

Public Interest Litigation

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Table of Contents

Abstract	1
Concept	1
Origin	1
Introduction in Indian and Pakistan	2
Scope	3
Constitutionality	4
Procedure	6

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Public Interest Litigation in Pakistan

Dr Faqir Hussain

Abstract

Legal/technical constraints, procedural restraints, costs and delays in litigation restrict access to courts and hampers downtrodden sections of the society in reaching the portals of justice. Economic and social deprivations also operate as inhibiting factors in seeking relief and soccour. Thus, injustice, discrimination and at times, blatant exploitation seem to be the fate of such sections of society. Notwithstanding the constitutional safegaurds of equality and social justice, these classes continue to suffer from injustice and inequality. Caught between the devil and the deep sea, they are trapped in the mire and have nowhere to go. Public interest litigation is a new evolving concept with potential to rescue and solace the deprived sections, enabling them to seek redressal of their grievances and get their due rights and entitlements. Viewing public interest litigation in this perspective, the author argues that it is no less than a revolution in judicial administration aimed at dismantling the unjust and exploitative dispensation and empowering the poor and lowly to get their due share in national wealth and power.

Concept

Public interest litigation is a newly evolving concept in the field of adjudication. Public interest litigation means litigation in interest of the public. The world 'public' means public at large, including all classes and sections of society without any distinction of gender, social status, economic background, ethnic origin, religious credence or cultural orientation. The raison d'être of public interest litigation is to break through the existing legal, technical and procedural constraints and provide justice, particularly social justice to a particular individual, class or community, who on account of any personal deficiency or economic or social deprivation or state oppression are prevented from bringing a claim before the court of law. In this context, this form of litigation is indeed a novel juristic prescription for overcoming the formal defects in the legal system so as to guarantee real and substantive justice to the masses, particularly the poor and deprived sections. In a sense, the public interest litigation is a judicial response to redress the problems of the under-privileged, by giving them the right to seek access to justice. It is a strategy to meet the exigencies of time and cater for the demands of emerging realities. It is a development identical and equal in importance to the evolution of the law of equity. It is a phenomenon unique in judicial history and perhaps equal, if not greater in significance to the precedent of Marbury v Madison, giving birth to the doctrine of judicial review. Public interest litigation is a strategy to free the legal system of its formalistic and technical connotations and liberate justice of the shackles of wealth and social influences. In other words enabling the lowly and poor to enter the temple and get the blessing of the goddess of justice.

Origin

Public interest litigation, an international movement, having its origin in the American and British system of laws has travelled far beyond those frontiers and with some variations and inculcalation of indigenous features, entered other common law jurisdiction, such as India and Pakistan. Initially, however, this

movement commenced in the United States wherein during the late 1960s there emerged certain public interest law firms to provide legal representation to unrepresented or underrepresented groups or interests.¹ These firms specialised in different disciplines such as environment, consumerism, civil liberties, minority rights etc.²

In the United Kingdom, the Attorney-General being responsible for the due observance of law is obligated to ensure compliance with the rule of law. For breach of law or act of negligence or failure of a public duty, he is required to initiate proceedings. In addition, relator action may also be employed to prevent public nuisance, protect the environment, ensure public health, check the executive action injurious to public welfare etc.³ This kind of suit is aimed at protecting public interest and is brought about jointly by the Attorney-General and an individual, having sufficient interest in the matter. In some cases an individual alone is also competent to initiate proceedings for endorsing a public duty or vindicating a public interest.⁴

Introduction in India and Pakistan

Towards early 1980's the Indian courts seemed poised to entertain cases of public interest and issue appropriate directions in such matters. These cases were initiated for the benefit of the deprived, dispossessed and disadvantaged sections of society. Such proceedings were part of the legal aid movement initiated by certain public spirited groups. Free legal aid movement was sympathised with by the executive and supported by the judiciary. While deciding public interest cases the judiciary was willing to relax the rules, deviate from the standard procedures and ditch formalities and technicalities that stood in the way of providing substantive justice to the poor and downtrodden. The courts adopted this strategy so as to secure the blessings of the rule of law for the weak and vulnerable members of society who had traditionally been deprived of its benefits. It was a unique and singular event in the judicial history of India when the judiciary extended its support to the poor and expressed its solidarity with them. It was, of course, a purely indigenous response to address the problems of the underprivileged and give them access to justice. It was indeed a native recipe for making socio-economic justice accessible to all. Justice Bhagwati explains:⁵

"The weaker sections of Indian humanity have been deprived of justice for long years; they had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights, and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice."

