

A CRITIQUE OF FOUR JUDGEMENTS OF THE GAUHATI HIGH COURT
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1. THE INTRODUCTION

In umpteen decisions the Supreme Court cautioned the courts as regards proper reading and use of precedents. The essence of the doctrine of precedents on this aspect can be sampled in the following selection of judgments of the Supreme Court such as (1) The five Judge Constitution Bench decision STATE OF ORISSA -Vs- SUDHANGSHU SEKHAR MISHRA, AIR 1968 S.C. 647; (2) AMBICA QUARRY WORKS -VS- STATE OF GUJRAT (1987) 1 SCC 213; (3) Three Judge Bench decision HARYANA FINANCIAL CORPORATION -Vs- JAGDAMBA OIL MILLS, (2002)3 SCC 496; (4) BHAVANAGAR UNIVERSITY -VS- POLITANA SUGAR MILLS (P) LTD., (2003) 2 SCC 111; (5) BHARAT PETROLEUM CORPORATION LTD. - VS- N.R. VAIRAMANI (2004)8 SCC 579 and (6) ISPAT INDUSTRIES LTD. - VS- COMMISSIONER CUSTOMS, MUMBAI, (2006) 12 SCC 583. What has been laid down at para 12 of the decision No.1, para 18 of decision No.2, para 19 and 21 of decision No.3, para 59 of decision No.4, para 9 and 11 of decision No.5 and para 47 to 50 of decision No.6 is very illuminating and instructive. The core principles emerging therefrom are (1) that a decision is an authority for what it actually decides and not for what can be logically deduced from various observations in it, (2) that the decision are not to be read as Statute Law and (3) that factual context of a decision is decisive of its binding character.

Courts however often fail to keep these in mind and hence the tribe of "aberrant decisions" / Judgments per incuriam proliferates despite the easy availability of tools provided by information technology.

Four decisions of the Gauhati High Court reported in law journals during the year 2012 seem eminently to belong to the tribe. The phrase "aberrant decisions" has been borrowed from a writing of Justice Ruma Paul, a former Judge of the Supreme Court of India. These four decisions namely (1) ANOWAR ALI & ANR -VS- JOLA BIBI & ORS., 2012(2) GLT 985 dated 03.04.2012, (2) SEHEKAYA LYNGDOH -VS- PLANLY RYNGREW AND ORS, 2012(4) GLT 825, (2013)1 GTR 614 dated 27.04.2012, (3) DEPPAK PAUL & ANR -VS- STATE 2012(5) GLT 902 dated 29.05.2012, (4)

KANAILAL BHATTACHARJEE –VS- BHAJANA BISWAS & ANR, 2012(4) GLT 187, 2012 Cri.L.J. 4158 dated 13.06.2012. All the four are Single Bench decisions and the aberrations in these decisions are not of the same degree or kind. These are being critically examined serially in the paragraphs that follows.

2. ANOWAR ALI (Supra)

The decision resulted from rejection of a petition under Order VI Rule 17 of the Code of Civil Procedure by the Civil Judge (Jr. Division), Udaipur filed after commencement of trial and without any pleading as to existence of due diligence. The High Court on being moved under Article 227 of the Constitution of India allowed the petition for amendment.

Upto paragraph 18 of the judgment there are reference to several Supreme Court Judgments cited by the learned counsels for the parties and some comments of the High Court relating thereto. Finding on these paragraphs is categorical that trial has commences and that there is no whiff of existence of any due diligence as required under the proviso to Order VI Rule 17 CPC. Despite these there appears an about turn in para 19 of the judgment where paragraph 6 to 10 from STATE OF MADHYA PRADESH –VS- UNION OF INDIA (2011) 12 SCC 268 has been quoted. The High Court concluded in para 20 of ANOWAR ALI that “fundamental principles for consideration” is the “real controversy” test of the pre-proviso vintage. The High Court allowed the petition for amendment basing on such a conclusion. Even from the extract of (2011) 12 SCC 268 quoted in ANOWAR ALI it becomes crystal clear that the Apex Court was not dealing with or applying the proviso to Order VI Rule 17 in the suit under Article 131 of the Constitution between the State of Madhya Pradesh and the Union of India. Para 9 of the Supreme Court judgment quoted in ANOWAR ALI makes it very clear that the Supreme Court was considering the matter under Rule 8 of Order 26 of the Supreme Court Rules and the proviso to Order VI Rule 17 is no part of that Rule. There is thus no factual basis for the conclusion in para 20 of ANOWAR ALI. Considered under the proviso to Order VI Rule 17 C.P.C. as enunciated in decisions at serial No.2 and 5 of the list in para 15 of ANOWAR ALI there can be no question that the amendment has to be rejected on the factual findings that trial has commenced and there is absence of due diligence. Thus (2011) 12 SCC 268 has been wrongly used to quash the order of the Civil Judge (Jr. Division).

