

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU V. UNION OF INDIA: THE CASE THAT CHANGED THE COURSE OF CIVIL LITIGATION IN INDIA

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Abstract

The legislature in 1999 and 2002 came up with amendments to the Civil Procedure Code, changing the nature of the statute. These amendments provided for reforms which if uniformly implemented could further the aim of justice as envisaged by our Constitution makers. However, the practicability of the amendments was questioned and a report for the same was drafted. This report was challenged in the Supreme Court of India, in the case of *Salem Advocates Bar Association v. Union of India*. The court affirmed the amendments and upheld the report. The decision was appreciated by both academicians and scholars. However, despite the judgment bringing a change in civil litigation in India, it also suffered from certain flaws. Therefore, this paper aims to analyze the said judgment, focusing on both the pros and cons. The paper will also throw light on where the court went wrong and the loopholes in the judgment. It will also make a case for the judgment, and highlight the commendable aspects of the judgment.

Case Analysis:

Name of the Case: - Salem Advocate Bar Association, Tamil Nadu v. Union of India¹

Provisions Involved:-

- Section 26(2) of the Civil Procedure Code
- Rule 15(4) and Order VI read with Rule 15 of the Civil Procedure Code
- Order XVIII, Rule 4 of the Civil Procedure Code
- Order VIII, Rule 1 of the Civil Procedure Code
- Order VI, Rule 17 of the Civil Procedure Code
- Section 35 of the Civil Procedure Code

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¹ AIR 2005 S.C. 3353.

- Section 80 of the Civil Procedure Code
- Section 148 of the Civil Procedure Code
- Section 89 of the Civil Procedure Code

Brief Facts-

- I. A committee was formed to ensure that the 1999 and 2002 Amendments to the Civil Procedure Code are effectively implemented and result in quicker dispense of justice.
- II. The report was submitted in three parts,
 - (a) Consideration of various grievances
 - (b) Draft Rules for ADR and mediation
 - (c) Case management conferences
- III. The validity of this report and the amendments was challenged before the Court, in the matter.

Main Issue-

- I. Whether the 1999 and 2002 Amendments to the Civil Procedure Code were constitutionally valid?

Arguments/ Pleadings

The case in depth discussed the report put forward. The report was classified into three parts, each one of them was discussed in great lengths.

Report One-

- The Report discussed Section 26(2) and Rule 15(4) to Order VI, wherein it was contended that filing of an affidavit is illegal and unnecessary as there exists a requirement of filing verification.
- Another contention by the parties was that there is a conflict between Order XVIII, Rule 5(a) and (b) and Order XVIII, Rule 4. The conflict here, was that Order XVIII, Rule 5 provides for recording of evidence by the Court itself in appealable cases. However, Rule 4 and 19 of the same order enable the commissioner to record the statements in any case, notwithstanding any situation. Therefore, it appeared as if the latter provision overrode the former.
- The report also discussed an ambiguity that existed in Order VIII, Rule 1 of the Civil Procedure Code, with respect to time limit for filing of plaint.

- The report dealt with a very niche area in Court proceedings i.e. service of summons through courier. It was contended that the courier's report about the defendant's refusal to accept service is likely to lead to serious malpractice
- The parties also raised a contention with respect to the costs in a suit. It was contended that unscrupulous parties take advantage of the fact that either there is no awarding of costs by the Court or nominal costs are awarded on the unsuccessful parties. It was submitted that only costs which are reasonably incurred by successful parties should be granted.
- Section 80 of the Civil Procedure Code, was also brought into discussion wherein it was contended that prior notice should be served to the government before filing of a suit unless the matter is urgent and in need of an interim order.
- Section 148 of the Civil Procedure Code, was also mentioned wherein the power of Court to enlarge time was discussed. Reliance was placed on the case of *Mahanth RamDas v. Ganga Das*,² and it was submitted that extension should be provided if the act could not be provided within 30 days for reasons beyond the control of the party but not for acts where the Limitation Act provides for limits.

Report Two-

- The main contention by the parties in this part of the report, was with respect to Section 89 of the Code i.e. settlement of disputes outside Courts. The said Section provides the discretion to the Court as to if it deems fit, that certain elements can be settled between the parties, then the Court shall formulate those terms and send them for observation by the parties. However, there existed an ambiguity with respect to the applicability of the Arbitration and Conciliation Act³ and the CPC simultaneously. Relying on the case of *P Anand Gajapathi Raju v. P.V.G. Raju*,⁴ it was contended that if reference is made to arbitration under Section 89, the Arbitration Act will apply from the stage after reference and not before.

