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Search for An Action Against Illegal Arrest

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Two major consequences flow from an illegal arrest or search of a citizen. It may either ensue a criminal or civil action against the defaulting officer, or it may completely vitiate the trial. The latter trend has not surfaced much in the Indian law although the judicial improvisation of "the exclusionary rule" in the United States has been developed with a view to keep the executive actions within the bounds of law. According to the "exclusionary rule" the Courts do not permit the use of any evidence, howsoever material bearing it may have on the charge, if it has been obtained as a result of illegal arrest or search of the defendant. An arrest and consequently the search is illegal from the very beginning, if there is a failure to comply with the legal standard set for the arrest and search. In the immediate circumstances this rule comes as a protection to the person who has been a victim of illegal enforcement of a legal process.

Civil Action:

A law enforcement officer is vulnerable to civil liability, if in discharge of duties his actions turn out to be a trespass on the person or property of the alleged victim. A trespass thus committed may either be or assault, battery false arrest or false imprisonment. As most cases of detention or arrest without warrant

approximate to situations of wrongful confinement, usually the remedy sought is in common law action of recovering damages for false imprisonment.

Tort remedies for police violations of individual rights have not proved effective counteractions. That large number of arrests without warrant take place in the day to day law enforcement, and that many of such arrests if challenged would be unlawful, nonetheless the remedy with its surrounding technicalities has had little attraction for purposes of collecting substantial money judgments against the police officers.

Apparently, an explanation for infrequent litigation, in contrast to large number of arrests, may lie in the low economic status of the potential plaintiff. Added to this is the restriction that in the absence of proof of pecuniary loss, the courts award nominal damages for mental anguish and humiliation, which are the usual elements of damage in such cases. Furthermore, the recovery of a sum sufficient to justify action depends on the moral aspects of the case as well. This aspect of reparation of injuries in a civil action has a restrictive effect on litigation, because the rule does not contribute much incentive to the potential plaintiffs who so often are the persons with past conviction records, or suspects of questionable character. The element of respectability, on which the fiction of reparation can operate, is lacking in these cases of torts. The view is that a person with prior criminal record could not have been humiliated by arrest.

Immunity of the officers from civil liability is another factor which reduces the efficacy of tort remedy. Even where an arrest is not lawful the presumption of legality is unvariably in favour of police action presumably with a view to promote a policy of not hampering the law enforcement officers in their day to day enforcement of the law. The judicial approach has been that the government cannot be held liable either when an officer takes action in pursuance of a statutory duty, or when the act committed by him happens to be in excess of his

authority, unless in the latter case the act is either done by government's order or is subsequently ratified" (Maharani Gurcharan Kaur v. Province of Madras (1942) M.L.J. 14).

In view of the legal and practical difficulties it may be submitted that a recourse to civil action has lost significance to a considerable degree to compensate for injuries arising out of illegal police actions. One possible way to resolve is to enact a specific legislation making the government liable for actions of false arrest, false imprisonment, assault and battery, and in case of government liability for wrongful arrest the wages of the defaulting officer be subjected to garnishment.

Criminal Action:

The prosecution of officials for a wrongful act is open to an individual. The private individuals can move the machinery of criminal justice by filing a complaint for an offence which the police officer might have committed. Section 220 of the Indian Penal Code also provides for punishing the police officers if they confine persons on some accusation or commit them for trial. Section 220 Indian Penal Code reads:

Who ver bing in any office which gives him legal authority to commit persons for trial or to confinement, corruptly or maliciously commits any person for trial. Or to confinement in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment ... or fine ... or with both."

The use of the above check on exercise of arbitrary power and illegal authority has met with the difficulty of proving the ingredient of "corruptly or maliciously". As stated earlier the exercise of authority by a police officer has been taken to be lawful unless proved otherwise.

Once the premise of legality of action is in favour of the police officer an exceeding of authority has found a condonation for the excesses unless the action has been too callous or too revolting so much so that the compounding of extreme guilty knowledge superadded to an illegal act is clearly visible.

The filing of complaint against a public servant has to be preceded by securing sanction for prosecution under Section 197 Criminal Procedure Code. Indeed such a step is aimed at affording reasonable protection to public servants acting or purporting to act in the discharge of their duties. But this protection cannot be used as a cloak for doing what transgresses the authority of law. It would be objectionable both in terms of propriety and rule of law. The judicial attitude in this regard has succinctly been put in Mulshankar Dija v. Bhagwan Misra (1971 Cr. L.J. 442) where it has been observed that "the circumstance that while so acting, the public servants acted in excess of their duty will not be a sufficient ground for deprivation of such protection so long as there is a reasonable connection between the impugned act and the performance of the official duties." The reasonable connection is however a matter which is essentially and substantially to be determined on the facts and circumstances of each case (Ibid).

