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PATIENTS OVER PATENTS

Imagine! How beautiful that world would have in which the professionals would have been more anxious about public health rather than their own gains. what if they had suspended their intellectual property rights in an emergency for the sake of humanity? Not so many lives would have been seen agonizing on the roads. But unfortunately, in this unfortunate situation of global pandemic the patentees are more concerned of their own profits than the public health.

The intellectuals are divided on the contentious issue of the suspension of Intellectual property rights and the protection of Public health. India and South Africa have floated an idea in the World Trade Organization of a patent waiver, overriding patent rules, allowing generic or other manufacturers to make vaccines and drugs till the people develop "herd immunity" and the pandemic is declared over. Hundreds of countries have come out in favour of India and South Africa. Many noble laureates, health advocates and human rights bodies also advocated for the patent waiver. However, the rich countries. Although USA and Europe have indicated that they are considering to support India, are reluctant to vote for the same because of their vaccine hoardings or vaccine nationalism and the plea to revoke intellectual property rights have so far been ineffective.

Consequently, disturbing figures are coming out about the disparity in vaccination. To vaccinate about 70% of the total population, the world needs more or less 11 billion doses of the vaccine. presuming two doses per capita. Extraordinarily, more than 8.6 billion orders have been corroborated. But around 6 billion of these vaccines will go to rich countries, and the rest to the poor countries from where 80% of the population belong to.

The People vaccine alliance reported that only 1 of the 10 people are likely to get vaccinated till the end of this year in 70 developing countries, while the Global North which accounts only 14% of the worlds' population, has procured 3 times more vaccines than they require and has acquired more than half i.e. 53% of the total anticipated vaccines. A Country like Canada has reserved enough vaccine to vaccinate its citizen 5 times over, and no one knows about what has been written in kismets of 67 poor countries.

THE PREVALENCE OF PUBLIC HEALTH OVER PRIVATE PATENT IN THE LEGAL

Gold identifies three broad approaches to conceptualising the relationship between patent rights and human rights:

• The "Integrated approach," which positions patents as a human right.

• The "Coexistence approach," which contends that while patent law and human rights law are distinct, they share a fundamental concern in determining the optimal amount of patent protection needed to incentivize and practise socially useful innovation.

• The "Subjugation approach," which states that human rights considerations should prevail over patent law when patent rights and human rights conflicts

The "Subjugation approach" seems to be a perfect way to determine the confrontational relationship of patents and public health. The aforesaid approach never means to abolish or obliterate all the patent rights; rather it establishes the necessity and the essentiality of the public health when it is confronted with patents. Unsurprisingly, this is the same thing the laws endorse for.

There are many provisions in different conventions and declarations which confirm that the public health is always to be given priority when it is needed and indeed having an upper hand.

Article 12 of The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises "the right to the highest standard of physical and mental health and makes it a necessity for the state parties to prevent, to treat and to control epidemic, endemic, occupational, and other diseases." While the Article 25 of the Universal Declaration of Human Rights (UDHR) declares "a standard of living adequate for the health and well-being of himself and of his family" to be a human right.

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement itself states in its Article 7 that the protection of intellectual property rights should go hand in hand with the socio-economic welfare. And a balance of rights and duties must be maintained."And Article 8.1 of the same agreement references the same thing in a more lucid and strong manner giving all the rights the TRIPS members to take every step which as long as is for the protection of public health and is in accordance with the terms and condition of TRIPS agreement.

The WTO ministerial conference also known as Doha declaration proved all the arguments of public health and private patents outlandish. And "Conclusively remarked"that intellectual property rights are undoubtedly crucial for the acceleration of the drugs and medicines. But its effects on the prices cannot be unforeseen. Which are undeniably an obstacle for the developing countries as the patents and the high medicine prices are correlated. The Doha declaration then recognized the issue of public health and private patent and declared that the TRIPS agreement cannot restrict the signatories from taking measures to protect public health. And the agreement should be enforced in a manner that the public health could be protected along with access to medicine for all.

