SUPREME COURT OF INDIA

V.Vasanthakumar

Vs.

H.C.Bhatia & Ors.

WP.(Civil)No.36 of 2016

(T.S.Thakur and R.Banumathi and Uday Umesh Lalit,JJ.,)

13.07.2016

JUDGMENT

T.S.Thakur,CJI.,

1. This petition, filed in public interest, raises questions touching possible structural reforms at the highest echelons of the Indian judicial system. Similar questions have been addressed in the past not only by the Law Commission but also by this Court on the judicial side. We may briefly refer to the same to place the issues that fall for determination in proper perspective.

2. In its 14th Report dated 26th September, 1958, the Law Commission of India advocated the need for a restrained approach towards grant of special leaves to appeal against judgments and orders passed by the High Courts. The Commission felt that a liberal grant of leave to appeal had the tendency to adversely affect the prestige of the High Courts. It said:

> "(13) Although the exercise of the jurisdiction under Article 136 of the Constitution by the Supreme Court in criminal matters sometim.es serves to prevent injustice, yet the Court might be more chary of granting special leave in such matters as the practice of granting special leave freely has a tendency to affect the prestige of the High Courts"

3. Then came the 95th report dated 1st March, 1984 in which the Law Commission proposed the setting up of a Constitutional Division within the Supreme Court, in the following words:

> "6.4 If the proposed constitutional division is to be created, it will have to be assigned a part of the business of the Supreme Court within its jurisdiction as at present provided. The second issue that falls to be considered is, what matters should be assigned to that division. In this connection, there are two principal alternatives to be considered as per (a) and (b) below:

(a) This division may be entrusted with the adjudication of all public law cases within the Supreme Court's jurisdiction.
If this alternative is accepted, its jurisdiction would comprise-

(i) every case involving a substantial question of law as to the interpretation of the Constitution, or an order or rule issued under the Constitution;

(ii) every case involving a question of Constitutional law, not falling within (1) above;

(iii) every appeal against the decision of a High Court, rendered under Article 226 of the Constitution;

(iv) every appeal against the decision of a tribunal under article 136 of the Constitution (whether such tribunal is created by law passed by virtue of article 323-A or Article 323-B of the Constitution or otherwise), where a question of administrative law is involved.

(b) In the alternative, only matters of Constitutional law may be assigned to the proposed Constitutional Division. If this alternative is accepted, its jurisdiction would only the items

(i) and (ii) mentioned in (a) above. The jurisdiction would then cover only the following:

(i) every case involving a substantial question of law as to the interpretation of the Constitution or an order or rule issued under the Constitution, and

(ii) every case involving a question of constitutional law, not falling within

(i) above. Our preference is for alternative (b) above. It is easier to define precisely and locate such matters, confined to constitutional law proper. We Appreciate that question of constitutional and administrative law often dovetail into each other, p-articularly in proceedings under article 226 of the Constitution (which may reach the Supreme Court on appeal). But, in our opinion, it would be desirable to make the jurisdiction of the proposed division narrow and compact, at least for the present. Accordingly, we recommend that the proposed Constitutional Division of the Supreme Court should be entrusted with the cases of the nature mentioned in alternative (b) above. It follows that other matters coming to the Supreme Court will be assigned to its Legal Division.

6.5. Of course, the creation of two divisions in the abstract does not end the matter. For practical implementation of the proposed scheme, it will be necessary to deal with at least two concrete matters, namely, (1) when can a constitutional issue be said to be "involved." and (ii) what will be the machinery for allocating cases between two divisions.

> As to the first matter, which relates to the criterion to be adopted, we should make it clear that a case should be regarded as "involving a" constitutional issue only when the decision of that issue is absolutely necessary for the disposal of the controversy. The mere fact that a party has raised a constitutional issue is not enough. Although, it may not always be possible to determine at the outset (at the time of allocation of the case), whether the case "involves" a constitutional issue in the above sense, it may still be useful to bear this aspect in mind"

4. Two years later *in Bihar Legal Support Society v. Chief Justice and Others*[1] a Constitution Bench of this Court while disposing of a Writ Petition in which the petitioner had prayed for adoption of a uniform approach and sensitivity in special leave petitions filed by the less fortunate of the litigants as was shown in the case of two big industrialists for whom the Court had held a late night sitting to consider their prayer for bail, held that special leave petitions filed by "small men" were entitled to the same consideration as is given to those filed by "big industrialists". This Court declared that it had always regarded the poor and the disadvantaged to be entitled to preferential consideration over the rich and the affluent, the businessmen and the industrialists. That is because the weaker section of the Indian humanity had been deprived of justice for several years on account of their poverty, ignorance and illiteracy, and on account of their social and economic backwardness and resultant lack of capacity to assert their rights. This Court rejected the suggestion that it was not giving to the "small men" the same treatment as it was giving to the "big industrialists".

