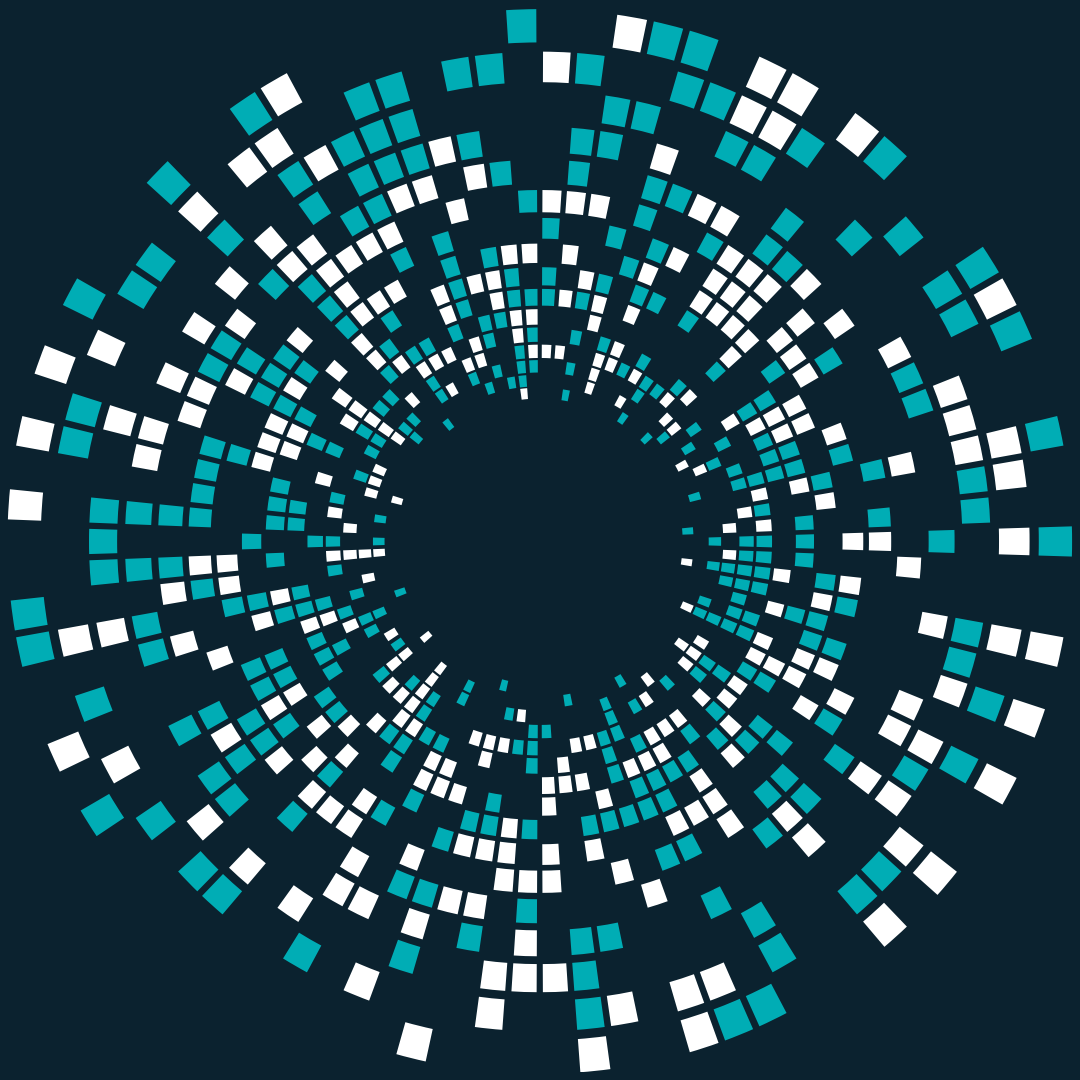
THOUGHTS ON LAW

EMERGING VOICES IN LEGAL WRITING



VOLUME I

THOUGHTS ON LAW

EMERGING VOICES IN LEGAL WRITING

VOLUME I

EDITED BY

ANSHUMAN SAHOO

ISBN: 978-93-5311-425-1

Published by: Law Matters Centre for Research, Education, and Social Action (LaMCRESA)

The information provided in this book is for informational purposes only, and is not to be construed as professional legal advice.

Preface

Law does not live only in courtrooms or statutes. It lives in conversations. It lives in questions. It lives in the everyday reflections of people trying to make sense of justice, power, rights, and responsibility in a changing world.

This volume brings together selected writings originally published on *The Law Blog*, a platform committed to expanding participation in legal discourse. The essays collected here were written by emerging authors from across India and beyond, each engaging with law not as a distant abstraction but as a lived and evolving reality.

In an era where public debate is increasingly shaped by speed and soundbites, thoughtful writing becomes both rare and necessary. The blogosphere has opened new spaces for participation, allowing individuals outside traditional academic and institutional hierarchies to contribute meaningfully to discussions that shape our collective future. At its best, digital writing democratizes knowledge production. It lowers barriers to entry. It diversifies voices. It challenges concentration of narrative power.

Thoughts on Law is an attempt to preserve and curate some of those voices.

The essays in this volume were originally published over time and are presented here largely in chronological order. They have been lightly revisited to enhance readability in a book format while retaining the integrity of the authors' original arguments and perspectives. The aim is not to standardize voice but to reflect a spectrum of concerns, methods, and sensibilities that characterize contemporary legal thinking among young scholars and practitioners.

This compilation is not organized around a single doctrinal framework. Law, as it is experienced in public life, rarely presents itself in neatly categorised themes, rather emerging through encounters, arguments, and unexpected intersections. Likewise, this compilation reflects the organic evolution of discussions that emerged through the life of the blog. Read together, these writings capture a moment in time: how a generation of emerging thinkers encountered questions of constitutionalism, governance, rights, regulation, and social justice in their own language and from their own vantage points.

The Law Blog was founded with a simple conviction: that a more inclusive and democratic blogosphere is essential to a better-informed society. If law is one of the primary structures through which societies organize power and resolve conflict, then widening participation in legal conversations is civic work. When more individuals write, reflect, and engage critically with law, the public understanding of legal institutions deepens. A plural legal imagination strengthens democratic culture.

This book marks the beginning of a continuing series. Future volumes will document the evolving contributions of new authors, new debates, and new challenges. As the legal landscape transforms in response to technological change, economic shifts, and social movements, it is important to preserve the intellectual traces of how these transformations were understood and contested in real time.

By compiling these essays into book form, we seek to move from the ephemerality of digital publication to the durability of print. Blogs capture immediacy. Books provide continuity. Together, they form a record of civic engagement with law. This volume belongs first and foremost to its contributors. Their willingness to write, to question, and to participate sustains the project. It also belongs to readers who approach law not as a closed system of rules but as an open field of inquiry.

If this collection encourages even a few readers to join the conversation, to write, to question, and to contribute their own thoughts on law, it will have fulfilled its purpose.

This is Volume I. The conversation continues.

Anshuman Sahoo

Kharagpur, West Bengal. 18 February 2026.

Table of Contents

The Enigma of Subtle Trademark Infringements

Syed Suhaib is an editor at All India Commercial Law Review (AICLR) & a final-year law student at UILS, Chandigarh University. Neeva Ojha is also a final-year law student at UILS, Chandigarh University.

As the planks of Theseus' ship needed repair, it was replaced part by part, up to a point where not a single part from the original ship remained in it anymore. Is it, then, still the same ship?

– The Ship of Thesus Paradox.

It is unequivocal that trademarks of any brand or company are quintessential for protecting the outlook, goodwill, reputation, & trade of the products or services rendered by them; consequently, their infringement, intricate indifference or inadvertent use of a registered trademark can effectuate ambiguity for the consumers. In such circumstances, the *Ship of Theseus Paradox* provides an analogous allegorical reference and poses a paradoxical conundrum: *whether a mark can become so altered that it no longer represents its original source and can be passed off as a different mark.* This is the intricate, enigmatic conundrum that has been and is being deliberated by courts across the jurisdictions of the *United Kingdom* & *India,* and both jurisdictions have articulated their reasoning for adjudicating such conundrums.

In *India*, on *December 4th, 2024*, one of the prominent aviation airlines, *Indigo,* filed a lawsuit against a well-known car manufacturer and seller, *Mahindra,* over its newly launched electric SUV, which *Mahindra* named *'BE 6e'*. The reason behind *Indigo* filing this suit was because of the use of the alphabetical numerical *'6e',* which *Indigo* asserted is infringing upon their well-known alphabetical numerical mark of *'6E',* which has been associated with identifying *Indigo* flights *(i.e. 6E Flex, 6E Prime)*. This led *Mahindra* to insinuate that they won't be using the name *'BE 6e'* for their new electric *SUV* until the present lawsuit is settled.

At the outset, a limpid distinction can be observed that *Mahindra* uses the lowercase to denote their '6e' leads one to ponder whether this constitutes an infringement within the meaning of *Section 29* of the *Indian Trademark Act, 1999.* Can a consumer be deceived into thinking that *'BE 6e',* the new *Electric SUV* of *Mahindra,* has something to do with *Indigo Airlines*? The answer to this may seem evident, but such an answer can set a disturbing precedent, especially in the era wherein such marks are not just names or numerals but also represent the identity and goodwill of a brand or company. Although the case has yet to be decided, it makes one ponder how it would pan out, whether the court will reason that *Mahindra* has indeed infringed *Indigo's* long-standing *'6E'* mark or not, is a matter of consequential intricacies which can have a significant impact on the *Indian Trademark law*. Interestingly, in the *U.K.,* such reasoning does not seem to resonate, which can be observed in the recent *Adidas* case, wherein the *'4 Bars mark'* of *Thom Browne* was not considered to be deceptively similar but distinct. It is pertinent to note that this is not the first instance where such a close usage of the mark has constituted an infringement. The cases envisaging such an enigma have been encountered and ruled upon within the purview of *'deceptively similar marks'*, andboth the *Indian* and *UK* trademark laws are inconspicuous in manoeuvring the *'ratio of similarity'* of such deceptively similar marks, and consequently, it becomes imperative to scrutinise the precedential jurisprudence on the outlook of *deceptively similar marks*.

Scrutinising the *Stare Decisis*

In India, the purview of 'deceptively similar' is envisaged under *Section 2(1)(h)* of the *Indian Trademark Law, 1999*. Under the purview of this section, a mark will be considered as deceptively similar if, firstly, there is a close resemblance and secondly, such resemblance can cause confusion or deception for the consumers. The present act is inconspicuous in manoeuvring the 'ratio of similarity' which leads to distinct precedential jurisprudence on the outlook of deceptively similar but herein the precedential jurisprudence in *Cadila Healthcare Ltd v. Cadila Pharmaceutical Ltd (2001) 5 Supreme Court Cases 73: 2001 SCC OnLine SC 578* which was articulated by the *Hon'ble Supreme Court of India,* deliberates the standard for contemplating *'deceptively similar'* marks. The *Court* has contemplated that the following factors must be taken into consideration for ruling upon the *deceptively similar marks.* These include:

1. *the nature of the products or services the mark relates to*;
2. *the degree of resemblance between the two marks,* &;
3. *the target audience that the company offers its products & services to.*

The interpretation of trademark infringement within the purview of being *'deceptively similar'* seems to run in parallel in the *UK* and *India,* even though both jurisdictions are of *common law* jurisprudence. The precedential reasoning in the *U.K.* can be articulated to stem from the *2006* case between the record label of the most influential band, *The Beatles* & the contemporary tech giant *Apple Inc (Apple Computers Inc. before 2007)*. In *1968*, the members of the *Beatles Band* founded their record label called *Apple Corps Ltd,* which was inspired by the artwork of *Belgian* artist *René Magritte*. In *1991*, boththe *Beatles* and *Apple Computers* realised the similarities between their names and the *helter-skelter* it can cause. Subsequently, both companies entered a *'collective trademark'* contract which discerned the *'ratio of usage'* for the use of the mark *'Apple'*. The contract enunciated that things associated with electronic goods, software, data processing & transmission would reside with *Apple Computers Inc,* whilst things associated with music & creative works would reside with the *Beatles' Apple Corps Ltd* for the foreseeable future. However, in *2001 Apple Computers Inc.* launched their first music player, the *'iPod',* which redefined the muse of the music experience. The product itself was unique given the genius of *Steve Jobs* & *Steve Wozniak* but the *Beatles* envisaged it as a breach of contract which in *2006* led to a lawsuit by the *Beatles* for infringement and breach of contract against *Apple Computers Inc.* in *Royal Courts of Justice Strand, London* wherein the presiding *Justice Edward Mann* deliberated his reasoning that *Apple Computers Inc* had developed the *iPod* from the standpoint of hardware & software usage and any consumer using the device would not contemplate it to be a product of *Beatles' Apple Corps Ltd.* Although, later in *2007*, parties reached a settlement wherein *Apple Computers Inc* owned all the trademarks associated with the term '*Apple'* and licenced certain marks back to the *Beatles' Apple Corps Ltd.*

The Contemporary Narrative

Besides the ***Interglobe Aviation v/s Mahindra Electric Automobile Ltd DHC – CS(COMM) 1073/2024*** case, a subtle distinction in reasoning can also be perused in certain concomitant cases which fall within this enigma of deceptively similar marks.

3 Strips v/s 4 Bars:

In the *U.K.,* such a situation was encountered by the *High Court of London* in the case of ***Thom Browne Inc & Anor v Adidas AC & Ors,***wherein *Adidas* had sued *Thom Browne* for implementing and using the '*4 Bars'* mark design which, as contended by *Adidas*, infringes upon the iconic *'3-Strip'* mark design used across its products and services. *Thom Browne* contended that the '*4 Bars'* mark design is distinct and is rooted in *American varsity fashion*. The *London High Court* ruled in favour of *Thom Browne,* reasoning that there was a clear distinction between the *'3-Strip'* and '*4 Bars'* mark design. However, if one were to examine these marks closely, the distinction between them is

quite subtle, but the trademarks *prima facie* appear to be deceptively similar as *Thom Browne* has also utilised the black colour for its *'4 Bars'* mark, which is similar to *Adidas' '3-Strips'* mark.

Wow Momo Foods Pvt Ltd Vs Wow Delicious CS(COMM) 1110/2024 & I.A. Nos. 47879/2024.

On the contrary, in *India*, on *December 11th 2024*, the *Delhi High Court* recently issued an *ex parte* interim order against the food chain *'Wow Delicious'*and restrainedit from using such a mark because the court reasoned that the mark was deceptively similar to the prominent food chain *'Wow! Momo* were susceptible to deception for the consumers. One can't help but draw parallels between the aforementioned two cases as they profess intriguing reasoning for deliberating infringement based on the notion of deceptive similarity & susceptibility by the consumers, and to adjudicate this enigma, the *rule of anti-dissection* & the *'rule of the dominant feature'* are incumbent ruling factors for colloquial of *'ratio of similarity'* across multiple jurisdictions.

Ratio of Similarity

The amalgamation of the *'rule of anti-dissection'* & *'rule of dominant feature'* is the aiding test that determines the *'ratio of similarity'* for disputed trademarks. These rules are not expressly mentioned under the *Trademark Acts* of either *India* or *the UK,* but are rather interpreted with the quintessence of legislative intent & judicial interpretations. The derivation of these rules under the *Indian Trademark Act, 1999* stems from *Sections 15* & *17 (for the rule of anti-dissection)* & *Section 11(b) (for the rule of dominant feature)* and under *U. K's Trademark Act*, *1994,*from *Section 5(2) & 5(3)* respectively within the purview of grounds for refusal of a trademark.

Rule of Anti-Dissection

It is evident that registered trademarks have a commercial head within the consumer market, and any intricate reference from a well-known registered mark can lead to ambiguity for consumers. To mitigate such ambiguity and to maintain the unique commercial heed of a registered trademark, the *rule of ant-dissection* aids in the determination of infringement by the Defendant, which allows the Plaintiff to succeed in a suit of infringement against their registered mark. To abridge, the *rule of anti-dissection* prevents a trademark from being assessed separately and views the trademark as a whole. For example, *if someone were to copy the whole trademark of the food chain KFC with a red colour scheme and change it to a blue colour scheme to pass it off as an entirely new trademark, this rule prevents such infringement.* Another edifying example of this rule is the *Delhi High Court's* ruling in the case of ***Bennett, Coleman & Co Ltd v VNOW Technologies Pvt Ltd 2023 SCC OnLine Del 864.***The Defendant's 'VNOW' use of the trademark was ruled to be an infringement against Plaintiff's well-known registered trademarks, including but not limited to, 'ROMEDY NOW', 'MIRROR NOW', 'TIMES NOW', etc.

Rule of Dominant Feature

Subsequent to the *rule of anti-dissection*, the rule of dominant feature is a cardinal rule that depicts an exclusive feature of a trademark. This rule emphasises that a *'dominant'* or a *'prominent'* feature of a composite mark will be considered by an imprudent consumer, hence even using a part of a registered mark will be reasoned as an infringement under this rule. It is pertinent to note here that, in cases of composite marks, courts dissect the *'exclusive'*, *'significant'* or *'dominant'* feature of a mark for determining an infringement; however, such dissection is not considered to be antithetical to the *rule of anti-dissection*, rather both rules are interpreted to be correlative in a panoramic view. This rule can be contemplated through the case of ***Royal Stag* v/s *Indian Stag 2010 SCC OnLine Del 3806: (2010) 174 DLT 279 (DB)***wherein the *Delhi High Court* ruled *'STAG'* to be a dominant feature of the Plaintiffs' *Royal Stag* and *prima facie* to be an infringement upon its trademark by the *Indian Stag*.

On the contrary, the determination of these tests can be critically evaluated in the case of ***PhonePe v/s BharatPe 2022 SCC OnLine Del 2638: (2022) 92 PTC 446*** wherein the word 'Pe' was considered to be a generic wordplay of the word 'Pay' and hence, the court reasoned that there was no infringement on the part of the Defendant since the essentials' of registering a trademark connotes that the mark should not be generic or descriptive. The court also deliberated upon the fact that whilst *PhonePe* was used for all types of online payments, *BharatPe* was limited to merchant payments. However, this intriguing case could have been appealed for further reasoning; the parties settled the issue amicably. Herein, it can be critically articulated that an antithetical interpretation of the *rule of anti-dissection* leads to obscurity within the judicial jurisprudence of the two rules, and both rules must be interpreted and applied in amalgamation, which is incumbent because such ambiguity can set an abrasive precedent for *sub-judice* cases like that of *Indigo v/s Mahindra.*

Conclusion

The contemporary cases contour a strenuous enigma of deliberating upon the deceptively similar trademark infringements, and the discerning jurisprudential reasoning by the courts can lead to ambiguous qualms, metaphorically analogous to the *Ship of Theseus Paradox.* Consequently, it becomes eminently imperative for either imperious legislative scrutiny or stringent precedential deliberation on the jurisprudence of deceptively similar trademarks. As aforementioned, trademarks carry a commercial heed and when disputed can effectuate a colossal dearth to a company or a brand; hence, it becomes incumbent upon such companies & brands to devise a unique trademark which is not a subtle imitation of any other registered trademark. Subsequently, it is also incumbent upon the brands or companies to protect their trademark not just by registering it but also by inducing market heed around such a trademark, which aids it in making it unique and well-known among the consumers, like the *Ship of Theseus,* which even disputed, was contented by many to be same ship thereby, resulting in a paradoxical heed which has endured the test of time, unlike the ship, it's heed persists, as a unique & distinct trademark should.

Online Counterfeiting & E-commerce Liability: Are platforms 'intermediaries' or 'participants'?

Prathwiraj Kadam & Samikshya Rout are second-year law students at National Law University, Odisha.

Exponential growth of the internet and online infrastructure in India has brought a paradigm shift in consumer shopping behaviour. Consumers are buying through online E-commerce platforms due to an increase in disposable income, a change in lifestyle and convenience. Platforms such as Amazon, Flipkart, Blinkit, and Zomato provide services. It is expected that the E-commerce marketplace will reach USD 136 billion in 2025, growing at a rate of 19% per year. Further, by the end of the decade, it is estimated that the market will reach up to USD 385 billion.

While these Platforms have created convenience for the buyer, however it have also made it easier for third-party sellers to exploit them using unauthorised sales and misuse of trademarks, patents or copyrights through the use of domain names, Cybersquatting, and Counterfeiting of goods. This creates an adverse environment for the sellers on E-commerce Platforms. The major issue is the lack of a legal framework to regulate online e-commerce platforms' infringement of intellectual property rights. The e-commerce platforms reduce the protection of sellers/innovators. The intermediary participant debate cannot be resolved just through formal classifications. As e-commerce platforms are increasingly exercising control over market access, product visibility and consumer autonomy, the questions of intermediary liability must be within the broader framework of platform power and digital marketplace governance. The blog examines ambiguity on the part of the law as well as the judgments by courts. It will also examine the nature of the obligation that e-commerce platforms should or can be held liable for infringement of the intellectual property rights of rightful Sellers and Innovators. Further, the blog also argues that the continued reliance on the safe harbour principle is misplaced and requires the creation of obligations and liabilities.

The Intermediary Role of E-Commerce Marketplaces

The rise of the age of the internet has created many new opportunities and challenges. Electronic Commerce (e-commerce) is now playing an important role in the global economy through e-commerce platforms such as Amazon, Flipkart, and eBay, among many more platforms. While e-commerce has emerged as a vital part of the economy and has introduced significant opportunities, it has also created challenges. The e-commerce platforms allow sellers to list their products on their platforms, acting as intermediaries between sellers and buyers. This practice creates a wide range of options for the buyers, which in turn leads to exponential popularity and growth of the e-commerce platforms among buyers. However, this growth has not been without challenges. The growth of e-commerce platforms has created a surge in sales of counterfeit products, violating the IP rights of the rightful owners. The e-commerce platforms get protection from being prosecuted as they are acting as intermediary and do not have any active role in infringement.

Challenges for Trademark Protection in E-Commerce

In the e-commerce era, trademark infringement has become a significant issue. While legal frameworks as well as judicial rulings are shaping the duties and liabilities of intermediary platforms such as Amazon or Flipkart. E-commerce platforms acting as intermediaries and merely facilitating

the transaction generally escape liability for the infringement. The Trademark Act 1999 does not provide an explicit provision for the liabilities of e-commerce platforms. Under Section 29, intermediaries can be held liable if they engage in services such as advertising or providing support to sellers. Intermediaries are protected under Section 79 of the IT Act 2000, under the principle of safe harbour, if they are acting as a passive facilitator. The statutes for infringement of Intellectual property rights do not provide exclusive provisions for liabilities; thus, the liability of intermediaries is determined through judicial pronouncements.

In the case of MySpace Inc v. Super Cassettes Industries Ltd, the Delhi High Court held that if an intermediary has knowledge of infringement, then it must actively stop such infringement. Further, if the affected party bring notice of the infringement, the intermediary must promptly stop the infringement within 36 hours.

Indian courts have dealt with the case of infringement of the rights of the rightful owners and have consistently held such platforms/ intermediaries liable. In Puma SE v. Indiamart Intermesh Ltd and L'Oréal v. Brandworld, have consistently held that platforms cannot enrich themselves through counterfeit sales and must actively remove any material or products or prevent any unauthorised use of brand trademarks. This position has been clarified and holds the marketplace or intermediaries liable if they facilitate, aid or benefit from the counterfeit sales in the case of Christian Louboutin v. Nakul Bajaj.

Considering all these cases together, the e-commerce platforms can only be held liable for the violation of the Intellectual Property Rights of the seller or innovators if they actively facilitate, aid or benefit from such infringement. E-commerce today not only acts as a facilitator but, in many cases, structures the market, creates visibility and access for the sellers. Therefore, the courts are not dismantling the safe harbour principle, but are actively conditioning its applicability on the nature and extent of platform involvement. Merely hosting third-party sellers who are infringing IP rights does not create liability, but it is based on the level of control the platform exercises over the infringing party/seller. The courts are considering factors such as involvement in advertising, sponsored listings, promotion using an algorithm and economic benefits from the sale of infringing products. Scholars argue that safe harbour exists as intermediaries cannot practically monitor every seller, but at the same time, absolute immunity has harmful effects. This allows the e-commerce platforms to neglect the enforcement of IP rights while deriving commercial benefits from the infringement. The judicial approach taken by Indian courts closely aligns with these arguments. Further, it is also an attempt to distinguish neutral intermediaries from market actors who control and monetise infringing activity.

Global Perspective

The European Union introduced the Digital Services Act 2022, which created new obligations for digital platforms and marketplaces. Earlier, the e-commerce Directives shielded hosting providers and online marketplaces from the liability of user-created content if the platform acted upon notice of such infringement. Introduction of the Digital Services Act introduced stricter obligations for digital marketplaces or e-commerce platforms. The act required the e-commerce/digital platforms to proactively assess risk, moderate content, and enhance transparency during the content removal process, and an accountability mechanism for repeated infringements. These requirements increased the responsibilities of intermediaries/ e-commerce platforms and offered more effective tools for the enforcement of Intellectual Property Rights of Sellers or Innovators.

In the United States of America, Section 230 of the Communications Decency Act provides immunity to online platforms from the infringements caused by their users. The Digital Millennium Copyright Act plays an important role in the U.S. to give a framework for intermediary liability of online platforms. It recognises the need for a system which is responsive yet responsible for the

content created by the users. With judicial pronouncements, the act has established a notice and takedown procedure. This procedure compels intermediaries to take down the content when an infringement notice is given. Further, if the notification is disregarded by the Online platform, another legislation is provided for the backup. The Federal Trade Commission Act makes marketplaces liable if they fail to adequately address infringement. Under Section 512(c) of the DMCA, the marketplaces can avoid responsibility for the copyright infringement if they publicise their policy on infringement, outline the procedure to address notices for infringement of IP rights and remove infringing content once noticed.

In China, the E-commerce Law of the People's Republic of China require E-commerce platforms to verify the qualifications and authenticity of merchants and their products. Article 42 of the law provides the right to notify the e-commerce platform to delete, block or disable the link if the IPR holder believes that there is an infringement of their IP rights. Further, Article 45 provides that if e-commerce platforms know or should know of any infringement and do not take necessary steps to stop such infringement, then the intermediary will assume joint and several liability with the primary infringer.

The European Union adopts a precautionary risk-based obligation model to govern and treats large e-commerce platforms as systemic market actors, imposing an affirmative duty to mitigate the foreseeable harm. On the other hand, the United States follows an innovations-focused model prioritising platform immunity and relies primarily on reactive enforcement triggered by notice. China follows a supervisory model where platforms function as market regulators, making them directly responsible for the conduct of sellers. All these major jurisdictions reveal that they create a statutory obligation, while, on the other hand, India occupies an intermediate position, relying on judicial interpretation rather than statutes to create a conditional safe harbour on e-commerce platforms.

Way Forward

E-commerce continues to expand exponentially. This creates an urgent need to introduce policy and technological solutions to curb IP rights infringement. Marketplaces need to monitor and remove infringing goods with penalties on the infringers. The Government need to introduce legal provisions to empower IP owners to file a case against both the e-commerce marketplace as well as the seller for the damages.

It is also important that a robust notice and takedown system is created. The Marketplaces need to process the infringement claims at the earliest and maintain proper legal process. Further, to prevent IP infringement, the marketplaces must adopt an active approach towards IP infringement by the sellers rather than a passive approach.

Further, Indian law only prosecutes e-commerce platforms if they actively participate in the activity which causes the infringement. The Indian legislature must introduce provisions to create an obligation on the E-commerce platforms to actively monitor and remove infringing products or sellers. It is important to create a statutory responsibility on the platforms corresponding to the degree of control and economic benefits exercised by the platforms.

Conclusion

E-commerce platforms continuously shape market access and consumer choice. Treating e-commerce platforms as neutral intermediaries no longer reflects current realities. While judicial developments in India show a clear shift towards a conduct-based approach, where liability is derived from active participation of the e-commerce platform. It is important to effectively protect intellectual property rights while not affecting the efficiency and profitability of E-commerce

platforms. Further, it is important to recognise statutory proactive measures and duties such as robust notice and takedown mechanisms, and repeat infringer policy. A balanced shift towards responsibility instead of blanket immunity. It is important to safeguard innovators and genuine sellers and sustain the long-term integrity of e-commerce platforms.

The Legal and Safety Aspects of Scramblers and Electric Scooters in Ireland

Tadgh Quill-Manley is a student at King's Inns, and can be reached at tadghquillmanley@yahoo.com.

In Ireland, the use of scramblers and electric scooters has sparked intense debate on road safety, public space management, and regulatory effectiveness. The tragic death of 16-year-old Grace Lynch in Finglas, Dublin, in January 2026, after a collision with a scrambler bike, has intensified these discussions, prompting urgent calls for reform. This article examines the characteristics of these modes of transport, the applicable laws, safety data, key court cases, and emerging policy changes.

To move beyond a purely descriptive account and address the broader question of what animates Ireland's regulatory response to these new mobility risks, this article applies the lens of regulatory lag – the temporal and institutional delay between the rapid emergence, adoption, and social impact of new technologies or practices and the development of tailored legal frameworks to govern them. In the context of scramblers and electric scooters, regulatory lag explains why initial responses were reactive rather than anticipatory: widespread use preceded specific rules, enforcement has often trailed incidents, and reforms have frequently been driven by high-profile tragedies rather than proactive risk assessment. This framework unifies the analysis, revealing persistent gaps in governance and the drivers behind recent and proposed adjustments. It highlights the tension between facilitating environmental and mobility benefits on one hand, and mitigating safety risks on the other.

Characteristics and Usage of Scramblers and Electric Scooters

Scramblers are off-road motorcycles built for rough terrain, featuring knobbly tyres, enhanced suspension, and the potential to exceed 50 km/h. In Ireland, they are frequently used in urban and suburban settings – parks, green spaces, and residential areas – despite their design intent. Electric scooters, by contrast, are battery-powered personal transporters typically limited to around 25 km/h and intended for short urban trips on paved surfaces. Their popularity surged during the COVID-19 period as a low-emission commuting option.

The contrasting patterns of use reflect different manifestations of regulatory lag. Scramblers have long operated in a grey zone, with recreational and antisocial use in public spaces outpacing specific urban restrictions. Electric scooters, meanwhile, proliferated in an unregulated space before their formal legalisation in May 2024 under the Road Traffic and Roads Act 2023. A 2025 Road Safety Authority (RSA) survey revealed that 24% of regular e-scooter users had experienced collisions and 32% near-misses, underscoring how the absence of early controls allowed risky behaviours to become normalised. Both vehicles support environmental goals by reducing emissions, but they also exacerbate healthcare costs from injuries. Modifications to increase speed further exacerbate risks, particularly among younger male users in urban areas. Historically, scramblers fell under general motorcycle rules since the 1960s, while e-scooters were effectively prohibited on public roads until

2024. Regulatory lag thus created a vacuum in which usage grew unchecked, setting the stage for subsequent enforcement and reform efforts.

The Current Regulatory Framework

Ireland's primary legislation derives from the Road Traffic Acts (1961–2023), incorporating EU directives. Scramblers qualify as mechanically propelled vehicles, requiring registration, taxation, and insurance for public road use; off-road models lack type approval for highways and are confined to private property. Section 41 of the 2023 amendments empowers Gardaí to seize vehicles without warrants for dangerous or antisocial use, with fines up to €5,000 and potential imprisonment. This framework illustrates regulatory lag in action. Scramblers have been governed by outdated general provisions, with targeted urban restrictions only emerging reactively. For electric scooters – classified as Personal Powered Transporters since 2024 – rules include a minimum age of 16, a 20 km/h speed limit, prohibition on footpaths, and bans on passengers or goods. Helmets are recommended but not mandatory, and insurance is not required, complicating claims. EU Directive 2002/24/EC shapes vehicle standards, while micro-mobility policies encourage adoption.

Enforcement challenges persist, as Gardaí face resource constraints despite increased seizures, and confusion over e-scooter rules remains common. Local bylaws (e.g., Dublin City Council) supplement national law, but gaps – such as non-mandatory insurance – reflect incomplete adaptation to new risks. Compared to the UK (helmet mandates in trials) and France (footpath penalties), Ireland's approach has been slower and more fragmented. The lag is evident in the reactive nature of 2023–2024 changes and ongoing 2026 proposals for scrambler restrictions in public areas (including parks), as reported in The Irish Times and supported by Minister Sean Canney. Plans for drone monitoring have been delayed, and calls for temporary halts (e.g., from the Labour Party) highlight the difficulty of closing the gap once patterns are entrenched. Civil liability follows negligence principles, with contributory negligence reducing awards. Overall, the framework shows incremental progress but persistent lag in addressing underage use, insurance voids, and public-space conflicts.

Safety Data and Related Issues

Safety concerns are pronounced. The RSA's 2025 research ranked e-scooters as high-risk, with 24% of users reporting collisions. Garda records document over 1,500 e-scooter incidents in three years, including fatalities. Head injuries dominate, accounting for 25% of paediatric neurosurgical cases at Temple Street, often from falls without helmets, as noted by the Royal College of Physicians of Ireland in 2025. Pedestrians and children are disproportionately affected.

Scrambler incidents cause severe outcomes, including mobility and vision impairment; the 2026 Grace Lynch case exemplifies pedestrian vulnerability at crossings. Speeds, poor visibility, and road conditions contribute, with orthopaedic injuries common and over 50% requiring ongoing care. These patterns are symptomatic of regulatory lag: the absence of early, specific controls permitted unsafe practices to proliferate, leading to elevated risks, underreported data, and significant societal costs. Ireland's 2025 road fatalities (190 from 179 collisions) included rising serious incidents involving these vehicles, reinforcing the need for timely governance.

Analysis of Relevant Case Developments

Courts have addressed both civil and criminal dimensions. In the 2025 High Court case Avetian v MIBI, a €5.2 million settlement compensated injuries from a scrambler collision in a park, with the Motor Insurers' Bureau of Ireland (MIBI) stepping in due to absent insurance, and Dublin City Council involved. A 2025 District Court case in Waterford saw a bus driver charged with dangerous driving causing death after striking an e-scooter. In the Grace Lynch matter (January 2026), the teenage defendant faces dangerous driving charges, potentially carrying up to 10 years under

Section 53. Another e-scooter fatality case resulted in an eight-year sentence, while a post-2024 decision dismissed no-insurance charges for an e-scooter, clarifying classification.

These cases demonstrate how courts fill gaps left by regulatory lag – interpreting broad laws, applying criminal sanctions for unsafe operation, and relying on MIBI for uninsured incidents. Contributory negligence adjusts awards, and UK precedents (e.g., pothole-related rulings) offer comparative insights. Judicial outcomes underscore the need for clearer, proactive legislation to reduce reliance on case-by-case resolution.

Potential Reforms and Recommendations

Proposals seek to overcome regulatory lag through targeted measures. Discussions in 2026 include mandatory helmets and high-visibility clothing for e-scooters, outright scrambler bans in public spaces, and mandatory insurance to address claim barriers. Enhanced Garda enforcement – via drones, training, and surrender programmes – builds on 2023 powers. Infrastructure improvements (designated lanes) and RSA education campaigns aim to prevent entrenchment of unsafe norms. Comparative examples – the UK's helmet trials, France's penalties – suggest pathways forward. Collaboration across government, enforcement, and communities is essential. Temporary restrictions on scramblers, as proposed by the Labour Party, could facilitate evaluation. However, the Government is already set to ban the use of scramblers in public places. By shifting from reactive to anticipatory governance, these reforms could reduce lag, better balance mobility benefits with safety, and prevent future tragedies.

Conclusion

Scramblers and electric scooters present Ireland with complex regulatory and safety challenges. The Road Traffic and Roads Act 2023 marked progress, but regulatory lag – evident in delayed rules, enforcement gaps, and incident-driven reforms – has allowed risks to persist. The theoretical lens of regulatory lag illuminates why responses have often been reactive and why further proactive steps are needed. Ongoing developments, including 2026 proposals for scrambler bans and tighter e-scooter rules, offer opportunities to close the gap. Continued monitoring and adaptation will be crucial to ensuring these modes of transport enhance rather than undermine public safety.

Children, Famine, and the War in Gaza: How the Crisis Violates Children's Right to Food

Shivani Tripathi is a PhD candidate at Faculty of Law, Banaras Hindu University.

Since 2023, Gaza City has been facing a humanitarian crisis due to the ongoing conflict with Israel, which has led to the most severe violations of children's rights documented in recent history. Other than bombs and missiles, children's lives in Gaza are suffering from a lack of food. According to a study by United Nations Relief and Works Agency for Palestine Refugees (UNRWA), as of mid-August 2025, an estimated 54,600 children under five years of age are acutely malnourished, with approximately 12,800 suffering from fatal severe acute malnutrition and is estimated that by June 2026, around 132, 000 children will be suffering from acute malnutrition.

The severity of the problem can be adjudged from the fact that, since the conflict began, more than 100 children have tragically died from famine and malnutrition-related causes. As much as 98.5 percent of agriculture is destroyed, contributing to an acute food shortage. The food available is overly priced, making it inaccessible to the people and this raises the phenomenon of 'food poverty'. Israel has been using starvation as a method of warfare, and the destruction of essential infrastructure aggravated by obstruction in humanitarian aid has created a famine characterized by mass hunger and malnutrition. The Integrated Food Security Phase Classification (IPC) confirmed famine conditions in the Gaza Governorate in August 2025 for the first time in the Middle East region. This action of indirect killing of civilians falls under the definition of genocide.

The catastrophic effect on children

Children are uniquely vulnerable and face higher mortality rates in war and conflict situations. Children in war-torn Gaza City are receiving one meal a day or no food at all. The impact of such hunger and malnutrition in early childhood causes stunted growth, cognitive deficits, developmental delays, and compromised immune functions that even persist into adulthood. Some impact of famine can never be undone- the physical harm and mental trauma faced by children will be unforgettable for them. The absence of essential nutrition in food puts the entire generation at risk, and the tenacious starvation and malnourishment have pushed thousands of children in Gaza to the brink of death. The frequent airstrikes and attacks have forced the children to be displaced from their homes. Similarly, 55,500 pregnant and breastfeeding women are estimated to be suffering from high levels of malnutrition by June 2026, as a result of which, underweight and malnourished babies are born and raised.

Why is this human rights and international law problem?

The malnutrition crisis constitutes systematic violations of the children's human rights framework. The Convention on the Rights of the Child, 1989 (CRC) is the most important document on children's rights, and Article 24 and Article 27 mention that children have the right to adequate food, nutrition, and health, and obliges parents and state parties to provide for the child's development, specifically states providing material assistance for the child's nutrition. The UN Committee on the Rights of the Child is the monitoring body that observes compliance to the Convention, and it has vehemently criticized the mass starvation of children amid the blocking of

aid in Gaza and unequivocally stated that the right to food is a fundamental human right that is intrinsically linked to the right to life and has called for insistence on ensuring food security. Also, Target 2.2 of the United Nations Sustainable Development Goals casts a duty on the member states to end all forms of malnutrition by 2030, and end stunting and wasting among children under 5 years of age by 2025. Several human rights conventions recognize the importance of the right to food for a person's life and survival. Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESR) recognizes the right to adequate food and freedom from hunger as an essential part of the right to an adequate standard of living and casts an obligation on the State Parties to the Covenant to take measures to ensure production, conservation and distribution of food. Through various provisions, the International Covenant on Civil and Political Rights, 1966 (ICCPR) mandates the protection of life and public health.

Beyond these human rights, the deliberate use of starvation as a method of warfare constitutes war crimes under international humanitarian law. Israel's security-driven restrictions has obstructed most of the food and water aid reaching Gaza residents and has been using mass starvation and collective punishment as a means to fight. Humanitarian workers are also at constant threat of attacks. The food distribution system in Gaza relies on only three distribution points, which are in militarized and inaccessible areas, resulting in loss of lives while receiving the aid. Article 55 of the Fourth Geneva Convention bestows duties on the occupying power to ensure the food and medical supplies for the population, "to the fullest extent of the means available to it." The Rome Statute of the International Criminal Court and UN Security Council Resolution 2417 (2018) explicitly condemns and criminalises the intentional use of starvation of civilians as a method of warfare, calling it a 'war crime'.

The pathway to recovery

The prevailing ceasefire should be immediately accompanied by unimpeded food and nutritional supplies, water, sanitation, and medical equipment to all war-affected areas, along with efforts to prevent further escalation. The United Nations and other aid agencies should be granted full access to Gaza to reach out effected children. The children need rapid mass screening, emergency therapeutic feeding for severe wasting, and supplementary feeding for moderately malnourished children. Breastfeeding mothers need nutrition and medical support. The parties to the conflict must adhere to international humanitarian laws and need to create secure humanitarian corridors and distribution points so that the aid reaches the needy. Long-term interventions may include rebuilding agriculture and markets to reinstate household food security. Safe water, hospitals, and sanitation infrastructure must be ensured. The conflicting parties must fulfill their obligations under human rights and humanitarian law regime. The whole international community should come forward to help the children of the Gaza City through funds and food supplies.

Conclusion

Food is not a luxury; it is a basic need for human survival, and to have food is the basic human right of these children. The exorbitant number of children suffering from hunger in Gaza is not just a humanitarian crisis; it is a violation of children's fundamental rights under the UNCRC and other international norms. These innocent children have no participation in war, but they have been suffering for years. It is not only a legal but a moral duty of states to protect children's lives and health, for these children are not only the present but also the future of the world.

Iron Lines and Legal Transformation: Railway Litigation and its Influence in UK Law

Tadgh Quill-Manley is a student at King's Inns, and can be reached at tadghquillmanley@yahoo.com.

The rise of the railway in nineteenth-century Britain was, in addition to being an engineering as well as economic phenomenon, also a profound legal event. Railways disrupted existing social practices, transformed patterns of work and travel, and concentrated unprecedented power in the hands of private corporations operating under statutory authority. Inevitably, these changes generated disputes that reached the courts with remarkable frequency. In resolving them, judges were compelled to adapt established legal doctrines to new industrial realities. The result was a body of case law in which railways served as both subject matter and catalyst for legal development.

Railway litigation occupies a distinctive position within UK legal history. Unlike many industries, railways have intersected simultaneously with contract law, tort law, labour relations, company law, statutory interpretation, and constitutional principle. Passengers, workers, landowners, shareholders, trade unions, and Parliament itself all found their interests entangled in railway disputes. Courts were thus required not only to resolve private conflicts but also to articulate principles capable of governing a rapidly modernising society.

This article examines a range of influential UK cases involving railways and considers how they shaped the law far beyond the tracks on which they arose. It argues that railway cases acted as doctrinal pressure points, exposing weaknesses in existing legal rules and prompting both judicial innovation and legislative reform. Through an analysis of key decisions, the article demonstrates that the legal legacy of the railways originates not in technical transport regulation alone, but in the foundational principles of modern British law.

Railways, Commerce, and the Modern Law of Contract

Contract Formation and Conduct

The development of contract law, in especially with regard to the manner in which agreements are constructed in complicated business circumstances, is one of the most lasting contributions that railway litigation has made. In the case ofBrogden v. Metropolitan Railway (1877), the judgement that was made is representative of this impact. The disagreement did not originate from a spectacular tragedy or strike; rather, it was a seemingly insignificant economic arrangement for the delivery of coal that led to the disputes. The legal issue that it raised, namely whether or not a contract may exist without the explicit assent of the parties, turned out to be of essential importance.

The House of Lords approved an objective approach to the establishment of contracts by acknowledging that ongoing performance by both parties indicated acceptance of the contract. Taking into account the reality of industrial business, where formalities sometimes lag behind practice, this line of reasoning seemed appropriate. The importance of *Brogden* sits not only in the conclusion that it reached, but also in the fact that it asserted that the law of contracts ought to be able to accommodate commercial conduct in their current form, rather than in the manner that classical theory may desire it to be. As a result of this, the case contributed to the consolidation of

the notion that contracts may be formed by behaviour, which is a theory that is today considered to be conventional in English law.

Standard Form Contracts and Exclusion Clauses

In addition, cases involving railways compelled the courts to address the ramifications of bulk contracting. There were challenging problems of consent and justice that were raised as a result of the daily sale of thousands of tickets, each of which was subject to specified requirements. It was established by the Court of Appeal in the case of Parker v. South Eastern Railway Company (1877) that contractual conditions might be included by fair notice, even if the consumer had not read them. A decisive change away from subjective agreement and towards an objective criterion that is based on what a reasonable person would comprehend was highlighted by this event.

In the case of Thompson v. London, Midland and Scottish Railway Co. (1930), the court upheld the incorporation of an exclusion clause against an illiterate passenger. This case was a continuation of the reasoning that was presented in *Parker*, and it could be argued that it was made more definitive. The ruling provided a striking illustration of the power imbalance that is inherent in standard-form contracts and revealed the limitations of common law protection in the face of increased economic efficiency. In spite of the fact that these instances brought clarity and certainty to business players, they also brought to light the societal cost of adhering to rigorous contractual standardisation.

