



Estd. 1950

Focus

SUPREME COURT JOURNAL™

Weekly Law Journal

Judgments of Supreme Court & Articles

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MODE OF CITATION

2011 (1) SCJ

20th Jan., 2011

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*** FREE SCJ YEARLY DIGEST 2010**

NOTE : Complaint of non-receipt of parts will not be attended to, if not received within 15 days after the due-date

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territory involving no power to change the policy of the law has been held to be valid.¹⁵ Addition or alteration of the schedule to an Act, has been held to be valid, on the ground that the lines on which such addition or alteration has to be made is clearly indicated in the Act.¹⁶

(6) The power of the Judiciary to examine the validity of delegated legislation and for declaring it as invalid proceeds on two important grounds namely :- (a) violation of the Constitution and (b) violation of the Act under which rules are made (which includes scrutiny of the mandatory procedures under which the rules are made). When a criteria is fixed by a Statute or policy, the rule-making authority must follow the criteria and the policy.¹⁷ However, the policy decision must be conformable to the Constitutional mandates as otherwise, the policy itself will be subjected to review by the Courts.¹⁸ Though as a rule, the Judiciary does not interfere with the policy decisions of the legislature but has a duty to hold the supremacy of the Constitution when it reviews the policy decisions which violate the Constitution. Delegated legislation cannot destroy the Act under which powers are delegated.¹⁹ The delegatee of a legislative power cannot play the dual role of policy-maker and as a delegate of legislative powers.

(7) The rules framed by the executive may have retrospective effect, if such power is expressly conferred or inferred

15. *Raj Narain v. Patna Administration*: (1955) 1 SCR p.290.

16. See Sec.8 (2) of the Provident Fund Act, 1925; Sec. 27 of the Minimum Wages Act, 1948 and such other Statutes.

17. *Clariant International Ltd. v. SEBI* (2004) 8 SCC p. 523.

18. *State of Rajasthan v. Basant Nahata* (2005) 12 SCC p. 3401.

19. *B. K. Industries and others v. Union of India* (1993) Suppl. 3 SCC p. 621.

by implication²⁰conclusive evidence clauses are ineffective to cure a complete want of authority, basic defect of Jurisdiction or a complete non-compliance of a mandatory procedural requirement. However, the conclusive evidence clauses may cure non-compliance of a directory procedural requirement or defects which are not of a fundamental character.

(8) Acts constituting Statutory bodies and conferring powers to make delegated legislation and make the rules beyond challenge with regard to defects in the Constitution of the bodies or defects in the procedure not resulting in substantial prejudice are viewed as legal.²¹ The apex Court named such clauses as "Ganga Clause"²²

REQUIREMENT OF CONSENT OF ADVOCATE-GENERAL IN CONTEMPT CASES: A STUDY IN THE LIGHT OF BIMAN BASU'S CASE*

By

Prof. (Dr.) Mukund Sarda**

(1) The requirement of 'consent' of the Advocate-General for initiating contempt proceedings arose in several cases. In the case under study,¹ a petition filed by a person for initiating appropriate contempt proceedings against the contemnor without the consent of the Advocate-General came up for consideration. This

20. *Indramani v. W.R. Natu* AIR 1963 SC p. 286. Also see Art. 209 where the President or Governor may make rules retrospectively.

21. *B.K. Srinivasan v. State of Karnataka*; (1987) 1 SCC p. 669.

22. *Ibid.*

* *Biman Basu v. Kallol Guha Thakurta and another*: 2010 (7) SCJ 477 = AIR 2010 SC 3328.

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1. *Supra*

case involved deliberate and willful derogatory, defamatory and filthy statements made against a sitting Judge. These aforesaid statements got wide media publicity, and constituted a straight and direct attack upon a sitting Judge lowering the dignity of the Judge and also the Judicial system of the Country. Affidavits were filed in support of the contempt case by the petitioner. The contempt petition was opposed on the grounds of its maintainability as it was filed without the consent of the Advocate-General.

