

## Judicial Imperialism in India: A Critique of KAMINI (2017)

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**Story-1:** Centuries ago, while the ‘doctrine of sovereign immunity’ (“King can do no wrong;” and “King cannot be sued in the court of his own creation”) prevailed, an emperor, in spite of the fact that he was nude, misled by swindlers who convinced him that his clothes were made of such fine fabric that it is invisible; and only the most elevated people could see it, asked people: How do I look? Everyone pretended to admire the clothes, being afraid to contradict him. However, one little boy yelled out, “but the Emperor has no clothes”!!! The Emperor realized that the assertion was true, but continued the procession...

**Story-2:** Centuries later, where the feudalistic ‘doctrine of sovereign immunity’ has been replaced by ‘rule of law’ (“law is supreme; and is above every individual”); and ‘principles of natural justice’ (including the principle-‘*nemo judex in causa sua*’-“no one can be a judge in his own cause”), criticizing the decision of the apex court of India in *Kamini Jaiswal v. Union of India* (Writ Petition (Criminal) No.176 of 2017), a Supreme Court lawyer and former IPS officer, Dr. Ashok Dhamija yells out: “My Lords, the Emperor has no clothes !!!” (See, Live Law (November 19, 2017))

The story starts with the arrest of an accused in ‘Medical Bribery Scam’ who led the CBI eventually to a retired judge of the Orissa High Court, IM Quddusi. The FIR names a retired judge as an accused, who had allegedly been negotiating through a ‘middleman’ to get a favorable order for a medical college in a petition pending before the Supreme Court. Two writ petitions were filed in the Supreme Court (one filed by Advocate Kamini Jaiswal; and the other by Campaign for Judicial Accountability and Reforms (CJAR)) demanding the constitution of a Special Investigation Team (SIT) headed by a retired Chief Justice of India

to investigate the offences arising out of the FIR. Chelameswar J. directed that the matter be heard by the Constitution Bench of the first five judges in the order of seniority; and that the entire material collected by the CBI in the course of the investigation of the crime shall be kept in a sealed cover for production before the Constitution Bench.

There is a further twist to this tale. On 9<sup>th</sup> November when Chelameswar's bench ordered the case to be listed before him at 12:45 p.m., the Chief Justice's Constitution Bench was suddenly made to rise at noon and did not sit thereafter till post lunch. At 2:00 p.m. the Chief Justice mentioned that he had to rise early to attend to some family matters. Strangely at 2:45p.m. Prashant Bhushan, petitioner's counsel received a call from the registry that a seven judge bench is being constituted to sit in Court no. 1 at 3: 00 p.m. and that he should appear. At this point it is important to point out that the court did not list the related matter which was filed in the name of Kamini Jaiswal before this bench, with which this matter was tagged in the morning as per the proceedings dictated in open Court no. 6. A list setting out the constitution of the seven judges bench was posted on the notice board but when Mr. Prashant Bhushan entered the court, to his surprise there was a bench of five hand -picked junior judges, presided by the Chief Justice, as opposed to the order dated 9<sup>th</sup> November 2017, that considering the importance of the issues raised, the matter should be raised before the five senior most judges.

The hearing began to a full court where the office bearers of the Supreme Court Bar Association seemed to have been invited to address the court. Additional Solicitor General also addressed the court. The hearing was unprecedented since the atmosphere of the court was most unbecoming of the Chief Justice's Court of the Supreme Court. The proceedings progressed in an atmosphere that was chaotic and like a fish market with sloganeering. The Counsel for the petitioner was neither called upon nor permitted to put forward his case and there was a constant cry for hauling him, along with the others who have taken up this issue, for contempt. Despite several attempts to make him heard, at every point, counsel for the petitioner was shouted down and interrupted which ultimately forced him to leave the court.

At the end without hearing counsel for the petitioner, order dated 9<sup>th</sup> November 2017 has been rendered void. though the matter was not before the court. A detailed order has been passed without addressing the issue of conflict of interest raised by the petitioner directing that the Chief Justice of the High Court and the Supreme Court were the master of the Roster, which issue was not challenged or raised by the petitioner at any point of time. (See, the press note on an unprecedented hearing before a Constitution Bench at 3:00 p. m. on the 10<sup>th</sup> of November, 2017: <http://judicialreforms.org>)

Thus, a new bench was constituted. (It cannot be disregarded that the medical college in question had approached the Supreme Court earlier in a case which was heard by a bench of Misra, Roy & Khanwilkar JJ; and that Roy and Khanwilkar JJ. were also on the “constitution bench” that Misra J. set up.)