1. Joel F. Handler. Public Interest Law Firms in the United States. In *Access to Justice*, eds. M. Cappelletti and B Garth Vol III. (Milan: Sijthoff & Noordhoff, 1979. p 441).
2. *Ibid*, at pp 430-38
3. Mauro Cappelletti. Vindicating the Public Interest Through Courts. *op cit*, p 541.
4. Attorney-General v Independent Broadcasting, 1 All ER 689; Reg v Greater London Council, Ex-parte Blackburn, (1976) 3 All ER 184. In a subsequent judgment this option was, however, restricted by the House of Lord's ruling. The Court observed that the Attorney-General alone is responsible for enforcing the law and if he refuses to give his consent to a relator, an individual alone is not competent to file a suit. See *Couriet v UPW* (1978) AC 482.
5. Bihar Legal Support Society v Chief Justice of India, (1986) 4 SCC p 768.

And with a view to enabling the exploited and underprivileged to get the benefits of rule of law and secure their due rights and interests, the judiciary was willing to extend a helping hand. The assistance from the judiciary was not just against the powerful social elite but also against the mighty government. Bhagwati, J. declared:⁶

"When the Court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the Court certainly can and must intervene and compel the Executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economic rights.... It is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with the feeling that the constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large numbers of half-clad, half-hungry people of this country."

In public interest cases the court jurisdiction is not restricted to the aggrieved person but is made widely open to any public-spirited individual or group, acting pro bono publico and seeking the redressal of grievances or elimination of injustice or discrimination from the society.

Scope

The scope of public interest litigation was determined by the Supreme Court of India in the case of S.P. Gupta v President of India. The Court observed:⁷

"Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

As is clear, this jurisdiction is available for the redressal of grievances of an individual or group or community at large. This remedy is also available for a breach of law or rule or procedure or failure to

6. State of Himachal Pradesh v Student's Parent, Medical College, Simla, (1986) LRC (Const) 208, SC, p 213.

7. AIR 1982 SC 149 at 151.

perform a legal duty. Such a jurisdiction may also be availed for the observance of rule of law in the society.⁸ As observed by the Indian Supreme Court:⁹

"...as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury...."

Notwithstanding the Court preference for entertaining cases of public importance under this jurisdiction, no hard and fast rule has been laid down in this respect, and individual cases too, in exceptional circumstances, are maintainable. The Supreme Court of Pakistan expressed the view¹⁰ that the expression "public importance" as it occurs in Article 184(3) of the Constitution should not be construed narrowly. The Court stated that even individual cases, raising serious question of violation of law or enforcement of fundamental rights which may likely have a bearing on the community, are issues of public importance, hence may be entertained under this jurisdiction.

The remedies provided under this jurisdiction are also unconventional and vary from case to case and circumstance to circumstance. The remedies available under the traditional system are totally inadequate to provide effective relief in cases involving the interest of groups, sections or society as a whole. The sufferings of the disadvantaged, living under centuries old system of exploitation and oppression could not be relieved by the mere issuance of a certain prerogative writ or grant of damages or injunctive relief.¹¹ Such situations call for new remedies and modern techniques to implement them so that the oppression and exploitation is eliminated and a just and equitable order established in the society. Such remedies include affirmative action and positive measures through legislation/policy formulation with an inbuilt mechanism to monitor their enforcement/implementation. This is how social evils may be checked and distributive justice made available to all sections of the society.

Constitutionality

The constitutionality of public interest litigation is founded on the provisions of Article 32 and 226 of the Indian Constitution. The comparable provisions in the Pakistani Constitution are Article 184(3) and Article 199 of the Constitution. These articles give wide powers to the superior judiciary to enforce fundamental rights, ensure compliance with the rule of law and provide access to justice to all citizens, irrespective of any consideration of wealth or social status.¹² Article 184(3) says:

"Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

8. Benazir Bhutto v Federation of Pakistan, PLD 1988 SC 416 at 421.

9. S.P. Gupta v President of India, AIR 1982 SC 149 at 189.

10. Benazir Bhutto v Federation of Pakistan, op cit, p 422.

11. P.N. Bhagwati. Judicial Activism and Public Interest Litigation. Columbia Journal of Transnational Law, 1985 Vol 23 No 3: 575.

