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The Art of Hearing

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Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws, are not always just, and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice. We are bound by the Penal Code (Substantive law) and the Criminal Procedure Code (Procedural law), by the very oath of our office (Vide: *Joseph Peter* v. *State of Goa, Daman & Diu*, AIR 1977 SC 1812).

Thus it is evident that while hearing a case, the court has to ensure compliance of all statutory laws and rules as well as the principles of natural justice. Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it *"jura naturalia"* i.e. natural law. Different jurists have described the principle in different ways. Some called it as the unwritten law (*jus non scriptum*) or the law of reason.

In *Union of India & Anr.* v. *Tulsiram Patel & Ors.* 1985 AIR 1416, the Constitution Bench observed:

> "The first rule is *"nemo judex in causa sua"* or *"nemo debet esse judex in propria causa"* as stated in 12 Co.

> Rep. 114, that is, no man shall be a judge in his own cause". Coke used the form *"aliouis non debt esse judex in propria causa quia non potest esse judex et pars"* (Co. Litt. 141a), that is, "no man ought to be a judge in his own cause, because he cannot act as a judge and at the same time be a party". The form *"nemo potest esse simul actor et judex"*, that is, "no one can be at once suitor and judge" is also at times used. The second rule - and that is the rule with which are concerned in these Appeals and Writ Petitions - is *"audi alteram partem"*. that is, "hear the other side". At times and particularly in continental countries the form *"audietur et altera pars"* is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely, *"qui alliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit"*. that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right" (see Boswell's case) [1606] 6 Co. Rep. 48b, 52a, or, in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done."

In ***R.* v. *University of Cambridge*,** (1723) 1 Str. 557, the University of Cambridge had deprived Bentley, a scholar, of his degrees on account of his misconduct in insulting the Vice-Chancellor's Court. The action of the University was nullified by the Court of King's Bench on the ground that deprivation was unjustified and, in any case, he should have been given notice so that he could make his defence. In that case, it was noted that the first hearing in human history was given in the Garden of Eden, in the following words:

> "....even God himself did not pass sentence upon Adam, before he was called upon to make his defence. "Adam', says God, 'where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldn't not eat?' And the same question was put to Eve also."

The Code of Civil Procedure lays down the procedure to be adopted in civil courts, and its principles being based on public policy are applicable in other courts, like writ courts, and Tribunals to the extent the enactments establishing the Tribunals provide for it. It provides for a fair procedure for redressal of disputes. The other party must know that what is the dispute about, what defence it can take, and how both the parties may proceed to prove their respective cases. Some of its provisions are substantive in nature and not procedural at all, like sections 96, 100, 114 and 115 providing for a right of appeal, review and revision etc. The other provisions are generally procedural in nature. The purpose of the Code is to provide a litigant a fair trial in accordance with the accepted principles of natural justice. While the main principles are contained in the Sections, the detailed procedures with regard to the matters dealt with by the Sections have been specified in the Orders. Section 122 of the Code empowers the High Court to amend the Rules, *i.e.*, the procedure laid down therein. The Code contains the principles of natural justice in codified form and provides for fair procedure to be adopted by the Courts, e.g., O1R3 (parties); O6 R1 (pleadings – plaint and written statement); O8R5 (specific reply); O8R9 (replication with the permission of the court).

O22R4 deals with substitution of legal representatives, if the defendant dies within the stipulated period, otherwise the case would stand abated as no decree can be passed against a dead person. However, O22R6, as an exception, does not permit substitution of the dead person, if the death occurs subsequent to the date of conclusion of arguments (i.e., judgment is reserved) as the matter remains between the court and file (vide: *Arjun Singh* v. *Mohinder Kumar*, AIR 1964 SC 993; and *N P Thirugnanam* v. *R. Jagan Mohan Rao*, AIR 1996 SC 116)

