Recent judicial recusals

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Why in News: Recently former Supreme Court judge Justice MR Shah refused to recuse himself from hearing a plea by former Indian Police Service (IPS) officer Sanjiv Bhatt to submit additional evidence to back his Gujarat High Court appeal against his conviction in a 1990 custodial death case.

Recent Instances of Justice Rescuals

Mr. Bhatt contended that there was a reasonable apprehension of bias as Justice Shah, as a High Court judge, passed strictures against him while hearing his plea linked to the same First Information Report (FIR).

However, Justice Shah dismissed the plea as an attempt to indulge in 'bench hunting'. Notably, Justice Shah's colleague in the bench, Justice CT Ravikumar, had recused himself a few weeks ago from hearing a batch of appeals against the discharge of Kerala Chief Minister Pinarayi Vijayan in the SNC-Lavalin corruption case, noting that he had dealt with an incidental proceeding in the case as a Kerala High Court judge.

On the same day, Chief Justice of India (CJI) D.Y Chandrachud rejected an application seeking his recusal from hearing petitions seeking legal recognition of same-sex marriages.

In another instance, Justice Gita Gopi of the Gujarat High Court last month recused herself from hearing Rahul Gandhi's appeal seeking a stay on his conviction in the 'Modi surname' criminal defamation case. No reasons were however specified for the recusal.

The purpose of judges recuse

Whenever there is a potential conflict of interest, a judge can withdraw from a case to prevent the perception that the judge was biased while deciding a case. This conflict of interest can arise in many ways — from holding shares in a litigant company to having a prior or personal association with a party.

Another common reason is when an appeal is filed in the Supreme Court against a High Court judgment delivered by the concerned judge before his elevation.

The practice stems from the cardinal principle of due process of law — nemo judex in sua causa, that is, no person shall be a judge in his own case.

Another principle guiding judicial recusals is 'justice must not only be done but must also be seen to be done' propounded in 1924 in Rex v. Sussex Justices by the then Lord Chief Justice of England.

By taking the oath of office, judges, both of the Supreme Court and High courts, promise to perform their duties, 'without fear or favour, affection or ill-will', in accordance with the Third Schedule of the Constitution.

Furthermore, the Restatement of the Values of Judicial Life adopted by the Supreme Court forbids a judge from deciding a case involving any entity where he holds pecuniary interest unless the concerned parties clarify that they have no objections.

The procedure for recusal

There are two kinds of recusals — automatic recusal where a judge himself withdraws from the case, or when a party raises a plea for recusal highlighting the possibility of bias or personal interest of the judge in the case.

The decision to recuse rests solely on the conscience and discretion of the judge and no party can compel a judge to withdraw from a case. While judges have recused themselves even if they do not see a conflict but only because such apprehension was cast, there are also several instances where judges have refused to withdraw from a case.

In 2019, while hearing a plea on the plight of inmates in Assam's detention centres, the then CJI Ranjan Gogoi was asked to recuse himself for some adverse oral remarks. Mr. Gogoi refused, saying that the plea had 'enormous potential to damage the institution'.

If a judge recuses himself, the case is listed before the Chief Justice for allotment to an alternate Bench. India has no codified rules governing recusals, although several Supreme Court judgments have dealt with the issue

Recording the reasons for recusal

Since there are no statutory rules governing the process, it is often left to the judges themselves to record reasons for recusals. Some judges specify oral reasons in open court; others issue a written order recording the reasons while in some cases the reasons are speculative.

More often than not, the reasons behind a recusal are not disclosed, leading to a diatribe against judicial transparency especially when mass recusals occur in sensitive cases. For instance, last year, five judges of the Bombay High Court recused themselves from the Bhima Koregaon case. Earlier, five Supreme Court judges recused themselves from hearing pleas by another accused in the case, activist Gautam Navlakha.