12. Ibid, p 570.

This clause has been regarded as the enabling provision for the Court to initiate appropriate proceedings for the enforcement of fundamental rights. The High Courts can also exercise similar powers under Article 199 of the Constitution. The main difference between the powers of the Supreme Court and High Court is that whereas the Supreme Court jurisdiction is restricted to issues of "public importance", no such condition is imposed on the High Court. The Supreme Court in the case of *Benazir Bhutto v Federation of Pakistan*,¹³ extended the scope of fundamental rights and observed that such rights include the rights guaranteed by Article 2A as well as the rights available under the Chapter on Principles of Policy. The Court stated:¹⁴

"While construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be given to the object and the purpose for which this Article is enacted i.e. this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam."

This triad of provisions together with the preamble of the Constitution and Article 4 occupy a place of pride in the scheme of our Constitution,¹⁵ as this combination extends the concept and scope of human rights beyond its traditional compass. The emerging catalogue of human rights is so comprehensive that it includes all essential human rights, crucial for a civilised existence in the society. The preamble and Article 2A especially lay emphasis on the rights guaranteed by Islam. Indeed the right to have an access to justice is an important right guaranteed by the Islamic law. Article 4 gives every citizen the right to enjoy the protection of law and to be treated in accordance with law. This Article is stated to be the equivalent of the principle of the rule of law.¹⁶ The Chapters on Fundamental Rights and Principles of Policy ensure a vast array of fundamental rights including social, economic and political rights. The rights given in Chapter on Principles of Policy though not justiciable per se are actually an altruistic extension of fundamental rights and impose an obligation on the State to make necessary legislation for giving effect to such rights. Thus it has been held both by the Indian and Pakistani Courts that the Principle of Policy are associated with and have a direct nexus with the Fundamental Rights, hence they are actionable and enforceable, just like human rights.¹⁷

Article 3 coupled with Articles 37 and 38 of the Constitution indeed cast a duty on the State to eliminate exploitation and ensure social and economic justice in the society.¹⁸ The provisions of socio-economic justice to all sections of the society, thus, is a dictate of the Constitution and the establishment of an egalitarian society, the destination of all the organs of the State. The Courts are, therefore, required to play, not just a neutral or non-partisan role but a positive and affirmative role, in giving effects to the dictates of the Constitution.¹⁹

13. Op cit, p 419.

14. Ibid.

15. Mohammad Afzal Zullah. Human Rights in Pakistan. In Commonwealth Law Bulletin, October 1992. London: Commonwealth Law Secretariat. p 1343.

16. Ibid.

17. *Bandhua Mukti Morcha v Union of India*, AIR 1982 SC 802; *Mukesh Advani v State of MP*, AIR 1985 SC 1368. See also *Benazir Bhutto v Federation of Pakistan*, op cit.

18. *Benazir Bhutto v Federation of Pakistan*, op cit, p 420.

19. Note by Khalid Ishaque. Powers of the Supreme Court under Article 184(3) of the Constitution. (unpublished).

To play its role in the dispensation of justice, particularly distributive justice, the Supreme Court enjoys necessary powers and authority to play an effective role. Article 187(1) empowers the Court "to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter before it". Article 189 says that the decisions of the Supreme Court shall be binding on the subordinate judiciary. Besides, under Article 190 of the Constitution all executive and judicial authorities are required to act in aid of Supreme Court. These provisions enable and empower the Supreme Court to pass any appropriate order and give any direction to an executive authority or judicial body for the enforcement of fundamental rights in the society.

Procedure

The Superior judiciary is empowered to enforce fundamental rights and thereby ensure compliance with rule of law. Be that the case of enforcement of an individual right or provision of distributive justice to the community at large, the judiciary is mandated to ensure that adequate, effective and complete relief is given and substantive justice is ensured.

However, the issues in public interest cases are altogether different than the issues involved in private litigation. The issues in public interest litigation are commonly related to State repression, governmental lawlessness, administrative deviance, exploitation of poor and disadvantaged groups and denial to them to their legal rights.²⁰ Such issues call for corrective remedies, sometimes in the shape of new legislation. To decide these issues and give appropriate relief, the traditional Anglo-Saxon procedure is totally inadequate to meet the requirements of justice. The Anglo-Saxon law being transactional and individualistic in character is incapable of dealing with issues and concerns of collectivity and provision of socio-economic justice to groups or sections of society.²¹ The main hurdle in the traditional Anglo-Saxon system of jurisprudence is the sheer inability of poor litigants to seek justice. Being unequal in wealth and social status they do not get fair treatment and equal opportunities. Realising this hardship the judiciary has taken the view that in public interest cases a more relaxed and liberal procedure may be adopted to ensure real and substantive justice. A change in procedure is necessary because lately the government activities and functions, specially in the area of socio-economic development are increasing and a new category of rights in favour of citizens and a new set of corresponding obligations on the State functionaries are emerging. Consequently, individual rights and duties are giving place to collective social rights and duties. Therefore, departure from the traditional rules of procedure is called for. There are adequate provisions in the Constitution which justify such departure.²²

