



REVIEW OF RECENT DECISIONS

I. LAW RELATING TO ARBITRATION IN INDIA – RECENT DEVELOPMENTS

The past few years witnessed a remarkable interaction between arbitration in India and international developments. In this background, we have also seen what commentators have called a ‘pro-arbitration trend’ in the Supreme Court.¹ Possibly, it started with the arbitration jurisprudence developed almost single-handedly by Justice Raveendran² and got consolidated by the decisions in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*³ and *Chloro Controls*.⁴ That trend has only continued in 2013 and 2014 and in this note, we consider three important decisions of the Supreme Court.

A. The Public Policy Exception under §48: Has the ‘unruly horse’ been tamed at last?

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,⁵ the Court considered the meaning of ‘public policy’ as used in §48(2)(b) of the Arbitration and Conciliation Act [the Act]. The respondent secured two GAFTA arbitral awards in its favour, based on the determination that grain sold did not conform to contractual specifications even when the certification body under contract had attested to its conformity. The Delhi High Court recognised the award and ordered for its enforcement.

¹ See Hassal, *Two Recent Pro-Arbitration Cases from Indian Courts Continue the Judicial Trend Towards Recognition of Arbitral Independence* CLIFFORD CHANCE CLIENT BRIEFING, February 21, 2014 available at http://www.cliffordchance.com/briefings/2014/02/two_recent_pro-arbitrationcasesfromindia.html; Lieberman and Paracha, *Indian Supreme Court Continues Pro-International Arbitration Stance*, TAYLOR WESSING, August 8, 2013 available at <https://www.taylorwessing.com/news-insights/details/indian-supreme-court-continues-pro-international-arbitration-stance-2013-08-08.html>.

² For eg., *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267.

³ (2012) 9 SCC 648.

⁴ *Chloro Controls (I) (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

⁵ (2014) 2 SCC 433.

The appellant moved the Supreme Court. Relying on previous decisions,⁶ it was argued that an Indian Court can refuse ‘patently illegal’ awards. In particular, reliance was placed on the phrase ‘public policy of India’ as being in *pari materia* with §34(2)(b) of the Act and should thus be interpreted in the same manner. The respondent sought for a distinction between ‘public policy’ for domestic arbitrations and foreign-seated arbitrations on the basis of *Renusagar*⁷ which, being a 3 judge bench decision, had precedence over *Phulchand*. Further, it contended that *Saw Pipes* was never intended to have a broad application encompassing foreign-seated arbitrations.

The Court held for the respondent, and recognised that in *Saw Pipes*, the Court had drawn a distinction between a challenge to an Indian award and a foreign award.⁸ Accordingly, the Supreme Court held that the *Renusagar* position with respect to Section 7(1)(b)(ii) of the Foreign Awards Act “*must equally apply to the ambit and scope of Section 48(2)(b)*.”⁹ Therefore, the phrase ‘public policy of India’ under §48(2)(b) of the Act is restricted to the fundamental policy of Indian law (i); interests of India (ii); or justice or morality (iii). For this reason, the Court rejected the challenge to the award which was essentially one on merits.

(a) *Comment*

While the decision is certainly a step in the right direction, the approach of the Court in considering the enforceability reflects vestiges of the traditional tendency to review the arbitral award. In this case, the appellant never contended the award violated the three conditions of *Renusagar*. Instead, enforcement was challenged *solely* on grounds of misinterpretation of contractual terms. The Court considered the facts and English law applicable to the contract despite its own dictum. It would have been interesting had the Court come to the conclusion that the arbitral tribunal erred on facts or law. A principled reading of the decision *cannot* permit a review on the merits of the award. Yet, the approach leaves scope for misinterpretation which unfortunately, is not unheard of, in Indian decisions relating to the law of arbitration in India.

(b) *The BALCO paradox*

It is to be noted that this decision confirms that commercial parties contemplating arbitration in India face a very stark choice: *if the arbitration is seated in India*, (or Part I is applicable because of *Bhatia International*), commercial parties will have the benefit of the court’s assistance in granting interim relief

⁶ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Venture Global Engg. v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190; *Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300.