5. Having said that, this Court declared that it was never intended to be a regular court of appeal against orders made by the High Courts and the Sessions Courts or the Magistrates. It was created as an apex court for the purpose of laying down the law for the entire country and for that purpose it was given the extraordinary jurisdiction to grant special leave to appeal under Article 136 of the Constitution so that it could interfere whenever it found that the law was not correctly appreciated or applied by the lower courts or tribunals. The jurisdiction was also held to be available for correction of grave miscarriage of justice. More importantly, this Court held that every case, where the apex court finds some error, need not be entertained for otherwise, the Court would become a regular court of appeal and be reduced to a position where it will not be able to remedy any injustice at all, on account of the tremendous backlog of cases which will get accumulated. This Court said:

> "We must realise that in the vast majority of cases the High Courts must become final even if they are wrong. The apex court can also be wrong on occasions but since there is no further appeal, what the apex court says is final. That is why one American Judge said of the Supreme Court of the United States:
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> "We are right because we are final: we are not final because we are right". We must, therefore, reconcile ourselves to the idea that like the apex court which may be wrong on occasions, the High Courts may also be wrong and it is not every error of the High Court which the apex court can possibly correct. We think it would be desirable to set up a National Court of Appeal which would be in a position to entertain appeals by special leave from the decisions of the High Courts and the Tribunals in the country

in civil, criminal, revenue and labour cases and so far as the present apex court is concerned, it should concern itself only with entertaining cases, involving questions of constitutional law and public law. But until any such policy decision is endorsed by the government, the apex court must interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex court for the entire country or where there is grave, blatant and atrocious miscarriage of justice."

6. The Law Commission of India took another two years after the above observations to reiterate its recommendation whereunder it had proposed the splitting of the Court into two divisions. While doing so the Law Commission gave an additional reason namely the handicap which the litigant from more distant parts of the Country like Tamil Nadu in South, Gujarat in the West and Assam and other States in the East face in the matter of accessing justice before the Supreme Court. The Commission observed:

" The result is that those coming from distant places like Tamil Nadu in the South, Gujarat in the West and Assam and other States in the East have to spend huge amount on travel to reach the Supreme Court. There is a practice of bringing one's own lawyer who handled the matter in the High Court to the Supreme Court. That adds to the cost. And an adjournment becomes prohibitive. Adjournment is a recurrent phenomenon in the Court. Costs get multiplied. Now if the Supreme Court split into Constitutional Court and Court of Appeal or a Federal Court of Appeal, no serious exception could be taken to the Federal Court of Appeal sitting in Benches in places North, South, East, West and Central India. That would not only considerably reduce costs but also the litigant will have the advantage of his case being argued by the same advocate who has helped him in the High Court and who may not required to travel to long distances. Whenever questions of constitutionality occur, as pointed out in that report, the Supreme Court can sit in en banc at Delhi and deal with the same. This cost benefit ratio is an additional but important reason for reiterating support to the recommendations made in that report."

7. Then came the 229th report dated 5th August, 2009 submitted by the Law Commission, whereunder, it once again recommended restructuring of the Supreme Court by setting up of a Constitution Bench at Delhi and Cessation benches in four regions namely; Delhi, Chennai/Hyderabad, Kolkata and Mumbai. Drawing support from the system prevalent in other countries like Italy, Egypt, Portugal, Ireland, United States and Denmark the Commission recommended that:

"(1) A Constitution Bench be set up at Delhi to deal with constitutional and other allied issues as aforesaid.

(2) Four Cassation Benches be set up in the Northern region/zone at Delhi, the Southern region/zone at Chennai/Hyderabad, the Eastern region/zone at Kolkata and the Western region/zone at Mumbai to deal with all appellate work arising out of the orders/judgments of the High Courts of the particular region.

(3) If it is found that Article 130 of the Constitution cannot be stretched to make it possible to implement the above recommendations, Parliament should enact a suitable legislation/ Constitutional amendment for this purpose."

