

THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

Mt. Abu - May 1969

By

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In the social process of any country of this complicated and competitive world, consisting of various interwoven processes of interactions involving individuals and groups moving with fast speed towards materialism, it is but inevitable that individuals and groups have strong natural instinct to maximise their material values, preferably power and wealth. With these two values they can easily reshape and maximise their other values like skill, rectitude, well being, affection, respect and enlightenment. Therefore, the participants in any process of interaction, using all their resources constantly apply various permissible as well as non permissible strategies to achieve these goal values. This gives rise to clashes of interests and necessitates prescription, invocation and application of law to perform the functions of social engineering. So long as the distribution and sharing of power and wealth amongst the members of the community is equitable, based on a policy for promoting the mutually agreed public order of human dignity, the various processes of interaction are well balanced and lead to maximum of creativity and abundance of production; which must again be equitably distributed and shared. Otherwise, the very equilibrium of the cyclical process will be disturbed, thereby affecting adversely the creativity and production.

One of the important factors which hampers the creativity and production in a community is the violence or injury of any sort by an individual or a group against the other. All violences whether economic, physical emotional or intellectual are bad. They lead to chains of conflicts and retard the progress of the whole community.

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The ultimate object of the law of torts is to prevent imbalances interest caused by the commission of these violences and create circumstances conducive to maximum of creativity and abundance of production. The law of torts, with a view to maintain and promote public order by human dignity, declares certain types of conduct of human beings which hurt others as civil wrongs and compels the wrong doers to pay damages to the persons so injured. The immediate policy involved here is to protect exclusive and inclusive interests of individuals and the community respectively. It is only in the furtherence of this policy that the community has prescribed the law of torts. Though the law of torts in India is very rarely resorted to by the members of the community, its efficacy cannot be doubted.

The specific torts are nothing but illustrations of various kinds of violence, e.g., physical violence, such as assault battery and false imprisonment; economic violence, such as trespass to land and trespass to goods and emotional violence, such as enticement, adultery and defamation. Now it may be useful to see whether gherao comes under any of these violence or not. "Gherao", according to Chief Justice Sinha of the Calcutta High Court, "is the physical blockade 'target' may be a place of a person, usually the managerial or supervisory staff of an industrial establishment."<sup>1</sup>

Gherao as a strategy, though of recent origin, was evolved first by industrial workmen and applied by them against their employees to press their demands, its use spread like an infectious disease in nature, and to day it has become to most favourite weapon in the hands of different groups of the community to achieve various objectives. It is significant that, without realizing its legal implications, it has been resorted to as an instrument of coercion not only by labour class but also by inteligentia class, like students and teachers even without taking into consideration its general repercussions upon the progress of the community. And it is alarming that it has been, to a certain extent, tolerated, permitted and incited also by one of the State Governments.<sup>2</sup>

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1. Jay Engineering Works Ltd. v. State of West Bengal 72 C.W.N. 441, 457.
  2. See circulars No.513, P.C., dated 28th March 1967 and P.914, P.S. dated 12th June 1967 of the Joint Secy. in the Home and Political Department of State of West Bengal.

It reached its climax when the judges of the Calcutta High Court, while hearing arguments, in a case regarding legality or otherwise of gherao, were themselves gheraoed.<sup>3</sup> It challenged the very basis of the constitutional government and the rule of law in the country. It is however, praise-worthy of the judges of the Calcutta High Court that maintaining the high traditions of judiciary in India, they came out of the situation very boldly and gracefully.