### **The Prayer**

The petitioners implored: (i) in order to restore the confidence of the public in the judiciary, investigation should be handed over to SIT headed by a retired Chief Justice of India and not left to the agency controlled by the Government; (ii) since the matter had been heard by a Bench presided over by Chief Justice, propriety demands that he ought not to deal with the present petition either on the judicial side, or even on the administrative side. Therefore, present petition can neither be heard by a Bench presided by him, nor can it be assigned to any other Bench by him in his administrative capacity.

### **Issues**

- Whether the Bench formed by the Chief Justice of India in exercise of his administrative power is valid and proper?
- Whether Article 144 of the Constitution renders it impermissible for any Bench of the Supreme Court to overrule an order passed by another Bench of the Supreme Court?
- Whether registration of FIR against any sitting Judge of the High Court or Supreme Court is permissible?
- Whether the Chief Justice of India could constitute Benches in cases where imputations are made against him?
- Whether A.M. Khanwilkar J. should recuse from the matter?

### **Decision**

The Court dismissed the petition, with a threat of contempt of court thus: “We cannot fall prey to such unscrupulous devices adopted by the litigants, so as to choose the Benches, as that is a real threat to very existence of the system itself and it would be denigrated in case we succumb to such pressure tactics.”

## Reasoning of the Court

- (i) The Chief Justice of India is the 'master of the roster.' He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted. (*State of Rajasthan v. Prakash Chand* ((1998) 1 SCC 1) Also, the Supreme Court Rules, 2013 provides that the Chief Justice has to assign the cases.
- (ii) The submissions of the petitioner that: (i) Article 144 of the Constitution binds the Supreme Court and, renders it impermissible, for any other Bench of the Supreme Court, even if it is a Bench presided by Chief Justice of India to overrule an order passed by another Bench of the Supreme Court; and (ii) All orders passed by the Supreme Court are binding under Article 142 of the Constitution of India, even upon the Chief Justice of India and other Benches of the Supreme Court, as held in *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388- are totally devoid of substance.
- (iii) There is no question of registering any FIR against any sitting Judge of the High Court or Supreme Court as it is not permissible as per the law laid down by a Constitution Bench in *K. Veeraswami v. Union of India* (1991) 3 SCC 655. Any complaint against a Judge and investigation by the CBI if given publicity will have a far reaching effect on the Judge and the litigant public. The need, therefore, is of judicious use of action taken under the Act. There cannot be registration of any FIR against a High Court Judge or Chief Justice of the High Court or the Supreme Court Judge without the consultation of the Chief Justice of India and, in case there is an allegation against Chief Justice of India, the decision has to be taken by the President, in accordance with the procedure prescribed in the said decision. The instant petitions, as filed, are a misconceived venture inasmuch, as the petition wrongly presupposes that investigation involves higher judiciary, i.e. this Court's functionaries are under the scanner in the aforesaid case; that independence of judiciary cannot be left at the mercy of the CBI or that of the police is a red herring. There cannot be any FIR even against the Civil Judge/Munsiff without permission of the Chief Justice of the concerned court; and rightly, FIR has not been registered against any sitting Judge. Otherwise, on unfounded allegations, any honest Judge to the core can be defamed, and reputation can be jeopardized.
- (iv) When imputations are made against the Chief Justice, it is the prerogative of the Chief Justice to constitute the Benches and assign judicial business, and it would not hinge on the whim of the litigant. It is the duty of the Chief Justice to assign judicial work to brother Judges. By doing so, he did not become a Judge in his own cause. It is contempt to imply that the Chief Justice would assign it to a

Bench which would not pass an order adverse to him. (*Dr. D C Saxena v. Chief Justice of India*, (1996) 5 SCC 216)

- (v) There is no room for the petitioner to infer bias. There is no reasonable basis to pray for recusal of A.M.Khanwilkar, J; and that tantamount to contempt of court and an attempt at forum hunting. The Chief Justice's prerogative to constitute benches and assignment of judicial business would not hinge on the whim of a litigant.