There is evidence that these railway instances had a lasting impact, as seen by the subsequent participation of the government. One interpretation of the Unfair Contract Terms Act of 1977 is that it was a legislative reaction to judicial theories that were formed in instances such as *Parker* and *Thompson*. This statute limited the capacity of transport operators to avoid responsibility for carelessness that caused bodily damage. Not only did railway litigation have a role in shaping the common law, but it also brought to light the flaws of the common law, which ultimately led to its revision.

Scope of Carrier Liability

In the matter of Great Western Railway Co. v. Wills (1917), the plaintiff, who operated as a meat merchant, consigned 750 carcasses of sheep and lambs to the defendant railway company under a "owner's risk" note, which diminished the liability of the carrier in return for reduced rates. Upon arrival, it was noted that 14 carcasses were absent, which led the plaintiff to initiate legal proceedings to recover their value. The document absolved the organisation from responsibility regarding "loss, damage, misdelivery, delay, or detention," except in instances of intentional wrongdoing, while maintaining accountability for "non-delivery of any package or consignment that was completely and accurately addressed." The primary concern pertained to the interpretation of "non-delivery," specifically whether it included instances of partial loss (short delivery) or was limited to a complete failure to deliver the full consignment. The defendant contended that the term "consignment" denoted the entirety of the goods, thereby categorising the insufficient delivery as an exempted "loss." The plaintiff asserted that the delivery necessitated the inclusion of every item, thereby rendering any deficiency as a failure of delivery, particularly in light of allusions to theft. The House of Lords, in a majority decision that included Lords Loreburn, Haldane, Kinnear, and Parmoor, permitted the appeal of the railway, determining that the term "non-delivery" referred to the inability to deliver the entire consignment. The authors deduced from the content of the note, differentiating between packages and consignments as distinct entities, as well as analysing its structure, which encompassed varying claim periods for loss or damage (three days following delivery) in contrast to non-delivery (14 days subsequent to dispatch). This interpretation corresponded with the intent of the note, which involved assigning risk to the owner for partial issues in order to substantiate lower rates. In the absence of intentional wrongdoing, the company bore no liability. Lord Shaw expressed a dissenting opinion, contending that the provision of an

amount that fell short of the total represented a failure to deliver, thereby underscoring the principles of commercial reasoning. This resolution strengthened the safeguards for carriers under the stipulations of owner's risk conditions, elucidating that short deliveries were regarded as exempt losses unless they were consigned separately.

Statutory Interpretation and the Limits of Judicial Formalism

Since its foundation, the railway business has been subject to a significant amount of regulation, which has resulted in repeated disagreements over the interpretation and extent of legislative requirements. London and North Eastern Railway v. Berriman (1946) is one of the few instances that exemplifies the conflict between literal and purposive interpretation in a more clear and concise manner. The restrictive interpretation of safety laws by the House of Lords, which resulted in the denial of compensation to a worker who was murdered while servicing railway points, is illustrative of the judiciary's unwillingness to stretch statutory language beyond its usual meaning throughout the middle of the twentieth century.

However, despite the fact that the judgement may be defended on the basis of rigorous interpretation, it has been criticised for placing a higher priority on linguistic correctness than on worker safety. The dissenting judgements, which advocated for a view that was both more expansive and more purposeful, served as a precursor to subsequent changes in statutory interpretation, notably in the context of health and safety law. It is for this reason that *Berriman* has a significant position in the annals of interpretative method history. He is responsible for illustrating the human repercussions of judicial constraint and for influencing subsequent moves towards purposive thinking.

Earlier instances, such as Crouch v. Great Northern Railway Company (1856), reflect a different judicial mindset, one that is more inclined to curb the power of corporations via the rigid implementation of legislative boundaries. The courts reaffirmed the protective aim of railway legislation and maintained the notion that statutory monopolies must be operated within clearly defined limitations. This was accomplished by banning railroads from charging excessive rates for combined parcels with the intention of preventing them from charging excessive rates.

Negligence, Risk, and the Human Cost of Rail Transport

Occupiers' Liability and Foreseeable Harm

Railways were inherently hazardous settings, and accidents often generated issues regarding the extent of culpability that may be incurred. A substantial reevaluation of occupiers' obligation towards trespassers was carried out by the House of Lords in the case of British Railways Board v. Herrington (1972). By acknowledging a responsibility of "common humanity," the court moved away from the rigorous exclusionary rule that was established in Addie v. Dumbreck (1929) and towards a definition of obligation that is more objectively ethically sensitive.

Herrington's significance originates not only in the results it produced but also in the approach it used to achieve those results. It was freely admitted by the House of Lords that the social circumstances had changed, and that the law needed to adapt in accordance with these changes. This willingness to stray from precedent in order to reflect modern values constituted a critical point in the history of negligence law and directly inspired the passage of the Occupiers' Liability Act 1984.

Psychiatric Injury and Rescuers

The emotional aftermath of railway disasters also forced courts to confront the boundaries of liability for psychiatric harm. In Chadwick v British Railways Board (1967), the recognition of a duty owed to a volunteer rescuer extended negligence law into new territory. The court's emphasis on foreseeability and proximity reflected an emerging sensitivity to psychological injury as a genuine

and compensable harm. Although later cases would impose limits on such claims, *Chadwick* remains significant as an expression of judicial empathy and an acknowledgment of the broader human impact of industrial negligence. It illustrates how railway cases prompted the law to respond to experiences previously regarded as legally invisible.

Statutory Duty and the Architecture of Safety

When it came to railway safety, the enforcement of statutory requirements was of the utmost importance, and within this framework, the courts often took a tough approach. It is clear from the case of Knapp v. Railway Executive (1949) that the judicial system is willing to impose culpability in situations where safety duties have not been satisfied, even in situations when contributory fault is evident. In order to strengthen the preventative purpose of safety regulations, the court ensured that the need to lock level-crossing gates was treated as an absolute obligation.

A wider legal culture was established as a result of these cases, in which statutory responsibilities were perceived to be more than just regulatory suggestions; rather, they were believed to be enforceable obligations that were aimed to protect life and limb. Therefore, railway caselaw was very important in establishing the notion that safety regulations need to be read and executed in a stringent manner.

Employment Relations, Collective Action, and Political Consequences

It is possible that no other railway dispute had a bigger political impact than the one that took place in 1901 of Taff Vale Railway Co v Amalgamated Society of Railway Servants. As a result of the House of Lords' decision to hold trade unions accountable for economic losses brought on by strike action, the legal landscape of labour relations underwent a considerable transformation. Due to the judgement, labour unions were put in a position where they were exposed to crushing financial risk, which essentially reduced their capacity to conduct industrial action.

The general relevance of railway litigation is brought into sharper focus by the response to the *Taff Vale* case. In addition to leading directly to the reversal of legislation in the form of the Trade Disputes Act 1906, the case was crucial in galvanising the trade union movement and contributing to the expansion of the Labour Party. With regard to this particular aspect, the law governing railways intertwined with the development of democracy, demonstrating how judicial judgements may bring about significant political shifts.

Corporate Governance and Fiduciary Responsibility

There was also a setting in which courts established concepts of corporate governance, and that environment was given by railway firms, which are often capital-intensive and publicly prominent business entities. Within the context of the case of Hutton v. West Cork Railway Co. (1883), the Court of Appeal set significant constraints on the discretion of directors, highlighting the fact that corporate powers must be employed for appropriate objectives.

It is not the particular circumstances that are the source of this decision's lasting effect; rather, it is the way in which it articulates certain fiduciary principles. Insistence by Bowen LJ that corporate generosity must be justified by corporate advantage continues to shape current company law and demonstrates judicial concern with avoiding excess of corporate power during moments of decline or restructuring. Bowen LJ's insistence will continue to have an impact on modern company law.

Professor Blanaid Clarke highlights *Hutton v West Cork Railway Co*. (1883) as her favourite case because it remains a cornerstone of company law and corporate governance. The UK Court of Appeal ruled that payments made to directors and officers during the company's winding-up were

invalid, as they were not "reasonably incidental" to the business or for the company's benefit. Lord Justice Bowen's famous "cakes and ale" judgment established a pragmatic principle: companies may look after employees and other stakeholders, provided this serves the company's benefit. He recognised that humane treatment of employees can promote loyalty and long-term success, anticipating modern debates on corporate social responsibility. Clarke values the case as a teaching tool because it challenges black-and-white thinking about executive pay and corporate spending, encouraging students to assess whether actions genuinely benefit the company. She argues the case is still highly relevant today, especially after the financial crisis, as it supports a long-term, stakeholder-focused approach to governance rather than short-term profit maximisation for shareholders alone.

Railways and Constitutional Principle

Controversies involving railways also reached the highest levels of constitutional administration. The notion of parliamentary sovereignty was reaffirmed by the House of Lords in the case of Pickin v. British Railways Board (1974). The House of Lords refused to question the legality of an Act of Parliament, even in cases where claims of procedural impropriety were made.

The relevance of the *Pickin* case appears in the fact that it reaffirms the territorial borders of the Constitution. As a result of the ruling, the separation of powers was strengthened, and legal certainty was maintained. This was accomplished by requiring that judicial procedures not be scrutinised by the legislative branch. The fact that such a fundamental constitutional principle was reinforced in the midst of a dispute involving a railway exemplifies the variety of difficulties that are generated by the statutory foundations of the sector.

Conclusion

Railway litigation occupies a unique and influential place in the development of UK law. From the formation of contracts to the limits of negligence, from labour rights to constitutional doctrine, railway cases repeatedly forced courts to confront the consequences of industrial modernity. These disputes exposed tensions between formal legal reasoning and social justice, between economic efficiency and human vulnerability, and between judicial authority and legislative supremacy. In responding to these challenges, the courts shaped doctrines that continue to govern contemporary legal practice. The railways may no longer dominate the legal landscape as they once did, but their legacy endures in the principles established through the cases they inspired. To study railway litigation, therefore, is also to trace the development of modern British law itself.

A Response to Okin's Woman

Kritika Thakur is a fourth-year law student at NLU Delhi.

At the fag end of the 20th century, when third wave feminism was just beginning to take form, Susan Okin was writing a deeply influential, gendered critique of Rawls' conception of Justice in the book *Justice, Gender and the Family*. Okin engages in a feminist examination of how Rawls imagines the subject and agent of justice both, whom he conceptualises as a rational, mutually disinterested, free and equal person. The Rawlsian subject is atomized, with no ties to other people beyond social constructs that are hidden by the veil of ignorance. Okin attempts to complicate this understanding through the lens of family, by showing the ways in which inequality and inequity affects women within the family.

This is an important complication, for Rawls' view without looking at the reality of gender and sexual division of labour within families had led to a glaring simplification in what was an attempt at a grand theory of justice. Okin's critique begs the question "can justice be achieved without any concessions to gender". She speaks to the unfair burden of carework that falls on the primary or default parent, who is most often the woman. Equally, however, Okin's critique seems to think of women as a homogenous group, not recognizing the wildly varying degrees and types of injustice faced by women in social groups, family dynamics, sexualities and cultures that differ from the middle class cisgender woman in a heterosexual, nuclear family. The woman that Okin centers is too much of a minority to be applicable to a large swathe of women in the real world.

Despite being more comprehensive than Rawls, Okin still takes as her subject only a very specific type of subject: the Western, liberal, individualistic person. This paper explores the kind of subject a truly grand, universal theory of justice must examine, specifically through intersectional and relational lenses, to acknowledge the context many women are embedded in; because while the veil of ignorance in the original position is drawn over the context itself, the personality and character of people, and consequently, their conceptions of justice, are deeply affected by the contexts. This paper attempts to expand Okin's subject of justice.

Background

Within Rawls' theory of justice, all the human beings within the original position, where the principles of justice upon which basic structures of society would be created are to be decided, are heads of families. This is one of their basic characteristics. Okin's concern with this is that because everyone creating the theory of justice is the head of a family, there can be no meaningful interaction with any ideals of justice within the family.

John Rawls's argument for considering all people within the original position as heads of families is that there must be a justification for those people to have some interest in intergenerational well being. Within this, he says that the way for people within said position to carry out this consideration is by imagining themselves as fathers, and measuring how much should be set aside for their sons based on how much they would expect from their own fathers. This ties into the idea of mutual disinterest, and ignores the fact that women tend to be aligned with the interests of the next generation without any real requirement of being a mother. Rawls doesn't deal with this at all. Women don't need to be heads of a family to wish for the well being of the next generation at large.

Rawls says that family, is the basic unit of society and that the differences in family situations do make a concerted difference in the lives of the men who come from them. Okin's critique, however,

has to do with the fact that Rawls assumes a monogamous family and never actually examines it from the lens of justice, and adult members of the family who are not the head of the family go unrepresented in the original position. Okin also criticizes the way in which children are treated within Rawls' theory, since abusive households are unaccounted for in the paternalistic view he takes.

Okin also critiques the assumption that once the veil of ignorance is lifted, all people in the original position will participate in the paid labour market, as though there is no difference between the individuals who make up the household.

However, Okin doesn't actually deal with the woman who does get paid because there is no choice, where her income is essential to the running of the household, but faces financial abuse despite it.

Analysis

This blog argues that Okin's critique of Rawls' theory of justice can be extended to include women in cultures not her own, provided those who use it do not fall into the pitfalls already identified by a number of scholars in the field. The subject of the justice discourse could well be a woman, but this woman must be able to encompass the real women who suffer under the systems that make up the world, and cannot be an abstraction of a cisgender, white, middle class woman in a heterosexual relationship.

If one attempts to use Okin's critique by creating such an abstraction and then tries to add the complexities and disadvantages of a real woman, one will have at the end of the process, a being comprised of such a number of contradictions that it will be patently useless to any ideations of justice. This is because one cannot externalise the context within which a human being develops, especially a woman, because of the peculiar way in which women are socialised from infancy.

Ignoring the multitude of interactions that create a woman to universalise her will lead to injustice, because these contexts are internal. What is required is a universal or grand theory of justice that does not hinge upon a specific type of woman to remain internally consistent because conflict between different identities often leads antagonism within the group.

It is important to realise that the experiences of tribal or dalit women living in villages are vastly different from the experiences of working, middle class women in urban India, which are once again equally different from the experiences of black women in America. The danger of universal theories of justice is precisely this- that it might subsume these differences which are precisely what make theories of justice so important.

Moreover, to examine Mari Matsuda's critique, which hinges upon the methodology of abstraction, one can similarly extend her ideas to Susan Okin's work. It is also important to realise that the woman that Susan Okin speaks of is normative and utopian. Ideas like equality and fairness don't take into account the lived realities of women within the gendered social structures that prevail across the country. Race and class distort the image she creates of a woman who remains at home and carries out a disproportionate amount of housework and domestic chores, discouraged from seeking paid work. The danger one faces when dealing with Okin's idealised and simplistically structured woman is that she, too, is an abstraction living a life that is almost like an ideal type, fulfilling a number of check boxes, inapplicable to the majority of women across the world.

Conclusion

This project argues that Susan Okin's critique of Rawls can well be extended to marginalized communities within her culture as well as women of entirely different cultures provided that the extension doesn't get caught up in typecasting women a certain way. Okin argues against the unfair

division of labour, and if taken in that spirit, it applies across circumstances and situations. However if the reader fixates upon the letter of her work as it applies to stay at home mothers and wives, they will likely find that the critique does not apply to women steeped in other cultures. A good example of this is the fact that women from certain communities in India work overwhelmingly as domestic workers and other basic carework tasks where despite being paid, they are not paid highly, and they do not truly have any scope for a different field of work. This is not acknowledged in Okin's work, but one can read the text in the spirit it was intended to be read in and see that Okin would likely have felt strongly on behalf of such women as well.

Endangered Linguistic Minority Rights: The NCMEI Act, 2004's Divergence from Articles 29 and 30

Harshita Jindal and Aashi Sharma are second year law students at Rajiv Gandhi National University of Law, Punjab.

The Bombay High Court in *Karachi Education Society v. State of Maharashtra and Ors.*, recently, quashed an order passed by the Director of Education of Pune for exempting linguistic minority institutions from the ambit of the Maharashtra Educational Institutions Act. This is representative of the struggle of linguistic minority communities across India who are unable to uplift themselves owing to non-application of certain prominent legislations to them. This article aims at answering one of such legislative fallacies evident in the National Commission of Linguistic Minority Institutions Act, 2004.

According to the census of 2011, there are 1,369 'rationalised' mother tongues out of which 400 are facing the threat of extinction. Keeping these concerns in mind, the framers of the constitution incorporated Articles 29 and 30. The latter grants religious and linguistic minorities the right to safeguard their language by establishing and administering educational institutions of their choice.

Jurisprudential ambiguity around the term

The term 'minority' has not been defined anywhere in the constitution but existing judicial precedents shed some clarity on the term 'linguistic minority'. The foundational explanation of this term was given by the Supreme Court in *DAV College v. State of Punjab 1971*. It was held that the presence of a distinct spoken language amongst a group, thereby necessitating a separate linguistic identity, characterises them as a linguistic minority. Minority groups have an inherent right to set up and manage educational facilities according to their preferences, which includes choosing the medium of instruction. This understanding arises from a conjunctive reading of Articles 30(1) and 29(1).

Moreover, an eleven-judge bench in *TMA Pai Foundation and Ors v. UOI* decided on the criterion for the determination of linguistic minority. The apex court affirmed that linguistic minority has to be determined in the context of the state and not India as a whole. The Hon'ble Supreme Court in *re Kerala Education Bill, 1959* decided that those communities with less than 50% of the population of the particular state and have their mother tongue other than the State Official Language are a Linguistic Minority. For instance, In the State of Maharashtra, Marathi is recognized as the Official Language. Consequently, individuals whose mother tongue is any language other than Marathi, and whose community constitutes less than 50% of the population, are considered Linguistic Minorities in Maharashtra. This includes speakers of languages such as Urdu, English, Punjabi, Gujarati, Sindhi, Kannada, Malayalam, Telugu, Bengali, Rajasthani, and others are guarded under Article 30 (1). These judgements have tried to fuel clarity into the term, which was left open to elucidation by the Constituent Assembly.

On the basis of these judicial precedents, a criteria was mapped out in the Report of the National Commission for Religious and Linguistic Minorities, which emphasised on numerical inferiority, non-dominant status, and distinct identity. The report states that "exclusive adherence to a minority language is a leading factor that contributes to socio-economic backwardness, and that this backwardness can be addressed only by teaching the majority language". But a workshop conducted

by the National Commission for Religious and Linguistic Minorities (NCLRM) in 2006 recommended a clear definition of the term "linguistic minority" which would be applied when creating legislation to implement affirmative action. It stated that the criteria should not circle around the fact that a linguistic minority group should lack knowledge of the majority language, but on the susceptibility of a specific language to disappearing and the absence of institutional backing to nurture, maintain, and promote that language.

Plight of the linguistic minorities

The National Commission for Minority Educational Institutions (NCMEI) was created under the National Commission for Minority Educational Institutions Act, 2004 (NCMEI Act) to define measures for promoting and safeguarding the minority status and identity of institutions established by minority groups, address inquiries regarding the designation of an institution as a minority educational institution, and protect that designation.

It seems that while the NCMEI Act does not explicitly differentiate between linguistic and religious minorities, the NCMEI is currently not accepting applications—either directly or through appeals against state minority commission decisions—for minority status certificates for linguistic minorities. Although the Act does not specifically prohibit linguistic minorities from applying, Section 2(f) defines "minority" as a community recognized as such by the Central Government. To date, the Central Government has only recognized six religious minorities and has not acknowledged any linguistic minorities. Additionally, the National Commission of Minorities Act, 1992 also defines 'minorities' as a community notified by the central government. Hence, the power and authority to declare a community as minority completely falls into the purview of the central government. So far, the union government has only notified six religious minority communities i.e. Muslim, Christian, Sikh, Buddhist, Parsi and Jain.

This statutory recognition to these six minority communities stems from the Ministry of Human Resource Development's notification dated 23 March 2018. The latter categorically reserved the minority status for the above-stated six religious minority communities, thereby leaving the question open in case of linguistic minorities. Therefore, issuing minority certificate, under the NCMEI Act, 2004, to linguistic minorities does not arise.

The fact that there is not even a single notification of a linguistic minority by the central government bolsters the NCMEI's blatant neglect towards linguistic minorities. Time and again, the NCMEI has reiterated its stance of being a regulatory body entirely for religious minorities and not catering to the interests of linguistic minorities. A document published by the NCMEI titled *Guidelines for determination of minority Status and related matters in respect of minority educational institutions*, available on NCMEI's website explicitly states that 'The Commission does not entertain applications for linguistic minority'.

Reportedly, this position taken by the NCMEI has created difficulties for many linguistic minority institutions across various states. For instance, Moreh College in Manipur was established in May 1992 with an objective to provide higher education to minority communities, particularly, the Gangte-Lepcha community in Chikim village, Manipur. Despite over 30 years of establishment and recognition by the UGC, the college is yet to be recognized as a minority institution, owing to this legislative fallacy.

These institutions have faced significant delays in processing their applications for minority status by state authorities. Some institutions have sought relief from the relevant courts to address this long-standing issue. However, the future of linguistic minority institutions that have applied for minority status but have not received it, or those that have not had their provisional status renewed, remains uncertain until a final decision is made by the appropriate authorities. In conclusion, the lack of

recognition and support for linguistic minorities hinders their educational institutions, highlighting the urgent need for legal clarity and protective measures to preserve linguistic diversity in India.

This contradicting nature of the legislative dictum and the constitution creates a conundrum for any linguistic minority community. This is because linguistic minorities are at a loss of judicial precedents as well as legislative action bolstering the exercise of their rights guaranteed by the constitution. In *K.P. Gopalakrishna v. State of Karnataka*, it was held that in the absence of any notification by the Central government indicating the linguistic minorities, it would be inexplicable as to how the commission would adjudicate as to the linguistic minority status of any applicant.

Conclusion and remedies

In the context of the prevailing neglect and uncertainty concerning linguistic minorities, it is imperative to ensure their protection through judicial activism and robust legislative measures. To date, significant precedents have been established that clarify the rights of religious minorities, particularly regarding their entitlement to establish and administer educational institutions. The landmark ruling by the nine-judge bench in the TMA Pai Foundation case affirmed the equal standing of linguistic and religious minorities. However, there remains an absence of jurisprudential authority aimed at creating a protective framework specifically for linguistic minorities. Therefore, this necessitates the filing of a Public Interest Litigation before the apex court since this would enable justice to aggrieved linguistic minority communities across the country.

A critical initial step toward the inclusion of various linguistic minority communities across India involves amending the definitions of minorities as outlined in the National Commission for Minorities (NCM) Act of 1992 and the National Commission for Minority Educational Institutions (NCMEI) Act of 2004. It is essential to consider the establishment of distinct criteria for identifying religious and linguistic minorities, given that there are six recognized religious minority communities, while linguistic minorities are determined based on the state as a unit of analysis.

Furthermore, the NCMEI Act of 2004 is explicitly limited to the rights of religious minorities. Consequently, the legislature faces the dual responsibility of either enacting new legislation specifically addressing the rights of linguistic minorities or expanding the scope of the NCMEI Act to include linguistic considerations. A more prudent approach would be to pursue the enactment of new legislation dedicated to the rights of linguistic minorities, as the current phrasing of the NCMEI Act has proven to be exclusive and insufficiently accommodating of linguistic minority concerns.

This step towards the inclusion and recognition of linguistic minority communities will go a long way. By recognizing and supporting the rights of linguistic minorities, India can move closer to realizing the promise of equality and opportunity for all, ensuring that no group is left behind in the pursuit of educational excellence and social progress.

Supreme Court reasserts the validity of in-service bonds in employment contracts

Avantika Kakran is a fourth-year student at Dr. Ram Manohar Lohiya National Law University, Lucknow.

In a recent judgment delivered on 14th May 2025, the Supreme Court, after considering the validity of indemnity bonds providing compensation for breach of a minimum service clause in employment contracts, upheld the enforceability of such bonds. Indemnity bonds in employment contracts usually stipulate that an employee must serve an employer for a minimum period and pay a specified amount if they leave before the expiry of that period. These bonds are designed to secure the employer against pecuniary losses incurred due to early resignation of employees. The decision came in the backdrop of the Karnataka High Court quashing a clause contained in the appointment letter whereby the respondent-employee was required to pay liquidated damages of Rs. 2 lakhs in the event of leaving employment of the appellant-bank prior to three years. The court held the clause to be in restraint of trade under Section 27 of the Indian Contract Act, 1872.

Questions of law before the court

1. Whether the clause contained in the appointment letter amounts to restraint of trade in terms of Section 27 of the Indian Contract Act, 1872 and/or
2. Whether it is opposed to public policy and thereby contrary to Section 23 of the Indian Contract Act, 1872 and violative of articles 14 and 19 of the Constitution.

Findings and rationale

On the first question of law, the court, while discussing the distinction between restrictive covenants operating during the subsistence of an employment contract and those operating after its termination reiterated the law that a restrictive covenant operating during the subsistence of an employment contract does not put a clog on the freedom of a contracting party to trade or employment.

On the second question of law, the court, after a discussion of several previous judgments, held that the contours of public policy are ever evolving and, therefore, the standard of what is just, reasonable or fair in the eyes of society keeps varying with the growth of knowledge and evolving standards. It was the view of the court that PSUs (the appellant-bank in the present case) are required to compete with the private players in the market and therefore need to retain efficient and experienced staff.

Views and suggestions

The court noted that indemnity bonds operating during the employment differ from post-employment restraint on trade and, therefore, are not barred under Section 27 of the Indian Contract Act, 1872. However, it is important to consider whether, even though such bonds prima facie do not put a restraint on trade, they could have a similar effect as that of post-employment restraint contracts by reducing job mobility and limiting an employee's freedom to switch jobs.

Protection of employee interests is ensured when there exists a way for them to exit a job for better opportunities, and when pressure exists on the employer to provide humane working conditions. Negative covenants in an employment contract create high exit barriers that might result in reduced incentive for the employer to provide quality post-bond training and competitive salaries, depending on the field. It is also to be noted that such covenants might restrict a fresher's freedom to explore

other career options in their initial years if the minimum period of service provided in such a contract is too high.

Such clauses in an employment contract may cause a reduction in the quality of work due to the employee feeling tied down to one job; hence, such a negative covenant might prove to be counterproductive to the employer. They also lead to stagnation of skills due to limited exposure to diversity and a restriction on the cross-pollination of ideas among various industries.

Moreover, such indemnity bonds are, prima facie, one-sided. When compared to compensation schemes or provisions for lay-offs and retrenchment, indemnity bonds provide an edge to the employer since similar compensatory benefits do not exist for the employees when employees are laid off or retrenched by an employer, or if they exist, the amount is minimal . Therefore, instead of introducing or endorsing a system of such negative covenants by way of indemnity contracts, the introduction of positive covenants such as retention bonuses might prove to be more helpful by incentivising the employees to remain in a particular job.

Additionally, a major logical flaw that the proponents of indemnity bonds ignore when citing attrition as the cause of bringing such bonds is that attrition is caused mainly due to factors like job dissatisfaction, work-pay disparity, poor management, etc. Thus, introducing indemnity bonds into the market does not seem to address the root causes of attrition.

Another justification cited for the validity of indemnity bonds is the voluntariness of the employee to enter into such a contract. Such voluntariness or consent of an employee needs to be construed keeping in mind the economy of a country and the disproportionate bargaining power that exists in standard form contracts. In a struggling economy like India's, with an unemployment rate of 3.2% , many individuals are forced to take up or stay in unsatisfactory jobs with subpar working conditions. Therefore, even though prima facie an employee enters into a contract containing a negative covenant by his/her consent, whether such consent comes truly without any undue influence also needs to be considered.

Moreover, there needs to be a set standard of reasonableness of the compensation amount in an indemnity bond, since an exorbitant amount of damages with little to no regard to the current salary of an employee might open room for arbitrariness and exploitation of an employee at the hands of an employer. The compensation amount should be calculated with regard to both the employee's current salary and the documented expense in that employee's training. Such a set method will help ensure the interests of both the employer and the employee.

Conclusion

In my view, the court's decision in upholding the validity of indemnity bonds based on the reason that such bonds do not act as a restraint on post-employment opportunities of an employee and, therefore, are not violative of Section 27 of the Indian Contract Act, 1872 is legally sound but warrants scrutiny in terms of its socio-economic implications. The judgment correctly identifies the technical validity of indemnity bonds, but without required safeguards like penalties proportional to the income and the investment in the training process, in-service indemnity bonds risk becoming tools of exploitation rather than legitimate strategies to tackle attrition and safeguard employer interest. Additionally, since the judgment caters only to PSUs, it leaves scope for uncertainties with respect to the validity of such bonds in the private sector. In conclusion, the court is right in pointing out the changing landscape of public policy with the onset of liberalisation; however, going forward, effective job security regulations that help strike a balance between employer and employee interests should be given priority over one-sided mechanisms.

Niranjan Shankar Golikari v Century Spg and Mfg Co Ltd, 1967 SCC OnLine SC 72; *Superintendence Co of India v Krishan Murgai*, (1981) 2 SCC 246.

Central Inland Water Transport Corpn v Brojo Nath Ganguly, (1986) 3 SCC 156; *Niranjan Shankar Golikari v Century Spg and Mfg Co Ltd*, 1967 SCC OnLine SC 72.

Central Inland Water Transport Corpn v Brojo Nath Ganguly, (1986) 3 SCC 156.

How to Train Your AI? The Copyright Predicament of Training Generative AI Models

Syed Suhaib is a final-year law student at the University Institute of Legal Studies, Chandigarh University, specialising in Corporate Law. He presently serves as an Editor at the All India Commercial Law Review and is keenly engaged in legal research, editorial writing, and academic discourse.

"Artificial intelligence is only as good as the data it learns from."

Harvard FAS Mignone Center for Career Success. (2025, January 23). What is AI: The pros and cons of artificial intelligence, and what its future holds. Harvard University.

The Generative Artificial Intelligence (AI) chatbots have accumulated a commercial heed considering that abundant conglomerated industries are capitalising upon the *de facto* applications of this technology and desiderate it to be inclusive within their prevailing business structure. The valuation of such inclusivity is envisaged to be adjuvant in reaping substantial profits whilst economising the cost of operations. In terms of innovation, the generative AI technology is malleable considering the inceptive predominance of the erstwhile *Chat-GPT* model series, which was hobbled by newer ingenious models like *Perplexity* & *Gemini*, making it reasonable to conceit that the generative AI industry will remain tenacious in pioneering out newer & better models. However, this has presented policymakers with a predicament because, as technological innovation transmutes, it arrives at an impasse with the prevailing legislative jurisprudence. Within the *Indian Intellectual Property* law framework, such a predicament of generative AI models is cognate with the concurrent *Indian Copyright Act of 1957* & the *Doctrine of Fair Use*, which contemporarily is inapt to manoeuvre the digital jurisprudence of generative AI models specifically with regards to the data usage for training the generative AI models.

The Predicament of Generative AI Models

In order to ascertain the intricate nature of this predicament between the generative AI models & copyright law, foremost, it is imperative to contemplate how these generative AI models are trained. The generative AI technology can be substantiated to be an amalgamation of *Large Language Models (LLMs)* & *Deep Learning* which constitute a subset of *Machine Learning (ML)* algorithms and consequently require a considerable amount of data & coding for their training. However, this data is exclusively cherry-picked from the public domain, which is open source but protected under copyright law, which routes the prevailing impasse of generative AI models infringing upon the intellectual rights of creative holders.

Within the Indian Copyright framework, such a standoff has been witnessed in the case of *ANI v/s Open AI 2024 SCC OnLine Del 8120*, wherein the Plaintiff *ANI*, a prominent news agency, sued Defendant *Open AI* for utilising its data to train its *LLMs*. On *19th November 2024*, the matter was interimly adjudicated by the *Delhi High Court* through *Justice Amit Bansal*, by upholding the infringement and issuing an *ad interim injunction* against the Defendant. The court was also briefed by the Defendants' counsel that *Open AI* had blocklisted the Plaintiff agency for further training of its model. However, such contention of data usage to train generative AI models is not limited to the

Indian jurisdiction because similar instances have occurred across the jurisdictions of the *United States*, *Europe*, *Canada* & *United Kingdom*.

Antecedent to the lawsuit by *ANI*, in *Canada*, on *24th November 2024*, five Canadian media & newspaper publications in amalgamation, filed a lawsuit of copyright infringement against *Open AI* within the *Ontario Superior Court of Justice* and sought damages and permanent injunction to be issued against *Open AI*. Subsequently, in the *U.S.*, such a suit was filed by *Dow Jones & NYP Holdings* against *Perplexity AI* in the *Southern District Court of New York.*Another such lawsuit in the *U.S.* was filed against *Meta* in the *Northern District Court* of *California, San Francisco Division* by Plaintiff *Christopher Farnsworth*, who provided arguments contending *Meta's* use of training its *LLaMa Model* using his work.

However, a substantial ruling which can eminently influence the aftermath of such cases has neighed from *Raw Story Media Inc. v. Open AI Inc., S.D.N.Y., No. 24-cv-01514, 11/7/24* in *US District Court, Southern District of New York.* Herein, in accordance with the judicial interpretation of the *Digital Millenium Copyright Act*, specific to *Article III, Section 1202(b)(i),* the *District Judge* held that *Open AI has not misused the articles from news outlets to its L.L.Ms.* The *District Judge* reasoned that Defendant can create & reproduce derivations of Plaintiff's work without incurring liability under the *Digital Millennium Copyright Act,* and in order to seek monetary or injunctive relief or both, as the case may be, Plaintiff has to substantiate that the fabrication of their work has caused detrimental ramifications. Consequently, in response to this verdict, the Plaintiff sought a jury trial.

In Search of a Harmony

The real-world applications of generative AI models are now ubiquitous & undeniable within the sphere of innovation integration & assistance. Even with a substantial amount of constructive criticism, these models have remained persistent in narrowing down complex avocations. However, to substantiate whether the training of these models can cause a cognizable injury is a matter of imperative intricacy, as the contention of arguments fuels ambiguity. *"Journalism is in the public interest. OpenAI using other companies' journalism for their own commercial gain is not. It's illegal"* was quoted by *Torstar, Postmedia, The Globe and Mail, The Canadian Press, & CBC/Radio-Canada* and was reported on *Reuters.*

On the other hand, the companies leveraging generative AI models argue *'Fair Use'* in accordance with the jurisdictive and concurrent copyright law. However, such arguments pose a reasonable apprehension around the training of these models, since AI is becoming a billion-dollar industry, they should compensate copyright holders, whose work is being utilised to train these models. On the other hand, these models being open source also becomes a problem, since they are free to use publicly and can be leveraged by anyone for custom use. However, it is also pertinent to note that, in some jurisdictions, there is still a struggle in contemplating the digital jurisprudence that AI has brought. Some have taken arguably strict measures to mitigate such predicaments, like the *European Union's AI Act* which is a luminary legislation in the contemporary era to mitigate such predicaments arising with the inclusivity of generative AI models.

Nonetheless, the protection of every copyright holder's work is also *sine qua non* and cannot be disregarded.A middle ground between fair use and artistic freedom should be deliberated upon, by cogitating fair compensation for copyright holders, if training of such models is done for commercial gain, which can be reasoned to be a prudent way of outwitting & mitigating the prevailing predicament whilst protecting creative & artistic freedom *because an individual should be entitled to fruits of their labour*.

Ian Goodfellow, Yoshua Benigo and Aaron Courville, Deep Learning (MIT Press 2016) Pg. 6–12.

'Generative AI – Intellectual Property Cases and Policy Tracker' (Mischon de Reya, 12 August 2024).https://www.mishcon.com/generative-ai-intellectual-property-cases-and-policy-tracker

Christopher Farnsworth v. Meta Platofrms Inc., 3:24-cv-6893 https://storage.courtlistener.com/recap/gov.uscourts.cand.437440/gov.uscourts.cand.437440.1.0_5.pdf

Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), https://www.copyright.gov/legislation/dmca.pdf

Honderich, H. (2024, November 29). Major Canadian news outlets sue OpenAI. BBC News. https://www.bbc.com/news/articles/cm27247j6gno

John Locke, Two Treatises of Government (A New Edition, Corrected, in Ten Volumes, vol V, Printed for Thomas Tegg; W Sharpe and Son; G Offor; G and J Robinson; J Evans and Co; Also R Griffin and Co Glasgow; and J Gumming, Dublin 1823) 115-25. https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf Also, John Locke, Two Treatises of Government (Whitmore and Fenn and C Brown 1821) Chapter V 'Of Property' Pg 208-229.

Appearance of Parties: An Examination of the Role of Virtual Appearance in Achieving Procedural Justice

Ms. Sanjana Rao is a 3rd Year B.A., LL.B. (Hons.) student at National Law School of India University, Bangalore.

The appearance of parties in civil litigation is a fundamental procedural requirement essential for the effective administration of justice. The Code of Civil Procedure, 1908 (hereinafter referred to as CPC), delineates the procedure for the appearance of parties, under Order IX.

This blog seeks to examine the practical effects of the operation of these rules through first, a socio-economic lens; and second, from the perspective of efficiency. I propose that the issues posed by the current procedure under Order IX can be abated through the successful implementation of virtual appearance. To this end, I have divided this blog post into three sections. The first section provides a broad overview of the scheme of Order IX by laying out the consequences of non-appearance of parties and how the remedies to such consequences operate. The second section brings out the challenges faced by this procedure through *firstly,* an analysis through a socio-economic lens; and *secondly,* from the perspective of efficiency. In the final section, I argue that virtual appearance should be made *a right* in India and I propose a means to that end by *first,* examining the role that virtual appearance would play in abating the socio-economic and efficiency issues highlighted in the previous section; *second,* analysing the existing provisions and position of law with regards to the virtual appearance of parties in India; and *lastly,* proposing measures that must be undertaken to ensure virtual appearance becomes a right in India with reference to other jurisdictions.

A Broad Overview of the Appearance of Parties under Order IX

The rules governing the appearance of parties is outlined in Order IX of the CPC. Rule 1 requires the parties to the suit to appear in person or through their pleaders on the day fixed in the summons.

In cases where only the defendant appears and the plaintiff fails to appear, Rule 8 provides that the Court shall dismiss the suit unless the defendant admits the whole or part of the claim. If the court is satisfied that there was sufficient cause for non-appearance, it may set aside the order of dismissal and fix a day for proceeding with the suit. This is based on the principle that a cause of action should never be dismissed without hearing the aggrieved party.

Conversely, when the plaintiff appears and the defendant fails to appear, the Court may make an order to hear the suit *ex-parte* in cases where the service of summons is proved. However, as reflected in *Arjun Singh v Mohindra Kumar,* even if the defendant is unable to prove sufficient cause for their previous non-appearance, they are permitted to participate in further proceedings from the date of their appearance. The underlying principle is that the defendant has the right to defend themself up until the suit is finally decided.

A defendant has many concurrent remedies if an *ex-parte* decree is passed against them. The defendant may file for the setting aside of the decree under Rule 13. They may concurrently appeal

the decree in an appellate court under Section 96 (2) of the CPC. They can also file for review of the decision under Order 47 Rule 1, or file a suit to set aside the decree on the grounds of fraud, as the remedies provided under the CPC can be pursued simultaneously.

The Practical Implications of the procedure under Order IX

This section examines *firstly,* the socio-economic effect of Order IX, and *secondly,* its efficiency. These perspectives bring out the challenges faced on the ground today with respect to the civil procedure of appearance of parties.

The Socio-economic Impact of Order IX of the CPC

It is known that the process of litigation itself has a disproportionate impact on socio-economically weaker sections of society. The procedure under Order IX of the CPC further exacerbates this impact. Rule 1 mandates that parties appear in person or through their pleaders. Those from socio-economically weaker sections of society may struggle to appear in person as they are likely to reside far away from the Court complex, which is usually located in popular cities. Further, such sections of society do not have easy access to pleaders. Order XXXIII Rule 9A allows for the Court to appoint pleaders for suits brought by indigent persons. However, not all socio-economically weaker individuals may be able to file a suit as an indigent. Order XXXIII Rule 1 explains that an indigent person is categorized through the economic value of their property. This excludes several marginalized sections of society as *firstly,* Rule 1 provides for a very high threshold of only owning property of value lesser than a thousand rupees for a person to be considered indigent. This has a disproportionate impact on litigation costs for individuals that closely fail in fulfilling the criteria under Rule 1. *Secondly,* Rule 1 only accounts for economic backwardness and ignores the role of social backwardness in pursuing litigation. Those belonging to depressed castes and communities face greater barriers in litigation due to discrimination. Thus, many socio-economically backward individuals remain excluded from the provisions made for indigents and thus lack access to pleaders for appearance under Order IX Rule 1.

Further, the CPC attempts to balance the rights of parties with the prejudice caused to the other party through the imposition of costs. Order IX Rule 7 provides for turning back the clock upon the defendant's payment of costs. Further, an *ex-parte* decree against the defendant can be set aside upon payment of costs. Similarly, an order of dismissal of the suit due to the plaintiff's non-appearance can be set aside if costs are paid. This is based upon the principle that any prejudice to the other party can be compensated with costs, based on Section 35B of the CPC. It allows courts to impose costs as a condition precedent on a party causing delay. This has a disproportionate impact on socio-economically weaker sections of society, who may fail to appear in Court on the specified date due to existing barriers. The imposition of costs on such delays potentially denies them the opportunity to plead their suit due to circumstances beyond their control.

The Efficiency of the Procedure under Order IX

One of the main objectives of the CPC is the expeditious disposal of cases and the quick resolution of disputes. Measures undertaken to promote efficiency are reflected in the amendments that have been made to Order IX over the years. The time available to the plaintiff under Order IX Rule 5 (1) to apply for a fresh summons after initial summons was returned unserved has reduced progressively over the years from one year in 1908 to seven days today.

However, the procedure for the consequences of non-appearance of parties and the remedies thereof is not in its most efficient form. Order IX Rule 7 allows the defendant to turn back the clock and start proceedings afresh. Rule 13 also provides for a defendant to set aside an *ex-parte* decree. Similarly, Rule 9 allows a plaintiff to set aside a dismissal. Orders and decrees can be set aside for

'sufficient cause'. As reflected in *Shamdasani v Central Bank of India Ltd,* Courts have liberally construed this definition of 'sufficient cause'. The Supreme Court has held that 'sufficient cause' would include anything other than misconduct or gross negligence. This has caused scores of decrees that were passed using the time and resources of the Court to be set aside, and fresh proceedings on the same matter to be reinitiated. This causes significant delay and backlog in the court system.

Virtual Appearance: A Revolutionary Solution or a Mere Ideal?

The appearance of parties or their pleaders on the date fixed for appearance in the summons through video conferencing or other digital communication platforms is referred to as virtual appearance. This section *firstly,* examines the role that virtual appearance plays in abating the socio-economic and efficiency issues highlighted in the previous section; *secondly,* analysesthe existing provisions and position of law with regards to the virtual appearance of parties in India; and *lastly,* proposes measures that must be undertaken to secure virtual appearance as a right in India.

The Role of Virtual Appearance in Abating Order IX's Socio-Economic and Efficiency Issues

In the previous section, I highlighted how the procedure for appearance of parties under Order IX of the CPC has a disproportionate impact on socio-economically backward sections of society. I also argued that the setting aside of orders of dismissal and *ex-parte* decrees negatively impacts the efficiency of the court process. These issues however can be abated through virtual appearance. Socio-economically backward sections of society often reside far from the court complex and find it unfeasible to appear in Court for every hearing of their case. The cost and time taken to travel to Court increases the likelihood of parties failing to appear. The right to virtual appearance bridges this gap by making it easier for a party to be present during their hearing.

Additionally, litigants have wider access to pleaders to represent them if the pleader can appear virtually. Lawyers often sit in Court for hours to appear for minutes while charging fees to their clients the whole time. Virtual appearance of pleaders on behalf of the parties saves huge costs for the party, thus benefitting socio-economically weaker sections of society.

Virtual appearances are also more efficient. As argued previously, the right of virtual appearance reduces the likelihood of parties failing to appear. Therefore, the incidents of decrees and dismissals being set aside due to non-appearance are reduced, thus saving the resources of the Court, both in terms of costs and time.

The Current Indian Position on Virtual Appearance

The text of the CPC does not explicitly provide for the appearance of parties through video-conferencing or other virtual means. However, as reflected in *Sangita Sharma v Rohit Kalia,* virtual appearances have been allowed and conducted in civil litigation in certain cases. Its legitimacy can be derived from Section 151 of the CPC. Section 151 saves the inherent powers of Courts to make any orders in the interest of justice.

The Indian judiciary underwent a nation-wide transition into virtual courtrooms during the Covid-19 pandemic, through which new procedures and courtroom modalities were developed. The Supreme Court released guidelines under Article 142 of the Constitution for the functioning of virtual courtrooms during the pandemic through *In Re: Guidelines for Court Functioning through video conferencing during Covid-19 Pandemic.* The SC noted that although the pandemic was temporary, technology was here to stay, and video conferencing could not be seen as a temporary measure. In pursuance of this, 28 High Courts implemented their own videoconferencing guidelines. According

to these guidelines, a litigant can apply for online appearance, the granting of which is subject to the discretion of the Court.