It prioritised the considerations of public health and clarified that it does not only apply to certain selected provisions of TRIPS but extends over the whole of TRIPS agreement. The phrase "measures to protect public health"applies not only to medications, but also to vaccines, diagnostics, and other health resources required to make these items easier to use. Thus, the primacy of the public health can clearly be seen over private patent.

People's Vaccine: The Suggestion, The Solution.

People's Vaccine is critical for bringing the Covid-19 pandemic to an end. Because it can be mass-produced, distributed fairly, and made available to all people regardless of their status in all the countries. It can also enable the production of billions of additional doses in the shortest amount of time, ensuring availability and accessibility everywhere round the globe.

To enforce People's Vaccine, the government of all around the world should endeavour to

• Support the idea put forward by India and South Africa to waive off some patent rules of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)

• Protect public health by preventing monopolies on vaccine while making sure the sharing of "Know-How" and all the relevant information about the same

• Allocate the vaccines fairly to both developing and developed countries. As the discriminatory distribution of the same has already created a blatant gap and hundreds of people are dying every day

• Ensure the transparency in the process

• Provide the vaccine for free or for a price that could be affordable by the very last member of the society

The pharmaceutical companies argue that the suspension of intellectual property rights would put the kibosh on innovation and technology because they spend billions in the process of vaccine-making and take substantial risk. However, this is not the truth.

First of all, suspending the intellectual property rights does not mean bulldozing the companies into loss. But to avail the vaccine at a Reasonable price considering the investments the companies have made. Now please don't tell me that making an 80% profit margin is reasonable. Second, vaccine like Oxford-AstraZeneca is 97% publicly funded. And the governments have spent 93 billion. Which is people's money, on corona vaccines. Thus, it is indeed a People's Vaccine.

CONCLUSION

While addressing the World Health Assembly, Geneva. Mrs Indira Gandhi rightly delivered that "My idea of a better-ordered world is one in which medical discoveries would be free of patents and there would be no profiteering from life or death". The monopolization of the vaccines has done nothing but subsequent denied drugs to poor people.

We could stop up the pandemic way earlier. But the Patent on drugs and related products put up a Price Tag on human life right from the very beginning. Rapid Testing Kit's patent took a very difficult test from the people in these testing times and made the pandemic last longer. The patent on the N95 mask made it difficult to take breath. I am frightened to hear the vaccine 1, Vaccine 2 and Vaccine 3 just like Covid wave 1, Covid wave 2 and so on……If all the people do not get vaccinated rapidly, quickly and speedily. The playing field is open to new strains that would continue to arise and would elude our current vaccines. Therefore, it's time for a new approach. This is important to realize our social and moral duty towards the society. The pharmaceutical companies must share their knowledge. Which is not really a new concept or something extremely out of the box. But this is how the flu vaccines are being dosed to the world by "Open Science" through the WHO's Global Influenza Surveillance and Response System (GISRS) from the last 50 years. Same goes with Polio Vaccine, which was not patented by its inventor, Jonas Salk. In an interview when he was asked about the reason behind it. he replied. "Well, the people, I would say. There is no patent. Could you patent the sun?" The answer is NO

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LITIGATION FINANCING: INDIA'S TIME IS NOW

INTRODUCTION

Litigation financing/ funding or third-party funding of disputes is an arrangement between a third party and a party to a litigation, where the former agrees to fund legal expenses in relation to the dispute, including legal counsel's fees, court fee, and other costs, in exchange for a share in the claim proceeds if it succeeds in the dispute. It is basically infusion of capital for furthering resolution of disputes, in litigation, arbitration and/or mediation.

Many a times, owing to the obvious hurdles that litigants face, meritorious claims get delayed or do not reach the courts due to the high costs of litigation. In such circumstances, third-party funding is advantageous for parties as it frees the value of a legal claim much prior to its recovery from the courts. This practice comes into picture especially where the plaintiff is not able to incur any expenses on the proposed litigation or where he is not willing to incur such expenses Moreover, with the aid of these third-party funders, parties in different disputes are able to seek better options, as they can then solicit better lawyers and firms to build their case. It is pertinent to note that a judgement which is in favour of the plaintiff would result into gain for the funder, while an unfavourable judgement leaves the funder out-of-pocket without any return.

