

INVOCATION OF ARTICLE 142 VIS-A-VIS A RECENT CASE OF THE SUPREME COURT

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ABSTRACT

Article 142 of the Constitution of India states, “*Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it*”. The purpose behind Article 142 is that the Supreme court should not be left in the lurch while doing justice to the parties. However, in the past few years, judges have assumed a greater role than what was provided under Article 142. If we look at the application of Article 142 by the judges of the Supreme Court in the past few years, we find that they have given a very broad and expansive meaning to Article 142 especially the term “complete justice”. Ritesh Sinha vs. State of Uttar Pradesh¹ is one recent case, where the judges of the Supreme Court have resorted to using Article 142 to decide the case. The issue that was raised before the court was whether the accused can be compelled to give his/her voice sample for identification purposes in an ongoing criminal investigation. The Supreme Court answering in affirmative said that Article 142 of the constitution could be invoked to confer such power on the magistrate and therefore, a judicial magistrate can now direct an accused to provide voice samples without even seeking his consent. The pronouncement is important because it will help the cases that are not getting solved due to lack of proper evidence. However, it has its own set of loopholes. Use of Article 142, in this case, is problematic in the sense it is given in negation of guidelines given in previous cases. It has also unsettled the already settled position in Article 142. The Supreme Court has resorted to the use of unfettered power under the garb of doing justice. Instead of doing justice, it has caused more harm. This decision has been made in direct contravention of the fundamental rights enshrined under the Constitution. The judges in the Ritesh Sinha case, took a very liberal approach while using its power enshrined under Article 142. The author, here, believes that taking a too liberal approach and conferring unfettered power upon itself has its ramifications. Such invocation of Article 142 threatens the concept of separation of power which

¹ AIR 2019 SC 3592

constitutes the part of the basic structure. Therefore, it is high time that judges must realize that such misuse of the power conferred by Article 142 needs to be stopped. The judges must make a serious attempt to lay down a set of guidelines and test for the invocation of Article 142.

INTRODUCTION

Our Constitution has conferred some extraordinary power on the Supreme Court of India to do justice to the parties through its judgements. Article 142 of the Constitution of India is one of those extraordinary powers. It states, “*The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it*”. The purpose of Article 142 is that the Supreme court should not be left in the lurch while doing justice to the parties.

However, in the past few years, judges have assumed a greater role than what was provided under Article 142. If we look at the application of Article 142 by the judges of the Supreme Court in the past few years, we find that they have given a very broad and expansive meaning to Article 142 especially the term “complete justice”. They are using Article 142 without looking at the consequences which the decision would entail if it were to be pronounced. Judges have conferred unfettered power upon itself under the guise of doing justice. One could say that by using article 142 in such a purposeless manner, judges are trying to assert judicial supremacy. Judges of the Supreme Court have even diluted the concept of Separation of power. The Supreme Court has become an executive judiciary whereby it is not only deciding the law but also making the law. Instead of limiting the application of Article 142, Judges have been using it as a tool to fix everything that comes before them and thereby, negating the irreparable consequences that the decision would entail. Motivated by the vision to do complete justice, judges often tend to make the situation worse. Judges think that they have done justice using Article 142, but it is only after analysing the consequence part, we discover that what is justice according to the judges, it may be an injustice for someone else. Ritesh Sinha vs. State of Uttar Pradesh² is one recent case, where the judges of the Supreme Court have resorted to using article 142 to decide the case. The brief facts of the case are- Police lodged an FIR alleging that one Dhoom Singh in association with the appellant-Ritesh Sinha, was engaged in the collection of

² AIR 2019 SC 3592

monies from different people on the promise of jobs in the police. The investigating authority wanted to verify whether the recorded conversation on the mobile phone was between Dhoom Singh and the Appellant-Ritesh Sinha. They, therefore, needed the voice sample of the Appellant and accordingly applied to the learned jurisdictional Chief Judicial Magistrate praying for summoning the Appellant to the Court for recording his voice sample.

The issue that was raised before the court was whether the accused can be compelled to give his/her voice sample for identification purposes in an ongoing criminal investigation. The Supreme Court answering in affirmative said that Article 142 of the constitution could be invoked to confer such power on the magistrate and therefore, a judicial magistrate can now direct an accused to provide voice samples without even seeking his consent.

The pronouncement is important because it will help the cases that are not getting solved due to lack of proper evidence.

However, it has its loopholes which will be considered in depth in the next part of the article. For now, it will suffice to say that the use of Article 142, in this case, is problematic in the sense it is given in negation of guidelines given in previous cases. It has also unsettled the already settled position in Article 142. The Supreme Court has resorted to the use of unfettered power under the garb of doing justice. Instead of doing justice, it has caused more harm. This decision has been made in direct contravention of the fundamental rights enshrined under the constitution.

