defect, deficiency, design, complainant, complaint, goods, harm, injury, express warranty, etc. The purpose of incorporating and defining various terms associated with product liability action conveys the message that the CPA 2019 aims to provide utmost clarity, avoiding all possible ambiguities.

4 Airbus Industrie v. Laura Howell Linton , 1994 (5) Kar LJ 63

5 NeenaAneja and Ors. v. Jai Prakash Associates Ltd, AIR 2021 SC 1441

The terms 'Service' and the 'Service Provider' which are defined in the CPA 2019 provide very wide scope to the product liability action. The term service includes all the paid services which include services such as banking, finance, insurance, transportation, telecommunication, lodging or boarding, or both, construction, entertainment, amusement, etc. Free services are not included within the definition.[6]

Deficiency Defect and Harm

The product liability action is to compensate the user who suffers harm or an injury because of using a defective product or service. The term 'harm'[7]includes (i)any loss or damage to any other property other than the product itself, (ii)personal injury, illness, and death, (iii)mental agony or emotional distress attendant to personal injury or illness or damage to property; or any loss of consortium or services or other loss resulting from a harm referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii). Similarly, the term 'injury'[8] is defined in such a way that it includes the injury associated with body, mind and property. The wide meaning of the terms 'deficiency' and 'defect[9]' as defined in the CPA 2019 increases the scope of product liability action. The term defect includes the imperfections and the shortcomings of a product or service in terms of quality, quantity, and standards which are very much expected under any other law or as per the express and implied terms conveyed to the user of the product or service. The term deficiency also includes negligence, omission, or deliberate withholding of relevant information.[10]

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6 Consumer Protection Act, 2019, §2(42), Act No.35 Acts of Parliament, 2019(India)

7 Consumer Protection Act, 2019, § 2(22), Act No.35 Acts of Parliament, 2019(India)

8 Consumer Protection Act, 2019, § 2(23), Act No.35 Acts of Parliament, 2019(India)

9 Consumer Protection Act, 2019, § 2(10), Act No.35 Acts of Parliament, 2019(India)

10 *Id*

The Complaint and the Complainant

Under the CPA 2019, the term 'complainant' means a consumer, or any voluntary consumer association, or both central and state governments, or the central authority, or the guardian, or the legal heirs of the deceased consumer. The only requirement is that the complainant needs to make his complaint in writing in order to claim any of the remedies provided under the Act.

"Any allegation made by a person falling within the scope of the definition of 'complainant' for obtaining any relief provided by or under the Act that the goods bought by him or agreed to be bought by him suffer from one or more defects or that the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency would constitute a complaint in terms of the provisions of the Act.'[11]

Fixing the Liability

The liability associated with the harm or injury caused is identified with the manufacturer, seller, and with the product service provider.

A manufacturer is made liable if the product contains a defect associated with manufacturing or design, product not as per specifications, not as per the terms of express warranty, or warning defect. The scope of product liability action as per the CPA 2019 is much wider compared to the concept of product liability under the US jurisprudence, which is limited to manufacturing design defect and warning defect. The CPA 2019 has adopted a strict and absolute liability concept concerning product liability action. The manufacturers cannot avoid liability on the ground that they were not negligent or had not acted with fraudulent intention.[12]

By the American jurisprudence, there can be three specific kinds of defects which can be the subject matter of an injury caused to a consumer: manufacturing defect, design defect, and warning defect. A defect on account

11 P and N Ceramics (Pan Marketing) Pandarakalam Buildings v. Issac Sebastian, WP(C) NO. 18091 OF 2021

12 Consumer Protection Act, 2019, § 84, Act No.35 Acts of Parliament, 2019(India)

of manufacturing is identifiable based on a comparison with same line products in the market. Every manufacturer has to ensure that a product is duly tested before it enters the market. Generally speaking, most of the defects will be noticeable at this stage itself.

Design defects, on the other hand, will not be isolated occurrences as such. A design defect by its very nature is such that all individual items in the entire lot will be defective too. For example, a blunt knife serves no commercial purpose. Thus, unlike the manufacturing defect, here the products of the concerned manufacturer are weighed against products in a similar line of production of another manufacturer. Thus, the emphasis here is on industry standards as opposed to the manufacturer's standard in manufacturing defects. The manufacturer is duly bound to issue sufficient and reasonable warnings to the potential users. The duty extends as to product usage, dos and don'ts concerning usage, action in case of malfunction, etc. The rationale is to ensure that the consumers are on a par with the manufacturer as to information about the product.

Similarly, the CPA 2019 provides for liability associated with defective product service providers. Inadequacy in quality, the nature of performance, the act of negligence, the act of omission, and withholding of any information, etc., which are the proximate causes for the harm, are brought within the purview of product liability action. It further includes liability for not issuing adequate instructions or warnings associated with the product or service which would avoid possible harm to the user. The service providers are even liable for not confirming the terms of conditions and express warranty.[13]

Further, the product seller is made liable even if he is not a manufacturer or a service provider if the seller of the product happens to exercise substantial control in designing, testing, packaging, labeling of the product, which is the proximate cause for the harm or injury sustained by the user

13 Consumer Protection Act, 2019, § 85, Act No.35 Acts of Parliament, 2019(India)

of the product or service. The seller can be made liable even for the alteration or the modification of the product or the services which results in harm to the user.[14] *In MacPherson v. Buick Motor Co*.[15], a 1916 case from the United States, judge Benjamin N Cardozo removed the requirement of privity of contract for duty in negligence actions. As per the facts of the case, Donald MacPherson was driving his sick neighbor to a hospital when the wooden spokes on the rear wheel on the left side of his Buick car got crushed. As a result, the car collapsed throwing MacPherson. The wheel which had given way was procured by Buick from another company and Buick claimed the defense of absence of privity of contract. The New York court did not allow this defense and decided in MacPherson's favor. The court held that the company had failed in its duty to exercise due inspection. The company is responsible for the product on offer and the liability does not extinguish just because it had purchased the wheels from a well-known manufacturer.

The House of Lords in *Donoghue v. Stevenson*[16] an English tort law case, held that the manufacturer owed a duty of care to reasonably foresee that a failure to ensure the product's safety would lead to harm to the consumer.

Similarly, even in Australia in *Grant v. Australian Knitting Mills*[17], the manufacturer Australian Knitting Mills, was also held to be negligent in failing to take due care in garment preparation. Grant had purchased two pairs of woolen underwear from John Martin & Co-the retailer. The retailer was into the business of selling goods of this description and accordingly was held liable for damages due to acute skin disease suffered by Grant after wearing the underwear.

The seller is also liable for implied and express warranty and also for providing additional express warranty, apart from the express warranty

14 Consumer Protection Act, 2019, § 86, Act No.35 Acts of Parliament, 2019(India)

15 MacPherson v. Buick Motor Co., 217 NY 382

16 Donoghue v. Stevenson, [1932] UKHL 100

17 Grant v. Australian Knitting Mills, (1936) AC 85

provided by the product manufacturer or the product service provider, in all such cases where it becomes the reason for harm or injury to the user[18]. For example, in *Frost vs. The Aylesbury Dairy Co. Ltd[19].,* the defendants being dealers in milk provided milk to the plaintiff. The milk supplied by them contained typhoid germs. The wife of the plaintiff consumed the said milk and died as a result. The milk dealers were held to be liable for damages. It is natural that in case of any food item or provisions for ready human consumption, the responsibility on the part of seller for ensuring safety is even greater. Such items must meet the test of wholesomeness and be fit for human consumption, even though the fault is not an obvious one.

In addition to these, a seller is also liable for the product liability action for all harms caused to the consumers where the manufacturer of the defective product is not known. The seller is even liable for not passing the proper instructions associated with the usage of the product which happens to be the approximate cause of the harm sustained by the user of the product[20]. There is a change from negligence to strict liability, which means the existence or nonexistence of negligence on the part of the manufacturer or service provider is not a ground to avoid liability.[21]

In *Adams v. Bullock[22]*, it was observed that the companies cannot be expected to protect against all that is a possible occurrence. That will be very unfair and unrealistic to expect from the companies. This holds, even more, when the cost of preventing it is excessive. This judgment laid the foundation for a cost-benefit analysis of the risk of harm, the extent of injury, and the cost of preventing it. In this case, the defendant operated a trolley system that was powered by overhead wires. At one point in the system, a

18 *Id* at 12

19 Frost v. Aylesbury Dairy Co., [1905] 1 KB 608

20 *Id* at 12

21 John W Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. LJ 825. (1973)

22 Adams v. Bullock, 227 N.Y. 208

railroad bridge crossed over the trolley wires. The bridge had an 18-inch wide wall on each side and the bridge was over four-and-a-half feet higher than the trolley wires. Plaintiff, a 12-year-old boy, was crossing the bridge while carrying an 8-foot wire. The boy's wire dangled over the edge of the bridge and hit the trolley wires, causing a shock and resulting in burns to the plaintiff. The plaintiff sued the defendant, alleging negligence. The court held that the party cannot be held liable as they had taken all reasonable precautions and the accident was not foreseeable.

Similarly, in *Henningsen v. Bloomfield Motors*, Inc.[23] the plaintiff purchased a four-wheeler from the defendant who was the dealer for the said car. After the use of the car for just 10 days, it was noticed that the steering wheel was malfunctioning and resultantly the wife of the plaintiff was injured in an accident. On being sued by the plaintiff for the malfunctioning steering wheel, the dealer referred to the clause in the warranty that freed it from personal injuries. It argued that the warranty extends only to defective parts. The court however held the manufacturer and dealer liable and laid down that there is an implied warranty of safety with every subject matter of the sale. In addition, it also rejected the contention that they did not have privity of contract with the plaintiff's wife. The court held that the implied warranty of safety extends to every foreseeable user of the product.

Recently , the US Court of Appeals in *Heather R. Oberdorf & Anr. v.Amazon.com Inc.* [decided on July 3, 2019] has held that Amazon would be treated as a seller in cases where the third-party vendor is untraceable on the ground that Amazon exerts substantial market control over product sales[24]. The High Court of Delhi has also observed that sale on e-commerce platforms of unauthorized, tampered products is not permissible[25].

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23 Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (NJ. 1960)

24 Amway India Enterprises Pvt. Ltd. and Ors. v. IMG Technologies Pvt. Ltd. and Ors., 260 (2019)DLT 690

25 *Id*

If the consumer forum arrives at the finding that the product is defective or any of the allegations of the complainant concerning service, unfair trade practice, or claim for product liability is proved, the consumer forum may inter alia direct one or more of the following: removal of the defect, replacement of the product, return of the price paid by consumer along with interest, compensation to the consumer, including punitive damages for negligence, discontinuation of unfair trade practices, withdrawal of hazardous or unsafe goods, direction to cease to manufacture hazardous goods orcease to offer for sale hazardous services, compensation for product liability action, and cease from issuing misleading advertisement or direction to issue corrective advertisement. Since the CPA 2019 aims to provide enhanced protection to consumers, it accordingly provides for more stringent punishments compared to the erstwhile Act.

Limitations of Product Liability Action

The CPA 2019 also provides for limitations on the product liability action. Like, the manufacturers of the product and the service providers, who are made liable to pay compensation to the user who sustains harm or injury due to defective product or service, a user of the product or the service is made liable for the harm or injury if it resulted due to his negligence or not following the instructions appropriately[26]. The user of the product will not be compensated if it is found that the user has sustained harm or injury because the product or service is misused, altered, modified, or is used in a manner that is not warranted. Further, the manufacturer of the product or the product or service provider is not made liable for failure to issue appropriate instructions or warnings about the dangers associated with the products or services which are very much obvious or are commonly known to the users or consumers of such product[27].