Code of Criminal Procedure also codifies the Principles of Natural Justice. It basically protects the rights of the accused guaranteed under Articles 20 and 21 of the Constitution. The supply of a copy of the police report and all the documents to accused is mandatory (s. 207 CrPC). It also provides the opportunity of hearing to the accused at the time of framing charges. (S.228 CrPC). Charges must be specific and not vague. The charges shall contain particulars such as to time, place and person (S.212 CrPC). If charges are altered during trial the accused is given fresh opportunity to meet the new charge, the witnesses may be recalled for examination and there may be a new trial (Ss. 216 and 217 CrPC). If the accused is not acquitted under s.232, he is called upon to enter on his defence (S.233). Accused has a right to make Oral arguments and submit the memorandum of arguments (S.314 CrPC). It lays down a

specific procedure where accused does not understand proceedings (S.318 CrPC).

S.191 CrPC provides for transfer of the case on being asked by the accused if, the cognizance is taken by the concerned magistrate under S. 190(2)(C).

S.352 CrPC disqualifies a judge to hear certain cases when committed before himself (no person can be judge in his own cause.)

State of Maharashtra & Ors. v. *Sukhdeo Singh & Ors.*, AIR 1992 SC 2100

Under Section 313(1), CrPC – Power to examine the accused to ensure compliance with the principles of natural justice. Where sub-section 1(a) starts with the word 'may', giving the Court the discretion, whereas sub-section 1(b) uses the word 'shall', bringing out the mandatory nature of the clause. The aforesaid sub-section 1(a) provides that question can be put to the accused at any stage during the trial or enquiry while sub-section 1(b) is applicable when prosecution has lead its evidence. (See also: *Sujeet Biswas* v. *State of Assam*, AIR 2013 SC 3817; *Rajkumar* v. *State of Rajasthan*, AIR 2013 SC 3150; *Narsingh* v. *State of Haryana*, AIR 2015 SC 310; and *Nagraj* v. *State* (2015) 4 SC 739).

Even if the law does not provide for right of hearing, yet the justice of the common law will supply the omission of the legislature. Fair hearing is a postulate of decision making (Vide: *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; and *Mohinder Singh Gill* v. *Chief Election Commissioner*, New Delhi, AIR 1978 SC 851).

Principles of Natural Justice do not supplant the law , but supplement the law unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice.

(See: **Umrao Singh Choudhary v. State of Madhya Pradesh**, (1994) 4 SCC 328; and **Gorkha Security Services v. Govt (NCTE of Delhi**); AIR 2014 SC 3371)

Principle of Natural Justice – violated – order voidable not void

(See: **State of Rajasthan v. A.N. Mathur***;* (2014) 13 SCC 531.)

Cross Examination is a part of Principles of Natural Justice. Cross examination is conducted to test veracity of the deposition of the witness (Vide: *State of Madhya Pradesh* v**.** *Chintaman Sadashiva Waishampayan*, AIR 1961 SC 1623).

Ram Chander v. *State of Haryana*, AIR 1981 SC 1036

The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop

into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.

With such wide powers, the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not' assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Any questions put by the judge must be so as not to frighten, coerce, confuse or intimidate the witnesses.

In *Jones* v. *National Coal Board*, [1957] 2 All. E.R. 155., Lord Denning observed:

> The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been over looked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law;

> to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the judge and assumes the role of an advocate; and the change does not become him well.

Brij Mohan Lal v. *Union of India & Ors.*, AIR 2002 SC 2096

The qualities desired of a judge can be simply stated: 'that if he be a good one and that he be thought to be so'. Such credentials are not easily acquired. The judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the prophet'. A few paragraphs from the book "Judges" by David Panicky which are often quoted need to be set out here:

> The judge has burdensome responsibilities to discharge. he has power over the lives and livelihood of all those litigants who enter his court.... His decisions may well affect the interests of individuals and groups who are not present or represented in court. If he is not careful, the judge may precipitate a civil war... or he may accelerate a revolution.... He may accidentally cause a peaceful but fundamental change in the political complexion of the country.

