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POWER OF THE COURT TO AWARD COMPENSATION IN CRIMINAL CASES- REVISITED?

A critical appraisal of *Ankush Shivaji Gaikwad V. State of Maharashtra*

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The recognition of compensatory right in criminal procedure code has been three phase edification in Indian jurisprudence. Way back in 1973, Section 357 of Criminal Procedure Code, 1973, (herein after Cr.P.C) marked the inception of compensatory right in criminal law.[1] In 2008, Section 357A entered the Criminal Procedure Code book, with improvements over the existing rights.[2] Thirdly, the amendment Act of 2013 made the greatest contribution in the form of mandatory compensation by the government in certain offences.[3]

However, even though these welfare provisions are existing in the Criminal Procedure Code, neither section 357 nor section 357A have ever received a substantial attention of the judiciary. These welfare provisions were never taken to the ultimate spirit with which they have been enacted. In fact, the judiciary was more bothered about the capacity of the offenders and suitability of the offences for exercising salutary powers under sections 357 and 357A.[4]

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[1] Before 1973, The Criminal Procedure Code of 1898(in the form of Section 545) contained a provision for restitution. However, for its inherent defects, the Law Commission of India in its 41st Report submitted in 1969 pressed for the need of a separate provision for victim compensation. Section 357 of criminal procedure code sustainably reflects the said intention of Law Commission of India.

[2] This amendment came into effect from 31 December, 2009. Under this provision the Court is empowered to direct the State to pay compensation to the victim in such cases where "*the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated.*"

[3] The Criminal Law (Amendment) Bill, 2013 was passed by the Lok Sabha on March 19, 2013, and by the Rajya Sabha on March 21, 2013.The, Bill received Presidential assent on April 2, 2013 and came into force from April 3, 2013.Newly inserted section 357 B reads "*The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code."*

[4] In *Sarwan Singh and Ors. v. State of Punjab*, 1978 CriLJ 1598, this court said that in awarding compensation it was necessary for the court to decide whether the case was a fit one in which compensation has to be awarded. If it is found that compensation should be paid then the capacity of the accused to pay compensation has to be determined. The Court said that the purpose would not be served if the accused was not able to pay the fine or compensation for imposing a default sentence for nonpayment of fine would not achieve the object.

Further, in *Palaniappa Gounder v. State of Tamil Nadu and Ors*., 1977 CriLJ 992 the court observed that it was the duty of the court to take into account the nature of crime, injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.

This dismal judicial attitude has been cured by Supreme Court in *Ankush Shivaji Gaikwad V. State of Maharashtra*[5] . *Ankush Shivaji Gaikwad* decided by Hon'ble Supreme Court of India has been an eye opener in victim jurisprudence, an essential insertion in progressive interpretation and flagship in economic rehabilitation of sufferers. Hon'ble bench consisting of J. Thakur T.S. and J Gyan Sudha Misra laid down the proposition that

> "While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the Court's discretion, *there exists a mandatory duty on the Court to apply its mind to the question in every criminal case*. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation"[6] (emphasis supplied)

In arriving at the said ratio, two premises weighed the court's reasoning, the established practices in England and USA, *and* rules of statutory interpretation where 'may' may be interpreted as 'shall'.

In England, The Criminal Justice Act 1982 requires the courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review.[7]

In the United States of America, the Victim and Witness Protection Act of 1982 authorizes a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a)(7) of Title 18 of the Act requires Courts to consider in every case *"the need to provide restitution to any victims of the offense"*. Though it is not mandatory for the Court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows: *"If the court does not order restitution or orders only partial restitution, the court shall include in the statement the reason thereof."* [8]

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[5] (2013) 6 SCC, decided on May 3, 2013
[6] *Ibid* Para 62
[7] *Oxford Handbook of Criminology* (1994 Edn., p.1237-1238), which has been quoted with approval in *Delhi Domestic Working Women's Forum v. Union of India and Ors. (1995) 1 SCC 14*
[8] *Ibid* Para 32

The practice in these two jurisdictions easily convinced the Hon'ble court to hold that compensation shall be considered in every criminal cases unless expressly unwarranted for and the court shall furnish the reasons for non awarding of compensation.

Further, the language of Section 357 Cr.P.C. at a glance may not suggest that any obligation is cast upon a Court to apply its mind to the question of compensation. Sub-section (1) of s.357 states that the Court "*may*" order for the whole or any part of a fine recovered to be applied towards compensation in the following cases:

(i) To any person who has suffered loss or injury by the offence, when in the opinion of the Court, such compensation would be recoverable by such person in a Civil Court.

(ii) To a person who is entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abetment thereof.

(iii) To a bona fide purchaser of property, which has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property, and which is ordered to be restored to its rightful owner.

