UNSETTLING THE SETTLED FOR SETTLING THE UNSETTLED?

AN INTROSPECTION INTO ABHIRAM SINGH V. C.D. COMMACHEN

Naveen Kumar Murthi
Advocate, Madras High Court, Chennai

“Religion is the opium of the People” - Karl Marx

Substance abuse has always been visualised as an abominable addiction that is presumed to annihilate the very existence of a man since it starts controlling him and not vice versa. But, the very same substance, when consumed in the right proportion is deemed to give an exhilarating ecstasy which even the kings and rulers of the greatest of great kingdoms spanning over the last thousands of years have relished.

For a moment, it is not to be presumed that the author by any stretch of imagination supports or canvasses substance use or abuse. The above lines are used on purpose to exemplify that the addiction towards religion, race, caste and language has been so strong to a man as it is to a substance that gives him ecstasy.

On one hand, it has paved way for bloody riots, civil wars, eradication of races, greatest downfalls of many kingdoms and chaos. While on the other, it has created different civilisations, cohesively held several nations intact and made men better human beings. In the last seven decades since independence, this unbelievably diverse democracy has evolved so drastically. Though the law of the land has been altered numerous times to adapt itself to the changing times, the indispensable concept of equality that is deeply enshrined and embedded into its very fabric has remained very much intact.

It is rather the utmost obligation of an elected government controlling the nation or the States to ensure that discrimination on any pretext is completely eradicated and all men and women, tall or short, black or white, atheist or theist, crippled or healthy are given a level playing field. To obviate these disparities, especially if they occur on religious, casteist, communal, racist or linguistic pretexts, it is certainly compelling on part of a prospective entrant into the halls of the Parliament and the Assemblies to ensure that he assures his fellow men that all is going to be well.
and he and his party would ensure treating the equals equally and ensuring that the unequals are not left suffering.

The Supreme Court of this nation which is described as and in fact, is the most powerful in this globe has changed, tilted, modified and transformed the law in black and white by its judicial interpretation and activism over these years. One of the iconic verdicts of this year that surprised, troubled and periled not only the men in the kurtas and dhotis, but also sizeable chunk of the majority is the seven judge Constitution Bench finding in *Abhiram Singh v. C.D.Commachen*\(^{328}\). The Court by a wafer thin 4:3 majority, in one stroke, completely unsettled what was settled by the very same Court in the last several decades in the context of an extremely important provision of the Representation of the People Act which also boils down to having an indiscernible link to the Right of free speech of a campaigner and the same does not augur well with this author.

Though four of their Lordships penned down their opinions running to several pages on behalf of the majority and minority, the short, narrow and seminal controversy that was decided is regarding the term “his” in Sec.123(3) of the Representation of the People Act and what it means or is deemed to mean. Does “his” refer to the candidate or the voter or both? The answer to this question by the Court is the very reason for the author to ponder upon its correctness and the ramifications it could cause hereafter. Sec.123(3) of the Representation of the People Act as it stands in the present day is as below:

> “123(3)The appeal by a candidate or his agent or by any other person with the consent of a candidates or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate: [Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]”

This was not how this provision really was when it was born in the statute book. Instead of the term ‘appeal’, the word ‘systematic appeal’ was used. Further, the word ‘his religion’ was merely ‘religion’. Therefore, one can see that the Parliament was conscious of the compelling requirement of ensuring the needful was done for facilitating a trouble-free campaign for the contestants.

\(^{328}\) 2017 SCC Online SC 9: 2017 1 MLJ 522 (SC)
The law from 1960 till the present matter was decided was that the term ‘his’ used in the present Sec.123(3) only refers to the religion, race, caste, etc., of the candidate and not the voter\textsuperscript{329}. Subsequent to the removal of the word ‘systematic’, the scope of this provision was broadened. However, the addition of the word “his” naturally narrowed down the tentacles of the provision which was even pointed out by Lokur.J in his finding.

But according to his Lordship, the addition of the word ‘his’ has opened up a can of worms. It may be right in a way that by the addition of the word ‘his’, the scope is narrowed, but one has to naturally see the context in which it was done.