⁷ *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644.

⁸ *Shri Lal Mahal Ltd.*, at ¶26.

⁹ *Shri Lal Mahal Ltd.*, at ¶27.

in aid of the Indian arbitration. *However, parties also face an expanded inquiry into the merits of the Indian award by way of the doctrine of patent illegality.* On the other hand, *if parties choose to have their arbitrations seated outside India,* Indian courts may not assist them on interim reliefs but they would not face any appeal on the merits of the award obtained.

B. Anti-Arbitration Injunctions by Indian Courts: Is there some clarity finally?

Anti-Arbitration Injunctions issued by Indian Courts have garnered a lot of attention from the international arbitration community, *inter alia* being labelled a form of ‘Arbitral Terrorism’.¹⁰ Previously, these have been issued without citing a provision empowering the Court to do the same¹¹ (a decision subsequently overruled¹²), by relying on the Supreme Court’s power to do complete justice under Article 142 of the Constitution¹³ among other interesting orders.

In this background, it is very curious that a decision of the Court precluding Indian courts from issuing such injunctions has escaped notice let alone careful scrutiny. In *Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd.*¹⁴ the appellant filed a request for arbitration in the ICC in relation to a restructuring agreement between the appellant, West Bengal government, West Bengal Industrial Development Corporation (WBIDC) and the respondent asking for the transfer of WBIDC’s shareholding to the appellant. The respondent contended the arbitration agreement was hit by §45 of the Act and filed a suit for the declaration of the arbitration agreement to be void, and prayed for an anti-arbitration injunction. The Calcutta High Court issued the injunction against which this appeal was considered by the Supreme Court.

A full consideration of the contentions by both parties cannot be undertaken here. Specifically, on the question of the injunction, it was argued that §5 of the Act precluded the Court’s power to issue such an injunction. The respondent argued a suit for the injunction was maintainable, on the principle that there is an inherent right in every person to bring suit of a civil nature unless the suit is barred by statute. Reliance was placed on *SBP v. Patel Engineering*¹⁵ to substantiate the case for interference with an allegedly invalid arbitration agreement.

¹⁰ Bishop, *Combating Arbitral Terrorism: Anti-Arbitration Injunctions increasingly threaten to frustrate the International Arbitral System* available at <http://www.kslaw.com/library/pdf/bishop7.pdf>.

¹¹ *MSM Satellite (Singapore) Pte Ltd. v. World Sport Group (Mauritius) Ltd.*, (2010) 112 Bom LR 4292.

¹² *World Sport Group (Mauritius) v. MSM Satellite (Singapore) Pte. Ltd.*, 2014 SCC Online SC 58: AIR 2014 SC 968.

¹³ *Antrix Corp Ltd. v. Devas Multimedia Pvt. Ltd.*, Order dated 9 April 2012 in Arbitration Petition No. 20 of 2011, available at <http://judis.nic.in/temp/20201127942012p.txt> (Last accessed on August 25, 2014).

¹⁴ *Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd.*, Civil Appeal No. 10932, decided on 10-12-2013 (SC).

¹⁵ *SBP and Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618.

The Court, rejecting the respondent's contentions and upholding the appeal, held that §5 prohibiting judicial interference other than what was provided in the Act is applicable to Part II of the Act as well in light of *Bhatia International*¹⁶ and *Venture Global*.¹⁷ For this reason, *the suit filed with the aim of seeking an anti-arbitration injunction would not be maintainable in law*.¹⁸

(a) Comment

The Court's analysis on the applicability of §5 of the Act to Part II, and its interaction with §9 of the Code of Civil Procedure is surprisingly bare. Especially so because §5 of the Act explicitly restricts its application to Part I over and above §2(2) of the Act. Furthermore, the Court dismisses the validity of the suit on the conjoint reading of the arbitration agreement being valid and the applicability of §5 to Part II. This leads to uncertainty. If in the event the arbitration agreement is invalid, would §5 preclude an anti-arbitration injunction even then? While the result in *Chatterjee Petrochem* is desirable, the same cannot be said of the Court's reasoning. It is not far-fetched to imagine clarifications from the Court sooner rather than later.