However considered under the general provision for amendment in Section 153 C.P.C. which is not circumscribed by the proviso under the special provision for amendment of pleadings in Order VI Rule 17 CPC the Court has the discretion to allow the amendment categorising the matter as a defect or error under the first limb of Section 153 C.P.C. or even under the second limb thereof basing it on the real controversy test. A mere addition of a prayer without any charge in the pleading need not be confused with amendment of pleadings. A close reading of Rule 15 of Order VI makes this apparent.

ANOWAR ALI also contain a direction in para 23 to file the amended plaint. This direction is in the teeth of the law laid down in para 13 to 17 of GURDIAL SINGH AND OTHERS –VS- TAJ KUMAR ANEJA AND OTHERS, AIR 2002 SC 1003. ANOWAR ALI, thus, suffers from twofold aberration. Despite the aberrations indicated the conclusion to allow the amendment appears unexceptionable.

3. SEHEKAYA LYNGDOH (SUPRA)

Whether an ex-parte order, of ad interim temporary injunction is appealable or not is the question considered in this decision. The question has been considered and decided by a Full Bench of the Gauhati High Court in AKMAL ALI AND OTHERS –VS- STATE OF ASSAM AND OTHERS, AIR 1984 Gau 86. In SEHAKAYA LYNGDOH the Full Bench decision was relied on by the learned counsel for the petitioner. Except a mere reference to this fact in the decision not to speak of any discussion, there is even no further mention of the Full Bench decision, in SEHEKAYA LYNGDOH. The decision at same length considered the Supreme Court Judgment. A. VENKATASUBBIAH NAIDU –VS- S. CHELLAPPAN (2000)7 SCC 695 and the A.P. High Court judgment in INNOVATIVE PHARMA SURGICALS –Vs- PIGEON MEDICAL DEVICES, AIR 2004 AP 310, quoted some extracts from those two judgments and following the latter decision decided the question contrary to what the Full Bench of the same High Court decided. Unless the High Court holds that the Supreme Court judgment has overruled the Full Bench of Gauhati High Court such reliance will fly in the face of the principles mentioned in introduction of this writing. Having not even considered the Full Bench Judgment there is no such finding in the decision. Incidentally it will be apposite to indicate here that there are two other Single Bench decision of the High Court where the same question of law arose and where the Full Bench and the same Supreme Court judgment were considered. These Single Bench judgments are AIRPORT AUTHORITY OF INDIA –VS- M/S PARADISE HOTEL & RESTAURANT, AIR 2002 Gau 146 and SAJJAN KUMAR THARAD –Vs- SMTI DEORIS MARBANING, AIR 2011 Gau 47. These decisions did, unlike, SEHEKAYA follow the Full Bench decision and found nothing there in the Supreme Court Judgment detracting from or circumscribing the law laid down by the Full Bench. If anything the AIR 2011, Gau 47 has stated the law even far more widely than that even in the Supreme Court and the Full Bench Judgments which is difficult to appreciate because the procedural provision in Rule 3 of Order XXXIX has been read as substantive provision. At this point it will necessary to have a closer look at the Supreme Court Judgment and the A.P. High Court Judgment which have influenced SEHEKAYA.

In (2000)7 SCC 695 the Supreme Court dealt with the Order of the High Court on a petition under Article 227 of the Constitution against an ex-parte interim order of injunction. It was argued before the Supreme Court that High Court should not have entertained the petition in view of the two statutory remedies under Order XXXIX Rule 1 and 4 available to the petitioner. The Supreme Court accepted this contention (see para 13 and

22). In para 21 of the judgment the Supreme Court was only dealing with a hypothetical situation in reaction to the observation of the High Court noted at para 16 and 17. Para 21 has been quoted in SEHEKAYA and its replica para 19 from AIR report has been quoted in AIR 2004 A.P. 310. Neither in SEHEKAYA nor in the A.P. case the hypothetical situation dealt with by the Supreme Court existed. Therefore para 21 of the Supreme Court judgment cannot be read as containing the ratio of that judgment and applied as such to a non-existent fact situation. Para 21 contains, among others, the sentence –

“So we are of the view that in a case whether mandate of Order 39 Rule 3A of the code is flouted the aggrieved party, shall have right of appeal not with standing the pendency of the application.....”

This sentence cannot be read in isolation by tearing it out of the context. Even if it is read as expanding the right of appeal from the further inference that right of appeal is circumscribed cannot be drawn. All this will be in the teeth of the principles indicated in the introduction to this writing. The inference drawn as to law and the facts stated in para 17 of AIR 2004 A.P. 310 as regards the Supreme Court judgment are not correct. Misappreciation of the facts and law in the AIR 2004 AP 310 has spread to SEHEKAYA as well. Besides this some observations regarding dual remedies made in para 5 of SEHEKAYA appears to be in the teeth of para 5 and 6 of 1992(4) SCC 196. Quadruple Remedies against ex parte decree are also a pointer to that end.