The majority view was led by Lokur. J whose finding was concurred with by Rao.J, while T.S.Thakur, C.J. (as he then was) and Bobde.J with supplementing views agreed with the conclusion arrived by Lokur.J. The majority in unison interpreted the word “his” occurring in Sec.123(3) to include both the voter and the candidate whereas the minority view penned down by D.Y.Chandrachud. J on behalf of Goel.J and Lalit.J concludes that the word “his” would only mean the candidates and not the voter\textsuperscript{330}.

The majority was apprehensive and assiduous in ensuring that Sec.123(3) is interpreted in a manner so as to further the noble ideal that the provision is not exploited by a candidate on his or her behalf by making an appeal on the ground of religion with the possibility of disturbing the even tempo of life. The majority by and large agreed that Sec.123(3) has to be interpreted broadly and purposively so as to ensure that communalist, separatist and fissiparous tendencies are curbed during an Election campaign.

Whereas, the minority found that electoral change is all about mobilising opinion and motivating others to stand up against patterns of prejudice and disabilities of discriminations. Accordingly, it was concluded that Sec.123(3) does not prohibit electoral discourse being founded on issues pertaining to caste, race, community, religion or language.

Though it could be legally and logically right that religion ought not to be the trump card for winning the votes of the electorate, nonetheless it cannot be classified as a strict taboo to canvass on religious lines considering the situation of the voters. This definitely is not what Sec.123(3) in letter and spirit intends. It is only by judicial interpretation of the majority taking aid

\textsuperscript{329} Kultar Singh v. Mukhtiar Singh AIR 1965 SC 141; Kanti Prasad Jayshanker Yagnik v. Purshottundas Ranchhoddas Patel (1969) 1 SCC 455; Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte (1996) 1 SCC 13

\textsuperscript{330} Para 51 of the Minority Judgment
of purposive interpretation, has the scope of Sec.123(3) which in fact has a *quasi* penal consequence has been broadened. This certainly unsettles the law that has been settled and laid down by the top Court and which was in vogue all these years.

Despite the opinion of Lokur J. being idealistic in its spirit, the question would be whether the judgement paves way for interpreting Sec.123(3) in the way in which the Parliament would have really intended to and also whether this conclusion could be a universal remedy for rifts caused in the communities on these grounds. With greatest respect, in the opinion of this author, the answer is ‘no’. Despite all of us striving to ensure that the separations on the basis of caste, creed, race, language, and religion ought to be necessarily eliminated, it is not this kind of an approach that would take us there.

Rightly, it was observed by D.Y.Chandrachud J, in his Lordship’s concluding paragraphs that the view adopted by the Court earlier commends itself for acceptance and there is no reason to deviate from the same. In fact, it is adjunct to point out that D.Y.Chandrachud J referred to the view of Lokur J in the NJAC Judgement wherein his Lordship had earlier held that reconsideration of an earlier judgement must be done only when the Court is convinced that the decision is plainly erroneous and has a baneful effect on the public, apart from holding that the power to reconsider is not unrestricted or unlimited.

‘Stare decisis’ has been a standard rule in observance of judicial discipline and it is only when the Court finds that the view taken by the Courts previously is palpably erroneous or perverse does it take a different view. As pointed out in the minority judgment, the majority has not adduced extremely convincing reasons to upset the balance and set at naught a long line of decisions rendered over the years.

In the majority judgement, the Court has observed in today’s modern era, discourse between the Politicians and the Electorate is not limited to campaigns in the *Maidans* and streets with the noisy loudspeakers and pamphlets that are issued door to door and the citizenry has become extremely cautious and conscious of what is happening in the political world and they have access to information with a mere touch of a finger through Facebook, Whatsapp or Twitter.

Access to information is essential and would be a rudimentary feature of the Right to know stipulated in Article 19(1)(a) of the Constitution. By putting fetters on the manner in which a candidate has to campaign, isn’t there an actual restriction of information? It is undisputed and

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331 Supreme Court Advocate on Record Association vs. Union of India, (2016) 5 SCC 1
indubitable that there isn’t a real equality amongst the citizenry of the second most populous country in this globe.