C. The Conundrum of determining Curial Law and Exclusive Jurisdiction in Arbitration: *Enercon v. Enercon*

Governing Law and Jurisdiction issues in Indian Arbitration Law have always remained uncertain, with few decisions undertaking a thorough reasoning of the sophisticated issues involved. *Enercon (India) Ltd. v. Enercon GmbH*,¹⁹ involved a complex set of facts and a host of issues including the validity of the underlying contract, unworkability of the arbitration agreement *et al.*²⁰ It is not possible to comprehensively analyse some conclusions of the decision here.²¹ For that reason, only the crucial issue relating to curial law and exclusive jurisdiction of courts is considered.

It is important to reproduce the relevant parts of the agreement:

17 Governing Law

¹⁶ *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105.

¹⁷ *Venture Global Engg. v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190.

¹⁸ *Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd.*, Civil Appeal No. 10932, decided on 10-12-2013 at ¶35 (SC).

¹⁹ (2014) 5 SCC 1.

²⁰ *See Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 at ¶71.

²¹ For the basic conclusions of the Court, *see Naniwadekar, Enercon v. Enercon*: Indian Supreme Court on arbitration/conflict of laws, IndiaCorpLaw Blog, February 18, 2014 available at <http://indiacorplaw.blogspot.in/2014/02/enercon-v-enercon-indian-supreme-court.html>.

17.1 This Agreement and any dispute of claims arising out of or in connection with its subject matter are governed by and construed in accordance with the Law of India.

18. Disputes and Arbitration

18.1 ***

18.2 ***

18.3 A proceedings in such arbitration shall be conducted in English. *The venue of the arbitration proceedings shall be in London.* The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable-fees of counsel) to the Party (ies) that substantially prevail on merit. *The provisions of Indian Arbitration and Conciliation Act, 1996 shall apply.*

In light of this arbitration clause, the question that arose was what was the seat of the arbitration (London or India), and accordingly, which courts had jurisdiction to oversee the arbitration. The Court held London was merely the place where arbitration proceedings were to be conducted and all other indicators pointed towards the seat being in India – Governing Law, the explicit stipulation that the 1996 Act would apply to the arbitration.²² In light of such strong factors connecting the arbitration to India, London could not be read as its seat. In reaching this conclusion, the Court relied on the English Court of Appeal in *Naviera Amazonica Peruana S.A.*²³ which was decided on similar facts. Here, the Court also distinguished a seemingly similar situation in *Union of India v. McDonnell*²⁴ where even though the Indian Act was expressly stipulated, London was called the ‘seat’ in the agreement.²⁵

Additionally, it pertinently observed that holding London is the seat when the Indian Act applies would lead to the absurd situation wherein both Courts may exercise jurisdiction on similar applications (for instance, appointment of arbitrators) leading to multiplicity of proceedings and inconsistency in results.²⁶

Having held the seat of arbitration was India, the Court held Indian courts had exclusive jurisdiction over the arbitration proceedings.²⁷ Further, the Court on

²² *Enercon*, at ¶¶98, 99, 103.

²³ *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros del Peru*, (1988) 1 Lloyd’s Rep 116 (CA).

²⁴ *Union of India v. McDonnell Douglas Corpn.*, (1993) 2 Lloyd’s Rep 48.

²⁵ *Enercon*, at ¶135.

²⁶ *Enercon*, at ¶114.

²⁷ *Enercon*, at ¶137.

examination of the factors connected to the contract found no connection with England. Accordingly, a plea of *forum non-conveniens* could not be advanced by the appellant.²⁸ Thus, the Court issued an anti-suit injunction requiring parties to not litigate in the United Kingdom.²⁹

In conclusion, therefore, the Court brought to the fore the importance of good drafting of arbitration clauses (colloquially called ‘midnight clauses’) to evince parties’ intention to arbitrate in a particular manner. This is a welcome decision in so far as it brings clarity to the concept of seat (in such a situation) and its relationship with curial law and jurisdiction which was emphasised extensively in *BALCO*.