LITIGATION FINANCING: INDIAN PERSPECTIVE

Although there is no piece of legislation that oversees or regulates litigation financing for litigations and/or arbitrations in India, this concept has recently garnered much attention within the Indian legal field. However, before delving into the recent developments, it is pertinent to understand the position of law in relation to litigation financing.

The Code of Civil Procedure, 1908 (CPC) does not expressly prohibit litigation financing in India. Under Order XXV, Rule 3 of the CPC, the concept of litigation financing has been allowed in few states such as Maharashtra, Gujarat, Karnataka and Madhya Pradesh, through their respective state amendments. It expressly acknowledges the role of the funder and sets out the situations when such funder may be made a party to the proceedings.

The concept of litigation financing is not entirely new and can be traced back to the common law doctrines of champerty and maintenance. Maintenance refers to funding of disputes by an unconnected third party, whereas champerty refers to financing of disputes by third parties in exchange for a share in the profits. As early as 1876, the Privy Council in the case of Ram Coomar Coondoo v. Chaunder Canto Mukherjee, observed that champertous agreements would only contravene public policy of India if they were inherently inequitable, unconscionable, and not made with malafide objects of supporting a claim. However, in Lala Ram Swarup v. Court of Wards, the Privy Council held that an agreement to finance a dispute in consideration of receiving a share in the property, would not per se be illegal and opposed to public policy, and that regard must be given to not just the value of the property claimed but to the commercial value of the claim.

In this context, the last few decades have witnessed the Indian Courts deviating from the common law decisions, as for instance, the Hon'ble Supreme Court of India in the case of Re: Mr 'G' A Senior Advocate v. Unknown heldthat the strict rules of maintenance and champerty as enshrined in common law are not applicable in India and agreements of champertous nature will not per se be violative of public policy as long as advocates are not part of such transactions. Nevertheless, in following years, some courts have held that while champertous agreements are legal under the Indian

laws, the same could become unenforceable under certain conditions and that they could be violative of public policy if on the face of the agreement, the object of the agreement was unlawful.

Among these decisions wherein the enforceability of litigation financing could only be inferred in between the lines of the decisions, the Hon'ble Supreme Court's decision in Bar Council of India v. A.K. Balaji marked a paradigm shift, as it expressly clarified the legal permissibility of litigation financing and observed that "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation."

It is crucial to note that advocates cannot seek contingency fees or even share the results of litigation and are therefore, prohibited from financing the litigation costs of a party as per Rule 20 of Section 2 of the Bar Council of India Rules (Standard of Professional Conduct and Etiquette). Further, the Arbitration and Conciliation Act, 1996 makes no mention of third-party funding, hence any possible third-party funding agreement would largely depend on it being a valid contract under the Indian Contract Act, 1872. However, a favourable reference to litigation financing has been given by the 'High Level Committee to review the Institutionalisation of Arbitration Mechanism in India' in its report.

LITIGATION FINANCING: INTERNATIONAL PERSPECTIVE

With the passage of time, litigation financing has ceased to be considered as a crime and has been an acceptable practice in many jurisdictions around the world. For instance, England and Wales abolished the classification of champerty and maintenance as crimes under the Criminal Law (Amendment) Act, 1967. Similarly, the Code of Conduct for Litigation Funder was published by the Civil Justice Council – an agency of the UK's Ministry of Justice – in November 2011, and the Association of Litigation Funders were charged with administering self-regulation of the industry. Additionally, in a landmark decision of Essar Oilfields Services Ltd. v. Norscot Rig Management, the England and Wales High Court upheld the arbitrator's decision to allow the successful claimant to recover its third-party litigation costs from the losing party as 'other costs' under section 59(1)(c) of the Arbitration Act, 1996. Similarly, in the case of UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and Road Haulage Association Limited v. Man SE, the Competition Appeal Tribunal described third-party litigation funding as a well-recognised feature of modern litigation which facilitates access to justice for those who otherwise may be unable to afford it.

Notably, in 2017, the Paris Bar Council also indicated its support for litigation financing by passing a resolution stating that the same is not prohibited by French Laws. The resolution confirmed that litigation financing is in the interests of both clients and counsel, particularly in the context of international arbitration.