26 Consumer Protection Act, 2019, § 87, Act No.35 Acts of Parliament, 2019(India).

27 *Id*

In the *McDonald's case*, the plaintiff came up with ample evidence suggesting McDonald's coffee is being served around 180-190°F, making it not just hot but seriously hot!! On the other hand, McDonald's did have a warning posted for its hot coffee. Hot coffee surely brews better. It is true that there have been hundreds of reported complaints against this hot McDonald's coffee, but also over a million cups have got sold over the years which surely put up a case of market acceptance[28].

There needs to be a level playing field on the aspect of product liability by requiring the need for care and caution from consumers too. The exceptions provided in Section 87 of the Act address the issue to an extent. These provisions of the CPA 2019 protect the interests of the consumers along with protecting the interests of product manufacturers and product service providers. The CPA 2019, along with protecting the interests of consumers, has taken due care to prevent misuse of the provisions of consumer legislation by including the limitations on product liability action.

Product Liability: The Way Ahead

It is interesting to note that Section 2(35) of the Act defining product liability action provides that it is a complaint filed by a person, whereas Section 83 of the Act dealing with Product Liability Action provides that a product liability action may be initiated by a complainant. The use of the word 'person' in Section 2(35) and 'complainant' in Section 83 conveys different interpretations. The word 'person' is defined in Section 2(31) and complainant is defined in Section 2(6) of the Act. The CPA being socio-welfare legislation is in recognition of the power imbalances between the product manufacturers and service providers and consumers and thus seeks to protect and empower consumers as the weaker party. In the landmark case of *Laxmi Engineering Works v. P.S.G. Industrial Institute*, the Supreme Court laid down the direct nexus test. It is not the value of goods but the purpose for which it was purchased that matters.

28 SHERROW VICTORIA, PRODUCT LIABILITY-POINT COUNTER POINT (2010)

The legislative intent is to deny the benefit of the legislation to those who have bought the goods to pass it further by resale or intend to use it in a profit-making venture on a large scale. These are therefore left out from the definition of consumer under the Act. It remains to be seen how the courts interpret the provisions relating to product liability concerning B2B transactions as the word 'person' in Section 2(31) includes companies as well.

Conclusion

At present, in India, there are not many product liability-related litigations, but at the same time, we should appreciate that in the case of such litigations, effective and adequate adjudicatory bodies are being recognized under the CPA 2019. In case of insufficiency of the provisions of the CPA 2019, a consumer may look forward to civil courts for adjudication of their dispute. The CPA 2019, no doubt, provides adequate measures to safeguard the consumers' interests concerning product liability actions. The provisions are general and do not make specific regulations sector-wise. Along with the provisions of present consumer legislation, there is a need to issue sector specific guidelines. For example, in the contemporary world, there are malpractices associated with the health sector, financial technologies, tobacco industry, etc. There is a need to give special emphasis to these sectors. It is further suggested that along with the compensation, the consumer law should prescribe sanctions to the manufacturers and product service providers for providing defective products and deficient services. Further, precautions should be taken to avoid malicious prosecution by consumers. In the era of retail marketing, direct marketing, online marketing, etc., it becomes essential to have guidelines depending on the nature of marketing also. As there is a product liability risk associated with product manufacturing, marketing, etc., provisions such as product liability insurance should be given more emphasis, and awareness in this regard should be created among manufacturers, sellers, and consumers.

While enforcing the duty to warn and give adequate and timely instructions to the consumers, the law on product liability should also encompass other consumer rights-right to information and right to choose. Overall, the provisions regarding product liability in the CPA aim at creating a level playing field and promise to be a huge milestone in consumer protection.

From Sukanya to Cox : The Saga under Sections 8 and 45 of the Arbitration & Conciliation Act, 1996

Shreya Singh*

Reference under Section 8

Before the 2015 amendment, Indian Courts interpreted Section 8 of the Arbitration Act to refer parties to arbitrations *only* on the signatory's request. Section 8 was amended by the 2015 Amendment and the word 'party' was replaced by '*a party to the arbitration agreement or any person claiming through or under him*'. This gave Indian Courts the liberty to include non-signatories in domestic arbitrations.The following section examines the difference in the approach of Indian courts pre and post the 2015 Amendment.

Pre-2015 amendment

In *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Ors.,*[1] the parties had entered into a partnership agreement for carrying on business in the name and style of M/s Hetali Construction Company to construct on the land belonging to one Ms. Jaykirti Mehta who had brought the said land as her capital contribution. Disputes arose relating to the said construction, however all interested parties were not parties to the original agreement

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1 Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya &Ors ., (2003) 5 SCC 351

containing the arbitration clause. The Supreme Court of India held that in context of Section 8 of the Arbitration Act, causes of action against different parties cannot be bifurcated and that an arbitration agreement will only bind the parties which have entered into the same. The Supreme Court of India interpreted the language used in Section 8, which stated "*in a matter which is the subject matter of an arbitration agreement'*, and held that the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Accordingly, any person who was not a party to the arbitration agreement could not be brought into the arbitration.

In *Indowind Energy Ltd. v. Wescare (India) Ltd. &Anr*.,[2]Wescare operated wind farms and generated powers from wind electricity generators. On 24.02.2006, Subuthi Finance Ltd., the second respondent and promoter company of Indowind, entered into an agreement with Wescare for transfer of assets worth Rs. 981.9 million from Wescare to Subuthi and Indowind. Disputes arose between the parties, and Wescare approached the Madras High Court under Section 11(6) of the Arbitration Act seeking appointment of an arbitrator under the terms of the arbitration agreement between the parties. Subuthi resisted the application, claiming that no transaction had taken place between Wescare and Subuthi and hence there was no reason for the dispute. Moreover, Indowind claimed that there was no arbitration agreement between Wescare and Indowind, as it was not a party to the main agreement and had not ratified the same. Aggrieved by the High Court's decision allowing the application under Section 11(6) of the Arbitration Act, Indowind approached the Supreme Court. Supreme Court relied on Section 7 of the Arbitration Act and observed that the agreement must be between the parties to the dispute, and must relate to or be applicable to the dispute. Applying these conditions to the facts, the Supreme Court held that Indowind had not entered into the main agreement and had not expressed any intention of entering into an arbitration agreement. Furthermore, Subuthi

2 Indowind Energy Ltd. v. Wescare (India) Ltd. &Anr., (2010) 5 SCC 306

and Indowind were two independent companies incorporated under the Companies Act, 1956 and the mere fact that the two companies had common shareholders or common board of directors did not make the two companies a single entity.

Post-2015 Amendment

In *DuroFelguera, S.A. v. Gangavaram Port Ltd.*,[3]Gangavaram Port Ltd., invited tenders for expanding their sea-port facilities with respect to the bulk material handling systems. An Indian party named FelgueraGruas India Pvt. Ltd. and a Spanish company named DuroFelguera submitted a single tender bid. The first package was allotted to DuroFelguera and the rest were allotted to FelgueraGruas India Pvt. Ltd. Each package had a separate contract with an arbitration clause each and was between different parties. Disputes arose between parties and arbitration was sought to be invoked. However, the Supreme Court denied making a reference to a single arbitration for all the agreements, opining that each agreement contained a provision for arbitration, and there had to be an arbitral tribunal for the disputes pertaining to each agreement. The Supreme Court observed that the parties took a conscious decision to split the works which led to five separate contracts and consequently an arbitration clause in each split contract was retained. The sixth agreement was a Corporate Guarantee, which also contained an arbitration clause. It was held that a general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. Interestingly, even though the arbitral tribunal for each agreement was separate, the Supreme Court noted that arbitrators for all the tribunals could be the same.

In *AmeetLalchand Shah &Ors. v. Rishabh Enterprises &Ors.*,[4] Rishabh Enterprises entered into an agreement for supply of material, and another

3 DuroFelguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729

4 AmeetLalchand Shah &Ors. v. Rishabh Enterprises &Ors., (2018) 15 SCC 678

agreement for installation and commissioning of solar power plant at Dongri, Uttar Pradesh, with M/s Juwi India Renewable Energies Ltd. Both agreements had an arbitration clause. Rishabh Enterprises thereafter entered into a sale and purchase agreement with Astonfield for purchasing CIS Photovoltaic products, which it further intended to lease to Dante Energy. Rishabh Enterprises and Dante Energy also entered into an Equipment Lease Agreement, which had an arbitration clause. However, the sale and purchase agreement did not have an arbitration clause. Ameet Lalchand was the promoter and controlling shareholder of both Astonfield and Dante Energy. Ameet Lalchand, Astonfield and Dante Energy filed an application under Section 8 of the Arbitration Act seeking for disputes pertaining to all four agreements to be referred to arbitration as they were all inter-connected. The Supreme Court noted that all four agreements were interconnected as they contained references to each other and were executed with the same objective in mind, which was commissioning of the Solar Plant. It was held that where several parties were involved in a single commercial project, all parties could be covered by an arbitration clause contained in the main agreement. The Supreme Court considered the Equipment Lease Agreement to be the Principal Agreement, which did contain the arbitration clause.

In *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*,[5] One K.C. Palanisamy ("**KCP**') entered into an agreement with Kasturi & Sons Ltd. ("**Kasturi**'), Sporting Pastime India Ltd. ("**SPIL**') and another company named Hindcorp Resorts Pvt. Ltd. SPIL was a fully owned subsidiary of Kasturi. As per the agreement, in lieu of certain book debts due from SPIL to Kasturi, SPIL was to allot numerous equity shares fully paid up at par to Kasturi and Kasturi could further offer to sell shares. Kasturi offered to sell equity shares in SPIL to KCP, so that after assuming control of SPIL, KCP or his nominees would discharge the liabilities of SPIL towards Kasturi. This agreement also contained an arbitration clause. Furthermore, KCP while acting in capacity as the authorised signatory of Cheran Properties, requested by a letter to KSL that in accordance

5 Cheran Properties Ltd. v. Kasturi&Sons Ltd., (2018) 16 SCC 413

with the Agreement, the shares be transferred to itself and its group companies, including Cheran Properties. Disputes arose between the parties and Kasturi invoked arbitration against SPIL and KCP. The Supreme Court held that the letter contained a clear reference to the Agreement, and it was in pursuance of that Agreement that the group of companies had agreed to purchase the shares of SPIL. KCP had been acting as the authorised signatory of Cheran Properties and therefore, Cheran Properties had clear knowledge and intention that it would be bound by the terms of the Agreement. The Supreme Court also relied on Section 35 of the Arbitration Act to hold that Cheran Properties was claiming under KCP and would be bound by the award, notwithstanding the fact that it was not a party to the arbitration agreement or proceedings.

In *Reckitt Benckiser (India) Private Ltd. v. Reynders Label Printing India Pvt. Ltd. &Ors.*,[6] the main agreement was between Reckitt Benckiser (India) Private Ltd. and Reynders Label Printing India Pvt. Ltd., wherein the latter was to provide packaging material to the former and its affiliates. Reckitt Benckiser sent an email a draft of agreement with its code of conduct and anti-bribery policy with Reynders Label Printing. This email was reverted by one Mr. Fredrick Reynders who was the promoted of Reynders Etiketten NV, which is one of the group of companies of Reynders Label Printing Group and is bound by laws of Belgium. Reckitt Benckiser wanted to implead this Belgian associate company in an application filed under Section 11 of the Arbitration Act, based on the 'group of companies' doctrine. The Supreme Court observed that unless the non-signatory's intention to be bound by the arbitration agreement can be established, such non-signatory cannot be referred to arbitration. The Supreme Court held that Reynders Etiketten NV was neither the signatory to the arbitration agreement, nor did it have any casual connection with the process of negotiations preceding the agreement or the execution thereof. Hence, no relief was granted to Reckitt Benckiser against Reynders Etiketten NV.