II. MEDICAL NEGLIGENCE: NEW GROUND IN COMPENSATION

In what seems to be the inflexion point in jurisprudence concerning medical negligence, the Supreme Court in *Balram Prasad v. Kunal Saha*³⁰ awarded an unprecedented sum of Rs. 5.96 crore as compensation, which with interest exceeds Rs. 11 crores. While reiterating that hospitals and doctors are instrumentalities who ought to ensure that the fundamental right to health is respected, a bench consisting of Justices Mukhopadhyaya and Gopala Gowda held that medical negligence is also an affront to the human right to be treated with dignity.

Anuradha Saha, the wife of the respondent Dr. Kunal Saha, was a young child psychologist based in USA. She approached Dr. Sukumar Mukherjee at Nightingale Diagnostic Centre in Kolkata in 1998, complaining of acute pain, fever and rashes and was administered a higher-than-recommended dose of a steroid. Anuradha was then admitted to AMRI Hospitals but was shut down after a fire gutted one of its buildings. Here she was administered another steroid while Dr. Mukherjee left Anuradha under the supervision of dermatologist Dr. Balram Halder and physician Dr. Abani Roychowdhury. Anuradha was then diagnosed by Dr. Halder as suffering from toxic epidermal necrolysis (TEN), but there was no change in the treatment regimen. On showing no improvement, Anuradha was taken to Breach Candy Hospital in Mumbai, where she died on 28 May 1998. In March 1999 the respondent commenced legal proceedings against the errant doctors and AMRI Hospital. On having lost his battle before the Calcutta High Court and Medical Council of West Bengal, the National Consumer Disputes Redressal Commission (NCDRC) awarded compensation amounting to Rs.1.7 crores. In 2009, Dr. Kunal Saha moved the Supreme Court claiming enhancement of compensation on several counts and was finally awarded the same in 2013.

²⁸ *Enercon*, at ¶152.

²⁹ *Enercon*, at ¶156.

³⁰ (2014) 1 SCC 384.

The Supreme Court while allowing the appeal emphasized on the principle of *restitutio-in-integrum* in arriving at the compensation and lamented that the NCDRC had failed to do so.³¹ Several significant principles emerge from this decision. *First*, the Supreme Court decried that the NCDRC had employed the multiplier method popular in motor vehicle accidents claims, to quantify claims in medical negligence cases. The court rightly recognized that the multiplier serves a peculiar function in motor vehicle accident cases and transplanting the same in cases involving medical negligence will only encourage errant doctors. Moreover, the court recognized the unfairness in the low multiplier in cases involving the death of a wife, the value of whose economic services is often disregarded.³² *Second*, the court for the first time emphasised on taking into account inflation leading to increase in the claim amount especially since this case had been pending for fifteen years before reaching the Supreme Court.³³ *Third*, the court emphasised on several new factors to be taken into account while determining the quantum of compensation in medical negligence cases. Factors such as education of dependants, nature of work carried out by the dependants, salaries and perks given by companies to be noted while taking into account loss of future salary, the fact that the deceased was educated in an Ivy League School and had bright career prospects, residence of the deceased being a foreign country, and non-pecuniary damages were emphasized upon by the court.³⁴ *Fourth* the court awarded interest for the period during which the claim was pending before several judicial fora, commencing from the date of complaint.³⁵ *Fifth*, the court held the hospital vicariously liable for the actions of the doctors and refused to accept any distinction between full-time staff and those hired on a contractual basis. It was held that once allegations are levelled against a hospital, it is the responsibility of the hospital to discharge its burden of proving that due care was taken. Therefore, even though in the instant case the hospital was not joined as a party, the court found this to be no material lacunae and held the hospital liable.³⁶ Finally, the court emphasised on reading the term service broadly, while calculating the loss caused when the deceased is a married woman, so as to allocate economic value to the work done by housewives.³⁷ A hitherto neglected area, this case lays down that work done by housewives amounts to a service and must be valued on economic terms while awarding damages. Lastly, the court recommended that the legislature should lay down guidelines or enact legislation to govern the actions of private hospitals and their doctors to check the alarming increase in cases involving medical negligence.