(2) The Jurisdiction to punish for contempt touches upon two important fundamental Rights,² namely the right to personal liberty and the right to freedom of speech. A special committee, which examined the issue of dignity of Courts *vis-a-vis* freedom of speech of an individual, in its recommendations took note of the importance given to freedom of speech in the Constitution and the need for safeguarding the status and dignity of Courts and the interests of administration of Justice.³

(3) Section 2(c) of the contempt of Courts Act, 1971 defines criminal contempt which includes civil or criminal contempt. Criminal contempt means publication (whether by words spoken or written, or by signs or by visible representation or otherwise) of any matter on the doing of any other act whatsoever which

- (i) Scandalizes or tends to scandalize or lowers or tends to lower the authority of any Court; or
- (ii) Prejudice, or interferes or tends to interfere with the due course of any judicial proceeding; or

2. *Supra* para 9.

3. The Special Committee was set up under the Chairmanship of Late Mr. H.H. Sanyal, the then Solicitor General of India.

- (iii) Interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

The manner of taking cognizance has been provided in Section 15 of the Act.⁴ It provides that the action for contempt may be taken up by the Supreme Court or the High Court

- (a) On its own motion; or
- (b) On a motion by the Advocate-General or
- (c) Any other person with the consent in writing of the Advocate-General

The Sanyal Committee,⁵ whose recommendations were considered in the enactment of law on contempt, felt that if action is taken on a motion of some other agency, it would give considerable assurance to the individual charged and the public at large. The Advocate-General be associated in such cases, who may move the court not only in his own motion but also at the instance of the Court concerned.

In *S.K. Sarkar's Case*,⁶ the Supreme Court laid down the following:-

- (i) If the High Court acts on information derived from its own sources such as a perusal of the records of a subordinate Court or on reading a report in a newspaper or hearing from a public speech without any reference from the subordinate Court or Advocate-General, it can be said to have taken cognizance on its own motion;

4. Act refers to the Contempt of Courts Act, 1971 throughout this study

5. Quoted in *S.K. Sarkar, Member, Board of Revenue, U.P. v. Vinay Chandra Misra*: AIR 1981 SC 723.

6. *Supra*

- (ii) If the High Court is directly moved by a petition by a private person feeling aggrieved, not being the Advocate-General, without the consent in writing from Advocate-General, the High Court, has, in such a situation, a discretion to refuse to entertain the petition, or to take cognizance on its own motion on the basis of the information supplied to it in that petition;
- (iii) If the petitioner is a responsible member of the legal profession, it may act Suo motu more so, if the petitioner prays that the Court should act Suo motu;
- (iv) The whole object of prescribing these procedural modes of taking cognizance under Sec. 15, is to safeguard the valuable time of the High Court or the Supreme Court from being wasted by frivolous complaints of contempt of Court;
- (v) If the High Court is *prima facie* satisfied that the information received by it regarding the commission of contempt of a subordinate Court is not frivolous, and the contempt alleged is not merely technical or trivial, it may in its discretion act Suo motu and commence the proceedings against the contemnor. This mode of taking cognizance of contempt of a subordinate Court, should be resorted to sparingly where the contempt concerned is of a grave and serious nature;
- (vi) Frequent use of this Suo motu power on the information furnished by an incompetent petitioner, may render the procedural safeguards otiose.
- (vii) The High Court may be well advised to avail of the advice and

assistance of the Advocate-General before initiating proceedings.

The Supreme Court further observed:⁷

"The requirement of consent of the Advocate-General/Attorney-General/Solicitor-General, where any person, other than these officers, makes motion in the case of a criminal contempt in a High Court or Supreme Court, as the case may be, is not a mere formality; it has a salutary purpose. The said law officers being the highest law officers at the level of the State/Centre, as also officers of the Courts virtually interested in the purity of the administration of justice and preserving the dignity of the Courts.

They are expected to examine whether the averments in the proposed motion of a criminal contempt are made vindicating public interest or personal vendetta and accord or decline consent....

Further the cases found to be vexatious, malicious or motivated by personal vendetta and not in public interest will get filtered at that level.

If a motion of criminal contempt in the High Court/Supreme Court is not accompanied by the written consent of the aforesaid law officers, the very purpose of the requirement of prior consent will be frustrated. For a valid motion compliance with the requirements of Sec. 15 of the Act is mandatory. A motion not in conformity with the provision of Sec. 15 is not maintainable".