Therefore, the purpose of the author in this article would be to unfold every problematic aspect of this decision; to lay down all the guidelines which have been given by the previous cases; to show how the court negated the guidelines of previous cases; to look at the consequences this decision has entailed and at last, to show why we need to read the Article with limitations i.e., why limitations are necessary for the use of Article 142.

ANALYSIS

If we trace the first few cases regarding the usage of Article 142, we find that the Supreme Court was hesitant or reluctant to read Article 142 broadly and expansively and confer unfettered power upon itself. Initially, judges did not hesitate to put self-imposed limitations on the usage of Article 142.

No doubt, there were cases on the other hand where we find the Supreme Court giving article 142 a broad and expansive interpretation. The sole purpose of doing an unrestricted reading of article 142 was to put forth the idea that nothing could act as a limitation on the power conferred upon the Supreme Court through Article 142 for doing complete justice.

Cases like the Delhi Judicial Service Assn. v. State of Gujarat³ and Union Carbide Corpn. v. Union of India⁴ held that Article 142(1) contains no limitations regarding the causes or the circumstances in which the power can be exercised nor does it lay down any condition to be satisfied before such power is exercised. It is this approach of the judges in earlier cases of the Supreme Court which persuaded the later judges to read Article 142 in a very expansive and broadway. Therefore, the wrongs committed by judges in Ritesh Sinha case could be attributable to the attitude of previous judges who saw Article 142 containing neither express nor implied limitations.

As discussed above, there were few sets of cases that had laid down restrictions on itself concerning Art. 142(1), viz., the court does not exercise the power to override any express statutory Provision.

*In Prem Chand v Excise Commissioner*⁵, we find an attempt by the judges to lay down some guidelines on the usage of Article 142. The court had given an elaborate framework on the application of Article 142. It comes amongst those few cases, where the judges had read Article 142 with restrictions. The position that came forth, in this case, was that Article 142 is curative. It is meant to supplement and not to supplant the substantive law. Article 142 cannot be exercised against a definite statutory provision. The court also ruled out that it cannot be exercised against a fundamental right.

Another attempt was made by *A.R Antulay v R.S. Nayak*⁶ case to lay down some framework on Article 142. The Supreme Court observed concerning Art. 142: “however wide and plenary the

³ AIR 1991 SC 2176

⁴ AIR 1992 SC 248

⁵ AIR 1963 SC 996

⁶ AIR 1988 SC 1531

language of the article is, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific provisions of any statute”.

This same position has been later reiterated by *State of Haryana v Sumitra Devi*⁷, *Secy. State of Karnataka v. Uma Devi*⁸ and many other cases.

The question that now comes before us is to know whether the court in the present case adopted a restricted or a liberal approach in its application of Article 142 to deliver the judgment. If it adopted either of the approaches, what consequences did the decision entail?

Back then there was no provision in existence in criminal procedure code that allowed the taking of the voice sample. So, in this case, the court while allowing the taking up of voice sample from the accused ruled out the following things: -

1. The procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation. Court for this relied upon the case of *Sushil Kumar Sen v. State of Bihar*⁹.
2. Taking up of voice samples can be allowed in light of the decision of the *State of Bombay v. Kathi Kalu Oghad*¹⁰ case.

Fair enough of the court to use *Kathi Kalu* judgement to say that the voice sample is not protected by Article 20(3). However, the problem arises when the court went ahead to rule that even if there is no express provision that allowed the taking up of a voice sample, we will allow it because the procedure is handmaid, not the mistress, of justice. We will fill the gap which has been left vacant by the legislature. The court, therefore, added one more provision to the CRPC code.

The phrase, “filling up of the gap” is problematic because it directly goes against the guidelines given in the case of *Prem Chand* and the decision of many other cases given along the line of *Prem Chand* case. When a legislature chooses not to add a certain provision even after several recommendations, it is to be understood that there must be some sound justification for not

⁷ AIR 2004 SC 1050

⁸ AIR 2006 SC 1806

⁹ (1975) 1 SCC 774

¹⁰ A.I.R. 1961 SC 1808

adding that provision. The legislature might be aware of the consequences that the adding up of that provision would entail. So, when a statute doesn't find within itself some provision and the Supreme Court goes ahead to add that provision, it will not be wrong to say that it is going against the statute and intent of the legislature.

Moving further, the court, in the Prem Chand case, had also pointed out that one cannot use Article 142 when it comes in direct conflict with the fundamental rights.

Now if we look at the present case, a question requiring constitutional interpretation came up before the court. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy Under Article 20(3) of the Constitution? The court's response to this question is as follows, "The issue is interesting and debatable but not having been argued before us it will suffice to note that because of the opinion rendered by this Court in *Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors. Gobind v. State of Madhya Pradesh and K.S. Puttaswamy and Anr. v. Union of India and Ors.* the fundamental right to privacy cannot be construed as absolute and must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us."