² Mahanth Ram Das v. Ganga Das, (1961) 3 S.C.R. 763 (India).

³ Arbitration and Conciliation Act, 1996 (India).

⁴ P Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 S.C.C. 539 (India).

Further, it was also submitted that even if the arbitration or any other proceeding is not successful, the Court would not be barred to try the suit afterwards.

Report Three-

This report dealt with introduction of case flow management and model rules. Model high court rules were provided for, which contained various regulations provided by the Committee.

Analysis-

Salem Advocate Bar Association v. Union of India, is a landmark judgment of the Supreme Court of India which has been relied by Courts and tribunals in over 700 judgments. The judgment is in furtherance to the aim of speedy justice and effective functioning of the judiciary. The judgment amounts to a good law and is unlike the usual kind, as it does not feature opinions of every judge as is witnessed in most of the judgments. The judgment has its commendable features but also has certain shortcomings, all of which are discussed in detail below.

The judgment is commendable for certain aspects which are discussed below-

1. No denial of justice on procedural grounds

The judgment allowed for acceptance of the proposal of adducing evidence at a later stage in trials mostly when certain evidence not known to the parties earlier emerges. Such an act of the court furthers its aim of justice instead of denying it on procedural grounds.

2. Deterrence from misuse of Court proceedings

The judgment needs to be appreciated for its stance on serving of summons. The court upheld the contention, that in cases of summons being served through courier and not being delivered, both the parties have to sign an undertaking that if such a claim by them is false then they will be charged for perjury and contempt of court. This step, acts as a deterrent against misleading the Court, as the parties are aware of the risk and have willingly signed it. Further, the concept of awarding costs reasonably keeping in mind the position of the parties and the course of litigation, is commendable in itself as the idea that the

losing parties in every circumstance have to bear the cost, will be negated. It will further lead to no frivolous claims being raised by any party, as they will be aware that they will be penalized for the same. The report has also taken into account various unforeseen circumstances that may come up before a party, providing for various extensions in form of time, so as to prevent denial of justice merely on procedural rigmaroles.

3. Case Flow Management

This judgment has also been revered for its idea of introduction of case management flow in the Indian judiciary. Case flow management despite being a nascent concept in India, is of central focus in the administration of judiciary in countries like the United States of America.⁵ Case flow management primarily includes number of processes, starting from filing of disposition to the dismissal or trial.⁶

However, the judges keeping in mind the diversity and difference in the administration of courts in India provided for a modified version of this feature. One such noteworthy modification was the division of cases in three tracks i.e. track one, two and three. The basis for such division seems to be the amount of time taken by the judge generally to decide such cases, keeping in view the subject matter in each case. Further, the judgment also provides the judges with discretion to categorise the matter accordingly and also change the track keeping in view the status of the case.

Such a modification provides for speedy disposal of cases and also gives the litigant an assurance of his case status. Further, it minimises the bureaucracy which the procedural rigmarole brings in with it.

4. Improvisation in Cause List of the Court

A common practice that prevails in the courts is of listing the cases to be heard in the cause list of the court. However, not even half of them are heard by the court on the allotted date. This problem is not just restricted to India as a similar instance

⁵ Robert J Brink, *Court Records- Review, Preservation, Storage and Access*, 73 LAW LIBR. J. 997(1980).

⁶ R WHEELER & H WHITCOMB, *JUDICIAL ADMINISTRATION: TEXT AND READINGS*, 161(Englewood Cliffs NJ: Prentice Hall 1977).

occurred in the Court of Hong Kong, where more than a 1000 cases were listed to be heard in a span of 3 days.⁷

In order to tackle such a problem, the Court has accepted the proposal that listing of cases should be based on reasonable estimate time i.e. the number of cases that can be reasonably heard in a day. Further, another proposal put forward was that every cause list should be first listed before a senior officer of the court, who shall review it before it is released.

Drawbacks in the Judgment

The judgment despite being one of its kind also suffers from certain flaws. The author has listed these drawbacks in this part of the paper.

1. Contradictory Stance

The judgment at various instances contradicts itself. For instance, paragraph 4 of the judgment does not consider an affidavit as an evidence for court purposes; however Order XIX Rules 1 and 2 of the code categorically provide the contrary. Hence, despite being a one of a kind judgment it suffers from certain contradictions in itself.

