"RIGHT" TO WITHDRAW

JUSTICE SHOULD not only be done, but be seen to have been done: this is one of the avowed principles close to the hearts of all who are engaged in the administration of justice.

Nothing is more treacherous than judicial populism bereft of judicial activism.

On 29 August 1988, M.N. Venkatachaliah, J. for himself and Ranganath Misra, J. in the Supreme Court, dismissed a Criminal Misc Petition No. 3128 of 1988,[1] denying Sheela Barse the right to withdraw her main Public Interest Writ Petition (Criminal) No. 1451 of 1985 and substituting the Supreme Court Legal Aid Committee in her place; for it would otherwise have "frustrated the important issues the main petition has served to highlight in the matter of the status and enforcement of the laws enacted for the protection and welfare of the children in the country."[2]

The main petition, so rescued by the Supreme Court from the hands of Sheela Barse who sought to "walk out"[3] on the court, "highlights the gross violations of the constitutional and statutory rights of a large number of children suffering custodial restraints in various parts of the country and for the protection and enforcement of their rights.

It may be worth mentioning here that the main petition thus resurrected by the Supreme Court was defended by 32 respondents[4] led by the Union of India with the aid and expert legal guidance and advice of five Senior Advocates and 33 Advocates with them. In the miscellaneous criminal petition, as in the main petition, the battle was pitched between this defence line-up and Sheela Barse, petitioner-in-person.

Sheela Barse filed the petition agitating, as of right, to withdraw the proceedings. Of her averments only three broad areas were acknowledged by the Supreme Court. These, briefly, were:[5]

1. The court had become "dysfunctional", and due to its functional deficiencies could not dispose of the petition since November 1986 when it was listed for final hearing. It was also averred *inter alia* that the court had not been able to exact compliance with its orders.
2. The applicant was disabled from conducting the proceedings with "dignity".
3. The proceedings were initiated by her as 'voluntary action' and she was entitled to withdraw it, and the petition could not be continued without her participation.

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1 *Sheela Barse* v. *Union of India*, JT (1988) 3 SC 765.

2. *Id* at 767, para 3

3. *Ibid*

4 *Id.* at para 9

5. See *id* para 4 for details.

The averments were certainly gunpowder and the defence line-up ignited it by observing that the applicant stated her case "in over-assertive tone of great severity but of questionable propriety".[6] Yet there was apparent objectivity when the Supreme Court observed, "but we should not allow ourselves to be influenced by this".[7]

Having initially observed that "no elaborate arguments are, indeed, necessary to decide a question such as this",[8] the court did, "out of deference to the applicant's submissions", proceed to examine the averments and demolish each one of them in a 19 paragraph judgment.

The court, in a pacificatory preface, clarified that "by the force of their order the applicant is not denied the right or the opportunity of instituting any public interest litigation, nor is the right of any public minded citizen to bring an action for the enforcement of fundamental rights of a disabled segment of the citizenry disputed."[9] Then, in further preparation for what was to follow, it dilated on the meaning and content of public interest litigation. The court observed: "...in public interest litigation the proceedings cut across and transcend the traditional forms and inhibitions. The compulsions for the judicial innovation of the technique of public interest action is the constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare state... The technique of public interest litigation serves to provide an effective remedy to enforce (these) group rights and interests".[10]

Then tip-toeing through the concept of "group rights", the "lowering of the *locus standi* thresholds", and "the rights" of those who bring the action on behalf of the others being necessarily subordinate to the "interests" of those for whose benefit the action is brought[11] the court slowly but cruelly dealt the blow: "Therefore what corresponds to the stage of final disposal in any ordinary litigation is only a stage in the (PIL) proceedings. *There is no formal declared termination of the proceedings.*" (emphasis added) With these words, the right to speedy trial in a public interest litigation, and the interests of the hundreds and thousands of children languishing in jails, was crucified. The crusadors of public interest litigation (Sheela Barse here), who cannot

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6. *Id.* at 768, para 5.

7. The court, however, was too human to resist reaction as is witnessed in: "the concern of the court for, and its achievements in the field of, public interest litigation (laid) open to the public assessment" (para 5); the averments were "strong expressions of remonstrance" (para 5) and "hyper-articulated grievance" (para 7); the court was "unable to appreciate the unconcealed, *cynical scorn* the applicant has permitted to exhibit towards the process of this court" (para 9, emphasis added); and "the applicant has chosen to give herself the role of self-appointed invigilator and has made a generous use of that position by her barbed quips and trenchant comments against this court" (para 9).

8. *Id.* at 767, para 2.

9. *Id.* at 767, para 1.

10. *Id.* at 768-69, para 6.

11. *Id.* at 769, para 6. It may be pointed out that the court admits its concern only for the "interests" of those for whose benefit the action is brought but *not* their "rights"; their "rights" are in fact generalised by evolving the concept of "group rights".

certainly be classified as litigation happy, or of wasting their time and money frivolously, but who are public-minded citizens (a fact that is accepted when a PIL petition is admitted) were stripped of the status "analogous to *dominus litus*."[12] And this was effected anticipating applause for what was represented as a resurrection of a PIL litigation, a creation of a laudable norm that a PIL litigation does not survive at the mercy of its crusador.

The exercise in hypnosis proceeds to demolish the averment that the court has become "dysfunctional". A list of reliefs sought under the main petition is met with extracts from as many as 5 Supreme Court orders issued from 15 April 1986 to 21 November 1986, by which the court seeks to justify its concern and its action in the matter of relief. It illustrates the wide-ranging directions issued by it to State Governments, State Legal Aid and Advice Boards, District Judges, the Director General All India Radio, the Director General Doordarshan and the Registrars of High Courts.

This is only an exercise in "self-hypnosis". The *effect* of the orders and directions is lost sight of, even as the court expresses its concern and surprise at these directions *not* being properly carried out. So much so, that in August 1988 when this miscellaneous petition is dismissed the court has not even the basic data on the number of children, the duration of their confinements, the offence charged. . . Even directions of the court issued in 1986, and as clear as this: "on no account should the children be kept in jail and if the state government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail,"[13] have not been followed!

The state and the subordinate judiciary do not invite the reprimand of the highest court even after flouting its unambiguous and repeated directions. On the contrary, the Supreme Court champions their cause. It refrains from "harsh and coercive measures"; it wants to explore, even after the non-compliance of its directions of early 1986, in August 1988, the *willing* co-operation of the authorities. It is apprehensive of the harsh and coercive measures against state and the authorities being "counter-productive".[14] And this is followed by the assurance to anyone who is listening that "coercive action would, of course, have to be initiated if persuasion fails. The court shrouds inaction in the weight of numbers, for "there are 32 respondents, 429 districts in which reports of the district judges have been called for and nearly 400 of them have submitted their reports. There are innumerable jails, remand homes, custodial institutions etc."[15]

The court then moves on to the averment regarding "non-participation of counsel". It employs ingenuity in its defence of the "officers of the court"

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12. *Ibid.*

13. Order dated 13 August 1986 reported at *id.* 772.

14. *Supra* note 1 at 773, para 9.

15. *Ibid.* The quote is notable for its vagueness: "nearly 400", "innumerable jails, sub-jails...". The burden of numbers seeks to suggest that one person is to ensure total compliance and is justified in the inefficiency occasioned.

and distinguishes them from the petitioner. The ground for distinction? That, unlike the petitioner, they were accountable to the court for reporting compliance and were therefore justified in taking extensions of time.[16] The court observes, with sympathy, that their request "might or might not have been made with perfect justifications" but the grant of such requests is not discriminatory, as the petitioner and counsel are not in comparable positions. On the other hand, the court cites an occasion where the case was adjourned on account of illness of the petitioner.

The Supreme Court rebukes the petitioner[17] for her approach in seeking to "establish principles of accountability of the Government of India, the states and the judiciary", as real and larger issues--apart from the immediate problems of the case.

More justification for inaction follows as the court champions the cause of the state and the others, totally silent on the "interests" of those affected, and observes: "All social and political institutions are under massive challenges and pressures of reassessment of their relevance and utility. Judicial institutions are no exception.... But for that reason courts of law, in their actual day-to-day judicial work, cannot allow the incantations and professions of these principles to enable parties to judicial adjudications[18] to constitute themselves the overseers of the judicial performance and accountability in the individual case."

The court builds upon this to dispose of the averments that "in the last analysis both the dignity of the court, the honour of the institution of judiciary and the effectiveness of judicial process are at stake".

And, finally, a populistic pat on the back for the petitioner. The court recognises the "broader right" to criticise the systemic inadequacies in the larger public interest. It introspects and observes: "Judicial institutions are, and should be made, of stronger stuff intended to endure and thrive. . ."

A return then to the issue and the court notes that to allow *dominus litus* to the petitioner and to allow her to withdraw it, would have "rendered the public interest litigation vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends resulting in prejudice to the public weal".

The second averment of the petitioner is then rather summarily dismissed. To be noted here is the court's insistence[19] that, after the initiation of PIL, it is improper for the petitioner to address communications to judges directly. Reasons are given for this which are peculiarly those applicable to traditional dispute resolution mechanism. The court does not volunteer to pass such communications on to the registry to be processed, which would have been a simple action-oriented solution, much needed in public interest

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16 *Id* at 774, para 9

17 *Ibid*

18. Cf. the court's observation that PIL is not traditional dispute resolution

19 *Id* at para 14.

litigation, but concludes that it is for the petitioner (who does not have *dominus litus* and who is battling the formidable defence line-up) to file papers with the registry only. The averment that the petitioner was not allowed to conduct proceedings with dignity is barely discussed and "left at that",[20] apart from a general discussion that the parties submit themselves equally to the jurisdiction and discipline of the court.

The court dismisses the proposition that without the petitioner the proceedings cannot be carried further. Though the court cites that the applicant, "in the written submissions, however, . . . seems to strike a different note and seeks to participate in the proceedings subject to certain conditions", yet the conditions are not discussed by the court.

Finally, the Supreme Court Legal Aid Committee is directed to prosecute the petition, and its name substituted in the place of Ms. Sheela Barse.

Justice is thus seen to have been done, the main petition filed in 1985 highlighting the gross violation of constitutional and legal rights of the children languishing in jails in dehumanising conditions being resurrected in 1988 with a new petitioner.

The Supreme Court does not appear to concern itself with what will follow if, like the states, the district judges and the other authorities, the Supreme Court Legal Aid Committee also does not follow the directions of the Supreme Court and does not effectively prosecute the main petition: Does the substitution of the petitioner presume that it adopts the petitioner's arguments/averments in the main petition, or can it file them afresh even though at the expense of further delay? Does the substitution re-open the case altogether? Is the Supreme Court Legal Aid Committee aided directly or indirectly by the Union of India an effective petitioner against the 32 respondents led by the Union of India? Or is it a proxy litigant for the court which will be itself espousing the "cause"?

The miscellaneous petition was a cry, a call to the Supreme Court to spring to action; it was an opportunity for the court to use its power to administer justice, to prove by acting--by disposing of the main petition, by remedying the violated rights of those affected--that those who occupy the highest pedestal of justice care to ensure that justice is not thwarted.

But, the Supreme Court chose to submerge the violated 'rights' in the sea of mere "concern". No relief followed. The process continues to be punitive; a petitioner is substituted and a petitioner is gone.

The main petition will not proceed in the Supreme Court. But the decision in the miscellaneous petition has already become a page in the history of public interest litigation in India. It will undoubtedly stand out as a reaffirmation by the highest court of its continuing "concern" for the rights of the disabled segments of the citizenry. It is clearly a step towards "creation of rights"--a mission championed by Bhagwati, J. and Krishna Iyer, J. among others. It is definitely laudable that the Supreme Court did not allow the

20. *Ibid.*

miscellaneous petition to succeed, which if it had, would have been a black mark in the field of social action litigation making it a stooge of the petitioners. Yet, the decision does not take the mission of protection of human rights, through public interest litigation, any further.

Many have voiced their concern about lack of action by the state and the administration in the enforcement of the newly recognised "rights".[21] There are reports[22] of gross inaction by the administrative authorities, in many cases despite Supreme Court's directions. In the main petition in this case, in the matter of custodial restraint of children, there were glaring instances of violation of the Supreme Court's directions not only by the state and the administration but also by its own subordinate judiciary.

Yet, instead of a transformation in the activism of the highest court by ensuring enforcement, the Supreme Court bureaucritised social action litigation into what now appears as an endless process. The development of social action litigation has, to this extent, been retarded.

The state and the administration must be making merry, Ms. Sheela Barse can only introspect on losing the opportunity to pursue the cause and can at best examine the possibility of joining hands as a proxy with the SCLAC, and the hundreds and thousands of suffering children can only look to the Supreme Court for their future. But the Apex Court still has an immediate choice. To continue to rollick or to rock the foundations of bureaucracy now, to take affirmative action for "enforcement" of new rights, to give "real" meaning to the lowering of *locus standi* thresholds, to grant adulthood to social action litigation in India. The judicial child is suffering from judicial restraint and is eagerly knocking at the doors to be liberated, with those in the country suffering custodial restraint. Are the sentinels of justice listening?

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21. *E.g.* P.N. Bhagwati, J. "Human Rights in Criminal Justice System", 27 *J.I.L.I.* 8, 9.
22. *Report of the Committee on Jail Reforms* (1980-83).

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