Infrastructural changes to courts have been made to allow for easier virtual hearings, such as providing videoconferencing equipment to court complexes, sanctioning funds for further equipment, and setting up videoconferencing cabins and acquiring licenses. The Uttarakhand HC launched mobile e-courts vans equipped with Wi-Fi and videoconferencing equipment to provide access to justice to remote hill areas that are not physically proximate to courts.

However, the Supreme Court stated that virtual hearings were a mere temporary measure and rejected a petition demanding virtual hearings as a fundamental right. Despite the progressive measures that have been taken, the virtual appearance of parties in civil disputes continues to be a mere exception subject to the Court's discretion. It needs to become a right for it to become a reality in Indian civil procedure.

Measures that must be Implemented for the Successful Implementation of Virtual Appearance in India

While India boasts of the infrastructural developments that aim to bolster virtual hearings, these changes have only been made from one end. The provision for videoconferencing equipment and allocation of funds for providing such equipment has only been directed towards courtrooms. I argue that virtual appearance can never become an actual alternative to physical appearance unless measures are undertaken to provide virtual access to courts to litigants who do not have access to such systems.

Only 52% of India's population even has access to an internet connection. Virtual appearance cannot become a reality unless provisions are made to provide easy and free access to videoconferencing services. The US State of Missouri for example, has provided a phone-in option to facilitate virtual hearings for parties without access to the internet, while simultaneously initiating a program to provide low-income families with mobile phones. Turkey has UYAP, a national e-judiciary system linked to an advanced video-conferencing platform that has been made available and easily accessible to all citizens. Similarly, Italy has an online civil trial facility that provides for virtual appearance for all civil cases throughout the country.

While India has shortlisted Bharat VC as its uniform videoconferencing platform, measures need to be implemented to ensure nationwide *access* to this platform. This can be achieved through the establishment of videoconferencing kiosks across remote regions of the country while simultaneously enacting a scheme to increase digital literacy amongst both litigants and court officials. Other long-term measures that can be implemented include increasing nation-wide access to internet services through easy availability and cost reduction.

The enactment of these measures, although long-term, will make virtual appearances an actual alternative and not merely an exception in civil procedure.

Conclusion

While Order IX of the CPC aims to maintain a balance between the rights of parties and the efficiency of the judicial process, it places a disproportionate burden on socio-economically weaker sections of society. The requirement for appearance in court either personally or through pleaders and the imposition of costs for delays or non-appearance poses a barrier to justice and exacerbates existing inequalities. Moreover, they contribute to inefficiencies within the legal system, leading to delays and increased costs.

Virtual appearance provides a promising solution to these challenges by allowing more accessible and cost-effective means for parties to appear in legal proceedings. It benefits socio-economically backward sections of society and reduces inefficiencies by saving time and costs. However, for virtual appearance to be truly effective, comprehensive measures must be implemented to ensure widespread access to digital infrastructure and services. Only then can virtual appearance be transformed from an exception to a right.

Shamdasani v. Central Bank of India Ltd, AIR 1938 Bom 199, 202, (Beaumont CJ).

Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993.

East India Cotton Mfg. Co. Ltd. y. S.P. Gupta. 1985 DLT 22.

Rani Choudhury v. Suraj Jit Choudhury, AIR 1981 SC 1393.

Jessica K Steinberg, 'Demand Side Reform in the Poor People's Court' 47 CLR 3.

GC Pal, 'Caste and Consequences: Looking through the lens of Violence' Global Journal on Social Exclusion Vol. 1 (1), pp 95-110.

Hakmi v. Pitamber, AIR 1978 P&H 145 at 146; *See also Vernekar Industries v. Starit Engg. Co. (P) Ltd.,* AIR 1985 Bom 253.

Law Commission, *The Code of Civil Procedure 1908* (Law Com No 27, 1964), p 5.

Law Commission, *The Code of Civil Procedure 1908* (Law Com No 54, 1973), p 136.

Sudha Devi v. M.P. Narayanan, (1988) 3 SCC 366.

David Tait & Martha McCurdy, 'Justice reimagined: challenges and opportunities with implementing virtual courts' (2021) 33 (1) Current Issues in Criminal Justice <https://www.tandfonline.com/doi/full/10.1080/10345329.2020.1859968?needAccess=true>.

Bannon AL & Keith D, 'Remote Court: Principles for Virtual Proceedings during Covid and Beyond' NWULR 115 (6).

Sangita Sharma v Rohit Kalia 2021 SCC OnLine HP 4621.

Chad Flanders & Stephen Galoob, 'Progressive Prosecution in a Pandemic' Journal of Criminal Law and Criminology 110 (4) 685-706.

In Re: Guidelines for Court Functioning through video conferencing during Covid-19 Pandemic 2020 SCC OnLine SC 355.

'Supreme Court frames guidelines for hearing of cases via video conferencing' *India Legal* (Delhi, 6 April 2020).

Department of Justice, 'e Courts MPP> Videoconferencing' <https://doj.gov.in/video-conferencing/> accessed 15 August 2024.

Prashant Jha, 'Wheels of Justice: 'E-court vans to reach remote Uttarakhand hills' *The Times of India* (Dehradun, 11 August 2021).

Abraham Thomas, 'Virtual Court can't be the norm, says Supreme Court; explains its reservations' *Hindustan Times* (Delhi, 8 October 2021).

World Bank, *Individuals Using the Internet: in %* (ITU/ ICT Indicators Database).

Tony Romm, 'Lacking a Lifeline: How a Federal Effort to Help Low-Income Americans Pay Their Phone Bills Failed Amid the Pandemic' *Washington Post* (Missouri, 9 February 2021).

Rajya Sabha Standing Committee on Personnel, Public Grievances, Law and Justice, *Functioning of Virtual Courts/ Court Proceedings through Videoconferencing* (103rd Report) para 1.16.

E-Sports vs. Online Gaming: Why the distinction matters under Indian Law?

Vanshika Kamboj is a second-year B.A., LL.B. (Hons.) student at Rajiv Gandhi National University of Law (RGNUL), Punjab. Passionate about the intersection of law, technology, and policy, with a keen interest in emerging fields such as Esports and digital entertainment, her academic pursuits focus on regulatory frameworks, technology law, and consumer protection.

Esports in India has experienced remarkable growth, primarily driven by the rise of professional players, expanding audiences, frequent tournaments, and substantial investments. What sets Esports apart from online gaming is its competitive, skill-based nature, bringing it closer in spirit to traditional sports. Despite this, the Indian legal system still does not recognize Esports as distinct from online gaming, leading to regulatory gaps and the absence of an industry-specific framework.

Online gaming regulations in India are largely focus on three inter-connected areas: gambling, addiction concerns, and user safety issues – with little or no consideration for Esports separately. This lack of distinction between Esports and online gaming poses significant regulatory challenges especially regarding tax implications, sponsorship policies, international tournament visa facilitation and support for infrastructure construction. Without a clear legal definition, Esports struggles to gain formal recognition as both a legitimate profession and a competitive sport, limiting its growth within the broader digital economy.

India faces significant challenges because it does not differentiate between Esports and other online gaming activities, even as several countries have introduced legal frameworks to support competitive video gaming. This blog explores the key differences between Esports and online gaming and argues for targeted legal reforms and regulatory measures to address the gap and unlock the full potential of India's growing Esports market.

Difference between Esports and Online Gaming

Although often used interchangeably, Esports and online gaming differ significantly in terms of structure, intent, and legal implications. Esports refers to organized, skill-based competitive gaming supported by sponsorships, structured tournaments, and professional rankings, whereas online gaming encompasses a broader category that includes casual games, real-money platforms, and fantasy sports, many of which rely on chance or financial input. The fundamental distinction lies in the *skill-centric nature of Esports*, which has been internationally recognized as a legitimate sport by institutions such as the International Olympic Committee and the Olympic Council of Asia, notably featuring as a medal event in the 2022 Asian Games. As highlighted by Suji, Director of the Electronic Sports Federation of India, Esports is rooted in individual ability and should not be conflated with gambling or online betting.

Recognising these distinctions is crucial when analysing the manner in which Indian law presently classifies and regulates online gaming – a framework that frequently fails to account for the specific attributes of Esports.

Current Indian Legal Regime

India's legal framework governing online gaming remains fragmented and inconsistent, largely due to the absence of a comprehensive central statute addressing the sector. The responsibility for regulating online gaming lies with the State Governments, as gambling and betting fall under Entry

34 of the State List (List II) in the Seventh Schedule of the Constitution. Resultantly, various states have adopted divergent and often conflicting regulatory approaches. For example, Tamil Nadu, Telangana, and Andhra Pradesh have enacted prohibitions on games involving monetary stakes – even those based on skill – while other states have opted for more permissive or conditional frameworks.

At the central level, efforts to introduce uniformity have been limited. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, along with subsequent amendments proposed by the Ministry of Electronics and Information Technology (MeitY) in 2023, seek to impose certain compliance standards on online gaming intermediaries. These include obligations relating to content moderation, grievance redressal mechanisms, and creation of self-regulatory bodies. However, these guidelines are applied uniformly across all forms of online gaming, without distinguishing between games of chance, real-money gaming, and skill-based competitive Esports..

As a result, the current regulatory regime treats online gaming as a homogenous category, thereby neglecting the unique legal and structural characteristics of Esports.

Why Esports Doesn't Fit into India's Online Gaming Regulations

The Government of India recognised Esports as part of multi-sport events in 2023, bringing it under the ambit of the Ministry of Youth Affairs and Sports.

One of the entities spearheading the Esports movement in India is the Electronic Sports Federation of India (ESFI), a non-profit organization. ESFI is a full member of the International Esports Federation (IESF), Global Esports Federation (GEF), and Asian Esports Federation (AESF).

This move was expected to distinguish Esports from casual online gaming and gambling, and to align it with other recognised competitive sports. However, the legal and regulatory frameworks that followed have not fully clarified the practical implications of this classification. Notably, the amendments introduced by the MeitY continue to exhibit vagueness, making it unclear whether Esports, particularly those that do not involve real money, fall within their scope. For instance, the term "deposit" as used in the definition of Online Real Money Games (ORMGs) could be interpreted to include in-game purchases, potentially bringing free-to-play Esports titles under unnecessary regulation intended for wagering-based platforms.

Furthermore, taxation remains a contentious area. A 30% TDS is levied on winnings from online games under the Income Tax Act, 1961. Yet, there remains no clarity on whether Esports tournament winnings, particularly from skill-based, non-wagered competitions, are subject to the same tax regime, as the statutory language refers broadly to "online gaming" without distinguishing Esports. This lack of definitional and fiscal clarity continues to hinder the development of a distinct regulatory identity for Esports in India. (*See* this.)

The Goods and Services Tax (GST) regime adds yet another layer of confusion. While the GST Council's 2023 decision imposed a 28% GST on online games involving real money, a government official clarified that this would not extend to Esports titles such as FIFA, League of Legends, or games on PlayStation, Xbox, and Nintendo consoles. These would continue to attract an 18% GST rate, applicable to entertainment and digital services. However, the absence of a statutory distinction in the GST law itself creates ambiguity. In the absence of codified exemptions, Esports developers and tournament organizers remain exposed to arbitrary interpretation by tax authorities, potentially jeopardizing the growth of the sector.

Learning from Global Models

As India grapples with defining and regulating Esports within its broader online gaming framework, several global jurisdictions offer valuable insights into how Esports can be distinctly recognised, supported, and governed.

Countries like South Korea, the United States, and Germany have already established robust regulatory and infrastructural models that separate Esports from gambling or casual gaming, promoting it as a legitimate sporting discipline.

South Korea, often considered the pioneer of professional Esports, has integrated Esports under the Ministry of Culture, Sports and Tourism. It has established dedicated Esports arenas, associations, and even athlete visas, recognising Esports players as professionals. The Korean e-Sports Association (KeSPA) functions under governmental oversight, ensuring standardisation and support for players, tournaments, and broadcasters.

Germany amended its Immigration Act to issue special Esports visas, thereby simplifying the process for international players to participate in tournaments. Esports is also recognised under the country's legal definition of sport, allowing teams and organisations to benefit from subsidies and tax incentives.

The United States takes a decentralised but economically encouraging approach. Esports athletes can obtain P-1 visas, the same used by traditional sports professionals. Moreover, universities across the country now offer Esports scholarships and degrees, treating it as an academic and career discipline.

India can benefit by adopting similar distinctions: recognising Esports separately from online gaming in its laws, creating structured visa and taxation policies for Esports professionals, and investing in digital infrastructure and grassroots development. These international models demonstrate that clear legal recognition and tailored governance can foster a thriving, internationally competitive Esports environment.

Conclusion

Esports in India has rapidly evolved into a dynamic, skill-based industry, with organisations like S8UL leading the charge by representing India on global platforms and winning the title of the Best Content Group of Esports in the World thrice. Despite its growing influence and India's recognition of Esports as part of multi-sport events under the Ministry of Youth Affairs and Sports, the sector continues to be regulated under the same legal framework as online gaming, which is largely focused on gambling and real-money platforms. This conflation creates regulatory confusion, especially regarding taxation, infrastructure, sponsorships, and international recognition. With global Esports events such as the Asian Games and upcoming Olympic showcases gaining prominence, India's lack of a tailored legal framework holds back its potential. Drawing from successful international models, it is essential to adopt Esports-specific regulations to fully support its athletes, organisations, and ecosystem. Legal clarity will not only legitimise Esports but also fuel its growth as a premier digital sport.

Legalization and Implementation of Passive Euthanasia in India: Challenges, Comparative Analysis, and the Path Forward

Asmit Kumar Singh is a 4th year student of BA LL.B at National Law University Odisha. He can be reached at 22ba024@nluo.ac.in.

On 30th of January, 2025, Karnataka officially issued its permission through a circular for permitting ill patients beyond the irrecoverable stage, and have the option for passive euthanasia. This move officially followed the guidelines of the Supreme Court in 2023. It became the first state to issue and provide its direction, and it has been reaffirmed as a fundamental right under Article 21 of the Constitution of India. It reflects as a transformative step, while it's still debatable in other parts of the state of India upon its legitimization. The medical term that defines intervention to assist death is known as medical euthanasia. This procedure is quite debatable and illustrates different viewpoints from the moral standpoints, and legitimacy to allow for uniformity. This process is quite complex due to vague guidelines and criteria for such medical assistance to death. The person's right to die has also been associated with euthanasia. In this blog, the analysis of the Indian jurisprudence compared with the Netherlands on how to legitimise the purpose of such treatment.

Persisting Challenges and Issues in Euthanasia Implementation

The breakthrough development surrounding the term "assisted suicide", which created a groundbreaking norm against the morality of the society, alongside maintaining the current balance by addressing the right to die under Article 21 of the COI, which protects the personal autonomy choices of the person. The legalization of such challenges is perceived differently in different states, which makes it difficult due to the moral and religious beliefs of individuals in contrast to persons who are beyond recovery, pleading for death to be relieved from their sufferings. The major issues it faced is improper legislation of laws and procedure, existing acts with amendment failed to highlight the current legal scenario in demands to such passive euthanasia, recognition of right to deal under article 21 of the constitution of India, as it embody such rights of the individual and their autonomy, and there is a risk of enforcement due to vague guidelines on whom to applicable or not as it required specific requirement of law to be applicable. The main ingredient is whether there is a valid consent, depending on the circumstances in which it has been made, through orally or by directives. The analysis of another country to understand and their legal takeaways need to be implemented in the existing policies and legal framework to address them.

Key Decision Concerning This Issue

In the aforesaid judgment of Aruna Ramchandran Shanbaug v. Union of India on 7th of March, 2011 legalized the passive euthanasia in India under strict judicial and medical guidelines. The court laid down the requirement for guidelines to be approved by the high courts, based upon medical boards, recommendations of secondary medical boards, and a three-level field expert committee. This transformative judgment led to development, established procedure, and strictly disallowed illegal active euthanasia and issued its order to have a proper framework to legalise

passive euthanasia. The word "passive euthanasia" signifies intervention upon the treatment of an ill person supported with medical equipment by withholding or withdrawing life-sustaining medical treatment to allow the person to die.

The expansion of the legality of the right to die enshrined under Article 21 of the Constitution of India as part of the guarantee to the right to life was started and laid the foundation for the new concepts under the judgment of Common Cause v. Union of India, 2018. It recognized how the living wills or advance medical directives (ADs) allow patients suffering from terminal illness or in vegetative states to consent in advance for passive euthanasia. From above, the judgments lack implementation at the state level.

Ambit of Consent and Legal Responsibilities of Doctors in Euthanasia

The laws aren't fixed and are non-uniform across various states of India. However, the passive euthanasia treatment requires consent to use it. The term consent is vague and its lack proper definition defined under the mental Health Care Act under section 2 (j), which states that, "*informed consent" means consent given for a specific intervention, without any force, undue influence, fraud, threat, mistake or misrepresentation, and obtained after disclosing to a person adequate information including risks and benefits of, and alternatives to, the specific intervention in a language and manner understood by the person*;" it didn't included the possibility of other interpretation of ill patients, patients in vegetative states, etc. The lack of collecting data and its morality based upon religion, customs which has been followed since time immemorial. The lack of interpretation and case study led to stagnant growth as opposed to other developed nations such as Switzerland, the Netherlands, Colombia, etc. The developed nation had taken the initiative for its research and its legal complexities in addressing it.

The existing customs followed by every physician or doctor under the Code of Medical Ethics Regulation, 2002, and are obligated to respect these rules while providing services to ill and sick persons. The main issue in addressing such involvements of doctors or physicians involved in such treatments as it is viewed as committing a crime, and against their oath. In contrast to the doctors' code of conduct vs the right to life, the ethics code of doctors be responsible and obligated towards the patients and treat them with empathy. However, it became quite debatable violation of the doctor's code related to assisted suicide. The Supreme Court has ruled in Common Cause v. Union of India that, without clear instigation or encouragement, a conviction under Section 108 BNS cannot be sustained. This means that unless a doctor actively encourages or aids a patient in committing suicide, they may not be held liable under this section. However, the legal framework remains strict, and any direct involvement in active euthanasia could lead to criminal charges. As a result, the involvement of doctors is complex in addressing it, and without any clear justification to they can't be involved in it under this section.

Comparison with the Legal Framework and Euthanasia Regulations in the Netherlands

In comparison with other developed jurisdictions like the Netherlands. Comparing it with the Netherlands, as it is the first country to legalize assisted suicide and permit a physician to provide assisted dying to a patient whose suffering the physician assessed as unbearable. In 2002, the first Dutch euthanasia act came, and this Act was developed in the context of searching for the proper balance between unbearable suffering for the patient, and the government's duty to protect the lives of individual citizens. The Netherlands has developed in this aspect and extended whether healthy people or senior citizens are given the option to end their lives. They are exercising their right to die as they have fulfilled their completed life. The Netherlands remains focused on the question of

whether the Dutch government should allow legal support for self-determination, that is, increased patient autonomy within the Euthanasia Act and its practice.

In the case of Albert Heringa, Albert Heringa, son of Mary Heringa, he requested her to consult her GP (General Physician) to end her life due to a diagnosis of heart failure, chronic kidney disease, osteoporosis, and macular degeneration. The GP resisted it, and she requested her son to end her life. The son decided the end her mother's life by doses of poison. Albert Heringa was convicted in 2010 of violating the prohibition of assisted suicide. As a result, the son was prosecuted and the court, looking at the intention of the accused, reduced the term of sentence to 3 years. This analysis underlies how the Albert Heringa case (with its plea for more self-determination and patient autonomy) in the Netherlands challenges both the validity and sustainability of the Dutch Euthanasia Act.

In the Netherlands, physician-assisted death is only allowed under the condition of due care. This particular article is a margin of appreciation which is used by the Dutch government "to prevent misuse of assistance with suicide and to protect incapacitated and vulnerable persons."

Critical Analysis of both the jurisprudence of the Netherlands and India

The major takeaways are to have legislation on this specialization of such to be handled delicately to address the legal issues concerning about violation of the right to life. The developed jurisdiction, like the Netherlands, solely focuses on private consumption and protects it. As a result, the laws are framed to express the rights of the individuals in the country. The euthanasia act, which was passed to cohabitate and maintain the relationship between the patient-physician relationship, and any acts outside of it will be heavily influenced in administering such treatments to such people who have completely lived their life or suffering from any irrecoverable disease. The Albert Hiranga judgment showcased the judiciary's role in maintaining patients' autonomy on their right to life and respects the choices of the individuals. These statutory due care criteria enable a due care assessment of unbearable suffering by physicians in response to a well-considered request from the patient. Furthermore, with their ruling in the Albert Hiranga case, the Supreme Court states that these statutory due care criteria are not a violation of the right to self-determination as stipulated by art. 8 of the ECHR. As such, the physician–patient relationship is predominantly present in the due care criteria to enable a well-functioning and safe euthanasia practice. Therefore, physicians' assessment of unbearable suffering cannot be omitted following the "completed life" or "tired of living" request for physician-assisted death.

However, it lacked one aspect regarding religious views presently in India, with various concerns in implementing it. The Indian legal framework under the Mental Health Care Act needs to address the trends of the world to address it, and bring amendments to maintain the right to autonomy of the people to express their rights without any legal intervention of BNS. The religious part of it needs to be implemented as the doctors and the physicians are considered as the Gods. To balance such views, the parliament should frame such laws to legalize passive euthanasia, and legal awareness should be raised about their rights. In response to the legal issues that persisted has been clarified in the judgment of Common Cause v. Union of India clarified the legal guidelines related to the withdrawal of life-sustaining treatment (LST). In addition to this, a circular was issued related to passive euthanasia by the Ministry of Home and Family Welfare. This guideline was aimed at providing a structured framework for healthcare providers regarding end-of-life care. However, these are yet to be implemented, and fewer states have implemented it, while Karnataka became the first to consider it by judicial intervention.

Conclusion

The legalization and effective implementation of passive euthanasia in India shows crucial steps towards maintaining the rights of patient autonomy and the right to die with dignity under Article 21 of the Constitution. When the Karnataka official order circulated in January 2025, it marked with progress of translating Supreme Court guidelines into actionable state policy, addressing the needs of terminally ill patients beyond recovery. However, the present legal framework in India is fragmented and ambiguous across various states, with issues relating to unclear definitions of consent, ethical dilemmas faced by medical professionals, and socio-cultural and religious opposition. On the other hand, the Netherlands would be instructive in having a full-fledged legal regime balancing patient autonomy, physician duties, and protection against misuse, concerning the landmark decisions like Albert Heringa. Legal clarity combined with public awareness and strong safeguards shall provide a compassionate, respectful, and ethically acceptable framework towards end-of-life care in India, in turn ensuring that all patients eligible for dying with dignity do enjoy this right.

The Great Indian Wedding SALE!!!! Where Products are the KING… (A Satirical Tale of the Shaadi Mandi)

Sachin is a research scholar at IIT Kharagpur. Quoting his words, he believes he's primarily "a story-teller", and "researcher on the side". Comments and feedbacks are welcome at adv.sachinkumarpp@gmail.com.

Shaadi Mandi, a bustling town in the heart of every Indian family. It is no ordinary market; here, grooms are the products and the bride's families are the consumers. At the grand entrance of the mandi, a glowing neon-lit sign read:

"A Happy Boy- The Key to Girls' Happiness"

Inside the mandi, hundreds, thousands and lakhs of grooms are displayed with their price tag & special features (*NRI (With an active accent!!!), Bureaucrat- Limited Edition, Ph.D. holders- Only with a scholarly look, etc*…) attached to them.

In front of one of the shops in the mandi, Mr. Manav, a retired School Headmaster was standing with a folder full of his daughter Vanitha's degrees, certificates, and model portfolio edited with the right amount of filters *(so as to make his daughter more fairer/ clean skin)*

Seeing a prospective customer, the owner of the shop *(keeping a fake smile)* enquired… "Hello Sir ji…. How are you…. How can I help you???" *(the fake smile is still on his face)*

Mr. Manav responded, "I would like to buy a groom!!!" He said meekly.

The shop owner responded *(keeping his fake smile on)*– "Arey sir, you are in the right place…. Sir ji, tell me… you are….."

"I Am Mr. Manav, former Head Master of Govt. Higher Secondary School for Boys."

Shop Owner: "Manav……"

Manav: "Oh Achaa… , Manav Sharma."

Shop Owner: "Sirji, you are not only at the right place but also at the right shop. We specialise in General Caste Shaadi …. Sir ji, we have the best of the best boys with us… come inside let me show you" *(all this while he had his fake smile on)*

Before the shop owner offered him any chaay, he asked with a superior tone *(maintaining the fake smile on his face)* "Sirji, Aapka ***budget*** kitna hai????"

Sharma ji responded by saying "50 Lakhs Liquid Cash, 1 acre agricultural land in Ambala)"

Shop owner, in a ridiculing tone, scoffed and said, "BAS itna hi!!!?" *(his fake smile is beginning to fade away)* "arey sir ji, Isme kuch nahi hoga, you will only get a mediocre part-time employee with some moral issues…. You may check the fourth & the last aisle, that's where we keep our ***over-aged, and still entitled collection***."

"Sir ji, just show me your daughter's profile" *(now without any smile)*, he asked, drawing a deep breath, and a small pause.

Mr. Manav readily pulled out the folder, and handed it over to the shop owner.

"Arey sir ji, your daughter is **fair-skinned, slim and educated** as well… I have some B. Tech-MBA (pvt. Sector employee) in the second aisle." *(Now the fake is coming back on his face)*

Mr. Sharma wandered across the second aisle, thinking '***(with all her degrees, certificates and values… none came for her rescue, rather it was her skin tone and physicality that's valued in this mandi…)***'. With a heavy heart, he wandered across the tens and thousands of grooms/ products across the second aisle.

He stopped in front of a podium… he called the shop owner, the shop owner responded *(with his fake smile)* "Ahhh… what a terrific choice sir ji…. He is a good product, with minimal maintenance like **Rolex on Diwali**, **only 25 Kilos of dry fruits** to his family on all festivals and **only an Audi Q3 on his sister's wedding…** this is your guy**,** sir ji…. His requirements are really minimal."

As the shop owner was convincing Mr. Sharma, a loudspeaker announcement echoed:

Here, in Shaadi Mandi, Products are the Kings and not the customer, remember- "A Happy Boy- The Key to Girls' Happiness"

Mr. Sharma, speaking to his inner voice, said- "This feels wrong. Should I end my subscription to this mandi?" Suddenly, the voice of the shop owner brought him back to reality… "So, sir, cheque or cash? Jaldi boliye… There are others in line…."

Mr. Sharma handed over the cheque and booked the "Product" from aisle two for his daughter.

Income Tax Bill 2025: Digital Search Powers and Privacy

Aryan Chauhan is a fourth-year student at Dr. Ram Manohar Lohiya National Law University, Lucknow.

The Income Tax Bill, 2025, introduced in Parliament on 13 February 2025, promises to modernize India's tax laws. But one provision has drawn fierce debate. Clause 247 dramatically expands search-and-seizure powers into the digital realm. It authorizes a tax officer who "has reason to believe" a person is hiding income to break digital locks. In the Bill's own words, an authorised officer can "gain access by overriding the access code to any computer system, or virtual digital space". In practice, this would allow investigators to hack into personal emails, social-media and messaging apps, cloud storage, and other private accounts. Digital rights groups warn that without limits, the state could effectively conduct wide-ranging surveillance of individuals' private communications. As an expert cautioned, the clause "could allow the use of privacy-violating data extraction tools to break into locked devices or password-protected accounts without any safeguards". Even supporters of tougher enforcement concede that such sweeping digital access must be carefully circumscribed.

Expanded Digital Search Powers under Clause 247

The Bill defines "virtual digital space" very broadly. According to the draft, this includes email servers, social media accounts, online investment and banking accounts, asset ownership websites, cloud servers, and "any other space of similar nature". In short, virtually every place where a taxpayer might store information electronically comes under scrutiny. Clause 247(1)(b)(iii) explicitly empowers officers to break into any locked container **or** override any digital access code to reach alleged incriminating material. As one legal expert bluntly put it, the Bill effectively allows"the Government to override access codes and directly enter digital spaces to gather information" if access is refused. The draft law also enables authorities to compel suspects to hand over passwords or keys. In this sense the Bill codifies what was previously a legal grey area; currently officers may demand access under Section 132 of the Income-tax Act, but there is no explicit authorization to override encryption or password protection. Starting 1 April 2026, any refusal to comply could be treated as obstruction under law, effectively making non-disclosure of credentials an offence.

The expansion in Clause 247 goes well beyond past practice. Section 132 of the existing Act allowed search of premises and seizure of electronic records, but in fact officers already have informally been seeking data from phones and apps during raids. The Income Tax Department under Section 132 have been seizing hard drives and extracting data from platforms like WhatsApp and Telegram as evidence. The new Bill removes any uncertainty by spelling out that an "authorized officer" (at the rank of Joint Director or higher) may literally break into digital spaces on mere suspicion of undisclosed income. As media reports note, this means tax officials will formally have power to override any access codes on a computer or phone during a search. The definition of digital space is so broad that even bystanders could be swept in: officers could seize data from a person's cloud server or app if it contains records pertinent to another's tax probe, raising concerns about third-party privacy.

Privacy and Constitutional Safeguards

This radical shift inevitably raises constitutional questions under the right to privacy. The Supreme Court in *Justice K.S. Puttaswamy v. Union of India* unanimously held that privacy is a fundamental right

under Article 21. Any state intrusion must therefore meet strict tests of legality, necessity and proportionality. In Puttaswamy, the Court insisted that laws infringing privacy must be clear, unambiguous, and confined to the "least intrusive" means to achieve a legitimate aim. Here the legitimate aim is combating tax evasion, which itself is a valid state interest. But critics note that Clause 247 does not incorporate the kind of proportionality standards the Court demanded. The Internet Freedom Foundation (IFF) has pointed out that the Bill does not require an officer to show that no less-invasive tool could retrieve the data, nor does it mandate prior judicial oversight. Instead, the bill relies solely on internal sanction (a senior tax officer's order) to authorize searches. Even under Section 69 of the Information Technology Act, which allows government agencies to compel decryption of communications, strong safeguards are required. Section 69(3) expressly obliges any subscriber or intermediary to assist in decryption when directed by the government, and failure to do so is punishable by imprisonment up to seven years. But those powers are theoretically limited to national security or serious crime investigations. The Income Tax Bill would extend similar override powers to routine tax cases, with no clearer guidelines. Legal scholars warn that without express judicial warrants or transparency requirements, Clause 247's forceful search regime risks running afoul of Puttaswamy's proportionality test.

Indeed, the Bill's proviso that the search may proceed even if the taxpayer does not "cooperate" effectively makes password surrender compulsory. In Parliament the Finance Ministernoted that the new Section 247(1)(ii) essentially codifies the power to override access codes when the target is uncooperative. Refusal to provide a password under a valid search order can already be punished under the Income-tax Act as obstruction. The Bill thus squares this with technology: if officers have the right to break locks physically under the current regime, it is unsurprising the law now explicitly lets them demand you turn over the password or circumvent it. But from a privacy standpoint, this is a fraught extension.End-to-end encryption on personal devices designed to protect privacy by making data unreadable even to service providers would be effectively nullified. Encrypted group chats and messages could be decrypted or exposed if someone in the group is under suspicion. Digital freedom activists argue that this undermines privacy norms, because once a backdoor is opened in encryption by law, it weakens security for everyone.

Global Digital Privacy Norms

Compared to practices in other democracies, the Bill's approach appears aggressive. In most mature jurisdictions, any compelled access to private data generally requires a judicial warrant or equivalent oversight. For example, the United States' position is that law enforcement supports "strong, responsibly managed encryption," but insists that tech companies should provide encrypted data **only** in response to valid court orders. The U.S. emphasises that constitutional safeguards must guide any intrusion: "We continue to embrace the rigorous legal standards law enforcement must meet to obtain a warrant before accessing evidence," the FBI stresses. Similarly, the European Union's jurisprudence tends to balance privacy with law enforcement needs, but even there, strong encryption is not lightly overridden without due process. India's laws have acknowledged the tension for years. Under the IT Act, Section 69 empowers the government to intercept or decrypt communications in the interest of security and crime prevention, and requires any subscriber or intermediary to assist, with failure punishable by up to seven years in jail. The Bill's Clause 247 echoes Section 69 in spirit, but drops the security justification, treating tax enforcement like a matter of public order. Arguably, putting such extraordinary cyber-search powers into the routine tax code breaks from global norms. If a warrant system is a necessarysafeguard for national security or crime investigations, it should be at least as stringent for financial investigations; broad roving digital searches without independent review arebeyondconstitutional permissibility in India.

Conclusion

The Income Tax Bill's drafters have signalled that they intend to equip tax authorities for the digital age. Yet the legal community is warning that this must not come at the cost of constitutional rights. The proposed Clause 247 clearly ventures into uncharted territory: it would permit agents to remotely unlock personal devices and invade encrypted chats when any tax-related suspicion arises. Under Article 21, such extraordinary powers must be narrowly tailored. As IFF and others have urged, Parliament could mend the apparent gaps by introducing proportionality requirements and judicial warrants, much as the Supreme Court directed in *Puttaswamy*. Until then, Clause 247 will remain controversial. Legal analysts stress that only careful checks and transparency can prevent it from becoming a license for unchecked surveillance. The debate over this Bill's privacy implication may well end up in court, where ultimately the standards of *Puttaswamy* that no intrusion be more intrusive than necessary will govern the outcome.

Law, Complexity, and the Political Economy of Legal Complexity

Anshuman Sahoo is a researcher and writer, and can be reached at anshuman@thelawblog.in.

Some concepts are easy enough to be understood by everyone. Some are on the exact opposite end of the spectrum, and are known by their analogies to 'rocket science'. There exist, however, some peculiarly complex concepts in between these two extremes, that achieve a deceptive familiarity due to their frequent, albeit reductionistically shallow, deployment. The concept of 'complexity', ironically, is one of them.

Describing our daily lives wouldn't probably be possible without using the words 'complex' and 'complexity'. The city route is complex, the job market is complex, the office politics is even more complex. And mirroring all these complexity, the legal system is getting increasingly complex.

Are we confusing complex with complicated, though?

Complexity?

The job market is indeed complex. So is the economy. The urban society is doubly so. But a bunch of threads tangled together? Maybe not. Complicated, sure, but not complex. A complex system is one where its numerous parts dynamically interact with each other, giving rise to emergent, often unpredictable, patterns and behaviours that evolve over time. (Read this.) Human societies are complex, because they are the result of groups of individual interacting. So is the economy. Culture. Legal systems.

Appreciating legal complexity requires understanding at least three features of any functioning legal system: *interconnectedness, adaptive evolution, and emergent non-linearity*.

- ***Interconnectedness***: Law doesn't and can't operate alone – it is deeply embedded within social customs, public morality, economics, politics, technology, among others. But legal provisions are also highly interconnected, leading to something like a 'web of rules'. As scholars have pointed out, law is better understood as a network of relations and normative prescriptions rather than a linear body of blackletter texts.
- ***Adaptivity and Evolution***: Law continuously responds and adapts to changes in society, technology, economy, and politics. And in doing so, it mimics the Darwinian model to evolve. Recent scholarship also attempts at a memetic approach to legal evolution. Using an evolutionary lens to look at law presents us with a more nuanced, decentralised, and path dependent picture of the legal order, as opposed to the older centralised and intelligently designed model.
- ***Non-linearity & Emergence***: Non-linearity means that the output of a system isn't directly proportional to its input, often leading to complex interactions, while emergence describes the arising of unpredictable properties or behaviors in a system as a result of these non-linear interactions among its components. Despite the reputation of legal studies as a stable as well as stabilising system, legal systems show significant levels of non-linearity and unpredictability with small changes to rules often leading to disproportionately large socio-economic effects. Interestingly, however, network effects and emergence also come together in legal systems to enable predictability, eventually.

The three peculiarities discussed above give law and legal studies its characteristic complexity. However, it also means that these complexities are inherent to legal systems, and were always there, hidden deep within the very epistemological structure of law and legal studies. Then, the question arises, if legal systems did fine a century ago with all these inherent complexities, why bother about it now?

Because the last few decades of techno-social transformations have irreversibly transformed the legal system as well, driven by a systemic response to the changing socio-economic order. From a theoretical standpoint, at least three interconnected drivers stand out: increasing functional differentiation and specialisation, globalisation and the emergence of multi-level multilateral governance, and finally, the growing influence of algorithmic governance.

Modern societies tend towards increasing functional differentiation and specialisation, fragmenting social processes into specialised subsystems (see this). Over time, each subsystem internally develops its own specialised language, expertise, and operating logic, exponentially increasing the level of complexity. As law interfaces and interacts with these differentiated systems, it must continuously adapt, and internalise those complexities in the process.

This increasing differentiation has a deep causal link to the second driving factor I mentioned above, globalisation and the emergence of multi-level multilateral governance. The accelerating pace of globalisation intensifies the interconnectedness of jurisdictions, economies, and regulatory frameworks, creating layers of overlapping rules and institutions. This multilayer overlapping creates an adaptive pressure over the domestic legal systems. Regulatory responses to differentiated socio-economic subsystems eventually overlap, and create a web of nested legal norms spanning local, national, and supranational domains. These multiple layers not only interact non-linearly, but also evolve dynamically, consequently increasing the legal system's structural and interpretive complexity.

The third and final driving factor I mentioned above is that of algorithmic governance, popularly referred to as 'code is law'. Technological advances, especially digitisation and automation, fundamentally reshape the way legal norms function by embedding rules directly into software codes and technical architecture. Consequently, the legal system becomes embedded into the privately owned technological systems, fundamentally changing how we perceive property, ownership, and autonomy.

These three intertwined and interdependent drivers have come together in recent times to amplify the inherent legal complexity, shaping law into a highly networked and adaptive system with ever-more dynamic boundaries and internal coherence. Given the role of law in coding the social structures of rights, duties, powers, and restraints, it becomes an interesting, though difficult, undertaking to try and understand the political economy of the increasing legal complexity.

Political Economy of Legal Complexity

Before delving into the political economy of legal complexity, it is important to understand the political economy of law; how law functions as a form of 'code' in structuring economic transactions and defining the distribution, or even predistribution, of wealth and power through the selective allocation of rights and privileges.

Assets, be it physical, financial, or even digital, gain economic value primarily because of legal recognition (sometimes even by using the law to create artificial scarcity, like the case of IP law). When creating rights by way of recognition, the law does not only encode rights but also create hierarchical arrangements of privileges, determining who controls and accesses resources, markets, and opportunities. Legal systems do so by positioning law as a modular architecture through which capital and hierarchies are institutionalised through tools like property rights, collateral, redefining

tools of corporate personhood and other legal fictions, trust mechanisms, creation of artificial scarcity etc. (*see*)

Why do laws and legal systems encode these rights and power structures despite the vulnerabilities of being captured by private actors? The answer is social entropy. Legal systems function primarily to manage and navigate social entropy by structuring expectations, interactions, and institutional behaviour. By encoding clear rules, responsibilities, and procedures, legal complexity can initially help stabilize society by reducing uncertainty and enhancing predictability.

However, beyond a certain threshold, growing legal complexity paradoxically increases systemic entropy and fragility by producing ambiguous norms, conflicting regulations, and interpretive uncertainty. It also introduces non-linear emergent risks and vulnerabilities, resulting in unpredictable outcomes and higher susceptibility to systemic crises or breakdowns.

As these uncertainties loom over, legal complexity disproportionately advantages actors who possess socio-economic resources and expertise to navigate the complexity. With complexity as a part of the epistemic design of law, the legal system becomes increasingly frictionless for those with access, and increasingly exclusionary for those without. Legal complexity, then, becomes a tool to facilitate rent-seeking behaviour, enabling privileged private actors to manipulate regulatory ambiguities for economic benefit, further consolidating their socioeconomic advantage. A tool for legal preselection. Complexity, then, becomes a political-economic resource, something that private actors can leverage to protect and entrench their interests. (*See* this, this, and this.)

From a systems perspective, the implications are even worse for institutional plasticity, epistemic justice, and governmentality. Legal complexity emerges as a coevolutionary product of the state-market interactions. Law, in its attempt to regulate the financial, technological, and socio-political complexity, absorbs and institutionalises the very complexity it is trying to regulate, and becomes a platform that selects certain market forms and freezes them into legal infrastructure. (*see*) This entirely transforms our understanding and treatment of legal subjectivity itself. The citizen-subject becomes a managed entity instead of the autonomous right-bearer, whose participation is actively conditioned by his/her navigability of the legal complexity.

Way forward?

So, what do we do about it?

Honestly, I have no idea. Neither do many others. While we don't yet know what would work and what won't, we have a number of working hypotheses, though. From principled governance to revisiting institutional design, we have been theorising and experimenting. (*See* this, this, this, this, this, and most importantly, this.)

Nevertheless, a good starting point can be the recognition that legal complexity is already influencing how we live and thrive as a society, and if not managed carefully, it can emerge as a strategic tool through which private actors shall systemically protect, entrench, and recreate their privileges.

Constitutionality of Grievance Appellate Committee under Information Technology Rules, 2021

Saumya Raj is a final-year student from National University of Study and Research in Law, Ranchi pursuing B.A.LLB with Corporate Law specialization. She has a peculiar interest in Information Technology Law.

This article presents a discussion on the internet intermediary liability and the constitutionality of the grievance appellate committee, which is a redressal mechanism provided under the IT(IGDMEC)Rules, 2021 in light of the recent case of X Corp. v. Rajat Sharma, wherein the author argues that the GAC mentioned above and the Rule 3 of the aforementioned Rules of 2021 does not stand the test of constitutionality and the grounds are analyzed in depth for the same.

In the present times as today wherein every citizen is a digital citizen or digital '*nagrik*' the system of accountability, redressal and operations will also have to be digitalized. In an attempt to do so, under the ambit of Information Technology Act, 2000 (herein the Act), the law for holding intermediaries liable has been introduced under Section 79, and the criteria and conditions to hold them liable has been prescribed under the Rule 3 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (herein the IT Rules, 2021). When we talk about "digital intermediaries" we include every OTT platform, shopping websites, marketing websites, publication websites and blogs, and others as the contemporary evolution will lay bare.

But, does every rule made in furtherance of the provisions of the parent act; actually stands the test of constitutionality? Which brings the focus to the provision in question, that is of the Grievance Appellate Committee or the GAC, which is an appellate body as per Rule 3 of the IT Rules, 2021 with whom any internet user aggrieved with the internet intermediaries' redressal mechanism can make an appeal against such intermediaries. Example: Any user or viewer, aggrieved by any episode of any series broadcasted by Hotstar, which has hurt his sentiments in any prudent manner, may file a complaint against the same with Hotstar or the Star Channels. If such grievance is not solves, then the appeal against the same can be taken up to the GAC. This is only an online redressal system, made for the digital users (the users who avail the service of the intermediaries) of all types of OTT platforms (Netflix, Prime, Hulu) and intermediaries (social media, shop- ping websites, etc). These fall under the larger umbrella of network operators in the cyberspace. The legislative intent of the IT Rules, 2021 is to put a set of bridle straps to only OTT platforms and media publication websites. Therefore, the constitutionality of the GAC shall be looked vis-à-vis these two effete, different sides of the same coin.

The constitutionality of the GAC Mechanism herein is checked on the following basis:

1. Consistency with the parent act, that is Information Technology Act, 2000.
2. Consistency with the Fundamental Rights (herein Article 19 (1) a).

At present, there are three levels of GAC, notified on 29 January, 2023,

Level 1: Self-Regulation by the publisher

Level 2: Creation of Self-Regulatory Body

Level 3: Oversight by the Government

In Level 1, that is self- regulation, an online intermediary, the publisher must set up a grievance redressal officer who will handle any disputes pertaining to content shared on the platform, such as deepfakes, fabricated data, or fake news. This level serves as a precursor to existing legislation and is the simplest approach to avoid severe government penalties or outright prohibitions.

Level 2 is where self regulatory bodies are created or the guidelines of the ones already in existence like DMCRC for OTT platforms, COMI for news, etc. are followed for the corresponding entity. This level is in furtherance of level 1 where grievances can be raised on the violations of these guidelines as well and this helps in monitoring and regulating the content furnished on the platform.

Level 3, the oversight by the Government is where the urgent recommendations are made to the Ministry of Broadcasting and Information for making interim orders, specifically for taking down contents, or any publications which may threaten the internal peace, security, stability of the country, or is offensive and hate speech towards any religious feelings and beliefs, as to prevent any religious rites in the country and to uphold the harmony. But as seen in the OTTS, social media platforms, and other intermediaries including blogs of free and autonomous bodies as well as news channels branches or the print media, such restrictions are used entirely antithetically, that is, to restrict the free expression of opinions and to entirely block any criticism of any authoritative body. Free speech and expression of the media houses and persons is one of the major pillars upon which the Indian Democracy stands, which is now been systematically eroded.