8. In *Mathai @ Joby v. George & Anr*[2]., this Court was once more confronted with the question whether Special Leave Petitions should or should not be entertained against every kind of order. This Court noticed that Special Leave Petitions were being filed by the litigants against almost every kind of order resulting in piling up of huge arrears and converting this Court into an ordinary appellate court which was never the intention of the framers of the Constitution when they enacted Article 136 and empowered the Supreme Court to intervene by granting special leave to appeal to an aggrieved litigant. Relying upon the decisions of this Court in *N. Suriyakala v. A. Mohandoss*[3], *Bengal Chemical & Pharmaceutical Works Ltd. v. Employees*[4], *Kunhayammed v. State of Kerala*[5] *State of Bombay v. Rusy Mistry*[6], *Municipal Board, Pratabgarh v. Mahendra Singh Chawla*[7], *Ram Saran Das and Bros. v. CTO*[8], *Pritam Singh v. State*[9], *Tirupati Balaji Developers (P) Ltd. v. State of Bihar*[10], *Jamshed Hormusji Wadia v. Port of Mumbai*[11], *Narpat Singh v. Jaipur Development Authority*[12], *Ashok Nagar Welfare Assn. v. R.K. Sharma*[13], this Court held that the exercise of jurisdiction under Article 136 of the Constitution by the Supreme Court was discretionary and that the provision did not confer a vested right of appeal to a party in litigation.

9. This Court further held that the extraordinary jurisdiction vested by the Constitution implied that the Court ought to exercise extraordinary care and caution while making use of that power. Having said that this Court lamented the filing of special leave petitions against all kind of orders of the High Court or other authorities without realising the true scope of Article 136 of the Constitution thereby giving rise to an alarming situation whereby this Court had converted itself into a mere court of appeal as though it was obliged to correct every error which it found in any judgment delivered by any Court or Tribunal exercising jurisdiction under any statute.

10. On a conspectus of the dimensions of the question this Court held that exercise of jurisdiction under Article 136 of the Constitution should be limited to certain specific category of cases and referred the question of interpretation of Article 136 to a Constitution Bench in the light of Article 145(3) of the Constitution.

11. The Constitution Bench, however, declined to look into the question of interpretation of Article 136 of the Constitution or to enumerate the circumstances in which the extraordinary power vested in this Court under the said provision could or ought to be exercised. Relying upon the decisions of this Court in *Pritam Singh v. The State (suupra)*at page 457 Penu *Balakrishna Iyer & Ors v. Ariya M. Ramaswami Iyer & Ors.(Supra)*at Page 53 and *Union Carbide Corporation & Ors. v. Union of India & Ors*[14]. the Constitution Bench held that power under Article 136 had to be exercised with circumspection but considered it unnecessary to limit the use thereof forever by a process of interpretation. The Court was of the view that the question referred to the Constitution Bench stood answered by the three decisions mentioned above.

12 . It is in the above backdrop that the petitioner who is a practicing Advocate has filed the present petition in which he has sought a mandamus directing the respondents to consider his representation and to take steps for implementation of the suggestion of the Constitution Bench of this Court in Bihar Legal Support Society's case (supra) by establishing a National / Regional Courts of Appeal.

13. When the writ petition came up for preliminary hearing before us on 26th February, 2016, while issuing notice, we requested Shri Mukul Rohatgi, learned Attorney General for India to assist us in the matter. In addition, we requested Shri K.K. Venugopal and Shri Salman Khurshid, learned Senior Counsel to appear and assist the Court as Amicus Curiae.

14. We have, accordingly, heard at some length the petitioner, the learned Attorney General and the learned Amicus Curiae. We have also heard at some length Shri Andhyarujina who intervened to make his submissions in support of the prayer made in the writ petition. Relying upon a report prepared by Vidhi Centre for Legal Policy on "the need for efficient and effective Supreme Court" by reference in particular to the issues of backlog and regional disparities in access to justice, Mr. Venugopal argued that the statistics quoted by Vidhi and the analysis thereof based on round table discussions with several eminent lawyers and jurists, clearly established that the Supreme Court had strayed from its original character as a Constitutional Court and gradually converted itself into a mere court of appeal to correct every error it found in the decisions of the 24 High Courts and numerous Tribunals subordinate to it.

15. The jurisdiction of the Supreme Court, argued Mr. Venugopal, was now being invoked in relation to matters falling within 45 categories listed in the Practice and Procedure Handbook. It was submitted that there was an urgent need for a comprehensive re-appraisal of the role of the Supreme Court and the need for restoring its exclusivity as suggested by Shri Andhyarujina in his article "Studying US Supreme Court Working" It was urged that filing of cases in the Supreme Court since 1950 had increased exponentially for as against 1215 cases filed in total in the Supreme Court in the year 1950 the total number of cases filed in the year 2014 (Upto November) were no less than 81,853. This argued Mr. Venugopal showed a cumulative annual growth rate of 6.8 per cent per year. It also suggested that the number of cases filed in the Supreme Court doubled every year or so and the trend continued. The Supreme Court was by that standard likely to be facing a burden of nearly 1.5 lakh cases by the year 2025.

