

SPECIAL LEAVE PETITIONS, AN IMPEDIMENT TO JUSTICE: NEED FOR STRUCTURAL CHANGES TO ENSURE EFFICIENT TIME ALLOCATION OF THE COURT

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The Supreme Court (SC) has consistently faced the problem of the Special Leave Petition privilege being misused. This paper considers directives, judgments and observations by the SC in that regard. It analyzes the problem, examines viable solution models deployed in other jurisdictions and comes up with a unique model to assist the SC in strengthening the floodgates against frivolous SLPs. We propose a Board to be created by the SC by passing rules as per its power to examine the SLP applications both formally, that is for compliance with procedural requirements and substantially, that is on the legal issues, and opine. The subsequent step would be to engage a senior counsel for advice as to the merits of the case. These will also be a cog in the wheel to reduce the backlog of cases, as well as add substantive opinions of experienced legal minds while being merely supplementary and not resulting in a delegation of the SC's duties. Further, SLPs that the court finds frivolous should be fined on a regular basis to create deterrence.

I. INTRODUCTION

Recently, the Supreme Court has expressed anguish over the frivolous number of SLPs filed. In *Mathai @ Joby v. George*¹, the will of the defendant was challenged as not being genuine. The special leave jurisdiction of the

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¹ (2010) 4 SCC 358.

court had been invoked, praying before the court, to enable the petitioner to send the will of the defendant for forensic testing a second time, which was rejected by the Trial Court and the High Court. The Court held that such a claim was tantamount to trivialization of the discretionary power of the court.

Article 136 in its nature and scope, enables the preservation of the most coveted principle in the common law system, the rule of law.² It is symbolic of the principle, to the extent that it allows discretion to the Supreme Court to the self-ascribed limits. The court may, if it deems fit invoke the Article 136 jurisdiction suo motu or can at the instance of the parties take up the matter at hearing. The court has on several occasions remarked that it was the High Court that was intended to be the final court of appeal and Article 136 was just a provision to ensure that substantial justice is done.³ Having said that, the corollary, which can be corroborated by the Supreme Court decisions, is that the provision is to be used judiciously. A vast number of Special Leave Petitions are filed and summarily dismissed by the court. The backlog of the cases ironically vitiates the actual objective of the article. Wastage of Court's time leads to unnecessary delay in conclusions.⁴

II. THE ISSUE OF FRIVOLOUS SLPS AND INEFFICIENT TIME ALLOCATION

Indiscriminate Filing of SLPs

Each day a vast number of SLPs are filed and rejected on several procedural, technical and substantive reasons. The delay caused to the court is actually detrimental to the health of the institution of judiciary. As pointed out by K.K. Venugopal in 1997 there were only 19,000 pending cases in this Court but now, there are over 55,000 pending cases. In a few years' time the pendency will cross one lakh cases. In 2009, almost 70,000 cases were filed in this Court, of which an overwhelming number were Special Leave

² INDIA CONST art. 136.

³ Dhakeshwari Cotton Mills v. CIT AIR 1955 SC 65.

⁴ Sanwant Singh v. State of Rajasthan AIR 1961 SC 715.

Petitions under Article 136. In contrast, the U.S. Supreme Court hears only about 100 to 120 cases every year and the Canadian Supreme Court only 60 cases. Thus, it is observed that the magnitude of the problem in India is rather enormous. Right to a speedy trial is construed as a right under Article 21 and Article 14, within the chapter of fundamental rights in the Indian Constitution.⁵ In 1987, Justice Venkataramaiah had foreseen the current predicament. In *P.N. Kumar v. Municipal Corporation of Delhi* disposing of a writ petition under Article 32 he observed that:

*“This Court has no time today even to dispose of cases which have to be decided by it alone and by no other authority. A large number of cases are pending from 10 to 15 years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than 15 years to dispose of all the pending cases.”*⁶

The gravity of the problem is apparent and can further be illustrated by the following figures. Total pendency has gone up from 19,000 in 1997 to 53,221 in 2009, an increase of over 150% in about 12 years. An increase at the same rate would bring the total pendency of cases to 1,25,000 over a period of the next ten years.⁷

