women's own definitions that has informed law, it becomes almost imperative to rearrange our social, political and legal systems so that the feminine needs, aspirations and interests originating in women's distinctive existential and material state of being, find a genuine reflections therein.

An effective and appropriate representation of women from different strata of society at Parliament and all State legislatures would certainly prove conducive to bring all our laws in consonance with gender equality and social justice. Even reservation of seats for women may be resorted to temporarily for ensuring such representation, at the initial stages.

Votaries of egalitarianism have always raised their eye-brows against certain provisions in the 'personal laws' and the 'customs of the tribal communities' in India which allegedly perpetuate gender discrimination. The concept of coparcenary, the father's overwhelming right as natural guardian of a child *vis-a-vis* that mother, the position only of a Hindu male as karta of joint family *etc.,* are still the legalized rules of Hindu law. The Muslim law still validates polygamy, unilateral talaq and women's unequal share in inheritance. The Christian law still contains very strict divorce provisions for women. Diverse customs of various tribal communities still continue to treat women unequally, for example by their strict adherence to patrilineal succession. Yet these are accorded constitutional protection in that they cannot be challenged as violating any of the fundamental rights. In effect, rights constitutionally guaranteed as being 'fundamental', are rendered unavailable to women in the realm of family law. Such a legislative policy prevailing hitherto in the name of 'protecting personal laws' and 'preserving tribal culture' calls of an immediate reconsideration.

K. RUDRAPPA V. SHIVAPPA, AIR 2004 SUPREME COURT 4346 : 2004 SAR (CIVIL) 781 — A DISCONCERTING DECISION

Laying down the failure to pray for setting aside the abatement and the failure to pray for condonation of delay in terms of the statutory provisions as provided under 22(9) (2 and 3) C.PC., are only technical objections and shall not come in the way of doing justice, giving a wide meaning of a Judicial Review a direction of a legislative nature, is a legitimate judicial function?

In other words

Does this decision amount to impermissible legislature, and per "incurium"?

By

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The study of the article is spread over into two phages. Per incurium and impermissible legislation.

Phase –I- Per incurium

The judgment of the Supreme Court, a Bench decision, consisting of two learned Judges in *K. Rudrappa v. Shivappa,* AIR 2004 SC 4346 – 2004 SAR (Civil) 761, without considering the impact of order 22(9) (2 and 3) CPC., laying down *inter alia*, the failure to pray for setting aside the abatement of appeal, and failure to pray for condonation of the delay, are only technical objections and

such technical objections should not come in doing full and complete justice between the parties, in the opinion of the writer is certainly a disconcerting decision, leaving the subordinate judiciary and the litigant public in a quandary as to whether to follow the statutory law, or to follow the strained meaning or wider meaning of the statutory provisions. The effect of the judgment amounts practically to the statutory provisions of order 22(9) (2 and 3) CPC *non- est.*

Provisions of Order 22(9)

Effect of abatement or dismissal

(1) Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal reprehensive of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal and if it is proved that he was prevented by an sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877, shall apply to application under sub-rule (2).

Even a cursory reading of these provisions read with Articles 120 and 121 of the Indian Limitation Act, makes it clear an application to bring the legal representatives of a deceased party is not filed within the period stipulated the suit stands abated as against the party who died as per Rule 4(3) of Order XX CPC., under Article 121 of the Limitation Act, an application to set aside the order of abatement shall be filed within sixty days from the date abatement. Therefore the application for setting aside the abatement has to be filed within 150 days (90 +60) days from the date of death of the party as per the Articles 120 and 121 of the Indian Limitation Act. A bare look at clause 5 of Order XXII Rule 4 CPC makes it clear that the application under Section 5 of the Limitation Act is mandatory.

Having thus streamlined the statutory procedural law, let us now survey the legal principles on this important aspect of frequent occurrence. The following are the catena of decision of the Supreme Court no various High Courts.

AIR 1964 Supreme Court 215, 3 Judges Bench

In AIR 1964 Supreme Court 215, 3 Judges Bench Division Union of India Ram Charan (deceased)

Order 22(3 and 4)

Procedure-Application for bringing legal representatives on record necessary.