Even Singapore, in March, 2017, promulgated the Civil Law (Amendment) Act, 2017 along with the Civil Law (Third Party Funding) Regulations, 2017 which confirmed that the use of third-party funding in litigation and arbitration was not contrary to public policy or illegal, if used by eligible parties and in the categories so reserved for its use. Similarly, Hong Kong amended its legislation and enabled the third-party funding in arbitration and mediation.

Among these various jurisdictions, Australia has been the home to a proper litigation funding practices, wherein, litigation financing has been actively used in insolvency claims and even civil and commercial disputes. The first instance wherein an Australian Court validated litigation financing was Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited, wherein the High Court of Australia held that litigation funding of a class action was not an abuse of process or against public policy. The said trailblazing case opened new doors for the Australian legal system. The Australian Securities and Investments Commission Act, 2001, has laid down that as providers of financial services and credit facilities under the said Act, funders are prohibited from stipulating unfair contract terms, and performing misleading, deceptive and unconscionable conduct. The provisions of the said Act inter

alia, also provide avenues for redress against unfair or false and misleading terms in the funding agreements.

WAY FORWARD

It is incontrovertible that in a fast-pacing world like todays, where there is liberalisation of economic policies and countries openly invite foreign investments, a progressive legal framework that would augment dispute resolution is crucial. The process of traditional litigation is expensive and time consuming, and resultantly many a times, parties forego the route of legal redressal. Litigation funding in such a case acts as the perfect alternative by aiding disputing parties in seeking a proper legal recourse and access justice. Although currently, there does not exist any formal regulation for this practice, the recent interest in the same is certainly promising.

Moreover, while the concerns of the Courts predicate upon the shared belief that these fundings could subvert the legal process by promoting vexatious claims, suborning witnesses, or debilitating the integrity of public justice. One should also bear in mind that third party funders invest a lot of time and resources in studying the cases they choose to fund, and only invest in ones with high chances of success. Moreover, litigation financing facilitates not only access to justice but could also play a role in cases of insolvency and is therefore needed today more than ever. Where the country, just like the rest of the world is battling with the outbreak of Covid-19 pandemic, cash flow for many businesses is not adequate, thereby rendering pursuing legal remedies onerous. Pursuing litigation has always been arduous for parties and one cannot deny that with litigation financing, the road to recovery from the aftermath of the pandemic will undoubtedly be easier, if not smoother.

Resultantly, a proper and precise legal framework regulating these fundings is required to make proper use of its potential. Due to the negligible laws regulating litigation financing, there is a blank canvas available to the legislator and this canvas can be painted by colours of any choice. A proper regulation that stipulates the requisites a third party funder has to meet before entering into the agreement, such as ensuring that it has adequate financial resources to fund the disputes, paying the debts when they become due and payable, a provision that lays down the procedure to be followed in case a conflict ensues between the funder and the client, etc., are some provisions that would certainly help in laying the foundation for litigation financing without damaging the sanctity of civil justice system in India.

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COMPLIANCE DUTY FOR COVID-19 MASK NORM HIGHER FOR ADVOCATES, CANNOT BE AN EGO

While dismissing a petition by four advocates challenging the Delhi government's order to wear masks as part of Covid-19 protocol even while travelling alone in a personal vehicle, the Delhi High Court as recently as on April 7, 2021 has observed without mincing any words in a strongly worded judgment titled Saurabh Sharma vs Sub-Divisional Magistrate (East) & Ors. in W.P.(C) 6595/2020 & CM APPL. 23013/2020 that, "Advocates as a class owing to their legal training have a higher duty to show compliance especially in extenuating circumstances such as the pandemic. Wearing of masks cannot be made an ego issue." If advocates who are the biggest upholders of law and who are the officers of the court and the real crown of the judicial system themselves start disregarding the rule of wearing masks at a time when the corona pandemic has engulfed nearly all the countries and has killed more than lakhs of people in India itself, then what message will go out to others? People in general will also start emulating the lawyers and this can have a cascading effect in spreading this deadly virus all across! So it merits no reiteration that complacency of any score on this front cannot be condoned under any circumstances!