Here, it is important to distinguish the writ jurisdiction from that of special leave. The special leave allows the Supreme Court to admit for deciding not just a final judgment but any order of the court. To that extent Article 136 grants the Supreme Court the power to review any decision of any court or administrative body whereas jurisdiction of the court under Article 32 is an original jurisdiction granting certain writ remedies to be filed before the court. Article 32 is a matter of right of the party before the court, whereas Article 136 is a matter of discretion of the court.⁸ Supreme Court on several

⁵ K. K. Venugopal, R. K. Jain Memorial Lecture: Towards A Holistic Restructuring of the Supreme Court of India, January 30, 2009, available at: http://www.hindu.com/nic/venugopal_lecture.pdf (Last visited on February 5, 2013).

⁶ (1987) 4 SCC 609.

⁷ K.K. Venugopal, *supra* note 5.

⁸ Article 32 falls within the chapter on Fundamental Rights whereas Article 136 falls within the chapter on Powers of the Supreme Court.

occasions has reiterated the function and established the sanctity of Article 136.

The Supreme Court's View in the Matter of Frivolous SLPs

Even prior to the Indian constitution a similar discretion was conferred to the Privy Council as is conferred to the Supreme Court by virtue of Article 136. Sir George Rankin pointed out in the case, that for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice and that misdirection as such, even irregularity as such will not suffice and that there must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law.⁹ But today even small matters are brought to the Supreme Court. Justice Katju, illustrates the point by citing examples of cases, where even allowing amendment petitions to claims are fought up to the Supreme Court.¹⁰ The probable misuse of Article 136 was immediately pointed out and taken care in one of the first SLPs in the case of *Pritam Singh v State*.¹¹ The judgment suggested sparing and exceptional use of Article 136, and suggested uniform guidelines for the use of SLPs.¹² The subsequent line of cases, did focus on the sparing use of the provisions of Article 136 but did not subscribe to the requirement of particular guidelines to be set for allowing SLPs. The result was enunciated by Justice Dalvi in a private interview. He said that using Article 136 for common matters, was like asking a super-specialist doctor for general medicines. Such is the degree of misuse of SLPs.¹³

The *Bengal Chemicals Ltd v. Their Workmen*¹⁴, the court restricted the scope of SLPs to cases where there was a violation of the principles of natural justice, causing substantial and grave injustice to parties. Though, this

⁹ See, George G. Feller v. The King AIR 1943 PC 211; Mohd. Newaz v. Emperor AIR 1941 PC 132.

¹⁰ Mathai, *supra* note 1.

¹¹ AIR 1950 SC 169.

¹² *Id.*

¹³ Interview with Anil Dave, J., Supreme Court (May 16, 2011).

¹⁴ AIR 1959 SC 633.

principle was not directly referred to by the subsequent cases. The point to note here is that these principles have not been overruled though it may be said that the jurisprudence regarding SLPs took a turn from hereon.

In *P.S.R. Sadhanantam v. Arunachalam*¹⁵, Justice Krishna Iyer substantiated the reasoning for limiting the scope of SLPs. He said, “The wider the discretionary power, the more sparing its exercise. A number of times this Court as stressed that though parties promiscuously ‘provoke’ this jurisdiction, the Court parsimoniously invokes the power. It is true that the strictest vigilance over abuse of the process of the court, especially at the expensively exalted level of the Supreme Court, should be maintained and ordinarily meddlesome bystanders should not be granted a ‘visa’.”¹⁶

Under the constitutional framework it was the High Courts which were meant to carry out the functions as the highest appellate body, and the Supreme Court was there ideally as a supervisor. The intervention of the Supreme Court was deemed to be only that as to correct the High Courts in exceptional matters.¹⁷ The current position of the court merely suggests that the SLP provision should be used sparingly and in exceptional cases, when a substantial question of law remains ambiguous and unresolved or where it appears to the Court that interference by this Court is necessary to remedy serious injustice.¹⁸

Inefficiencies Associated with Frivolous SLPs

There are several reasons why floodgates of litigation have opened: firstly, the failure of the court to lay down substantial and strict guidelines regarding filing of SLPs; secondly, the lack of faith within the judiciary of achieving speedy justice through formation and implementation of such guidelines; thirdly, delay of justice and fourthly inefficiency in dealing with the cases at hand.