* * * *

> Judges today face tribulations, as well as trials, not contemplated by their predecessors.... Parliament has recognized the pressures of the job by providing that before the Lord Chancellor recommends anyone to the Queen for appointment to the Circuit Bench, the Lord Chancellor 'shall take steps to satisfy himself that the person's health is satisfactory'.... This seems essential in the light of the reminiscences of Lord Roskill as to the mental strain which the job can impose.... Lord Roskill added that, in his experience, 'the work load is intolerable: seven days a week, 14 hours a day'...

* * * *

> He [judge] is a symbol of that strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape."

Burger C.J. of the American Supreme Court once observed: "A sense of confidence in the Courts is essential to maintain the fabric of ordered liberty for a free people and it is for the subordinate

judiciary by its action and the High Court by its appropriate control to ensure it".

Gurbaksh Singh Sibbia & Ors. v. *State of Punjab*, AIR 1980 SC 1632

Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions.

Zahira Habibullah Sheikh & Ors. v. *State of Gujarat & Ors.*, AIR 2006 SC 1367

The complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions, ideas and ideals. If the Court acts contrary to the role it is expected to play, it will be destruction of the fundamental edifice on which justice delivery system stands. People for whose benefit the Courts exists shall start doubting the efficacy of the system. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking that "the Judge was biased".

At the same time the Judge is not to innovative at pleasure. He is not a Knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness, as observed by Cardozo in "The Nature of Judicial Process".

Tribhuvandas Purshottamdas Thakur v. *Ratilal Motilal Patel*, AIR 1968 SC 372

It is true that every Judge of a High Court before he enters upon his office takes an oath of office that he will bear true faith and allegiance to the Constitution of India as by law established and that he will duly and faithfully and to the best of his ability, knowledge and Judgment perform the duties of office without fear or favour, affection or ill will and that he will uphold the Constitution and the laws: but there is nothing in the oath of office which warrants a Judge in ignoring the rule relating to the binding nature of the precedents which is uniformly followed. ….The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.

State of U.P. v. *Anil Singh*, AIR 1988 SC 1998

It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

P.N. Dua v. *P. Shiv Shanker & Ors.*, AIR 1988 SC 1208

Administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour. This the Judges must do in the light given to them to determine what is right. …. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas criticisms about the judicial system or Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice.

Divisional Manager, Aravali Golf Club & Ors. v. *Chander Hass & Ors.*, (2008) 1 SCC 683

We hasten to add that it is not our opinion that judges should never be 'activist'. Sometimes judicial activism is a useful adjunct to democracy such as in the School Segregation and Human Rights decisions of the U.S. Supreme Court vide Brown v. Board of Education (1954) 347 U.S. 483, Miranda v. Arizona 384 U.S. 436, Roe v. Wade 410 U.S. 113, etc. or the decisions of our own Supreme Court which expanded the scope of Articles 14 and 21 of the Constitution. This, however, should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society but always keeping in mind that ordinarily the task of

legislation or administrative decisions is for the legislature and the executive and not the judiciary.

Shobha Rani v. *Madhukar Reddi*, AIR 1988 SC 121, the Court while dealing with the issue of cruelty in a matrimonial case held that *the cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents*.

Ritesh Tewari & Ors. v. *State of U.P. & Ors.*, AIR 2010 SC 3823

Section 165 of the Evidence Act, 1872 empowers the Court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the Court that the question put to him is irrelevant or the facts the court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the court is to be based on relevant facts which have been duly proved. A court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the court to elicit the truth and

to act in the interest of justice. A wide discretion has been conferred on the court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the court can ask the question to the parties concerned at any time and in any form. "

Every trial is voyage of discovery in which truth is the quest".
Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the court can put questions to the parties, except those which fall within exceptions contained in the said provision itself. (See also: *Jamatraj Kewalji Govani* v. *State of Maharashtra*, AIR 1968 SC 178; and *Zahira Habibulla H. Sheikh & Anr.* v. *State of Gujarat & Ors.*, (2004) 4 SCC 158.

Session Judge, Nellore v. *Intna Ramana Reddy,* ILR 1972 AP 683

It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section

172(2) of the CrPC enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial