

MOHD. SALIM V. STATE OF UTTARAKHAND 2017 SCC ONLINE UTT 367 A BREAKTHROUGH MOVE OR AN UNTHOUGHTFUL JUDGEMENT?¹

Abstract

The following case comment is on the recent judgement by the Uttarakhand HC in the case of *Mohd. Salim v. State of Uttarakhand 2017 SCC OnLine Utt 367*. The judgement is a breakthrough move by the HC as it declares rivers Ganga and Yamuna as a legal person and also placed the Director NAMAMI Gange, Chief Secretary and the Advocate General of Uttarakhand in the capacity of *loco parentis* for their protection. It's the first time in the world that a court has awarded a legal status to the rivers Ganga and Yamuna. The judgement however seems to be a far-fetched thought. This is because of the fact that there are no implementation methods provided by the court for the implementation of its orders. What will be the status of the rivers outside the jurisdiction of the HC was also not provided for. There is also uncertainty as to what will exactly cause 'harm' to the rivers. River inter-linking scheme was also not discussed. Finally some insights have also been provided with regard to the International scenario. The case comment has finally been concluded with the role of judicial activism which has led to the unprecedented move taken by the court.

INTRODUCTION

Sooner or later, we will have to recognize that the Earth has rights, too, to live without pollution-Evo Morales

The above quote sums up the importance of nature for us and how pathetically we are treating it. In a breakthrough judgement, the division bench of Uttarakhand HC headed by Justice Rajiv Sharma and Alok Singh, in *Mohd. Salim v. State of Uttarakhand*² gave River Yamuna and Ganga legal status and also placed the Director NAMAMI Gange, Chief Secretary and the Advocate General

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² 2017 SCC OnLine Utt 367.

of Uttarakhand in the capacity of *loco parentis* for their protection. It's the first time that legal status has been awarded to a river by way of judicial order though such status was recently granted to the Whanganui river in New Zealand by the legislature. The present case comment aims at critically analyzing the unprecedented move.

BACKGROUND

The case traces its existence to December 2016, when the original case was filed by the petitioner, Mohammed Salim, contending that illegal encroachment upon the land along the banks of Yamuna was made by the respondents and also illegal construction work was started by private respondents, the same being brought to the notice of higher authorities by the petitioner. Request was made to the Divisional Magistrate who in turn ordered the Executive Engineer to evacuate the respondents from the encroached area and remove the illegal construction.

However, despite various orders, the respondents couldn't be evacuated.

The petition was filed under Art 226 of the Constitution requesting for writ, rule or direction appropriate in nature by directing the respondents state authorities to remove the illegal construction raised by the private respondents in Government land in Dehradun and for the issue of writ of *Mandamus* directing to Centre for appropriate directions regarding disbursement of land and water resources between the successor states, to stop the encroachment over the Government land. The contention of the private respondents was that they had already purchased government land and also the construction was raised. Reference was also made to Sec 43 of the U.P. Reorganisation Act. The respondents also contended that the land belonged to the State of UP, with the boundaries yet to be determined. The court laid down 4 directions with that regards namely:

- 1) Eviction of the respondents from the government land within 12 weeks.
- 2) Direction to the Centre for final decision on the basis of settlement of division of assets between UP and Uttarakhand.
- 3) Direction to the Centre to constitute the Ganga Management Board under Sec 80 of the Act and to induct Uttarakhand as a member of the Upper Yamuna Board within 3 months.
- 4) Ban on mining in river bed of Ganga and its highest flood plain area with District Magistrate and Sub-Divisional Magistrate personally responsible for implementation.

The present petition was with regard to the non-compliance even after 3 months of passing the orders. Neither of the State governments were co-operating with the Centre for the establishment of Ganga Management Board.

ISSUE

The main issue that arose was whether HC can order the Central government to take measures for the protection of rivers?

JUDGEMENT

While exercising the *parens patriae* jurisdiction, the court declared River Ganga and Yamuna, and all their tributaries, streams, and every natural water flowing continuously or intermittently of these rivers as having the status of a legal person with all corresponding rights, duties and liabilities in order to conserve the river Ganga and Yamuna. The Director NAMAMI Gange, Chief Secretary and the Advocate General of Uttarakhand were placed as *loco parentis* for the protection of the rights of the rivers.

RATIO DECIDENDI

The bench opined that to protect the recognition and faith of society, rivers are required to be declared legal persons. Hindus have deep devotion in these rivers for providing physical and spiritual sustenance since eternity. They support and assist life, natural resources and health of community. Reference was also made to Art 48-A and Art 51A(g) to back the views.