The procedure under Rules 3 and 4 requires an application for the making the legal representation of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of suit the defendant stands to gain. However an application is necessary to be made within the time allowed by law for the purpose if no such application is made within the time allowed by law. The suit abates so a far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit the surviving plaintiffs or the suit against the surviving defendants depends on other considerations.

At Para 12, page 219, the Supreme Court was pleased to observe. "The consequences of abatement of the suit against the defendant is that no fresh suit can be brought on the same cease of action. Sub-rule (1) of Rule 9 bars fresh suit. The only remedy open to the

plaintiff or the person claiming to be legal representative of the deceased plaintiff is to get the abatement of the suit set aside and this he can do so by making an application for the purpose within time. The Court will set aside the abatement if it is proved the applicant was prevented by any sufficient cause from continuing the suit. This means the applicant has to allege and establish facts which in view of the Court be a sufficient reason for his not making the application for bringing on record the legal representatives of the deceased within time. If no such facts are alleged none can be established and in that case the Court cannot set aside the abetment of the suit unless the very circumstances make it so obvious that the Court be in a position to hold that there was sufficient cause for the applicant's not continuing the suit by taking necessary steps within the period of limitation.

2004 (1) ALT 493, *Nethra Chits (P) Ltd v. B. Ramachandra Rao,*

Application under Section 5 of the Limitation Act is necessary without such application legal representatives cannot be brought on record and abatement cannot be set aside.

AIR 1968 P&H 340, AIR 1976 Goa 11

are to the similar effect which are followed in 2004 (1) ALT 493. It is not desirable to multiply authorities in the narrow campus of this article.

The aforesaid decision of the Supreme Court the subject-matter of the article, AIR 2004 SC 4346, is to water down the statutory provision of Order 22(9) (2 and 3) CPC., by giving a wide meaning of judicial Review, which amounts to a direction of a legislative nature amounting to legislative function which is impermissible, which aspect is dealt with separately under phase II of the article.

LAW OF PRECEDENTS

(AIR 1974 SC 1596)

Now adverting to the law of precedents, it is well settled the former decision of a Larger Bench of the Supreme Court will prevail over the later smaller Bench Decisions of the Supreme Court (please see AIR 1974 SC 1596).

To a similar effect is the decision AIR 1976 SC 2433

Para 12, the Proper, course for a High Court is to try to find out and follow the opinion expressed by Larger Bench decisions of the Supreme Court in preference to those expressed by smaller benches of the Court. That is the practice followed by the Supreme Court itself. The Practice has now been crystallized into a rule of law declared by this Court. If, however the High Court was of opinion that the view expressed by the larger benches of this Court were not applicable to the facts of the instant case it should have said so giving reasons supporting its point of view…."

It is therefore clear whenever there are conflicting decisions of the Supreme Court former decision of a Larger Bench prevails over the smaller bench of the Supreme Court.

AIR 1992 SC 955, *Kadarnat v. State of Bihar*

If two views are possible one making the provision in the statute constitutional if farmer to be preferred.

Now applying this litmus test of law of precedents it is submitted the formed larger decision of the Supreme Court AIR 1964 SC 215, prevails over the later smaller bench decision of two Judges AIR 2004 SC 4346, the subject-matter of the article.

It is therefore respectfully submitted the later decision of the Supreme Court. AIR

2004 SC 4346, the subject-matter of discussion of the article holding failure to pray for setting aside the abatement or failure to pray for connation of delay are only technical objections is per incuriam.

Phase-II

Impermissible Legislation

Is the decision incorrect and amount to impermissible legislation?

Without considering the impact of Order 22(9) (2 and 3) CPC, the learned Supreme Court a decision of two Judges Bench, taken a liberal view contrary to the statutory provisions and gave a wide meaning of judicial review. That the provisions of Order 22(9) (2 and 3) are only of technical nature and failure to pray for setting aside the abatement or failure to pray for condonation of delay shall not come in the way of doing justice.

In this context, in order to consider the validity or correctness of this decision it is profitable and just to trace out or survey the law on the matter.