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6 Reckitt Benckiser (India) Private Ltd. v. Reynders Label Printing India Pvt. Ltd. &Ors., (2019) 7 SCC 62

In *Mahanagar Telephone Nigam Ltd. v. Canara Bank &Ors.,*[7] MTNL floated 17% non-cumulative secured redeemable bonds worth Rs. 425 crores, executed a Memorandum of Understanding with Can Bank Financial Services Ltd. and placed bonds worth Rs. 200 crores with them through fixed deposit. Soon after the bonds were subscribed, there was a security scam which led to a collapse of the secondary market in shares, security, and bonds. Canara Bank, being the parent concern of Can Bank Financial Services Ltd. bought some bonds from Can Bank Financial Services Ltd., and requested MTNL to register the bonds in their name. MTNL refused and cancelled the bonds with Can Bank Financial Services Ltd. The parties agreed to refer the matter to arbitration. The Supreme Court held that since Can Bank Financial Services Ltd. was a wholly owned subsidiary of Canara Bank and the dispute between Can Bank Financial Services Ltd. and MTNL was with respect to bonds that were purchased by Canara bank, there was a clear and direct nexus between the parties. It was also found that Can Bank Financial Services Ltd. participated in the legal proceedings and was listed as a party in the draft arbitration agreement prepared by Canara Bank. Further, it was evident from the conduct of the parties that there was an intention to have Can Bank Financial Services Ltd. as a proper and necessary party to the arbitration.

Recently, in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. &Ors.,*[8] ONGC awarded a contract to Discovery Enterprises Private Ltd. ("**DEPL**'), which is a company belonging to DP Jindal Group, for operating a floating, production, storage and offloading vehicle in 2006. In 2008, ONGC invoked arbitration against DEPL and Jindal Drilling and Industries Pvt. Ltd. ("**JDIL**') claiming Rs. 63.88 crores as dues. ONGC argued that DEPL and JDIL belonged to DP Jindal Group of Companies and since they constitute a single economic entity, the

7 MahanagarTelephoneNigam Ltd. v. Canara Bank &Ors., (2020) 12 SCC 767

8 Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. &Ors., 2022 SCConline SC 522

corporate veil should be lifted to compel the non-signatory, JDIL to arbitrate. The arbitral tribunal held in its interim award that JDIL was not a party to the arbitration agreement and must be deleted from the array of parties. ONGC challenged the interim award but the Bombay High Court dismissed the same, leading to an appeal before the Supreme Court. The Supreme Court opined that a non-signatory may be bound by an arbitration agreement where there exists a group of companies, and parties have engaged in conduct or made statements indicating an intention to bind a non-signatory. It was held that in order to decide whether a non-signatory in a group of companies would be bound by it, the following factors must be considered : i) the mutual intent of the parties; ii) the relationship of a non-signatory to a party which is a signatory to the agreement; iii) the commonality of the subject matter; iv) the composite nature of the transaction and v) the performance of the contract.

As can be seen from the above cases, the Supreme Court has permitted such inclusion only after the parties satisfy that there was intention between the parties to include such non-signatory.

Reference under Section 45

While reference to arbitration on the application by a non-signatory was a change that was introduced only in 2015 for domestic arbitrations by amending Section 8 of the Arbitration Act, Section 45 of the Arbitration Act always envisaged such reference to foreign arbitrations.

In *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. &Ors.*,[9]Chloro Controls, an Indian company and one Mr. M.B. Kocha entered into a shareholders' Agreement with Capital Control (Delaware) Co. Inc. The Agreement had an arbitration clause with London being the seat of arbitration. Several interconnected agreements stemmed from the said Shareholders' Agreement, however not between the same parties. The

9 Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. &Ors., (2013) 1 SCC 641

allegations *inter alia* were that respondents Severn Trent and Capital Control (Delaware) Co. Inc. (*collectively, "***Respondents 1 and 2**") were to undertake distribution activities in India solely through one Capital Controls (India) Pvt. Ltd. i.e. the entity formed due to the joint venture between the Chloro Controls and Respondent 1 and 2, and not through any of their group entities. However, Severn Trent (Delaware) Inc. i.e. the ultimate parent company of the respondents, was distributing the products in India also through one Hi Point Services Pvt. Ltd., which through a set of subsidiaries and joint ventures was also alleged to be a group entity of Respondent. 1 and 2.

Pertinently, this case was decided before the 2015 amendment, and hence the Supreme Court drew a distinction between *Sukanya Holdings* and *Chloro Controls* as the former was passed in context of Section 8 of the Arbitration Act, while the latter fell within the ambit of Section 45 of the Arbitration Act. The Supreme Court held that the expression '*person claiming through or under*' provided under Section 45 of the Arbitration Act indicates that the provision does not refer to parties to the agreement, but persons in general and if it is established that a person is claiming through or under the signatory to the arbitration agreement then the matter could be referred to arbitration. The Supreme Court however stated that such reference could be done though only in exceptional cases where the facts principally justify a reference, and laid down certain important factors to be considered while dealing with such an issue, such as (i) direct relationship to the party signatory to the arbitration agreement; (ii) direct commonality of the subject matter; (iii) agreement between parties being a composite transaction; (iv) transaction should be of composite nature where performance of principal agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute; and (v) whether a composite reference of such parties would serve the ends of justice. The Supreme Court also discussed the 'Group of Companies' doctrine, whereby an arbitration agreement entered into by a company, being within a group of companies, can bind its non-signatory

affiliates if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatories and non-signatories.

It was held that the various agreements executed by the parties in the case formed part of a composite transaction where the shareholders' agreement was the mother agreement and the other agreements were ancillary and for effective implementation of the shareholders' agreement. Therefore, the Supreme Court held in favour of making a reference to arbitration even though certain parties were not signatories to the shareholders' agreement.

In *Chatterjee Petrochem Company &Anr. v. Haldia Petrochemicals Ltd. &Ors.,*[10]Chatterjee Petrochem (Mauritius) Co. ("**CPMC**') filed a request for arbitration in International Chamber of Commerce, Paris, in relation to an agreement of restructuring which was entered into between CPMC, Government of West Bengal, West Bengal Industrial Development Corporation ("**WBIDC**') and Haldia Petrochemicals Ltd. As per the Agreement, Government of West Bengal was to cause WBIDC to transfer existing shareholding to CPMC to ensure that CPMC holds 51% of the total paid-up capital of Haldia Petrochemicals Ltd. A dispute arose between the parties regarding the allotment of shares, and CPMC sought transfer of 155 million shares in favour of its Indian counterpart, i.e. Chatterjee Petrochem (India) (P) Ltd. After a round of litigation before the Company Law Board, CPMC invoked arbitration. The Supreme Court rejected the argument of the respondents that the transfer of shares to Chatterjee Petrochem (India) (P) Ltd. instead of CPMC would substantially change the legal rights and responsibilities of the parties as per the Agreement, thereby resulting in novation of contract. Relying on *Chloro Controls,* the Supreme Court observed that the fact that Chatterjee Petrochem (India) (P) Ltd. was initially a non-signatory to the agreement does not jeopardize the arbitration clause in any manner.

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10 Chatterjee Petrochem Company &Anr. v. Haldia Petrochemicals Ltd. &Ors., (2014) 14 SCC 574

In *Cox and Kings Ltd. v. SAP India Private Limited,*[11]Cox and Kings Ltd. had executed an agreement with SAP India Pvt Ltd (SAP) for providing software related services. Thereafter, Cox & Kings listed out various issues in the implementation of the project by SAP and requested SAP's parent company to intervene. SAP's parent company gave assurances, but the agreement could not be fulfilled even in the extended timeline. SAP and its parent company neither responded to the notice nor appointed their nominees. Accordingly, Cox & Kings approached the Supreme Court for appointment of Arbitrator in an International Commercial Arbitration under Section 11 of the Arbitration Act. The Supreme Court raised concerns over the application of the 'group of companies' doctrine. The Court also observed that the ambit of the phrase 'claiming through or under' as stated in the amended Section 8 of the Arbitration is still unclear. Further, as the definition of 'party' under Section 2(1)(h) of the Arbitration Act remained unchanged, there was a need to relook the scope of judicial reference at the stage of Sections 8 and 11 of the Arbitration Act.

Conclusion

The Supreme Court in *Cox and Kings Ltd. v. SAP India Private Limited*[12]passed several opinions, but they all kept India's pro-arbitration sentiment intact. Justices Ramana and Bopanna opined that the interpretation of the 'group of companies' doctrine as envisaged in *Chloro Controls* carries the risk of going against distinct legal identities of companies and party autonomy itself. Justice Kant opined that the 'group of companies' doctrine is a means of dealing with complex multi-party transactions even if all parties have not signed the contract and in fact ensures that arbitrationas a dispute resolution mechanism is able to adapt to this reality. Justice Kant noticed that the doctrine is even more relevant in the Indian scenario as many Indian business houses arecomposed of family run entities or groups

11 Cox and Kings Ltd. v. SAP India Private Limited, 2022 SCC OnLine SC 570

12 *Id*

and the individuals running these entities often occupy multiple roles in different companies.The Supreme Court referred the aspect of interpreting 'claiming through or under' *qua* the 'group of companies' doctrine to a larger Bench.

Hence, while the jurisprudence under Section 8 of the Act has evolved over time, the decisions under Section 45 of the Act continue to be scant, thereby leaving a pertinent question unanswered, *viz.* "Whether foreign awards can be enforced against non-signatories?'

Protection of Water Resources and the Doctrine of Public Trust with Special Reference to Kamal Nath Case

Jayareshmi A S*

Introduction

Water is the most important natural assets of the earth. Water is a fundamental requirement for survival of human beings as well as every living creatures .The significant bit of the earth that is the three fourth of the earth surface is secured with water which means oceans, seas and rivers. But the deficiency of water and the contamination of water bodies, obstruction and redirection of water streams, exploitation of water resources etc, are the significant water related issues prevailing in India. Indians are blessed with various water ways like Ganga, Brahmaputhra, Godavari, Yamuna, etc with a lot of water in it. But these water assets are in a very critical stage of diminishing its water level, redirection and obstruction of water streams, and contamination of water resources etc. The fundamental reasons for water related problems are industrialisation, population increase ,urbanisation and modernisation of agriculture, etc in various parts of the country.

In India the Constitution makers intended to protect the water resources and gave directives to the state governments to preserve the natural resources like air, water and land for the uses of the future generations. There is a

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number of environmental legislation in India to preserve and protect the environment especially the Water Act to protect water resources. Even though we have constitutional directives and environmental legislations, the water resources are under threat of obstruction and redirection of water flows. The doctrine of public trust is the best remedy to this issue .It is a part of the principle of sustainable development ,which states that, the development must be in consonance with the preservation of ecosystem. The doctrine of public trust means that, ‘’the state as a trustee of all natural resources and is under a legal duty to protect it for the benefit of the public.”[1] The Indian Judiciary also upheld the doctrine of public trust through judicial.

Water resources and the need for protection

There are mainly two types of water resources such as surface water sources and ground water resources. Surface water resources includes lakes , rivers and manmade reservoirs. Ground water sources include spring well ,dug well and drilled well etc. The basic facts about water are water is essential to all for life’s daily activities.

Water is very special natural resources of earth, in which only 3 % of planet has fresh water resources, and only 1 % of the total water on earth is considered as fit for human consumption. The growing human population threatens to destroy the water resources on earth through pollution, obstruction and redirection of water flows, etc. The major water related issues are shortage of water, pollution of water bodies, exploitation of water resources, obstruction and redirection of water flows etc. Industrialisation, population explosion, urbanisation, globalisation, modernisation of agriculture etc, are the main reasons for water related issues existing in India.

