The Indian Law Institute

NOTES AND COMMENTS

CAN JUDGES BE LAW-MAKERS ?

"NEITHER MIDWIVES nor rain makers shall thou be."

The judgments of the Court of Appeal and the House of Lords in a case arising out of claims of consigners against the shipowners of "The Siskina"[1] contain variegated assessments of the judicial functions and deserve notice, if not for any, for that reason alone. The Siskina was owned by a Panamanian company, insured with a London underwriter for US $750,000 and managed by Greeks from Piraeus. In 1976, she was chartered for a voyage from Italy to Saudi Arabia. Disputes arose between the shipowners and the characters regarding payment of freight and the former ordered the Siskina to divert to Cyprus. Upon her arrival, the Supreme Court of Cyprus issued a writ *in rem* against the cargo and a warrant for the arrest of the cargo on the ground that the shipowners had a lien on it for the unpaid freight. The cargo was arrested and the Siskina sailed away from Cyprus to meet its watery grave on 2 June, 1976.

The shipowners preferred a claim of US $750,000 against their insurers in London and the cargo owners were worried about non-availability of assets for recovery of damages for loss of the cargo for which they had already paid the freight to the charterers. The shipowners had no assets except what they would get from the underwriters in London and, hence, the consigners applied for leave to issue a writ against the shipowners claiming firstly, damages and, more importantly, an injunction to restrain the shipowners from disposing of the insurance moneys within the jurisdiction or removing them out of the United Kingdom. The trial judge declined to grant the relief and the Court of Appeal (Lord Denning, M.R., Lawton, L.J., Bridge, L.J., dissenting) allowed the appeal.

Lord Denning, M.R., referred to the practice of English courts to grant what is called the "Mareva injunction" a sobriquet from the name of the case in which it was first granted—whereby a court can come to the aid of a creditor when the debtor has absconded or is overseas, but has assets in the country. The *Mareva* type of injunction prevents a debtor from disposing of those assets or removing them from England, thus, defeating the creditor of his claim. But it was urged before the Court of Appeal that the English court does not have jurisdiction to issue an injunction *in vacuo* in support of a substantive claim which is not within the jurisdiction of the court.

---

1. *The Siskina*, (1977) 3 All E.R. 803.

www.ili.ac.in © The Indian Law Institute

The Indian Law Institute

Lord Denning felt that the case came within the principle of the *Mareva* type and that an injunction should issue. Regarding the objection of the shipowners that by doing so the court is in effect legislating, Lord Denning said:[2]

> It was suggested that this course is not open to us because it would be legislation; and that we should leave the law to be amended by the Rule Committee. But see what this would mean: the shipowning company would be able to decamp with the insurance moneys and the cargo owners would have to whistle for any redress. To wait for the Rule Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable? Or another ship sunk and insurance moneys here? I ask: why should the judges wait for the Rule Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts; and we can invoke it now to restrain the removal of these insurance moneys. To the timorous souls I would say in the words of William Cowper:
>
> 'Ye fearful saints fresh courage take,
> The clouds ye so much dread
> Are big with mercy, and shall break
> In blessings on your head'.
>
> Instead of 'saints', read 'judges'. Instead of 'mercy', read 'justice'. And you will find a good way to law reform!

Bridge, L.J., found that the court has no jurisdiction to issue the injunction not only because the Rules Committee, empowered to frame the rules of the Supreme Court which has statutory force by virtue of section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, does not allow it, but also because it may go against the spirit of the European Economic Community country. As regards the philosophy expressed by Lord Denning, Bridge, L.J., said:[3]

> I am clearly of opinion that we should not allow the urgent merits of particular plaintiffs, whom we see in peril of being deprived of any effective remedy, to tempt us to assume the mantle of legislators. The clouds in my Lord's adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers.

The appeal to the House of Lords was allowed upholding the dissent of Bridge, L.J. Lord Diplock found[4] that there may be merits in Lord

2. *Id.* at 815.
3. *Id.* at 821.
4. *Id.* at 827.

www.ili.ac.in © The Indian Law Institute

The Indian Law Institute

Denning, M.R.'s alternative proposal for extending the jurisdiction of the High Court over foreign defendants but, "they cannot be supported by considerations of comity or by the Common Market treaties". Lord Diplock felt that the extension of this jurisdiction would require at least subordinate legislation by the Rules Committee under section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, if not primary legislation by Parliament itself. Then he observed:[5]

> It is not for the Court of Appeal or for your Lordships to exercise these legislative functions, however, tempting this may be....