The enforcement of fundamental rights being an extraordinary jurisdiction, of course, implies the provision of extraordinary remedies by employing extraordinary procedure to do so. Thus the Supreme Court of India has taken the view that the exercise of powers under Article 32 of the Constitution must be purpose-oriented and appropriate means and procedures may be adopted to ensure the provision of real and substantive justice to the people, particularly to the poor and downtrodden.²³ The Supreme Court of

20. Bhagwati, *op cit*, p 569.

21. *Ibid*, p 570.

22. *S.P. Gupta v President of India*, *op cit*. p 191.

23. *Bandhua Mukti Morcha v Union of India*, *p cit*.

Pakistan also made an identical observation on this issue.²⁴ As stated by the Court in the case of Benazir Bhutto v Federation of Pakistan:²⁵

"The plain language of Article 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infringed or extends to the enforcement of the rights of a group or a class of persons whose rights are violated."

The Supreme Court of India stated that the traditional rule of standing insisting that only an aggrieved person having suffered legal injury by reason of actual or threatened violation of his rights or interests can bring an action, is contrary to the norms of justice as it restricts access to justice by a large section of the population who may not fulfil the condition of being aggrieved though they may have special or sufficient interest in the matter.²⁶ Besides, the aggrieved person or group may not have the means to contest the action. Thus the Supreme Court of India as well as Pakistan have taken the view that in public interest cases, when a person or class or group of persons is by reason of poverty, helplessness, disability or socially or economically disadvantaged position, unable to approach the Court, any member of the public, acting bonafide, may move an action for relief.²⁷ Thus the traditional rule of standing was relaxed and the person with sufficient or special interest was also authorised to bring an action.

This relaxation of the standing rule was indeed a follow up to the trend already set by the Courts in the United States and United Kingdom. In the United States the strict requirement of legal interest has been watered down and consequently the requirement of standing has been relaxed.²⁸ In the United Kingdom also both in the *Mc Writer*²⁹ and *Blackburn* cases,³⁰ dealing with the question of endorsing public duty against a statutory authority, the Court relaxed the standing rule and held that any member of public, having sufficient interest in the matter may bring an action. Quoting these precedents the Supreme Court of India concluded:³¹

"We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."

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24. Benazir Bhutto v Federation of Pakistan, op cit, p 416; see also Darshan Masih v The State, PLD 1990 SC 513.
 25. Op cit, p 419.
 26. S.P. Gupta v President of India, op cit, p 150.
 27. Ibid, p 151; Benazir Bhutto v Federation of Pakistan, op cit, p 416.
 28. Association of Data Processing Service v William B Camp, (1870) 397 US 150; Office of Communication of United Church of Christ v FCC, 123 US App DC 328.
 29. (1973) 1 All ER 689.
 30. (1976) 3 All ER 184.
 31 S.P. Gupta v President of India, op cit, p 194.

It means that any member of the public or a social group, acting pro bono publico, may move the Court for the enforcement of fundamental rights. This could be done by filing a proper petition³² or sending a letter to the Court.³³ In several cases letters or telegrams addressed to the Court were converted in the regular petitions. This resulted in the creation of a new (epistolary) jurisdiction. This jurisdiction is, however, subject to certain conditions. The conditions are that the person bringing the action must be acting pro bono publico and not for personal gain or private profit or political motivations or other oblique considerations.³⁴ Similarly the Court must also refuse to act at the instance of a pseudo public spirited citizen who indulge in wild and reckless allegations, be smurching the characters of others.³⁵

Besides receiving letters the Court also assumed suo moto jurisdiction in cases of human rights abuses reported by print or electronic media. The courts have dealt with several cases³⁶ under this jurisdiction and given appropriate remedy. In addition, the Supreme Court of Pakistan took notice of human rights violations revealed during the hearing of pending cases, and issued appropriate directions in such cases.³⁷

While adjudicating such cases, the courts relaxed the rules of procedure. In one case the Court ignored even the plea of res judicata,³⁸ and in several cases the rules of paying court fee, filing an affidavit and engaging of a lawyer etc. were dispensed with.³⁹ The Supreme Court of Pakistan made it abundantly clear that no technical difficulties should prevent the court from deciding the cases of human rights violation.⁴⁰