There are serious divides on religious lines. Bloody wars still happen. Inter-caste marriages are seen a strict taboo and the remedy to that in most areas is to behead the couple under the caption of honour killing. The people from the north-east who go to every single part of this country for eking out their livelihood are in many places treated indifferently. The minorities still have issues against the majority and the majority at times, do suffer in the hands of the minority. These are predicaments that have to be voiced out and not prohibited. Silence is not always the safest policy just as Napoleon Bonaparte remarked long back that “The world suffers a lot. Not because the violence of bad people. But because of the silence of the good people.”

The underlying spirit of the majority judgement is that an appeal which has even the slightest of religious, casteist, racist or linguistic flavour is a corrupt practice. By silencing the campaigners not to speak about this, are we going to achieve the concept of welfare state so easily and harmoniously? Whether an appeal that could create hatred is prohibited or any appeal per se is prohibited? With utmost respect, these facts have not been considered elaborately in the majority finding. An ‘appeal’ can be genuine, welfare oriented and aimed at eliminating disparities. Likewise the same can be casteist, separatist and diabolic. Should not there be a reasonable classification of these kinds of appeals? Shouldn’t the grain be separated from the chaff?

Sadly, there has been no distinction of the tone, tenor, manner and purpose of an appeal. If an appeal is made, for instance, stating that the people belonging to ‘x’ linguistic group will be provided adequate protection and they would be treated equally, will this be a corrupt practice? If a candidate states that the persons belonging to the oppressed communities who are still discriminated will be ensured of a better life, will this be an impermissible appeal? Even an absolutely essential and compelling welfare measure, if it slightly even touches upon these categories, according to the majority, is a corrupt practice.

At this juncture, it would be apposite to recall the sentiment reverberated by Gajendragadkar C.J (As he then was) speaking unequivocally on behalf of the 5 Judges in the Constitution Bench almost five decades back in Kultar Singh v. Mukhtiar Singh332 wherein it was held

“17. ......If in propagating its views on such a political issue, a candidate introduces an argument based on language, the context of the speech in which the consideration of

332 AIR 1965 SC 141
language has been introduced must not be ignored, and that is how this Court held that the corrupt practice alleged against the successful candidate had not been established. Political issues which form the subject-matter of controversies at election meetings may indirectly and incidentally introduce considerations of language or religion, but in deciding the question as to whether corrupt practice has been committed under Section 123(3), care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy. We are, therefore, satisfied that the High Court was in error in coming to the conclusion that the impugned poster Ext. P-10 attracted the provisions of Section 123(3) of the Act.”

We all know that someone who blew his TRUMPhet a little too loud which eventually aided his triumph in the most powerful country of the West. But the invectives he hurled on the opposition and the assurances he gave to trample the immigrant races and religions led to an international outburst including heated discussions in the halls of the Parliament of the Brexited Nation.

What would happen if the same happens in our country? Why has the majority departed from the very well reasoned approach of the Court in Kultar Singh333, which clearly stipulates that care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy? Though, it was the intent of the majority to eradicate fissiparous and separatist tendencies, by painting all appeals with the same brush, with great respect the author is afraid that the cure that has been found is far worse than the disease.

Curiously, the majority view has been classified as anti-minority by a Professor334 at the Harvard Law School which has been retorted335 by a friend of the author claiming his perception of the judgment as incorrect. Perhaps these debates have crept up only because of the majority not carving out exceptions to the general rule set in by its judgment.

In this author’s opinion, the only prohibition that, in the present day, would be required is to ensure that an appeal made by a candidate does not pave way for hate speech or mobilising the people for the wrong reasons. Sans that, any appeal that is made by a candidate not seeking votes

333 Supra
334 https://www.bloomberg.com/view/articles/2017-01-08/india-s-high-court-favors-nationalism-over-democracy
on his own religion or other affiliations but seeking a vote pointing out that he will redress the issues of the groups who have been suffering is certainly not a corrupt practice.

This exactly is the sentiment that has been resonated by D.Y.Chandrachud J. in his minority judgement which according to the author is well suited to the changing trends of the society. Since even the majority is only wafer thin, there is always room for change of minds and hearts in future. It has happened so many times in this nation and the author hopes that the minority view transforms into a majority as it could be a panacea for settling the unsettling of the settled practice. Long Live Democracy!