2. Departure from the doctrine of *Generalia Specialibus Non Derogant*

Another flaw in the judgment is its departure from settled doctrines. One such doctrine is that of *generalia specialibus non derogant*. The rule of *generalia specialibus non derogant*, is a settled doctrine and provides that in cases where two interpretations of a single law are present, the Court should let the specific one prevail over the other.⁸

Order XVIII, Rule 5 of the Code provides for recording of evidence by the Court itself in appealable cases. However, Rule 4 and 19 of the same order enables the commissioner to record the statements in any case, notwithstanding any situation. Therefore,

⁷ Chris Lau, *More than 1000 Court cases in three days- Hong Kong magistrate says it's close to absurd*, (Sep. 6, 2015, 7:30:45 PM) available at <http://www.scmp.com/news/hong-kong/law-crime/article/1856640/over-1000-court-cases-three-days-hong-kong-magistrate-says>.

⁸ Commissioner of Income Tax, v. Shahzada and Sons and Ors. A.I.R. 1966 S.C. 1342 (India).

the former provision is more specific in nature, as it deals with appealable cases alone. However, the Court in the judgment by allowing the commission to record any statement even including appealable cases has accepted the latter rule, hence overriding a specific interpretation over a more general one.

3. Special Grounds for appointing Court commissioner not provided

The judgment acknowledges the need to appoint court commissioners for recording evidences, when certain exceptional and special situations exist. However, the flaw here is that the Court has not listed what these ground will be, therefore leaving it to the discretion of the judges.

4. Anomaly between definitions of ‘mediation’ and ‘judicial settlement.’

Another flaw with the judgment is that it creates an anomaly by mixing up the definitions of ‘mediation’ and ‘judicial settlement’ under Clause (c) and (d) of Section 89(2).⁹ Clause (c) of the said Section states provides the Court with the power to refer a matter to a person who is qualified and deemed to be a Lok Adalat. Further, on similar lines with respect to compromises in mediation it uses a similar procedure.

However, the above stated view of the Court goes against the settled definition of mediation, wherein a neutral third party assists the parties in dispute to reach an amicable solution without resorting to trial.¹⁰ Contradictorily, the stance of the court in the present case gives it the upper hand.

Further, the procedure for judicial settlement provided by the Court here is also twisted. Judicial settlement primarily involves adjudication by a judge not assigned officially to adjudicate on the matter.¹¹ The Court, on the contrary here, provides for a person whose qualifications and nature is nowhere specified, leaving lacunae again.

⁹ Justice R Raveendran, *Alternate Dispute Resolution under Section 89 of the Code of Civil Procedure Rules*, (Sep. 8, 2015, 6:30:54 PM) available at <http://www.legalblog.in/2011/09/alternate-dispute-resolution-under.html>.

¹⁰ Arammal Parkum A.B. & Ors. v. Panangadan Vachali Subhadra & Ors., 2008(2)K.L.J. 508 (India).

¹¹ Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors., (2010)8S.C.C. 24 (India).

5. Procedure envisaged goes against the basic premise of Alternative Dispute Resolution Forum

A plain reading of Section 89(1) provides that every judge before framing issues is required to identify whether there exists any element of settlement which the parties may accept. This procedure is then followed by the formulation of the term of settlement, a reference to the parties and final handing over to the dispute resolution mechanism so chosen.

However, the problem this mechanism puts forward is that since, the entire procedure of settlement is already handled by the Court, there is barely anything left to be done by the arbitrator, mediator, or the adjudicator. Therefore, it allows for the judge to step into the shoes of the above named.

Suggestions

- **Revision of the deadline for filing a plaint**

The Court accepted the proposal of the Report, that the judge has the discretion to accept the plaint after the expiry of 90 days or not. The reason for the same was that there might be certain factors that might have not let the plaintiff file the plaint on time. However, a better suggestion to deal with the delay of filing a plaint, was provided by the 253rd Law Commission Report, 2015.¹² The Commission provided for acceptance of plaint only till 120 days and a blanket ban after that. This recommendation of the law commission seems to be a better alternative, as four months is a reasonable time which takes into account all circumstances that might arise and lead to a delay in filing the plaint. In the past, when the discretion to accept a plaint or not was left with the judges it has led to exorbitant delays in the cases being filed and reaching the trial.

- **Institution of a Compliance Committee**

A major problem that the courts face today despite having efficient reforms is that of implementation. A suggestion to tackle that front is the constitution of a Compliance Committee, which checks the implementation of the said guidelines and ensures

¹² 253 Law Commission Report, 2015 available at http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf.

compliance. Such a committee can be headed by the Chief Judge of the Court.

Such a committee will have a two-fold effect. First, it will ensure that cases are being handled efficiently and being disposed off speedily and second since the Chief Judge of the Court will be heading it, the working of the committee will be effective and adherence to its commands will follow too.

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