In its zeal to protect the right to speedy trial of an accused the Supreme Court enacted certain bars of limitation covered by catena of decisions. Common cause venison of India. 1996 (4) SCC 33, *Rajadeo Sharma v State of Bihar,* 1998 (2) ALD (Crl) 769 (SC). *Rajadeo Sharma v. State of Bihar*, 1999 (2) ALD (Crl) 662 (SC), though the legislature and the statutes have not chosen to do so question of far reaching importance and implications has lead to the constitution of seven bench *P. Ramachandara Rao v. State of Karnataka*, 2002 (1) ALD (Crl) 792 (SC) = 2002 (2) ALT (Crl) 133 (SC).

In *P. Ramachandra Rao's* case (supra), the question considered by the seven Judge Bench was whether the bar of limitation for criminal trials fixed by smaller Benches of the Supreme Court was valid? The seven Judge Bench of the Supreme Court was of the view that the directions given by the smaller Benches decisions mentioned above were invalid as they amounted to directions of legislative nature which only the legislature could give.

The Supreme Court has clarified the position and has clearly observed (in pares 22-27) that giving directions of a legislative nature is not legitimate judicial function.

It is respectfully submitted a Court of law cannot exercise it's discretion *de horns* the statutory law. Its discretion must be exercised in terms of the existing statute and is therefore submitted for reconsider ration of the decision under study.

AIR 1995 SC 96

In *Union of India and another v. Deoknandan Aggarwal*, AIR 1992 SC 96, a three Judge Bench of the Supreme Court observed, "It is not the duty of the Court either to enlarge the scope of the legislature when the language of the provisions is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court. The Court cannot add words to a statue or read words into in which are not there. Assuming there is defect or an omission in the words used by the Legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the Legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Modifying and altering the schemes and applying it to others who are not otherwise entitled to under the scheme will not also come under

the principle of affirmative action adopted by Courts sometimes in order to avoid discrimination. If we may say so what the High Court has done in this case is a clear and naked usurpation of legislative power."

1997 (6) SCC 312 = 1997 (4) ALD (SCSN) 55

It is well settled the Courts cannot direct legislation as observed by a three Judge Bench decision of the Supreme Court in Institute of chartered accountants of *India v Price water House and another*, 1997 (6) SCC 312 = 1997 (4) ALD (SCSN) 55, Judges should not proclaim that they are playing the role of law maker merely for an exhibition of judicial velour. They have to remember that there is a line though thin which separates adjudication from legislature. They should not be crossed.

It is therefore respectfully submitted the decision under study far from being per in curium appears to be incorrect statement in law and amounts to impermissible legislation and requires reconsideration either for confirmation or otherwise of its reversal which, however appears to be impliedly overruled by the three Bench Decision of the Supreme Court AIR 1964 SC 215.

ORDERS ON INTERLOCUTORY APPLICATIONS — THEIR IMPACT ON THE SUITS

By

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The Supreme Court of India held in *Satyadhyan v. Smt. Deorajie Dabi,* AIR 1960 SC 941, that, 'Interlocutory orders which have the force of a decree must be distinguished from other interlocutory orders which are a step towards the decision of the dispute between parties by way of a decree or a final order. *Moheshur Singh's* case, *Forbe's* case and *Sheonath's* case dealt with interlocutory judgments which did not terminate the proceedings and led up to a decree or final order. *Ram Kirpal Shakul's* case, *Bani Ram's* case and *Hook's* case deal with judgments, which though called interlocutory, had, in effect, terminated the proceedings…."

Following the said judgment of the Apex Court, A.P., High Court held at para 26, page 421 of 1994 (2) ALT 411 as follows:

"26. From the judgment of the Supreme Court referred to above, it is clear that in order to determine whether a particular order was an interlocutory order or not, we have to see whether the order terminates the proceedings. If the order terminates the proceedings, then it becomes a final order; otherwise, it remains to be an interlocutory order. If it is an interlocutory order, the correctness of the same can be challenged in appeal filed against the final order…. Therefore, the order was a final order as it had the consequences of putting an end to the controversy and as such Section 105 CPC is not applicable….".

2. Section 104 of CPC speaks of orders from which an appeal lies. Order 43 Rule 1 narrates certain orders passed under various