¹⁵ AIR 1980 SC 856.

¹⁶ *Id.*

¹⁷ *Narpat Singh v. Jaipur Development Authority* [2002] 3SCR365.

¹⁸ *J.P. Builders v. A. Ramadas Rao* (2011) 1 SCC 429.

Be that as it may, the hypothetical obliteration of Article 136 is inefficient, if justice is the purported output of the court. The justification for the requirement of Article 136 can be given on economic grounds. The first situation would be where there was no Article 136 or a provision for special leave. In such a situation all appeals to the Supreme Court would be either on certificate by the High Court or through a very narrow writ jurisdiction under Article 32.

To that extent Article 136 forms a pareto-superior alternative in that Article 136 provides for a mode which allows furtherance of justice or correction of grave injustice. Justice as such could be classified as a non-rivalrous resource. What it suffers from is the 'tragedy of commons'. Filing of rivalrous SLPs is comparable to the over-exploitation of the resource (of justice) resulting in lower efficiency. The current system, thus, needs betterment to the system to speedily dispose of the cases in order to increase the efficiency of delivery of justice. This gives rise for the need of a rule-based model for the implementation of Article 136 *intra vires* the Constitution of India.

At this point it is important to establish how the over-exploitation of the judiciary may lead to the depletion of its effectivity and thus the output. Increase in the number of cases, would certainly reduce the amount of time given to one case, also it would naturally increase, the time taken to dispose off one case, over a span of time. With lower available time per case and increase in the number of hearings thus increasing the discontinuity and the total duration of the case, it may lead to serious injustice for both parties. In cases where there is a mis-trial or a prejudice several years have gone by and the accused is left disheartened with the justice system (assuming that he is innocent). For instance, a person charged with murder and refused bail, is declared by the Supreme Court to be not-guilty may have suffered through the process for such a long time that he might have lost the peak of his life fighting a trial, when in fact he had done nothing wrong. Even for a victim, waiting for years to get justice may be a frustrating exercise. It may be argued that by ensuring a speedy trial if justice itself becomes the function of time then it creates a trade-off (quicker trial with a higher probability of error, slow trial with a lesser problem of error but which itself is unjust). The

model which the authors seek to propose does not offer this trade-off but in fact avoids it, yet offering a speedier trial and ensuring an inherently fair procedure.

III. PROPOSED MODEL AND COMPARATIVE PERSPECTIVES

Theoretically, the discretion of the court begins when the appeal is filed and continues throughout the duration of the proceeding. Thus, the court may at any time either reject or dismiss the petition.¹⁹ The Supreme Court on one occasion has said that an SLP filing is similar to that of a person at a gate, requesting the gate-keeper to allow entry.²⁰

Thus, owing to the nature of the discretion being exercised in admitting or rejecting an SLP, it is possible to create an alternate body for handling SLPs. Now, the authors will explain the features, characteristics, advantages and limitations of the alternate body they propose.

The Authors' Proposition

The authors propose the creation of a body (hereinafter referred to as 'Board') with the sole objective of procedurally and substantively analyzing the SLPs before they are filed in Court. A proposed SLP will be taken to the Board prior to being taken to the Supreme Court. The Board on receiving such an application will initially review the application solely on procedural grounds for any technical errors and will advise the filing party to rectify any such errors found. Unless compliance with such action is met by the petitioner, the petition cannot proceed to be heard by the SC. The opinion of the Board shall be available to both the parties for information and further action. Such an opinion shall have advisory value or persuasive value but shall not be considered in any way either binding on the court, or as a conclusive determination of merit of the case. The opinion of the Board would aid the court proceeding without procedural hassles. All powers of the Supreme Court under Article 136 shall remain vested in the Supreme Court.