Sub-section (3) of Section 357 further empowers the Court by stating that it "*may*" award compensation even in such cases where the sentence imposed does not include a fine. The legal position is, however, well-established that cases may arise where a provision is mandatory despite the use of language that makes it discretionary.

The court observed that

> '…There is no gainsaying that Section 357 confers a power on the Court in so far as it makes it "*legal and possible which there would otherwise be no right or authority to do*" viz. to award compensation to victims in criminal cases. The question is whether despite the use of discretionary language such as the word "*may*", there is "*something*" in the nature of the power to award compensation in criminal cases, in the object for which the power is conferred or in the title of the persons for whose benefit it is to be exercised which, coupled with the power conferred under the provision, casts a duty on the Court to apply its mind to the question of exercise of this power in every criminal case.'

Applying the reasoning adopted in *Smt. Bachahan Devi and Anr. v. Nagar Nigam, Gorakhpur and Anr*[9] and *Dhampur Sugar Mills Ltd. v. State of U. P. and Ors,*[10] the court

[9] *AIR 2008 SC 1282*

observed that, **'**Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite Legislature having gone so far as to enact specific provisions relating to victim compensation, Courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on Courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.'[11]

Further, after the survey of many cases,[12] the court observed that, "…Section 357 Cr.P.C. confers a duty on the Court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the Court must *disclose* that it has applied its mind to this question in every criminal case…"

Thus the combined reading of *Hari Singh v. Sukhbir Singh and Ors*[13] *and Ankush Shivaji Gaikwad V. State of Maharashtra*[14] would invincibly lead to the following corollary

1. power of Courts to award compensation is not ancillary to other sentences but *it is in addition thereto*
2. This power is intended to do something to reassure *the victim* that he or she *is not forgotten* in the criminal justice system
3. *It is a measure of* responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a *constructive approach to crimes*
4. Section 357 Cr.P.C. confers *a power coupled with a duty* on the Courts to apply its mind to the question of awarding compensation in every criminal case.

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[10] *(2007) 8 SCC 338*
[11] *Supra note* 1 Para 50
[12] *NEPC Micon Ltd. and Ors. v. Magma Leasing Ltd. (1999) 4 SCC 253, Swantraj and Ors. v. State of Maharashtra (1975) 3 SCC 322, Hari Singh's State of Andhra Pradesh v. Polamala Raju @ Rajarao (2000) 7 SCC 75 State of Punjab v. Prem Sagar and Ors. (2008) 7 SCC 550 Sangeet & Anr. v. State of Haryana (2013) 2 SCC 452 Maya Devi (Dead) through LRs and Ors. v. Raj Kumari Batra (Dead) through LRs and Ors. (2010) 9SCC 486, State of Rajasthan v. Sohan Lal and Ors. (2004) 5 SCC 573, Hindustan Times Ltd. v. Union of India (1998) 2 SCC 242 Director, Horticulture Punjab and Ors. v. Jagjivan Parshad (2008) 5 SCC 539, Hindustan Times Ltd. v. Union of India (1998) 2 SCC 242 Arun v. Inspector General of Police (1986) 3 SCC 696 Union of India v. Jai Prakash Singh (2007) 10 SCC 712, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity (2010) 3 SCC 732, Ram Phal v. State of Haryana (2009) 3 SCC 258, Director, Horticulture, Punjab v. Jagjivan Parshad (2008) 5 SCC 539*
[13](1988) 4 SCC 551
[14] (2013) 6 SCC 770

5. It necessarily follows that the *Court must disclose that it has applied its mind* to this question in every criminal case
6. If application of mind is not considered mandatory, the entire provision would be rendered a dead letter
7. disclosure of application of mind is best demonstrated by recording reasons in support of the order or conclusion

The court did not rule that, compensation shall be paid in each and every case; rather, the court declared that Section 357 Cr.P.C. confers *a power coupled with a duty* on the Courts to apply its mind to the question of awarding compensation in every criminal case and disclosure of application of mind is best demonstrated by recording reasons in support of the order or conclusion. Accordingly the court also directed the registry to send the copies of the judgments to all lower courts to comply with. The present judgment answers the concerns of judiciary when the court once disappointedly observed that '…Criminal justice would look hollow if justice is not done to the victim of the crime…[15]

However, the concern of the victim is whether the lower courts would really devote enough time on section 357 and 357 A or would merely pay lip service as has been witnessed in number of earlier judgments. The devise of 'strictures' would discipline the approach of lower courts in this regard. The development of jurisprudence in the aftermath of this judgment is noteworthy.

[15] *State of Gujarat v. Hon'ble High Court of Gujarat* AIR 1998 SC 3164