In *Mani's Case*,⁸ it was held that consent obtained after filing the

7. *State of Kerala v. M.S. Mani*: AIR 2001 SC 3315.

8. *Supra*

contempt petition is not valid to maintain the petition as "subsequent obtaining of the consent does not cure the initial defect, so as to convert the incompetent motion into a maintainable petition".

In other words, the filing of the contempt petition must be accompanied by the written consent of the Advocate-General.⁹

(4) A private person unable to comply with the requirement of 'consent' from the Advocate-General and chooses to move the matter, he has three courses open to him:-

- (i) Firstly, he may place the information in his possession before the Court and request the Court to take action;¹⁰
- (ii) Secondly, he may place the information before the Advocate-General and request him to take action; or
- (iii) Request the Advocate-General to permit him to move the Court.

The first course constitutes a mode of laying the relevant information before the Court for such action as the Court may deem fit and no proceedings can commence until and unless the Court considers the information before it and decides to initiate proceedings.¹¹ The Rules¹² envisages a petition only where the Attorney-General or any other person with his written consent moves the Court. This position of law was clearly reiterated by the Supreme Court in *Bal Thackrey*

Case.¹³ It has been laid down in clear terms that the High Court, while exercising their powers under Art 215 of the Constitution to punish for contempt, the procedure prescribed by law must be followed.¹⁴

It may of interest to note that prior to the contempt of Courts Act, 1971, there was no law, which required the prior consent of the Advocate-General etc., for entertaining or maintaining a contempt petition.

In *D.N. Taneja's Case*¹⁵ the Supreme Court laid down as follows:-

- (i) A contempt is a matter between the Court and the alleged contemnor;
- (ii) Any person who moves the machinery of the Court for contempt only brings to the notice of the Court certain facts constituting contempt of Court;
- (iii) After furnishing such information, he may still assist the Court, but it must be borne in mind that in a contempt proceeding there are only two parties, namely the Court and the contemnor;
- (iv) The person bringing the facts constituting contempt to the notice of the Court can never be a party to the lis nor can join the proceedings as a petitioner.

The Supreme Court asserted that 'no one can compel or demand as of right initiation of proceedings for contempt¹⁶ and the jurisdiction to initiate and to punish for contempt are both

9. *P.N. Duda v. P. Shiv Shankar*: AIR 1988 SC 1208.

10. *C.K. Daphtary v. O.P. Gupta*: AIR 1971 SC 1132.

11. Rules 3 and 4 of the Supreme Court (Contempt of Court) Rules.

12. *Ibid.*

13. *Bal Thackrey v. Harish Pimpal Khute*: AIR 2005 SC 396.

14. *L.P. Misra v. State of U.P.*: AIR 1998 SC 3337; *Pattavi Sheth v. Custodian*: AIR 2001 SC 2763.

15. *D.N. Taneja v. Bhajan Lal*: (1988) 3 SCC 26.

16. *Om Prakash Jaiswal v. D.K. Mittal and another*: AIR SC 1136.

discretionary.¹⁷ In *Om Prakash Jaiswal's*¹⁸ Case the apex Court reiterating some of the earlier principles again further laid down as follows:-

- (i) A private party or litigant may also invite the attention of the Court to such facts as may persuade the Court in initiating the proceedings for contempt. However, such person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings;
- (ii) The position of the person is just an informer or relater. His duty ends with the facts being brought to the notice of the Court;
- (iii) It is thereafter for the Court to act on such information or not to act, through the private party or litigant moving the Court, may at the discretion of the Court continue to render its assistance during the course of the proceedings.

The apex Court explained the 'Suo motu' power of the Court in contempt cases in *J.R. Parashar's Case*¹⁹ thus:-

- (i) In any event the power to act *Suo motu* in matters, which otherwise require the Attorney-General to initiate proceedings or at least give his consent must be exercised rarely; and
- (ii) Courts normally reserve this exercise to cases where it either derives information from its own sources, such as from perusal of records, or on reading a report in a newspaper or hearing a public speech or a document which would speak for itself.

Contempt action to be followed by the procedures to ensure smooth working and streamlining of such contempt actions which are to be taken up by the Court *Suo motu* on its own motion.²⁰ Procedural safeguards of the Advocate-General's consent nugatory,²¹ if exercise of powers by the Court is based on the information furnished in a contempt petition.