Constitutional provisions and the protection of environment

The original Constitution did not make any special reference to environmental protection. The Constitution 42nd Amendment Act 1976

1 MC Mehta v. Kamal Nath and Ors, (1997)1 SCC 388

incorporated two specific Articles to the Constitution of India.[2] The State government is responsible to protect and improve the environment as per the Directive Principles of State Policy mentioned in the Indian Constitution. Again in the fundamental duties chapter it is provided that all the citizens are responsible to protect the environment.[3]. This Article imposes duties on the citizens for protecting and improving the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. Thus the preservation of natural resources is not only the directives to the state government but also the fundamental duties to the citizen. In addition to these constitutional directives there are many legislations in India for protecting the natural resources of the earth.[4]

In spite of Constitutional directives and numerous legislations to protect water resources , we are facing a threat to water related issues including the obstruction and redirection of water flows. As mentioned above the apt solution would be the application of the public trust doctrine. This doctrine makes it clear that State is considered as a trustee of all natural resources and is legally bound to protect it for the benefit of the public.

Kamal Nath case (*M.C. Mehta v Kamal Nath & Ors*)[5]- A Discussion

Facts of the case

This is a landmark judgement of the Supreme Court in relation with environmental issues in India. This case highlights the significance of public trust doctrine and its implementation in cases of environmental law. In this

2 INDIA CONST.art.51A(g)& 48 A amended by The Constitution(Forty second Amendment)Act,1976

3 Article 51 -A(g)

4 The Environmental Protection Act,1986, No.29 Acts of Parliament 1986,The Water (Prevention and control of pollution) Act, 1974,No.06 Acts of Parliament 1974,The Water(Prevention and control of pollution) Cess Act 1977,No.36 Acts of Parliament 1977 ,The National Green Tribunal Act,201o,No 19 Acts of Parliament 2010, etc.

5 (1997) 1 SCC 388

case the Supreme Court took notice of the news paper report by Indian Express news paper that Span Motel Company Limited was given lease of about 40 *bighas* and 3 *biswas* of property for a period of 99 years. The government granted approval for sanction of further lease of 27 *bighas* and 12 *biswas* of property which is a part of forest land .This government property was occupied by the company illegally on the bank of river Beas. It was further reported that the channel of the river Beas was being diverted by the company. The company's encroachment upon the forest land led to the swelling of river Beas and the company decided to divert the flow of river in order to protect the bank of the river Beas by using heavy earth moving machines. Company. The matter was taken note by the newspaper.

Issues of the case

- Whether the Span Motel company encroached the property of the government which is a part of forest land?
- Whether the Span Motel company is liable for diversion of river channel?
- Whether the construction activities done by the company is justified or not?

Arguments of the Petitioner and the Respondent

The arguments of the petitioner was that a piece of forest land owned by the government measuring 27 *bighas* and 12 *biswas* was encroached by Span Motel company and they were using the encroached land. And also the expert team appointed by the government reported that the motel company had used heavy earth moving machinery to retrieve their property and also to divert the flow of river. Construction activities made by the company intends to restrict the flow of stream that was not legal and no sanction has been given by the government.The arguments of the respondents was that the construction activities undertaken by the Company intends to protect the banks of the river Beas from future damage. The main purpose

of the construction activities such as wire crates installed by the company on the banks of the river intends to strengthen and preserve the banks from erosion and no work was done for any form of diversion of river channel. The motel also claimed that they are permitted to carryout necessary work to protect their property.

By the analysis of the facts of the case and issues and the arguments on both sides the court found that the motel encroached the forest land and diverted the river flow with the prior permit of the government to the lease deed which was not legal and the construction activities which was done by the company without expert advice.

Judgement –A Critical Analysis

In this case,the Supreme court found that the motel company was given lease of a property which is owned by the government and it is part of forest land .The Himachal Pradesh Government had committed a patent breach of public trust by leasing the forest land to the Span motel company. The court came to a conclusion that the state government is guilty of violation of the doctrine of public trust by giving and hence cancelled the lease deed.

The doctrine of public trust

The Supreme court explained the meaning of the doctrine in the landmark judgement of *Kamal Nath case*. The Supreme court stated that, "The State is considered as a trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea- shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Here the Honourable Apex court explained the meaning of the term public trust doctrine in a simple way. The doctrine of public trust consist of two parts.The first part deals with the responsibility of the government to protect the natural resources like sea shore, running waters

and forest etc, for the benefit of public and the second part means that the ownership of natural resources shall not be conveyed to the private companies.[6]

In *Kamal Nath case*, the Supreme court observed that, "the ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust''. "It was founded on the ideas that certain common properties such as rivers, sea- shore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about 'the environment' bear a very close conceptual relationship to this legal doctrine. Under the Roman Law these resources were either owned by no one (*Res Nullius*) or by everyone in common (*Res Communis*). Thus it is clear from the Roman law that common properties of the environment must be owned by the state government itself. But at the same time it can be used for the benefit of the public at large.[7]

According to P Leelakrishnan ''The public trust doctrine, implicit in the agreement for the acquisition, commands the government to protect the resources like air, sea, waters and the forests have such great importance to the people as a whole."[8]

The Supreme court found that the Himachal Pradesh government is liable For conveying the ownership of forest land to the span motel company for the purpose of doing private business. In the present case the court held that the Himachal Pradesh Government is responsible to reinstate it to its original natural position. The court also imposed exemplary fine on the Span Motel Company Private Limited for restoration of damaged environment.

Hence the court recognised the doctrine of public trust as a solution to this problem by which the state is responsible to protect and improve the water resources.

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6 http://www.indian kanoon.org (last visited Oct 4,2019)

7 *Id*

8 P LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA (2017)

Conclusion

The landmark judgement of Justice Kuldip Singh relating to public trust doctrine has a lot of relevance today. The application of this principle to the environmental issues in India has again been reaffirmed by the Supreme court in its recent decision in *Kochi Maradu Flat case*.[9]The Supreme court on May 8, 2019 ordered demolition of four apartment complexes in Maradu Kochi due to illegal construction in the coastal zone and it was demolished on 11th January 2020.[10] The guidelines provided by Judiciary in M C Mehta v Kamalnath[11] case recognising the public trust was applied by the court in *Maradu flat case*.It proves that the doctrine of public trust has very much significance for protecting natural resources especially the water resources in the present scenario..

9 The Kerala State Coastal Zone Management Authority v.The State of Kerala Maradu Municipality and Ors., (2019). In this case a bench of the Supreme court including justice Arun Mishra and Navin Sinha passed the order to demolish H2O Holy Faith, Alpha Serene buildings, Jains Coral Cove and Golden Kayaloram through implosion

10 *Id*

11 (1997)1SCC388

An Outlook on Efficiency of Existing Laws Protecting Reproductive Rights of Women

Joseph Cyriac*& Parshathy S. R.**

Introduction

Reproductive rights are essential human rights. Whenever we talk about the topic of reproductive rights, actually we are indirectly talking about women's right because, it is a woman's life which is mostly influenced and affected by the process of reproduction. As defined by the Cairo agenda, women's control over their own child-bearing is a key component of reproductive rights[1]. Issues related to reproductive rights are one of the most vigorously contested rights' issues worldwide, regardless of the population's religion, culture, socio-economic level,etc. The reproductive rights and the freedom requires three things –

1. That woman must have right to make decisions that affects her reproduction;
2. There must be least interference of state in relation to reproduction; and
3. Conducive social atmosphere to exercise reproductive freedom.

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1 Cairo Declaration on Population & Development, 1994, https://www.unfpa.org/resources/cairo-declaration-population-development. (last visited May 3, 2022)

These three elements have to be guaranteed by the law of the state.[2]

It can be said that the struggle of women for freedom and autonomy in the society can be realized only when their reproductive right to decision making will be protected.

Meaning of Reproductive Rights

Reproductive right of women means the right of a woman to attain the highest standard of sexual and reproductive health and at the same time achieving full participation in the social and economic life.[3] It includes various human rights of women such as- right to safe sex, right to procreation and to have family, right to abortion, right to make her own decisions regarding her body and her reproductive life, etc.

Due to their reproductive capacity, sometimes women are vulnerable to health complications. There are many instances of death or injury to the women during child birth. So, now it is the governmental obligation to provide adequate and comprehensive reproductive health care for women that include, measures to promote safe motherhood, that is, safe pregnancy and delivery, care for those with HIV/AIDS or sexually transmitted infections, offer abortion, infertility treatments and a full range of quality contraception including emergency contraception[4].

In all the liberal societies, reproductive right has been recognized as a part of human rights. We can say that reproductive rights are expressly human rights that are inalienable and inseparable from basic human rights. Some of the human rights included as reproductive rights are – right to

2 Rachael N. Pine and Sylvia A, *Principles Governing Reproductive Freedom*, 8(10) THE LAWYERS.13(1993), http://www.cwds.ac.in/wp-content/uploads/2016/12/rr_principles_governing-1.pdf (last visited Oct 22, 2022)

3 Reproductiverights.org, https://reproductiverights.org/the-global-pattern-of-u-s-initiatives-curtailing-womens-reproductive-rights-a-perspective-on-the-increasingly-anti-choice-mosaic/ (last visited Oct. 28, 2022)

4 Using Legal Advocacy to Advance Reproductive Rights, https://www.igwg.org/wp-content/uploads/igwg/files/pub_bo_GG_advocacy.pdf (last visited Oct. 26, 2022)

marry and found a family; right to be free from gender discrimination: right to reproductive health and family planning; right to be free from sexual assault and exploitation; right to decide number and spacing of children. a family; right not to be subjected to torture or other cruel, inhuman or degrading treatment; right to privacy; right to modify customs that discriminate against women; right to life, liberty and security; right to enjoy scientific progress and to consent to experimentation, etc.

Reproductive Rights in Indian Context

Both men and women have equal right to choose and control their own reproductive functions but because of the complex social structures, introduction of this concept is especially complicated in India. In India, procreation is often seen as a social expectation and in that context; an individual's rights are overlooked. Irrespective of age and marital status reproductive rights apply to everyone. But this is a fact which is difficult to get through to Indian audience.

Historically, we can say that reproductive health-related laws and policies in India are mostly patriarchal as it has failed to take a women's rights-based approach. Simply put, reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the rights to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence[5].

It includes right to control one's reproductive functions; right to access in order to make reproductive choices free of coercion, violence and discrimination; right to access education about contraception and sexually

5 Dr. Carmel Shalev *Rights to Sexual and Reproductive Health - the ICPD and theConvention on the Elimination of All Forms of Discrimination Against Women,* www.un.org (March 18, 1998), https://www.un.org/womenwatch/daw/csw/shalev.htm. (last visited Sept 9, 2022)

transmitted diseases; freedom from coerced sterilization and contraception; right to menstrual health, right to safe and legal abortion; right to protection from gender-based practices such as female genital mutilation, etc. But in most cases, women have been left to suffer – because they are not empowered to demand what is due to them.

In India, women's enjoyment of their reproductive rights is heavily undermined by gender-biased norms and practices that govern family matters. Decision on childbearing depends upon several factors like adequate housing, one's own income, facilities and measures such as information regarding contraceptive methods and accessibility, affordability and availability of services for the same.

We can say that reproductive technologies such as contraceptive, abortion and pre-natal test are advocated to achieve goals of national population control policies. Because, to resolve problems of hunger, poverty, depletion of ozone lawyer, backwardness, and degradation of environment, etc., population growth is seen as a primary cause. But the main aspect is that in this population control program, woman is seen as a tool for population control. But, with new reproductive technologies, for many women, there is an increase in individual choices. For example, to remain free from unwanted pregnancies, an increasing number of women are using contraceptives now. For lesbians to have children, they have no options of self-insemination at home or artificial insemination by donor sperm at clinics, and in -vitro fertilization, surrogacy which gives infertile women a chance to become pregnant or to realize their desire for a biological child.

Actually, the measures for preventing conception like abortion, contraception, menstrual extraction, etc. were known to the society for a long period of time. But women hardly have the choice to adopt such practices as it was at the option of male partner the reproductive decisions are taken and women were never considered as the decision-makers on it.