¹⁹ V. N. SHUKLA CONSTITUTION OF INDIA, 11TH EDN, 502 (M.P. SINGH ED, 2011).

²⁰ *Id.* at p. 503.

In accordance with *Sampath Kumar v. Union of India*²¹ and *L. Chandra Kumar v. Union of India*²², where it was stated that the role of the court may be supplemented by another quasi-judicial body, but cannot be substituted by it; the Board will in no manner 'take-over' the discretion granted to the Supreme Court Article 136, but will assist the court so as to reduce the time spent on the number of infructuous, technically-impaired and frivolous SLPs. That is the reason why the authors propose advisory jurisdiction of the Board and not a binding opinion. Despite the advisory value of the opinion of the Board, the procedural aspects of the opinion of the Board, will be de facto binding upon the party filing the petition. It would be because if the party refused to comply with the advice of the Board, the objective probability of the case being accepted in the Supreme Court substantially reduces.

Such a Board, the authors propose should be created by inclusion into the Supreme Court Rules. In this regard, the Board will have the powers granted by the Supreme Court and will be regulated by it, which is necessary because the Board will be dealing with the discretionary power of the Supreme Court, which has absolutely no legislative interference. Any curb on the discretionary power would be held as restricting the power and thus, unconstitutional.²³ For the purposes of the legislative power of the Supreme Court in matters of framing its rules, it falls within the ambit of State under Article 12. Thus, if the Board is constituted under the Supreme Court Rules, the appointment of judges, the functioning of the Board etc. will be subject to fundamental rights and thus, be transparent and open to scrutiny.

It may be argued that an advisory opinion may be disregarded as merely procedural, but in order to obtain a clearance and opinion from the Board, all technical fallacies in the SLP would have been dealt with and the court will have opinion of judicially trained people such as ret'd. judges of the Supreme Court, look through and suggest their opinion to the judges presiding over the case. This will automatically give the judge an insight into some important nuances of the case. One may allege bias and violation of the

²¹ AIR 1987 SC 386.

²² (1997) 3 SCC 261.

²³ *Supra* note 22.

right to a fair hearing, but such is not the case either, for even when in an appellate jurisdiction case, the judge has an opinion of the High Court and trial court, of judicially trained minds, in consideration. Despite having such an opinion there are numerous cases where the Supreme Court bench disagrees with the High Court. If bias was alleged in case of the advisory opinion of the Board, logically a bias has to be alleged in appellate jurisdiction as well, which is not the case. Hence practically, the Supreme Court has complete discretion to disagree with the opinion of the Board and accept or reject an SLP.

With regard to the appointment of members of the Board, the authors propose 5-7 retired judges of the Supreme Court subject to the court's discretion regarding the requirement should individually handle SLPs. The appointment of members would be made similar to the appointment of judges of the court, except of course the requirement of Presidential consent considering the body would be quasi-judicial. With regard to it falling in the ambit of Article 12 of the Constitution, the authors propose that the body be subject to Fundamental Rights granted under our Constitution and for that a separate legislation be formed in order to create the body. As distinct from the judicial appointments of the Supreme Court, the appointments of the judges to the body shall be open to the public. The Board serves an important function of reviewing SLPs prior to them being heard by the Supreme Court. Conflicts of interests, prejudices and biases from within the Board are not a remote possibility. Subjecting it to Fundamental rights would ensure transparency within the operation of the Board.

Justifications of the Proposal

It may be argued that the procedure will lead to some delay in filing SLPs and prima facie might result in further delay, resulting in no different a situation than before. But such an argument would not be valid. For pressing matters like personal liberty, the original writ jurisdiction of the Supreme Court may be invoked under Article 32. It is a fundamental right which the court cannot reject as distinct from the court jurisdiction under Article 136 which is solely discretionary. As a fundamental right, the Court

becomes constitutionally bound to hear cases under Article 32, for pressing situations. In dire cases, an Article 226 application may be filed with the concerned High Court. Though it is admitted that the court has discretionary power, there are adequate constitutional measures to account for immediate attention. Also, a Board supplementing the power of the supreme court, will aid in clearing the burden of the court as the time spent by the court correcting technical details of SLPs or hearing frivolous SLPs will be diverted to clearing other appellate cases.

