

MARCH OF LAW

Address delivered by Hon'ble Mr. Justice Elipe Dharma Rao, Judge, High Court, Madras on 15.10.2012 at Tamil Nadu State Judicial Academy for Newly Recruited Civil Judges

While congratulating you all, once again, for your successful outcome as the Junior Civil Judges and insisting you all to always maintain the dignity and decorum and discharge your noble judicial duties with pride, let me proceed to deal with the topic: 'march of law'.

The judicial journey that commenced from the Federal Court of India, supervised by the Privy Council, continued till 1950, when legal administration at the apex level was assumed by the Supreme Court of India on 28th day of January, 1950, that is two days after the India became a Sovereign Democratic Republic. One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Central Acts and State Acts in their respective spheres, it has generally provided for a single integrated system of Courts to administer both Union and State laws. At the apex of the entire judicial system, exists the Supreme Court of India.

In the face of the sad reality of the masses being taken for a ride by their elected representatives and their considerable control over the bureaucracy, the citizen's ultimate hope lies with the judiciary. In a democratic country governed by rule of law, efficient, strong, un-biased, honest, devoted and enlightened judiciary is essential to maintain the well-ordered society. The Constitution assigned judiciary an important function of rendering fair and impartial justice to the citizens with a pragmatic approach to redress their disputes.

The Honourable Apex Court in all these six decades is infallible, upholding the majesty of justice. It has acted as protector of the workers, and at time played the role of legislator where labour legislation is silent or vague. It has stood tallest not only before the other two organs of the 'State' – the Legislature and the Executive – but also, before its other counterparts, age-old or young, in the developed and developing countries. Throughout it has sought to be a defender of the rights of the people against excesses of the executive.

Three initiatives of the Honourable Apex Court warrant particular attention i.e.

- 1 the development of the doctrine of non-amendability,
- 2 the construction of a jurisprudence of public interest litigation, and
- 3 the expansion of fundamental rights protection through creative interpretation of Article 21 of the Constitution.

Under the first, the Apex Court has enumerated certain "basic features" of the Constitution that may not be amended under the procedures set out in the document. For example, judicial review is one such feature, which means that the authority of the Court to void acts of other political actors on grounds of unconstitutionality is itself immune from constitutional emendation. It has been held in the landmark **KESAVANANDA BHARATHI ruling of 1973, [(1973) 4 SCC 225]** that "Our Constitution is not a mere political document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. Likewise, a constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.

Public interest litigation, a signature achievement of Indian constitutional interpretation, and the principal vehicle by which the poor are granted access to the courts, embraces the idea that legal redress for the disadvantaged should not succumb to the exclusionary criteria of traditional adversarial jurisprudence.

Similarly, judicial interpretation of Article 21, which provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law,” has led to a vast extension of substantive rights.

Beginning soon after its inauguration in 1950, the Supreme Court has decided some thousands of cases, which involved a consideration of human rights.

In **A.K.GOPALAN vs. STATE OF MADRAS [AIR 1950 SC 27]**, the Supreme Court had upheld the Preventive Detention Act, 1950, as the Constitution itself permits preventive detention to deal with persons whose acts threatened the very fabric of society. This decision was held not to be a good law in **R.C.COOPER vs. UNION OF INDIA [AIR 1970 SC 564]**. and since then, in many decisions, a wide meaning has been given to the words 'life and liberty' in Article 21.

In **HUSSAINARA KHATOON vs. STATE OF BIHAR [AIR 1979 SC 1360]**, it has been held that a system of criminal procedure which did not prescribe a speedy trial could not be said to be either fair or reasonable. By this, the Supreme Court has ordered the immediate release of persons who had been detained longer than the maximum sentence they could have suffered had they been convicted. It has also been held that bail cannot be refused to indigent persons who are unable to procure a solvent surety. It was, however, only the first step. In **COMMON CAUSE vs. UNION OF INDIA [AIR 1996 SC 1619]**, the Apex Court observed that it was necessary to give directions to all States and Union Territories to ensure that criminal proceedings did not operate as engines of oppression and under the elaborate directions given, persons were ordered to be released on bail only on a personal bond if they had remained in custody a certain time, the time being laid down with reference to the maximum sentence that could be imposed under the offence with which they were charged. In the case of less serious offences such as traffic offences, or compoundable offences or non-cognizable offences, the accused were to be discharged if they had been under detention for specified periods of time, however, the directions were not to apply to certain graver offences.

In **PREM SHANKAR vs. STATE OF DELHI [AIR 1980 SC 1535]**, strict guidelines on when an under trial or prisoner being taken to a Court could be handcuffed were laid down.

In **AHIL BHARATIYA SSOSHIT KARAMCHARI SANGH vs. UNION OF INDIA [(1981) 1 SCC 246]**, it has been held that 'in matters of promotion reservation of posts for SC & ST candidates is not unconstitutional.'

