ACCESS OF JUSTICE A GIMMICK TO COVER UP ABUSE OF PROCESS

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Abstract

Vexatious and Frivolous litigation has been held to be an abuse of process of court. Meritless motions are brought before the court causing delay and hardship which results into huge backlog of cases. Courts have been given inherent power to prevent such vexatious litigation. However this has not been proved to be sufficient and eminent members of bench through landmarks cases have time and again suggested that there exists a clamant need to address the concern of increasing pendency in court. It might appear to be an expedient option to leave it to the discretion of the court but the pragmatic solution to this would be evolving a mechanism that would be in black and white. John. F. Kennedy rightly said-"We often enjoy the comfort of opinion without the discomfort of thought."The Law Commission of India has lived up to these words of Kennedy and has dealt with the legal nuances of the existence of a piece of legislation for prevention of vexatious and frivolous litigation. This article has made a critical evaluation of 192nd Law Commission Report and Vexatious and Frivolous Litigation Bill, 2016.

Keywords: *Judicial activism, sue the bastard, chance of success, delay of justice.*

Introduction

Justice Oliver Windell Holmes had once rightly said -"Courts are courts of law and not courts of justice."The courts of law aims to deliver justice by means of enforcing laws. The laws undoubtedly form the corner stone of justice.

Laws are expected to fortify the rights of thousands of individuals and thereby fulfill itsobject in entirety. However, the whole law-making process would be completely otiose if these voluminous statutes fail to obtain its purpose. It ain't about condescending the power of legislation, because without any shred of doubt it is a maneuver that the legislative body accomplishes while it puts down law in black and white. Instead there is a need to press upon the fact that laws made must have a pragmatic approach while dealing with the purpose for which it was made.

In a country like India where justice is to be served to a million there is a need to strike a balance between abuse of process and access of justice. Lest the huge backlog of cases will prove to be a juggernaut for the administration of justice .The clogging of the judicial machinery would lead to circumstances under which one organ will be side-stepping its obligation. It being so as 'Justice delayed is justice denied.'Delay causes hardship. Delay brings our court into disrepute.

[1]Delays in the Indian judicial system as well have long been highlighted not just by foreign courts but even by our own judges have severely undermined the credibility of the Indian legal system.[2] The other factor which should not be forgotten is for how long parties are compelled to contest or defend, they are harassed to the hilt for decades in totally frivolous and dishonest litigation in various courts. They have also wasted judicial time of various courts.[3]

Here we are considering the need to make laws for eliminating the evil of malicious proceedings and to determine the legal measures that are to be adopted to wipe it out. For this, we are making a critical study of the 192nd Law Commission Report on 'Prevention of Vexatious Litigation' and the latest bill of 2016 – Vexatious Litigation (Prevention) Bill, 2016.

192nd Law Commission Report

The 192nd Law Commission Report has exclusively dealt with vexatious and frivolous litigation and has suggested means to obliterate this menace from the administrative setup of the country. The Law Commission has made a comparative study of the shields that other countries are using in order to prevent their judicial machinery from the hurls of vexatious and frivolous litigation.

The Commission has as such observed that most of the countries have codified laws pertaining to this. The statutes of USA, Australia, New Zealand and Canada have all taken in one way or the other a similar approach to this. Firstly they have restricted themselves to sift the frivolous and vexatious matter by putting it to the test of reasonability and also persistence.

Secondly, they have devised the concept of "the leave of court" to be taken by those who have been declared to be abusive litigants. It is pertinent to note that time and again these laws have laid much emphasis on preventing the abuse of process or the harassment of the defendants.

But actually this is not prevention alone but it has a lot more to it.

Analysis of the recommendation given by 192nd Law Commission Report, 2005-

The unwinning fight of prejudice and injury makes justice to fall in the bottomless abyss of endless litigations. A detail study of the '192nd Law Commission report' has made me draw the following conclusions:

1)Whether increasing costs will curb vexatious and frivolous litigation?
This question that always was and still persists remains undecided and those fretting for an answer seem to be struggling in a quagmire.

The foremost loophole of 192nd Law Commission Report is that it only discussed of costs that were to be imposed once a person who after having been declared to be a vexatious litigant[4] has filed a case without the leave of the court. No consideration has been given to the idea of imposing costs to counteract vexatious and frivolous litigation at first hand.

Discussing of which, I am reminded of Lord Macaulay's remark pertaining to the preamble to the Bengal Regulation of 1795 [5] which stated that-"the purpose of prescribing higher court fee in the said Regulation was intended to drive away "vexatious" litigation" [6]. Lord Macaulay had then vehemently opposed the idea for he thought that the reason why dishonest plaintiffs apply to the Courts, before the institution fee was imposed, was because they thought they had a chance of success.[7] But in my opinion this is just one facet of it. There is a lot more to it.