Needless to say, this alone explains why a Single Judge Bench of Justice Pratibha M Singh who authored this extremely brilliant, brief, bold and balanced judgment too underscored that due to their legal training, advocates and lawyers were expected to aid measures to contain the pandemic rather than "questioning the same". It is the bounden duty of all the lawyers all across the country to adhere unflinchingly to what Justice Pratibha M Singh of the Delhi High Court has held so elegantly, eloquently and effectively! There can be no denying it.

To start with, a Single Judge Bench of Justice Pratibha M Singh of the Delhi High Court sets the ball rolling by first and foremost pointing out in para 1 that, "These are four writ petitions filed challenging the imposition of fine of Rs.500/-, on the Petitioners, for non – wearing of face masks while travelling alone in a private car. The brief facts of each of the cases are captured below."

While elaborating on the petitioner's case, the Bench then puts forth in para 2 that, "In W.P.(C) 6595/2020, the Petitioner's case is that he is a practicing advocate for the last 20 years. On 9th September, 2020, at about 11.00 A.M., he was driving a Honda City DL 13CC 1479, and was stopped by the police near Geeta Colony, New Delhi. It is not disputed that he was travelling alone in his car. After the car was stopped, an Executive Magistrate, along with a Police Constable and a Delhi Police Inspector, informed the Petitioner that a fine of Rs. 500/- is being imposed on him for not wearing a mask in a public place. The Petitioner challenged such imposition of fine before the officials, on the ground that since he was travelling alone in his car, the said car does not constitute a public place and would be a private zone. Accordingly, it is prayed that the challan bearing challan no. 2993, dated 9th September, 2020, be quashed and the amount of Rs. 500/- be refunded. In addition, compensation of Rs.10,00,000/- is sought on the ground of alleged mental harassment publicly caused to the Petitioner."

To put things in perspective, the Bench then elucidates in para 3 stating that, "In W.P.(C) 8455/2020, the facts are that the Petitioner is a lawyer who was stated to be on his way to his chambers at Tis Hazari Courts, around 12.00 noon on 9th August, 2020. He was driving his privately owned car, a Maruti Suzuki Swift and was stopped near Aruna Asaf Ali Hospital, Rajpur Road, Civil Lines by the Police. The Petitioner was in his car travelling alone, with his mask hanging on his face, from one of his ears. The case of the Petitioner is that since he was in his car alone, he had not put the face mask on and that he had intended to wear the mask as soon as he stepped out of the car. It is highlighted that the four windows of the Petitioner's car were closed. When the police official stopped his car, he was

informed that the non-wearing of mask by him is in violation of the Delhi Epidemic Diseases (Management of COVID-19) Regulations, 2020 (hereinafter referred to as 'the Regulations of 2020') and a sum of Rs. 500/- was imposed on him as fine. In this petition, apart from quashing of challan bearing challan no. A22062, dated 9th August, 2020, a declaration is sought to the effect that privately owned cars are private places for the purpose of the Regulations of 2020. Apart from refund of the amount of Rs. 500/- paid by the Petitioner as fine, a compensation of Rs. 5,00,000/- is sought in the present petition for mental harassment."

While continuing in a similar vein, the Bench then enunciates in para 4 stating that, "The Petitioner in W.P.(C) 8588/2020 is also a practicing advocate who states that he was crossing Vikas Marg area near Laxmi Nagar Metro Station on 20th August, 2020 in his privately owned car, with all windows of the car closed. However, officials of the Delhi Police stopped his car on the ground that he was not wearing a face mask in his car. Similarly, an amount of Rs. 500/- was imposed on him as fine for violations of the Regulations of 2020. In this case, a direction is sought that the Respondent-Authorities ought not to fine people for not wearing a face mask while in their own car. Refund of Rs. 500/- is sought, along with compensation of an unascertained sum."