The provisions of Rule 3 over cedes the provisions of the parent act's corresponding provisions on the same, that is, regarding due diligence under Section 79 and Section 79(2) wherein the conditions are laid down for observing due diligence. The power of the government to prescribe such conditions on the due diligence specifically, is under Section 89 (2) (zg), which is a very limited power, but the rules has prescribed further additional requirements of due diligence and has also divided the intermediaries into two types, which has no mention in the parent act. Such imposition of extra due diligence criteria and requirements through the rules and also through the division in the types of intermediaries, intends to impose conditions which will make any free speech and expression strenuous. Without fulfillment of such requirements, both the types of intermediaries, including Social Media Intermediary (Rule 2(w)) and Significant Social Media Intermediary (Rule 2(v)) will cause them to face legal repercussions as per the IT Act as well as IPC's relevant provisions.

Now, this aforementioned segregation is not being provided for in Section 2(w) which defines intermediaries, read with Section 79 and Section 89 (2) (zg), is also not provided for in the act. Therefore, the rules herein go beyond the provisions of the parent act, making the entire rule 3A unconstitutional, following the Adani Gas Limited judgement, and H. Ganesh Kamath case, wherein it was held and affirmed clearly that any provision which does not confers with and exceeds the provisions of the parent act, is *ultra-vires*.

Taking a look on the composition of the 3 GAC levels as mentioned above, at present none of the level is composed including any judicial authority. It includes retired naval officers, retired IPS, retired railway officers and banking heads amongst others, as per the press release of 23 January, 2023. Herein, the retired executive officials are being assigned the judicial tasks, which requires judicial scrutiny as well as an expert opinion that is beyond the scope of the powers granted under the IT Act, 2000 as well as beyond the functions of the executive. It is now well settled by the S. Manoharan case, that no hearing should be conducted without any judicial members, as they have the power, knowledge and responsibility and such hearings shall be *void-ab initio*. GAC and their hearings are also against the basic jurisprudential principle of Rule of Law and supremacy of law

This is also causing Article 50 of the constitution to be completely disregarded, that is the attempt to separate the powers and functions of executive and the judiciary. But presently, too much delegation of functions is taking place, thus hampering the efficiency of its implementation. Even rationally, application of judicial mind would be much needed because most of the violations of due diligence is being penalized and punished under the IPC, making such violations a criminal offence, thus keeping judicial members on the GAC board shall work in twofold, that is, reducing the work load of the ministry of broadcasting and information and passing direct orders to curb any menace, rather than further delegation and compromising efficiency.

Apart from the aforementioned, such strict scrutiny is also cited by the legal advisers of the current government to be a step towards totalitarianism, the same as followed in China which is inspired by North Korean model of censorship. The rule 3 is under the challenge in the Delhi High Court, Karnataka High Court as well. Although the advices and inputs were sought from all the stakeholders before passing the IT Rules, 2021, none heed was paid to thy. Rather, the legal advisers who spoke against the Rules, and stated its adversaries were very gingerly sidelined and were declined any credits, a pure case of "charity begins at home".

In conclusion, the entire Rule 3 of the IT Rules 2021 is unconstitutional as it exceeds the provisions and requirements of the parent act, as it restricts the freedom of speech and expression, as the GAC is extending too much judicial function to a non-judicial rather executive bodies, which is violative of Article 50 of the constitution, and that no hearing should be conducted without judicial body, which puts the hearings and the recommendations made after such hearings of GAC under the questionable radar.

But with minor though significant changes in the composition of the GAC's levels, a board chaired by the judicial member, at all three levels, can improve the current scenario and make the hearings compliant with the rule of law as well as be in the interest of meeting the ends of justice, keeping in hindsight that this digital world is the new reality where more presence of people and work is seen than in the physical world, thus more exacting regulatory bodies will have to be formed and hard and fast enforcement of such will have to be done in this virtual field.

National Court of Appeal and Creation of Regional Benches: Does the Supreme Court Need to Undergo a Structural Re-configuration?

Raawiah Mansoor is a final year student at ILS Law College, Pune with a keen interest in Corporate and Commercial Laws as well as the regime of Competition Law.

In 2016, a PIL was filed before the Supreme Court, highlighting the need for a structural overhaul at the topmost level of the Indian judicial system. The petitioner sought a writ of mandamus directing the Government of India to take steps towards the establishment of a National Court of Appeal with regional benches in certain parts of the country. The Supreme Court acknowledged that the volume of cases that it has been dealing with has increased substantially over a period of time and that the current Judge strength in the Court is not sufficient to handle this influx of cases. Taking into account that the conversations around the need for reform in the judicial system of the country have been going on for a long time, the Court while referring the matter to a Constitutional Bench for a comprehensive decision, framed eleven substantial questions of law mainly focusing on the issues pertaining to – access to justice; undue delay and pendency of cases; division of Supreme Court into a Constitutional wing and an appellate wing; and the feasibility of establishing regional benches of the Supreme Court.

Conversations around the idea

This conundrum regarding the need for change in the configuration of the Supreme Court is not something that has appeared out of nowhere. Article 130 of the Constitution of India says that *"The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint".* So, by virtue of this provision, the Constitution does provide a mechanism whereby the Supreme Court can maximize its reach and not just remain confined within the contours of the National Capital.

Further, in the year 1986, in the case of Bihar Legal Support Society Vs. CJI & Anr, Justice Bhagwati had expressed the desire of bifurcating the functions of the Supreme Court, wherein there would be a National Court of Appeal primarily looking at appeals by special leave from the decisions of the High Courts and the Tribunals and the apex court in its present form would be restricted to entertain cases involving questions of Constitutional and Public law.

The Law Commission of India in various reports has also recommended the separation of the Constitutional and legal functions of the Supreme Court (95th Report, 1984) as well as emphasized the need to set up regional benches of the Court to increase its accessibility (125th Report, 1988). Thereafter, in 2009, in its 229th Report, the Commission recommended setting up four cassation benches, divided into North (New Delhi), South (Chennai), East (Kolkata), and West (Mumbai).

Even the Executive at various points in the past has exhibited an inclination towards such a modification. In 2019, Vice President Venkaiah Naidu advocated for the need for regional benches of the Supreme Court in at least four major cities. Thereafter, in March 2021, the Parliament Standing Committee on Personnel, Public Grievances, Law and Justice in its 107th report, while reiterating the recommendations of the Law Commission, emphasized the need for

easy access to justice which would only remain a distant dream as long as the Supreme Court was out of reach for people from far-flung and remote areas of the country.

If one tries to understand the cumulative effect of these proposals, the dominant idea that seems to emerge is that there should be a functional division of the Supreme Court whereby the apex court will function in two distinct capacities: Constitutional and legal, with regional benches at certain major cities to make the Supreme Court readily accessible to people residing across the length and breadth of the country.

Time for a decisive step

There are essentially two primary arguments that can be put forward in support of the need for this reform. First, is the principle of access to justice, and second, the dilution of the Constitutional functions of the Supreme Court.

In its most basic sense access to justice can be understood as the ease with which any person can approach the judiciary to get his grievances addressed. In July 2016, the Constitution Bench of the Supreme Court in Anita Khushwa v. Pushpa Sadan, while reiterating that access to justice is a fundamental right under Article 21, further elaborated that it may as well be a facet of equality under Article 14. It stated that "*The citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws*". Further, the court delineated four essential facets of this principle – an effective adjudicatory mechanism; accessibility of this mechanism in terms of distance; speedy adjudication; and affordable access to the adjudicatory process.

It is in this context that one needs to understand the growing clamour for reform in the structural working of the Supreme Court. As the various Law Commission reports point out, the fact that the seat of the Supreme Court is circumscribed within Delhi adversely affects potential litigants coming from areas far off areas of the country. For a substantial number of such litigants, it is not financially viable to bear the expenses involved in going to the National Capital and fighting the case there. The fees of lawyers handling cases at the Supreme Court is nevertheless high. Adding to this the cost of travelling in and out of Delhi, especially considering adjournments and other delays becomes both logistically and financially unfeasible for a large part of the Indian population. In light of the fact that the Supreme Court has recognized access to justice as a Fundamental Right, the exclusive seat of the Supreme Court in Delhi creates an anomaly as the very institution that the people are supposed to approach for seeking justice is not within their reach.

Other than being a Constitutional court, the Supreme Court under Article 136 has a special leave jurisdiction to take up appeals against any judgment, determination, sentence, or order of any Court or Tribunal within India. In the year 1950, in the case of Pritam Singh v. The State acknowledging the immense discretionary power granted to it, the Supreme Court emphasized the need to exercise its special leave jurisdiction in "*exceptional*" and "*special*" circumstances. A similar stand was taken by the Court in the case of Mathai @ Joby vs George, wherein while referring the matter to the Constitution Bench the court observed that "*if the Supreme Court entertains all and sundry kinds of cases it will soon be flooded with a huge amount of backlog and will not be able to deal with important questions relating to the Constitution or the law or where grave injustice has been done, for which it was really meant under the constitutional scheme*". However, the Constitution Bench while declining to look into the question of interpretation of Article 136 observed that while it is true that there is a need to use the powers given to the Court by virtue of this Article with circumspection, there is no question of limiting such power as it would go against the interest of justice.

In the current scenario the Supreme Court is dealing with a huge volume of cases under Article 136 and has consequently to a large extent converted itself into a regular court of appeal, leading to undue delay and backlog of cases and consequently affecting the efficiency of the apex court's justice delivery mechanism both in the Constitutional and the appellate sphere. Hence, a systematic bifurcation of the Constitutional and appellate functions of the court along with the setting up of regional benches could be a potential solution whereby the court could continue using its discretion under Article 136 as and when it deems fit as envisioned by the Constitutional Bench in Mathai but at the same time these appeals would not in any way impact or overshadow the vital Constitutional functions of the Court. A somewhat similar reform was seen in Ireland in 2014 with the establishment of the Court of Appeal as an additional jurisdictional tier between the High Court and the Supreme Court. Now the only appeals that go to the Supreme Court in Ireland are those which raise issues of major public importance or where such an appeal is necessary for the interests of justice.

Conclusion

While the initiation of virtual hearings by the courts during the pandemic is being seen by some as a reasonable solution to increase the accessibility of the Supreme Court, it does not provide an answer to the need for bifurcating the Constitutional and appellate functions of the Supreme Court. Further, considering the surprising stand taken by the Union of India contending that the proposed National Court of Appeal or Regional Courts of Appeal are neither "*constitutionally permissible nor otherwise feasible*", it would be interesting to see how the Constitution Bench answers the issues raised in the case, especially in view of the fact that the court itself has recognized access to justice as a fundamental right as well as conceded that the clutter of cases over the past few decades has impeded the efficient functioning of the apex court.

Nata Vivah (Marriage) and Maintenance related issues under Section 125 CrPC

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

What is Nata Vivah

According to this custom, in some tribes the woman (wife) can leave her husband and live with another man. This is called Nata. No formal rituals have to be done in this. There is only mutual consent. This practice is prevalent even today in many tribal communities in Rajasthan. This practice is quite similar to the live-in relationship of the modern society. It is said that Nata Pratha was created to give recognition to widows and abandoned women to lead a social life, which is still believed today.

Under this system, no formal marriage ceremony is required to live together. Couple can perform all obligations of husband and wife without entering into wedlock. According to the practice, man has to pay money to live a modern day live-in relationship with a woman of his choice, after the woman's first husband walks out of the marriage and pass on his wife to other man in return for money. This money, the "bride price" is fixed by members of the community, or middlemen, who may receive a cut for doing so. The sum may range from a few thousand bucks to even a few lakhs depending upon the paying capacity of the person concerned.

For ex. If a man wants to live with a woman who is already married than he has to pay some amount of money to the woman's husband. After satisfied with the amount the husband of the woman releases her and then the lady can live with the other man who paid the price. This is called Nata.

The problem that arises in Nata cases is that of Maintenance. Since the woman has left her legally wedded husband and started to live with another man, is she entitled to claim maintenance from him?

Introduction-Object and Scope of Section 125 CrPC

There are different statutes providing for making an application for grant of maintenance/ interim maintenance, if any person having sufficient means neglects, or refuses to maintain his wife, children, parents. The different enactments provide an independent and distinct remedy framed with a specific object and purpose. Maintenance laws have been enacted as a measure of social justice to provide recourse to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy.

Article 15(3) of the Constitution of India provides that: "Nothing in this article shall prevent the State from making any special provision for women and children." Article 15 (3) reinforced by **Article 39 of the Constitution of India**, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.

Justice Krishna Iyer in his judgment in **Captain Ramesh Chander Kaushal v Mrs. Veena Kaushal & Ors**. held that the object of maintenance laws is:

"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause- the cause of the derelicts."

The legislations which have been framed on the issue of maintenance are the **Special Marriage Act 1954 ("SMA"), Section 125 of the Cr.P.C. 1973; and the Protection of Women from Domestic Violence Act, 2005 ("D.V. Act")** which provide a statutory remedy to women, irrespective of the religious community to which they belong, apart from the personal laws applicable to various religious communities.

In **Badshah v Urmila Badshah Godse**, the Supreme Court was considering the interpretation of Section 125 CrPC. The Court held:

"13.3. …purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society."

Maintenance in cases of Nata Vivah

The main issue that arises in cases of maintenance out of Nata Vivah is whether woman who has solemnised Nata Marriage falls under the definition of wife as given under Section 125 of CrPC.

In ***Roopsi @ Roop Singh vs State of Rajasthan*** it was held that Section 7 of the Hindu Marriage Act, 1955 provides that Hindu Marriage can be solemnised in accordance with the customary rites and ceremonies of either party thereto. It is thus obvious that a **marriage Solemnised following the customary rites and ceremonies of either party constitute a valid marriage.** By virtue of Sub-section (1) of Section 7 of the Hindu Marriage Act, a **Hindu marriage can be solemnised in accordance with the customs and ceremonies of either party.** So there is no dispute in this position that a 'Nata' marriage is permissible in the community to which the parties belong, then the wife of such a marriage is a legally weeded wife.

In **Boli Narayan vs Shiddheswari Morang** it was stated that Section 125 of the CrPC makes it clear that it is a measure of social justice to ensure protection to wives, children and parents. It falls within the sweep of Articles 15(3) and 39 of the Constitution and is the core of the fundamental duties enshrined in Article 51A and the legislative inspiration is drawn from the Preamble to the Constitution which provides for securing social justice to all. The code words printed must be explicated to enable the provision to fulfil its social function which is the generating force for enacting the provision. The constitutional compassion for the weaker sections calls for an interpretation having social relevance. When alternative meanings may be advanced in interpreting a word and both are reasonable, the meaning which promotes or proffers the cause of the derelicts should be accepted. Wives as well as divorcees are entitled to maintenance. The entitlement is

obtainable when the bonds of marriage are still there as well as when it is snapped by divorce where the marriage link is ruptured. Existence of a marriage knot is, therefore, not the condition precedent for such entitlement. A wife and an ex-wife are equally entitled to maintenance subject to the limitation contained in Section 125. To discern the question posed, it is necessary to ponder why the Legislature applied the term "wife" and not the expressions "legally married wife" or a married wife.

A woman who comes in the life of a man, gives herself to the man, takes the family-life of the man and the man uses her as such, recognises her as his wife, must come within the fold of the term "wife", absence of ceremonial marriage notwithstanding. Acceptance of a woman as a wife, declaration of the status directly or indirectly and acceptance of status by the woman are enough to bring her within the purview of Section 125. The view serves "the social purpose' for which the Section has been enacted. To reject it would exclude woman living as wife, giving her life for the man but not validly married to be excluded from the scope of the section.

In **Saudamini Dei vs Bhagirathi** it was observed that to decide as to whether a relationship of husband and wife exists for the purposes of Section 125 CrPC, it is not necessary to insist on the strict proof of all the formalities of a particular form of legal marriage as is necessary in civil proceedings where the question of the legality of marriage is a primary issue.

In the scheme of Chapter IX of the Code of Criminal Procedure, 1973, Section 125 provides a swift and summary remedy for providing maintenance to neglected wives, parents and children by compelling the man to perform his moral' obligation. In such a summary proceeding, it is not necessary to go into intricacies of law. The facts and circumstances of this case indicated that the man and the woman lived together as husband and wife and were treated as such by the community and the man treated the woman as his wife. The Panchayati Patra was his unequivocal declaration. So for the limited propose of Section 125, it may be inferred that there was marriage.

Strict Proof of Marriage is not required to claim maintenance

In **Chanmuniya vs Virender Kumar Singh Kushwaha** it was held that while construing the term 'wife' broad and expansive interpretation should be given to term 'wife' to include even those cases where man or woman have been living together as husband and wife for a reasonably long period of time; strict proof of marriage shouldn't be a pre-condition for maintenance under Section 125 CrPC so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.

In **Dwarika Prasad Satpathy vs Bidyut Prava Dixit**, Hon'ble Apex Court stated that:

"Unlike matrimonial proceedings where strict proof of marriage is essential, in the proceedings under Section 125 CrPC, such strict standard proof is not necessary as it is summary in nature meant to prevent vagrancy."

Relationship in the Nature of Marriage

From the above discussion it can inferred that Nata Vivah as such doesn't require rites and ceremonies in the strict sense. Moreover rulings of superior courts says that in order to claim maintenance no strict proof of marriage is required under Section 125 CrPC. So we can say that Nata Marriage somewhat resembles modern day Live-In Relationships. But it has to be noted that merely living in Live-In is not sufficient to claim maintenance. It has to be proved that the setup in which male and female is living amounts to Relationship in the Nature of Marriage.

In **D. Velusamy vs. D. Patchaiammal**, while referring to Domestic Violence Act the court noted that the definition of Domestic relationship in Section 2(f) of the Act includes not only the relationship of marriage but also a relationship in the nature of marriage.

As the expression **'relationship in the nature of marriage'** has not been defined under the Act, the bench explained its meaning. The bench said that not all live in relationships will amount to a relationship in the nature of marriage and only those which must fulfil the below mentioned requirements (common law marriage requirements):

- The couple must hold themselves out to society as being akin to spouses.
- They must be of legal age to marry.
- They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

It was further held that merely spending weekends together or a one night stand would not make it a domestic relationship. If a man has a keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, be a relationship in the nature of marriage.

Entering Nata Vivah without getting divorce amounts to Adultery

In **Bhanwari vs Bhanwaria**, it was stated that if a husband marries a woman by way of Nata Vivah, without giving divorce to his first wife then it will amount to adultery.

In **Vishnu Prasad vs Smt. Durga Bai**, while referring towards Brahmin community it was stated that there was no such custom of nata vivah in Brahmin community. So it amounts to adultery if a Brahmin Man enters into Nata Vivah without getting divorce from his first wife.

Conclusion

On the basis of above discussion it can be concluded that in order to claim maintenance the woman who entered into Nata Marriage has to establish that:

- That the custom of Nata Vivah is followed in their community (Mandatory to Prove)
- Whatever essential Rites and Ceremonies for Solemnization of Nata Vivah are followed in either of Husband-wife's community were followed. These essential rites and ceremonies differs across the communities. (Either this has to be proved or the next one) or;
- Woman has to prove that she has been living into a setup that amounts relationship in the nature of marriage.

Right to Lead Rebuttal Evidence – When and How this Right is Exercised

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Order 18 of Code of Civil Procedure (CPC) deals with hearing of the suit and examination of witnesses. **Order 18 R.1** deals with right to begin i.e. the plaintiff has right to begin unless the defendant admits the facts alleged by the plaintiff. **Order 18 Rule 2** deals with statement and production of evidence i.e. on the date fixed for hearing of the suit, a party having the right to begin is to state his case and to produce his evidence in support of the issues which he is bound to produce. It is thereafter that the other party is to state his case and produce his evidence. Under **Order 18 Rule 3**, a case where there are several issues and the burden of proving some of which lies on the other party, the party beginning on his option can produce his evidence on these issues or reserve it by way of evidence produced by the other party and in the latter case the party beginning can produce evidence on those issues after the other party has adduced all his evidence.

Stage for exercising the option to reserve the right of rebuttal

Order 18 Rule 3 of CPC says that where there are several issues, the burden of proving some of which lies on the party, ***the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party***; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

The above said rule lays down the procedure as to how the evidence has to be adduced whenever the burden of proof on some issues is on one party and on other issues on the opposite party. As to who is entitled to begin, **Order 18, R. 1** states that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on the point of law or on some additional facts urged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Order 18, R. 3, however, does not mention in what manner the option, either to adduce evidence or to reserve, has to be exercised by a party or as to when such a reservation is to be made. Questions have naturally arisen before the Courts on these matters of procedure. In several cases, it has been held that the option has to be exercised by the party intending to begin, at the time when he commences the evidence on his side. In some other cases, it has been held that he should exercise the said option after closure of the evidence on his side and before the opposite party begins his evidence.

In **I. Nookalamma vs I. Simchachalam**, it was held that the plaintiff is entitled to express his reservation to adduce evidence by way of rebuttal after the completion of the evidence on the side of the plaintiff and before the commencement of the evidence for the defendant under Order 18,

R. 3 in respect of issues on which onus lies on the defendant. The **option given to the party, contemplated under Order 18, R. 3, is to be exercised only at or before the time when the other party that has got the right to lead evidence begins**, and not afterwards.

The abovesaid view that the option could be exercised by the party beginning, **at or before the time when the opposite party starts his evidence**, has been followed by the Mysore High Court in **S. Chandra Keerti vs Abdul Gaffar**. It was observed that, on the facts of the case, the party who began the case, namely, the defendant, could not be said to have intended or reserved his right to adduce rebuttal evidence. In that context, it was observed that it is reasonable that the right of reservation under Order 18, R. 3 should be exercised either before the party begins his evidence or, in any event, before the other party begins his evidence so that it might be borne in mind that the party beginning has not closed the evidence.

Hon'ble Rajasthan High Court in **Inderjeet Singh vs Maharaj Raghunath Singh**, has also taken the same view. It was held that the rule does not prescribe the stage at which the Court should be informed about the exercise of the option therein. It is sufficient if the party leading evidence does so (provided it has not led any evidence on the issue covered by the option/on which it wants to give rebuttal evidence) before the other party begins its evidence.

A Division Bench of the Punjab and Haryana High Court in **Jasvant Kaur vs Devinder Singh**, observed that on the language of Order 18, R. 3, CPC, on principle, and on the weight of precedent, **the last stage for exercising the option to reserve the right of rebuttal can well be before the other party begins its evidence**. So in view of the language of Order 18, Rule 3 CPC, on principle, and on the weight of precedent, **the last stage for exercising the option to reserve the right of rebuttal can well be before the other party begins his evidence**.

Manner of Reserving Right of Rebuttal

Coming to the manner of the exercise of the option, in some cases it has been held that there should be express reservation of the right to adduce rebuttal evidence and in some other cases it has been held that it need not be expressly reserved and that the reservation could be implied from the facts and circumstances of the case. There can be no difficulty in cases where **the right of rebuttal is exercised expressly by the party who begins**, either at the beginning of his evidence on his side, or, at any rate, when he closes the evidence and before the opposite party starts evidence on its side. This is done by writing in the ordersheet of the case that the party reserves his right to rebuttal on such and such issues.

The difficulty, however, arises in cases where there is no such express reservation. In a case where the party had not adduced any evidence on a particular issue, the mere fact that specific reservation is not made is not fatal, unless there is anything in the record either expressly or impliedly to hold that he lost his right to adduce evidence. There could be a situation where the party who adduced the evidence in the first instance exercised his right to begin his case and did not adduce any evidence on the particular issue and the party on whom the burden lay also did not adduce evidence on that issue and in such a situation there would be no evidence at all on the issue. Moreover there was no warrant to hold that in the absence of any specific written memorandum filed into Court reserving such right to adduce rebuttal evidence, the party must be deemed to have forfeited its right to adduce evidence in the absence of any other material on record. When nothing is disclosed in the record to show that he had forfeited his right, the mere omission to specifically reserve the right by filing a written application into Court would not destroy his right to adduce such rebuttal evidence.

In **Shaw vs Beck**, it was held that the plaintiff does not lose the right to have such discretion exercised in his favour by not adducing evidence in the first instance to rebut the plea set up by the

defendant, although the nature of the defence is disclosed by the cross-examination of the plaintiff's witnesses.

A similar situation arose in the case before the Punjab and Haryana High Court in **Jaswant Kaur's Case.** In that case, the suit was one for permanent injunction restraining the defendant from interfering with the plaintiff's possession. A large number of issues were framed and the burden of proof rested on the plaintiff on some issues and on the defendant on some other issues. The plaintiff, who apparently had the right to begin, had not completed their evidence both in affirmative and in rebuttal. The plaintiff's counsel made a statement that he was closing his case in affirmative only. At a later stage when the plaintiff wished to lead evidence in rebuttal, an application was preferred on behalf of the defendant therein stating that the plaintiff should be disallowed from doing so because the option to reserve the right of rebuttal had not been expressly exercised at the very outset. The trial Court rejected the said application holding that the **statement given by the plaintiff's counsel that he was closing the evidence in the affirmative had implicit therein that the right of rebuttal stood reserved.** In that case, no memorandum or anything in writing was filed into Court to show that the plaintiff had expressly reserved the right of rebuttal. Even so, the trial Court held reservation could be implied. The said view was affirmed by the Division Bench and, in that context, the provisions of Order 18, R. 3 were examined and a reference was made to various decisions and also to Order 16 R. 1, CPC. The Court initially held that the reservation could be made by the party beginning the evidence at any stage before the opposite party already started its evidence. The Court then considered the question whether it could be said that there was any reservation by implication. In that context, Sandhawalia, C. J. observed as follows:

"…. .The modalities of reserving the right of rebuttal also calls for some comment. It appears to me that herein also an overly strict view is not to be taken. If it is possible to necessarily imply from the mode of reservation that the right of rebuttal has been retained, then it should not be negatived, merely on the ground that it has not been so done in express terms. Cases where the party or its counsel makes the statement that he closed his evidence in the affirmative only, would inevitably imply that rebuttal evidence may well be led and consequently such right has been reserved."

If, however, there is no express reservation, nor any such reservation which could be implied from the facts and circumstances of the case, the party would not be entitled to adduce rebuttal evidence.

Understanding through an Example

Suppose these issues are framed by the court in a suit:

1. Whether the agreement to sell dated ……in respect of the property in suit was arrived at between the plaintiff and defendant and, if so, to what effect? (Onus of proof on Plaintiff)
2. Whether the plaintiff has paid Rs…… the defendant towards the part payment of the agreement to sell? (Onus of proof on Plaintiff)
3. Whether the receipt dated…… and pages….. of the agreement to sell dated…..are forged documents? (Onus of proof on defendant)

It can be seen from the above that the burden of proving, inter alia, issue Nos. 1 and 2 is on the plaintiff, whereas the burden of proving issue No. 3 is on the defendant. The plaintiff has to give evidence on the existence of the agreement to sell dated…..as well as on the payments made by the plaintiff to the defendant to the extent of Rs …..It may be seen that the alleged receipt of part payment dated…. has been challenged by the defendant as being a forged document.

With regard to first two issues plaintiff has right to begin. With regard to third issue he has two options:

1. He can produce his evidence first on the third issue or

2. He can give evidence by way of rebuttal and for that plaintiff has to express his reservation to adduce evidence by way of rebuttal after the completion of his evidence on the issues no. 1 and 2, the burden of proving which lies on him and before the commencement of the evidence for the defendant under Order 18, R. 3 in respect of issue no.3, the burden of proving which lies on the defendant. The option given to the plaintiff in this case, as contemplated under Order 18, R. 3, is to be exercised only at or before the time when the defendant that has got the right to lead evidence on issue no.3 begins, and not afterwards.

Conclusion

On the basis of above discussion it is clear that the reservation of the right to adduce rebuttal evidence need not always be express but it can also be implied from the facts and circumstances of the case. Implied reservation can said to be in those cases where the party closes its evidence in affirmative only (meaning closing evidence on those issues the burden to prove which lied on him).

So the reservation of the right of adducing rebuttal evidence need not be express and need not always be by way of a memo filed on behalf of the party who has begun the evidence on his side. Of course, if the reservation is express, the matter would present no difficulty. But such a reservation could also be implied in a case where the counsel for such a party makes a statement that he is closing the evidence of his party in the affirmative only. In such a case, it must be held that the party had implicitly reserved the right to adduce rebuttal evidence. So, apart from express reservation, the reservation could be implied from the facts and circumstances of the case or the conduct of the case.

Defence Struck Off – What it really means and the procedure thereafter

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

The phrase **"defence struck off"** or **"defence struck out"** is not unknown in the sphere of law. Indeed it finds place in various provisions of Code of Civil Procedure (CPC) and other special and local laws. This blog tries to explain the term defence struck off in general without referring to any provision in particular and other related concepts like when it is done, what are the steps that the defendant can still do at trial and what is the procedure thereafter.

When a defence is struck off in the circumstances mentioned in CPC or any other law, it means that the defendant be placed in the same position as if he has not defended. But it does not necessarily follow that once the defence is struck off, the defendant is completely helpless and his conduct of the case should be so crippled as to render a decree against him inevitable. To hold so would be to impose on him a punishment disproportionate to his default.

Principles on which Defence can be struck off

The principle governing the courts exercise of its discretion is that it is only when the default on the part of the defendant to perform an act as ordered by court is wilful and as a last resort the court should strike out the defence, when defenadant is guilty of such contumacious conduct or there is a wilful attempt to disregard the order of the court with a view to arrest the trial of the suit.

As pointed out by Lord Russel C.J. in **Reg. vs Senior** and affirmed by Cave L. C. in **Tamboli vs G.I.P. Railway**, '**wilfully**' means that:

"the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it".

So it is settled law that the defence to be struck off only in extreme cases as a last resort where obstinacy or contumacy on the part of the defendant or a wilful attempt to disregard the order of the court is established and that too after giving him a reasonable opportunity of hearing. This is in consonance with the fact that the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it.

So the power of striking out of the defence, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party.

In **Khajah Assenoolla Joo vs Khajah Abdool Aziz**, Pigot J. made an order striking out the defence of the defendant under section 136 of the CPC, 1882 in consequence of non-compliance

with the earlier order for production of certain documents, and at the same time mentioned that the party against whom the order was made might come in and seek to set it aside on showing sufficient grounds for the application.

What defendant can do after his defence is struck off by the court

Even when a defence is struck off the defendant is ***entitled to appear, cross-examine the plaintiff's witnesses*** and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him.

A party whose defence is struck off can still **appear**, when the suit is called on for hearing, not only to **cross-examine the witnesses of the plaintiff** and demolish in such manner the plaintiffs case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such **arguments and submissions on law and on such evidence** as the plaintiff may have brought to the Court. These are, valuable rights under the Code which are not taken away by striking off defence.

It has to be understood that filing of written statement is not the only way of defending a suit. A defendant may ably and successfully defend a suit against him by cross-examination and arguments.

Why Defendant is provided with Right to Cross-Examine the Plaintiff Witnesses even after striking off his defence

While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff's case by the cross-examination of his witnesses, but it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well-established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. ***The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon.*** Looked at from this point of view it should be possible to take the view that, though the defence of the defendant has been struck out, there is nothing in law to preclude him from demonstrating to the court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfil the terms of the statute.

Moreover it is basic principle that where a plaintiff comes to the court he must prove his case even where no defendant appears. It will at once be clear to say that the Court can only do this by looking the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case. So on this reasoning the defendant should be allowed his right of cross-examination and arguments.

But this right is subject to some important safeguards

Firstly, the defendant cannot be allowed to lead his own evidence.

Secondly, there is force in the apprehension that if one permits cross-examination of the plaintiff's witnesses by the defendant whose defence is struck off, procedural chaos may result unless great care is exercised and that it may be very difficult to keep the cross-examination within the limits. Under the guise of cross-examination and purported demolition of the plaintiff's case, the defendant may attempt to put forward pleas of his own. To perceive quickly the difference between questions put out to elicit a reply from the plaintiff which may derogate from his own case and questions put out to substantiate pleas in defence which the defendant may have in mind and to restrict the cross-examination to its limits will be not easy task. But this is a difficulty of procedure, rather than substance. This is a matter to be sorted out in practical application rather than by laying down a hard and fast rule of exclusion.

The third safeguard is based on the observations of Hon'ble court in **Sangram Singh's** case. As pointed out therein, the essence of the matter in all such cases is that the latitude that may be extended by the court to the defendant in spite of him not having filed a written statement, should not cause prejudice to the plaintiff. Where the defendant does not file a written statement or where he does not appear to contest the case, the plaintiff proceeds on the basis that there is no real opposition and contents himself by letting in just enough evidence to establish a prima facie case. Therefore, the court should ensure that by permitting the defendant at a later stage either to cross-examine the witnesses or to participate in the proceedings the plaintiff is not taken by surprise or gravely prejudiced. This difficulty however can be easily overcome in practice, because there is a wide discretion with the court and it is always open to the court, where it believes that the plaintiff has been misled, to exercise its discretion to shut out cross-examination or to regulate it in such manner as to avoid any real prejudice to the interests of the plaintiff.

How the case Proceeds when the Defence of Defendant is struck off

Where a defence is struck off, the order would be that the defendant be placed in the same position as if he has not defended. This indicates that once the defence is struck off, the position would be as if the defendant had not defendant and accordingly the suit would proceed as if it was ex-parte.

In **Sangram Singh vs Election Tribunal, 2 SCR 1**, it was held that if the court proceeds ex parte against the defendant under **Order IX, Rule 6(a)**, the defendant is still entitled to cross-examine the witnesses examined by the plaintiff. If the plaintiff makes out a prima facie case the court may pass a decree for the plaintiff. If the plaintiff fails to make out a prima facie case, the court may dismiss the plaintiff's suit. Every Judge in dealing with an ex parte case has to take care that the plaintiff's case is, at least, prima facie proved.

Conclusion

On the basis of above discussion it can be said that in a case where the defence of defendant is struck off under provisions of law, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

- ***to cross-examine the plaintiff's witnesses; and***
- ***to address argument on the basis of the plaintiff's case.***

The defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond

this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.

Shyju P.K. v. Nadeera & Anr., 2022 LiveLaw (Ker) 28

Bimal Chand Jain vs Sri Gopal Agarwal, 1982 SCR (1) 124

Babbar Sewing Machine Co vs Trilok Nath Mahajan, 1978 AIR 1436, 1979 SCR (1) 57

I.L.R. 9 Cal. 923

Modula India vs Kamakshya Singh Deo, 1989 AIR 162, 1988 SCR Supl. (3) 333

Modula India vs Kamakshya Singh Deo, 1989 AIR 162, 1988 SCR Supl. (3) 333

Babbar Sewing Machine Co vs Trilok Nath Mahajan, 1978 AIR 1436, 1979 SCR (1) 57

Whether accused is entitled to Default Bail when Charge Sheet/Challan couldn't be filed in Statutory Time due to Restraint order of Superior Courts

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

The article focuses on a unique situation faced by the trial courts. It happens sometimes that Hon'ble High Court or Supreme Court through their orders stops investigation for the time being or direct investigation authorities not to submit challan/final report until further orders or direct the investigation conclusion report to be filed by a ranked officer. Meanwhile the statutory period provided under **Section 167 CrPC** comes to an end and accused who is in custody applies for releasing on default bail before the trial court. So the question that arises is whether accused is entitled to be released on statutory bail or not. I will try to answer the question through case laws on the point which more or less have the same fact situation.

In the case of **State of West Bengal vs Dharam Paswan,** Hon'ble High Court through its order directed that the Special Investigation Team which was carrying on with the investigation to proceed with the investigation but shall not conclude the investigation or file final report before the criminal court until next date of hearing. Meanwhile on completion of 90 days accused filed application to be released on default bail which was accepted by the court of Chief Judicial Magistrate. So the state filed an application for cancellation of statutory bail granted to accused on the ground that there was no failure on the part of the Investigating Officer (I.O.) to file the charge-sheet since the charge-sheet was ready before the due date and the same could not be filed before the Learned Trial Court only because of the restraint order passed by the Division Bench of High Court. Moreover it was contended by the state that the statutory right of an accused in judicial custody to be enlarged on bail upon expiry of 60 days or 90 days, as the case may be, depending on the nature of the offence that the accused is charged with, arises only if there is failure or default on the part of the I.O. to file the charge-sheet within the period stipulated in Section 167 of the CrPC. That is why statutory bail is also referred to as default bail. Since there was no default on the part of the I.O and filing the charge-sheet without obtaining leave of the Division Bench would have amounted to contempt of Court; Section 167 (2) of CrPC only prescribes a procedure and nobody has a vested right in a procedure being complied with.

After hearing the arguments of both the sides Hon'ble Court held that in the case of **Uday Mohanlal Acharya** the question that arose for consideration by the Hon'ble Supreme Court was, when can an accused be said to have availed of his right for being released on bail under the Proviso to Section 167(2) of the CrPC, if a challan is not filed within the period stipulated thereunder. In the course of answering that question, the Hon'ble Court observed as follows in various paragraphs of the judgment:

" The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, is the provision which authorises the Magistrate permitting detention of an accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the proviso to sub-section (2) of Section 167. The proviso is unambiguous and clear and stipulates that the accused shall be released on bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be "compulsive bail" and such bail would be deemed to be a bail under Chapter 33. The right of an accused to be released on bail after expiry of the maximum period of detention provided under Section 167 can be denied only when an accused does not furnish bail, as is apparent from Explanation I to the said Section. The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate."

The Constitution Bench in Paragraph 48 of **Sanjay Dutt v State through CBI** stated thus:

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applied for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure."

That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not.

A conspectus of the aforesaid decisions of Hon'ble Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that the indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt (supra) case.

Report not filed by the Concerned Officer

In **Achpal @ Ramswaroop vs The State of Rajasthan** the accused persons were in custody from 08.04.2018, the investigation, in terms of Section 167 of the Code of Criminal Procedure had to be completed by 07.07.2018. On 05.07.2018 a report under Section 173 of the Code was filed by

the police before the concerned Judicial Magistrate. Since said report was filed by a police officer lower in rank than an ASP and was thus contrary to the order passed by the High Court on 03.07.2018, the Magistrate having noted the contents of said order, returned the charge sheet with certified copy of the order dated 03.07.2018 to the police for due compliance. Thus as on the expiry of 90th day i.e. on 07.07.2018 no report under Section 173 of the Code was on record with the Magistrate. Immediately after the expiry of 90 days the accused persons filed an application for bail under the provisions of Section 167(2) of the Code. The Judicial Magistrate, by his order dated 09.07.2018 rejected the prayer for benefit under Section 167(2) of the Code. It was observed that since the charge-sheet filed on 05.07.2018 was not in compliance of the order passed by the High Court, the charge-sheet was returned due to technical fault. It was further observed that the effect of the order dated 03.07.2018 passed by the High Court was extension of period within which the investigation could be completed. When challenged before the Hon'ble High Court it upheld the magistrate's order.

The matter being carried to the Hon'ble Apex Court, two questions were formulated for consideration.

- *Firstly, could it be said that the investigation was complete for the purposes of Section 167(2) of the CrPC so as to deny the benefit to the accused in terms of the said provision?*
- *Secondly, whether the order of the High Court could be construed as one under which the period for completing the investigation stood extended?*

The Hon'ble Apex Court noted the earlier decisions of that Court including the one in the case of **Uday Mohanlal Acharya** and also noted the recommendations of the **Law Commission of India** pursuant to which the new CrPC, 1973 was introduced. Having done so, the Hon'ble Court in reference to first question held that in the present case as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03.07.2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to custody dehors such consideration.

In reference to second question it was held that the provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organized Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period.

In **Rambeer Shokeen v State (NCT of Delhi)**, the accused had filed an application for statutory bail prior to expiry of the statutory period. Such application was not pressed. A second application was filed after expiry of the statutory period. However, by then and prior to expiry of

the statutory period, the I.O. had filed an application before the **Special Court** for extension of the period for completion of investigation. The Hon'ble Supreme Court held that since the report of the Additional Public Prosecutor seeking extension of time had been filed prior to expiry of the statutory period and also prior to the second application of the accused person for statutory bail, the application for extension of time ought to have been heard first by the Special Court as the application for statutory bail could succeed only if the extension application was rejected.

Conclusion

When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the provisions to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail.

No court can directly or indirectly extend the statutorily prescribed period within which investigation must be completed and the provisions of CrPC do not admit of any such eventuality. It would be a different thing altogether if the Court is dealing with a special statute like the Terrorist and Disruptive Activities (Prevention) Act, 1985 (since repealed) or the Maharashtra Control of Organized Crime Act, 1999 or Narcotic Drugs and Psychotropic Substances Act, 1985 which clearly empower the Court to extend the period of investigation and correspondingly, custodial detention of the accused provided application for extending time period is filed by prosecution before accused submits his statutory bail application. To that extent, those special enactments have modified the relevant provisions of CrPC including Section 167 thereof. In the absence of such special provision, no Court can extend the period of investigation and has to release the accused on Default/Statutory bail if he does furnish bail.

Whether a Non-Party to the Suit can get the Ex-Parte Decree Set Aside

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Order 9 of the Code of Civil Procedure (CPC) deals with the appearance of parties and the consequences of non-appearance on the first hearing. **Order 17, Rule 2**, lays down that the non-appearance of a party on an adjourned hearing may lead to similar consequences.

An ex-parte decree is a decree passed in the absence of the defendant (in absenti). Where the plaintiff appears and the defendant does not appear when the suit is called out for hearing and if the summons is duly served, the court may hear the suit ex-parte and pass a decree against him. Such a decree is neither null and void nor inoperative but is merely voidable and unless and until it is annulled on legal and valid grounds, it is proper, lawful, operative and enforceable like a bi-parte decree and it has all the force of a valid decree.

Non-Party's Right to get the ex-parte decree set aside

It is only when a decree has been passed ex- parte that an application is maintainable under **Order 9 Rule 13**, and a decree can be said to have been passed ex parte only if the defendant does not appear when the suit is called on for hearing.

In **Pawan and Ors vs Mamta Gupta and Ors**, the question before the Hon'ble Punjab and Haryana High Court was that whether a person to whom property was transferred by defendant during the pendency of suit can file an application to set aside an ex-parte decree passed against the defendant. The court held that the transferee pendente lite having stepped into the shoes of the original defendant is entitled to file an application under Order 9 Rule 13 CPC.

In **Raj Kumar vs Sardari Lal** the applicant non-party filed an application under Order 9 Rule 13 of the CPC seeking setting aside of the decree and also made a prayer under Order 22 Rule 10 of the CPC for being brought on record. The applicant in the present case was a transferee pendent lite who purchased the suit property during the pendency of the suit from the defendant.

The Hon'ble Supreme Court firstly elaborated upon the status of transferee pendente lite and doctrine of lis pendens and held that the doctrine of Lis pendens expressed in the **maxim 'at lite Pender nihil innovetur' (during a litigation nothing new should be introduced)** has been statutorily incorporated in **Section 52 of the Transfer of Property Act 1882**. A defendant cannot, by alienating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The **transferee pendente lite** is treated in the eye of law **as a representative-in-interest of the judgment-debtor** and held bound by the decree passed against the judgment-debtor though neither the defendant has chosen to bring the transferee on record by apprising his opponent and the Court of the transfer made by him nor the transferee has chosen to come on record by taking recourse to **Order 22 Rule 10 of the CPC**. In case of an assignment creation or devolution of any interest during the pendency of any suit, Order 22 Rule 10 of the CPC confers a discretion on the Court hearing the suit to grant leave to the

person upon whom such interest has come to vest or devolve to be brought on record. Bringing of a lis pendens transferee on record is not as of right but in the discretion of the Court. **Though not brought on record the lis pendens transferee remains bound by the decree.**

The court further took the help of **Section 146 CPC** as the transferee pendente lite would be a representative-in interest of the defendant judgment debtor. **Section 146 of the Code of Civil Procedure, 1908** provides that:

"146. Proceedings by or against representatives- Save as otherwise provided by this Court or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or application may be made by or against any person claiming under him."

A Lis pendens transferee from the defendant, though not arrayed as a party in the suit, is still a person claiming under the defendant. The same principle of law is recognized in a different perspective by **Rule 16 of Order 21 of the CPC** which speaks of transfer or assignment inter vivos or by operation of law made by the plaintiff-decree-holder. The transferee may apply for execution of the decree of the Court which passed it and the decree will be available for execution in the same manner and subject to the same conditions as if the application were made by the decree-holder. It is interesting to note that a provision like Section 146 of the CPC was not there in the preceding Code and was for the first time incorporated in the CPC of 1908. In Order 21 Rule 16, an explanation was inserted through amendment made by Act No. 104 of 1976 w.e.f. 1.2.1977 whereby the operation of Section 146 of CPC was allowed to prevail independent of Order 21 Rule 16 CPC.

So a decree passed against the defendant is **available for execution against the transferee or assignee of the defendant/judgment-debtor** and it does not make any difference whether such transfer or assignment has taken place after the passing of the decree or before the passing of the decree without notice or leave of the Court.

In **Smt. Saila Bala Dassi vs Sm. Nirmala Sundari Dassi and Anr**. where the question was whether a transferee of property from defendant during the pendency of the suit can be brought on record at the stage of appeal. The Court held that an appeal is a proceeding for the purpose of Section 146 CPC and further the expression 'claiming under' is wide enough to include cases of devolution and assignment mentioned in Order 22 Rule 10. Whoever is entitled to be but has not been brought on record under Order 22 Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code. A person having acquired an interest in suit property during the pendency of the suit and seeking to be brought on record at the stage of the appeal can do so by reference to Section 146 of the CPC, which provision being a beneficent provision should be construed liberally so as to advance justice and not in a restricted or technical sense. Their Lordships held that being a purchaser pendente lite, a person will be bound by the proceedings taken by the successful party in execution of decree and justice requires that such purchaser should be given an opportunity to protect his rights.