The invoking of criminal process against the police officers are surmounted with practical difficulties too. The bonds with which the policemen are tied together and a feeling on the part of a police witness that he could be in the same predicament tends to give him a diluted version of evidence. The inclination of the magistracy has also been to favour a governmental official rather than the citizenry. This trend was noticeable as far back as 1950 when the E.P. High Court in H. Singh v. Balmokand (A I.R. 1950 E.P. 367) directed the attention of the magistrate "to deal carefully and expeditiously with all complaints made to them against any body and more so against police officials, because the stability of the state depends on the confidence which the citizens have in the machinery for adjudication of rights ... Citizens should not be given even a chance to labour under the apprehension that against person in power they can get

no redress and that the policeman can get away with their high handedness without the state acting through its magistracy, taking any notice of it, and even where a complaint is made with regard to that matter". Since these observations were made the trend has been in the reverse direction and there is a confirmed belief that high handedness can go scot free and unpunished. All such anomalies have shown their ugly faces in a social order which still retains its basis on the concept of the rule where the government of law and not of men prevails.

Other Methods of Control:

Judicial activism has developed the "exclusionary rule" in the United States which forbids the use of evidence in criminal trial, if it was obtained in course of an illegal arrest or search. This mode has basically been used to police the police, so that this organised force of governmental may be disciplined to respect the sanctity of rights and privileges of the citizen in contrast to their enthusiasm to curb the criminals to zero growth rate. However, the rule of exclusion has not been adhered to very strictly in India. "The illegality of arrest or search does not always affect the jurisdiction of the court to try an accused (See 49 Cr. L.J. 178, 5 Cr. L.J. 89, 11 Cr. L.J. 453, 11 Cr.L.J. 576, 14 Cr.L.J. 236). A conviction is not bad merely because the accused was arrested illegally, or that the search which made available tangible and material evidence was not altogether legal. On the other hand a court has to take cognizance if a report is results from the police investigation (S. 190(a) - (C) Cr. P.C.) The jurisdiction is also not nullified even if the cognizance is based on an invalid report until and unless the irregularities committed by the officer are of such nature as may result in the miscarriage of justice (See Ch. XLV Ss. 530-533, 536 & 537). The rule of exclusion operates in the area of confessional statements because of the statutory rule.

As regards the admissibility of evidence obtained as a result of illegal arrest or search,

the general rule seems to be that "what would otherwise be relevant does not become irrelevant because it was discovered in the course ... in which the provisions of Criminal Procedure Code were disregarded. (See 11 Cr. L.J. 453, 11 Cr. L.J. 576, 14 Cr. L.J. 236). In Emperor v. Allahadad (14 Cr. L.J. 236) the Court set aside the order of acquittal stating that whether the search was legal or not there was evidence in the case that accused had kept contraband article in his house, and that should make him liable for conviction. The illegality of arrest has no bearing either on the jurisdiction of the court to try an accused (A.I.R. 1955 Nagpur 97, A.I.R. 1944 P.C. 173) or on confession made by him before a magistrate in compliance with the statutory provisions (46 Cr. L.J. 119). Thus, the evidence of guilt is not excluded merely because the police officer has committed illegality in securing evidence. The judicial policy can therefore be of not much avail to bring a check in the misuse of authority and power by a zealous police officer who by tradition and practice is attuned to disregard the individual rights even though the awareness for the same has now become crystallised into a constitutional mandate.

Need for Civil Rights Action

In view of the shortcomings of hitherto existing civil, criminal and departmental actions to check the arbitrary exercise of authority and also because of the growing need for awareness of the personal freedoms it has become incumbent that necessary ways and means be devised to strike a balance between the interests of the society and the individual rights. The need for a group action on behalf of the citizens to counter the exceeding authority of the officials which remain a powerful organised unit as compared to the individuals is thus felt. The remedial action need not any more remain with the individual, but the right of organised groups of civil libertarians to bring in necessary civil actions. Recognition of such right for compensatory money actions will go a long way to put a check on reckless authority. Likewise the criminal prosecutions against be made easier for wrongful police actions taken under the colour of law and also where a citizen has been willfully deprived of rights protected by the laws and the Constitution of India.

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