Of course, the Bench then states in para 5 that, "In W.P.(C) 9408/2020, the Petitioner is a lawyer stated to be practicing at Karkardooma Courts, New Delhi. On 25th October, 2020, he was travelling in his i-10 Grand bearing no. DL8CAE1725, along with his wife and had reached a spot in front of the of D.C. Office, Nand Nagri at about 1.50 P.M. It is stated that a Civil Defence Personnel forced him to stop his car. After the Petioner's car was stopped, the Civil Defence Personnel, along with a member of the Enforcement Team of SDM, Shahdara, informed him that since he is not wearing a face mask but only a cotton safa/dupatta/scraf around his mouth and nose, he would be liable to pay a fine of Rs. 500/-. In this petition also, quashing of the challan dated 25th October, 2020 is prayed for. Along with the quashing of the challan, a refund of Rs.500/- paid as fine is prayed for, as also compensation of Rs. 10,00,000/- for the harassment and insult allegedly caused to the Petitioner, and for alleged misuse of legal provisions to exhort Rs. 500/- from the Petitioner."

As a corollary, the Bench then holds in para 6 that, "From the facts of the above four cases, it is clear that in two of the cases, the Petitioners were not wearing any face masks; in one of the cases case, the Petitioner had a mask which was dangling from one of his ears; and, in the fourth case, the Petitioner was not wearing a mask, but was wearing a safa/dupatta/scraf covering his nose and mouth."

As we see, the Bench then while elaborating on the questions arising in these writ petition states forth in para 7 that, "The questions which arise in these writ petitions are three-fold. First, whether it is compulsory for persons driving alone in their own private cars to wear face masks and the manner in which such masks ought to be worn. Secondly, if as per the various guidelines, orders and notifications issued, the fine imposed on the Petitioners is valid and legal. Thirdly, if any compensation is liable to be granted."

After hearing the submissions from both sides, the Bench then observes in para 23 that, "From the submissions made herein above, broadly three issues arise –

i. What is the ambit of the power to issue guidelines under the provisions of EDA and DMA?
ii. Whether under the guidelines which have been issued under the April Order by the DMA and June Notification, wearing of face masks is compulsory even when an individual is travelling in a privately owned car. If so, in what manner is the face mask to be worn?
iii. Whether the Executive Magistrates who have issued the challans and imposed the fines of Rs. 500/- each were properly authorised in law?"

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SIGNIFICANT SUPREME COURT JUDGEMENTS PASSED RECENTLY

The Supreme Court of India has pronounced numerous judgments from January, 2021 to May, 2021. In this write-up, some of the important pronouncements are briefly discussed.

BHAVEN CONSTRUCTION V. EXECUTIVE ENGINEER SARDAR SAROVAR NARMADA NIGAM LTD. & ANR., CIVIL APPEAL NO. 14665 OF 2015

A Bench of Justices N.V. Ramana, Surya Kant and Hrishikesh Roy observed that it is prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under an enactment. The Bench held that the power of the High Courts under Article 226 and 227 of the Constitution of India to interfere with an arbitration process needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear bad faith is shown by one of the parties. The high standard set by the Court is in terms of the legislative intention to make the arbitration fair and efficient. The Bench also set aside the judgment of Gujarat High Court by allowing a writ petition challenging the jurisdiction of the arbitrator.

CHINTELS INDIA LTD. V. BHAYANA BUILDERS PVT. LTD., CIVIL APPEAL NO. 4028 OF 2020

A Bench of Justices R. F. Nariman, Navin Sinha and K.M. Joseph held that an appeal under section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under section 34 of the Arbitration Act, 1996 to set aside an award. The Bench observed that it is important to note that the expression "setting aside or refusing to set aside an arbitral award" does not stand by itself. The expression has to be read with the expression that follows "under section 34". Section 34 is not limited to grounds being made out under section 34 (2) and a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been condoned under sub-section (3) of section 34 would certainly fall within section 37(1)(c).

LAXMIBAI CHANDARAGI & ANR. V. THE STATE OF KARNATAKA & ORS., WRIT PETITION CRIMINAL NO. 359/2020.

A Bench of Justices Sanjay Kishan Kaul and Hrishikesh Roy observed that educated younger boys and girls are choosing their life partners which in turn is a departure from the earlier norms of society where caste and community play a major role. This is the way forward where caste and community tensions will reduce by such inter marriage but these youngsters face threats from the elders and the Courts have been coming to the aid of these youngsters. The consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock and that their consent has to be piously given primacy. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. Such a right or choice is not is not expected to succumb to the concept of class honour or group thinking.