During the last two or three years gherao has never remained constant either in its form or content. While tracing the origin of the word gherao and explaining its meaning Sinha, C.J., of the Calcutta High Court observed:

"The origin of the word "gherao" is not easy to ascertain. As I have already mentioned, the word occurs in three Bengali dictionaries. In the Dictionary compiled by Jnanendra Mohan Das, the word "gherao" is stated to have been derived from the Hind word "gherao" and means "covered or encircled". It is also mentioned that the word "gher" is derived from the sanskrit word "ghri" which also means "to cover or to encircle". The word "gherao" in this sense has also been mentioned in the "Chalantika" and in the "Biswakosh". In the Sanskrit - English Dictionary by Dr. Monier Williams, Boden Professor of Sanskrit in the University of Oxford, the sanskrit word "gher" (gharayati - Yitam) means "to cover". In Wilson's Glossary of Legal Terms, "gher" or "gherao" or "gherana" are Persian words which mean to surround, encircle, fence, or to bind a hedge. In Richardsons Persian - Arabic Dictionary, we come across the Persian word "gherra" which means "confinement, not free". Having heard all the matters before us, we have come to the conclusion that the word "gherao" may mean one of two things: Primarily, it means an "encirclement", in the sense of blockade. It may be a complete encirclement or a partial encirclement, intended to blockade the egress and ingress from and to a particular office,

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3. See, Jay Engineering Works Limited v. State of Bengal, 72 C.W.N., 441.

workshop, factory or even residence. The second kind of gherao is an encirclement in depth, that is to say a virtual occupation of the target to be "gheraoed" (an expression also in circulation by now) resulting in the prevention of ingress by the management of its staff."<sup>4</sup>

Thus it is obvious that gherao may be either in the form of total or partial encirclement or in the form of encirclement in depth. But these are the two extreme cases. In between these two forms it may take a number of shades or nuances. For example, it may be an encirclement of the person to be gheraoed by men surrounding him or it may be by locking him up in a room.

Now coming to the contents of gherao it may be mentioned that, as its immediate objective is to prevent egress from or ingress to a place, it is invariably accompanied either by wrongful restraint or by wrongful confinement. More often than not it is also accompanied by assault, trespass, mischief to person and property, unlawful assembly and various other cruel and inhuman acts and offences like confinement in a small space without lights or fans, and for long periods without food or communication with the outside world, beating, humiliation, abusive and threatening slogans and sometimes not allowing even to answer the calls of nature. These are merely illustrative and not exhaustive.

Since all the ingredients of gherao have not stabilized so far, the discussion may proceed on the common denominator which comes to encirclement of a place like office, workshop, factory, residence or even an open public place, where ever the person to be gheraoed may be found, with the immediate objective to prevent egress or ingress of the person to be gheraoed from or to that place. Thus, even in its barest form gherao infringes the rights of a citizen to his personal liberty and to move freely wherever he may like, at least, throughout the territory of India. These are not merely ordinary rights of citizen but are indeed sacrosanct, for the Constitution declares them to be fundamental rights

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4. Jay Engineering Works Limited v. State of West Bengal, 72 C.W.N. 441, 448.

and protects them even against the State.<sup>5</sup> Gherao violates these fundamental rights and is, thus, unconstitutional. It is a common belief that practically the constitutional remedy for the violation of fundamental rights guaranteed by Article 32 of the Constitution is not available against individuals. But the theoretical possibility of such a remedy being available cannot be ruled out and if gherao is supported by state governments, as it happened to some extent in West Bengal, a situation may arise where the Supreme Court may not hesitate to issue orders or directions under Article 32 even against private individuals organising gherao. So, far as the extraordinary remedy under Article 226 of the Constitution is concerned, the least doubt, if any, regarding its availability has been removed by the Calcutta High Court's decision in Jag Engineering Works v. State of West Bengal.<sup>6</sup> Thus, persons responsible for gherao are answerable to the High Courts and may be made answerable to the Supreme Court as well. However, it may be mentioned here that howsoever pious or laudable objective the persons organising gherao might have, they have no justification either under saving clauses of various Articles of the Constitution describing fundamental rights or under any other law of the land to resort to such a strategy.