Jugalkishore Saraf vs M/s. Raw Cotton Co. Ltd.,, was a case where during the pendency of a suit for recovery of a debt from the defendant the plaintiff in that suit transferred to a third person all the book and other debts. The Court held that the position of the transferor vis-a-vis the transferee is nothing more than that of a benamidar for the latter and when the decree is passed for the recovery of that debt it is the latter who is the real owner of the decree. When the transferee becomes the owner of the decree immediately on its passing, he must, in relation to the decree, be also regarded as person claiming under the transferor. The transferee is entitled under Section 146 to make an application for execution which the original decree-holder could do. The executing

Court can apply its mind to the simple equitable principle which operates to transfer the beneficent interest in the after acquired decree under Section 146. As the assignee from the plaintiff of the debt which was the entire subject matter of the suit, the transferee/assignee was entitled to be brought on record under Order 22 Rule 10 and must, therefore, be also regarded as a representative of the plaintiff within the meaning of Section 47 of the CPC.

Going by the same reasoning a non-party to whom suit property or some other rights related to the suit were transferred by the defendant during the pendency the suit is entitled to file an application to set aside the ex-parte decree.

In **Man Singh And Anr. vs Sanghi Dal Chand,** it was stated that the words ***"against a defendant"*** do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside. They are comprehensive enough to include a case in which the decree adversely affects the rights of a person who is not a party to the suit.

Property transferred or rights obtained in suit property after passing of Ex-Parte Decree

In **Santosh Chopra vs Teja Singh Sardul Singh,** where the question before Hon'ble Delhi High Court was that whether a person to whom property was transferred after passing of the decree and who was not a party to the suit has locus to file an application under Order 9 Rule 13 for setting aside ex-parte decree. Court said that on the very reading of the Rule it is clear that it is only the defendant in an action who can move an application under this provision of law. A person who is not a party, though he may be interested in the suit, is not entitled to apply under this Rule. Even if a person who is formally a party but against whom nothing is said in the operative portion of the decree or who has been expressly exempted from a decree cannot apply under this Rule to set aside an ex parte decree. **Order 22, Rule 10** contemplates a situation arising in the cases of assignment, creation and devolution of interest **during pendency of a suit** other than those referred to in earlier rules of the same order. It is based on the principle that trial of a suit cannot be brought to an end merely on account of interest of a party, subject matter of a suit, is devolved upon another, during its pendency. Such a suit may be continued, with the leave of the court, by or against the person upon whom such interest has devolved. Since in the present case subject matter of the suit was sold after the decree and not during the pendency of the suit, Order 22 Rule 10 is not applicable in this situation. Since the no-party purchased the property after passing of the ex-parte decree it has to first file an appeal as an appeal can be filed by an aggrieved person who was not a party to the suit and then the non-party has to apply under Order I Rule 10 for adding it as a party to the suit. So the non-party can't get the ex-parte decree set aside at this stage.

Similarly Calcutta High Court in **Susil Chandra Guha and another v. Gouri Sundari Devi and others**. In that case it was held that the puisne mortgagee not a party to a suit cannot be allowed to apply for setting aside the ex parte decree either under Order 9 Rule 13 or under Section 146 Civil Procedure Code.

The above two cases find support from the view of Hon'ble Supreme Court's finding in **Raj Kumar vs Sardari Lal**, where the Supreme Court had held **that a lis pendens transferee**, though not brought on record under Order 22 Rule 10 of the CPC, is entitled to move an application under Order 9 rule 13 to set aside a decree passed against his transferor the defendant in the suit. So the focus is on lis pendens transferee and the transfer done after passing of the decree and before filing of appeal can't said to be a lis pendens transfer.

Conclusion

So a non-party apart from the defendant also has the right to get the ex-parte decree set aside provided that the rights litigated in the suit or the suit property to such a non-party/assignee/ transferee were transferred during the pendency of the suit. So in such cases the procedure will be like this:

- Firstly, the non-party will apply under Order 9 Rule 13 for setting aside ex-parte decree on the ground that he is the one who is actually getting affected due to such decree and its execution will be brought against him.
- Court if satisfied with the reasoning of such a non-party will set aside the ex-parte decree.
- The effect of setting aside of ex-parte decree will be that the suit will be restored to the position wherefrom the ex-parte proceedings were initiated against the defendant.
- Secondly, once the ex-parte decree is set aside and the suit is restored, such non-party will file an application under Order I Rule 10(2) for being made a party to the suit.
- Court if satisfied that such a non-party is a necessary or proper party (chances are high because already this party got the ex-parte decree set aside) will add it as a party to the suit in the form of defendant.
- Then the court will adjudicate the whole dispute taking into consideration the averments made by this new defendant.

Whether Section 80 CPC Notice Required when Court Suo Motu adds/impleads Government as Party to the Suit?

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

As is well known, **Section 80 Civil Procedure Code**, lays down that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, without the expiration of two months next after notice in writing. The section falls into two parts, viz.,

- suit against the Government or
- suit against a public officer in respect of any act purporting to be done by such officer in his official capacity.

Obviously, in first case it is essential to give notice and in second case if the act complained of was done in discharge of his official duties.

This section is explicit and mandatory and admits of no implications or exceptions. The language of this section is imperative and absolutely debars a court from entertaining a suit instituted without compliance with its provisions. If the provisions of the section are not complied with, the plaint must be rejected under O. 7, R. 11(d) of CPC. So the notice under Section 80(1) of CPC, 1908 is the first step in the ligation against government or public officer.

A plaintiff intending to institute a suit against the Government has two options before him, either he may file a suit after serving two months notice under Section 80 CPC or he may file the suit without serving the notice but in that event he must satisfy the court that an urgent and immediate relief is required and also obtain previous leave of the court. In the event of the first course being adopted the suit cannot be filed before the expiry of the two months of giving of the notice and this explains the reason for using the word 'shall' in Sub-clause (1) of Section 80 C.P.C. by the Parliament. However, in the second case he has the choice to file the suit without giving the requisite notice but only after obtaining leave of the court and it is for this purpose that the word 'may' has been used in Clause (2) of Section 80 CPC.

When by Amendment of Plaint new Cause of Action is introduced or New Relief is sought against Government

From the reading of **Abhimanyu Nayak and Others vs Basanta Mohanty And Others** it is evident that service of notice under Section 80 (1) CPC is a sine qua non prior to institution of the suit against the Central Government/Railway/State Government. If the suit is of such nature, urgent or immediate relief sought for against the State Government or any public officer in respect of any act purporting to be done by such officer in his official capacity, suit may be instituted, with the leave of the Court, without serving any notice as required by sub section 1. The provision is imperative.

Sometimes an application is filed under Order 6 Rule 17of CPC by the plaintiff to amend his plaint and the amendment proposed to be included is of such a nature that if allowed it has the tendency to affect the interests of the government. So the question arises whether before the amendment is allowed it is necessary to give notice to the government.

It is not every amendment of plaint, which requires prior notice under Section 80(1) CPC. ***Only when new relief is sought for or when the amendment introduces a new cause of action,*** notice under Section 80(1) is necessary. In the case of amendment which is formal in nature or to elucidate the foundational facts already exist in the plaint, the same does not require any notice under Section 80 CPC.

The Calcutta High Court in the case of **Manindra Chandra Nandi vs Secretary of State for India**, held that where a new cause of action is sought to be introduced in addition to a cause of action specified in the plaint against the Government, notice under Section 80 is a pre-requisite.

In **Province of Madras vs R.B. Poddar Firm**, an application to amend the plaint by adding a paragraph to the original plaint was allowed by the learned trial court. The Provincial Government represented by the Collector sought to revise that order on the ground that as the amendment introduced a new cause of action, the same could not be allowed without the imperative pre-requisites of a notice under Section 80 CPC. The Court held that the proposed amendment had introduced a fresh cause of action, which was outside the scope of the suit as originally framed and was inconsistent with the allegation made earlier, the learned Sub-Judge was not justified in allowing the amendment, as ex concesis no previous notice has been served on the Government informing them of the new cause of action.

In another case the plaintiff filed a suit in representative capacity for a declaration of customary right of the villagers over the suit land. The defendants 1 and 2 countered the plaintiff's claim of customary right and asserted the claim over the same. The learned trial court dismissed the suit. The unsuccessful plaintiffs preferred an appeal before the learned Additional District Judge, Bhadrak. During pendency of the appeal, they filed an application under Order 6 Rule 17 CPC praying for impleadment of State of Odisha as party defendant. The prayer was objected to by the defendants. The learned Additional District Judge allowed the application and remanded the suit to the learned trial court for de novo trial. Defendant no.1 filed an appeal before High Court challenging the order of remand. High Court set aside the order passed by the learned appellate court and remanded the matter back for fresh disposal. Consequent upon the remand, the learned lower appellate court allowed the application and impleaded the State of Odisha as a party defendant. The High Court held that the provision being imperative, failure to serve notice complying with the requirement will entail dismissal of the suit. It was further held that service of notice under Section 80(1) CPC is not an empty formality. The object of such notice is to give the concerned Government or public officer an opportunity to reconsider the legal position and settle the claim, if so advised, without leading to any legal battle. The legislative intention behind such provision is that public money and time should not be wasted on unnecessary litigation and the Government or the public officer should be given reasonable opportunity to examine the claim made against them.

Similarly in a case where the plaintiff instituted a suit for declaration and other consequential reliefs impleading the opposite party as defendant. Two applications were filed under Order 6 Rule 17 CPC for impleadment of State of Orissa as a party to the suit. Both the applications were rejected. It was submitted on behalf of the plaintiff that a copy of the notice under Section 80 of CPC and a memo in support of the receipt had been received by the Collector, Puri. The undisputed fact was that the suit was instituted on 15.4.2008 whereas notice was sent in compliance of Section 80 C.P.C. on 17.6.2008. Thus, notice was sent after institution of the suit. The learned Judge held that the

requirements of Section 80 CPC if complied with prior to filing of the amendment of the petition, the State could have been made as a party by filing an appropriate application.

In **Bishandayal and Sons vs State of Orissa and others**, the apex court held as follows:

"There can be no dispute to the proposition that a notice under Section 80 can be waived. But the question is whether merely because in the amended written statement such a plea is not taken it amounts to waiver. This contention was argued before the appellate court. Even otherwise, we find that in the suit itself Issue No.4 had been raised as to whether or not there was a valid and appropriate notice under Section 80. Such a point having been taken in the original written statement and an issue having been raised, it was not necessary that in the amended written statement such a plea be again taken. On behalf of the respondents, reliance has been placed on the case of Gangappa Gurupadappa Gugwad vs. Rachawwa and others, wherein it has been held that where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 was served, it would be duty of the Court to reject the plaint. In this case the original notice was only in respect of a claim under the plaint as it originally stood. That claim was on the basis that there was a concluded contract and that the appellants had already acquired rights in the mill and the lands. As has been fairly conceded those reliefs were not maintainable and were given up before the appellate court. The amended plaint was on an entirely new cause of action. It was based on facts and events which took place after the filing of the original plant. It was a fresh case. Now the claim was for specific performance of the agreement alleged to have been entered into on 29-12-1978. Admittedly no notice under Section 80 CPC was given for this case. As there was an issue pertaining to notice under Section 80, the trial court should have dealt with this aspect. The trial court failed to do so. It was then pressed before the appellate court. In our view, the finding in the impugned judgment that the suit based on this claim was not maintainable is correct and requires no interference."

If a new cause of action is being introduced a fresh notice under Section 80 CPC would be required to be given. The same not having been given, the suit on this cause of action was not maintainable. The provision under Section 80(1) CPC being imperative in nature, prior notice under Section 80(1) CPC to the State is a sine qua non. It is not an empty formality. None compliance with requirements of Section 80 CPC will entail dismissal of the suit.

When Court Suo Motu adds/impleads Government as a party to the suit

It is Order 1 of the Code of Civil Procedure, which deals with parties to the suit. It deals with necessity of bringing parties to the suit for proper and effectual adjudication of the matter in dispute. Order 1 Rule 10 of CPC enables the court to add any person as party at any stage of the proceedings, if the person whose presence before the court is necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit. It is well settled principle of law that basically, it is for the plaintiff in a suit to identify the parties against whom he has any grievance and to implead them as defendants in the suit filed for necessary relief. He cannot be compelled to face litigation with the persons against whom he has no grievance. Where, however, any third party is likely to suffer any grievance, on account of the outcome of the suit, he shall be entitled to get himself impleaded.

The theory of dominus litus (Plaintiff is the master of the suit) should not be over stretched in the matter of impleading of parties, because it is the duty of the court to ensure that if for deciding the real matter in dispute, a person is necessary party, the court can order such person to be impleaded. Merely because the, plaintiff does not choose to implead a person is not sufficient for rejection of an application for being impleaded. The provisions of Order 1 Rule 10(2) CPC are very wide and the powers of the court are equally extensive. Even without an application to be impleaded as a party, the court may, at any stage of the proceedings order that the name of any party, who out to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary

in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

To answer the question whether court is obliged to give notice to the government or officer before it suo motu adds it as a party to the suit, we have to understand the legislative intention behind Section 80 CPC.

The legislative intent of Section 80 CPC is to give the Government sufficient notice of the suit which is proposed to be filed against it so that it may reconsider the decision and decide for itself whether the claim made could be accepted or not. The object of the section is advancement of justice and securing public good by avoidance of unnecessary litigation.

Prior to Section 80 CPC, 1908, similar provision existed in Section 424 of CPC, 1882. Considering the purpose and objective of such a provision, in **Secretary of State for India in Council vs Perumal Pillai and others** it was held:

"… object of the notice required by section 424, Civil Procedure Code, is to give the defendant an opportunity of settling the claim, if so advised, without litigation."

With reference to Section 80 CPC of 1908, the objective and purpose came to be considered in **Secretary of State for India in Council vs Gulam Rasul Gyasudin Kuwari** wherein it was held as under:

"… the object of section 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice."

In **Raghunath Das vs Union of India and another**, in para 8, the Court said:

"The object of the notice contemplated by that section is to give to the concerned Governments and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80, Civil Procedure Code are not intended to be used as booby traps against ignorant and illiterate persons."

The object and purpose of enactment of Section 80 CPC was also noticed in **State of Punjab vs M/s. Geeta Iron and Brass Works Ltd.** as under:

"A statutory notice of the proposed action under S. 80 CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted."

In **Dhian Singh Sobha Singh vs Union of India**, the Court observed that Section 80 CPC must be strictly complied with but that does not mean that the terms of Section should be construed in a pedantic manner or in a manner completely divorced from common sense. It observed:

*"The Privy Council no doubt laid down in **Bhagchand Dagadusa vs Secretary of State** that the terms of section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock, C. B., in **Jones vs Nicholls**, "we must import a little commonsense into notices of this kind." Beaumont, C. J., also observed in **Chandu Lal Vadilal vs Government of Bombay**, "One must construe Section 80 with some regard to common-sense and to the object with which it appears to have been passed."*

In **Sangram Singh vs Election Tribunal, Kotah**, the Apex Court said:

"Section 80 of the Code is but a part of the Procedure Code passed to provide the regulation and machinery, by means of which the Courts may do justice between the parties. It is therefore merely a part of the adjective law and deals with procedure alone and must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it."

In **Bihari Chowdhary vs State Of Bihar**, Supreme Court has highlighted the object of Section 80 of the civil procedure code:

"When we examine the scheme of the Section it becomes obvious that the Section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the Section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the Section insisting on the issuance of a notice setting out the particulars of the propose suit and giving two months" time to Government or a public officer before a suit can be instituted against them. The object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."

After going through the legislative intent behind Section 80 CPC, in my humble opinion when court suo motu decides to add Government as a party to the suit it can adopt either of the two approaches.

Approach-I

A party under Order I Rule 10(2) can be added by court suo motu against the wishes of the plaintiff, if the party is a proper or necessary party and its presence is necessary for complete and effectual adjudication of the dispute. Moreover court has the power to add party on such terms as it may appear to be just. So under this approach, court has to take the following steps:

- First determine whether the government is necessary or proper party in the suit. If the answer is yes;
- Then court will order plaintiff to give two months statutory notice to government;
- After completion of the notice time period court will add government as a party to the suit and
- Then order plaintiff to present amended cause title of the suit, summons/process fee to be issued against government and copy of the amended plaint.

In **Kamdas vs Board of Revenue,** a slight observation was made in reference to the issue at hand. Court said that when state government was not added arrayed as a defendant initially but the court impleaded it at subsequent stage of the suit, then non-compliance with Section 80 can't be regarded as a defect which may prove fatal to the suit.

Approach-II

As we know court can add party on such terms as it may find just. At this stage it is clear to us that under Section 80(2) of CPC, if the suit is of urgent and emergency character (for ex. Injunction Suit) then the requirement of statutory notice can be waived. So court has the power to add government a party to the suit even without giving statutory notice provided suit should be of urgent

or emergency character. Like if the suit is for Declaration of Civil Death of a person which can't be termed as of urgent character. In such situation if the plaintiff hasn't made government a party, then court can't order government to be made a party without giving it a statutory notice through plaintiff.

The protection of Section 80 can be waived; Third party not allowed to raise objection regarding non-compliance

The protection provided under Section 80 is given to the person concerned. If in a particular case that person does not require protection, he can lawfully waive his right. This is what was held in **Dhirendra Nath Gorai and Sabal Chandra Shaw and others vs Sudhir Chandra Ghosh and others** where considering a pari materia provision, i.e. Section 35 of Bengal Money Lenders Act, 1940 the Apex Court held that such requirement can be waived.

A Full Bench of the Bombay High Court in **Vasant Ambadas Pandit vs Bombay Municipal Corporation and others** while considering a similar provision contained in Section 527 of Bombay Municipal Corporation Act, 1888 held- "The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit."

In **Amar Nath Dogra vs Union of India**, **State of Punjab vs Geeta Iron and Brass Works Ltd.** and **Ghanshyam Dass vs Dominion of India** the Apex Court also held that notice under Section 80 CPC or similar provisions of other Acts are for the benefit of a particular authority. The same can be waived as they do not go to the root of jurisdiction in the true sense of the term. Referring to the aforesaid judgments as well as the Full Bench judgment of Hon'ble Bombay High Court in **Vasant Ambadas Pandit (supra)**, the Apex Court said that there can be no dispute to the proposition that a notice under Section 80 can be waived.

The requirement of Section 80 CPC of giving notice is express, explicit, mandatory and admits of no implications or exceptions, however one must construe Section 80 with some regard to common sense and to the object with which it appears to have been passed. Our laws of procedure are based on the principle that "as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities".

Considering the objective of such enactment and the fact that party concerned can waive it, the plea of want of notice under Section 80 cannot be taken by a private individual since it is for the benefit of the Government and its officers.

A Division Bench of Hon'ble Bombay High Court in **Hirachand Himatlal Marwari vs Kashinath Thakurji Jadhav** said in the first place defendant 3 is not the proper party to raise the objection and in the second place the receivers in our opinion must be deemed to have waived their right to notice. It is open to the party protected by S. 80 to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice, and if that is so, it is difficult to see any logical basis for the position that a party who has himself no right to notice can challenge a suit on the ground of want of notice to the only party entitled to receive it. We think therefore that this ground of attack is not open to defendant no.3.

The same view has been taken by Kerala High Court in **Kanakku vs Neelacanta**, holding that the plea of want of notice cannot taken by private individuals. In **Ishtiyaq Husain Abbas Husain vs Zafrul Islam Afzal Husain and others** has also expressed the same view:

"It appears to me that the plea of want of notice is open only to the Government and the officers mentioned in Section 80 and it is not open to a private individual. In this particular case the State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it."

Appointment of Commission for Scientific Investigation in Civil Cases- When, How and its Probative Value

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Appointment of commission is a daily thing in the civil courts, the most usual being appointment for local inspection, to get a report of the disputed spot. Out of the purposes for which commissioner can be appointed the most technical and tricky in terms of appointment, its procedure and the value of its report is the commissioner appointed to carry out scientific investigation. So this article will try to focus upon these aspects in detail.

Rule 10A of Order 26 CPC (Code of Civil Procedure) provides for commission for scientific investigation and it deals with question which must have arisen in a suit involving scientific investigation, and in the opinion of the Court it cannot be conveniently conducted before the Court and issuance of the commission may be necessary or expedient in the interest of justice. For example: When there is a dispute regarding handwriting, it requires a scientific investigation. Before we move forward lets quickly understand the general procedure which is routinely followed to carry out commission.

General Procedure for carrying out commission

- The commissioner will conduct the investigation and other functions as ordered in the commission.
- After completion of the function, the commissioner will reduce the findings in writing and will make a report.
- The commissioner will submit the report signed by him along with the evidence recorded in the Court.
- The report of commissioner will form a part of the record.
- While examining the report, the Court or the concerned parties, after prior permission, can examine the commissioner personally in open Court.
- If the Court is dissatisfied with the proceedings of the commissioner the Court can order a further inquiry on the commission or can issue a fresh commission and appoint a new commissioner.

Dispute as to Handwriting

Rule 10 A of Order 26 CPC is frequently used in two situations:

- *When handwriting or signature on a document is disputed*
- *When Paternity is disputed (DNA Test)*

In this article I will be dealing thoroughly with the first situation only.

In the case of **Chikkanna vs Sri. Lokesh and Others**, it was held that application for appointment of handwriting expert when there is dispute regarding genuineness of signature of testator, has to be accepted.

In **Ram Avatar Soni vs Mahanta Laxidhar Das and Ors,** it was held by Hon'ble SC that when a party challenges the genuineness of the will it means that it is challenging the signature of the testator on the will and in such a case the alleged will along with documents containing admitted signatures has to be sent to expert for handwriting comparison. While relying upon Order 26 Rule 10-A of Code of Civil Procedure, it was observed that in case the scientific examination of a document facilitates ascertaining of truth, the same has to be permitted in the interest of justice.

Where in a Suit for Recovery of Money based upon an agreement the main contention of the defendant is that the words font in page no 1 and 2 of the agreement differs from page no 3 and such an agreement is forged and fabricated then the right approach would be to send such agreement to FSL examination to the extent of checking whether fonts in page no 1 and 2 differs from page no 3.

If the application is filed by the Defendant seeking appointment of Court Commissioner to examine the signature on certain documents marked in evidence to examine and give opinion as to genuineness. But if the evidence on record shows that defendant is admitting the disputed signatures, then such application has to be rejected.

Procedure for Verification of Documents

From judgement of **N. Chinnasamy vs P.S. Swaminathan** the following principles for verification of the documents by the Court as well as by the experts has been culled out:

- Section 73 of the Indian Evidence Act authorises the Court to compare the disputed signature with the admitted signature in order to come to its own conclusion.
- It is always safe for the Court to take the aid of handwriting expert to have the expertise to scientifically compare such handwriting with reasons.
- The practice of sending original documents from the custody of the Courts to the handwriting experts is a highly objectionable one and a very bad procedure.
- The proper procedure would be to permit the handwriting expert to inspect the document in the Court premises itself in the presence of some responsible officers of the Court.
- If necessary, the expert may be permitted to have photographic copies of documents in the presence of the responsible officers of the Court.
- When examination of the disputed documents within the Court's premises is not possible due to genuine difficulties expressed by the expert, the Court has to find out the alternative way of achieving the object for the purpose of doing justice. (Discussed under next heading)
- In such circumstances as mentioned above, the Application has to be treated as an Application for an appointment of the commissioner in whose presence the examination of the disputed document has to be conducted by the expert.
- When the investigation cannot be conveniently conducted within the premises of the Court and the same has to be carried out in the laboratory of the Forensic Department of the Government, it is necessary to appoint a commissioner for conducting the investigation of the document in his presence.
- Filing Application for examination of documents by handwriting expert at a late stage thereby protracting and holding up the proceedings is highly objectionable.
- Merely because of the reasons that the Trial Court has by itself compared the admitted signature and the disputed signature invoking Section 73 of the Indian Evidence Act there is no bar or ban for the First Appellate Court for sending the documents to get the expert opinion.
- Expert opinions could give much more clarity for arriving at a decision upon the truth and genuineness of a disputed document.

- When the defendant denies the signature in a particular document which is very much relied upon by the plaintiff, it is for the plaintiff to take steps for examination of the disputed signature by sending the document to a handwriting expert.
- Thus, it is evident that when examination of the disputed documents within the Court premises is not possible due to genuine difficulties expressed by the expert, the Court has to find out the alternate way of achieving the object for the purpose of doing justice and in such circumstance, the application has to be treated as an application for appointment of Commissioner, in whose presence the examination of the disputed documents has to be made by the expert. It is also made clear in this judgment that an investigation has to be made by the expert in the presence of the Commissioner, appointed by the Court.

Appointment of Advocate Commissioner when the expert is not able to verify the document in the Court premises

In **Saharban Beevi vs S. Mumtaj** and **S. Chinnathai vs K.C. Chinnadurai**, it was held that Scientific Investigation would mean and include ascertainment of facts by observation and experiment, tested systematized and brought under a set of principle. If in the opinion of the Civil Court that the evidence of forensic expert is very much necessary for deciding the dispute between the parties, the Civil Court instead of exercising the powers under Section 73 of the Evidence Act, shall have to invoke the provisions of Order 26, Rule 10 of C.P.C. There is no bar for the Court to order appointment of Advocate commissioner for the purpose of taking a document to an expert.

In the case of **M. Munusamy vs Saraswathy** it was held that in order to conduct such specific investigation, the Court has also got power to appoint a Commissioner under Rule 10 A of the Civil Procedure Code. As the scientific investigation contemplated in Order 26 Rule 10A CPC includes report of the Forensic Expert, the Court can appoint a Commissioner / Advocate Commissioner to send the documents to be compared with the other admitted documents and get a report from the Forensic Expert. The Advocate Commissioner, who is an Officer of the Court, has to be given the responsibility of taking the document to an expert and collecting them back from the expert and submit a report to the Court. An Advocate Commissioner appointed by the Court is an Officer of the Court and giving the same to the Commissioner for the said purpose is deemed to be in the custody of the Court only.

In **Utham Prabhat Industries etc. vs P. Subramaniam**, it was held that when the very examining the disputed document within the Court is not possible due to the genuine difficulties expressed by the expert, certainly the Court has to find out the alternate way for achieving the object for the purpose of doing justice. The Court further held that the documents can be handed over to the Advocate Commissioner appointed by the Court, in whose presence the disputed documents have to be examined by the handwriting Expert. The advocate Commissioner shall address the Director of Forensic Science Department to fix a date and time for examination of the documents in his presence and after fixing the time, he shall receive the Court records either on the same day or one day in advance from the Court. The Advocate Commissioner shall deliver the documents, which are in sealed cover given by the Court and the department can verify the documents in the presence of the Advocate Commissioner. The said procedure is directed to be followed when the expert expresses his inability to verify the disputed documents within the Court premises.

The consideration that weighs in not allowing the document to be handled by any other person except the commissioner is only for the purpose of ensuring the safety of the document or preventing it from being tampered. So in such circumstances it is proper and desirable to have the

document examined by the Government expert, but he will do it in the presence of a Court official i.e., Commissioner.

An opinion from the Forensic Expert involves experiments with sophisticated equipments, which cannot be brought to the Court for the said purpose. However, the said reason cannot preclude a party from obtaining an opinion from the expert. With the advancement of science and technology, the Courts can have the assistance and aid of an expert in deciding a particular issue. The experts also cannot be expected to visit all the Courts wherever such requirements is there. It is also to be noted that there are not many Government experts with the facilities in the State. When the services of the Forensic Experts are originally required in criminal matters, the devotion of their time for civil matters is minimum. In such circumstances, it is open to the Court to appoint a Commissioner to obtain a report from Handwriting Expert after scientific investigation.

Commissioner's Report is a part of the record and he need not be examined for proving it nor the report required to be exhibited

According to Order 26 Rule 10(2) the report of the Commissioner shall be evidence in the suit and shall form part of the record. The Court on its own or the parties with the permission of the Court are at liberty to summon the Commissioner to examine him personally touching any of the matter referred to him or mentioned in his report. If the Court, for any reasons, is dissatisfied with the report, it can also direct such further enquiry to be made as it shall think fit, according to sub-rule (3) of Rule 10.

The law is also settled in this regard. According to the decision in **Shaik Fathima Bi vs Shaik Nanne Saheb** it was held that generally, the report of the Commissioner being part of record can be considered as evidence irrespective of the fact whether Commissioner is examined as a witness or not. The Court overruled the tenability of the objection raised by one party that the Commissioner's report cannot be relied upon when it was not marked as exhibit in the evidence and also for the reason that the Commissioner is not examined. At the same time, the Court expressed that whenever the report of the Commissioner plays a vital role, contention that reversal of judgment of trial Court made on the strength of un-exhibited report of commissioner cannot be sustained. The High Court cautioned the trial Courts that when substantial objections are taken to the report of Commissioner, it would be advisable and desirable to examine the Commissioner for the purpose of having a clear picture. But on that ground also, it cannot be said that the report cannot be looked into by the Court unless the same is exhibited or Commissioner is examined as a witness too.

What should ideally be done?

According to sub-rule (2) of Rule 10 of Order 26, the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record, as held in **Smt. Vadda Rajeswaramma vs Dr. V.L. Narasimha Charyulu and Others**. Therefore, there is no controversy with regard to admissibility of the report as evidence during the trial and making the report of the Commissioner part of record. However, it is said, before the report is made part of the record and taken as piece of evidence, it is open for the Court to examine the Commissioner on matter referred to him in his report or as to the manner in which he made the investigation. It is open for the parties also to examine the Commissioner or on the manner in which he had conducted the investigation. The court observed that this is the only interpretation which can be placed upon sub-rule (2) of Rule 10.

It is a different matter if neither the Court nor any of the parties take any objection to the report. In such a situation the report becomes final and becomes part of the record and can also be taken as piece of evidence. But once a party raises objection and specifically wants the Commissioner to be examined, the Court has no option but to examine the Commissioner. Unless that is done, the Commissioner's report can neither form part of the record nor can it become a piece of evidence which could be relied upon at the stage of disposal of suit.

Probative Value-Corroborative Piece of Evidence

The decision of a material issue cannot be left to the Commissioner, as such issues are decided by the Court. The report of the Commissioner on such an issue is not binding on the Court, as the Court is free to arrive at its own conclusion. It is open to the parties to disprove the accuracy of the report by leading independent evidence or by cross-examining the Commissioner in regard to his report instead of calling for fresh report, in the light of objection raised.

In the case of **Praga Tools Corporation Limited vs Mehaboobunissa Begum and Others**, wherein, it is held that the report of the Commissioner is in aid of other evidence to arrive at findings relating to the controversy between the parties.

It has to be noted that the commissioner's report is just like any other evidence in the suit and is no way binding on the Court. Acceptance or rejection of the report is to be considered by the Court at the stage of trial of the suit. A report of the Commissioner should not be made the sole basis and foundation of the final order in disregard of other evidence on record. Court can partly accept the report and partly reject it.

Now it is very much clear that under Rule 10 (2) of Order 26 CPC, the report of the Commissioner and the evidence taken by him shall be the evidence in the suit and shall form part of the record. But, nonetheless the report remains only as a piece of evidence. Therefore, it is for the Court to ascertain and find out as to how much reliance can be placed on such evidence keeping in view the other evidence in the case. It has to be kept in mind that the status of the person making report is not always a good ground for attributing credibility. The assessment of evidence has to be made by taking into account the totality of the circumstances and material evidence on record.

Conclusion

Special Procedure when the document has to be sent to Forensic Examination in Civil Cases

The decision of the Court in **S. Chinnathai vs K.C. Chinnadurai** provides much-needed guidelines in relation to the forensic examination of documents in civil cases:

1. The Civil Court has jurisdiction to send the document to the Forensic Expert for comparing the signatures between the disputed documents with the admitted documents by appointing a Commissioner and then to call for the report. The admitted signatures should be on contemporaneous documents and not subsequent to the disputed document. In the decision of **Damara Venkata Murali Krishna Rao vs Gurujupalli Satvathamma**, the Honourable Supreme Court allowed the prayer for sending the documents to Government Expert for comparison of signatures appearing in the receipts with the admitted signatures, by setting aside the order dismissing interlocutory application.
2. In cases of handwriting comparison, the civil Court has to exercise its power under Order 26 Rule 10A of the Code of Civil Procedure instead of invoking Section 73 of the Indian Evidence Act. Court should refrain from becoming an expert and a party to the proceeding. Hon'ble Supreme Court has repeatedly held that despite the fact that the Court has got the power to record a finding on comparison, even in the absence of an expert's opinion, the

Court should hesitate to venture a decision based on its own comparison of the disputed signature with that of the admitted signature.

3. The court will send the original document by appointing an Advocate commissioner to FSL.
4. When the court sends the original document, then a certified copy of the same will have to be kept on record under the custody of the Court.
5. The civil Court cannot direct the disputed signature/document to be compared with the signature on the Vakaltnama or Written Statement of a party.
6. When the Civil Court comes to the conclusion that the power under Order 26 Rule 10A of the Code of Civil Procedure should be invoked, then the Civil Court shall invoke the same even without an application from the parties concerned in the interest of justice in order to solve the dispute between the parties.
7. When a document is sent to an expert it should be sent only to the Government Department Expert and not to a Private Expert. There cannot be any doubt that the Forensic Science Laboratories established by the Government are specialized institutions regarding the matters involving scientific investigations and carry more credibility. In **T.A. Narasimhan vs Narayana Chettiar**, wherein the practice of sending the original documents to the Handwriting Expert was ordered to be deprecated since in the said case the document was ordered to go out of the Court's custody to a private expert. The reason is very simple that parting with original documents during the course of trial is very dangerous. While in **Nagarathinammal vs K.V. Rengasary Chettiar**, it was held that the document to be sent to a Government Expert viz., State Forensic Science Department for opinion will not cause any harm.
8. While sending a document to an expert, the original of the same has to be sent since it is not possible to compare the xerox copies with the other admitted documents.
9. The Civil Court shall not dismiss an application seeking for the examination of the document by an expert on the ground of wrong quoting of provision of law and in such a case, the Court shall exercise power under Order 26 Rule 10A of the Code of Civil Procedure.
10. The Civil Court has to use Order 26 Rule 10A of the Code of Civil Procedure even when a prayer is sought for a direction to summon the expert to the Court for the purpose of examining the document.
11. An application filed under Order 26 Rule 10A of the Code of Civil Procedure will have to be filed at the earliest opportunity in the normal circumstances. However, an application under Order 26 Rule 10A of the Code of Civil Procedure cannot be dismissed merely on the question of delay alone, unless the same is wilful and deliberate.

Navigating the murky waters – SC redefining the scope of mens rea in insider trading cases

Rishabh Jain is a penultimate year law student pursuing B.B.A. LL.B. (Hons.) from National Law University, Jodhpur. Rahul Tomar is pursuing a B.A. LL.B. (Business Law Honours) from National Law University Jodhpur and is currently in his fourth year.

With regard to India's Insider Trading regime, it is governed by the SEBI (Prohibition of Insider Trading) Regulations, 2015 . Owing to the difficulties faced by the regulator (SEBI) in identifying the instance of insider trading and the same being totally based on circumstantial evidence, the investigation of insider trading cases is a time-consuming process such that some cases took years to complete investigation. As a result, the culpability of the uncompleted investigations (before 2015) shall be determined from the lens of SEBI (Prohibition of Insider Trading) Regulations, 1992. Against this backdrop, it is imperative to analyse the conundrums in the 1992 Regulations and how the recent judgment of *SEBI v. Abhijit Rajan* resolves the same.

Insider trading is the practice of dealing in the securities of a listed company, by a person in possession of "unpublished price-sensitive information" (UPSI). It lacks a precise definition as neither the SEBI (Prohibition of Insider Trading) Regulations, 2015 (2015 Regulations) nor the SEBI (Prohibition of Insider Trading) Regulations, 1992 (1992 Regulations) define the term. However, a thorough reading of the Insider Trading Regulation identifies the following activities as insider trading:

1. Buying or selling shares of a third party by obtaining and utilising UPSI for personal gain;
2. Disclosing any UPSI to outsiders or use of such information for personal advantage constitutes a breach of trust.

Problem appurtenant to the 1992 regulations

The underlying premise on which insider trading is prohibited is that when an insider is in such possession of UPSI, he would be assumed to be influenced by the nature of the UPSI in his possession, which others in the market would not have. Thus, placing the insider on a higher pedestal than the remaining market thereby creating a situation for him to make unlawful gains by utilizing UPSI.

The 1992 Regulations was enacted to protect innocent investors' interest in the securities market, however, a look at the 1992 Regulations portrays a different picture. As a corollary, it outlaws the *bona fide* transactions consummated by the insiders in the regular course of business.

As evident by the language employed in Regulation 3(i) of the 1992 Regulations, India's insider trading regime is based on "parity of information" approach whereby an insider can be convicted for mere possession of UPSI while dealing in the securities of a company, irrespective of the fact whether there was any intention to make a profit or to avoid any loss as a result of that transaction.

By using vague terms such as 'dealing in securities', the 1992 Regulation encompasses *bona fide* transactions devoid of any gainful objective in its wide ambit. Deviating from its intention, the 1992 Regulations were intended to protect the interest of innocent investors by ensuring information parity and not to disrupt or outlaw *bona fide* transactions. The regulator has lost sight of the true

intention of the legislature, thereby inflicting unintended and unwarranted restrictions on each and every transaction in possession of UPSI. Penal provisions ought to be precise and shouldn't place an unfair burden on the courts by assuming that any anomalies would be resolved over the course of the legal process.

Such vague laws may trap the innocent by not providing fair warning and results in regulatory overreach. As witnessed in the *Udayant Malhotra case*, SEBI rendered a *bona fide* transaction of pledging the securities for the purpose of paying back the loan within the stipulated time as insider trading, for mere possession of UPSI while transacting. However, the said transaction was done on account of Corporate Debt Restructuring devoid of any gainful objective on the part of the insider.

On a conjoint reading of Section 15G and Section 24 of the SEBI Act, 1992 along with Regulation 3 of 1992 Regulations, it can be deciphered that for the offence of insider trading not only a civil penalty of 25 Cr. or three times the amount of profits (whichever is higher) but also criminal sanctions up to 10 years imprisonment could be imposed, rendering it a quasi-criminal offence. Non-affixation of profit motive in such offence would cause deterrence among the stakeholders in possession of UPSI as it may attract criminal sanctions. This hampers the corporate structure and profit maximization motive of corporations. Thus, in order to strike a balance between the protection of innocent investors and ease of doing business, it is important to inculcate profit motive in insider trading. If an insider (in possession of UPSI) transacts in securities devoid of any gain to him over others, the same cannot be implied to be prejudicial to genuine investors' interest.

In addition to the same, the 1992 Regulation imposes strict liability on the insiders such that they have no resort to defences. The defence of due diligence is only available to a company and not to an insider. By imposing strict liability on the insiders, the 1992 Regulations put a blanket ban on transactions dealing in securities in possession of UPSI. A situation may arise wherein it becomes essential for a person to deal in securities, otherwise as a direct consequence, the company would not be able to survive or it may cause extreme loss to stakeholders (as witnessed in the case of Rakesh Agrawal v. SEBI). Such cases result in regulatory overreach thereby deferring from the intention of the legislature.

How judgment solves the problem

The case pertains to conviction under the 1992 Regulations. The Hon'ble Supreme Court held that in assessing the culpability of an insider, the actual gain of profit or suffering of loss is immaterial, but "*the motive for making a gain is essential*". Deviating from the objective criterion of gain/profit and inclining towards the motive of an insider to determine his culpability, the Supreme Court paves the way for *bona fide* transactions entered in possession of UPSI. As a result, an insider (in possession of UPSI) would not be susceptible to the 1992 Regulations, if he enters into a transaction that is devoid of a profit motive or gainful objective.

By annexing the desideratum of 'profit motive', the Supreme Court brought the 1992 Regulations in tune with the intention of the legislature as it was nowhere intended to create hindrance in regular *bona fide* transactions. In the case of *M/S Daiichi Sankyo Company v. Jayaram Chigurupati & Ors*, the SC has observed that authors of subordinate legislation ought to articulate what they intended to legislate when writing regulations. For that matter, if an insider deals in securities based on the UPSI for no advantage to him over others, it is not against the interest of investors which the 1992 Regulation seeks to protect. In addition to the same, it brings India's regulatory regime at par with other developed markets. It may be noted that regulators in developed countries such as UK and USA have mandated *mens rea* as a prerequisite for imposing liability for the acts of insider trading. Furthermore, through a catena of judgments, the SAT has devised its own interpretation pertaining to profit motive as a requisite for insider trading. At times, it results in conflicting judgments. In view

of the same, a judgment by the Division Bench of the Supreme Court brings much clarity to this unsettled position of law.

One may argue that the mandate of profit motive may cause prejudice to the innocent investors as insider trading cases are based on circumstantial evidence making the motive hard to prove. An insider may gain profit as a result of transaction and still shows that he has no gainful motive as a part of transaction. Even though such a mischief is unrealistic and impractical, however, even if one would assume so, the insider would not go scot-free. By using Section 12A of the SEBI Act, 1992, which expressly forbids the use of any scheme or device to enable the direct or indirect circumvention of any provision of the Act or rules made thereunder, or even the direct or indirect commission of insider trading. Therefore, the provisions of Section 12A of the SEBI Act would sufficiently enable enforcement if someone were to create a pledge or an encumbrance as a means of getting around the prohibition on insider trading.

Conclusion

Courts use a variety of evidence, including trading patterns, circumstantial evidence, and connections between the connected party and the trader, to prove that the conduct constituted insider trading. Although there were a number of mitigating circumstances in the Abhijit Rajan case that needed to be taken into account, The absence of a profit motive could be viewed as a powerful defence moving forward in addition to the defined defences made available under the PIT Regulations in the case of insider trading claims. By defining the "attempt by the insider to encash the advantage" as a necessary component of the insider trading offence, the SC has obviously departed from the strict liability strategy used by the SEBI up until this point. It did not, however, include a requirement to establish *mens rea* for the crime of insider trading and appeared to lean toward a preponderance of probability standard that prevents irrational convictions like those in the Abhijit Rajan case. Indian legislation, committee reports, and court decisions on the matter are not very clear; in fact, the Supreme Court and the SAT have gone against its own precedents when addressing the "intent" of insider trading.

SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368.

Umakant Varotill, res_QB13.pdf (nseindia.com).

Shreya Singhal v. Union of India, (2013) 12 SCC 73.

Rakesh Agrawal v. SEBI, (2004) 49 SCL 351 (SAT).

Accused in Police Custody- What is the correct approach- Bail being non-maintainable or it deserves rejection

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Article 22 (2) of the Constitution of India and **Section 57 of CrPC** give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the court of the magistrate and no such person shall be detained in the custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law with regard to remand and therefore it is the magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in either police or judicial custody.

Whenever we speak of Police Custody it means sending the accused to Police Lockup and during this time he remains under the direct control and supervision of Police. While in Judicial Custody the accused remains in Prison or Jail as notified by Central or State Government, under direct control and supervision of Judicial Magistrate.

Special Order for Remanding the Accused

When any investigation cannot be completed within 24 hours of the arrest of an accused as provided under **S. 57 of the Code** and there are reasonable grounds for believing that the accusation or information is well-founded and the station officer is further in a position to show satisfactory grounds for the application for a special order for the detention of the accused in police custody u/s. **167 CrPC** the SHO of the police station or the investigation officer not below the rank of sub-inspector shall forward the accused to the nearest Judicial Magistrate (whether or not he has the jurisdiction to try the case), together with a copy of the entries in the case diary relating to the case and report the matter to the Superintendent, but in no case shall the accused remain in police custody for a longer time than is reasonable without the authority of a Magistrate.

Police Custody-How Long

When the arrested accused is so transmitted to the Judicial Magistrate directly, he may authorise further detention (after the first 24 hrs) within the period of first fifteen days to such custody either police or judicial and in cases where first remand was given by Executive Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate from the first 15 days. **After the expiry of the period of first fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage.**

Issue Involved

In legal arena I have often heard that Bail application is not maintainable while the accused is in Police Custody. But on asking what are the reasons behind it, nobody offered me a reasoned reply. So I decided to research on this point because it is important to understand that **"Bail being not maintainable"** and **"Rejecting Bail Application"** are two altogether different things having different consequences.

If an accused who has been remanded to Police Custody applies for bail and court makes an oral remark that accused being in Police Custody, his bail application is non maintainable then in such a situation accused can't file an application under Section 439 CrPC to Sessions Court because he has not exhausted his remedy under Section 437 CrPC. In my humble opinion this is not the correct approach.