The second theoretical question arises directly out of Article 136 is that the words 'may, in its discretion'²⁴ need to be analyzed. If the provision read, 'the Supreme Court may grant', it still would not have granted the petitioner the right to admit an SLP. It would have been left to the court. So then, the question arises what function do the words 'in its discretion' serve? The answer to that is that the Supreme Court may reject an SLP even without reasons. Then why do we need rules or why then should a body be instituted for filing of SLPs to review? The Supreme Court may reject herewith all SLPs pending before it without arguments and still would be valid. What function does the Board serve?

The answer to this is that, the Board does not seek to serve any substantive determination of a matter. What the Board seeks to serve is saving time and making the time of the court and the resource of justice more efficient. If the Supreme Court rejects all SLPs pending before it, that is neither the concern of the Board, nor does it preclude the purpose of the Board. The sole duty entrusted to the Board is to demystify and bring to the forefront those cases where there is genuinely a miscarriage of justice, and to dissuade frivolous SLPs from being filed without trampling upon the jurisdiction of the Court.

Thus, having a transparent body to review the SLPs to be filed in the courts procedurally, aids the to-be petitioners in filing the petitions and adhering to the guidelines prescribed by the Supreme Court, and opining upon the viability of that SLP to give the future petitioner a rational idea of whether the SLP is bound to fail or succeed. It is here that the authors re-iterate for

²⁴ INDIA CONST art. 136.

emphasis that the procedural errors having been taken care of by the Board and the Senior Advocate signing the petition, it will be an exceptionally rare case, where the Supreme Court would have to, despite all measures, go into matters of procedure.

After the opinion of the Board is received, the party filing the SLP will have to take advice of a senior advocate of the Supreme Court. This is not a novel procedure; it has been applied in the case of review petitions, for the same purpose of analyzing the merit of the case.²⁵ Additionally, the SLPs which the court finds frivolous, even after the two-step process taken, may be fined, in order to create deterrence. It will ensure that not only fewer advocates will want to argue for frivolous SLPs, but in fact members of the bar will contribute to the reduction of the number of cases, as they could give legally sound advice about the filing or not filing of the SLPs. A bona fide victim of substantial injustice would no way be deterred by the fine provision because of the wrong done to him or in public interest but a person with either malafide or one who knowingly files a frivolous SLP after the 2 step process would at least reconsider the decision to file an SLP, in the apprehension of the fine being imposed by the Court. The fine may be imposed at the discretion of the Court just as exemplary punishment in order to deter filing of frivolous SLPs. Such a conferment would despite increasing the workload at that time, offset it with the deterrent effect a fine may have on filing of those frivolous SLPs.

The requirement of a senior advocate further clarifies matters. It can be explained in two cases: Case 1, the Board has given a positive feedback. In such a situation, if the senior advocate gives a positive feedback, the SLP is deemed to be strong and worth presenting before the court. But if the senior advocate declines to give his assent, it comes to the court then the SLP is still worth being considered as there is a division of opinion. Case 2, if the Board gives a negative feedback of the SLP, and, then if the senior advocate gives a positive feedback, the case would still be worth being heard. But if the senior advocate too gave a negative feedback, then the case probably having been declined a certificate for appeal, having been given a negative feedback by

²⁵ INDIA CONST art. 137

the bench and by the senior advocate, gives a clear signal to the judges that it is frivolous and not worth spending too much of the court's time. Despite sending out such a signal, if the petitioner wishes to proceed with it to the court, the entire mechanism as proposed by the author does not violate either right to be heard of the petitioner nor does it clamp the jurisdiction of the court, but would aid the judges in assessing its merits.

Other Proposed Models and Comparison

On a few prior occasions creation of mechanisms to relieve the tremendous burden of the Supreme Court, have been contemplated. In *Bihar Legal Support Authority v. Chief Justice of India*²⁶, Justice Bhagwati proposed the creation of a National Court of Appeal, specifically dealing with constitutional and public laws having the power to entertain matters of Special Leave. It is important to compare the model proposed by the authors with the recommendations of Justice Bhagwati.