Lord Hailsham of ST Marylebone was equally critical of Lord Denning's suggestion. After stating that the Rules Committee which has to frame the rules regarding jurisdiction under the Supreme Court of Judicature (Consolidation) Act, 1925, consists of members of judiciary, branches of legal profession and of the Lord Chancellor's departmental officials and is presided over by the Lord Chancellor, he said:[6]

> To follow Lord Denning MR in his invitation to pre-empt its (i.e. Rules Committee's) counsels is not merely to usurp the function of a legislative body entrusted by Parliament wilh a particular task. It is to remove a function properly exercised by a representative body able to examine a question from all relevant points of view and hand it over to a particular panel of judges deciding an individual case. Even if such a usurpation were legitimate, which in my view it is not, it would, in my judgment, be highly undesirable....

Regarding the argument that the court should try to harmonise so far as possible the internal laws of the member states of the European Community, particularly in commercial matters, Lord Hailsham said :

> Here again, it is not for the courts in member states to anticipate the work of the diplomats and the legislative authorities. Courts exist, after all, for the decision of particular disputes according to the law as it exists at the relevant time. Matters of policy are often better left to the appropriate authorities entrusted with the task.[7]

How do two judges look at a case which is commonly known as a 'hard' case? Lord Denning, M.R., in *Re Vandervell's Trusts* (*No. 2*)[8] had the unenviable experience of listening to the arguments of a counsel who went on reminding him that "hard cases make bad law". Lord Denning felt that

5. *Ibid.*
6. *Id.* at 829.
7. *Id* at 830.
8. (1974) 3 All E.R. 205.

www.ili.ac.in © The Indian Law Institute

The Indian Law Institute

the counsel is repeating the statement as if it was the ultimate truth and came down heavily on the maxim saying that it being quite misleading should be deleted from the legal vocabulary. Then he tells us what judges should do when a 'hard case' presents itself:

> Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law.[8a]

This is the attitude of one who could be called an 'activist' judge. As against the House of Lords judgment in the *Siskina* case, a case[9] of extra-territorial taxation from U.S.A., in which Holmes, J., gave a dissenting opinion, would offer a striking contrast. The matter related to imposition of transfer tax on the intangible property of a non-resident who had already paid inheritance tax in the state of which he was resident. The U.S. Supreme Court invalidated the transfer tax on the ground that it amounts to double taxation. Holmes, J., felt that if the extension of judicial legislation proceeded in that manner

> I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable....[9a]

He was aware that it is very disagreeable to the citizen to be taxed in two places and it would be a good policy to restrict taxation to a single place. The way out, according to Holmes, J., was that

> (i)f that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition....[9b]

The learned judge made some barbed references to his colleagues on the Bench by saying that they have disregarded a number of precedents as if they were "on the Index Expurgatorius"![10]

How is the attitude of the two types of judges—the 'Activists' and the 'Conservatives'—predicated? Why do the latter voluntarily consign themselves to a 'verbal prison'[11] and proclaim that 'they are not

---

8*a*. *Id.* at 213.
9. *Baldwin* v. *Missouri*, (1930) 281 U.S. 586.
9*a*. *Id.* at 595.
9*b*. *Ibid.*
10. On the list of prescribed publications.
11. Per Frank Furter, J.'s dissent in *Sullivan* v. *Behimir*, (1960) 363 US 335 at 358.

www.ili.ac.in © The Indian Law Institute

The Indian Law Institute

legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing'?[12] Is it because they value 'certainty derived from a close attention to the words of a statute'[13] more than anything else? Probably no one would be able to tell.

*Vasant V. Vaze**

12. *Corocraft* v. *Pan American World Airways,* (1968) 3 W.L.R. 714 at 732.
13. *Ibid.*

* LL.M. (Stanford), Joint Secretary, Ministry of Law, New Delhi.

www.ili.ac.in © The Indian Law Institute