## Criticisms

- (i) The Supreme Court maintains that even if there is a conflict of interest, a judge can sit on a bench or that the Chief Justice of India can constitute or decide the bench to hear such matter. Considering the requirements of equity, ethics and natural justice, it is submitted that the view is incorrect. The decision by the two judges to sit on the Bench –Misra, CJI in the Constitution Bench and Khanwilkar, J. in the Constitution Bench and three-judge Bench – is, in fact, another instance wherein the Supreme Court has granted itself the power to go against even the basic tenets of our legal system. This amounts to judicial imperialism.
- (ii) Article 144 of the Constitution binds the Supreme Court and, renders it impermissible, for any other Bench of the Supreme Court, even if it is a Bench presided by Chief Justice of India to overrule an order passed by another Bench of the Supreme Court. All orders passed by the Supreme Court are binding under Article 142 of the Constitution of India, even upon the Chief Justice of India and other Benches of the Supreme Court, as held in *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388.
- (iii) The Supreme Court appears to have disregarded the effect of the FIR. In Supreme Court's view, the FIR is in no way connected with judiciary or any judges of the Supreme Court. In its order, the Supreme Court held: "There is an averment made in the writ petition that it is against the highest judicial functionaries; that FIR has been recorded. We do not find reflection of any name of the Judge of this Court in the FIR." In this regard, it is submitted that the court has failed to take note of certain vital facts: the retired judge was arrested and remanded to custody. An amount of Rs. 1.86 crore was recovered by CBI. The CBI had many phone intercepts in this matter. CBI does not suddenly register the FIR like a police station. CBI has its own internal system. The FIR has been registered under Section 8 of the Prevention of Corruption Act, 1988 and Section 120-B of the IPC. As the FIR states, the petition was pending in the Supreme Court before a bench headed by the present CJI; and promise was made by the middleman to get the matter settled by influencing the relevant public servants. Who could have been the 'person' who could have helped in settling the matter which was pending in Supreme Court? If

the matter is pending in the Supreme Court, then who else can be influenced to settle the matter? Can any ordinary person settle the matter which is pending before a bench headed by the present CJI. Hence, what the FIR mentioned raised a matter of grave concern.

- (iv) The Court concluded that there is no room for the petitioner to infer bias; and there is no reasonable basis to pray for recusal of A.M.Khanwilkar, J. However, as held in *Ranjit Thakur v. Union of India* (1987) 4 SCC 611, reasonableness of the apprehension or bias in the mind of the party has to be considered.
- (v) The cardinal principle of natural justice- the cornerstone of independent and impartial judiciary- is violated. While the judgment cites precedents to assert powers of the Chief Justice as a master of the roster, it does not address the arguments of the petitioners that Misra should have recused from hearing the case.
- (vi) The non-inclusion of any of the next six senior-most judges and the inclusion of the 'hand-picked' junior judges in the "constitution bench" suggests that Misra CJI had either no faith in his fellow judges to be neutral and impartial in this matter or he feared any neutrality and impartiality in this matter. Would it not be the most logical thing to do to include the above judges in the ongoing investigation, after going through the proper procedures? Would it not have been advisable for Misra CJI to have welcomed such a probe as it would have once and for all cleared all controversy?

**Moral of the stories:** People may be scared, and may pretend to agree. But, that does not mean that people do not know the truth. The moral is also that the men in power must listen to an unpleasant but honest voice even if that is coming only from a single person or from an unlikely source. Supreme Court may be supreme but it is not infallible. The FIR casts a cloud on the judiciary at the highest level. "Judicial independence" does not mean being independent of the laws. Being a judge does not mean being given arbitrary powers to make any agenda from the bench. The ultimate question is- what kind of country this is to be? — One ruled by "we the people," or one where the notions of an elite are to be imposed, whether the people agree or not. The credibility of the institution, built up over several decades and already under stress in the last few years, crumbled in two hours of high drama. On matters of integrity and accountability, the judiciary has always asked the public to trust them. Judges appoint judges. Judges decide whether judges face any consequences for misconduct. Judges decide whether judges have committed an impeachable offence. Judges decide whether judges will be named in a criminal offence. At all times, the claim has been raised that the institution of the judiciary is too precious, too fragile, and too important.