The vast majority of women in India have limited reproductive rights and choices despite the fact that abortion is legal in India through the

Medical Termination of Pregnancy (Act), 1972. If we check, we can find out several contradictions in how laws and policies are set, how services are delivered, how demographic trends and desires about family size and composition shape the demand for contraception and abortion.

As a signatory to the International Conference on Population and Development, 1994, India has committed itself to ethical and professional standards in family planning services, including the right to personal reproductive autonomy and collective gender equality[6]. Also, the National Population Policy,2000 affirms the right to voluntary and informed choice in matters related to contraception[7]. As we know, the Medical Termination of Pregnancy Act,1971 made abortion legal in India, but vast majority of women get abortions outside this legal framework because of the inherent restrictions regarding registered facilities and doctor consent built into by providers and even poorer understanding among women regarding their rights. Large proportionof woman in India is facing social and domestic pressures and constraints that limit their ability to formulate and act on reproductive decisions. Even though reproductive right is very much specific to the couples, there are many instances that in Indian context it is the collective decision of the family.

As per Article.12 and 16 of the Convention on Elimination of all Forms of Discrimination Against Women,1978, one has the right to make free and informed decisions about healthcare and medical treatment, including decisions about one's own fertility and sexuality.[8] Right to informed consent, confidentiality and autonomy are considered to be the fundamental ethical principles in providing reproductive health services.

HIV amelioration is an important aspect of reproductive rights because the virus can be transmitted from mother to child during pregnancy or birth,

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6 Srinivas Kosgi, et al, *Women Reproductive Rights in India:Prospective Future*, 10(1) OJHAS 1 (2011), https://ro.uow.edu.au/medpapers/130.(last visited July 22,2022)

7 National Commission on Population, Government of India : National Population Policy, 2000, http://mohfw.nic.in/ natpp.pdf

8 Rajalakshmi Ram Prakash, *Reducing Reproductive Rights: Spousal Consent for Abortion and Sterilization,* INDIAN J. MED. ETHICS (2007)

or via breast milk[9]. The WHO states that: "All women, including those with HIV, have the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'.[10] The reproductive rights of people living with HIV, and their health, are very important. The link between HIV and reproductive rights exists in regard to four main issues:

- prevention of unwanted pregnancy
- access to abortion services
- help to plan wanted pregnancy
- healthcare during and after pregnancy

The Government of India has taken significant steps toward improving national, regional and village-level sexual and reproductive health, including making substantial progress on key maternal and new born health indicators. Yet many women continue to have an unmet need for modern contraception and receive substandard pregnancy-related care.

Providing women with the full spectrum of contraceptive options, counseling and complete information allows them to make informed choices and decreases the numbers of unintended pregnancies, unsafe abortions and maternal deaths.

Sound reproductive health is integral to the vision that every child is wanted, every birth is safe, every young person is free from HIV, and every girl and woman is treated with dignity.

9 Sexual and Reproductive Health and Rights, https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights. (last visited July 22, 2022)

10 Rose Wilcher and Willard Cates, *Reproductive Choices for Women with HIV,* 87(11) Bull World Health Organ 833 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2770278/ (last visited July 22,2022)

Laws, Policies and Programs for the Protection of Reproductive Rights

As we know, area of reproductive rights has not yet been properly explored by India government and hence the laws are limited.

Constitution

The supreme law of our land, Constitution of India contains some provisions for the protection of reproductive rights of women and are scattered among Fundamental Rights, Fundamental Duties, Directive Principles of State Policy, etc.

Fundamental Rights

Part-III of the Indian Constitution guarantees various Fundamental rights under Article 14-35. Among them, Article 14–16 deal with right to equality. Article 14 provides for equality before the law; Article 15 prohibits discrimination among citizens on the ground of religion, race, caste, sex or place of birth; and Article 16 provides equal opportunity to citizens in matter of public employment. Thus, overall, under Article 14–16, the Indian Constitution provides gender equality. In particular, the Constitution also enables the State to make special provisions for women and children.[11]

Article 21 guarantees Right to life which lays down, "No person shall be deprived of his life or personal liberty except according to the procedure established by law.'[12] Right to life means freedom from all kinds of exploitation and right to live with human dignity. With passage of time and social change, many new rights, which are basic human rights, like right to health, right to privacy, etc. were included under Article 21 through judicial pronouncements. Since right to life includes right to enjoy life with all the limbs and faculties[13], it implies therefore that right to procreation and right

11 Art 15(3)

12 INDIA CONST. Art. 21

13 Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332.; Sunil Batra v. Delhi Administration, (1978) 4 SCC 409

to have control over reproductive organs are included in the broader concept of right to life. Every person including a girl has a right to marry and thereby to conceive a child.[14]

Directive Principles of State Policy

Directive Principles of State Policy under Part IV of Indian Constitution from Article 36–51 provides provision directing the government to eliminate inequalities in status, opportunities and facilities to ensure that the legal system promotes justice on the basis of equal opportunities, to secure just and human conditions of work and maternity relief and to regard the improving of nutrition, standard of living and public health as among its primary duties[15]. Also, under Article 39(e), it directs State to follow principles of policy securing the health and strength of workers, men and women, and children, are not forced by economic necessity to enter vocations unsuited to their age or strength.

Fundamental Duties

The Fundamental Duties provided under Part IVA of the Indian Constitution and Article 51(A) include a provision that every citizen has duty inter-alia by the Constitution to renounce practices derogatory to the dignity of women.[16]

By referring to these provisions under the Indian Constitution, judiciary has filled the gaps of inadequate laws on reproductive rights. For example, in *Govind v. State of Madhya Pradesh*,[17] the Court held that any right to privacy must include and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. In *Parmanand*

14 Manoj Sharma, *Right to Life vis-a-vis Right to Abortion: An Analytical Study*, 18 Cent. ILQ 412(2005)

15 INDIA CONST. art.38(2), art.39(a) art .42 & 47

16 INDIA CONST. art.51(a) and (e)

17 Govind v. State of Madhya Pradesh,1975 SCR (3) 946

Katara v. Union of India[18], the Supreme Court has recognized an individual right to medical treatment.

Indian Penal Code

Indian Penal Code, 1860 also contains certain provisions relating to reproductive rights but not so specifically. Section 312–318 of the Indian Penal Code deals with miscarriage, injuries to unborn child, exposure of infants and concealment of births. Section 312 of IPC which reads; "as any one causing a miscarriage of pregnant woman except for the purpose of saving the life of the mother is guilty of causing miscarriage', and Section 313 makes causing miscarriage without the woman's consent, punishable.

IPC provisions relating to miscarriage have not been amended or redrafted or repealed till now. These IPC provisions under Section 312–316 have now become subject to the provisions contained in the Medical Termination of Pregnancy Act. And abortion is now permissible in certain circumstances under the Medical Termination of Pregnancy Act.

The Medical Termination of Pregnancy Act

The features of abortion law have changed with the enactment of The Medical Termination of Pregnancy Act in 1971 as the Act liberalized the provision of Section.312 of Indian Penal Code. This law was enacted on the recommendation Shantilal Shah Committee appointed by the Central Government. The Medical Termination Pregnancy, Act was enacted in 1971 and came into force in 1972.

According to the Act, a pregnancy can be terminated on certain conditions - grave danger to the physical/mental health of the pregnant woman; foetal abnormalities; rape/coercion; and contraceptive failure. In fact, the main target was to control population explosion in India by allowing

18 Parmanand Katara v. Union of India ,1989 SCR (3) 997

termination of an unwanted pregnancy in such situation where contraceptive device has failed.[19]

The Medical Termination of Pregnancy Act has made a woman competent to give her consent to terminate her unwanted pregnancy. Only the consent of pregnant woman is made mandatory by the Act and the consent of a husband is not necessary. But the judgment in *Sushil Kumar Verma v. Usha*,[20] has contradicted this provision of the Medical Termination of Pregnancy Act where the husband got divorce on the ground of cruelty within the meaning of Section 13(I)(b) of Hindu Marriage Act,1955 ,as the wife aborted the foetus at the very first pregnancy without the consent of the husband, This judgment has actually depreciated the decision-making power of women regarding their reproductive rights.

There are 8 Sections in the Act which aim to confer women, the right to privacy which includes right to space and right to limit pregnancies; to decide about her own body.

A woman's right of choice to end pregnancy even in the first few weeks is still not recognised in India. In fact, final decision falls not on the pregnant woman, but on registered medical practitioners (RMP). Depending on the gestational period, one/two RMPs / a medical board decide "in good faith' that the pregnancy can be terminated. Other important issues are lack of access to RMPs, affordability, and social stigma leading to unsafe abortions. Abortion facilities in private medical centres are expensive and are available only for those who have resources. Not all public health centres, especially in rural India, provide abortion facilities. Most unmarried women end up resorting to unsafe abortions at home or in illegal clinics.

The Act was amended in 2021 ,expanding the access to safe legal abortion and it tried to pave way for humanitarian as well as comprehensive

19 Madhava Menon, *A Socio-Legal Inquiry into the Implementation of the Abortion Law in India*, 16 JILI, 626 (1974)

20 Sushil Kumar Verma v. Usha, AIR 1987 Delhi 86

access of benefits to women. The Act applies to married as well unmarried women and has replaced the term 'Husband' from the older act to 'Partner', which indicates that live-in couples or other unmarried women can also access legal termination. It changed the prescribed time period from 20 weeks to 24 weeks under certain conditions. Even though the amended act has widened its scope, still the complete autonomy has not been given to women for the termination of pregnancy. Termination of pregnancy beyond 24 weeks is only allowed under special circumstances like foetal abnormalities.

According to the latest National Family Health Survey 2019-2021, 27% abortions were carried out by women herself at home.[21] According to United Nations Population Fund's (UNFPA) State of the World Population Report 2022, around 8 women die each day in India due to unsafe abortions.[22]

Pre-natal Diagnostic Techniques Act,1994

In 1994, the Parliament banned sex- determination test except under certain conditions, by passing a law - The Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PNDT Act). This Act provides for regulation of genetic counseling centers, genetic laboratories and genetic clinics and also regulates pre-natal diagnostic procedures and the medical professional running the genetic centre has to be registered under the Pre-Natal Diagnostic Techniques, Act[23]. It allows the use of prenatal diagnostic techniques for the purpose of specific genetic abnormalities or disorders only and put down a prohibition on the use of these techniques for determining the sex of the foetus by any such person under the Act.[24]

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21 National Family Health Survey, India ; 2019-2021

22 State of the World Population Report-2022; United Nations Population Fund

23 Pre-Natal Diagnostic Techniques Act, 1994, S 3, No. 57, Acts of Parliament, 1994(India)

24 *Id*, 1994, S 3A, No. 57, Acts of Parliament, 1994(India)

The Act also prohibits any kind of advertisements on pre-conception and pre-natal sex determination of foetus or sex selection of foetus.[25] The Act further provides for the creation of a Central Supervisory Board consisting of concerned ministers, officials representing various ministries, departments, medical professionals and representatives of women's · welfare organization to exercise the power and performs the functions conferred on the board under the Act.[26]

It has been found from the survey conducted in 1992 in metropolitan city of Bombay that 7,999 out of 8,000 aborted foetuses were female. It has been reported in a national daily that as many as 50,000 female foetuses are aborted every year after determining the sex of the foetus. In Delhi 70 percent of abortion that was conducted, was for aborting female foetuses only.[27] This is the outcome of Misuse of technology for the purpose of pre-natal sex selection which has led to sex selective abortions.

