JUDICIAL OBSTINACY- A NEW FORM OF BIAS?

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In 1998, a rather shocking story appeared in *The Tribune*[1]. Though not widely publicized, it could have seriously shaken the citizens' faith in the judiciary. The Supreme Court termed it as an extremely serious situation — which sounded a note of caution to all the judges, irrespective of stature, that over-zealousness would *not* be tolerated.

The immediate cause for the precipitation of this situation was the case of *State of West Bengal v. Sivananda Pathak*[2]. The inception of this case was in the Calcutta High Court wherein a Writ of *Mandamus* had been prayed for by a set of persons seeking promotions to certain posts. By the time the Single Judge allowed the petition, a number of persons had already been promoted to these posts. Some affected employees contested this decision in an appeal before the Division Bench of the Calcutta High Court. The Division Bench set aside the prior ruling and substituted a fresh direction to the State Government to consider the promotion of these persons in accordance with the law and prescribed rules for appointment. Consequently, promotions were made which were effective from a later date than what was originally claimed by the petitioners. The promoted persons then filed another Writ Petition asking for a direction to be paid arrears in salary, which was turned down by the Court. The aggrieved petitioners filed an appeal before the Division Bench, which comprised the very same Single Judge who had originally heard the first Writ of *Mandamus*.

Usually, in cases of such nature, the Judge in question steps down from the Division Bench for that particular appeal, as especially in Writ Petitions[3] principles of natural justice have to be observed in letter and spirit. One of the primary requirements of such principles is that the hearing should be by a person with an unbiased mind[4] in order that 'justice must not only be

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1 18 May 1998, p. 11.

2 (1998) 5 *SCC* 513.

3 As such proceedings are not conducted strictly by the procedure specified in the *Code of Civil Procedure*.

4 'Bias' is defined as a preconceived notion or predisposition or predetermination to decide a case in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is a condition of mind, which sways judgments and renders the judge unable to exercise impartiality in a particular case. (Vide (1998) 5 *SCC* 513, Supra n. 2 at p. 524).

done, but must manifestly be *seen* to be done'[5]. However, in this case the Judge declined to dissociate himself and sat in on the appeal, and did not grant the requested relief. Instead of ruling on the issue at hand, he *reiterated the decision* given by him in the first Writ Petition and deemed the employees to be promoted as of the date of the original Writ Petition[6].

The case was appealed on its merits. It was also contended that the concerned Judge on the Division Bench had violated the rule against bias. Even a cursory glance at the two decisions revealed that there was no significant distinction between them and therefore the obvious presence of bias was not disputable. The Supreme Court was of the opinion that the bias of this judge could not fall into any of the previously defined categories of bias[7]. They felt the need for creating a new category of bias. A bias which arose from what they termed *unreasonable obstinacy.* This category of bias incorporates *unreasonable and unwavering persistence* by the deciding officer, who refuses to take **'NO'** for an answer in order to satisfy his egoistic *judicial obstinacy.*

When considering any decision of a Court, a quasi-judicial body or an administrative authority, one has to keep in mind that the decision has been made by a human being and not a machine. It is safe to assume that every human being grows to nurture certain ideas, opinions and ideologies along the course of her lifetime. Every human being attains and maintains predispositions. Much harm is done by the myth that merely by taking an oath of office as a Judge, a man ceases to be human and strips himself of all predilections and becomes a passionless thinking machine[8]. A search for a person totally devoid of any opinions, ideas or ideology would definitely result in futility. It is stated that, to ensure a person of his fundamental right to fair trial, the Judge should be unbiased. This does not mean that the person adjudicating must not have the slightest notion of or opinion on the person or the subject matter at hand. If such was the expected standard then no person has ever got a fair trial and no person ever will, as long as human beings are adjudicating[9]. However, it should be appreciated that there remains a marked distinction between prejudging of facts specifically relating to a party and preconceptions or predispositions about general questions of law, policy or discretion. In the former the Judge

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[5] *From the Latin maxim* 'nemo debet esse judex in propria sua causa', *evolved from the principle that no person shall be a judge in his own cause.*

[6] Judicial discipline requires that if a particular judgment is overruled, the judge must submit to that decision. He *cannot* in the same or collateral proceedings reiterate the earlier opinion.

[7] Namely — personal, pecuniary, subject matter, departmental or policy bias and bias due to preconceived notions.

[8] Judge Frank in *Linaham, In Re* 138 F2d 650.

[9] Ibid.

should disqualify himself since he has opinions which relate to a *specific fact situation.* In the latter it is not vital that he disassociate himself from the proceedings, unless his opinions are so strong that irrespective of the fact situation he will make a decision in consequence of that opinion. Therefore, it can be said that *preconceived notions* do not amount to the disqualification of an adjudicator but *prejudging a situation* does. The case at hand is a classic case of pre-judging a situation, which most certainly amounts to bias.

In my personal opinion, this case need not fall under a new category. The intricacies of the case can be sufficiently appreciated under the ambit of bias regarding subject matter or bias due to prejudging the situation. Since there are no hard and fast categories relating to the forms of bias, the Supreme Court was not wrong in creating this new category. Nevertheless, it should be appreciated that though this is not the kind of case that occurs on a frequent basis it is the kind of situation that can cause people to pause and question their absolute faith in the impartiality of the judiciary. The very notion of a judicial system is imbued with values of fair play in action. When one approaches a court of law one expects, as a right, to get a fair hearing and a reasoned decision by an impartial judge who applies his mind to the facts and circumstances and gives his decision based on the facts and evidence on record. Therefore when charges of bias are made against a judge an extremely delicate situation arises. A situation where the myth of judicial neutrality is shattered and the human frailty of the judge exposed.

The courts have striven hard to eradicate subjectivity from any level of decision making. However in their search for objectivity, they have not lost sight of the fact that it is human beings and not machines that are making decisions, and therefore, it is inconceivable that any decision can be made without pre-conceived notions. In the case at hand, it could be contended that the Judge might have taken the same decision simply because the same facts were placed before him, though he was performing a different role[10]. It need not necessarily be a case of bias. However, the norms of natural justice demand to be fulfilled in spirit, and not just in letter. A real likelihood of bias is sufficient; there being no need to prove actual bias. Therefore Courts have to continually act in furtherance of the ultimate ideal that at the end of the day justice should not only be done, but manifestly be seen to be done.

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[10] This situation occurs frequently in cases of policy or departmental bias wherein a person occupies two positions in the chain of decision-making and might have to review his own decision. Thus, though he might in fact be perfectly neutral, the chances of him abiding by his old decision are far higher, merely because he is human. It is this real likelihood of bias, which prompts that no one shared be allowed to play both judge and prosecutor.