Accused in Police Custody- His Bail application is maintainable although court has discretion to reject it

I argue in this present article that allowing accused to file bail application while he is in police custody and then rejecting on the ground that investigation in the case is pending and the presence of accused with the investigation authorities is required for complete and effectual adjudication is the correct approach because it neither takes away the right of police to conduct investigation nor it curtails the right of the accused to challenge the order of rejection of bail by filing an application under Section 439 CrPC and simultaneously challenging his remand order by way of revision before the sessions court. Courts not allowing accused to file a bail application or not taking on record his bail application simply on the ground that he is currently remanded to police custody, takes away his valuable right of regaining his personal liberty. Moreover he also loses the opportunity to the challenge his custodial order.

When an arrested person is brought before a Magistrate, he has to decide whether he should remand the person to Police custody under Section 167(2) CrPC as requested by the Police and at the same time he has to decide whether the request of the person for bail should be granted. In order to decide the question of remand, he must be satisfied on a perusal of the entries in the Police Diary that there were grounds for believing that the accusation or information against the accused was well founded and that the Police have exercised their right of arresting without warrant legally and further that it was necessary for the purpose of investigation that the accused should be remanded to custody. Unless, the Magistrate is satisfied on all these points, he cannot remand the accused to Police custody.

So when an accused is produced before Magistrate within 24 hours of arrest by police and police requests for police custody and simultaneously accused also applies for bail then in such situation proper course for a Magistrate is to hear both on the Remand and Bail Application and then he can take following steps:

- ***First decide whether accused can be remanded to Police Custody or not***
- ***And if Magistrate decided accused to be remanded to Police Custody then the bail application filed by the accused has to be rejected.***

Why Bail is not given during Police Remand/Custody

The reason behind rejecting the bail application while accused is in Police custody is to avoid contradictory orders. It is very well known that the Remand and Bail Application is heard by the same Magisterial Court. If the court grants Police Remand, it means that it acknowledges the need of the accused with the investigation agencies for complete and effectual investigation in order to decode the crime. If the court grants bail it means court admits the fact that detention of accused is

no longer required and releasing him will not jeopardize the investigation. So if the accused is already in Police custody then allowing bail application goes against the order of the court itself and creates a contradiction because at one hand court acknowledges the presence of accused with police authorities for investigation and on the other hand it is allowing bail application on the ground that his detention is no longer needed. So when the accused is in Police Custody granting bail firstly creates contradiction and secondly the Magistrate practically prohibits the investigating agency from making proper investigation to the case which, in fact, requires in-depth investigation and which could not be possible without the police custody. So the unsaid rule is that Bail can't be granted if the Magistrate has Remanded Accused to Police Custody.

When Defendant can lead Evidence before Plaintiff in a Civil Suit

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

It is well known in civil cases that plaintiff is the master of the suit and he has to win the case on his own legs. It follows that since plaintiff comes up with a claim before the court, he owes the burden to prove the material particulars in his favour to get a decree passed. But Civil Courts are places of continuous learning and you never know what is about to come. One such situation that requires deliberation is ***"Whether Defendant can present his evidence before the plainitff's in a civil suit?*** Through this article I will try to find out answer to this issue. So here we go.

Introduction- Right to Begin

Order 18 Rule 1 of the CPC recognizes the general rule that the plaintiff in a suit must prove his case. This is in consonances with **Sections 101 to 114 of the Indian Evidence Act, 1872**. It is evident that **Section 101 of the Evidence Act** provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Order 18 Rule 1 talks about Right to begin. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Rule 2 further provides that on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. Then the other party shall state his case and produce his evidence (if any) and may then address the Court generally on the whole case. Then the party beginning may reply generally on the whole case.

It is clear that as a general rule the party which set up a claim must prove the burden cast upon him. The plaintiff has a right to begin and because the burden of proof rests upon one who pleads, it is for the plaintiff to lead evidence first.

Issue Addressed

Whether, the Trial Court can order the Defendant on an application made by the Plaintiff or Defendant or even suo motu under Order 18 Rule 1 or even under Order 18 Rule 2, to lead evidence first?

When Defendant has Right to Begin

The defendant is given **"the right to begin"** only in a situation where the facts alleged by the plaintiff are admitted but the plaintiff's entitlement to relief is contested in law or on the basis of additional facts asserted by the defendant. The condition that the facts pleaded by the plaintiff must be admitted by the defendant is of great significance. It implies that:

- The facts necessary for proving the plaintiff's case must be entirely or atleast very substantially, admitted by the defendant and;
- It is by reason of the defendant's admission that the plaintiff is absolved from its duty to prove his case before the defendant is called upon to give evidence.

On a proper interpretation, the second part of Order 18 Rule 1 therefore is applicable in a situation where, but for the additional facts pleaded or legal defences raised by the defendant, the plaintiff would have been entitled to a decree upon admission. So the plaintiff has the right to begin **unless the defendant admits the facts alleged by the plaintiff** and **contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief** which he seeks, in which case the defendant has the right to begin

Let's understand it through an example: Suppose there is a case of recovery of money under an agreement. The defendant made a part payment and the plaintiff sued for the balance. The defendant accepted and admitted the execution of the agreement as also the payment of part amount by two instalments. The defendant, however, alleged undue influence and coercion. Now, the defendant had the burden of proving this allegation.

- ***When the defendant pleads Additional Facts in his pleadings and an Issue is framed in this regard***

In **Sandip Sankarlal Kedia v Smt. Pooja Sandip Kedia**, it was held that:

Issues are framed on the basis of material proposition of facts and law admitted by one party and denied by other. It is upon the court to see what is admitted and denied and then proceed to frame the issues. The issue whose burden to prove is upon the defendant, then it would be for the defendant alone to lead evidence. The plaintiff would be required to give evidence, if at all, only after the defendant's evidence is led. The defendant would have the obligation, responsibility, duty and liability to prove that material proposition or fact made by him as an additional fact in his written statement. It is this obligation, responsibility, duty and liability which is termed the "right" to begin. The expression "right to begin" in the sub title of Order 18 Rule 1 of the CPC and in its contents is, therefore, not a right such as a privilege which can be reserved or waived. It would have to be exercised if the additional fact alleged by the defendant upon which the issue has to be framed has to be proved by the defendant for the issue to be determined by the Court. It is, therefore, that this enjoinment is laid down in Order 18 Rule 2 of the CPC. In such a suit on the date of the hearing under that provision the Defendant who has "the right to begin" is enjoined to state his case and produce his evidence in support of the issue which he is bound to prove if he would want the plaintiff to get non suited. The expression "shall" in Order 18 Rule 2 of the CPC makes this abundantly clear. Hence Order 18 Rule 1 of the CPC lays down the situation in which the party would have a right (which is actually his obligation to begin his evidence.) Order 18 Rule 2 of the CPC lays down that party shall produce such evidence to prove an issue arising from the facts alleged by him.

- ***Where there are several issues and burden to prove some of them lies on the defendant (The issues can be of fact or mixed question of law and fact or pure question of law)***

Order 18 Rule 3 of the CPC deals with cases of several issues, the burden of proving some of them lies on one party and some on the other. The party beginning evidence is allowed to lead evidence only on those issues for which the burden lies upon him and reserve the evidence on the other issues by way of rebuttal to the evidence produced by the other party. Such party is then allowed to produce evidence on those issues after the other party has produced all his evidence. This specified procedure also reflects and manifests the need to give evidence as per burden which lies upon the party. It does not require only the Plaintiff to give all evidence first. In view of the fact that

admitted facts need not require to be proved, no plaintiff need give evidence of any admitted fact. The distinction in the actual tendering of evidence, therefore, becomes very stark when one sees the case of many issues. After the Plaintiff has to lead evidence upon all the issues, the burden of which lies upon him to prove and not the other issues and the Defendant is enjoined to give evidence upon all the issues, the burden of which lies upon him to prove, allowing the Plaintiff the right of rebuttal thereafter. So this is a classical case where the defendant has right to begin evidence in relation to an issue or multiple issues whose burden to prove lies upon him.

- ***Where the case setup by the defendant if decided will completely dispose of the issues in the suit***

Delhi High Court in **Poonam Bhanot v Virendra Sharma and Ors.,** where the facts of s partition suit were something like this, defendant no. 1 did not deny the existence of a registered will dated 05.09.2014, by which all the parties, including the plaintiff, were bequeathed shares in the properties owned by their father. The defendant no. 1 in his written statement had put up a case that their father revoked his earlier registered will dated 05.09.2014 by a subsequent will dated 12.07.2016, which was unregistered, by which he had bequeathed the properties in Model Town and Gurgaon in his favour.

In view of the aforesaid facts the Court said that the defendant no. 1 has admitted to the existence of the registered will dated 05.09.2014, by which the plaintiff had also got certain shares from the properties, which are subject matter of partition in the present suit, which as per defendant no. 2 to 4 is the last will of the father of the parties, though as per defendant no. 1, the same has been revoked. In view of the aforesaid, Delhi HC held that ***the unequivocal position that emerges is that if the defendants set up a case, which if decided, would decide the issues raised in the suit completely, then the defendants can be directed to lead evidence first under Order 18 Rule 1 CPC.***

- ***Where the defendant claims existence of a will contrary to plaintiff's plaint that the deceased died intestate***

Hon'ble MP High Court in **Sanjay Ingle and Anr v Panchfula Bai,** where the case was Plaintiffs had instituted a suit against the Defendants before the lower court seeking relief of declaration of title with regard to the suit property. They had also pleaded in their plaint that the suit property belonged to their late father who died intestate and that the defendants had no right, title and interest in respect of the suit property. Per contra, the Defendant had claimed that the late father of the Plaintiffs had left a Will. Considering the said submission, the trial court passed an order, thereby directing the Defendants to lead evidence before the Plaintiff to prove the existence of the Will. Aggrieved, the Appellants preferred an appeal, arguing that they should have been given the opportunity to lead evidence before the Defendants.

Examining the submissions of parties and documents on record, the Court concurred with the rationale of letting the Defendants lead the evidence first. Referring to Hindu Law by Sir Dinshaw Fardunji Mulla, the Court pointed out the two rules with respect to burden of proof vis-à-vis a Will i.e.:

- Onus probandi lies upon the party propounding a Will, and that they must satisfy the conscience of the court that the instrument so propounded is the last Will of free and capable testator;
- If a party writes or prepares a Will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever there nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the successor knew and approved the contents of the Will and it is only where this is

done that onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the Will.

Thus, the Court agreed with the reasoning of the court below and held that impugned order was neither illegal nor arbitrary and held that when these rules of proving a Will are taken into consideration, then the order passed by learned Civil Judge when tested on the touchstone of the aforesaid rules cannot be said to be illegal or arbitrary because the defendants are staking their claim on the basis of a registered Will left by deceased Laxman has to prove their Will first and then only plaintiffs can be asked to discharge their burden.

- ***Partition Suit- Where every party to the suit is Plaintiff in respect of his share and defendant in respect of shares of others***

In **Vikram Kaushik & Anr. v Vivek Kaushik** wherein, in a partition suit, the defendant was required to lead the evidence first, as the ownership of the property by the predecessor in interest of the parties had been admitted. It was held that the defendant would then be required to first establish the additional fact pleaded by him that the property in question had been orally partitioned during the lifetime of the predecessor in interest. **The facts show that the only disputed issues concerned the oral partition, which was asserted by the defendant. In any event, it is settled law that in a suit for partition, the status of the parties is not of great relevance, each party is a plaintiff in respect of their share of the suit property, and a defendant in respect of the shares of the others.**

Once Order Sheet is drawn asking plaintiff to start his evidence, can defendant be asked at this stage to start his evidence first?

In **Poonam Bhanot v Virendra Sharma and Ors**,, the defendant no. 1 contended that the court, via its 2019 order, had directed the plaintiff to lead evidence first. He further submitted that the said order had attained finality in the absence of any appeal against the same. But the Hon'ble Delhi High Court noted that the directions as regards the filing of list of witnesses and evidence by way of affidavit **were in the nature of a procedural order**. Further, Order 16 CPC deals with summoning and attendance of witnesses, which are procedural in nature. Therefore, the court opined that it had the authority to give necessary directions under Order 18 Rule 1 CPC on the procedural aspect as regards which party will begin the evidence in the interests of justice.

An evidence is a statement of disputed material facts and nothing more. An evidence is not an essay. It does not require to bear an introduction, a main body and a conclusion. It only must show relevant disputed facts which the Court must appreciate to accept or reject such oral evidence. Hence recording of evidence requires the protocol under Order 18 Rule 1 of the CPC and the mandate under Order 18 Rules 1 and 2 of the CPC to be followed. The Courts, duty is, therefore, to see that it is so followed. The Court, therefore, has the power and the duty to pass directions upon the application of any of the parties as also by itself upon considering the separate averments of the parties in the pleadings to efficiently direct the order of leading of evidence as the legislated discipline of work.

When Defendant can't be asked to lead his evidence first

- ***When Defendant doesn't admit the facts pleaded by the plaintiff***

This issue was considered by Hon'ble Delhi High Court in **Sabiha Sultana & Ors. v Ahmad Aziz & Anr.**, wherein this Court relied upon several authorities to hold that in the absence of admission of facts pleaded by the plaintiff, asking the defendant to lead evidence first could well be disadvantageous to the defendant. Paragraph 8 of the judgment, to that effect, is reproduced below:

"In terms of the procedure stipulated in CPC, it is clear that as a general rule the party which set up a claim must prove the burden cast upon it. The plaintiff has a right to begin and so he must

because the burden of proof rests upon one who pleads. It is for the plaintiff to lead evidence first. It is only when the defendant admits to the facts pleaded by the plaintiff that the latter would be relieved of this burden, ***but in the absence of any such admission, asking the defendant to lead evidence first could well be disadvantageous to the defendant.*** Order 18 Rule 1 of CPC prescribes "right to begin" the recording of evidence wherein the plaintiff would lead evidence first but the defendant may be permitted to lead evidence if after having admitted to the facts pleaded by the plaintiff, he so seeks to do. In the absence of these two qualifying circumstances, the Court would not direct the defendant to lead evidence first."

Similarly the Hon'ble Delhi High Court in **Rajnish Gupta v Mukesh Garg** observed that "plaintiff has a right to begin and so he must because the burden of proof rests upon one who pleads. It is for the plaintiff to lead evidence first. It is only when the defendant admits to the facts pleaded by the plaintiff that the latter would be relieved of this burden, ***but in the absence of any such admission, asking the defendant to lead evidence first could well be disadvantageous to the defendant.*** As per Order 18 Rule 1 of the CPC, it is the general rule that the plaintiff must lead evidence first, however, when the defendant admits to the facts pleaded by the plaintiff, the plaintiff could be relieved of such burden."

- ***When Defendant admits the facts pleaded by the plaintiff but not the material facts***

The judgment of Orissa High Court in **Mirza Niamat Baig v Sk. Abdul Sayeed**, indicates that the facts admitted by the defendant must include all the material facts. Paragraphs 4 and 5 of the said judgment are reproduced below:

"The law is well settled that a person who sets the law in motion and seeks a relief before the Court, must necessarily be in a position to prove his case and get the relief moulded by the law. The right to begin is to be determined by the rules of evidence. As a general rule, the party on whom the burden of proof rests should begin. In no case, the plaintiff can be allowed to take any undue advantage over the defendant, whatever may be the position or stand the defendant takes, for the very reason that the defendant is expected to answer the claim made by the plaintiff in the suit. **In the wording "unless the defendant admits the facts alleged" occurring in Order 18, Rule 1, CPC, the word "facts" means all the materials facts.** Thus, where a defendant admits only some of the facts alleged by the plaintiff, there the plaintiff should begin.

- ***In Defamation case until and unless defendant accepts that the contents of article constitutes libel, he can't be compelled to adduce evidence first***

Division Bench of Orissa High Court in **Balakrishna Kar v H. K. Mahatab**, wherein the Court overturned the order of the Trial Court placing the burden upon the defendant to lead evidence first in a defamation suit. The Division Bench held that the admission of publication of the allegedly defamatory articles was insufficient for this purpose as the defendant had not admitted that the articles constituted libel on the character of the plaintiff. It was held that in such circumstances, the onus lies on the plaintiff to establish his case.

<u>Provision is an Enabling one and Defendant can't be compelled to begin evidence</u>

In **Bhagirath Shankar Somani v Rameshchandra Daulal Soni**, the Court concluded that if the defendant decides to lead evidence first and is so permitted by the Court, the plaintiff can always lead evidence in rebuttal. The trial Court does not have the power to issue a direction to the defendant compelling him to lead his evidence before the plaintiff adduces his evidence under Order 18, Rule 1. ***Only when the defendant claims a right to begin under Rule 1 and the plaintiff disputes existence of such right, the Court will have to decide the question whether, the defendant has acquired a right to begin.***

Hon'ble Court in **Dattatray Namdeo Patil v Ram Namdeo Patil**, dealt with a similar issue and concluded in paragraphs 3 and 4 that Rules 1 and 2 of Order 18 of the Code of Civil Procedure would entitle the defendant, who admits the fact, to begin the recording of his evidence first. It is an enabling provision. ***If the defendant applies and makes a request or claims such a right, the Court may pass an order permitting the defendant to step into the witness box first.***

In **Metafield Coil Private Limited v Nikivik Tube Industries Private Limited**, while considering such an issue under Order 18, Rule 1, the Court concluded that a consistent view taken by the Courts is that a direction against the defendant to lead evidence before the plaintiff leads his evidence, cannot be issued under Order 18, Rule 1. The scheme of law appears to be that of a normal rule and it would be a privilege of the plaintiff to lead his evidence first. However, it enables the defendant to exercise the right in the contingency mentioned in the rule. After the plaintiff exercises his option to lead evidence first, it is for the defendant to decide whether, he would like to lead evidence and make such a formal request to the Court***. If the Court permits the defendant to lead evidence first, the plaintiff can always lead evidence in rebuttal. The Court does not have the power to issue a direction to the defendant so as to compel him to step into the witness box first and lead evidence.***

In **Haran Bidi Suppliers and Another v M/s. V.M. & Co., Bhandara**, the Hon'ble Court has considered the scope of Order 18 Rule 1 and has concluded that **it is an enabling provision, which may entitle the defendant to make a request to the Trial Court to begin first**. It was, therefore, interpreted that the Trial Court may consider the request of the defendant to begin first and would then hold, if the plaintiff does not oppose, that the right to begin will be of the defendant.

Hon'ble Gujarat High Court in the case of **Keshavlal Durlabhasinbhai's Firm v Shri Jalaram Pulse Mills**, has opined that the provision is enabling one entitling the defendant of right to begin, however, nothing in the provision confers any power on the Court under this rule to direct the defendant to adduce evidence first in the suit if the defendant himself is not claiming such right in view of the contingencies mentioned in rule 1.

The case of **Bhagirth Shankar Somani v Rameshchandra Daulal Soni**, has dealt with the question in detail and these observations were made:

The consistent view taken by this Court is that a direction against the Defendant to lead evidence before the Plaintiff leads his evidence cannot be issued under sub rule 1 of Order 18 of the CPC. The scheme of Rule 1 appears to be that as a normal Rule it is the privilege of the Plaintiff to lead his evidence first. However, it enables the Defendant to exercise the right in the contingency mentioned in the Rule. The Plaintiff in a given case can make a statement before the trial Court stating that as the case is covered by exception in Rule 1 of Order 18 of the said Code, he is reserving his right to lead evidence in rebuttal after the Defendant leads his evidence. The said option can be exercised in mofussil courts by the **Plaintiff by filing a pursis** *(Pursis is written statement /information given to the court pertaining to any matter pending before it which may include information/ facts/ joint statement/ compromise/ settlement/ no instruction from a party etc with the intent to put the same before the court for its consideration in any proceeding)* to that effect. In a Court in which there is no practice of filing pursis, the Plaintiff can make oral statement to that effect which will be normally recorded in the roznama (Ordersheet) of the case. After the Plaintiff exercises option it is for the Defendant to decide whether he wants to lead the evidence. If the Defendant decides to lead the evidence, the Plaintiff can always lead evidence in rebuttal. **The Court has no power to issue a direction to the Defendant compelling him to lead his evidence before the Plaintiff adduces his evidence.** Only when the Defendant claims right to begin under Rule 1 and the Plaintiff disputes

existence of such a right, the Court will have to decide the question whether the Defendant has acquired a right to begin.

Where the Plaintiff doesn't like to Begin

In **Shivaji Laxman Palaskar v Kamal Raosaheb Shipalkar,** the procedure was provided where the plaintiff doesn't want to begin and burden to prove an issue or issues lied on the defendant. It was stated that in a given case, the plaintiff may enter a purshis to state that the onus and burden of proving any issue has not been cast on him and therefore, he would not like to begin. After such a purshis is entered and upon verifying the issues, if the court is convinced that the plaintiff does not desire to lead any evidence as no burden is cast on him, the court may record such a contention and then, the defendant could step into the witness box and lead evidence. However, the court cannot exercise the jurisdiction to entertain the prayer of the plaintiff on an application to pass a judicial order directing the defendant to lead evidence first. The court can only entertain the purshis of the plaintiff stating that he does not desire to lead evidence as no burden is cast on him and if convinced, the court may accept the purshis and give liberty to the defendant to lead evidence first.

It has to be noted that court can only give liberty to defendant to lead his evidence first. Court can't compel him to start with the evidence as already we have discussed above that this provision is only an enabling one. If the defendant doesn't take the opportunity to start with the evidence then plaintiff has to start with his evidence.

Conclusion

In view of the above, it is no longer res integra that the court generally does not have the power under Order 18 Rule 1, much less, under Order 18 Rule 2 to entertain an application of the plaintiff for issuance of directions to the defendant to lead evidence first. **The right to begin will always be with the plaintiff unless the defendant makes a request to the court that he would like to exercise the right to begin before the plaintiff steps into the witness box** and in which case, an application by the defendant could be considered if the plaintiff has any objection, thereby, inviting a judicial order. In short, the defendant may have the liberty to claim the right to begin.

On the plain language of Order 18 Rule 1 CPC, it appears that it is only an enabling provision entitling the defendant of right to begin. This provision cannot to interpreted to mean that the Court would be competent to direct the defendant to enter the witness-box before the plaintiff and lead evidence in support of its case.

Needless to state that the procedure under Order 18 Rules 1 and 2 of the CPC is not empty formality. It is for true and clear management and administration of the case before the Court. It is for leading only the most relevant and necessary evidence by the party upon whom the burden of proving an issue, upon his own allegations denied by the other party, lies.

Understanding Spot Panchnama/Site Inspection Memo/Naksha Mauka, their procedure, often raised objections, and evidentiary value

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

The word panchanama is not defined anywhere in law. The word panchanama has significant value as it is used by almost all the courts in number of cases. Not only the Criminal Courts but also the Civil Courts rely on document named panchanama to check veracity and truthfulness of the action taken by Officers of State or Officers of Court. The word Panchnama literally means a "record of observation by five people". Panchanama is essentially a document recording certain things which occur in the presence of the Panchas and which are seen and heard by them. The word panchanama consists of two words, panch and nama. In Sanskrit the word panch means respectable person and nama a written document. In criminal cases this panchanama has very important value. The panchanama accounts state to things which were found at particular place at particular time.

A Panchnama is essentially **a document recording certain things which occur in the presence of Panchas and which are seen and heard by them**. Panchas are taken to the scene of the offence to see and hear certain things and subsequently they are examined at the trial to depose to those things and their evidence is relied upon in support of the testimony of an Investigating Officer. A Panchnama recorded on such an occasion is in its turn relied upon in support of the evidence of the Panchas as a statement previously made by them under Section 157 of the Evidence Act.

In criminal law the panchanama has corroborative value. The Code of Criminal Law, 1973 also does not define panchanama anywhere. But the same is incorporated in section 100 of the Code. The section 100 is part of chapter VII which titles Process To Compel The Production Of Things. In this chapter the power to carryout search of particular places is given to officers as laid down sections 93, 95, 97 and 98 of the Code. The provision of panchanama is made to convince court that officer have in fact have carried out such search or made such seizure.

In **Mohanlal Bababhai v. Emperor,** Beaumont, C. J. and Sen. J., observed thus:

"A panchnama is merely a record of what a panch sees. The only use to which it can property be put is that when the panch goes into the witness box and swears to what he saw, the panchnama can be used as a contemporary record to refresh his memory."

In **The State of Maharashtra v. Kacharadas D. Bhalgar**, a panchnama was stated to be a memorandum of what happens in the presence of the panchas as seen by them and of what they hear.

Object behind making Panchnama

The primary intention behind the panchnama is to guard against possible tricks and unfair dealings on the part of the officers entrusted with the execution of the search, with or without warrant and also to ensure that anything incriminating which may be said to have been found in the premises searched was really found there and was not introduced or planted by the officers of the search party. The legislative intent was to control and to check these malpractices of the officers, by making the presence of independent and respectable persons compulsory for search of a place and seizure of article.

Moreover Panchnama is an important document because it informs the person from whose premises the articles are seized or the person searched as to the name of the person or the building etc. where the search was carried out and the officers who were authorized and had carried out the search and the articles, if any, seized.

Procedure and Contents of a Panchnama

The procedure for preparing panchanama is not stated in any Act. But Section 100 subsection 4 and subsection 5 of the Code of Criminal Procedure, 1973 provides for panchnama in cases where search is done. The attesting witness i.e., the panchas are to be two or more independent and respectable persons. In the case where there is no eye witness to the offence and the case totally based on circumstantial evidence then such panchnama carries immense value. It is also important that after preparation of panchanama the panchas should read its contents. If the panch is illiterate, then such panchanama should be read over to him and there should be an endorsement that the contents of panchanama were read over to them. In case where at time of making panchanama there was no source of light then it should be mentioned as to how the source of light was managed to prepare panchanama.

'Panchas' should be independent and respectable people. They should normally belong to the locality and/or neighbourhood of the place where the panchanama is drawn. There is however no bar in getting panchas from distant places also if need be or to overcome the non-availability of local panch witnesses. The panchas should, however, be,-

- Intelligent
- Literate as far as possible
- Respectable citizens
- Should possess an understanding and of impartial nature
- Must be with good antecedents. No convictions earlier.
- Should not be interested /prejudiced in the matter they are attending to.
- Should not be easily influenced by pecuniary / other considerations.
- Should not be a minor.
- Acceptable to the religious sentiments of the owner of the house.
- Free from contagious diseases and infirmities as to effect their being proper panchas (for instance deaf, mute, blind etc.)
- Should have no relationship either with the place or persons searched.
- Complainant or owner of the house should not be made a pancha
- Well-to-do or affluent persons may not necessarily be respectable persons,
- No objection if panchas are Government servants.

In case no Panchs (Witness) are available when required, the Officer-in-charge shall conduct the search and seize the articles without Panchs (Witness) and draw a report of entire such proceedings which is called a Special Report.

Any search and seizure operation invades constitutionally protected and cherished right of privacy. Administrative lapse even of minor nature when there is invasion of the said right does lead to criticism and allegations. It will be salutary and proper that whenever a search is made under warrant a copy of the search warrant be furnished to the occupant or the person searched.

Site/Spot Inspection Memo/ Naksha Mauka

This panchanama is generally drawn by Investigating Officer when he visits the informant or the person who has knowledge about place of crime. When such informant or such person shows the Investigating Officer place of crime then in presence of two panchas the Investigating Officer draws spot panchanama. In this panchanama there are details of the position of scene of crime after the crime. For example if there is allegation of theft then generally in such panchanama it is found that the articles on the place of crime were scattered and cupboard or safe was broke open. So also in accident cases the tyre marks are often mentioned in this panchanama which shows that accused was driving his vehicle in speed or he tried to avoid accident. This panchanama corroborates the fact that incident had taken place.

How Panch Nama is proved

A panchanama can be proved by examining the panch witnesses in the Court. Panchanama can be submitted in court as documentary evidence in pursuance of the oral submissions of the witness or witnesses. Basically a Panchanama is a record of what the Panchs (Witness) see and the same can be proved only when the said Panchs stand in the witness box and testify on oath as to what they saw during the Panchanama. The main intention behind conducting Panchanama is to guard the case from unfair dealings on the Part of the Officers. The Panchanama can be used as a corroborative piece of evidence. It cannot be said to be a substantive piece of evidence, and hence relying only on the Panchanama in absence of any substantive evidence cannot attract conviction.

Whether it is necessary to be an eye witness to the crime in order to be a Panch (Witness to the Panchnama/ Memo)

The procedure for drawing a panchnama is Panchas are taken to the scene of an offence to see and hear certain things. Therefore, panchas are liable to be examined at the trial to depose to those things and their evidence is relied upon in support of the testimony of an investigating officer. A panchanama of this kind recorded and relied upon in support of evidence from the panchas is akin to a statement previously made by him under Section 157 of the Indian Evidence Act, 1878 which says that former statement of witnesses may be proved to corroborate later testimony as to the same fact. So there is no need for a panch to be an eye witness of the incident/crime. His only role is to going to the place and verifying the proceedings done by Investigation officer in front of him.

Evidentiary Value of Panchnama

Panchnama is a document having legal bearings which records evidence and findings that an officer makes at the scene of an offence/crime. However, it is not only the recordings of the scene of crime but also of anywhere else which may be related to the crime/offence and from where incriminating evidence is likely to be collected. The documents so prepared needs to be signed by the investigating officer who prepares the same and at least by two independent and impartial witnesses called "panchas", as also by the party concerned. The panchanama can be used as corroborative piece of evidence. It is not substantive piece of evidence. In absence of any substantive piece of evidence court can't rely upon panchanamas on record for conviction.

What happens when IO didn't made seizure memo or the memo (of any kind) is not drawn on the spot but in office or legalities were not followed

It is a humdrum that Sections 93 to 104 of Code of Criminal Procedure, 1973 are dealing with search and seizure. Section 461 of the said Code deals with irregularities, which vitiates the proceedings. From a close reading of Section 461 of CrPC, it is easily discernible that mere failure on the part of the Investigating Agency in preparing seizure memo does not vitiate the proceedings.

In **Yakub Abdul Razak Memon vs State of Maharashtra** it was held that on any deviation from the procedure, the entire panchanama cannot be discarded and the proceedings are not vitiated. If any deviation from the procedure occurs due to a practical impossibility then that should be recorded by the I.O. in his file so as to enable him to answer during the time of his examination as a witness in the court of law. Where there is no availability of panch witnesses, the I.O. will conduct a search and seize the articles without panchas and draw a report of the entire such proceedings which is called a 'Special Report'.

For better appreciation, it would be condign to look into the decision reported in **Khet Singh v Union of India**, wherein, the Hon'ble Supreme Court has held that when the seizure memo has not been prepared on the spot, but subsequently in the office of the Customs Department, the accused persons been present throughout and there been no allegation or suggestion that the contraband article has been in any way meddled with by the officer, the irregularity if any in the search would not vitiate the conviction. From a mere reading of the decision rendered by the Hon'ble Supreme Court, it is made clear that if there is any irregularity in preparing seizure memo, it would not belittle or vitiate the case of the prosecution.

For example in a corruption case where the witnesses corroborate the fact that they have given bribe to the accused and the accused was caught having huge sum of money in his office coupled with the fact that when he was examined no satisfactory reply was given, in such a situation not making a seizure memo will not defeat the case of prosecution.

It has already been pointed out that mere omission on the part of the Investigating Officer in preparing seizure memo would not vitiate the entire proceedings. Further, as per the decision referred to, seizure memo can be used as a corroborative evidence. Therefore, it is quite clear that it is not a substantive piece of evidence. Since seizure memo can be used as a corroborative evidence, mere omission on the part of the Investigating Officer in preparing the same would not militate the case of the prosecution.

Where witness accepts his signature on Panchnama but denies that it was made in his presence or states that he signed on the blank paper

Many people argue that a panchanama being a document can be proved, but it is not correct. Evidence may be oral or documentary. Documentary evidence is to prove the contents of a document, when the question is what are the contents of the document? But when the question is what a witness has seen or what he has heard etc., the evidence must be oral and must be direct. When the question is what the witness has seen, he must say what he has seen. There is no question of documentary evidence to prove the fact which a witness has seen and to prove that the witness has seen that fact. A document may be used for contradicting the witness but when the question is what the witness has seen, there must be direct oral evidence as to what he has seen.

It has to be kept in mind that a Panchnama is only a note made by the witness at the time of incident, which he has seen, and the only use which can be made of such a document is that provided in Sections 159 and 160 of the Evidence Act. A Panchnama can also be treated as a note or a record made by the Panch witness to refresh his memory under Section 159 of the Evidence Act. In view of Section 159 of the Evidence Act, even If the Panchnama is not written by the Panch himself but by another person, Section 159 Evidence Act would apply to it provided the Panchnama was read by the witness within the time mentioned in Section 159 Evidence Act and if when he read it he knew it to be correct. In such a case the Panchnama can be used by a witness to refresh his memory as laid down in Section 159 of the Evidence Act. When the writing is used by a witness to refresh his memory, the provisions of Sections 160 and 161 of the Evidence Act will apply.

In other words a witness's memory may be weak, but a witness may refresh his memory by referring to any writing made by himself at the time of the transaction concerning this question as provided in Section 159 of the Evidence Act. The witness may also refer to any such writing made by any other person, and read by the witness within the time referred to in Section 159, if when he read it he knew it to be correct. The very fact that a provision is made for a witness for refreshing his memory by referring to certain documents in order to prove certain facts makes it clear that the evidence of such facts must be given by the oral evidence of the witness and not by producing a document.

The question in such a case is not as to the contents of the Panchnama but as to what the witness, who was present at the time of the incident, has seen, and this can be proved by the oral evidence of the witness, if necessary by refreshing the memory by referring to any note made by him as provided in Section 159 of the Evidence Act. So it means that even if Panchnama was not drawn in front of witness or he was asked to sign on blank papers, still it will not disprove the panchnama nor it will affect the prosecution case as long as witness accepts the fact that what he saw has been correctly recorded in it. A witness can testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves if he is sure that the facts were correctly recorded in the document.

Whether Panchnama is a record of statement falling under bar of Section 162 CrPC

In **Mohanlal Bababhai v. Emperor**, it was held that, Section 157 of the Evidence Act (corroboration of testimony of witness with former statements made by him at or about the time when such fact took place before an authority legally competent) is controlled by Section 162 of the Code of Criminal Procedure and therefore if a statement, though falling under Section 157 of the Evidence Act, were also to fall under Section 162 of the Code, it would be Section 162 of the Code that would prevail and such a statement would be inadmissible. Reading Section 157 of the Evidence Act and Section 162 of the Code of Criminal Procedure together, it is clear that the word 'statement' in Section 157 of the Evidence Act has a wider connotation than the same word used in Section 162 of the Code.

But in order that a previous statement of a witness falls under Section 162 of the Code, two conditions have to be fulfilled, i.e.,

- that it has to be a statement made to a police officer and
- that it is made in the course of investigation under Chapter XIV, Criminal Procedure Code.

The question therefore is whether a Panchnama is a record of a statement which falls within the ban of Section 162 of the Code?

A previous statement of a witness complying with the conditions laid down in Section 157 of the Evidence Act is admissible. The exception is that if it fulfils the two conditions laid down in Section 162 of the Code, it becomes inadmissible thereunder, except for the limited purpose therein stated. The important words in Section 162 of the Code are "No statement made by any person to a police officer". Therefore the statement must be one to a police officer and unless it is to a police officer, it does not fall within the mischief of Section 162 of the Code. Therefore ***it is necessary that the statement in question must have the element of communication to a police officer. If a Panchnama is merely a record of facts which took place in the presence of panchas and of what the Panchas saw and heard, it is not a record of a statement communicated to a police officer, it would be admissible under Section 157 of the Evidence Act and would not fall within the ban of Section 162 of the Code of Criminal Procedure.***

As its very name signifies, it is a document recording what the Panchas saw and heard. At the same time, if a Panchnama does contain a statement which amounts to a statement communicated to a police officer during the course of his investigation, it would fall within Section 162 of the Code. Therefore every time when a Panchnama is tendered in evidence, it would be the duty of the Court to ascertain whether any part of it falls within the mischief of Section 162 of the Code of Criminal Procedure and if it does fall, the Court should take out that portion from being admitted in evidence.

As held in **Santa Singh v. State of Punjab**, the mere presence of a police officer when a statement is made does not by itself render such a statement inadmissible. So long as a Panchnama is a mere record of things heard and seen by panchas and does not constitute a statement communicated to a police officer in the course of investigation by him, it would not fall within the mischief of Section 162 of the Code.

In case of **Vishnu Krishna Belurkar v The State of Maharashtra,** the question before Hon'ble HC was whether the panchanamas are hit by the provisions of section 162 of the Code of Criminal Procedure, 1973. The question was referred to Hon'ble Full Bench of High Court of Bombay. In para 8, the Hon'ble Full Bench has observed that:

"In our view, the fact that panchanama is written out by the police officer or the police scribe as dictated to him by the panchas would not make any difference, for, that would merely be a mode in which the panchanama is recorded. Of course, if a panchanama does incorporate a statement which amounts to a statement intended as a narration to a police officer during his investigation, it would fall within Section 162 and will have to be excluded but that is the duty which the court must perform every time a panchanama, is tendered in evidence."

Conclusion

So on the basis of above discussion here is the conclusion:

- Panchnama is just a record of proceeding of what a panch saw or heard when he was taken to the spot by the IO of the case. It contains the signature of IO, the panchas as well as the person who identified the spot.
- A panchnama is proved by calling the panch who will testify that the document bears his signature and whatever is recorded in it is correctly recorded. It doesn't matter that the panchnama was actually made in the presence of the witness when he was taken to the spot or it was made by the IO sitting in his office. As long as witness says it correctly mentions all the details, it stands proved.

- Panchnama although being a document has to be proved by oral evidence of IO and panchas as to what they saw and heard. Procedural irregularities and not making panchnama is not fatal to the case of prosecution as long as other evidence exist on record.
- Pnchanama is just a corroborative and not a substantive piece of evidence. Conviction can't be recorded solely on the basis of it.
- Whether statements recorded in Panchnama falls under the bar of Section 162 CrPC or they are admissible by virtue of Section 157 of Evidence Act depends upon the nature of statement made by the panchas to the IO. If it is only about what they saw or heard, then it is admissible under Section 157 IEA but if it contains something in the nature of information then it will fall under the bar of Section 162 CrPC and the prosecution wouldn't be able to use such statement to corroborate the panchas.

Suit Dismissed for default, Restoration Application also dismissed for default – What are the Remedies Available?

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

It is a normal thing in civil courts that civil suits get dismissed for default under Order 9 Rule 8 of Civil Procedure Code (CPC) when the plaintiff doesn't appear when the suit is called on for hearing. Once the suit gets dismissed for default the remedy plaintiff has is to file a restoration application of the suit for setting aside dismissal under Order 9 Rule 9, showing sufficient cause for his previous non-appearance when the suit was called on for hearing. Apart from this he can also file an appeal under Section 104 read with Order 43 Rule 1(c) of CPC. On certain occasions an interesting situation arises if this restoration application also gets dismissed for default meaning that applicant/plaintiff remained absent when the application under O. 9 R. 9 was called on for hearing, then what is the remedy available with the applicant petitioner/plaintiff. Through the present article author tried to discuss the remedies applicant/plaintiff have in such a situation.

Early Position

Section 141 of the Code of Civil Procedure states that: "*The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction.*"

In **Venkatanarasimha Ruo v. Surya-narayana**, an application to restore a suit had been dismissed for default and a subsequent petition was filed to set aside that dismissal and it was allowed by the Court. The only question which arose before the High Court was whether Order 9 applied only to suits or whether by reason of Section 141 it also applied to applications made under Order 9 itself. The Judge observed with reference to an earlier decision as follows:

"What was held to be included were original matters in the nature of suits, but this statement is not exhaustive. It is argued that an application under Order 9 is not an original matter in the nature of a suit. It certainly is not a petition in a suit, for the suit is no longer on the file. It relates to a question quite independent of the suit and one which has to be determined on evidence as to matters which would be quite irrelevant to the suit. In this sense, it seems to me to come within the meaning of Privy Council's observations that Section 647 includes original matters in the nature of suits. So the Division Bench of the Madras High Court ruled that Order 9 would not apply to applications of the nature of second application and that the second application is not an original proceeding.

In **Salar Beg v. Kotayya**, , the question directly arose before the Madras High Court as to where an application under Order 9 Rule 9 CPC was itself dismissed for default, whether another application to restore the first application dismissed for default was competent. The Judges held that such a second application was competent but not under Order 9 Rule 9.

In **Perivakarupa Thevar v. Vellai Thevar**, the Judges of the Division Bench observed as follows:

"In our opinion, an application under Order 9. Rule 13 stands on the same footing as one under Order 9 Rule 9. A right to have an ex parte order set aside is not procedural but substantive in character. Further Section 141, CPC must be read subject to special procedure prescribed for a proceeding under a particular enactment. "We have already pointed out that in terms the provisions of Order 9, Rule 13 apply only to suits. And it is well settled that Section 141 CPC does not apply to execution proceedings. There is also ample authority interpreting the word 'proceeding' as relating to original matters in the nature of suit and an application under O 9 R 9 is not an original matter in the nature of the suit."

Whether Appeal is maintainable from restoration application dismissed for default

Section 104 of CPC enumerates the orders from which the appeal lies. **Order 43** provides for "appeals from order". Order 43 Rule 1 (c) & (d) which are relevant for the present case are quoted as below:-

"1. Appeal from orders.- An appeal shall lie from following orders under the provisions of Section 104, namely:-

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

In **Mohd. Farkhuida Ali v. Khamrunnissa**, it was held that no appeal was provided for from an order in a second application that is, an order dismissing an application which was for restoration of an application for setting aside the dismissal of a suit or an ex parte decree. To a similar effect is the decision in **Gaja v. Mohd. Faruk** wherein it was held that Order 13 did not provide for an appeal from an order dismissing for default an application for restoration of an application under Order 9 Rule 9 and Order 9, Rule 13, CPC.

In **Brijmohan vs. Raghoba**, it has been held by a Division Bench of the Nagpur Judicial Commissioner's Court that no appeal lies from an order rejecting an application to set aside the dismissal for default of an application for restoration of a suit dismissed in default, and that the dismissal of such an application can be set aside under section 151. The learned Judges based this conclusion on the reasoning that Section 104(1) and O. 43 R. 1 CPC did not provide for an appeal against an order of dismissal for default of an application for restoration of a suit under O. 9 R. 9; that the right of appeal being a substantive right could not be inferred by the application of Section 141 which only made the procedure in the Code applicable, in so far as it could be, in all proceedings in any court of civil jurisdiction and did not give any substantive right; and that, therefore, an order of dismissal for default of an application for restoration of a suit under O. 9 R. 9 was not applicable under O. 43 R. 1(c). On the same reasoning the learned Judges treating the remedy under O. 9 R. 9 as a substantive one held that it was not available by resorting to Section 141 CPC., for setting aside the dismissal in default of an application for restoration of a suit under O. 9 R. 9. This decision was followed by a Single Judge of the Nagpur High Court in **Prem Shankar vs. Rampyarelal**.

In **Komalchand Beniprasad vs Pooranchand Moolchand** it was held that the remedy under O. 9 R. 9 CPC is not a matter of procedure. The rule gives a substantive right of applying for restoration of a suit dismissed for default and this right cannot be conferred by Section 141 when it is made applicable to proceedings initiated on an application for setting aside the dismissal in default of an application for restoration of a suit under O. 9 R. 9 CPC. Section 141 deals only with procedure and not with any substantive right. It does no more than provide the procedure to be adopted by Courts of Civil jurisdiction is dealing with matters a before them. It does not provide that the Code is to be applied in its entirety to such proceedings so as to confer the right of appeal or any other substantive right in those proceedings. O. 9 R. 9 cannot, therefore, be invoked for setting aside the dismissal in default of an application for restoration of a suit under that rule. On

the same principle an order dismissing in default an application for restoration of a suit under: O. 9 R. 9 is not open to appeal under O. 43 R. 1 (c).

Use of Inherent Powers

In **Chandrika Singh v. Parsidh Narayan Singh**, also it was held that an application to restore an application which had been dismissed for default under Order 9 Rule 4, CPC was maintainable under Section 151 CPC. In **Madan Lall v. T. M. Bank Ltd.**, a Full Bench of the Assam High Court held that, where an application under Order 9, Rule 13, CPC, had itself been dismissed for default, then in so far as the Court dismissing the application for default is concerned, there may be remedy available by application under 151 CPC. In **Poorna Chand v. Komalchand**, , the Madhya Pradesh High Court held that the dismissal for default of an application for restoration of a suit under Order 9 Rule 9 CPC can be set aside in exercise of the Inherent powers of the Court under Section 151, CPC. They also held that the power of the Court to set aside was not fettered by any rule of limitation. Bobde J. in **Goverdhan vs. Hemrajsingh and others** where the question was as to under what provision of the CPC an application for restoration of the suit dismissed in default lie. The said suit had been stayed by an order passed u/s 10 of the Civil Procedure Code. Bobde J. opined that Order 9 was inapplicable and that the Court could restore the suit in exercise of its inherent powers.