In **MITHU vs. STATE OF PUNJAB [AIR 1983 SC 473]**, the mandatory death sentence required under Section 303 IPC to be imposed on a life convict who was convicted of murder has been held to violate both Article 14 and 21.

In **MANEKA GANDHI vs. UNION OF INDIA [AIR 1978 SC 597]**, the Court reiterated that the right to travel abroad was a part of the right to life guaranteed by Article 21 and laws empowering the seizure of passports had to be procedurally reasonable, providing for a hearing and imposing an obligation to give reasons. It has also been held that 'the principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of the rules of natural justice.

In **UNNIKRISHNAN vs. STATE OF A.P. [(1993) 1 SCC 645]**, it has been held that primary education is a fundamental right and this aspect still holds field despite the decision having been overruled on some other aspects in **TMA FOUNDATION vs. STATE OF KARNATAKA [(2002) 8 SCC 481]**. Moreover, Article 21-A added to the Constitution makes education the fundamental right.

In **P.A.INAMDAR vs. STATE OF MAHARASHTRA [(2005) 6 SCC 537]**, it has been held that 'right to impart education is a fundamental right under Article 19(1)(g), subject to control by Article 19(6) and the said right is available to all citizens without drawing a distinction between minority and non-minority.

In **VISHAKA vs. STATE OF RAJASTHAN [AIR 1997 SC 3011]**, the Honourable Supreme Court declared sexual harassment of a working woman at her place of work as amounting to violation of rights of gender equality and right to life and liberty, which is a clear violation of articles 14,15 and 21.

In **APPAREL EXPORT PROMOTION COUNCIL vs. A.K.CHOPRA [(1999) 1 SCC 759]** that Article 14 as guaranteeing equality in the workplace and by holding that sexual harassment in the workplace is a denial of the right to equality at the workplace for women.

In **NILABNATI BHERA VS. STATE OF ORISSA [(1993) 2 SCC 746]**, the Honourable Apex Court hailed the right of compensation in the cases of custodial deaths as a significant contribution to the protection of human rights. It is also held that public bodies and officials are expected to perform public duties properly and refrain from unlawful actions that are likely to violate individual rights under Article 21 of the Constitution.

In **D.K.BASU vs. STATE OF WEST BENGAL [(1997) 1 SCC 416]**, the Honourable Apex Court laid down safeguards against custodial torture, which are considered valuable in protecting the rights of prisoners.

In the **STATE OF HIMACHAL PRADESH vs. RAGHUVIR SINGH [(1993) 2 SCC 622]**, the Honourable Apex Court, dealing with a rape case, has held that conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence.

You all might have seen the newspapers of Saturday i.e. 13.10.2012, which carried the judgment of the Honourable Apex Court delivered on 12.10.2012. While dealing with a matter of acquittal of an accused by the Allahabad High Court in a rape case, who was originally awarded death penalty by the trial Court, speaking for the Bench, His Lordship The Honourable Mr.Justice P.Sathasivam, expressing concern at the devastating increase in rape cases and offences against women, has held that 'Courts should be more cautious in appreciating the evidence and the accused should not be left scot free merely on flimsy grounds.'

In **S.GOPAL REDDY vs. STATE OF ANDHRA PRADESH** [(1996) 4 SCC 596], the definition of the expression "dowry" was held as not confined merely to a demand made at or after the performance of marriage. A demand for dowry which is relatable to a proposal of marriage was also construed as a demand of dowry under the Act, even if, as a result of this demand, the marriage did not take place.

In **MILKMEN COLONY VIKAS SAMITHI vs. STATE OF RAJASTHAN** [(2007) 2 SCC 413], the Honourable Supreme Court has held that 'clean surroundings lead to a healthy body and healthy mind and thus living in clean and healthy surroundings is a right enshrined under Article 21 of the Constitution'.

In **E.V.CHINNAIAH vs. STATE OF A.P.** [(2005) 1 SCC 394], it has been held that 'a person does not even cease to be a Scheduled Caste automatically even on his conversion to another religion.' It has also been held that instead of sub-classifying the Scheduled Castes, if benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training as to enable them to compete with others.

The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure by Amendment Acts of 1999 and 2002 was rejected by the Honourable Apex Court in **Salem Advocate Bar Assn. v. Union of India** [(2003) 1 SCC 49] but it was noticed in the judgment that modalities have to be formulated for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments, may have to be operated. All these have been clarified by the Honourable Apex court in the subsequent judgment in **Salem Advocates Bar Association vs. Union of India** [(2005) 6 SCC 344] whereunder Case Flow Management was mooted. This basically intends to reduce the number of suits filed in the courts every year. The case has been referred to in numerous cases of civil nature after the amendments by the Act of 1999 and 2002. Moreover, the model provided to be followed by the trial court is an easily practicable model and does show the 'bright light of proper and speedy justice in the darkness of innumerable cases'. The rules provided in the model are appropriate for the system of Indian Judiciary and hence should be properly followed.