Maternity Benefit Act, (MBA),1961

This is an Act to regulate employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefits along with other benefits like bonus, nursing breaks, etc. Now, after the amendment in 2017, the limit for mandatory paid leave has been increased from 12 weeks to 26 weeks. But, most women in rural areas and in urban informal sector do not get this benefit. Even after the Recommendation of the National Commission on Rural Labour, an empowered governmental body has not acted upon in pursuance of the authority.[28]

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25 *Id*, 1994, S 22, No. 57, Acts of Parliament, 1994(India)

26 *Id*, S 7, No. 57, Acts of Parliament, 1994(India)

27 ShakeelAhmad,*Legalised Abortion: A Gender Sensitive Foeticide*, 31 C.M.L.J., 233(1995)

28 LINA GONSALVES, WOMEN AND HUMAN RIGHTS 25(2001)

National Food Security Act,2013

The Act provides that all people at all times get access to basic food for their active and healthy life. And Section 4 of the Act deals with matters concerning pregnant women and lactating mothers including:

(a) Meal, free of charge, during pregnancy and six months after the child birth, through the local anganawadis; and

(b) Maternity benefit of not less than rupees six thousand.

The Surrogacy (Regulation) Act,2021

This Act of 2021 prohibits commercial surrogacy, but it allows altruistic surrogacy. In India, surrogacy is a complicated task and there exist a social stigma also around it.

As per this Act, only a heterosexual married couple with certain preconditions can be the intending-parents. It strips reproductive autonomy of LGBTQ+ persons and single, divorced, and widowed intending-parents. It can be seen as a violation to their right to equality.

The Act requires intending-couple to declare their infertility and reveals identity of the surrogate, both of which violate the right to privacy. The landmark Puttaswamy judgment discusses bodily privacy – the right over one's body and "the freedom of being able to prevent others from violating one's body."[29] The current reproductive rights regulatory framework falls short in guaranteeing bodily privacy.

Policies & Schemes:

Janani Suraksha Yojana,2005

It aims at reducing maternal and neo-natal mortality by promoting institutional delivery of pregnant women.

29 K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

National Health Mission, 2013

It aims to protect the reproductive health rights of women including Reproductive Maternal Neo-natal Child and Adolescent Health (RMNCH+A) Services based on the concept of a continuum of holistic care.

National Health Policy of India, 2017

It aims to achieve the highest possible level of health and well-being and universal access to good quality health care services. It recommends increasing health expenditure to 2.5% of GDP by 2025. Further, it provides gender-sensitive, effective, safe, and convenient healthcare services.

Health Data Management Policy under National Digital Health Mission,2017

It aims to digitize healthcare in India.

Pradhan Mantri Matru Vandana Yojana, 2017

It provides for a cash incentive of Rs 6000/- to be transferred directly to the bank/post office account of pregnant women and lactating mothers for their first living child.

Ayushman Bharat Yojana, 2018

A centrally sponsored scheme, jointly funded by the Union and the State Governments, offering services to about 50 crore people. Ayushman Bharat has two interrelated components: (1) Health and Wellness Centres (HWCs) and (2) Pradhan Mantri Jan Arogya Yojana (PM-JAY).

Reproductive, Maternal, New-born, Child and Adolescent Health (RMNCH+A)

A scheme aimed at the health benefits for new-born children, maternal as well as adolescents. The strategy promotes to improve lifecycle and child survival in India. It links the maternal health to the health of the new born children and components of family planning and prenatal diagnostic techniques. It has strengthened the infrastructure, human resource and supply chain management of healthcare.

Pradhan Mantri Surakshit Maitritva Abhiyan

It is a governmental program that guarantees a minimum package of ante-natal care to women at their second and third trimesters of pregnancy. It ensures that diagnostics services are conducted well at the health centers. Appropriate birth-planning and complication readiness in some cases is taken care in the health centres.

Charter of Patient's Rights –

It was formulated by National Human Rights Commission and adopted by the Government of India .Certain basic rights to be ensured for everyone seeking care in both government and private health facilities including: right to information; right to records and reports; right to Emergency medical care; right to informed consent; right to confidentiality, human dignity and privacy; right to transparency; right to non-discrimination; right to safety and quality care; right to referrals and appropriate transfers; right to protection for patients entering clinical trials etc.

Factors Responsible for Slow Growth and Development of Reproductive Rights in India

Gender Inequality

In the Indian society, girl child is more vulnerable to human right abuses and are the most disadvantaged group.[30]Despite various efforts made by the government and NGOs, there are striking disparities in the health status of women and children, especially girl children. Maternal deaths due to complications in pregnancy and childbirth are the main causes of death among women in India. The causes of maternal death include - obstructed/ prolonged labour, hemorrhage sepsis, unsafe abortion, anemia etc. The factors responsible are poor health care facilities, limited access to family

30 Preeti Misra, *Female Foeticide: A Violation of Human Rights*, 21&22 JNPG L Rev. 71-72 (2001)

planning services and safe abortion services, poor nutrition, early marriage, frequent and closely spacing pregnancies, lack of access to health care units, etc. Even though there are various National Nutritional Policies missions and action plans, but the incidence of malnourishment among women and children continues to be increasing. Unsafe abortions are still prevalent in many parts of the country. Lack of education and healthcare resources results in ill treatment of women. This is one of the main reasons for increasing health hazards in females. Basically, the restrictions women are facing in attaining good reproductive health is because of socio-cultural reasons like gender inequality.

Failure of Pre-Conception and Pre-Natal Diagnostic Techniques Act

The PNDT Act,1994 has failed to achieve its objectives due to many reasons. The governing bodies entrusted to enforce the Act at the State and District-levels has not taken the machinery to enforce the Act seriously. Section4(2) of the Act provides that no pre-natal diagnostic technique shall be conducted except for the purpose of detection of any of the following abnormalities: 1)Chromosomal abnormalities 2)Genetic metabolic disease 3) Haemoglobinopalties. 4)Sex linked genetic diseases 5)Congenital abnormalities and 6)Any other abnormalities or diseases as may be specified. But purpose of technique is sometimes misused to end an unborn person on the basis of gender.

Health Programmes and its implementation

There are certain programmes aim at providing complete and adequate care to women's in terms of their reproductive health. An initiative was also taken to provide health education to the people under the programme called the Information, Education and communication Activities (IEC). The programme aims to intervene in improving the status of women in the sphere of family planning and maternal and reproductive health.

Limited access to health care/medical care

In India, medical facilities are not so well equipped to deal with reproductive health problems, especially in rural areas. It is concentrated

mostly on immunization and provision for iron and folic acid rather than on sustained care of women during pregnancy and after delivery. Some women, have to balance their domestic work and even go to the field to support the family financially, during their pregnancy,

Protection of Reproductive Rights of Women & Role of Judiciary

The courts in India have an important role to play in ensuring women's reproductive rights as guaranteed by Constitutional and human rights documents. The Judiciary has supported and given importance to the autonomy of women with respect to their reproductive right and choice and has time and again declared it as being part of right to life under Article 21 of Constitution. The Constitution also upholds the values of right to health which the judiciary has implemented.

The *Puttaswamy judgment* specifically recognised constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of Indian Constitution.[31] In *Suchita Srivastava v Chandigarh Administration*, which held that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity.[32]

In the landmark judgement of *Navtej Singh Johar v. Union of India*, the Supreme Court of India has decriminalized adultery and homosexuality and clearly held that women have full right over her sexual autonomy which is an important aspect of their right to personal liberty.[33]

In the case of *Paschim Banga Khet Samity v. West Bengal*, it was held by the court that it is the duty of the state to provide requisite medical facilities to the women. And, if there is any kind of denial of adequate

31 K S Puttaswamy v. Union of India, (2017) 10 SCC 1

32 Srivastava v Chandigarh Administration, (2009) 11 SCC 409

33 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

medical intervention to a person in need of such treatment by government hospital it will be against Article 21 of the Constitution.[34]

In *Devika Biswas v. Union of India*, SC held that freedom to exercise reproductive rights would include right to make a choice regarding sterilization.[35]

Thus, Indian Judiciary has played a vital role in providing justice to a woman whose reproductive rights are violated. This gives absolute right to a woman in enjoying their reproductive right without any obligation. This judgement guarantees right to free choice and right to live and liberty of women and girls.

Conclusion

In the era of globalization and urbanization, societies need their own solutions, grounded in a vision of justice, gender equality and consistent with their cultures and conditions, to provide a better life for both women and men.

One of the reasons why reproductive rights are not given sufficient importance in many countries is due to the ignorance of law. For example in Nepal, abortion was legalized in 2002, but a study in 2009 found that only half of women knew that abortion was legalized there[36]. What is important is that women must know their rights and be able to access the legal systems in order to advance gender justice. However it is also important to note that there are many loopholes in our existing-laws.

There are many schemes facilitating education and ensuring nutritional and health benefits of women. For young women, most effective way of awareness is definitely through educational programs. Age-appropriate

34 Paschim Banga Khet Samity v. West Bengal, (1996) AIR SC 2426

35 Devika Biswas v. Union of India, (2016) 10 SCC 726

36 Mahesh Puri et al, Abortion Incidence and Unintended Pregnancy in Nepal, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5568822/ (last visited July 22,2022)

Comprehensive Sexuality Education is widely recognized as the way of enabling young women to become aware about their bodies, gender identities, safe sexual practices and personal hygiene. Thus, a scientific and accurate study of sex education is important for youth for a better understanding of exercise of affirmative consent, safe sex and elimination of sexual stigma.

Analysing 'T.G.Venkatesh v. Registrar of companies

Shidhin Thampi*

Introduction

"Strive not to be a success, but rather to be of value.'

– Albert Einstein[1]

In this chaotic world of ours, we run behind success by not heeding to a value system that an individual must possess. And among these values, "trustworthiness' has a prominent space in the life of an individual in gathering credibility and confidence from people. This very "trustworthiness' is not alien to a company or firm which is desirous of flourishing across markets. This case analysis discusses the case of a company where the value of "trustworthiness' was indirectly in question.

2. Case summary

Particulars of the case

- Case name

  T.G. Venkatesh ..... (Petitioner)

  v.

  Registrar of Companies ..... (Respondent)

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1 https://www.brainyquote.com/quotes/albert_einstein_122232 (last visited May 22, 2022)

- Citation

  (2008) 145 Comp Cas 662 AP: (2007) 78 SCL 1 AP

- Court

  Andhra Pradesh High Court

- Bench

  S.A Reddy. J.

Facts of the case

- M/s. Richimen Silks Limited was incorporated as private limited on 16-10-1984 with the main objects of manufacturing of various types of silk fabrics.
- The Company was converted into a public limited company and a fresh Certificate of incorporation was issued on 19-9-1985.
- Company issued a prospectus to the public, inviting subscriptions to its shares on 23-8-1986.
- The petitioner along with other Directors was signatory to the prospectus, issued by M/s. Richimen Silks Limited, stating that:-
  - i) The trial production will be commenced in the first week of January, 1987
  - ii) The commercial production will commence in the second week of January, 1987
  - iii) dividends would be declared in the first year of operation, i.e., for the year ending 31-12-1987.

- It was observed by the Inspector that the Company had failed to adhere to the above-said statements in the prospectus on an investigation conducted under S.237[2] of the Companies Act,1956.
- The petitioner, by filing the petition under S.633(2)[3] before the court, seeks to relieve him from being proceeded with the prosecution for

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2 Without prejudice to its powers under section 235, the Central Government –
(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if –
(i) the company, by special resolution ; or
(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government ; and
(b) may do so if, [in its opinion or in the opinion of the Tribunal], there are circumstances suggesting –
(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;
(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ; or
(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.

3 Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

the alleged violations under Sections 63[4], 68[5] and 628[6] of the Act, in pursuance of the show-cause notice dated 23-6-2005.

Issues

Whether the petitioner is entitled to the relief sought under S.633(2) to stop the proceedings for the alleged violations under S.63, 68 and 628 of the Companies Act 1956, in pursuance of the show cause notice?