Correct Law on the point

In **Nathu Prasad vs Singhai Kapurchand** the full bench of MP High Court held that an application under Order 9 Rule 9 CPC is a proceeding in a Court of Civil jurisdiction. So the procedure provided in regard to suits can be made applicable to a proceeding under Order 9 Rule 9. There is no justification to read any such restrictive words in Section 141. The section is in general terms and the expression "as far as it can be made applicable" provides for the extent to which the section can be applied to a civil proceeding other than a suit. The expression **"all proceedings"** is of a very wide connotation and to restrict it to a proceeding, which is original in nature and wholly independent of a suit will be doing violence to the language of the section. The object and purpose of Section 141 is that for economy of words, it was unnecessary to repeat the whole of the procedure in providing for procedure for an application or any other proceeding original or ancillary.

When a suit, which is dismissed for non-appearance of the plaintiff can be restored on satisfying the Court that the plaintiff was prevented by some sufficient cause from appearing before the Court, there is no reason why, when an application under Order 9 Rule 9, is likewise dismissed for non-appearance of the applicant, the latter should be denied an opportunity to satisfy the Court that he was prevented by reason of sufficient cause from appearing before the Court when this application was called on for hearing.

In **Ravukumara Raj Appa Row vs Veera Raghava Raya Choudary** it was held that, if there were no provision like Order 9 Rule 9, CPC, the plaintiff would suffer irreparable loss by dismissal of his suit even if he had sufficient cause for his non-appearance, such as contemplated in Order 9 Rule 9 CPC. If there were no provision in law for a second application being made by a plaintiff regarding dismissal of an order under Order 9 Rule 9, CPC even if he had sufficient cause for non-appearance when his petition under Order 9 Rule 9 CPC was called, he would suffer irreparable loss in spite of the fact that provision under Order 9 Rule 9 CPC existed and the loss to him would be the same as if Order 9 Rule 9 CPC had not existed and as if he had not made any (first) application under Order 9 Rule 9 CPC at all, so, it would appear reasonable to infer that the Legislature, which passed the Act V of 1908, intended that such loss should not result to a litigant who, for sufficient cause, could not appear when his application under Order 9 Rule 9 CPC was called and against whom the Court had decided.

Dismissal for Default amounts to Rejecting the application

Full Bench of Madhya Pradesh High Court in **Nathu Prasad** case had occasion to consider the words **"rejecting an application"** as contained in Order 43 Rule 1(c) CPC. After considering the earlier judgments of the different High Courts the Full Bench opined as follows:-

"…….In our opinion, there is nothing in the wording of Order 43 Rule 1 (c), CPC to restrict it to rejection on merits. The words "rejecting an application" are comprehensive enough to include dismissal for default on rejection, in any other situation whatever."

Supreme Court in **Jaswant Singh & Ors. vs Parkash Kaur & Anr**., while affirming the view of full bench of MP High Court in **Nathu Prasad vs Singhai Kapurchand**, held that when application under Order 9 Rule 9 CPC for restoration of suit is rejected, the second application for restoration of the original application falls under the purview of the Order 9 Rule 9 CPC read with Section 141, and rejection of the application does fall under Order 43 Rule 1(c) CPC. When the second application falls under Order 9 Rule 9 C.P.C., hence the right of appeal shall also accrue when such application is rejected.

Limitation period to file the second application for restoration

An application for restoration could be filed under Order 9 and the limitation for restoration is 30 days from the date of dismissal as per Article 122 of Limitation Act. But what is the period of limitation for an application for restoration of an application filed under Order 9 Rule 9 which had been dismissed for default?

In **Brijmohan v. Raghoba**, the Court of the Judicial Commissioner had held that to such an application the provisions of Rule 9 of Order 9 of the Code of Civil Procedure were not applicable and that such an application could be entertained under the inherent powers of the Court under Section 151 of the Code of Civil Procedure. This view was followed by Robde, J. in **Premshankar v. Rampyarelal**, The application, being under the inherent powers under Section 151 of the Code of Civil Procedure, was not governed by Articles of the Limitation Act, though the party invoking the jurisdiction of the Court under Section 151 of the Code must be diligent and not guilty of laches.

In **Komalchand Beniprasad vs Pooranchand Moolchand** it was stated that since the dismissal of such an application for default was in the exercise of the inherent powers of the Court. That being so, the dismissal can be set aside by the exercise of the same inherent powers. When the dismissal in default of an application for the restoration of a suit under O. 9, R.9 CPC can be set aside by resort to Section 151 CPC, then there is no question of any limitation for an application made to invoke the inherent powers of the Court. Section 151 does not deal with any applications nor does it lay down procedure for any application. It is a provision recognising the inherent power of the Court to act ex debito justitiae. An application invoking this power is not one which a party is required to make under any provisions of the Code for setting in motion any machinery of the Court. Therefore it is not governed by Articles of the Limitation Act.

As has been held by the Supreme Court in **Sha Mulchand and Co. Ltd. (In Liquidation) vs Jawahar Mills Ltd.,** Article 137 governs only the applications under the CPC and has to be read as if the words "under the Code" were added in the first column of the Article. It follows therefore that the application contemplated by Article 137 is one which party has to make for the machinery of the Court to be set in motion under the provisions of the Code and the application has to be made within three years from the date when the right to apply accrues.

As an application made to invoke the inherent powers of the Court under Section 151 is not an application under the Code which a party is required to make, Article 137 has no applicability. That apart, reading Articles 122 and 123 together it is clear that Article 122 prescribes limitation for an application to set aside the dismissal for default of a suit and not for an application to set aside the dismissal for default of an application for restoration of a suit under O. 9, R. 9 CPC. Though there is no limitation for invoking the inherent powers of the court u/s 151, the party invoking that jurisdiction must be diligent and not guilty of latches.

Nature of Application under Order 9 Rule 9

An application under Order 9 Rule 9, CPC, is not an interlocutory application. It is different from an application made in a pending suit. By its nature, an application under Order 9 Rule 9, is an independent application and is registered as an independent Miscellaneous Judicial case.

Conclusion

I may now sum up the conclusions I have reached on the basis of above discussion:

- When application ('A') under Order 9, Rule 9, CPC, is itself dismissed for default of the plaintiff/petitioner's appearance, an application ('B') lies under Order 9, Rule 9, read with Section 141 of the same Code, for restoration of the application ('A'). In order to succeed in this proceeding ('B'), the petitioner has to satisfy the Court that he was prevented by sufficient cause from appearing on the date when the application ('A') was called on for hearing.
- The order of dismissal for default of the application ('A') is appealable under Clause (c) of Rule 1 Order 43 CPC.
- Both the above remedies, i.e., application under Order 9, Rule 9, and appeal under Order 43, Rule 1 (c) are concurrent. They can be resorted to simultaneously. Neither excludes the other. The scope of each of the above proceedings is, however, different.
- When an appeal (second remedy) is decided, one way or the other, the order of dismissal for default appealed from which appeal was preferred gets merged in the order of the appellate Court, so that thereafter the application ('B') under Order 9, Rule 9, becomes in-fructuous.
- When it comes to the notice of the appellate Court that an application has also been made under Order 9, Rule 9, for restoration, the appellate Court may do well to postpone the hearing of the appeal until the decision of the application under Order 9, Rule 9, CPC.

Dishonour of a cheque issued to satisfy time-barred debt – Whether attracts criminal liability

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Today, courts are flooded with Cheque Dishonour cases to such an extent that in every metropolitan area and in big districts there are Special Courts of Judicial or Metropolitan magistrates to deal exclusively with these cases. Negotiable Instruments Act (NI Act) provides for the offence of cheque dishonour. **Section 138, N.I. Act** provides for the situations when the cheque is said to be dishonoured. However, dishonour of a cheque is, by itself, not an offence under Section 138 of the N.I. Act. To become an offence, the following ingredients have to be fulfilled:

1. Drawing of the cheque for ***debt or other liability***.
2. Presentation of the cheque to the bank.
3. Return of the cheque unpaid by the drawee bank.
4. Issuance of notice in writing to the drawer of the cheque demanding payment of the cheque amount.
5. Failure of the drawer to make the payment within 15 days of receipt of the notice.

There is already a lot of jurisprudence on the various grounds of dishonour. Today's article specifically focuses on law regarding issuance of cheque to satisfy time barred debt.

Arguments Raised

- Sometimes during the trial accused accepts the fact that the dishonoured cheque belongs to him and bears his signature but he further contends that to satisfy the requirement of Section 138 NI Act the cheque should have been issued to discharge legally enforceable debt or liability and since the cheque was issued to satisfy time barred debt and such debts can't be recovered legally, so such a cheque on the same principles cant said to be issued to discharge legally enforceable debt or liability.
- Accused contends that promise made by him to repay the time barred debt is a void agreement as it is without consideration. Section 25(3) of the Indian Contract Act requires such a promise to be in writing and signed by the accused person.
- Accused also argues that neither he has made any acknowledgment of debt in writing in terms of Section 18 Limitation Act nor in accordance of Section 19 of Limitation Act he made any kind of part payment to once again start the period of limitation afresh.
- According to Article 19 of limitation act, the limitation period to recover money given on loan/lent is three years from the date it became due (the date decided between parties on which payment has to be made or instalment has to be deposited). So if a cheque is issued for any loan more than three years after it became due, it is said that the cheque is issued for a time barred debt.

What is Debt or other Liability under Section 138 NI Act

The Explanation appended to Section 138 explains the meaning of the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other

liability. Section 138 treats dishonour of cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawl of the cheque. In other words, drawl of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138.

Aiyar's Judicial Dictionary defines debt as follows:

"Debt is a pecuniary liability. A sum payable or recoverable by action in respect of money demand."

Lindey L.J in **Webb v. Strention** defined debt as "… a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti, solvendum in futuro." The definition was adopted by Supreme Court in **Keshoram Industries v. CWT**. Justice Mookerjee writing for a Full Bench of the Calcutta High Court in **Banchharam Majumdar v. Adyanath Bhattacharjee** adopted the definition provided by the Supreme Court of California in **People v. Arguello**:

"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in praesenti and solvendum in future … A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt until the contingency has happened."

Thus, the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of 'debt'. However, if the sum payable depends on a contingent event, then it takes the color of a debt only after the contingency has occurred.

In **Keshoram Industries v. CWT** the Hon'ble Supreme Court went on to observe that the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of *'debt'*.

Presumption under Section 139 of NI Act

According to Section 139 of NI Act it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

In short Section 138 of the Act has three ingredients, viz.:

- that there is a legally enforceable debt;
- that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which pre- supposes a legally enforceable debt; and
- that the cheque so issued had been returned due to insufficiency of funds.

The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

So the complainant needs to prove the existence of debt that was legally recoverable, then only the presumption under Section 139 will come into play and court can presume that the dishonoured cheque was issued for legally recoverable debt or other liability.

However, the presumption under Section 139 of the N.I. Act is rebuttable and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability.

Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

The Supreme Court in **Krishna Janardhan Bhat vs. Dattatraya G. Hedge**, has elucidated the law in this regard and has held as under:

"The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability"

An accused for discharging the burden of proof placed upon him under the act need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

Whether Cheque issued to discharge Time Barred debt attracts liability and raises presumption

No doubt, the promise to pay a time barred cheque (debt) is valid and enforceable, if it is made in writing and signed by the person to be charged therewith. But, it is clear from Section 138 of the Negotiable Instruments Act that in order to attract the penal provisions in the bouncing of a cheque in Chapter XVII, it is essential that the dishonoured cheque should have been issued in discharge, wholly or in part, or any debt or other liability of the drawer to the payee. The explanation to Section 138 defines the expression debt or other liability as a legally enforceable debt or other liability.

In **Girdhari Lal Rathi v. P.T.V. Ramanujachari**, the Andhra Pradesh High Court clearly held that if a cheque is issued for a time barred debt and it is dishonoured, the accused cannot be

convicted under section 138 of the N.I. Act, simply on the ground that the debt is not legally recoverable. The same ratio has also been laid down by the Bombay High Court in Ashwini Satish Bhat and Narendra V. Kanekar and by a single judge of the Kerala High Court in the case of Sasseriyil Joseph.

Sasseriyil Joseph case when reached Supreme Court it was affirmed by the Apex Court that Section 138 is attracted only if the cheque is issued for the discharge of a legally enforceable debt or other liability. If the cheque in question was issued in discharge of a time barred debt then it cannot be said that the cheque was issued in discharge of debt or other liability.

In **Vijay Polymers Pvt. Ltd. & Anr. v. Vinnay Aggarwal**, relying upon the judgment of the Supreme Court in Sasseriyil Joseph (supra), it was observed that, cheques issued for a time-barred debt would not fall within the definition of 'legally enforceable debt', which is the essential requirement for a complaint under Section 138 of the NI Act; the extended meaning of debt or liability has been explained in the Explanation to the Section which means a legally enforceable debt or liability.

In **Prajan Kumar Jain v. Ravi Malhotra**, wherein, it has been held by the Court that, an acknowledgment to be encompassed within the ambit of Section 18 of the Limitation Act has to be an acknowledgment in writing as also within the prescribed period of limitation. These are the twin requirements which have to be fulfilled in order to be a valid acknowledgment under Section 18 of the Limitation Act. There is no force in the argument that by issuance of the cheque the limitation for realising the loan amount get extended, because at the time of issuance of the cheque the debt should be a legally recoverable debt. In case a cheque is issued for a time-barred debt and it is dishonoured, the accused cannot be convicted under section 138 of the Negotiable Instruments Act simply on the ground that the debt was not legally recoverable.

It is well-settled that the presumption, which is contained in Section 139 of the NI Act, only raises the presumption that the cheque has been issued for the discharge of a debt or liability and existence of legally recoverable debt is not a matter of presumption, as per the aforesaid provisions of law.

Cardozo's Legal Philosophy: An Analysis

Sourav M is a second-year student pursuing B A LLB (HONS.) at the National Law School of India University Banglore. He has a keen interest in Legal philosophy and Constitutional law.

This paper examines Benjamin Cardozo's philosophy of law, specifically his ideas about the nature of judicial decision-making. The paper responds to Cardozo's work i.e. "*The nature of judicial process*" specifically Lecture-I(Methodology of Philosophy) of the book. In the first section, the paper presents a brief account of Cardozo's theory on the process that judges go through while deciding cases and attempts to locate Cardozo within a school of thought. Then the paper defends Cardozo's theory from the issues posed by realists and formalists. The paper then offers a critical analysis of Cardozo's argument on his proposed factors that need to be taken into account in the process of judicial decision-making.

The author argues that it generally agrees with Cardozo's theory. However, the author disagrees with one of Cardozo's arguments that overlooks the influence of judge's biases in certain aspects of the judicial process.

Summary of Cardozo's argument

In the book "*The nature of judicial process*", Cardozo is interested in exploring how judges decide cases and what sources the judge refers to while deciding hard cases.

In Lecture-1, Cardozo starts by discussing that the job of deciding a case cannot be purely objective, in the sense that judges like any other humans are subject to prejudices or subconscious biases and he says that it is through these subconscious forces that judges decide cases. Then Cardozo explores the question of where does the judge find the law that he applies in his judgment? In answering this question, he talks about the type of cases that are put forth to a judge. First, is the simple case that involves the plain application of the letter of the law. Where the judge just applies the law. He adds that this fact does not make the job of the judge a mechanical one because there are gaps to be filled and ambiguities to be mitigated. He says in difficult cases one must look at precedents as the guiding principles to decide a case. While looking at precedents the judge examines and compares them if they match perfectly with the facts of a given case and just applies the precedent(*Stare decisis)*.

The real problem arises when there is no decisive precedent on a given subject matter it is then the real job of the judge begins. Cardozo says that judges can deviate from the precedent in certain cases provided there are sufficient reasons. To decide such cases Cardozo proposes certain directive forces/factors that judges can rely on. These forces are philosophy/analogy, history, tradition/ custom, and sociology. The directive force of logical progression/rule of analogy is most preferred because it has the primacy of natural, orderly and logical succession. He also tells that this factor is not all binding and judges can deviate from this provided sufficient reason is present. He says this because people who prefer symmetry and logic in the law are troubled when the line of division becomes blurry. He ends the chapter by making a case that judges can be given more liberty while deciding cases. At the same time yearning for consistency, certainty and uniformity in the application of the law.

A balancing act

In the jurisprudence of judicial decision-making, there are two prominent schools of thought, one is *Formalism* where judges always decide on the rule of law be it statutes or precedents. The other is *Realism* which is critical of formalism wherein it says that judges decide cases not on the rule of law or precedents but on their personal biases and beliefs.

It is hard to locate Cardozo's philosophy as a completely formalist or a realist because the conception of realism has changed over time and Cardozo's arguments are inclined towards judicial restraint and rule of law but he also makes the claim that judges need to be given liberty in hard cases to use their discretion. So, this seems that he is creating a middle path in the field of philosophy of judicial decision-making. His theory can be located as broadly as realist, but it also incorporates formalistic elements.

He is inclined more towards Realism when he says that the rules and principles of case law are not final truths and that they are working hypotheses and subject to change when a certain result is felt to be unjust. He denies the conception of strict formalists by saying that the job of the judge is not just mechanical. He is arguing from a realist perspective and accepting that judge's prejudices do influence his judgment.

He says that Holmes did not tell us that logic is to be ignored when experience is silent. He argues that unless there is a complying reason like a strong consideration of history, custom or public policy there is no need to deviate from precedents which highlight the formalist kind of an argument. The method of philosophy states that law should develop along the lines of logical progression. He prefers this method because it ensures certainty in the law. This shows he did consider formalism. However, he also acknowledges that upon sufficient reason logic can be substituted by other methods while deciding a case. Considering all this Cardozo's philosophy can be best understood as a balancing act between judicial liberty and certainty in the law.

Defending Cardozo's arguments

The author agrees with Cardozo's attempt to formulate a philosophy which mediates between conflicting claims of certainty, impartiality, stability and growth and development of law. The challenge that realist pose is that they argue that judges decide the case on the merits without looking at the precedent or established principle. They do not agree with the idea of deciding a case to begin with some principle or precedent. They say that in reality, judges do not decide cases on some principle but on some "*judicial hunch*". This means that they decide on the end first and then find means/reasoning to support that end. A realist jurist Haines lay down factors which affect the judge's opinion in that he does not consider logic or established legal principles as factors in the judicial decision-making process. Realists say that judicial decisions are based on rule of law but rather on the judge's personality and external factors. Cardozo rejects the realist's conception on intuitive hunches are central to the decision-making process. Cardozo's theory contends that hunch does influence the application of law but primarily, the rule of law i.e., statutes and precedents is the central one while judges decide cases because most of the cases are simple and clear and involve straightforward application of the law.

Impartiality and symmetry

A formalist would say that the application of law should be impartial as it is critical to the legitimacy of the judicial institution. In Cardozo's theory his first factor i.e., 'logic/analogy' says adherence to precedents is the rule and not the exception. Which ensures the impartial application of the law. Another jurist Laskin agrees with Cardozo in that stability is an invariable factor in the decision-making process. However, he argues that the formalist ideal is an unrealistic oneand that plain application of the law would lead to an absurd result. Hence, he believed that judges need to be given liberty, but it needs to be constrained because permitting judges to take account of all

circumstances would lead to the danger of sacrificing impartiality. This conception of ensuring the logical development of law eventually also ensures symmetry in the law which will ensure that when two people with similar issues go to the court they will be judged similarly.

Uncertainty and Judicial discretion

Realists argue that the conception of the role of a judge as an entity who brings forth the law in a sense a mechanical job would result in unjust outcomes. However, formalists argue that allowing judicial discretion would lead to uncertainty in the law. To address the first concern Cardozo agrees and recognizes the fact that judges are persuaded by their beliefs, traditions and prejudices.

To address the second issue Cardozo's theory rejects the application of pure realist conceptions to his theory because he proposes certain directive force which restricts the judicial discretion of a judge. Specifically, the method of philosophy as per factor, adherence to precedent, as a rule, is itself logical. The fact of analogy/philosophy gives the law certainty, stability and predictability as it requires the judges to decide cases based on precedents. Another jurist Laskin also emphasized the importance of reconciling certainty and creativity. He recognized the influence of the judge's personal biases on the outcome of a case. He developed constraints to restrict judicial decision-making to balance conflicting grounds of creativity and constraint. Laskin also argues that judges do have creativity but it is controlled creativity, He restricts creativity more than Cardozo does in the sense that there are not as controversial as proposed by Cardozo. In that Laskin does not recognise personal preferences and prejudices as part of judicial discretion. He did not want to place his trust in the training of judges to be impartial and their personal convection to not let their prejudice influence their decisions. Hence, he created an extensive system of constraints to prevent over-indulgence of personal preferences while deciding cases to preserve certainty in the law. Hence, arguing that striking a balance between uncertainty and judicial discretion is important to attain just outcomes.

Development, growth and stability of law

A realist would contend that strict adherence to precedence echoes formalism and that it makes the law static and inhibit the development of the law. Development of law is important as Laskin pointed out that old rules are not versatile enough to deal with the changing times to which Cardozo agrees that there needs to be constant change in the law to suit and meet the requirements of changing times. To address this issue, Cardozo's theory acknowledges this problem when the philosophy is treated as supreme and final. To resolve this challenge Cardozo allows for reliance on extra-legal materials in cases where the logical inconsistency is not possible based on sufficient reasons. His proposal of factors like history, tradition and sociology allows for the growth of the law. His theory does not succumb to the formalist criticism that these three driving forces bring with them ambiguity and uncertainty, because the theory only recognizes community standards and not individual standards while choosing one of the three factors also these extra-legal sources can be used only if the welfare of society is in jeopardy.

The development of law should not result in judges entering the realm of policy-making otherwise stability of law cannot be achieved. Pond argues that judges need to be given the liberty to use their discretion while deciding cases in a way to allow the development of law. However, this law-making function of the judge is limited by principles. It is important to maintain this distinction to not obstruct the development of law. This explains that courts are governed by principle and not by policy considerations. Both Laskin and Cardozo recognized the issue of over-involvement of judges which may result in the entry into the public policy domain which is the legislature's domain. Hence, they placed constraints such that the judge considers past cases first and analyse them to be consistent with other principles. This helps in ensuring that restrict judicial control over the law.

Criticism of Cardozo's theory

Cardozo's attempt to prevent uncertainty in the law, to the extent possible, may have been overlooked in one of his arguments. When Cardozo says that there is a constant need to separate the non-essential from the essential(ratio decidendi) while analysing a precedent. He says that let us assume that this process has been done accurately and skilfully. Cardozo does not explain this process of culling out essential parts from a precedent. He takes it for granted that the interpretation of a precedent is certain and uncontroversial. which is not true. The interpretation of a precedent is also subject to a judge's perception.

A realist would say that a single judge's perception of the facts/ratio may be different from other judges as judges are humans and prone to faulty mistakes because the facts and law are not fixed entities and they are vulnerable to different interpretations by different people. Pound's theory also attests to this fact. It is argued that in hard cases, the individual conceptions of judges would influence the process of choosing the relevant facts/ratio from a precedent and that it would differ from judge to judge. Salience theorists also argue that judges pick aspects of precedents that favour them hence, making the process subject to the judge's perception. They contend that the process of application of precedent is vulnerable to salience because certain aspects of a precedent or a principle which stand out to the judges and as a result influences his judicial decision. This goes against what Cardozo is trying to argue, and it is problematic because this overlooking by Cardozo may lead to inconsistency in the application of the law because the judges can fashion their judgment by carefully picking certain aspects of a precedent which favour them. Moreover, this does not tie in which Cardozo's larger argument restricting the judicial discretion of judges and preserving certainty in the law.

Conclusion

This paper analysed the philosophy of Cardozo. Initially, the paper gave a summary of Lecture 1 of *"The Nature of Judicial Process"*. After that, we located Cardozo's philosophy as striking a middle ground between formalism and realism. Then we delved into the analysis of the challenges from both formalist and realist perspectives to Cardozo's theory and make the best case for the theory. Then the paper offers a brief criticism of Cardozo's argument on the process of finding the ratio of a precedent as being certain. To conclude, Cardozo's philosophy strikes the perfect balance between preserving stability and impartiality and the growth/development of law while ensuring that the welfare of society.

Benjamin N. Cardozo, 'The Nature of the Judicial Process' (Yale University Press, 1921).< http://xroads.virginia.edu/~Hyper/CARDOZO/CarNat.html>

Timothy J. Capurso, 'How Judges Judge: Theories on Judicial Decision Making,' (University of Baltimore Law Forum 1998) 1-2. <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1909&context=lf>

Carol J. Ormond, 'Justice Cardozo: A Mediator of Jurisprudential Thought in the 1920's and 1930's' (Cooley Law Review, 1984) 153. < https://heinonline.org/HOL/LandingPage?handle=hein.journals/tmclr2&div=17&id=&page=>

Denise Reaume, 'The Judicial Philosophy of Bora Laskin' (University of Toronto Press, 1985) 448. < https://www.jstor.org/stable/825537>

Roscoe Pound, 'Theory of Judicial Decision' (Canadian Bar Review, 1924) 11. < https://advocatetanmoy.com/2020/10/20/theory-of-judicial-decision-roscoe-pound-1924/ >

Pedro Bordalo, 'Salience theory of Judicial Decisions' (Journal of legal studies 2015) 30-31. < https://scholar.harvard.edu/files/shleifer/files/salience-and-law_feb15_2_0.pdf >

Defamation of Deceased – Analysing the sustainability of action from Criminal and Civil Law Perspective

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Before starting, the author wants to show his heartfelt gratitude to ***Mr. Vishal Vyas, Civil Judge Cum Judicial Magistrate First Class, Rajasthan Judicial Services*** *for providing his valuable insights and relevant case laws on the topic. The inspiration to write this article has been taken from Seminar Paper prepared by Mr. Vyas for the quarterly workshop of the Judges of the Rajasthan.*

Introduction

In India, defamation is both a criminal as well as civil wrong. So, the person defamed has been given the liberty to bring either civil or criminal action or both. In civil cases, the person defamed can bring a civil suit for defamation and in criminal law, he can file a complaint before the jurisdictional magistrate who after taking cognizance tries it as a Warrant Case instituted on the complaint. It has to be noted that FIR is not registered for defamation since it is a non-cognizable offence. In the case of **Subramanian Swamy v Union Of India,** wherein it was held that when a complaint made by the complainant before the Magistrate involves an offence punishable under **Section 500 of the Indian Penal Code (IPC)** (it provides punishment for the defamation), the Magistrate cannot exercise powers under **Section 156(3) of the Code of Criminal Procedure (CrPC)** so as to direct Police to register an FIR and then investigate into the offence, in view of the specific bar contained in **Section 199 of the CrPC**. The ingredients of the offence of defamation has been provided under **Section 499 of the Indian Penal Code**.

The present article focuses on the rare scenario where the person defamed dies either during the pendency of litigation or even before initiating the legal proceedings. We will see cases where proceedings abate (comes to an end) and cases where it doesn't. Before discussing the fate of civil cases let's see what happens in criminal cases.

Defamation of Deceased- Criminal Side

Section 199 CrPC deals with prosecution for defamation. Sub-section 1 thereof states that no Court should take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code, 1860, except upon a complaint made by some person aggrieved by the offence. This provision, therefore, mandates that the complaint be made by a **'person aggrieved'**.

Chapter XXI of the Indian Penal Code, 1860, deals with defamation. Section 499 IPC therein defines defamation and Explanation 1 appended thereto gives an indication as to who would be a 'person aggrieved'. **Explanation 1** states that imputing anything to a deceased person would amount to defamation if such imputation would have harmed the reputation of that person had he been living and such imputation is intended to be hurtful to the feelings of his family or other near relatives.

Who can said to be a person aggrieved in absence of a Person Defamed

The statutory scheme indicates that the **'person aggrieved'** must have an element of personal interest, being either the person defamed himself or in the case of a deceased person, his family member or other near relative.

Hon'ble Patna High Court in **Bhagwan Shree Rajneesh v The State of Bihar and another**, wherein it was observed that though generally, the person aggrieved is only the person defamed, an exception has been made in the case of a deceased person but the *'persons aggrieved' even in such case are limited only to members of his family or his near relatives, whose feelings would be hurt by the defamatory statement, and none else.*

Hon'ble Supreme Court in **G. Narasimhan and others v T.V. Chokkappa**, wherein it was held that an exception was created to the general rule that a complaint could be filed by anybody, whether he is aggrieved or not, as Section 198 of the old Code of 1898 (presently, Section 199 CrPC) modified that general rule by permitting only an 'aggrieved person' to move the Magistrate in cases pertaining to defamation. The Supreme Court observed that compliance with this Section was mandatory and if a Magistrate took cognizance of the offence of defamation on a complaint made by one who was not an 'aggrieved person', the trial and conviction in such a case would be void and illegal.

So every lineal descendant or every person interested in the deceased cannot complain of defamation against the deceased. Firstly, such complainant must be a member of the family of the deceased or must be a near relative of his. The words "family or other near relative" significantly are not defined in Section 499 IPC. Such expressions are not defined in the Indian Penal Code. The expressions "family" and "other relative" are expressions which can have different shades of meaning depending on the circumstances and the purpose which a statutory provision is intended to achieve. Any attempt to understand the sweep, width and amplitude of the expressions "family or other near relative" must certainly be made conscious of the purpose which Section 499 IPC and Explanation-I thereto have got to achieve.

In the landmark case **Mrs. Pat Sharpe vs Dwijendra Nath Bose** the Honourable court held that if the imputation would have harmed the deceased's reputation if he was alive then imputation must be said to have been intended to be hurtful to the feelings of his family or other near relatives.

Death of the Complainant after instituting Complaint

What happens on death of complainant in a case started on complaint has to be inferred generally from provisions of Code. There is no provision in Criminal Procedure Code about acquittal or discharge of accused in a warrant case on failure of complainant to attend. **Section 249 of CrPC** provides that when the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, **the Magistrate may, in his discretion**, notwithstanding anything hereinbefore contained, **at any time before the charge has been framed, discharge the accused.** So this provision talks about discharge and not acquittal. Moreover it is in the discretion of the magistrate to discharge the accused before the charge is framed. Generally this condition doesn't arise because Legal Representatives are there to come on record in place of deceased complainant.

Whether Legal Representatives of Deceased Complainant can be taken on record in case of Appeal against Acquittal

A bare reading of **Section 394 CrPC** makes it clear that an appeal under **Section 377** or **Section 378 of CrPC shall finally abate on the death of accused**. Further, every other appeal under Chapter XXIX, CrPC (except an appeal from a sentence of fine) shall finally abate on the death of the appellant. **So the literal reading of section provides that appeal abates on the death of the accused and not the complainant.**

In **Prayagdutt Tiwari & Ors. v Gajadhar P Tiwari** the main issue that came before the court was that *whether on the death of the complainant at the stage of appeal, his appeal would abate or his legal representatives can come on record in appeal against acquittal in case of defamation*. It was held that, under the Indian Law a crime is an offence not against individuals but against the society or the public as such. Once a complaint has been properly instituted and proceeded with, the Courts must punish the offender if the case is proved against him, the death of the complainant has no effect on the proceedings though in some cases the wrong is done strictly to the person of the complainant or where the complaint can be lodged only by specific class of persons. Court further ruled that, it is settled law that the **maxim action personalis moritur cum persona (a personal right of action dies with the person)** does not apply to criminal prosecution. It is equally settled that Section 306 of the Indian Succession Act has no application to criminal prosecutions. Hence the death of complainant does not ipso facto terminate a criminal prosecution.

The Supreme Court while considering the effect of the death of complainant during pendency of appeal against acquittal has held as under in **Khedu Mohton v State of Bihar**:

"An appeal under Section 417 **(now section 394)** can only abate on the death of the accused and not otherwise. Once an appeal against acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other."

Civil Suit for Defamation-Plaintiff died; Can his Legal Representatives continue the suit

When a party to a suit dies, the first question to be decided is whether the right to sue survives or not? If it does not, there is an end to the suit. If it does, the suit will not abate and can be continued by or against the Legal representatives. But what is right to sue?

Right to Sue?

The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

The expression is not really defined in CPC. Right to sue, simply put, is nothing but right to seek relief. The general rule is that all rights of action and all demands whatsoever, existing in favour of or against a person at the time of his death, survive to or against Legal Representatives.

Exception-Personal Action dies with the Person concerned

In cases of personal actions or in other words actions where the relief sought is personal to the deceased or the rights intimately connected to the individuality of the deceased (Just like Defamation), the right to sue will not survive to or against Legal Representatives. In these cases, the maxim **actio personalis moritur cum persona** (a personal action dies with a person) applies.

In the case of ***Sh. Raghu Nath Pandey and Anr. v Sh. Bobby Bedi and Ors.***, the court held:

"No action for defamation can be taken in respect of a dead person since defamation is a personal wrong and the legal right does not survive and is not actionable after the death of the person in view of principle laid down in the maxim 'actio personalist monitor cum persona'.

Hon'ble Delhi High Court in **Mr. Saifuddin Choudhary v Bartaman Limited and Anr**., faced the issue that whether on the death of a plaintiff in a suit for recovery of damages alleged to have been caused on account of defamation, the suit survives i.e., whether the right to sue survives and the legal heirs can be brought on record and can they continue the suit for damages filed by the erstwhile plaintiff. It was held that in view of Supreme Court's judgment in **Melepurath Sankunni Ezhuthassan case** leaves no manner of doubt on the issue in as much as it is clearly held in this line that where a plaintiff dies during the pendency of a suit, the suit will stand abated.

Hon'ble Rajasthan High Court in **Gajanand v Vishnu and Ors** when faced with the question whether cause of action in a Suit for Damages on account of malicious prosecution survives after the death of the plaintiff or not, while drawing an analogy of **Section 306 of the Indian Succession Act, 1925** with **Order 22 Rule I and II of the Code of Civil Procedure, 1908** held that Section 306 of ISA bars executors and administrators to pursue personal action of the deceased and on principle the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in a better position than executors and administrators and what applies to executors and administrators will also apply to other legal representatives. So it is clear that a cause of action for defamation does not survive the death of the deceased.

Further in a suit for malicious prosecution, Defendant died before Judgment. Full Bench of the High Court held that the right to sue does not survive within the meaning of Order 22 Rule 1.

Exception to the Personal Action dies with the Person

Hon'ble Apex Court in the case of **Melepurath Sankunni Ezhumassan v Thekitlil Geopalankutty Nair** has clearly held that if a suit for defamation is dismissed and the plaintiff has filed an appeal, what the appellant-plaintiff is seeking is to enforce his right to sue for damages for defamation in the appeal and as this right does not survive his death, his legal representatives have no right to be brought on the record of the appeal in his place. However, the position would be different if a suit for defamation has resulted in a decree in favour of the plaintiff/respondent because in such a case the cause of action has merged in the decree and the decretal amount forms part of his estate. The appeal from the decree by the defendant becomes a question of benefit to the estate of the plaintiff-respondent which his legal representatives, are entitled to upheld and defend. They are, therefore, entitled to be substituted in place of the deceased respondent-plaintiff.

In this judgment the Hon'ble Supreme Court has ruled that the suits which are filed for defamation can be divided in two categories.

- In the first category are those class of suits where no decree has been passed decreeing the suit for damages.
- The second class is of suits where decree of damages is passed but the other side/defendant against whom the decree has been passed has gone up in appeal.

The Supreme Court has held in the first class where in suits no decree has been passed, the right to sue does not survive and the suit abates in view of **Section 306 of the Indian Succession Act, 1925**. In the second class where a decree of damages is passed, the Supreme Court has observed that the decree becomes part of the estate of the deceased plaintiff and therefore death of the plaintiff during the pendency of an appeal filed by the defendant against whom the suit is decreed will not result in abatement.

In **AIADMK, Madras v K. Govindan Kutty** it was held that, any false imputation amounts to defamation whether the concerned person is alive or dead. To defame a dead person is not a tort, ***but if such statement though expressly referring to the deceased reflects upon the persons who want to be plaintiff (legal representatives) and affects their reputation, then the legal representatives can maintain the suit.***

Similarly in the case of **These Applications Are Filed … v Thekittil Geopalankutty Nair**, it was held that any living person may be defamed but no action would lie by his family members or friends for defamatory statement made about a person who is dead. ***Had there been any explicit or implicit defamatory words against a relative or family members, only then the right to sue would survive.*** Defamation of a deceased person does not give rise to a civil right of action at common law in favour of surviving spouse, family or relatives, who are not themselves defamed. The maxim 'actio personalis moritur cum persona' embodies within it the English principle that a personal action dies with the Plaintiff.

In **M. Veerappa v Evelyn Sequeira**, a client filed suit for damages and compensation against the advocate for negligence in performance of professional duties. During the pendency of the suit, Plaintiff died and his legal representatives filed petition under Order 22 Rule 3(1) CPC seeking their substitution in the suit for prosecuting the suit further. The Defendant opposed the Application and contended that the suit was one for damages for personal injuries alleged to have been sustained by the Plaintiff and the suit abated on his death as per the maxim "actio personalis cum moritur persona". The District Munsif upheld the objection and dismissed the suit as having abated, but the High Court held otherwise. ***The Supreme Court held that if the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive. The Supreme Court further held that the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirety and be adjudicated upon.***

In **Raju v Chacko** it was held that:

"A claim for compensation for defamation under the civil law may not be maintainable in respect of defamation of a deceased person on the principle that a personal right of action dies with the person **(Actio personalis moritor cum persona).** But still the law makers felt that defamation of a deceased person can legitimately give rise to a criminal prosecution for the offence of defamation against a deceased person."

So the court further added that:

"Any person may get triggered to commit offences and thus cause breach of the peace if a deceased member of his family or other near relative of his were defamed. Accepting this reality in life, Explanation-I has been added to Section 499 IPC to ensure that defamation of a deceased person is also culpable. The offending publication should not only be

defamatory to the deceased. It must also be intended to be hurtful to the feelings of his family or other near relative, it is stipulated.

Conclusion- When the Right to Sue Survives even after the death of the Plaintiff

On the basis of above deliberation it is very much clear that the maxim of actio personalis cum moritur persona has been held inapplicable in the following cases and the right to continue action survives in favour of LR's:

- Where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrong-doer;
- As well as in those cases where a suit for damages for defamation, assault or other personal injuries sustained by the plaintiff had resulted in a decree in favour of the plaintiff because in such a case the cause of action becomes merged in the decree and the decretal debt forms part of the plaintiff's estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff which his legal representatives are entitled to uphold and defend;
- Legal Representatives can get themselves impleaded as Party to the suit under **Order I Rule 10 of CPC** if the defamatory statement though expressly referring to the deceased reflects upon the persons who want to be plaintiff (legal representatives) and affects their reputation. In such cases Right to Sue will survive in favour of Deceased's LR's.
- When the right to claim is based upon contractual breach. Meaning, base of the action was a contract.
- The above maxim has no application on Criminal Case filed under Section 499 of Indian Penal Code.

‘Decree Holder’ and ‘Holder of Decree’ -Understanding who can get the Decree Executed

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

Section 2(3) of the Code of Civil Procedure provides that a decree holder is a person in whose favour a decree has been passed or an order capable of execution has been made. So this definition gives us the impression that only the person in whose favour a decree or order has been passed can get it executed. But Law is always not that much simple as it appears from the outside. In this present article, by way of a specific example, I will try to argue that not only the decree-holder but also the judgement debtor can get the decree executed.

Issue Involved

In **Somavally and Ors. v Prasanna Kumar and another,** a substantial question of law was raised that ‘*can a decree in a suit for fixation of common boundary of the properties belonging to the plaintiffs and defendants be executed at the instance of the defendants*?’

Brief Facts

Before the executing court the judgement debtor i.e., defendants in the suit for fixation of boundary, claimed demarcation of a common boundary between their property and that of the plaintiffs/ decree holder. The suit was for declaration of the plaintiffs’ right over plaint schedule property, a prohibitory injunction against the defendants from trespassing into the property and also for fixation of common boundary. The suit was partly decreed by the trial court declaring the plaintiffs’ right over the plaint schedule property and also holding that the site plan submitted by the commissioner is the boundary line separating the properties of the contesting parties. A certified copy of the plan was made a part of the decree.

Executing Court dismissed the execution petition filed by the judgment debtor (JD) on the sole reason that the JD cannot seek execution of a decree for fixation of boundary as they cannot be termed either as “decree holders” or “holders of the decree”.

Difference between Decree Holder and Holder of Decree

The point germane for our consideration is about the executability of the decree for demarcation of a common boundary separating the properties of the plaintiffs and defendants at the instance of the defendants/judgment debtor.

There is a marked difference in the expressions used by the **CPC in Section 2(3) and Order XXI Rule 10**. The term “decree holder” is defined in Section 2(3) CPC. The expression used is “holder of a decree” in Order XXI Rule 10 CPC. At first blush, it may appear to be synonymous. But, there is a legal distinction between these two expressions.

The term **“decree holder”** denotes a person:

- in whose favour a decree has been passed
- in whose favour an order capable of execution has been passed and
- whose name appears in the decree, either as plaintiff or defendant, and the following conditions are satisfied:
- the decree must be one capable of execution and
- the said person, by the terms of the decree itself or from its nature, should be legally entitled to seek its execution.

Division Bench of the Allahabad High Court in **Ajudhia Prasad v. The U.P. Govt. through the Collector** has considered the scope of the expression "decree holder" occurring in Section 2(3) CPC and held as follows:

"Now it is clear from this that a person in whose favour an order capable of execution has been made is also a decree holder. It is also evident from this definition that a decree-holder need not be a party to the suit. He may be 'any person'. ……..."

The expression **"holder of a decree"** occurring in **Order XXI Rule 10 CPC** is very wide and it not only encompasses Decree Holder but also takes into account the transferee of a decree and the legal representative of the decree-holder. Order **XXI Rule 16 CPC** deals with an application for execution by the transferee of a decree. Such a person also comes within the expression "holder of a decree".

Therefore, the expression **"holder of a decree"** in Order XXI Rule 10 CPC **takes in parties other than whose name appear on the decree**. Likewise, a legal representative of the decree holder, though his name may not be inscribed in the decree, can execute it as provided in the CPC. The term **"decree holder**" defined in Section 2(3) CPC **takes in persons whose names appear on the record as the persons in whose favour the decree was made**. It includes persons who have been recognized by the court by order as the decree holder from the original plaintiff or his representative.

The Supreme Court in **Dhani Ram v Sri Ram** answering a question as to whether the property in a decree passes as intended in the deed of assignment, without the recognition of transfer by the court as a precondition, the Supreme Court held that the property in a decree must pass to the transferee under a deed of assignment when the parties to the deed intend such property to pass and it does not depend on the court's recognition of the transfer. It goes without saying that such a transferee is also entitled to execute the decree.

Who can get the Decree Executed- Not Necessarily the Decree Holder Everytime

The aspect then comes up for consideration is the implication of the usage "or" in Section 2(3) CPC to separate the two portions of the provision. Decree holder means any person in whose favour a decree has been passed. This is the first limb of the provision. Thereafter, the expression "or" appears. Then it further says that the decree-holder means any person in whose favour an order capable of execution has been made. On careful reading, it can be seen that the word "or" occurring between two limbs of the provision has to be read as "or" itself. It shall not be read as "and" because *the term "decree holder" as defined in the above provision takes in two categories of persons, viz., any person in whose favour a decree has been passed and any person in whose favour an order capable of execution has been made.*

Against this backdrop, the question of whether fixation of the boundary can be executed at the instance of the defendants will have to be considered.

A Division Bench of the Calcutta High Court in **Iswar Sridhab Jew v Jnanendra Nath,** has laid down the law that, where a scheme decree is executable and gives any rights to any party, which can be enforced by execution, the fact that the person seeking execution was formerly a defendant in the suit and a judgment debtor under the decree cannot possibly prevent him from working out the decree by execution.

According to **Section 28 of the Specific Relief Act, 1963** to vouchsafe the point that under certain circumstances, even the defendant can seek indulgence of the court for reliefs subsequent to the decree. Section 28 of the said Act deals with the rescission of a contract after passing of a decree in a suit for specific performance. *It is well settled that a suit for specific performance does not come to an end on passing of a decree.*

Section 28(1) of the Act empowers a vendor or lessor to apply in the same suit in which the decree is made to have the contract rescinded, if the purchaser or lessee, as the case may be, does not, within the period allowed by the decree, or such further period as the court may extend, pay the purchase money or other sum. From this provision, it is clear that despite the vendor or lessor was a defendant in the suit, such a person gets an opportunity to seek rescission of the contract even after passing the decree. This principle has been approved by the Bombay High Court as early as in 1923 in the decision in **Bai Karimabibi v Abderehman Sayad Banu .**

High Court of Patna in **Kanu Charan Deep v Bimla Deep** has held that a *decree in a proceeding under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights* is executable even at the instance of the respondent as the decree is in favour of both the parties.

What Court has to do

For the said reasons, there cannot be any dispute that the decree passed in a suit for fixation of common boundary of the plaintiff and defendant, being one intended to put an end to the dispute between the parties and to achieve the object of common good, should be allowed to be executed by a defendant/judgement debtor in the suit too.