Creation of a National Court of Appeal would entail conferring partial power of the Supreme Court upon the National Court of Appeal. The intention behind creation of a court of appeal such as the one proposed by the Justice Bhagwati, though noble, would create certain theoretical conflicts. The first is the power to hear special leave petitions itself. Such a power is the exclusive prerogative of the Supreme Court. Such power is vested with the Court to remedy gross injustice and ensure the functioning of the state on principles of the rule of law. As discussed above, Article 136 is one of the forms of the manifestation of this power.²⁷ A National Court of Appeal cannot perform the functions of the Supreme Court in as much as the duty of the court to ensure the rule of law. Without that, if only the power to hear special leave petitions is conferred, an ideological conflict of the court's superiority arises. The model proposed by the authors does not in any way duplicate, or re-assign the power of the Supreme Court to hear SLPs but merely aids the court in sifting through the cases and efficiently allocating its time. It merely saves the court's time which may otherwise be spent in dealing with infructuous SLPs.

²⁶ (1986) 4 SCC 767.

²⁷ The other being Article 32, Article 142.

The second proposed model can be found in the 229th Law Commission report.²⁸ It is peripheral to the current topic the authors seek to deal with but it becomes of certain relevance in matters of pendency of cases.

The report proposes the creation of four Regional Courts as highest appellate authority. The Supreme Court will have the power to hear Special Leaves and Constitutional matters. Such a model though at first may seem acceptable to some, conflicts would again rise regarding the appellate jurisdiction of the Court. Normatively, the High Courts are sufficient to deal with cases and the Supreme Court should interfere only in case of exemplary matters. Even normatively, creation of the regional courts with the powers anticipated by the Law Commission report would conflict with the power of the court to deal with appellate matters. No such problem is seen in the model proposed by the authors. Even if the implementing law can chalk out the distinct jurisdictions and may not necessarily lead to conflicting ones, the petition or cases remain within the judicial system. Additionally, the Supreme Court has an over-arching power under Article 142. The court has an unrivaled, unbridled, unique power to be used as its discretion. To do what is necessary to secure the ends of justice. If the Supreme Court were not to interfere with the distinct jurisdiction of the Regional Courts, the suggestion would create a situation very similar to the one created in the case of *L. Chandra Kumar v. Union of India*²⁹ where the Supreme Court held that the power of the Supreme Court could not be substituted. The model provided as stated above merely supplements the power of the Court and in effect avoids the assuming of power from the Supreme Court.

The model proposes a sort of 'filter' to the cases which increases efficiency of the Court by making more time available to it by reducing its workload. The Board does not have the power to dismiss a case as that would be unconstitutional, but the procedural flaws it is supposed to rectify occurs outside the court, without wasting the court's time, thus giving the court more time to focus on the Special Leave and other matters which it already

²⁸ Law Commission Report India, August 2009, available at: <http://lawcommissionofindia.nic.in/reports/report229.pdf> (Last Visited on February 5, 2013).

²⁹ *Supra* note 22.

has before it. In addition, apart from procedural errors, the opinion of the members of the Board, even though advisory in nature would reduce the time required for the Judges to ascertain the maintainability of the petition, thus further increasing time for the cases at hand.

IV. CONCLUSION

In times of dire need, where there is a monumental backlog of cases piling upon the court, it is in the interest of justice that certain measures be taken to reduce the burden of cases without either trampling upon the jurisdiction and power of the courts and the rights of the person to natural justice. The proposed model by the authors takes care of both these restrictions and seeks to reduce the number of cases. It rests on a delicate balance between foreclosing the jurisdiction of the Supreme Court, and yet restricting the number of cases and thus, is significant. The need of the hour is to implement an alternate mechanism, probably one that the authors propose or a similar model for furtherance of justice. For the reasons discussed above, among the models discussed in the paper, the authors' model has the upper-hand in terms of its viability, effectiveness and its validity in terms of the Constitution.