COMPACK ENTERPRISES INDIA (P) LTD. V. BEANT SINGH, SPECIAL LEAVE PETITION (CIVIL) NOS. 2224-2225 OF 2021

A Bench of Justices Mohan M. Shantanagoudar and Vineet Saran reiterated that a consent decree would not serve as an estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake. The Bench held that in the exercise of its inherent powers it may also unilaterally rectify a consent decree suffering from clerical or arithmetical errors, so as to make it conform with the terms of the compromise. The Bench observed that it has to be cautious in exercising the inherent power to interfere in the consent decree, except where there is any exceptional or glaring error apparent on the face of the record.

RACHNA & ORS. V. UNION OF INDIA & ANR., WRIT PETITION (CIVIL) NO(S). 1410 OF 2020

A Bench of Justices A.M. Khanwilkar, Indu Malhotra and Ajay Rastogi reiterated that policy decisions are open for judicial review for a very limited purpose and the Supreme Court can interfere into the realm of public policy so framed if it is either absolutely capricious, totally arbitrary or not informed of reasons. The Bench observed that judicial review of a policy decision and to issue mandamus to frame policy in a particular manner are absolutely different. It is within the realm of the executive to take a policy decision based on the prevailing circumstances for better administration and in meeting out the exigencies but at the same time, it is not within the domain of the Courts to legislate. The Courts do interpret the laws and in such an interpretation, certain creative process is involved. The Courts have the jurisdiction to declare the law as unconstitutional. The Court is called upon to consider the validity of a policy decision only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution or any other statutory right.

APARNA BHAT & ORS. V. STATE OF MADHYA PRADESH & ANR. CRIMINAL APPEAL NO. 329 OF 2021

A Bench of Justices A. M. Khanwilkar and S. Ravindra Bhat observed that using rakhi tying as a condition for bail, transforms a molester into a brother, by a judicial mandate which is wholly unacceptable, and has the effect of diluting and eroding the offence of sexual harassment. The Bench further observed that the act perpetrated on the survivor constitutes an offence in law, is not a minor transgression that can be remedied by way of an apology, rendering community service, tying a rakhi or presenting a gift to the survivor, or even promising to marry her, and, the law criminalizes outraging the modesty of a woman. The Bench also issued a slew of directions in dealing with bail in sexual harassment cases and highlighted the need for sensitivity to be displayed by the judges in such cases. Some of the guidelines issued by the Bench were - bail conditions should not mandate, require or permit contact between the accused and the victim, such conditions should seek to protect the complainant from any further harassment by the accused; where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim; in all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days; bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr. PC, in other words, discussion about the dress, behaviour, or past conduct or morals of the prosecutrix, should not enter the verdict granting bail; the courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions or encourage any steps towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction; sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments; judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court; courts should desist from expressing any stereotype opinion, in words spoken during proceedings, or in the course of a judicial order, to the effect that women are physically weak and need protection, women are incapable of or cannot take decisions on their own, are the head of the household and should take all the decisions relating to family, women should be submissive and obedient according to our culture, good women are sexually chaste, motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother, women should be the ones in charge of their children, their upbringing and care, being alone at night or wearing certain clothes make women responsible for being attacked, a woman consuming alcohol, smoking, etc.

STATE OF GOA & ANR. V. FOUZIYA IMTIAZ SHAIKH & ANR., CIVIL APPEAL NO. 881 OF 2021

A Bench of Justices Rohinton Fali Nariman, B.R. Gavai and Hrishikesh Roy held that the State Election Commissioner has to be a person who is independent of the State Government as he is an important constitutional functionary who is to oversee the entire election process in the state qua panchayats and municipalities. The importance given to the independence of a State Election Commissioner is explicit from the provision for removal from his office made in the proviso to clause (2) of Article 243K. The manner and the ground for his removal from the office has been equated with a Judge of a High Court. Giving an additional charge of such an important and independent constitutional office to an officer who is directly under the control of the State Government is a mockery of the constitutional mandate. The Bench held that all State Election Commissioners appointed under Article 243K in the length and breadth of India have to be independent persons who cannot be persons who are occupying a post or office under the Central or any State Government. The Bench also held that if there are any such persons holding the post of State Election Commissioner in any other state, such persons must be asked forthwith to step down from such office and the State Government concerned be bound to fulfil the constitutional mandate of Article 243K by appointing only independent persons to this high constitutional office.