³¹ *Balram Prasad*, at ¶113.

³² *Balram Prasad*, at ¶¶118-125.

³³ *Balram Prasad*, at ¶¶98, 100.

³⁴ *Balram Prasad*, at ¶¶105, 106, 109.

³⁵ *Balram Prasad*, at ¶¶131, 182, 188.

³⁶ *Balram Prasad*, at ¶¶136, 139, 187.

³⁷ *Balram Prasad*, at ¶175.

In conclusion, one hopes that this judgment will go a long way in deterring negligent doctors and serve as a panacea in cases involving medical negligence by being an epitome of just and fair compensation.

III. SEXUALITY, GENDER, AND THE SUPREME COURT

In December, 2013 the Supreme Court handed down the long awaited decision in *Suresh Kumar Koushal v. NAZ Foundation*,³⁸ which dealt with the constitutionality of Section 377 of the Indian Penal Code [IPC]. This case came up before the Supreme Court after the much publicised decision of the Delhi High Court, wherein Section 377 was struck down as being unconstitutional. Section 377 of the IPC criminalizes sexual activities which are “*against the order of nature*”, which was understood to prohibit homosexual acts. In this context, the case saw detailed submissions on various aspects of the law, including constitutionality of this section vis-à-vis the fundamental rights guaranteed under the Constitution.

The Court divided its analysis into various segments. The first dealt with the scope of judicial review that it may undertake, especially with respect to pre-Constitutional legislations such as the IPC. After examining precedent, it concluded that while it was empowered to read down a statute or declare it unconstitutional, there exists a strong presumption in favour of constitutionality which must be effectively rebutted. This was buttressed by the court’s observation that the Parliament’s inaction in this regard despite criticism from various quarters was indicative of a particularly high threshold in this case.³⁹

The court then began its actual analysis by examining the scope of Section 377 and acts covered within it. It concluded that while listing the acts covered therein would be difficult, there most definitely was a wide ambit. Interestingly, the Court found it necessary to highlight that the section applied irrespective of age and consent, and did not criminalize a particular sexual orientation or identity.

Beyond this point however, the analysis appears woefully inadequate. The challenge under Article 14 and 15 of the Constitution was answered through statistics. As the LGBT community in India formed a miniscule percentage of the population, the discrimination between ordinary carnal intercourse and carnal intercourse against the order of nature was constitutional.⁴⁰ Subsequently, the Court found there was no violation of the limited guarantees of liberty under Article 21 either. More importantly, it held that mere misuse of Section 377 to violate the dignity of an individual was not enough to strike it down as contrary

³⁸ (2014) 1 SCC 1.

³⁹ *Naz*, at ¶¶45-46.

⁴⁰ *Naz*, at ¶¶63, 66.

to Article 21.⁴¹ Thus, the High Court decision holding Section 377 unconstitutional was overturned.

The Court chose to toe the line between the strict legal position and a holistic approach in favour of the latter. From a purely legal point of view, it seems like the court merely adhered to the separation of powers that has been envisaged under the Indian Constitution. However, much of the subsequent criticism has pointed out the inconsistency in such reasoning, given that these boundaries have been overstepped several times before. The decision shall be remembered for how the Court sought to sidestep a sensitive social issue by cloaking it in legality. This gives rise to interesting questions regarding the interaction between the social and legal spheres and the manner in which they ought or ought not to influence each other.

Such evasiveness was not at hand when the Court decided the writ petition in *National Legal Services Authority v. Union of India*.⁴² The issue concerned the legal status of transgenders, including *hijras/eunuchs* in India. The case, filed by the National Legal Services Authority on behalf of the transgender community, deals with some important interpretations both from a social and a legal perspective. As Sikri J. outlines in his opinion, the decision deals with two important questions – one, whether a person has a right to choose his gender and two, whether transgenders have a right to legal recognition as a ‘*third gender*’.