After the amendment of CPC, the controversy with regard to right of the defendant to file his written statement after the prescribed 90 days, was clarified by the Honourable apex Court in very many judgments. To quote one, in **Zolba vs. Keshao, reported in AIR 2008 SC 2099**, the Honourable Apex Court has held that

"The proviso to Order 8 Rule 1 CPC is not mandatory in nature. It would be open to the court to permit the defendant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice."

With regard to execution, post CPC amendments, the position has been clarified by the Honourable Apex Court. In **Mohit Bhargava vs. Bharat Bhushan Bhargava** reported in AIR 2007 SC 1717, the Honourable Apex Court has held that:

"A decree can be executed by the court which passed the decree so long as it is confined to the assets situate within its own jurisdiction or as authorised by Order 21 Rule 3 or Order 21 Rule 48 CPC or the judgment-debtor is within its jurisdiction if it is a decree for personal obedience by the judgment-debtor. The position as to when the property sought to be proceeded against is outside the jurisdiction of the court which passed the decree acting as the executing court has been settled by Amendment Act 22 of 2002 with effect from 1.7.2002 by adopting the position in Section 39(4) that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 CPC shall be deemed to authorise such court to proceed with the execution. Hence, it can no longer be contended that it is a matter of discretion for the court either to proceed with the execution of the decree or to transfer it for execution to the court within the jurisdiction of which the property is situate."

The procedure to be adopted by the Court in matters of retracted judicial confession under Section 164 of the Criminal Procedure Code has been dealt with, in a vivid manner, by the Honourable Apex Court in **Aloke Nath Dutta vs. State of West Bengal** reported in (2008) 2 SCC (criminal) 264. In this judgment, *inter alia*, it has been held that:

"Court should look at retracted confession with some amount of suspicion and should be slow and cautious in accepting the same. Except where there is per se evidence of motivating factors of retraction or retraction is based on extraneous circumstances, Court should probe deeper to find whether it was voluntary and truthful or was obtained by inducement, threat or torture. In absence of any objective evidence verifying conditions in which confession was retracted, court should extend the spirit of Section 24 Cr.P.C. and give the accused benefit of doubt. Courts should be guided by their past experience and decisions rendered by superior courts."

With regard to the principles to be adopted by the Court while dealing with an 'approver', the Honourable Apex Court in **Mrinal Das vs. State of Tripura** reported in (2011) 3 SCC (criminal) 810, has held that:

"though a conviction is not illegal merely because it proceeds on un-corroborated testimony of an approver, yet universal practice is not to convict upon testimony of an accomplice unless it is corroborated in material particulars. Insistence upon corroboration is based on rule of caution and is not merely a rule of law. Corroboration need not be in form of ocular testimony of witnesses and may even be in form of circumstantial evidence. Once evidence of approver is held to be trustworthy, it must be shown that story given by him so far as an accused is concerned, must implicate accused concerned in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. However, where evidence of approver is found unreliable, worth of his evidence is lost and such evidence, even by seeking corroboration cannot be foundation of conviction."

In ***State (National Capital of Delhi) vs. Navjot Sandhu***, reported in **2005 Criminal Law Journal 3950**, the Honourable Apex Court has considered, in depth, the recovery factor under Section 27 of the Evidence Act and held that 'fact discovered must be in consequence of information received from accused, and said fact should not have been within prior knowledge of police and the said information should be free from any element of compulsion.'

This brief and very selective analysis would show a pronounced change in the perspective of the Apex Court towards some human rights and Articles 21, 23 and 24 have been given a very wide construction and the Supreme Court has adopted innovative techniques of interpretation, referring to general principles, international conventions and, the Directive Principles while interpreting these Articles and virtually incorporating them into Article 21 in particular. This has resulted in some rules of social justice, which were to be found in the Directive Principles, becoming enforceable.

In recent times, the Supreme Court has through public interest litigation initiated and intervened in many matters of civic concern such as pollution, hygiene, etc. To ensure that executive functions are properly performed. In all these six decades, the Supreme Court has shown its independence and ensured that the legislative and executive branches remain within the framework of the Constitution. No doubt, this great tradition will continue for the future generations also. But, one thing is clear that the Honourable Supreme Court has proved to be a steady and consistent upholder of the intentions of the Constitution and the people of this great country and is tireless in upholding fundamental rights, which are the hallmark of a civilized society and in interpreting and enforcing those provisions of the Constitution which preserve a democratic society.

We all know how the Supreme Court is taking serious view of the corruption in the society, and monitoring investigations in the high level scams and thus standing as a guiding factor for the entire judiciary in the country.

With this, I resume my seat.
Thank you one and all.