As we all know that when a judgment is given, we expect the judges to take up each issue and answer it in a detailed manner. The responsibility is further increased when there is an invocation of Article 142 to do complete justice. It would be an abuse of constitutionally conferred power when judges invoke Article 142 on one hand and the other hand, don't justify the invocation of Article 142. Judges are to see whether their decision aligns with other statutes. They should make sure that their invocation of Article 142 doesn't damage the constitutional structure. Most important of all, they must look at whether their invocation of Article 142 is hit by any fundamental rights mentioned in the Constitution. And even if judges believe that an invocation of Article 142 would have an impact on the fundamental rights, they must try to find out every possible way where the infringement of fundamental rights could be prevented by the invocation of Article 142.

If we look at the present case, the author believes that the court adopted a minimalist approach while delivering the decision. Minimalism is often a tendency to decide on narrower (rather than broader) and shallower (rather than deeper) grounds. The court should not have just brushed aside the above question which, the author believes, tended to infringe the fundamental right just by saying that since it has not been raised, therefore we will not address the question. Whenever Questions Requiring constitutional interpretation are raised, we expect from the judges that they should engage with questions and not to shut eyes to the questions. The court, in the present case, was required to engage in a maximalist approach.

We also expect the judges to justify the existence of circumstances that demand complete justice. However, in this case, on reading the judgment, the author believes that the present issue was not one which justified the invocation of Article 142 or where the existence of circumstances demanded complete justice.

The court's invocation of Article 142 is also in direct conflict with the verdict of *Secy. State of Karnataka v. Uma Devi*¹¹. It said, "complete justice should be justice according to law. Although the Supreme Court can mould the relief, it would not grant relief which would amount to perpetuating an illegality. In the name of individualising justice, it is not also possible for the Supreme Court to shut its eyes to the constitutional scheme and the right of numerous persons, who are not before the court."

In the present case, the decision was made not according to the law but sympathy. Just because it will further the investigation process, it cannot be a ground for compelling the accused to give voice samples.

Returning to the larger question of privacy, the purpose for which the accused was compelled to give a voice sample was to help the police authority to verify the voice of the accused in the recorded conversation. The author, here, believes that when the court allowed the taking of a voice sample to verify the voice of the accused is recorded conversation, the accused expected privacy. The question that arises now is, How?

¹¹ Supra 4

For that, it is important to draw a line between those aspects of the defendant that are normally open to the public and those are not.

The general physical characteristics are not protected because they are not private. Physical characteristics are continually exposed to public observation, and no expectation exists that others will not observe these features. As such, these are merely identifying characteristics and not private aspects of one's personality.

Whereas, the recorded conversation of the accused is private because it is not exposed to public observation. Therefore, the use of recorded conversation of the accused does infringe on an accused's legitimate expectations of privacy and if any decision given allowing the use of these recorded conversations would constitute a breach of privacy.

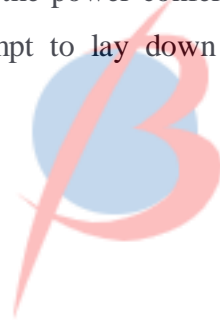
The court seemed to have overlooked this fact and considered it less important before the compelling public interest. Ideal solution by the court would have been to give priority to the investigation of the truth when very serious crimes are involved while privacy is allowed to prevail with less serious crimes. The interest in investigating the truth would take precedence over the privacy of the person concerned because serious offences are committed by the accused. By contrast, privacy is given priority in less serious offences.

It must also be noted that whenever a conflict arises between a fundamental right of an individual and the public interest, courts must recognize the important public interest in protecting the safety of the citizenry through conviction and incarceration of criminals. On the other hand, this interest must be tempered by the court's duty to protect and preserve the accused liberties.

Unfortunately, in the present case, the court's order of allowing the taking up of voice sample seems to fall short of adequately protecting accused rights. This problem arises as a result of the formal application of constitutional standards, instead of considering the actual effect of particular state practice on accused rights. The present court also failed to recognize the important public interest involved. The court should have engaged in this kind of analysis. It was much required in light of the invocation of Article 142.

CONCLUSION

In light of the issues and arguments discussed above, the author believes that the judges in the Ritesh Sinha case, took a very liberal approach while using its power enshrined under Article 142. However, it is to be understood that taking a too liberal approach and conferring unfettered power upon itself has its ramifications. Judges do more injustice under the pretext of doing justice. The consequences of taking this approach are often ignored by the judges when they invoke article 142 without any guidelines and tests. The purpose for which this Article 142 was inserted in the constitution lost its significance because of the flagrant abuse of power by the judges. Such invocation of Article 142 threatens the concept of separation of power which constitutes the part of the basic structure. Therefore, the author believes that it is high time that judges must realize that such misuse of the power conferred by article 142 needs to be stopped. The judges must make a serious attempt to lay down a set of guidelines and test for the invocation of Article 142.



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