224 years since Lord Macaulay reasoned that plaintiffs thought of their chance of success in courts. The legal machinery and the approach that the litigants have towards the temples of justice in the twentieth century have completely changed. Wesley A. Cann's catchy phrase –"sue the bastard" [8] firmly anchors the direction of my thoughts. Little do these frivolous litigants think of their chance of success in today's date, it is their malicious intention of harassing the other which backs their motive. It seems to be a win-win situation for the vexatious litigants irrespective of the decision of the court. In a country like India where justice is to be served to a million we can imagine the burden on the system. As per the 192nd Law Commission Report [9], 'vexatious' litigation means habitually or persistently filing cases on the issues which have already been decided once or more than once or against the same parties or their successors in interest or against different parties.[10] But so far as 'frivolous' litigation is concerned, "a litigation may be frivolous,- without the need for persistent filing of similar case,- even if it has no merits whatsoever and is intended to harass the defendant or is an abuse of the process of the Court.[11] If we consider Lord Macaulay's opinion on increase in costs and above mentioned connotations of vexatious and frivolous litigation it appears that Lord Macaulay's "chance of success" embodies only vexatious litigation. The concern of frivolous litigation is left unaddressed by him and is exactly what Wesley had encapsulated in his expression-"sue the bastard".

If we analyse the present scenario, the ease with which the litigants approach the court and the fact that they think of litigation as the first remedy that they could resort to binds me to take the stand of Wesley .This leaves me with the following line of thought –"Vexatious and frivolous litigation without any speck of doubt is to be restrained by higher costs." It is worth quoting Justice Bowen in Copper vs. Smith (1884)[12]. He said: "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs".

The principle underlying levy of costs was stated succinctly thus in Manindra Chandra Nandi vs. Aswini Kumar Acharjya[13] : "… We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a

recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence.[14]" It is a result of the abovementioned notion attached to the concept of costs that it was never successful to deter vexatious and frivolous litigation. If we take close look of this judgment itself we might get to know that awarding costs as a recompensation and not as a punishment is not a blanket rule. This judgment instantiates, that vexatious and frivolous litigation is an exception to this rule. The perception of Law Commission pertaining to costs as a deter to vexatious and frivolous litigation has turned topsy-turvy since 194th Law Commission Report. The 240th Law Commission report's very first recommendation clarifies the position regarding costs to be imposed as a curb. [15]

2) Secondly, I would discuss about the recommendation of the 192nd Law Commission Report to declare a person as a vexatious litigant if in case he habitually or without any reasonable ground institutes proceedings before the court.[16]

We need to critically analyse this provision and evaluate its effectiveness. Reflecting on the situation of Indian Court's today one thing that comes to everyone's attention is the huge pendency of litigation. Is there not a need to define the limits to abuse of process.The access of justice is a basic feature but then again there exists an urgent need to prevent abuse of process. Under the cover of access of justice how far can there take place an abuse of process.

The importance of the right to participate in legal proceedings before a court may be inversely related to its utilization. Beyond a certain level, expanded access may be costly. It's deterrent qualities may be diminished and the legal system when overloaded may be unable to ensure delivery of justice.[17]

If a law that declares a person, who habitually or without any reasonable ground is involved in the commencement of legal processes, to be a vexatious litigant is not evolved the delivery of justice would definitely be hampered. Consequentially the virtue of 'justice' in "access of justice" is not preserved and is ultimately lost.

The Vexatious Litigation (Prevention) Bill, 2016.

Endeavors made by legislature to curb frivolous litigation:

Order VI Rule 16, CPC[18]clearly empowers the Court to strike out any pleading if it is unnecessary, scandalous, frivolous or vexatious or tends to prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of Court. [19] Similarly Criminal Procedure Code,1973 has provision under Section 250 which allows the magistrate to order the complainant to pay monetary compensation to the accused where the case appears to be groundless. The State legislatureof Maharashtra and Madras have made efforts in this regard and constituted the following acts respectively

i.e. Maharashtra Vexatious Litigation (Prevention) Act, 1971 and Madras Vexatious Litigation (Prevention) Act, 1949.

Critical appraisal of the Vexatious Litigation (Prevention) Bill, 2016.

Understanding the idiosyncrasies of laws to prevent vexatious and frivolous litigation there comes to mind the following most significant aspects:

- Competency to make law to curb vexatious and frivolous litigation.

The vexatious frivolous litigation (prevention) Bill, 2016 does not thwart the basic structure of the constitution of India. Effective access to justice have been culled out as one of the basic structural pillars of the constitution through various pronouncements. Access to justice should not be viewed only as a tool to provide justice in individual cases, 'but also to attack the dynamics of exclusion' [20] by using the law's disapproval and sanction of certain practices as the impetus towards social change. Liberal access to justice does not mean access to chaos and indiscipline.[21]Access to justice is therefore intrinsically tied to the vision of law as containing an emancipatory potential. [22] Sahara Group Litigation is classic example of such frivolous litigation in which hundreds of precious judge hours were wasted and regulation authority had to duffer litigation from court to court incurring public expenses in its defense against such frivolous litigation, even after the matter was concluded judicial process was abused for close to two years [23] An observance was made in a separate opinion in the case of Bar Council of Maharashtra v M.V Dabholkar[24]case that ,the possible apprehension that widening legal standing with public connotation may unloose a flood of litigation which may overwhelm the judges is misplaced because public resort to court to suppress public mischief is tribute to justice system. [25] In order to strike the balance between abuse of process and access to justice two conditions must be satisfied i.e. a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way and b) the refusal to entertain the case must not cause an injustice to the plaintiff.[26]

Justice Krishnan Iyer who remain exponential critic of the vexatious practices in India stated that , "…we are thus satisfied that the bogey of busy bodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bonafide seekers is a democratic dimension of remedial jurisprudence even as public interest litigation class action, probono proceedings are. We cannot dwell in the home of processual obsolescence when our constitution highlights social justice as a goal."

Supreme Court in the case of M.P Mawle v State of Andra Pradesh[27]dealing with the legislative competence of Vexatious and Frivolous litigation bill passed by State legislature of Madras had upheld its constitutional validity.Entry 2 of List II, Entry 2 of List III and Entry 4 of List III of the Act were referred. The similar position exists under Entry 2, 13, 11A and 46 of List III of Constitution of India. These entries include all the matters in Civil Procedure Code and Criminal Procedure Court, matters related to administration of justice, constitution and organization of all courts except High Court and Supreme Court and jurisdiction and powers of all court except Supreme Court.[28]

- No provisions related to appeal

The right of appeal against an order declaring a person as 'vexatious litigant' and directing him to obtain leave of the court to institute or continue any proceeding , has not been given any consideration. In such case the parties shall always have right to move to the Supreme Court under Article 136 of the Constitution of India which would stay the previous order of the division bench . This would in turn clog our Supreme Court with petitions. Justice J S Khehar and Justice D Y Chandrachud and Justice S K Kaul stated that such multiple petitions would 'choke' the judicial system. [29] It appears manifestly to be an abuse of process to take such recourse as it would burden the Supreme Court with petitions and instead of serving it with solutions it would serve it with problems.

- No bar on PILs

In the proposed bill the proceedings under Art.226 of the Constitution of India have been excluded from its purview. The institution or continuation of 'civil or criminal proceedings' [30] does not include proceedings instituted or continued under Article 226 of the Constitution of India. A Supreme Court bench headed by Chief Justice of India Jagdish Singh Khehar has recognized the huge backlog of cases in courts across India including the Supreme Court. This is because vexatious litigation does not only start with suit but also Public Interest litigations (PILs). Many companies and traders have treated writ petition as an abuse of process of court.[31] Disgruntled Litigants use such recourse to cause delay and blockage in the judicial system. The sanctity of judicial process shall be eroded if strict and form action is not taken.[32] Though Judges have been very critical about the frivolous and vexatious PILs and heavy monetary damages is imposed upon the parties who file such petitions. Still in courts arrears are mounting by leaps and bounds and there is no respite in sight. [33] Imposition of such monetary compensation is not a recent development, rather since very long courts have been using such method, monetary damages has provided no bar or deterrence to luxurious litigants. They still add to the mounting arrears. PILs have appeared to be a tool in the hands of rich and powerful. This bill has failed to include that case that does not start with a suit.

- Government Litigant

Litigation serves as tool in the hands of an individual and social activist[34] to question the government policies and exposing corruption. It could be unsafe to empower Advocate general, who is appointed by the government in power, to play this role under section 2[35] of filling an application to declare a person as vexatious litigant. This could curb judicial activism, which forms the basic structure of constitution of India. Judicial Activism is a useful adjunct to democracy [36]to maintain the system of separation of power and system of check and balance. It serves as a ploy to embark upon an enquiry upon governmental policies. [37] The right to initiate such proceeding shall rest into the hands of any victim or registrar of the High Court of the State. Also, under Section 2 of the Bill the word 'person' is used, so if we go by the legal construction of the same, it makes us deduce that the term 'person' includes legal person and thereby the attenuated line of reasoning suggests that it would consequentially include 'government litigant' as well.

Juxtaposing the two scenarios, there comes again a crossroad where one would have to strike a balance, so that the bar which in case is brought against the government litigants is not such that it leads to injustice.

Conclusion

Time and again the eminent members of bench have made strict reminders for the urgent need to curb vexatious and frivolous litigation. If left unaddressed this would definitely stir the hornet's nest for the administrative set up.

So as far as the bill is concerned we need to bring out some measures to deal with the real time problems of the excess burden on the judicial organ. The critiques of 'The Bill' and the Law Commission Report mentioned above summarises as to how they are ineffectual in addressing the concerns of frivolous and vexatious litigation. We need to reflect on the key aspects of imposing cost even on the first-timers instead of restricting it's imposition on those declared as vexatious litigants. Also, it is suggested that as far as this fact, that a Registrar who is appointed by the government is the one who files an application for declaring a person as vexatious litigant, is concerned, it definitely raises eyebrows on his decisions to raise such motions against litigants that point fingers on the government.

Since the Bill does not apply on the PIL, should it be completely left out of the gamut of vexatious litigation? It is apparent on the face of record that this approach has somewhere or the other contributed in unloosing the flood of public interest litigation. It is recommended that there should be an imposition of cost for this as well.It is proposed that the limits of government litigants also is to be circumscribed.

Once, these major issues are adequately addressed these pieces of legislation would definitely help the administration to enjoy the fruits it had intended to bear.

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