At the very outset, the decision begins by tracing the idea of the third gender and how it is incorporated within the notions of gender identity and sexual orientation. It recognises that international human rights instruments such as the Universal Declaration of Human Rights, 1948 as well as the International Covenant on Civil and Political Rights guarantee the right to live with dignity to every human being.⁴³ The judgement then goes on to trace the jurisprudence of transgender rights in other countries, including Australia, United Kingdom and Singapore.⁴⁴ Through this it seeks to demonstrate the increasing acceptance of these ideas across the globe, thereby suggesting that a similar response is warranted in India. In fact, the court emphasizes on India’s international obligations and the need to ensure that Indian jurisprudence is in conformity with international conventions and principles.

The constitutional analysis is divided under two broad heads, Articles 14, 15 and 16 and Articles 19 and 21, respectively. The first part addresses equality and the prohibition against discrimination based on sex, including gender identity and sexual orientation. The court reiterates that ‘sex’ within the meaning of Article 15 and 16 is inclusive not merely of the biological sex, but also the psychological

⁴¹ *Naz*, at ¶76.

⁴² (2014) 5 SCC 438.

⁴³ *NALSA*, at ¶21.

⁴⁴ *NALSA*, at ¶35.

element. In fact, in an earlier part of the judgement, the court clearly expresses its preference for adopting a *psychological* and not a *biological* test while examining the rights of persons who have undergone Sex Re-Assignment Surgery (SRS). This ties in to the idea that under Article 14 of the Indian Constitution, every *person* is guaranteed the right to equal protection of the law. Consequently, absence of adequate public facilities for transgenders and the discrimination faced by them due to their gender, both at the workplace and otherwise, is a clear violation of their fundamental rights.

The second part of the analysis focuses on the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and the broader notion of liberty. The Court opined that a person's identity may be expressed through his/her dress, presentation and behaviour. Consequently, the State cannot interfere with this expression of personality.⁴⁵ Further, the liberty and personal autonomy of a person are also guaranteed under Article 21. Therefore, the State must not only respect but also actively seek to protect the personal integrity and dignity of transgenders. Finally, the court concludes by expressing the view that transgenders must be legally and officially recognised as being the '*third gender*' and a failure to do so would violate their fundamental rights.⁴⁶

The criticism gendered through the *Naz* decision was somewhat offset by this decision of the Court. However, the reaction to the Court addressing such a sensitive issue directly remains to be seen. The following months should provide a useful indicator on the limits of judicial impact on societal opinion, and help inform future practice of the Court.

IV. DELAY AND THE DEATH PENALTY: BHULLAR AND BACK AGAIN

On April 12, 2013, a bench of two Judges of the Supreme Court of India dismissed writ petition filed by Devender Pal Singh Bhullar requesting commutating of his sentence of death.⁴⁷ Mr Bhullar had been convicted for causing bomb blasts in Delhi in 1993, which resulted in the deaths of 9 persons. He had been awaiting execution for nearly twelve years; eight of those went in the consideration of his mercy petition. On March 31, 2014, a bench of three judges granted the same relief, in a curative petition filed by his wife. The journey of Mr Bhullar's case is extraordinary in all respects. It also represents the full-circle taken by the Supreme Court on the question: whether inordinate delay in executing a sentence of death relevant grounds for commuting the same.

⁴⁵ *NALSA*, at ¶62.

⁴⁶ *NALSA*, at ¶129.

⁴⁷ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195.

A spate of decisions in the 1980s first considered the question in detail. The harrowed existence of a man awaiting execution troubled Justices Reddy and Misra a great deal in *T.V. Vatheeswaran v. State of Tamil Nadu*.⁴⁸ They declared a delay of two years from the date of judgment to execution of death sentence would enable a plea for commutation. Three judges in *Sher Singh v. State of Punjab*⁴⁹ shared this sentiment. However, they held against the hard-and-fast rule of two years delay for pleading commutation of sentence. A constitution bench in *Triveniben v. State of Gujarat*⁵⁰ seemingly put the matter to rest. The majority held that inordinate delay alone could prove to be a factor to commute the sentence of death to imprisonment for life.