There are many instances in which a decree can be said to be in favour of the parties to the litigation, irrespective of the fact whether they are the plaintiffs or defendants in the suit. **In such cases, the decrees can be said to be capable of execution at the instance of any of the parties to the suit.**

For example in a suit for specific performance where a decree of specific performance of agreement to sale have been passed in favour of plaintiff (Decree Holder) and court has provided specific time to plaintiff to deposit the sale amount and get the sale deed executed. In absence of him not taking steps in the time provided the judgment debtor/defendant can also ask for the execution of specific performance of agreement to sale. Further Examples of such decrees are those passed in suits for partition, specific performance of a contract, suits under Section 92 CPC, etc. and this list is not exhaustive.

But a Decree granting Declaratory Relief is Not Executable at the behest of any person

When the decree includes the declaratory relief i.e., Declaration in favour of the Decree Holder (as the owner of the property) the defendants cannot seek execution of this declaratory part of the decree, viz., the relief of declaration granted to the plaintiff, for two reasons.

- Insofar as the declaratory relief is concerned, the defendants cannot be held to be the "decree holders" as defined in **Section 2(3) of the Code of Civil Procedure, 1908** (in

short, "CPC"). In Section 2(3) of the CPC, the term "decree holder" has been defined as "any person in whose favour a decree has been passed or an order capable of execution has been made". Firstly, on a mere reading of the decree, it is clear that the relief of declaration granted is for the exclusive benefit of the plaintiffs and, in fact, it is against the defendants. ***Logically, therefore, that part of the decree cannot be executed by the defendants as it may be an execution proceedings against themselves.***

- Further reason to hold that a declaratory decree cannot be executed at the instance of the defendants is that such a decree is incapable of execution. ***Viewing from any angle, that part of the decree granting a declaratory relief is inexecutable, not only at the instance of the defendants, but also by the plaintiffs themselves.*** The definition of the term "judgment debtor" in Section 2(10) CPC is also relevant. "Judgment debtor" means any person against whom a decree has been passed or an order capable of execution has been made. So far as the declaratory decree is concerned, it is passed against the defendants, though it is incapable of execution. This is yet another reason to find that the decree of declaration is incapable of execution at the behest of the defendants. (**So it is clear that even plaintiff can't ask for execution of Declaratory Decree in his favour because it is incapable of execution**)

The Deportation of Rohingyas to Bhasan Char: A Prospective case of 'Crimes against Humanity'?

Rhea E. S. Abraham is a law graduate from NLU Nagpur with an interest in world affairs.

The small state of Bangladesh is overburdened by a migrating population of the Rohingya, thus, since 2020 they have begun sending the Rohingya people to Bhasan Char, an Island close to their coast but considered uninhabitable by experts. Bangladesh intends to shift around 1 lakh of them, though so far, thousands have been shifted. They have also with the help of Chinese and British companies built concrete establishments such as flood embankments, hospitals, Masjids etc. To what extent are these structures habitable and for how long will people actually be able to live on this Island is a big question.

Also, while the Bangladeshi Government claims that the shifting of the Rohingyas is totally voluntary, some of the sources outside and within the nation claim otherwise. This contrary view shows that there is an immediate need for transparency so that workable solutions can be discussed. This article is an attempt to analyse the acts of Bangladesh from an International Criminal Law perspective.

A case of 'Crimes against Humanity' against Bangladesh

Article 7 of the Rome statute provides for a list of offences which constitute 'Crimes against Humanity.' Also, for the sake of a more objective analysis, a simultaneous reading of the Appeals Chamber decision in *Kunarac* provides the following elements-

Widespread or systematic attack directed against the Rohingyas

The *Tadic* case suggests that the number of the victims is of immense importance when considering the aspect of 'widespread'. Further *Tadic* suggests that there should exist a premeditated plan. However in terms of numbers, of the approximately one million refugees living in the refugee camps at Cox's Bazar, only a few thousands have so far been transferred to Bhasan Char which itself has been provisioned to accommodate up to a lakh people. On the point of a premeditated plan, a subsequent fact, though just an assertion, would be the fire devastation in Cox's Bazar refugee shelter, which in March 2021 can be viewed with a suspicious lens as it may add fuel for the need to shift to Bhasan Char.

Further, for the specific offences, Article 7 of the Rome statute, in paragraph 1, provides for a list of attacks which can constitute Crimes against Humanity. Accordingly, the following attacks-

Attack by 'deportation or forcible transfer'?

- *Are the Rohingyas being transferred by expulsion or other coercive acts?*

Article 7 Paragraph 2(d), emphasises on the words 'expulsion' and 'coercive acts' as the means of executing the attack. In the case of the Rohingyas, while the Bangladeshi government claims that they are being transferred on a voluntary basis, it is necessary to determine for sure whether it is

actually on a voluntary basis or not, especially when there are countering claims of the voluntary nature of the transfer.

- *Are the Rohingyas lawfully present in Bangladesh?*

The requirement of a lawful presence in the state, poses a challenge when refugees are involved, as the state may at all such instances take the defence of 'unlawful presence'. While the Rohingyas are not lawfully staying in Bangladesh, they have a right of non-refoulement. This is despite Bangladesh not having acceded to any international instrument, as 'non-refoulement' is majorly considered as a part of customary international law.

However, Bhasan Char is the territory of Bangladesh itself, thus the transfer of refugees is merely a relocation. Yet however, the crime conceived in Article 7 is that of 'deportation or forcible transfer' and both the terms do not hold the same meaning. While 'deportation' is the transfer of persons across borders, 'forcible transfer' is within the border of the same state itself. This difference was noted by the ICTY in the *Stakic* case which based its reasoning on the fact that the crime of 'deportation' saw its roots in 'war crimes' while 'forcible transfer' is a product of 'crimes against humanity'.

Also, if we look at the situation from a purely refugee perspective, the intention behind refoulement principles is to prevent the refugees from being put back in a place where they would be threatened. Hence, if the stay at Bhasan Char can be proven to be persecution or a human rights concern, then the charge of 'Crimes against Humanity' may be applicable.

Attack by Persecution

- *Is there any deprivation of fundamental (international) rights?*

Bangladesh has often seen the creation of such islands post monsoon seasons due to the sedimentation occurring over the Ganges-Brahmaputra-Meghna river system. Thus, these landforms pose the greatest risk to human life by being flooded or submerged underwater during monsoons, making the location fragile.

Some 'Human Rights Watch' authorities noted that the Refugees "believed – falsely – that they would receive money or gain Bangladeshi citizenship if they volunteered to move to Bhasan Char." Moreover, the Rohingyas once shifted to Bhasan Char are prohibited to leave the Island, unless it is to go back to their natural homeland, Myanmar. So, the facts show that the Rohingyas are basically being restricted from their freedom of movement.

It must be noted that Bangladesh, having ratified the ICCPR, is bound by Articles 9 and 10, which provide that, ". . . No one shall be deprived of his liberty. . . All persons deprived of their liberty shall be treated with humanity and with respect," and in the instant facts, the Rohingyas are deprived of their liberty despite the safety concerns related to the stay at Bhasan Char.

- *Is the deprivation merely because they are Rohingyas?*

Bangladesh is a host to refugees of 70 different nationalities. But from what the reports show so far, the plan is to shift only the 'Rohingyas,' the greatest proportion of the refugee population.

Thus, by and large, it can be said that a case of persecution and forced transfer may also arise for charging the Bangladeshi authorities.

A case 'for' Bangladesh

A large population is undoubtedly a huge burden on the resources of a nation, especially for a territorially small nation like Bangladesh, which is already burdened by its own rising population. In such circumstances, the influx of Rohingyas proves to be extremely burdensome. Moreover, the

currently occupied camps, where the refugees are based, are extremely congested and could pose security and health concerns for the people living there.

Also, Joblessness is common among the Rohingyas in Bangladesh and that is a major reason for a push towards extremism, especially among the Youth. Resource scarcity and safety concerns are the basis on which Prime Minister Sheikh Hasina justified the shifting of the Rohingyas to Bhasan Char at the UN General Assembly.

Prime Minister Hasina while addressing the UN General Assembly noted that Bangladesh is suffering a refugee crisis which is Myanmar's doing. And rightly so, while the crisis finds its roots in Myanmar, the focus has now shifted onto Bangladesh and the latest events have made the latter the 'bad guy' in the Rohingya crisis.

Conclusion

While Bangladesh has just reasons for the Bhasan Char shift, shifting Rohingyas to an unstable land with restricted freedom of movement is not humane. In the early 2000s, a similar situation was seen in Nauru, which had agreed to settle asylum seekers to Australia, at detention centres. While Australia seemed to be convinced by its methods, people there have attempted numerous suicide attempts on account of the poor mental health induced by the life of detention. Such a fate for the Rohingyas in the near future would not be surprising if the international community does not take mitigating steps immediately, especially by targeting the original offender- Myanmar.

What is the Fate of a Criminal Case when the Complainant/Informant dies without proving the FIR

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

It is very well settled that crime is against society as a whole and the state prosecutes the accused on behalf of the victim/society. But, there might be some peculiar situations where the person who lodges the First Information Report with the police (*he may be merely a witness who saw the incident or he may be a victim himself or in some cases, he may be the person who neither suffered the incident nor saw it but just on the basis of hearsay information goes and lodges the report; in the end, all are said to be complainant/informant*) dies before he can actually prove it before the court during the evidence stage. What happens to the fate of such cases when the actual torch bearer, when who brought the crime to the notice of the authorities died before he can actually prove one of the most essential documents in a criminal case i.e., An FIR, on the basis of which police undertakes the investigation?

So, the issues that arise for consideration are:

- ***Whether non-proving of the FIR leads to a situation of acquittal or Courts can still convict the accused on the basis of other material available on record?***
- ***Whether only the complainant/informant can prove the FIR or Investigation Officer can also do the same and if yes, then under what circumstances?***

What is an FIR

FIR (First Information Report), as the name suggests, is the first information provided regarding the commission of a cognizable offence (an offence in which the police may arrest a person without a warrant) by the victim himself or anyone on behalf of the victim., orally or in writing which is then recorded by the officer in charge of a Police Station. Such information can also be given via telephone, letter, or email. If the informant so desires, he can also file an E-FIR on the online portal of the concerned State. The Criminal Procedure Code 1973, however, does not provide any definition for the term. It only lays down the manner in the FIR has to be recorded. The object of registering a FIR is nothing but to simply set the investigative machinery rolling.

Evidentiary Value of an FIR

It is a settled position of law that FIR is not a substantive piece of evidence. It can only be used as corroborative evidence or to check the creditworthiness of the informant or the witness. The corroborative value of F.I.R substantially declines if there's an unexplained delay in filing of FIR, for the simple reason that a delay maybe interpreted as an afterthought and it puts the Courts on guard to look for possibilities of an ill motive or concoction of facts.

FIR can't be considered as substantive evidence, that is to say, as evidence of facts stated therein. Because it is not made during trial, it is not given on oath, nor is it tested by cross- examination. If the person making any such statement to the police subsequently appears and gives evidence in court at the time of trial, his former statement could, however be used to corroborate or to contradict his testimony according to the provisions of the Evidence Act, 1872.

- **Section 157 of the Evidence Act is as follows:**

"In order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the offence took place, or before any authority legally competent to investigate the fact may be proved."

- Further, **Section 145 of the Evidence Act** provides:

"A witness may be crossed-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

It was held in **Pandurang Chandrakant Mhatre v State of Maharashtra**, that it is fairly well settled that first information report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker thereof and it cannot be utilised for contradicting or discrediting the testimony of other witnesses. Although first information report is not expected to be encyclopaedia of events, but an information to the police to be "first information report" under Section 154(1) must contain some essential and relevant details of the incident. A cryptic information about commission of a cognizable offence irrespective of the nature and details of such information may not be treated as an FIR.

So it is well settled that FIR is not a substantive piece of evidence and can be used to corroborate or contradict the statement of the maker thereof. It is also equally established that trustworthiness of the prosecution story can also be judged from the FIR. Besides first information report is relevant as it may be a part of the res gestae.

If Complainant/Informant dies without proving the FIR

In **Kishan Chand Mangal v State Of Rajasthan,** it was held that FIR cannot be used as substantive evidence nor the contents of the report can be said to furnish testimony against the accused, if such an FIR is not be covered by any of the clauses of Section 32 and 33 of the Evidence Act and would not be admissible as substantive evidence. If by the time the case comes up for trial, and the complainant is dead, then in the absence of the evidence of the complainant, the Court even on the basis of evidence of independent witnesses if they corroborate with the story lodged by the complainant and prove the crime committed can rely on them and convict the accused. Further the court held that ***there is no law that the FIR cannot be taken into consideration on the death of Informant***. The case will have to be proved on the basis of evidence collected by the Prosecution during the course of investigation and FIR is no evidence in the case, it is only a piece of information with the police records with which the system comes into motions and investigation is started.

In **E.J.Goud & others v State of A.P.**, it was stated that FIR is only used for corroboration or contradiction if the complainant is examined. In a case where the first informant died before he could depose in the court, the purpose of corroborating or contradicting its contents by the person, would not be possible. In view of this, the accused could not cross examine the informant and in absence of such the other pieces of evidence which are produced in the court can be looked into. As the FIR is not a substantial piece of evidence, it should not have any effect on the prosecution case it its contents are not proved by the person who gave it due to his death.

In the case of **Hakirat Singh v State of Punjab**, the Supreme Court held that non-examination of the complainant on account of his death could not be fatal on its own to the prosecution case and it will depend on the facts of each case. If the prosecution story as revealed by the witnesses in the court is directly contradictory to the contents of FIR, it may have one effect and on the other hand

if the contents of FIR are in conformity with the evidence during the trial, it may have all together a different effect.

So answer to the first issue is that since an FIR is not a substantive piece of evidence it is not of much importance during trial. Neither proving of it solely leads to conviction nor non-proving of the same results in acquittal. In case the complainant dies before proving the same the help of testimony of other witnesses and evidence on record available can be taken to bring home the guilt of the accused.

When FIR can be treated as Substantial Piece of Evidence and When Investigation Officer can prove the Contents of FIR

There is an exception to the above mentioned scenario. FIR is considered a substantial piece of evidence **where the informant dies and the facts mentioned in the FIR has direct nexus with the death of the informant. In such cases FIR is treated as a dying declaration**, if it fulfils the criteria as a valid declaration under Section 32 of Evidence Act.

Supreme Court decision in ***Damodar Prasad* v *State of U.P.***, where it was explained that, if the informant dies, FIR can be unquestionably, used as a substantial piece of evidence**, only with the pre-requisite condition that, 'death of informant' must have nexus with the 'FIR' or somehow must have some link with any evidence regarding FIR, and the contents of FIR must be proved,** but if the death was natural, then the FIR cannot be admissible in evidence.

So answer to the issue two is also affirmative. In cases where FIR satisfies the definition of dying declaration it becomes substantive piece of evidence and the Investigation officer can also prove the same in the absence of complainant. So final conclusion is that death of complainant/informant is not necessarily fatal to the case of prosecution. It all depends on the facts and circumstances of the case in hand and the evidence available on record.

Defendant's Claim for Injunction in Suit filed by Plaintiff

Harshit Sharma is a Civil Judge-cum-JMFC at Rajasthan Judicial Services, and a doctoral candidate (Ph.D.) at NLU Jodhpur. He can be reached at harshitsharmanluj@gmail.com.

The present article focuses on the regularly encountered situation in trial courts. It is often seen that in a suit by a plaintiff where he claims injunction in the connected miscellaneous file through an application under Order 39 CPC, the defendant many times through his reply to the plaintiff's application not only denies the averments of the plaintiff's injunction application but also claims injunction in his own favour. So the moot question that arises before us is-

"Whether defendant can claim injunction in his own favour in reply to the plaintiff's claim for injunction? If yes, then under what circumstances and in which cases he can't claim for it and whether an alternate remedy lie to deal with such situations.

Introduction

Before we move forward it is necessary to look at the relevant provisions in the Code of Civil Procedure (CPC) that deals with Injunction.

Section 94 of CPC provides that in order to prevent the ends of justice from being defeated the Court may, **if it is so prescribed**:

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.

Order 39 Rule 1 of the Code is quoted below for ready reference:

(1) Where in any suit it is proved by affidavit or otherwise:

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated **by any party to the suit**, or wrongfully sold in execution of a decree, or

b. **that the defendant** threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

c. **that the defendant** threatens to dispossess the plaintiff or otherwise **cause injury to the plaintiff** in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property (or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit) as the Court thinks fit, until the disposal of the suit or until further orders.

Rule 2 of Order 39 deals with cases wherein the breach of contract or injury of any kind is apprehended. Provisions of Rule l (a), l (b) and l (c) are intended to meet different situations and different purposes. Rule l (a) speaks about the injunctions when the property is in danger of wasting, damage or alienation. Whereas Rule l (b) speaks about threatening with removal or disposal of the property with a view to defraud the defendant's creditors and Rule l (c) speaks about threatening with dispossession or any other injury in relation to the property.

Further **Section 151 of CPC** provides that nothing in the CPC shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The Problem-Moving to the Issue at Hand

A question of general importance was raised in the case **Nanasaheb vs Dattu and Others** as to "***Whether a defendant in a suit for injunction filed by the plaintiff can be granted injunction restraining the plaintiff from obstructing his alleged possession and enjoyment of the property"?***

Similarly in **Shakunthalamma vs Kanthamma,** the question that arose for consideration was ***"Whether the defendant in a suit for declaration and injunction can maintain an application for injunction under Order 39, Rule 1(c) of the Civil Procedure Code, 1908?"***

Understanding the Law on the Point

Clause (c) of Section 94 of the Code states that a Court may grant a temporary injunction there under, only **"if it is so prescribed**". **Section 2(16) of the Code** defines the word **"Prescribed"** to mean "Prescribed by the Rules". Therefore temporary injunction may be granted under Section 94(c) of the Code only if a case satisfies the requirements of the Rules 1 and 2 of Order 39 of the Code and not otherwise. Therefore, when a matter comes before the Court, it has to examine the facts and ascertain whether the conditions of Section 94 r/w Order 39, Rules 1 and 2 of the Code are satisfied and only thereafter grant appropriate relief. So we have to see whether such types of injunction can be granted under Order 39 R 1 & 2 CPC.

A careful reading of the Order 39 Rule 1 discloses that the Court is empowered to grant three types of orders under three different and distinct situations. Clause (a) of Order 39, Rule 1 CPC provides that where in any suit it is proved by affidavit or otherwise, that any property in dispute in a suit is in danger or being wasted, damaged or alienated **"by any party" to the suit (both plaintiff and defendant included)**, or wrongfully sold in execution of a decree, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property. The reason is obvious. After institution of the suit, the plaintiff may act detrimental to the interest of the defendant in the subject matter of the suit by allowing it to be wasted or damaged or alienated and in such an event, the defendant can take recourse to making application under Order 39, Rule 1(a) CPC.

What Clause (b) of Order 39, Rule 1 of CPC envisages is that a **plaintiff can seek temporary injunction when there is a threat by the defendant** to dispose of the property with a view to render the decree that may be passed in the suit useless or infructuous. Similarly, under Clause (c) of Order 39, Rule 1 CPC whenever the **defendant threatens** to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property, in dispute in the suit, the Court may restrain dispossession of the plaintiff until the disposal of the suit or until further orders.

The Legislature has consciously used the words **"any party to the suit" in Rule 1(a)** of Order 39 CPC but the same is conspicuously missing in Clauses (b) and (c). However, the words **"the defendant threatens" appearing in Clauses (b) and (c)** of Rule 1 of Order 39 CPC make it clear that the Court can grant an order of temporary injunction only in favour of the plaintiff because the Legislature has expressly not included the words "plaintiff threatens" and also not used the words "any party to the suit" in these clauses.

Defendant Can't be granted Injunction under clause (b) & (c) of Rule 1 of Order 39 CPC

Had it been the intention of the Legislature in framing such a rule that either of the parties could be granted a temporary injunction for the purposes mentioned in all of these clauses, there was no occasion to expressly use the term 'defendant' as the author of the mischief could be prevented, particularly when in Clause (a) of Rule 1 there is no such mention of 'defendant'. Therefore, purposefully the ambit of Clause (a) of Rule 1 was kept wider than the ambit of Clauses (b) and (c) of Rule 1 and provisions of Rule 2. **The intention appears to restrict the power of grant of injunction in the circumstances mentioned in later clauses in favour of the plaintiff only.**

Why there is Noticeable Difference between clause (a) and clause (b), (c)

The difference between the circumstances under Clause (a) and other clauses of Rule 1 is distinctive and important. The purpose of any interim relief is always to maintain the status quo in respect of the subject matter and the suit, so as to enable the Court to pass a fruitful decree after the hearing is completed. Therefore, waste, damage or alienation of the property by any party will result into disturbance in the status quo of the property and, therefore, even when an injunction is granted in favour of the defendant, it is really to protect the present state of the property in dispute and, therefore, from this angle can be considered to be an injunction in favour of the plaintiff, if he is honestly interested in getting the decree of protection of the property as it is on the day of the filing of the suit.

Injunctions in respect of disposal or removal of the property and particularly the injunctions in respect of protection of the possession are totally on different footing. Plaintiff comes to the Court for protection of his possession and enjoyment of the property. If the apprehended mischief by the defendant is proved prima facie, injunction is granted in his favour. If final relief cannot be granted in favour of a party, normally no question would arise to grant an interim relief in favour of that party so far as possession and enjoyment of property is concerned.

It is in this view, the Legislature must have made a distinction between the persons entitled for relief under these different provisions. If the Legislature omits to grant a power to the Court in respect of a party and grants power in respect of other party, then it will have to be presumed that the exercise of the power in respect of the first party is barred by implication.

No Casus Omissus

In **Commissioner of Sales Tax, Uttar Pradesh, Lucknow vs M/S Parson Tools and Plants, Kanpur**, Supreme Court held that, if the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so, would be entrenching upon the preserves of the Legislature, the primary function of a Court of law being jus dicere and not jus dare.

Use of Inherent Powers to Grant Injunction

Now another question that arises is ***whether Court can issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code?***

Supreme Court in the case of **Manohar Lal Chopra vs Rai Bahadur Rao Raja Seth Hiralal**, noticing the difference of opinion between the various High Courts on the question, held that there is no prohibition in Section 94 to issue a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. Supreme Court observed, it is well settled that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression **'if it is so prescribed**" in Section 94 is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule.

If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could be that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

In **Padam Sen vs State of Uttar Pradesh** it was observed that:

"These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. ***But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature.*** *This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."*

Thus, Supreme Court, in this case was of the opinion that the provisions of the Code of Civil Procedure are not exhaustive and the **Court has an inherent power to grant an injunction in circumstances which are not covered by the provisions of Order 39 of the Code of Civil Procedure.** It was of the opinion that inherent powers of the Court which are merely declaration by Section 151 are not controlled by any of the provisions of the Code as has been specifically stated in the section itself. **But those powers are to be exercised only when such an exercise is not in conflict with what has been expressly provided by the Code**.

In respect of the exercise of inherent powers Shah, J. further observed:

"Inherent jurisdiction of the Court to make orders ex debito justitiae is undoubtedly affirmed by Section 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive."

Therefore, it is now settled that Court has power to grant injunction even in circumstances not covered by Order 39 and it is also well settled that inherent powers of the Code can be utilised for issuing temporary injunctions but it should not be either to nullify a statutory provision nor to by-pass what is expressly provided. It is true, as was reminded by the Supreme Court in **Manohar Lal Chopra's case (cited supra)** that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. Therefore, the situations which are not dealt either expressly or impliedly by the provisions of the Code, the Court

is not rendered powerless and inherent powers as declared under Section 151 of the Code can always be resorted to meet the situation and ends of justice. ***The question would be whether a situation is dealt by the provisions of the Code or not. If the situation is dealt by the provisions of the Code, then the orders will have to be passed keeping in mind the provisions of the Code and if the situation is not dealt by the Code then resort to Section 151 can always be had.***

If **for example** the issue is with regard enjoyment of the well water which is covered by sub-clause (c) of Order 39 Rule 1. Since the circumstance of injury to the property in dispute in a suit or threatened dispossession is dealt by Order 39, recourse to Section 151 and exercise of the inherent powers will not be available and, therefore, the application of the defendant will have to be rejected.

Patna High Court in the case of **Smt. Indrawati Devi vs Bulu Ghosh** held that a defendant may claim interlocutory mandatory injunction:

"In the exercise of its inherent powers, the Court can in exceptional circumstances not covered by the situations envisaged under Order 39 Rules 1 and 2 of the Code of Civil Procedure grant temporary injunction, which includes not only a prohibitory but also a mandatory injunction and in the exercise of its inherent powers, no distinction can be drawn on the ground that such an order is passed at the instance of the plaintiff or the defendant."

A similar view has been taken by Kerala High Court in the case of **B.F. Varghese vs Joseph Thomas** that under inherent powers of the Court in exceptional circumstances, mandatory injunction on interlocutory application can be granted even in favour of the defendant.

Needless to say, that there is also a difference in respect of the remedies which can be resorted to. If the power is exercised under Order 39, then an appeal has been provided under Order 43. However, if Section 151 is resorted, then no such remedy is provided.

Situations where Injunction can be granted in favour of defendant

As we have already discussed earlier that mischief to be prevented by the temporary injunction in respect of situations under Clauses (b) and (c) of Rule 1 and under Rule 2 should be that of the defendant. However, mischief to be prevented by the temporary injunction in situations under Clause (a) of Rule 1 can be from either of the parties. A clear distinction appears to have been deliberately made in framing this rule by authorizing in respect of the situations listed in Clause (a) of Rule 1 on one hand and Clauses (b) and (c) of Rule 1 and Rule 2 on the other hand. In respect of situations covered by the first clause, injunction can be granted in favour of either of the parties whereas in respect of situations covered by other clauses injunction can be granted only in favour of the plaintiff and not in favour of the defendant.

In **Dr. Ashis Ranjan Das vs Rajendra Nath Mullick**, Calcutta High Court took a view that the defendant can ask for an interlocutory injunction restraining the plaintiff from making any construction over the plot in dispute. Such an injunction would come within the purview of Clause (a) of Rule 1 since the construction, in cases, would be a damage to the property as is the subject matter of the suit.

Conclusion

So on the basis of above discussion the following conclusion flows on the issue framed:

1. Both the plaintiff and the defendant can maintain an application under Order 39, Rule 1(a) of the Code for the reliefs set out in the said provision;
2. Insofar as relief under Order 39, Rule 1(b) and (c) is concerned, such relief is available only to the plaintiff and the defendant can not **maintain an application for the said reliefs in a suit filed by the plaintiff** irrespective of the fact that his right to such relief arises either from the same cause of action or a cause of action that arises subsequent to filing of the suit.
3. **However, it is open to the defendant to maintain a separate suit against the plaintiff and seek relief provided under Order 39, Rule 1(b) and (c) of the Code.**
4. In cases which do not fall under Order 39, Rule 1 of the Code, the Court has the inherent jurisdiction to grant the relief of injunction in its discretion, if it is satisfied that such an order is necessary to meet the ends of justice or to prevent abuse of process of the Court and nothing in this Code shall limit or otherwise affect such inherent power of the Court. But it has to be kept in mind that it shouldn't nullify or derogate any expressly stated provision.

Analysing the Most-Favoured-Nation clause under Tax Treaty: Is India's Divergent View Correct?

Anuj Kumar is a final-year law student at Vivekananda Institute of Professional Studies, New Delhi.

In Concentrix Services Netherlands B.V. v. Income Tax Officer (TDS) and ANR. ("Concentrix Services") (22 April, 2018), the High Court of Delhi ("Court"), decided an issue over the most-favoured-nation ("MFN") clause in the protocol of the Double Taxation Avoidance Agreement ("DTAA") in which the court using the principle of common interpretation ("principle") relied upon a decree issued by the Netherlands. The principle dictates that the court of one contractual state should review the decision rendered by another contracting state and determine whether interpretation can be transmitted to maintain a balance of view. According to Lord Denning's observations on the principle, "even if I disagreed, I would follow them in a matter which is of international concern." Later on 3 February 2022, the Indian Tax Department ("ITD") released a circular clarifying its stand on MFN Clause. This circular clarification posed significant questions pertaining to the principle. The question at the centre of the dispute is whether the court was correct in applying the principle or not. This blog post will examine the aforementioned issue in the context of the relevant case.

To briefly summarise the facts of the case, under India- Netherlands DTAA to get MFN benefit, India should have signed DTAA with another country that must be an OECD member. India signed DTAA with Slovenia, Lithuania, and Columbia when they were not OECD members but became OECD members at a later point. According to the ITD, as these countries were not OECD members on the date when their treaties were signed, the benefit from these treaties cannot be allowed to India- Netherlands treaty. Concentrix Services filed a case before the Court and according to the Court, the best interpretative tool is to look at the intent of contracting states and how they have understood it. The Court looked at the decree issued by the Netherlands in 2012 and according to it as soon as Slovenia became an OECD member, the MFN clause was triggered . The court additionally referred to Klaus Vogel's opinion , foreign rulings , and one Indian Supreme Court judgment . The Court in the end acknowledged that its judgment must be with the premise of the principle of common interpretation and the MFN benefit was granted. Consequently, a circular was issued by ITD clarifying that the unilateral decrees having a common view by the Netherlands, France, and Switzerland do not represent the shared understanding of MFN. These unilateral initiatives can, at most, convey the opinion of the other contracting states regarding the relief from taxes that must be paid in that individual nation. Further, since these unilateral communications have not been approved by India, they cannot affect the taxes that must be paid in India. A similar stand can be seen from the Mumbai Appellate Tax Tribunal in NGC Network Asia LLC v. DDIT, wherein they rejected a unilateral decree by the United States of America as it was not mutually agreed with India *(the ruling was not related to the MFN)*.

Binding nature of a foreign unilateral decree upon India in a tax treaty

The stand taken by the ITD is at fault considering the fact that the MFN clauses in India are of two types, non-self-operational- which need activities like negotiation or/and notification between the two states and self-operational- which grants benefit automatically. The contracting states mentioned in the ITD circular, Netherlands, France, and Switzerland, have a self-operational clause which signifies that India and these states have agreed that any activity done by one state will be accepted by the other without any added step. Moreover, an additional activity that is mentioned in India's Income Tax Act ("ITA") under section 90(1) has a requirement that a separate notification is to be issued for a protocol *(MFN clause)* to be applicable but this position is well settled in Indian courts that as protocols are an integral part, they are self-operational. ITD also overlooks the fact that India has signed a DTAA with Finland which, has wordings that "*a notification is to be issued for the application of exemption or lower tax rate"*. This reflects that the Indian government is well informed over the instances where they want additional activity by the contracting state and where they do not, looking at this accepting a unilateral decree seems to be correct. Further, ITD now taking a stand that India is not bound by any foreign unilateral decree seems to violate Article 26 of the Vienna Convention. This principle states that all international treaties "shall be carried out in good conscience." This signifies that the parties' commitments and their legitimate expectations should be taken into account when interpreting or applying a treaty so as to prevent abusive execution. For the faithful and honest implementation of DTAA, the contracting nations must do their best to make the clause's application as simple and practicable so that the potential application of an MFN clause which has been agreed upon by the parties is reached. Additionally, it seems odd when the ITD Circular was published as this document, was published in 2022, and purports to refute the interpretations of the MFN clause that were published by the Netherlands in 2012, which was 10 years earlier, France in 2016, which was six years earlier, and Switzerland in 2021. Notably, the Supreme Court of India in South Indian Bank Ltd. V. CIT has said that *"just as the government does not wish for avoidance of tax, it is their responsibility to design a tax system for which a subject can budget and plan. If proper balance is achieved, unnecessary litigation can be avoided without compromising on generation of revenue"* . The stand taken by ITD is totally opposite to these aims as businesses have been planning their tax structure for the past ten years but now taking this adverse view will cause huge harm to India's reputation as a business-friendly nation. Even, in the field of public international law, the principles of estoppel and acquiescence are well known to apply to prevent a country from regaining the rights that result from their failure to clarify when a responsibility to clarify existed. Such an approach can be seen from the following- The Former Yugoslav Republic of Macedonia v. Greece (International Court of Justice Reports 2011); Subsequent agreements and subsequent practice in relation to the interpretation of treaties, and Resolutions adopted by the General Assembly of the United Nations on December 20, 2018 (Resolution No. A/RES/73/202).

Moreover, in GRI Renewable Industries ruling, which was rendered after the circular's publication, did not concur with its guiding clarifications. The ruling reaffirmed that once a DTAA has been notified, no separate notification is required and authorities are not justified in denying the benefit. The ruling held that this circular could only be applied prospectively. Moreover, with this circular, a conflict arises for the ITD officers. As per Section 119 of ITA- orders, instructions issued by the ITD are binding on all revenue authorities but conversely, as per Agrawal Warehousing v. CIT, "*the order of a tribunal is binding on all the revenue authorities functioning under their jurisdiction*" . It's a prominent principle that courts have the power to interpret the statutes and give clarifications on the issue, officers should be following the court orders ideally.

Conclusion

Tax treaties are signed on different political, social, and economic circumstances between the states making the mutual benefits granted to each country vary. Currently, no explicit definition is specified by OECD and UN model conventions on the concept of MFN treatment. With lack of guidelines, each state has been interpreting the MFN clause as per its understanding and policies. Applying the principle of common interpretation is advised in these situations because the taxpayers' ability to structure their tax planning has been severely hampered by the various interpretations made by each nation. Further, looking at the publication issued by Switzerland wherein they have stated that they reserve the right to reverse their interpretation and reconsider the rates if there will be no guarantee of reciprocity of MFN interpretation by India. India should take into consideration that tax treaties go both ways and taking the above-explained stance will cause huge harm to India's FDI and investor-friendly reputation.

While one may argue that India through its circular took its stand on the MFN clause but the complexity it brings, it is suggested that the circular should be re-evaluated. ITD with its current stand will cause great exhaustion of taxpayer and revenue authorities' money and time due to endless litigation that will be coming up.

As India's economy is growing at a global scale, the author suggests that India should not take a stand that is hostile to other countries.

Corocraft Ltd. C. Pan American Airways Inc. (1968) 3 W.L.R. 1273, 1283 (opinion of Lord Denning).

Klaus Vogel, 'Double Tax Treaties and their Interpretation', 1986.

Corocraft Ltd. V. Pan American Airways Inc., 3 W.LR. 1273, 1283; Fothergill v. Monarch Airlines 3 W.L.R. 209, 224 (1980).

Union of India and Anr. v. Azadi Bachao Andolan and Another, (2004) 10 SCC 1 .

India- France DTAA: Steria (India) v. CIT (W.P.(C) 4793/2014, India- Switzerland DTAA: Torrent Pharmaceuticals Ltd. v. DIT (ITA No. 5369/Ahd/2004), India- Netherlands: Concentrix Services Netherlands B.V. v. ITO (W.P.(C.) 9051/2020).

Exclusionary Rules and Illegally Obtained Evidence

Shantanu Pachauri is an advocate registered with the Bar Council of Uttar Pradesh. He did his LL.M. in constitutional and criminal law from National Law University, Delhi and completed B.A. LL.B. (Hons.) from National Law Institute University, Bhopal. His research interest lies at the intersection of constitutional and criminal law. He may be reached at https://www.linkedin.com/in/shantanupachauri/.

Introduction: Exclusionary rules

The exclusionary rules permit an accused to prevent the prosecution from introducing at trial otherwise admissible evidence that was obtained in violation of the Constitution. The rationale behind these rules is the expectation that law enforcement officers will refrain from engaging in unlawful evidence-gathering techniques if they are aware that the physical or testimonial evidence produced will be inadmissible at trial. These rules play an important role in establishing a balance between individual rights and preventing abuses of power by the authorities by banning the use of illegally obtained evidence and enforcing limitations in criminal proceedings. Although there are other measures like disciplinary or criminal proceedings against the guilty official, they may be useful as supporting measures but are not viable alternatives to exclusionary rules.

Exclusion of such evidence is considered proper in order to protect the integrity of the court by requiring or permitting the court to refuse to countenance unlawful actions. It also supports the credibility of the judicial system in the eyes of police officers. Moreover, there is good reason to believe that the exclusionary rule does not allow criminals to go free as much as would be the case if direct sanctions was applied. At the same time, the exclusion of evidence obtained in violation of the Constitution acts as a reasonable deterrent to illegal police searches. However, the rule may not be applied in rejecting highly probative evidence having consequence of nullifying a meritorious prosecution. Exclusionary rules include several other rules like the doctrine of Fruit of the Poisonous Tree which was established to deter law enforcement authorities from violating individual rights during search and seizure. However, this doctrine is not applicable parallel in India. The Law Commission of India in 94th Report stated that there are many degrees of illegality and it appears that an element of elasticity in the law may, in the majority of cases, better serve the interests of justice than a blind adherence to a rigid rule of exclusion. At the same time, the question that must be considered is whether the present position in India is consistent with justice which is discussed in the following parts.

Illegally obtained evidence: Relevancy and admissibility

Regarding the admissibility of illegally admissible evidence, *G. L. Peiris* in *The Admissibility of Evidence Obtained Illegally: A Comparative Analysis* discusses three approaches:

- Illegally obtained evidence cannot be excluded on the ground that it was obtained by illegal action;
- Such evidence is never admissible; or
- Admissibility of such evidence is a matter for the trial judge to decide in his discretion.

The Indian Evidence Act, 1872 does not provide for legally allowed methods or means to obtain such evidence. It provides for general provisions for admissibility which depends upon the relevancy of the evidence. As per the legislative mandate, it is the only criterion which decides the admissibility of evidence. Section 5 of the Act provides that, evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others. The Act does not provide the means adopted to obtain evidence which results into the admissibility of illegally obtained evidence.

The courts have time and again emphasized upon the admissibility of such evidence though with certain caveats. In *Bai Radha v. State of Gujarat*, it was held that non-compliance with some of the provisions relating to search would not affect the admissibility of the evidence so collected unless a prejudice is created against the accused. In *State of Maharashtra v. Natwarlal Damodardas*, it was held that even if the search was illegal it would not affect the validity of the seizure and its admissibility in evidence, at the most the court may be inclined to examine carefully the evidence relating to the seizure. In *R.M. Malkani v. State of Maharashtra,* it was held that the tape-recorded conversation obtained through an eavesdropping device though obtained illegally, is admissible. The Court observed that the police officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. Just a few weeks back, the Delhi High Court in *Deepti Kapur v. Kunal Julka* while dealing with matrimonial disputes held that merely because rules of evidence favour a liberal approach for admitting evidence, this should not be taken as approval for everyone to adopt any illegal means to collect evidence, especially in relationships of confidence such as marriage.

As far as evidence illegally obtained by the tax authorities is concerned, there has been a conflict of opinion among various High Courts. The Mysore High Court held that such evidence could not be used but the Allahabad, Madras, and Delhi High Courts took a contrary view. However, clarifying the position of law, Hon'ble Supreme Court in *Pooran Mai v. Director of Inspection of Income Tax* held that there was no constitutional or statutory bar in using such evidence. The Court held that there is no construction of fundamental rights in the Constitution which can be construed in a manner so as to exclude the evidence obtained in an illegal search. However, it has been argued that the Indian courts have referred to old English case laws which are no longer applicable in the UK.

Exclusion of evidence and judicial discretion

In *Admissibility of illegally obtained evidence*, S.N. Jain argues in favour of the application of the American exclusionary rule in India as the safeguards are not enough to deter officials from taking recourse to illegal means in obtaining evidence. However, he argued that the admissibility of illegally obtained evidence may be left to the discretion of the courts to permit the use of such evidence or not. To ensure effective exclusionary rules and to limit the amount of judicial interpretation that can be used to narrow their scope, it is significant that the legislature drafts clear statutes. *Jain* argues that the exercise of judicial discretion in India should be in favour of exclusion on a broader and more liberal basis than that appropriate to English law. He argues that the exclusionary discretion of the court should be restricted to evidence whose probative value is significantly disproportionate to its potential prejudice. He suggests that the evidence whose probative value is unimpeachable should in no circumstances be excluded at the discretion of the trial judge on the ground that it has been obtained by illegal or unfair means. As Paul Roberts argues in *Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial* that what we are really concerned with is wise and well-informed judicial judgement rather than free-floating 'discretion'.

The Law Commission of India in its 94th Report discussed the issue in greater detail and concluded that there is need for conferring discretion on the court to exclude evidence obtained illegally or improperly if in the circumstances of the case, the admission of such evidence would bring the

administration of justice into disrepute. However, the discretion must be guided by certain factors. The Commission opined that the present position in India under which the legal "relevance" of the evidence of the facts in issue is the principal consideration, cannot be regarded as totally satisfactory. From time to time, cases would come where the illegality or impropriety is so shocking and outrageous that the judiciary would wish that it had a power to exclude the evidence. But the present Indian law has no specific provision recognizing such a power. The major deficiency in the present Indian position is that it reflects a legalistic and statute-oriented approach, which completely shuts out any consideration of deeper human values. The Commission concluded that the need for reform in the law is manifest. At the same time, a provision mandatorily shutting out a piece of evidence because some illegality has been perpetrated in collecting it, would not be advisable.

Interest of the prosecution vs. right of the accused: Reaching a balance

In recent decades, human rights have come to the forefront in criminal justice systems around the world, but at the same time more and more jurisdictions have adopted exclusionary rules. Various countries including Germany, Singapore, Switzerland, Taiwan, and the United States of America have tried to address the issue whether and under what circumstances the use of exclusionary rules can be an effective means for protecting human rights in criminal proceedings. While every legal system excludes some evidence deemed irrelevant or untrustworthy, the constitutional exclusionary rule is unusual in rejecting highly probative evidence, often with the consequence of nullifying a meritorious prosecution.

Paul Roberts and Jill Hunter argue that victims do not truly get justice when offenders are convicted unfairly as it is trite that the rights and interests of complainants and witnesses must somehow be accommodated, or 'balanced', with the rights of suspects and the accused. The right not to be wrongfully convicted of a criminal offence is surely one of the most fundamental procedural rights, more basic even than the vaunted right to a fair trial. In *Excluding Evidence as Protecting Rights*, Andrew Ashworth argued his 'protective principle' as a novel rationale for excluding improperly obtained evidence from criminal trials. In *Excluding Evidence as Protecting Constitutional or Human Rights?*, Paul Roberts finds Ashworth's work remarkably far-sighted in anticipating current controversies bearing on the status of constitutional principles and human rights and their implications for the admissibility of evidence in criminal trials. He elaborates the protective principle for a post-Human Rights Act era and opens up new the lines of enquiry suggested by Ashworths original conception.

The Law Commission of India in 94th Report noted that the Indian Constitution did not have any provision that was strictly corresponding to the Fourth Amendment of the US, and as regards the concept of procedure established by law laid down in Article 21 of the Constitution, remained to be spelt out in its application to the law of evidence. In the absence of any legislative mandate regarding the same, there arises an inconsistency in the approach of various benches of the Supreme Court and of the different High Courts regarding the admissibility of illegally obtained evidence including secret evidence *vis-à-vis* human rights including right to privacy. After the ruling of a constitutional court of the Supreme Court in *Justice K.S. Puttaswamy v. Union of India*, which held the right to privacy as a fundamental right enshrined under Article 21 of the Constitution, the issue has gained much more relevance.

Donald Dripps, Exclusionary Rule: Origins And Development of The Rule, The Policy Debate, Other Constitutional Exclusionary Rules, Proposals For Reform, https://law.jrank.org/pages/1111/Exclusionary-Rule.html

Sabine Gless and Thomas Richter, 'Introduction in Sabine Gless & Thomas Richter' (eds.) Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules 2 (Springer Open, 2018).

Niklaus Oberholzer, Grundzüge des Strafprozessrechts (3rd ed. 2012).

Loewenthal, Evaluating the exclusionary rule in Search and seizure 9(3) Anglo-American Law Review 238-256 (1980).

G. L. Peiris, The Admissibility of Evidence Obtained Illegally: A Comparative Analysis, 13 Ottawa L. Rev. 309 (1981).

Talha Abdul Rahman, Fruit of the Poisoned Tree: Should Illegally Obtained Evidence Be Admissible? S-38 PL, (2011).

S.N. Jain, Admissibility of illegally obtained evidence, 22(3) Journal of the Indian Law Institute 322-327 (1980).

L. Macula, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A Swiss Perspective' in Sabine Gless & Thomas Richter' (eds.) Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules 2 (Springer Open, 2018).

Supra note 5.

Paul Roberts, 'Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial' in Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions 163-193 (Paul Roberts and Jill Hunter eds., 2012).

Sabine Gless and Thomas Richter, 'Introduction in Sabine Gless & Thomas Richter' (eds.) Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules 2 (Springer Open, 2018).

Paul Roberts and Jill Hunter, 'Introduction—The Human Rights Revolution in Criminal Evidence and Procedure' in Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions 1-24 (Paul Roberts and Jill Hunter eds., 2012).

P Roberts and A Zuckerman, Criminal Evidence (2nd edn., 2010); L Ellison, The Adversarial Process and the Vulnerable Witness (2001).

Paul Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights?' In Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth (Lucia Zedner and Julian V. Roberts eds., 2012).

You have reached the final page of Volume I.

But law, fortunately, has not reached its final word.

Until Volume II, let the questions linger.