16. Shri Venugopal, further argued that on account of the distance at which the Supreme Court is located from other parts of the country, access to justice before the Supreme Court had been adversely effected in as much as litigants from far off places were unable to reach the Supreme Court as against those from High Courts that are closer in proximity. This according to the learned Counsel denied equal justice to citizens from these far off places in breach of the Constitutional mandate of equal access of justice to all. According to the learned counsel the lack of access had led to a demand for Regional Benches of the Supreme Court in different parts of the country or for setting up of National/Regional Courts of Appeal. Shri Venugopal drew our attention to the position in other countries, where too,

because of the huge backlog of cases, the systems had been reformed to provide Courts of Appeal as an intermediary Court between the High Courts and the Supreme Court. He referred to a speech delivered by Hon'ble Mr. Justice Susan Delham, Chief Justice of Ireland to argue that despite several initiatives like case management, use of information technology, mediation for amicable settlement encouraged by the Courts, the burden that came to fall upon the Irish Supreme Court was making it difficult for that Court to cope up with the situation. The solution which a working Group suggested was referred to by the Chief Justice of Ireland in the following passage of his speech:

> "Solution The solution advocated by the Working Group on a Court of Appeal in the report published in 2009 was the establishment of a Court of Appeal. This would be a permanent court which would have several divisions, to hear appeals in civil cases and to hear appeals in criminal cases. Thus, there would be a permanent Court of Appeal, with permanent judges on that Court, which would sit in several divisions - civil and criminal. All the other common law countries have a Court of Appeal in their legal system, placed between the Courts equivalent to our High Court, and the Supreme Court."

17. The Indian story was no different contended Mr.Venugopal. The working of the Supreme Court and the ever increasing burden which has grown to almost unmanageable limits has made it extremely difficult for the Judges of this Court to contain the piling arrears to a reasonable limit making it necessary for this Court to examine the possibility of structural reforms and to make suitable recommendations to the Government for taking corrective measures including a possible amendment of the Constitution.

18. Shri Andhyarujina while adopting the submissions made by Shri Venugopal submitted that because of increased awareness, legal literacy, development and resultant prosperity in the country, the number of cases is bound to increase. Experience shows that these cases leave little time for the Court to take up important constitutional matters which ought to engage the attention of this Court as its primary duty. He urged that it is time to give a thought to the formidable challenge that judiciary is facing at the highest level and to push reforms that would not only restore this Court to the glory it was meant to enjoy but also make access to justice a reality by setting up Courts of Appeal which can be approached by every litigant without having to travel long distances to Delhi.

19. Mr. Rohatgi, learned Attorney General, on the other hand argued that the Writ Petition was not maintainable as the petitioner has suppressed certain important facts which disentitle him to relief. It was also contended that the proposed National Court of Appeal or Regional Courts of Appeal were neither constitutionally permissible nor otherwise feasible. He contended that Article 136 of the Constitution gives to the citizens of this country an inalienable right to invoke the appellate power of this Court. That power being a basic feature of the Constitution, it could not be taken away or conferred upon another Court or forum. Mr. Rohatgi submitted that what was perhaps required was self restraint by this Court in the matter of entertaining special leave petitions as it was not necessary for this Court to

correct every error committed by the High Court or the statutory Tribunals set up to decide cases involving different subjects and dimensions.

20. We have given our anxious consideration to the submissions made at the Bar. Certain facts are beyond dispute. It is not in dispute that the Supreme Court was never meant to be a regular court of appeal. It was meant to exercise its powers under Article 136 of the Constitution only in cases which raised important questions involving interpretation of the Constitution or questions of general public importance or questions of constitutionality of State or Central legislations or those raising important issues touching Centre-State relationship etc. The jurisdiction may also have been available to the Court where it found gross miscarriage of justice or an error so outrageous as no reasonable person would countenance. The power to interfere was not meant to be exercisable just because prolonged argument would eventually reveal some error or irregularity or a possible alternative view on a subject that did not cause any miscarriage of justice of a kind that would shock the conscience of the court on the subject. The long line of decisions of the Court to which we have made reference earlier supports that view. The fact, however remains that the filing of cases in the Supreme Court over the past six decades has grown so sharply that the Judge strength in the Supreme Court is proving inadequate to deal with the same. Statistics show that more than 3/4th of the total number of cases filed are dismissed in limine. Even so, the dismissal is only after the court has applied its mind and heard arguments which consume considerable time of the Judges. Dismissal of an overwhelming number of cases has not and does not discourage the litigants or the member of the Bar from filing cases. That is why the number of cases filed is on the rise every year.