Besides gherao being unconstitutional, in most of the cases it amounts either to trespass to the person or trespass to land or to both. It is obvious that a person who is gheraoed is subjected to tremendous physical and mental torture. In other words a physical and emotional violence is committed against him. Similarly when gherao amounts to encirclement in depth, an economic violence is also committed against him. According to Professor Street "(r) he protection of the person from physical harm and restriction on freedom of movement, and the protection of interests in tangible property, especially the right to non-interference with land and chattles, are the most important concerns of law of torts."<sup>7</sup> Gherao as such is nothing but a restriction on freedom of movement and an interference with interests in tangible property. Therefore, it doubtlessly amounts to tort. Now coming to the specific torts to which gherao may amount there appears no difference between a gherao in the form of

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5. Constitution of India, Articles 19 and 21.

6. 72 C.W.N. 441.

7. Harry Street, The Law of Torts, 5.

complete encirclement intended by defendants to blockade the egress of the plaintiff from an office, workshop, factory or residence and false, imprisonment which means "an act of defendant which directly and intentionally causes the confinement of the plaintiff within an area delimited by the defendant."<sup>8</sup>

What is necessary to constitute a tort of false imprisonment is an infliction of total or complete bodily restraint not expressly or impliedly authorised by law.<sup>9</sup> So far as total restraint of body is concerned it is present in most of the gherao cases. The question whether persons causing gherao have any express or implied authority of law may be considered a little later after discussing the relationship between gherao and trespass to land.

Trespass to land has been defined as "(i) intentionally or negligently entering or remaining on, or directly causing any physical matter to come into contact with, land in the possession of another."<sup>10</sup> Briefly speaking, it is an unjustifiable interference with the possession of land.<sup>11</sup> In gherao amounting to encirclement in depth of a place, there is no doubt, an element of interference with the land. Encirclement in depth cannot be constituted unless people enter and remain on land. The other elements to be satisfied are to establish that the land interfered with is in the possession of person gheraoed and that the entering or remaining on or interference with the land is unjustifiable. The most common cases of gherao are those of management by its workmen. In these cases it is the person gheraoed who is in lawful possession of the land interfered with, because a gherao of an employer by his workmen generally takes place either in a factory office, workshop or in his residence and all these places are deemed to be in the lawful possession of the employer and not in the possession of his workmen,<sup>12</sup> who are mere his licences,<sup>13</sup> having right to enter such places for the purposes of their employment.

So far as the question of lawful justification to interfere either with person or property, or of immunity for such interferences, which amount to gherao, is concerned there is hardly any provision of law which may even remotely be considered relevant to the

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8. Id. at 23.

9. Winfield on Torts, 155, See also, S.Rama Swamy Iyer, The Law of Torts, 44.

10. Harry Street, The Law of Torts, 62.

11. Winfield on Torts, 358.

12. Winfield on Torts, 363.

13. Harry Street, The Law Of Torts, 67.

topic. The immunity conferred by Trade Unions Act, 1926, which provides that,

"No suit or other legal proceeding shall be maintainable in any civil court against any registered Trade Union, or any officer of member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills"<sup>14</sup>

is not applicable to the gherao cases at all, Even if it be accepted that gherao of employers by their workmen amounts to acts in contemplation or furtherance of a trade dispute, it cannot be maintained by any stretch of imagination that elements of gherao are confined only to inducing some person to break a contract of employment, or to interference with the trade, business or employment of some person, or to interference with the right of some person to dispose of his capital or of his labour as he wills.

As already pointed out earlier, gherao amounts to infringement of fundamental rights of citizen to move freely throughout the territory of India. Therefore, even if there be any law providing justification for gherao that law, being violative of fundamental rights, would be null and void except where it prescribes only reasonable restriction in the interests of general public or for the protection of the interests of any scheduled Tribe.<sup>15</sup> It may be relevant to see whether, on policy considerations, gherao can amount to reasonable restrictions in the interests of general public. In an opinion survey of one hundred fifty persons, comprising twenty five each from educationists, lawyers, journalists, Members of the Parliament, employers and trade unionists, the majority opinion is that:

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14. Indian Trade Unions Act, 1926, Section 18.