(5) The ratio in *Biman Basu's case*²² firmly enunciates that a contempt petition at the instance of private person without the written consent of the Advocate-General was not maintainable in law. As a result, the contempt case stood dismissed, when the judgment of the High Court was set aside. (The contemnor was sentenced to undergo simple imprisonment for a period of three days and to pay a fine of ₹ 10,000/- by the High Court).

Acts of attack on a sitting Judge and lowering his dignity having its effect on the Judicial system of the Country are of great importance than a technical rule like 'consent of the Advocate-General'. It would have been more appropriate, to remit the case for consideration afresh, after referring it to the Advocate-General to move an appropriate motion or give consent to the petition, if the Advocate-General finds a *prima-facie* case that the contempt had the effect of lowering the dignity of the Judge or the judicial system of the Country as otherwise, it gives an impression that the contemnor had a victory over the Judge in the case, which is not in the best interests of the Judiciary. If such a feeling gets strengthened, it may be repeated with impunity and the Judiciary runs the risk of damaging itself at the hands of a few. The apex Court, if it considers necessary to do so, may exercise

17. *Ibid.*

18. *Ibid.*

19. *J.R. Parashar v. Prasant Bhushan*, AIR 2001 SC 3395.

20. *Bal Thackray Supra p. 396.*

21. *Duda case (AIR 1988 SC 1208).*

22. *Supra.*

its review jurisdiction under Art 137 to restore the dignity of the Judiciary.

A NOTE ON SECTION 26 AND 27
OF THE PROTECTION OF
WOMEN FROM DOMESTIC
VIOLENCE ACT – TWO KNOTTY
PROVISIONS*

By

S.R. Sanku**

The present Seminar today on the most gripping and moving subject of Domestic Violence is timely. Ever since the enactment of the Act 43 of 2005, came into being the Country has been witnessing an enormous response in the shape of cases in the law courts, paving the way for flooding litigation over and above the cases under Sec. 498-AIPC, that has its own lion's share in the realm of Criminal Cases.

2. With the authoritative pronouncement of a Division Bench of our Hon'ble High Court, to which His Lordship Justice K.C. Bhanu is a party, in the case of *Afzalunnisa Begum v. State of A.P.* 2009 (2) ALT (Crl.) 204 (DB)(A.P.), a very ticklish issue came to be decided holding that a D.V.C. is maintainable against the women folks also. His Lordship Justice G. Bhavani Prasad in a case reported in 2009 (3) ALT (Crl.) 222 (A.P.) held that, principals of natural justice deserve to be extended while implementing the order in D.V.C. without straight away sentencing the respondents. His Lordship Mr. Justice

* Seminar on Domestic Violence Act held on 13-11-2010 at Narsapur, West Godavari District, Under the Auspices of the Bar Council of the State of Andhra Pradesh, and the Bar Association of Narsapur in the August Presence of her Lordship Justice G. Rohini, Mr. Justice K.C. Bhanu and Mr. Justice G. Bhavani Prasad, Judges, High Court of Andhra Pradesh, Hyderabad.

** Advocate, High Court of A.P.

K.C. Bhanu declared in a case reported in 2010 (1) ALT (Crl.) 105 (A.P.) that the Act is retrospective and remedial in nature. These refreshing Judgments, are indicative of our Hon'ble High Court of A.P. being the forerunner of the Country in declaring sound principles of Law. It is quite apposite to quote the very brand new Judgment of the Supreme Court in the case of *D. Velusamy v. D. Patchaiaammal* reported in (2010) 2 Law ISC-174, wherein the Supreme Court while dealing with Section 125 Cr.P.C. and the provisions of the Domestic Violence Act, held that relationship in the nature of being a mistress is not a living relationship. Further holding that, spending weekends together or a one night stand would not make it a domestic relationship. Supreme Court holds that relationship be in the nature-of marriage, which is akin to a common law marriage.

3. Now, coming to the core-issue, Section 26 of the Act reads as follows:

"26. Relief in other suits and legal proceedings:- (1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in subsection (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceedings before a civil or criminal court.

(3) In case any relief has been obtain by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate for the grant of such relief".