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4 (1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to 1 [fifty] thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true
(2) A person shall not be deemed for the purposes of this section to have authorised the issue of a prospectus by reason only of his having given –
(a) the consent required by section 58 to the inclusion therein of a statement purporting to be made by him as an expert, or
(b) the consent required by sub-section (3) of section 60.

5 Any person who, either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into –
(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting shares or debentures ; or
(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures; shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to [one lakh] rupees, or with both.

6 If in any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement –
(a) which is false in any material particular, knowing it to be false ; or
(b) which omits any material fact, knowing it to be material ; he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

Contentions by the petitioner

Petitioner's role as a Non-executive independent Director

It was stated by the petitioner that he was no way connected as to the day-to-day running of the said Company, as he was not in charge of or in control of the affairs of the Company. It was further stated that the petitioner had resigned as a Non-Executive Independent Director of the said Company on 26-4-1988, immediately after the commencement of the trial and commercial production. Hence, the petitioner should not be made liable.

Occurrence of unforeseen circumstances

The petitioner could understand from the circumstances that the said company was not able to declare dividends due to unforeseen slump in the business of the said company's products. Therefore, the statements made with good intentions could not be treated as a fraudulent or mischievous statements.

Show cause notice barred by limitation

Since the present show-cause notice is issued after 19 years of the issue of prospectus, the same is barred by limitation and the Court shall not take cognizance of the said alleged offence.

Case laws

The learned Counsel relied upon the observations made by the various courts in the following cases where relief was granted by the courts to the Directors under S.633 of the Companies Act, 1956:-

i) *Rabindra Chanarua* v. *ROC* [7]

ii) *Progressive Aluminium Ltd*. v. *ROC*[8]

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7 (1992) 72 Comp. Cas. 257

8 (1997) 89 Comp. Cas. 147 : 14 SCL 177

iii) *Jagijivan Hirala Dosh* v. *ROC*[9]

iv) *Municipality of Bhiwandi & Nizampur* v. *Kailas Sizing Works* [10]

Contentions by the respondent

Petitioner's motive to hinder the impending prosecution against him

According to the respondent, the company petition itself was not maintainable since the petitioner had come to the Court on some pretext or other with a sole motive to stall the impending prosecution against him before the Special Judge for Economic Offences Court.

Petitioner was a signatory to the prospectus

Since the petitioner joined as one of the Director and was designated as chairman, he has got equal responsibility and obligation to comply with the terms of the prospectus issued to which he is one of the signatories. It is stated that the petitioner having subscribed his signature for issuance of the prospectus, the resignation on subsequent date would not relieve him of his obligation.

Inadequate explanation as to the company's failure to comply with the promises in the prospectus

It was stated by the respondent that the petitioner had failed to substantiate the reasons with adequate proof of non-commissioning of the project with the stipulated period, as stated in the prospectus, equally with reference to the commercial production and declaration of dividend.

Justifiable delay in taking action

Since the investigation was made under Section 237[11] of the Act when

9 (1989) 65 Comp. Cas. 553

10 (1975) AIR 529:(1975) SCR (2) 123

11 *Supra* note 2

these facts of the company department have come to the knowledge of the Inspector, immediate action was initiated by issuing a show-cause notice, and hence, the petitioner could not take shelter under the guise of the delay in initiating the action. It was also stated that the petitioner had got ample opportunity before the Economic Offences Court, where he could have produced his evidence to prove his innocence. Also, the failure of the company to comply with the promises is a concern which affects a large number of investors who believed in the prospectus and contributed to the company. Hence, the issue of delay should not be discussed in the current scenario.

Judgment

Since the petitioner has got an opportunity to lead evidence and place the material to prove his innocence before the Court, where the proceedings would be initiated, this Court declines to interfere with the proposed action on the part of the Registrar of the Companies.

Under the above circumstances, the petitioner is not entitled for the relief as sought for under Section 633 of the Act, in view of the fact that no material is placed, explaining the circumstances for non-compliance of the terms, declared in the prospectus to prove that the statements made in the prospectus are not false, deceptive or misleading.

The Company Petitions are, accordingly, dismissed. However, it is open to the petitioner to adduce necessary evidence before the Court, where prosecutions if launched against the petitioner, to prove his innocence.

Analysis

Reasoning of the Court

While examining the judgement of the court and its reasoning in the matter before it, it can be noted that it runs parallel to the contentions raised by the respondent.

Violation of declarations in the prospectus

The court observed that there was delay of 11 months while going for trial production and one year three months, while commencing commercial production. Further the Inspection Report shows that the company has not at all declared any dividend till 7-6-2004, the date of investigation undertaken by the Inspector of the Company Department. From this, it is clear that the Directors of the company have not stuck to the schedule as declared by them.

- *Inadequate explanation by the petitioner*

  With respect to petitioner's role as a Non-executive independent director

  The explanation that was put forward by the petitioner is that due to unforeseen circumstances, inevitable delays were caused in project implementation over which the petitioner as a non-executive independent Director had no control. This clearly shows that there is no proper explanation at the first instance and at the second instance the petitioner seeks to excuse himself, claiming that he is only a non-executive independent Director, and therefore, he had no control. It is not known how he can seek such excuse, especially when he is one of the signatories to the prospectus. Therefore, the said excuse claimed by the petitioner is clearly devoid of merit. Though the petitioner claimed that he had resigned from the Directorship on 26-4-1988, immediately after the commencement of the trial and commercial production, but still, being a signatory to the prospectus, he cannot be relieved of his obligation .Also, even by the date of his resignation, the provisions of the Act are already contravened, therefore, the resignation from the Directorship itself would not absolve the petitioner of his obligations and liabilities.

- *With respect to the dividends*

  It was stated by the petitioner that the market conditions underwent drastic change in the industry, as a result of which, the profitability

went haywire, which were totally unforeseen at the time of issue of the prospectus. Therefore, due to the factors beyond the control of the management, the dividend would not be declared. But the statement made by the petitioner is clearly a vague statement which is not supported or substantiated by any of the relevant material.

Precedents

The court relied on the following guidelines formulated through various cases with respect to the scope of S.633, in deciding the present case:-

- In *Tapan Kumar Chowdary v. ROC*[12] ,where the learned Single Judge after considering various decisions, had summarized the requirements of Section 633 of the Act in order to grant the relief as under:

  (i) If there is any statutory default on the part of an individual while acting on behalf of the company the Court is empowered to consider the application for excusing the said person from such responsibility and or liability;

  (ii) While considering the application made under Section 633(2), the Court will have to come to a conclusion that the applicant had acted honestly and fairly and even after his honest and fair act the default was committed for some unavoidable circumstances;

  (iii) Non-compliance with such statutory requirements by the applicant was caused due to incident beyond his control;

  (iv) The Court is neither empowered to extend the time to hold annual general meeting or to comply with the statutory requirements nor empowered to relieve the company from such responsibility and/ or liability.

12 (2003) 114 Comp. Cas. 631, 50 SCL 283 (Cal.)

- In *Tri-Sure India Ltd. In re*[13], the Bombay High Court interpreted the expression 'appears to the court' contained in S.633 by referring to the decision laid down in an English case of *Duomatic Ltd, In re*[14], which was rendered while considering the provisions of the Section 448 of the English Companies Act, 1948 and Section 372 of the English Companies Act, 1929, which are the sections therein equivalent to Section 633 of the present Act. In that judgment, Buckley, J. said that Section 448 enabled the Court to grant relief where three circumstances are shown to exist. They are:-

  i) The position must be such that the person to be excused is shown to have acted honestly.

  ii) He must be shown to have acted reasonably.

  iii) It must be shown that, having regard to all the circumstances of the case, he ought fairly to be excused.

- In *Progressive Aluminium Ltd. 's case*[15], the learned Judge of the present Court had an occasion to consider the scope of Section 633(2) of the Act. The Court reiterated the guidelines laid down in the above said decisions for granting relief under S.633.

- The Court also pointed out the fact that in all those cases raised by the petitioner, where the Directors were granted relief, ample material was brought on record not only by way of oral evidence, but also by way of documentary evidence, explaining the circumstances, under which there are deviations from the schedules declared in the prospectus, which is absent in the petitioner's case.

13 (1983) 54 Comp. Cas. 197

14 [1969] 1 All ER 161 (Ch.D)

15 *Supra* note 8

Comment

After a strict perusal of the case, I too agree with the decision laid down by the court. As the petitioner was not successful in providing a proper explanation in support for his contentions .Further the petioner failed to provide relevant documentary evidence to substantiate his contentions.

Conclusion

The decision laid down in this case is a warning set out for those companies which hardly give any importance in sustaining the value of "trustworthiness'. Any form of breach of promises, malpractices or fraud can seriously affect the credibility and confidence of the company among the people including the potential investors. Hence, I consider this case to be a check on companies which give little importance to the laws of the country.

Securities and Exchange Board of India ... Appellant
v.
Abhijit Rajan ... Respondent

Shantanu Devendra Haldavnekar*

- **Court of Appeal-** Supreme Court of India
- **Jurisdiction Exercised by the Court-** Civil Appellate Jurisdiction
- **Civil Appeal No.-** 563/2020
- **Citation** - MANU/SC/1195/2022
- **Date of Decision** - 19 September 2022
- **Bench** - Division Bench comprising Justice Indira Banerjee and Justice V. Ramasubramanian.
- **Author of the Judgment** - Justice V. Ramasubramanian.
- **Legal Provisions Referred -**

1. Sections **15Z** and **30** of Securities and Exchange Board of India Act, 1992,

2. Regulations **2 (ha), 2 (k), 2 (e), 2 (d), 3** and **4** of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992.

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Introduction

In layman's language Insider Trading can be described as, "The buying or selling of a publicly traded company's shares by some insider who has non-public, material information about that Company. Material non-public information is any information that could substantially impact an investor's decision to buy or sell the security that has not been made available to the public.[1] The current Regulations that govern prohibition of Insider Trading are ambiguous so far as the requirement of Profit Motive or a Motive to avoid loss is concerned for constituting the offence of Insider Trading. The present judgment settles the position of law in this regard. The present judgment also answers the issue that 'Whether a transaction which is surely to result into loss, be held as a transaction which successfully constitutes the offence of Insider Trading?'

Facts

1. The Respondent herein was the Chairman and Managing Director of a company by name Gammon Infrastructure Projects Limited (hereinafter **'GIPL'**) till September 20, 2013. Thereafter, he ceased to be the Chairman Managing Director, but continued to be a Director of the Company.
2. In the year 2012, GIPL was awarded a contract by National Highways Authority of India (hereinafter **'NHAI'**). The total cost of the project was Rs. 1648 crores. For the execution of the project, GIPL set up a special purpose vehicle called Vijayawada Gundugolanu Road Project Private Limited (hereinafter **'VGRPPL'**).
3. Similarly, another company by name Simplex Infrastructure Limited (hereinafter **'SIL'**) was awarded a contract by NHAI in Jharkhand and West Bengal and the total cost of the project was Rs. 940 crores.

1 Akhilesh Ganti, *What Is Insider Trading, and When Is It Legal,* INVESTOPEDIA https://www.investopedia.com/terms/i/insidertrading.asp. (last visited Oct 30,2022)

For the execution of the project, SIL set up a special purpose vehicle called Maa Durga Expressways Private Limited (hereinafter **'MDEPL'**).

4. GIPL entered into two shareholders agreements with SIL. Under these agreements, GIPL was to invest in MDEPL and SIL was to invest in VGRPPL for their respective projects. The mutual investments were to be tuned in such a manner that GIPL and SIL would hold 49% equity interest in each other's projects.

5. However, on 9.08.2013 the Board of Directors of GIPL passed a resolution authorizing the termination of both shareholders agreements.

6. On 22.8.2013, the Respondent sold about 144 lakhs shares (approx.) held by him in GIPL, for an aggregate value of approximately Rs. 10.28 crores.