15. Constitution of India, Article 19(5).

- (1) Gherao is not desirable under any circumstances;<sup>16</sup>
- (2) Gherao is not at par with Satyagrah;<sup>17</sup>
- (3) Gherao is not better than Strike;<sup>18</sup>
- (4) Gheraos lead to inter union rivalry and militant trade unionism;<sup>19</sup><sup>20</sup>
- (5) Impact of gheraos on general discipline and law and order is bad;<sup>21</sup>
- (6) Gherao is not conducive to industrial peace;<sup>22</sup>
- (7) Gheraos have not been helpful in achieving the desired result;<sup>23</sup>
- (8) Government should not allow gherao;<sup>24</sup>
- (9) Gherao should not be allowed either in private or public sector;<sup>25</sup>
- (10) Gherao should be checked and prevented by all possible means;<sup>26</sup>
- (11) Gheraos have adversely affected:<sup>27</sup>
  - (a) Collective Bargaining;<sup>28</sup>
  - (b) Tripartite agreements;<sup>29</sup>
  - (c) Industrial relations and industrial peace;<sup>30</sup>
  - (d) Production and employment;<sup>31</sup> and
  - (e) Trade Union movement;<sup>32</sup>

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16. Arjun P. Aggarwal, Gheraos And Industrial Relations, 47.

17. Id., at 13.  
18. Id., at 58.  
19. Id., at 90.  
20. Id., at 88.  
21. Id., at 94.  
22. Id., at 65.  
23. Id., at 69.  
24. Id., at 106

25. Id., at 51.  
26. Id., at 114, 115.  
27. Id., at 75.  
28. Id., at 77.  
29. Id., at 78.  
30. Id., at 78.  
31. Id., at 81.  
32. Id., at 85.



(12) Gherao is undesirable:

- (a) For settling industrial disputes; <sup>33</sup>
- (b) As a method of economic coercion; <sup>34</sup> and
- (c) For the development of trade union movement, <sup>35</sup>  
and

(13) Gherao should be discouraged by all, namely, the public, <sup>36</sup> political parties, <sup>37</sup> employers <sup>38</sup> and trade unions. <sup>39</sup>

This analysis merely shows a trend of social thinking which is unfavourable to gherao. Even otherwise it is difficult to imagine that such gheraos which put total restraint upon the personal liberty of the person gheraoed would, under any circumstances, be treated as reasonable restriction in the interests of general public. Gheraos even amounting to partial restraint should not be treated so, because in any form it causes violence of at least two types. First, it puts a blockade against the egress or ingress of a person from or to a place and thus causes physical violence against him. Second, it puts him to a great mental torture and, therefore, causes emotional violence as well. Tolerating gheraos in any form in likely, by setting a chain reactions, to cause chaos and conflicts in the society and, thus, to stagnate the progress of the society. In this connection what bothers much is the fact that in spite of gherao being condemned by the community generally, a section of the people, sufficiently large in number, have resorted to during the last two or three years a number of times, and are still resorting to, gherao as an instrument of coercion to achieve various objectives. This merely shows that these persons are not satisfied with the present state of affairs. Either they feel that they are not getting their equitable share in the preferred values of the community or, the other reason may be that they are over-ambitious. If they are over ambitious they

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33. Id., at 53.  
34. Id., at 56.  
35. Id., at 61.  
36. Id., at 115.  
37. Id. at 119.  
38. Id., at 122.  
39. Id., at 128.

deserve no sympathy, but even if their first premise be accepted as true they should not be permitted to adopt strategies, violent in character, by themselves. The community should find out some other peaceful strategy to ensure equitable distribution of the preferred values. Thus, even on policy considerations gheraos are not justified at all.

Having discussed this much about gheraos in their barest form it may not be out of place to mention that if gheraos are accompanied by other wrongs the civil liabilities for them may arise separately. It may be a liability for assault, battery, trespass to goods, nuisance, defamation or even for negligence depending upon the fact situations and circumstances of each and every case.

The conclusion is that gherao, being unconstitutional, is neither permitted nor can be permitted by law. It is, no doubt, a civil wrong and creates liability to pay damages at least, either for false imprisonment or for trespass to land or for both. Even on policy considerations it is undesirable and it must be checked and stamped out as early as possible.