Aberrations apart SEHEKAYA, thus is a judgment per incuriam being contrary to the binding precedent of the Full Bench decision of the same High Court.

4. DEEPAK PAUL (Supra)

In this decision a question of adulteration of “Besan” fell for determination by the High Court. An “aberrant decision” has resulted from inadequate information from the Bar and consequent wrong application of an earlier decision of the High Court. It cannot be gathered from DEEPAK PAUL (Supra) whether the earlier decision reported in 2001 (3) GLT 56 (NIKHIL SAHA *hereinafter*) has been cited by the counsel for the petitioner or discovered by the High Court. NIKHIL SAHA in its turn has relied on 1964(1) Cri.L.J. 448 dated 22.10.1962. Clause (ia)m in Section 2 of the Prevention of Food Adulteration Act 1955 came into the Statute Book through Prevention of Food Adulteration (Amendment) Act 1976 only in 1976. The decision of 1962 could not have considered and indeed did not even mention adulteration under Section 2(i)a)m of the PFA Act. That decision turning on the unamended law of adulteration of food could not have done any duty in deciding a case of adulteration under 2(i)a)m. Even the standard A 18.04 for “Besan” of 9.12.1958 vintage was not at all considered in the 1962 case. That case was decided by considering only adulteration under 2(i)a), 2(i) (b) and 2(i) (c) only as the law then was. In 2001 NIKHIL SAHA was wrongly decided by relying on a case which is not

all applicable because of change of law. Only similarity is factual both being cases of adulteration of Beson. There can be no doubt that NIKHIL SAHA is an “aberrant decision” and has in its turn spread the aberration to DEEPAK PAUL (Supra). It is surprising that the learned counsels did not place any decision from other High Courts relating to adulteration of Beson like 1998(1) FAC 372, 2000(1) FAC 119, 2000 Cri.L.J. 1879 and 1988 Cri.L.J. 261 where standard A 18.04 in Appendix B to the PFA Rules, 1955 had been considered in detail. DEEPAK PAUL (Supra) unlike NIKHIL SAHA considered the standard for Beson laid down in A 18.04 in Appendix B but because of inadequate assistance from the Bar did not notice the law laid down by the Three Judge Bench of the Supreme Court in MUNICIPAL COMMITTEE, AMRITSHAR -VS- HAZARA SINGH, 1948-1997 FAC 131 upholding the primacy of the standard enacted in the Appendix. Even a marginal variation from the standard cannot be condoned. Existence of Pea powder in Beson as found by the Public Analyst will be a flagrant departure from the standard and will make the sample of Beson adulterated within Section 2(ia) (m) read with standard A 18.04 in the Appendix B to the PFA Rules 1955.

5. KANAILAL BHATTACHATJEE (SUPRA)

In this decision the High Court dealt with a criminal appeal against acquittal in a case under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act hereinafter) and Section 420 of the Indian Penal Code, 1860. The High Court affirmed the acquittal but in the process in paragraph 14 of the Judgment (GLT report) recorded some observations which are per incurium of the first water. The said paragraph began with a reference of Section 142 N.I. Act yet latter the paragraph records the legal howler that “there is no provision in the N.I. Act prescribing extension of the period of limitation in taking cognizance”. This completely overlooks the proviso to Section 142 (b) of the N.I. Act extant since 06.02.2003. Incidentally the events in the case started in 2004 and culminated in the acquittal in 2007. The decision also did not notice the non obstante clause with which Section 142 N.I. Act began and held that Section 473 Cr.P.C. is applicable to extend the period of limitation in a case under Section 138 of the N.I. Act. This conclusion was reached by reading section 4(2) of the Cr.P.C. only and not conjointly with Section 5 of the Cr.P.C. Such a reading would have yielded the result that 473 Cr.P.C. cannot do any duty in the matter. Last of the aberration in the decision is the total negation of the right of the accused to be heard before he is sought to be criminally disturbed after the period of limitation as enunciated in the Three Judge decision of the Supreme Court in STATE OF MAHARASTRA VS- SHARAD CHANDRA VINAYAK DONGRE, AIR 1995 S.C. 231. The High Court upheld the taking of cognizance by the Magistrate even though the complaint was delayed by ten days on the reasoning such as above. However the conclusion by the Magistrate and the High Court that the accused deserve to be acquitted suffer no aberration.

6. CONCLUSION

As an apt conclusion to this writing Justice Ruma Paul's words, in the foreword to the 5th Edition, 2010 of Justice R.S. Bachawat's Law of Arbitration and Conciliation are extracted, which read thus :

“Again when lawyers in the higher courts preface their arguments with “your Lordship (or Ladyship knows” it only underlines the fiction that Judges are deemed to know the law on every subject. Aberrant decisions are sometimes the outcome of this fiction and some times because Judges are inadequately informed by the Bar.”