GOVERNMENT OF MAHARASHTRA (WATER RESOURCES DEPARTMENT) V. M/S BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD., CIVIL APPEAL NO. 995 OF 2021

A Bench of Justices Rohinton Fali Nariman, B.R. Gavai and Hrishikesh Roy held that the object of speedy disposal sought to be achieved under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13 (1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches. The Bench overruled the judgment in N.V. International v. State of Assam, (2020) 2 SCC 109 which held that a delay beyond 120 days for arbitration appeal under section 37 cannot be condoned.

AMWAY INDIA ENTERPRISES PVT. LTD. V. RAVINDRANATH RAO SINDHIA & ANR., CIVIL APPEAL NO. 810 OF 2021

A Bench of Justices Rohinton Fali Nariman and B.R. Gavai held that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country carry on business in India through a business office in India.

RAMESH BHAVAN RATHOD V. VISHANBHAI HIRABHAI MAKWANA MAKWANA (KOLI) & ANR., CRIMINAL APPEAL NO 422 OF 2021

A Bench of Dr Dhananjaya Y Chandrachud and M R Shah held that the Court granting bail cannot obviate its duty to apply a judicial mind and to record reasons, brief as they may be, for the purpose of deciding whether or not to grant bail. The consent of parties cannot obviate the duty of the High Court to indicate its reasons why it has either granted or refused bail. This is for the reason that the outcome of the application has a significant bearing on the liberty of the accused on one hand as well as the public interest in the due enforcement of criminal justice on the other. The rights of the victims and their families are at stake as well. These are not matters involving the private rights of two individual parties, as in a civil proceeding. The proper enforcement of criminal law is a matter of public interest. The Bench observed that grant of bail under Section 439 of the CrPC is a matter involving the exercise of judicial discretion. Judicial discretion in granting or refusing bail as in the case of any other

discretion which is vested in a court as a judicial institution is not unstructured. The duty to record reasons is a significant safeguard which ensures that the discretion which is entrusted to the court is exercised in a judicious manner. The recording of reasons in a judicial order ensures that the thought process underlying the order is subject to scrutiny and that it meets objective standards of reason and justice.

DR. JAISHRI LAXMANRAO PATIL V. THE CHIEF MINISTER & ORS. CIVIL APPEAL NO. 3123 OF 2020

A Constitution Bench of the Supreme Court comprising Justices Ashok Bhushan, S.A. Nazeer, L. Nageswara Rao, Hemant Gupta and S. Ravindra Bhat, while striking down the Maratha quota, held there were no exceptional circumstances justifying the grant of reservation to Marathas in excess of 50% ceiling limit as a socially and economically backward class. The Bench also held that there was no need to revisit the 50% ceiling limit on reservation laid down by the 9-judge bench decision in Indra Sawhney v. Union of India, 1992 Suppl. (3) SCC 217. The Bench observed that neither the Gaikwad Commission nor the High Court have made out any situation for exceeding the ceiling of 50% reservation for the Marathas.

GAUTAM NAVLAKHA V. NATIONAL INVESTIGATION AGENCY, CRIMINAL APPEAL NO.510 OF 2021

A Bench of Justices Uday Umesh Lalit and K.M. Joseph held that custody under Section 167 CrPC has been understood as police custody and judicial custody, with judicial custody being conflated to jail custody ordinarily. The concept of house arrest as part of custody under Section 167 has not engaged the courts, however, when the issue has come into focus, and noticing its ingredients, it involves custody which falls under Section 167. The Bench observed that under Section 167 in appropriate cases, it will be open to courts to order house arrest as well. The Bench observed that in order to house arrest a person, courts can consider criteria like age, health condition and the antecedents of the accused, the nature of the crime, the need for other forms of custody and the ability to enforce the terms of the house arrest.

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