In the backdrop of these decisions, Justices Singhvi and Mukhopadhyaya decided Mr Bhullar's petition in 2013. The delay of eight years to decide his mercy petition was strongly pressed before the Court. There was little argument of this being caused by him, and remained largely unexplained by the government communications. Justice Singhvi rejected the contention outright on two separate grounds. The *first* came from jurisprudence on the standard of "rarest of rare" employed while awarding the death penalty. According to this, to decide the sentence for an offence of "murder", the nature of the crime with its particular facts must be considered. Where the Court rejects mercy petitions in such cases of brutality, the Court is powerless to review the decision on the ground of delay. The *second* was particular to the facts of the case. It was held that delay could not be grounds for commutation when a conviction is under the Terrorist and Disruptive Activities (Prevention) Act 1986 [TADA] and similar statutes. The "bogey of human rights"⁵¹ could not be raised against such grave offences.

The decision attracted criticism from certain quarters for the second ground advanced by Justice Singhvi. The tension with previous decisions such as *Triveniben* was evident, and the Court took the opportunity to reconsider the verdict in *Shatrughan Chauhan v. Union of India*.⁵² Thirteen writ petitions seeking commutation of death sentences to imprisonment for life were heard together by a bench of three judges. Several grounds were raised for the same, however here we focus on delay in execution.

The Chief Justice spoke for the bench and found for the Petitioners on the question of delay. An evaluation of the time taken for disposing mercy petitions over the years revealed dismal facts. Records showed that where it took an average of five months to decide petitions in the late 1990s, one of the writ petitions saw a delay of 12 years.⁵³ The Court recommended the executive consider the

⁴⁸ (1983) 2 SCC 68.

⁴⁹ (1983) 2 SCC 344.

⁵⁰ (1989) 1 SCC 678.

⁵¹ *Bhullar*, at ¶67.

⁵² (2014) 3 SCC 1.

⁵³ *Shatrughan*, at ¶53.

delay in execution as another criterion in determining mercy petitions. It specifically held, that “*undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which is a violation of Article 21 and thereby entails as the ground for commutation of sentence.*”⁵⁴

The distinction for TADA offences created in *Bhullar* was specifically argued as being erroneous and non-binding. The Court agreed. It held that brutality of the offence did not justify additional incarceration beyond the sentence of death for the Court. It had already been considered to award the death sentence itself. There was no doubt in the mind of the Chief Justice that the Supreme Court espoused the view that unexplained delay alone can be grounds for commutation. He moved to specifically hold the decision *per incuriam*, observing there was “*no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence.*”⁵⁵

Fifteen persons saw their sentences commuted as a result of this decision. Its effects were to reverberate further. Writ petitions were filed on behalf of the persons convicted in the Rajiv Gandhi Assassination plot seeking commutation.⁵⁶ Relying on *Shatrughan*, they contended the eleven year delay to dispose mercy petitions was sufficient grounds to commute their sentence. The Court found the delay to be inordinate and unreasonable and not caused by the Petitioners. It also disapproved of the argument that a death-row convict must show actual harm by the delay caused to seek commutation on that basis.⁵⁷ After imploring the government to speed-up the process and requesting consideration of delay as a factor in disposing petitions, the Court on February 18, 2014 commuted the sentence of the Petitioners to imprisonment for life.

Buoyed by these developments, Ms Navneet Kaur filed the curative petition against the decision of April 2013.⁵⁸ Her husband’s acute mental illness coupled with a long, agonising wait for death came up again before the Court. This time but, they did not condemn him to the gallows.

⁵⁴ *Shatrughan*, at ¶61.

⁵⁵ *Shatrughan*, at ¶72.

⁵⁶ *V. Sriharan v. Union of India*, (2014) 4 SCC 242.

⁵⁷ *Sriharan*, at ¶21.

⁵⁸ Curative Petition (Criminal) No. 88 of 2013.