7. On 30.08.2013 GIPL made a disclosure to the Stock Exchanges regarding the termination of two shareholders agreements.

8. On 20.09.2013 the Respondent resigned from the post of Chairman and Managing Director of GIPL.

9. Pursuant to an input received from the National Stock Exchange, about the aforesaid transaction and the possibility of the trading having taken place on the basis of Unpublished Price Sensitive Information (hereinafter **'UPSI'**), Securities and Exchange Board of India (hereinafter **'SEBI'**) conducted a preliminary enquiry. After completion of the preliminary enquiry, SEBI passed an ex-parte interim orderholding prima facie that the Respondent violated the provisions of Section 12A(d) and (e) of The Securities and Exchange Board of India Act, 1992 (hereinafter **'SEBI Act, 1992'**) and consequently restraining the Respondent from buying, selling or dealing in securities and accessing the security markets directly or indirectly. This ex-parte interim order was also confirmed by a

confirmatory order. The appeal filed by the Respondent against the said confirmatory order was dismissed as withdrawn.

10. In the interregnum, SEBI completed the investigation and issued certain directions, followed by a showcausenotice. The show cause notice was addressed not only to the Respondent herein, but also to another Company by name Consolidated Infrastructure Company Private Limited and two of its Directors. The noticees filed their replies and after giving an opportunity of hearing to the noticees, the Whole Time Member (hereinafter **'WTM'**) of SEBI passed an Order. By the said order the WTM held the Respondent herein guilty of insider trading and hence liable to disgorge the amount of unlawful gains made by him to the tune of Rs. 1.09 crores. The show cause notices issued to the others, namely, Consolidated Infrastructure Company Private Limited and its Directors were closed without any directions, on the ground that no case was made out against them.

11. Challenging the said order of the WTM, the Respondent filed a statutory appeal before the Securities Appellate Tribunal. (hereinafter **'SAT'**)The appeal was allowed by the Tribunal and it is against the said order that SEBI came up with the present appeal in the Supreme Court of India.

Issues

1. Whether the information regarding the decision of the Board of Directors of GIPL to terminate the aforesaid two contracts can be characterized as "price sensitive information' within the meaning of Section 2(ha) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 1992. (hereinafter **'Regulations'**)

2. Whether the sale by the Respondent of the equity shares held by him in GIPL, under peculiar and compelling circumstances in which he was placed, would fall within the mischief of 'insider trading' in

terms of Regulation 3(i) read with Regulation 4 of the Regulations.

3. Whether SEBI should have takenintoaccount the last trade price of the day on which information was disclosed instead of the trade price of the next day.

Arguments in brief

Appellant

1. Regulations 3 and 4 contain an absolute prohibition against insider trading and such a statutory prohibition cannot be diluted by arguing that the total value of the contracts terminated by the company was just a minor percentage of the order book value and the total turnover of the company.
2. In any case the total value of the contracts terminated on both sides was nearly Rs. 2600 crores (Rs. 1648 crores + 940 crores) and hence the information relating to the termination of the contracts was definitely likely to materially affect the price of the securities of the company Under Regulation 2(ha).
3. Explanation (vi) Under Section 2(ha) which speaks about "significant changes in policies, plans or operations of the company' cannot limit the scope of the main part of the definition and in this case as a matter of fact the price of the share dropped in just one day and the Respondent avoided a loss of Rs. 85 lakhs.
4. In any case, SEBI took note of the situation in which the Respondent was placed, warranting the necessity to sell the shares and hence confined the final order only to disgorgement, which is merely in the nature of restitutionary relief.
5. The intimation regarding the termination of the contracts was given to the Bombay Stock Exchange at 1.05 p.m. and to NSE at 2.40 p.m. on 03.09.2013 and the trading concluded at 3:30 p.m. and hence the

adoption of the closing price on 03.09.2013 would not correctly determine either the gains made or the losses averted. Therefore, the question of SEBI taking the closing price as on 03.09.2013 did not arise.

Respondent

1. In the case on hand, the information in question, namely, the termination of the Agreements actually resulted in GIPL gaining total control of a larger project worth Rs. 1648 crores and that in other words what was lost by the termination was far lesser than what was gained and hence the information relating to the termination of the Agreements was actually a favourable and not adverse information.
2. One of the key factors which the Court takes into account in insider trading cases, is the purpose for which the transaction waseffected.
3. What was sold by the Respondent was 70% of his total shareholding in GIPL and the sale was not an isolated one but coupled with the sale of multiple other assets to raise money to fund promoters' contribution to the Corporate Debt Restructuring (**'CDR'**) package of Gammon India Limited, the listed parent company of GIPL, the failure of the Respondent to meet the obligation towards CDR package would have led to GIL filing for bankruptcy. SEBI itself has accepted the fact that the sale proceeds were used for funding the CDR package.
4. SEBI itself exonerated the co-noticee, namely, Consolidated Infrastructure Company Private Limited, on the ground that its sale of shares was on account of a pressing need to meet a margin shortfall to its stock broker. SEBI thus applied two different yardsticks, one in respect of the Respondent and another in respect of the co-noticee in the very same proceeding, which necessitated interference by the Tribunaland therefore the present appeal does not raise a

substantial question of law and that in any case the order of the Appellate Tribunal does not call for any interference.

Judgment *(Ratio Decidendi)*

***For Issues – 1 and 2*,**

The Court held that,

1. Nothing more is required to show that the information listed in Items (i) to (vi) of the Explanation under Regulation 2(ha) of the aforementioned Regulations, is likely to materially affect the price of securities of a company, but the same is not the case insofar as the information in Item No. (vii) is concerned.
2. While dealing with a case falling under Explanation (vii) of Regulation 2(ha), one may have to see whether there was any likelihood of the said information materially affecting the price of the securities of the company.
3. The sale by a person at a time when the price of the securities is likely to shoot up on account of price sensitive information coming into the public domain or the purchase by a person at a time when the price of the shares is likely to go downward due to price sensitive information getting published, cannot come under the category of insider trading. While it is true that the actual gaining of profit or suffering of loss in the transaction, may not provide an escape route for an insider against the charge of violation of Regulation 3, one cannot ignore normal human conduct. If a person enters into a transaction which is surely likely to result in loss, he cannot be Accused of insider trading. In other words, the actual gain or loss is immaterial, but the motive for making a gain is essential.
4. The cancellation of the Shareholders Agreements resulted in GIPL gaining very hugely in terms of order book value. In such

circumstances an ordinary man of prudence would expect an increase in the value of the shares of GIPL and would wait for the market trend to show itself up, if he actually desired to indulge in insider trading. But the Respondent did not wait for the market trend, after the information became public. The reason given by him, which is also accepted by the WTM and the Tribunal is that he had to dispose of his shares as well as certain other properties for the purpose of honouring a CDR package. It is on record that if the CDR package had not gone through successfully, the parent company of GIPL namely, Gammon India Ltd., could have gone for bankruptcy.

5. This is not a case where the Respondent has come up with an excuse of necessity to justify his action that was intended to give him a financial advantage. This is a case where a man of ordinary prudence would have expected the price of the shares to go up, after the information became public, due to the impact that the information was likely to have on the turnover/net worth of the company.

6. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/ allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom.[2]

7. An attempt by the insider to encash the benefit of the information is not exactly the same as mensrea. Therefore, the Court can always test whether the act of the insider in dealing with the securities, was an attempt to take advantage of or encash the benefit of the information in his possession.

8. In *Chintalapati Srinivasa Raju*[3] the Apex Court approved the minority judgment of the Securities Appellate Tribunal which took

2 Securities and Exchange Board of India v. Kishore R. Ajmera, MANU/SC/0212/2016: (2016) 6 SCC 368

3 Chintalapati Raju v. Securities and Exchange Board of India, MANU/SC/0598/2018: (2018) 7 SCC 443

note of the compelling circumstances under which the individual was selling shares. In the present case, the fact that this has been taken note of by WTM as a mitigating factor, while passing a mere restitutionary order, does not take away the validity of the defence taken by the Respondent.

Thus, the Court answered the first and second issue in the following words,

> *"Therefore, we are of the view on Question No. 1 that the information regarding the termination of the two contracts can be characterised as price sensitive information, in that it was likely to place the existing shareholders in an advantageous position, once the information came into the public domain. In such circumstances, our answer to Question No. 2 would be that the sale by the Respondent, of the shares held by him in GIPL would not fall within the mischief of insider trading, as it was somewhat similar to a distress sale, made before the information could have a positive impact on the price of the shares."*[4]

For Issue – 3

Based on the answers given to First and Second Issue the Court found that there is no necessity to go into the Third Issue.

Thus, the Court Dismissed the Appeal in the following words,

> *"Our answers to Question Nos. 1 and 2 are sufficient to hold that the impugned order of the Tribunal does not call for any interference. Therefore, the appeal is dismissed."*[5]

4 Securities and Exchange Board of India v. Abhijit Rajan, MANU/SC/1195/2022

5 *Id*

Analysis

1. The sum and substance of the present judgment is that if the transaction is devoid of any profit motive or a motive to avoid loss then mere possession of UPSI, while carrying out the transaction will not attract the guilt of Insider Trading under the abovementioned Regulations.

2. Although the presence of profit motive or a motive to avoid loss does not find any conspicuous mention as an ingredient to constitute Insider Trading under the said Regulations, nevertheless it is implied that such presence is essential to hold someone guilty for Insider Trading since the very purpose of prohibiting Insider Trading is to prevent unjust enrichment of those who can access UPSI at the cost of those who cannot.

3. In Insider Trading cases, Who? What? and When? of the transaction in question matter but the present judgement also includes WHY? element of a transaction as a relevant factor to be taken into consideration[6].

4. Section 15Z of SEBI Act, 1992 says that *Any person* aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court, In the present case, it is interesting to note that the words '*Any person'* shall also include SEBI though it is statutorily subordinate to SAT.

5. The applicable regulations in the present case i.e. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 are now replaced by Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, yet the present case will certainly have significant bearing on future

6 Shruti Rajan, *The 'why' of a trade will matter in insider trading cases,* MINT https://www.livemint.com/opinion/online-views/the-why-of-a-trade-will-matter-in-insider-trading-cases-11663868292924.html. (last visited Oct. 30, 2022)

cases of Insider Trading which are being dealt under the new 2015 Regulations.

6. Often in circumstances of financial exigencies a need -based transaction is required to be executed by an Insider in possession of UPSI, who either refuses to execute such a transaction or executes such a transaction with an apprehension that he may face the charge of Insider Trading and he executes it at his own peril. The present judgement shall incontrovertibly aid to bring down this apprehension to a significant extent if the transaction results into loss. Nevertheless, the present judgement will be of little help if the transaction results into profit even in the absence of any profit motive on part of such an Insider.

7. The present judgement will act as a good impediment if SEBI indulges into the acts of regulatory overreach while scrutinising transactions for the alleged violation of Regulations governing prohibition of Insider Trading.[7]

Conclusion

In order to establish healthy economic and trade practices in the securities market so as to maintain the investors' confidence in the regulatory system, any instance of Insider Trading must be dealt with strongly. However, due care must be taken to ensure that no innocent gets trapped into long drawn litigations at different fora. The present judgement is significant so far as it distinguishes and protects transactions based on financial exigencies from transactions that are purely based on profit motive. It will be interesting to look in future that whether SEBI incorporates the 'WHY' criterion to ascertain whether there was any profit motive or not, while scrutinising transactions for alleged violation of Regulations governing prohibition of Insider Trading.

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7 Kumud Das, *SC stops Sebi's regulatory overreach in Abhijit Rajan insider trading case,* BIZZ BUZZ, ,https://www.bizzbuzz.news/eco-buzz/sc-stops-sebis-regulatory-overreach-in-abhijit-rajan-insider-trading-case-1170006. (Oct. 30, 2022)

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