Similarly, the recusal of Supreme Court judge Justice Bela M. Trivedi earlier this year from hearing Bilkis Bano's plea led to widespread speculation since no reasons were specified. The recusal was largely attributed to Justice Trivedi's deputation as Law Secretary to the Gujarat government from 2004 to 2006.

In the 2015 Supreme Court judgment striking down the National Judicial Appointments Commission (NJAC), a claim for Justice J.S. Khehar's recusal was made on the ground that he was a member of the Collegium. In his concurring opinion, Justice Kurien Joseph wrote that it was the judge's 'constitutional duty' to be 'transparent and accountable' and therefore, reasons must be indicated for recusal. This will negate any room for attributing any motive for the recusal, he said.

On the contrary, Justice Madan Lokur was of the opinion that citing reasons for recusal is unwarranted, expressing apprehension about a scenario where a party may challenge the reasoning before a court and it would set aside the recusal, ruling that the reason was frivolous. He, however, highlighted the need for 'procedural and substantive rules' to deal with the growing frequency of recusal pleas.

The Delhi High Court recently ruled that no litigant or third party has any right to intervene, comment or enquire regarding a judge's recusal from a case. Justice Asha Menon underscored that the judge's discretion in such cases is absolute and that any investigation into the reasons for recusal would constitute an interference with the course of justice.

Rules of Supreme Court in the past regarding the Judges rescual

The Supreme Court has over time outlined various factors to be taken into consideration for deciding the impartiality of a judge.

In Ranjit Thakur v. Union of India (1987), the SC held that to determine if a judge should recuse, what is relevant is the reasonableness of the apprehension of bias in the mind of the concerned party. "The proper approach for the Judge is not to look at his own mind and ask himself, however honestly, "Am I biased?" but to look at the mind of the party before him," the Court ruled.

The SC in State of West Bengal v. Shivananda Pathak (1998), defined judicial bias asa “preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction”. Thus, it is a condition of mind which renders the judge incapable of impartiality in a particular case, the Court explained

Formulating a more definite rule in Supreme Court Advocates-on-Record Association v. Union of India (2015), the Cout observed that where a judge has a pecuniary interest, no further inquiry is needed as to whether there was a ‘real danger’ or ‘reasonable suspicion’ of bias.

However, other cases require such an inquiry, with the relevant test being the ‘real danger’ test— whether there is a ‘real danger’ of bias, to ensure that the court is thinking in terms of possibility rather than the probability of bias.

In a controversial recusal ruling, Justice Arun Mishra in Indore Development Authority v. Manoharlal and Ors (2019), held that a judge who had rendered any decision in a smaller combination is not disqualified from being part of a larger Bench to which a reference is made.

The practise in foreign jurisdiction

Contrasted with India, the United States has a well-defined law on recusals — Title 28 of the U.S. Code details the grounds for ‘disqualification of justice, judge, or magistrate judge’. Such rules are also codified in the American Bar Association’s Model Code of Judicial Conduct. This specifies three grounds for recusal— financial or corporate interest, a case in which the judge was a material witness or a lawyer, and a relationship to a party.

This is an indicative list: these grounds are expressly stated to be non-exhaustive. However, on several occasions, judges recuse on their own— known as sua sponte recusals.

The United Kingdom’s law on judicial recusals evolved through judicial pronouncements. In the landmark case of R v. Gough, the ‘real danger’ test was adopted as the applicable standard based on of which recusal orders need to be passed. The test entailed disqualification solely on substantive and tangible evidence which conclusively highlights the presence of judicial bias and prejudice.

However, the ‘real danger’ test was subjected substantial criticism especially since the European Convention of Human Rights requires only the ‘appearance of bias’ to ensure that an onerous burden is not placed on any litigant to prove actual bias.

Accordingly, a new test was formulated in Lawal v. Northern Spirit Ltd, where the standard laid down was to look at the likelihood of bias from the perspective of a fair-minded and reasonable observer.