21. It is common knowledge that the huge backlog of cases in the Supreme Court not only attracts criticism from the litigant public but also from independent observers of the judicial systems. To add to the woes of the Court there are a number of new legislations which provide for a first appeal to the Supreme Court, a role which the Supreme Court was never intended to play in the Constitutional scheme. Suffice it to say that the pronouncement of this Court sounding notes of caution against liberal grant of special leave to appeal or exercise of restraint in the matter of entertaining cases have lead to no meaningful improvement in the situation.

22. What then is the way forward? M/s. Venugopal and Andhyarujina argue that the way forward is setting up of Regional Courts of Appeal, firstly, because the same would take justice closer to the doorsteps of the litigants, especially those living at distant places and secondly, because an intermediary court would reduce the burden of the Supreme Court without denying to the litigants an opportunity to agitate his case before a court higher than the High Court. The only difference in that situation will be that in place of the Supreme Court the Court of Appeal would look into the matter and correct whatever needs to be corrected in the judgment impugned before it. It is in that backdrop that following questions arise for our consideration:

"1. With access to justice being a fundamental right, would the said right stand denied to litigants, due to the unduly long delay in the disposal of cases In the Supreme Court?

2. Would the mere increase in the number of judges be an answer to the problem of undue delay in disposal of cases and to what extent would such increase be feasible?

3. Would the division of the Supreme Court into a Constitutional wing and an appellate wing be an answer to the problem?

4. Would the fact that the Supreme Court of India is situate in the far North, in Delhi, rendering travel from the Southern states and some other states in India, unduly long and expensive, be a deterrent to real access to justice?

5. Would the Supreme Court sitting in benches in different parts of India be an answer to the last mentioned problem?

6. Has the Supreme Court of India been exercising jurisdiction as an ordinary court of appeal on facts and law, in regard to routine cases of every description?

7. Is the huge pendency of cases in the Supreme Court, caused by the Court not restricting its consideration, as in the case of the Apex Courts of other countries, to Constitutional issues, questions of national importance, differences of opinion between different High Courts, death sentence cases and matters entrusted to the Supreme Court by express provisions of the Constitution?

8.Is there a need for having Courts of Appeal, with exclusive jurisdiction to hear and finally decide the vast proportion of the routine cases, as well as Article 32 petitions now being decided by the Supreme Court of India, especially when a considerable proportion of the four million cases pending before the High Court may require review by a higher intermediate court, as these judgments of the High Courts may fail to satisfy the standards of justice and competence expected from a superior court?

9.If four regional Courts of Appeal are established, in the Northern, Southern, Eastern and Western regions of the Country, each manned by, say, fifteen judges, elevated or appointed to each Court by the Collegium, would this not satisfy the requirement of 'access to justice' to all litigants from every part of the country?

10. As any such proposal would need an amendment to the Constitution, would the theory of 'basic structure' of the Constitution be violated, if in fact, such division of exclusive jurisdiction between the Supreme Court and the Courts of Appeal, enhances the efficacy of the justice delivery system without affecting the independence of the judicial wing of the State?

> 11. In view of cases pending in the Supreme Court of India on average for about 5 years, in the High Courts again for about 8 years, and anywhere between 5-10 years in the Trial Courts on the average, would it not be part of the responsibility and duty of the Supreme Court of India to examine through a Constitution Bench, the issue of divesting the Supreme Court of about 80% of the pendency of cases of a routine nature, to recommend to Government, its opinion on the proposal for establishing four Courts of Appeal, so that the Supreme Court with about 2500 cases a year instead of about 60000, may regain its true status as a Constitutional Court?

23. Keeping in view the importance of the above questions and the need for reforms which have been long felt, we deem it proper to refer the same to a Constitutional Bench for an authoritative pronouncement. The Registry shall, accordingly, place the record before the Hon'ble Chief Justice for constituting an appropriate bench.

Judgment Referred.

[1]*(1986) 4 SCC 0767*
[2]*(2010) 4 SCC 0358*
[3]*(2007) 9 SCC 0196*
[4]*AIR 1959 SC 0633*
[5]*(2000) 6 SCC 0359*
[6]*AIR 1960 SC 0391*
[7]*(1982) 3 SCC 0331*
[8]*AIR 1962 SC 1326*
[9]*AIR 1950 SC 0169*
[10]*(2004) 5 SCC 0001*
[11]*(2004) 3 SCC 0214*
[12]*(2002) 4 SCC 0666*
[13]*(2002) 1 SCC 0749*
[14]*(1991) 4 SCC 0584*