A major hindrance commonly faced by the judiciary, while dealing with the public interest cases is the traditional 'adversarial' system of adjudication. This system of litigation requires two contending parties, one raising the claim and the other denying it; the framing of issues for which evidence is produced by each party; and finally each party presenting arguments through a lawyer in support of its claim. And based on the quality of evidence and arguments, the verdict is pronounced by the Court. This system may be effective in a situation where both the parties match in material resources and social influence. If the relationship, however, is uneven, the weaker party is less likely to obtain equal justice. This system is totally inappropriate for a society which is not just unequal but where economic and social disparities are too pronounced, as the weaker party cannot hope to get legal justice, much less real or substantive justice. Such a system of litigation, again is totally inappropriate for resolving the issues of social or economic concern to the community at large. Thus in such-like cases the judiciary, in the interest of justice, deviated from its set course of procedure and invented new and creative methods of finding facts and discovering the truth. The courts did so by launching an investigation into the matter. A variety of techniques, ranging from calling of official record to deputing experts to probe and constituting socio-legal Commissions to investigate the matter were employed. The Court then examined the reports submitted by the experts and Commissions and decided the case accordingly. In such cases the Court

32. Instances are Begum Bhutto v Chief of Army Staff, PLD 1977 SC 657; Benazir Bhutto v Federation of Pakistan, op cit; Mohammad Nawaz Sharif v President of Pakistan, PLD 1993 SC 473.

33. Instances are S.P. Gupta v President of India, op cit; and Darshan Masih v The State, op cit.

34. S.P. Gupta v President of India, op cit, p 195.

35. Chaitanya Kumar v State of Karnatka (1986) 2 SCC 594 at 606.

36. Constitution Petition No. 9 of 1993; (Ch. Shaujhat Hussain v Federation of Pakistan); Ram Pyari v Union of India, (1987) 2 RLR 410.

37. Human Rights case No. 2, (Abduction of Women and Childsren); H.R. Case 20 (Cm 163/92 in Cp 168/91); H.R. Case 25 (Mohammad Shoib Khan - PTV case).

38. Rural Litigation & Entitlement Centre, Dhera Dun v State of U.P., AIR 1988 SC 2187.

39. Human Rights Case No. 9 (Ch. Shujhat Hussain v Fedearion of Pakistan); H.R. Case 20 (CM 163/92 in CP 168/91).

40. Human Rights Case No. 4 1992 (Shafia Bibi Case).

follows a certain patterns: It regards the report as prima facie evidence and supply its copies to the parties for rebuttal of affidavit. The Court then considers the report together with affidavit, if any, and proceeds to adjudicate the issues involved in the case. As is clear this procedure is new and imaginative and is altogether different from the traditional rules of procedure under the adversarial system of adjudication.

As a final comment for concluding the discussion on the procedurum, let it be stated that the proceedings under the public interest litigation, not being adversary in character⁴¹, should not be regarded as a contest or competition between the rival parties. Such proceedings are purpose-oriented and goal-focused. The purpose is to make socio-economic justice available to all groups and sections of the society or community at large. Indeed the achievement of such an objective is the dictate of the Constitution, hence, it is incumbent upon the parties involved, including the petitioner, respondent (be that a private person or public functionary) and the Court to coordinate their efforts and cooperate with each other for the realisation of the common goals and objectives.⁴² This is an area where the three organs of the State, notwithstanding the principle of separation of powers, can join hands and work together for the realisation of the goals of the Constitution. However, the court must be careful and vigilant not to over-step outside its judicial limits and trespass into the domain of the executive or legislature, for that, besides being violative of the Constitution, may also prove destructive of the very scheme of public interest litigation. What is required of the judiciary is to be creative in its response and innovative in its techniques, employed to achieve the goals of social justice. It means playing the role of a judicial statesmanship, by encouraging the legislature to endeavour for transforming legal and constitutional goals into viable legislative and policy options and prodding the executive to enforce and implement the same. This will enable the judiciary to acquire credibility with the masses and seek legitimacy for its role and function.

41. Hiralal Zila Prishad, Kanpur, Writ No. 1869-70/81 (SC 1981) reported in 1982 UPL BEC; Rural Litigation & Entitlement Centre, Dhera Dun v State of U.P., op cit, p 2187; Bandhua Mukti Morcha v Union of India, op cit.

42. Vincent Parikulangara v Union of India, (1987) 2 SCC 165; Bandhua Mukti Morcha v Union of India, op cit.