The court also said that the States are bound by the orders of the Centre, failing which might invite consequences under Article 365 for declaration of President's rule. For a bigger thrust of social-political-scientific development, evolution of a fictional personality to a juristic person becomes inevitable. The constitution of the Board is important for the purpose of irrigation, rural and urban water supply, hydro power generation, navigation etc.

ANALYSIS

It is humbly submitted that the court has adopted a myopic view while addressing the issue at hand and the pronouncement is not free from flaws. Reliance was placed on *Yogendra Nath Naskar v. Commission of IT*³ and *Jankijee Deities v. State of Bihar*⁴, where the court held idols as juristic entities, capable of being taxed and to hold property. The need for creation of juristic persons arises out of

³ (1969) 1 SCC 555.

⁴ (1999) 5 SCC 50.

the necessities in the human development.⁵ Interestingly, no attempt was made to distinguish between a living and juristic person. This is evident from the words “status of legal person with all the corresponding rights, duties and liabilities of a living person” in the judgement. Contradictorily, considering the rivers as infants, the court also designated Director NAMAMI Gange, Chief Secretary and the Advocate General as representatives. This is clearly a paradoxical situation. Considering the fact that the rivers are legal entities, if now, there is any pollutant illegally discharged in the river thus polluting it, will the harm caused to it come under harm to body or to the property of the person, as is provided in the penal code?

What also failed to come to the notice of the judges is the River Inter-linking Scheme launched by the government which aims at is to ensure greater equity in the distribution of water by enhancing the availability of water in drought prone and rain-fed areas.⁶ This will be achieved by building dams. So will building dams come under “harm caused to the river”? An implementation method was also required for the implementation of the order. But, like its previous order, no such methods were laid down even in the latest order.

Apart from flowing in the states of Uttarakhand and UP, Ganga and Yamuna flow in other states as well. What will be the status of rivers in other states is a question yet to be pondered upon. The tributaries and streams of these rivers flow in the other countries too. Shouldn't all the states and countries in whose geographical regions these rivers flow have a say on this sensitive issue as they all will be affected by the same?

INTERNATIONAL SCENARIO

*Sierra Club v. Morton*⁷ is one of the first cases in which the issue of legal standing of inanimate objects as living objects came up for consideration. In his famous dissenting opinion, Douglas J contended that contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.⁸

He also recognised that inanimate objects can be party in litigation as well and river is a living symbol of all the lives it sustains which, as a plaintiff speaks for the ecological unit of life.

An attempt has been made to adopt eco-centrism in the country where nature is the focal point of the decision making and is given priority over and above humans. Eco-centrism advocates for legal rights of the nature rather than anthropocentrism which considers humans as the focal point

⁵ *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass*, Civil Appeal No. 3968 of 1987.

⁶ Interlinking of rivers, India, available at: <http://wrmin.nic.in/forms/list.aspx?lid=1279> (last updated on 02/03/2016).

⁷ 405 U.S. 727 (1972).

⁸ *Ibid.*

in decision making and merely moral duties towards nature are recognised. The human centric approach of the judiciary was given way to eco-centric approach in the case of *Animal Welfare Board v. A. Nagaraja*⁹, where it was observed that animal welfare must be given priority over the customary practices of killing a bull. The judgement basically focused on the three stage development in Judiciary's approach to environmental issues. At first the driving fuel for the protection of environment should be out of pure human self-interest. This should further focus on sustainable development considering the future generations' welfare. Finally, the nature's own rights should be recognised as a living being.

The implementation of the order in the present case seems to be a far-fetched thought incapable of practical application and implementation.

CONCLUSION

Judicial activism has played a key role in this case to fill the legislative *lacuna* to recognize the rivers as legal persons. It has been rightly said, "take away the Judicial Activism and tyranny will step into the vacant place"¹⁰. Though being an important aspect of judiciary, as the third pillar of a democracy, it must be applied thoughtfully and judiciously unlike in this case. The consequences of the orders are in the womb of future. Whether the unprecedented move of the Court bears fruits in the long run or becomes a yet another failed attempt to preserve nature is yet to be seen. Clouds of uncertainty still hover over the implementation of order. It is high time to recognize nature's protection as a legal obligation rather than a moral duty. A shift from anthropocentrism to eco-centrism is the need of the hour. Nature must be protected and preserved in all its forms. Further developments should be made to the path-breaking *Jalikattu case* judgement. Hopefully, the order won't appear merely on papers.

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⁹ (2014) 7 SCC 547.

¹⁰ T.K. Tope, *Supreme Court of India and Social Jurisprudence*, (1981) 1 SCC (Jour) 8.