



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Recusal and its Development in the Indian Judiciary

Bhavya Dubey^a

^aSVKM's Pravin Gandhi College of Law, Mumbai, India

Received 22 March 2022; *Accepted* 07 April 2022; *Published* 13 April 2022

Judiciary is the third pillar of our democracy, it has the most important role to play for it is vested with the power to implement the law of the land in letter and spirit, and a sense of justice and fair play pervades the society. It is vested with the supreme power to safeguard our fundamental rights, guardian protector of our laws and most importantly it checks and balances the two other wings of our democracy, the legislature, and the executive. With great power comes great responsibility, as a result of which the judiciary has the responsibility to deliver free and fair judgements so as to maintain the credibility of the institution. As a matter of fact, the judiciary has been doing justice to its duty and has been pronouncing judgements fairly. But there have been instances where the judges have felt that they might not be able to discharge their duties in the best manner and in order to uphold the principle of natural justice, they chose their right to withdraw from hearing the case laid before them. Recusal has now become a customary practice where judges have sought their withdrawal from a case so that their bias does not lead to injustice.

Keywords: *judiciary, justice, recusal, democracy.*

INTRODUCTION

The beginning of the Indian Judicial System can be traced back to the Anglo-India era when the judicial system was at its primitive stage. Formerly, there was no concrete, separate judicial system in India, but the advent of the British era marked the establishment of the Indian

judiciary. The notable feature of this system was that the administration of law and justice was entrusted to non-legal and non-professional Englishmen who belonged to the trading community having little knowledge of the law and its procedure.¹ But with the developments taking place all around the world and in the Indian system, a procedure to appoint learned judges was established. The constituent body, which drafted the constitution of India, mentioned in article 124², the establishment of the Supreme Court of India and the appointment of judges and the Chief Justice of India. Judiciary is an integral part of governance as it highly affects the process of decision-making and the process by which decisions are implemented. Judiciary has, thus, played a crucial role in the development and evolution of society in general and in ensuring good governance by those holding reigns of power in particular. Perhaps, there can be no two views about the significance of the role expected of the judiciary, viz-a-viz, the goal and good governance in a free society.³

One of the most important features of the judiciary is its independence from the two other wings of the government. The independence of the judiciary means and includes the independence of the judiciary as a collective body or organ of the government from its two other organs as well as independence of each member of the judiciary-the judges-in the performance of their roles as judges.⁴ Judges ought to be independent not only from the control of other actors and foreign influence but also from their conscience and personal beliefs. In order to maintain public confidence in the judiciary and to maintain the integrity of the institution, the judges must comply with their oaths and affirmation. Yet, several instances have come to light where the judges have been accused of potential conflict of interest in a particular case. There have also been instances where the judges themselves believed their

¹ 'Indian Court System and Methods of Resolution Disputes' (*Indian judicial system*) <https://nios.ac.in/media/documents/SrSec338New/338_Introduction_To_Law_Eng/338_Introduction_To_Law_Eng_L13.pdf> accessed 20 March 2022

² Constitution of India, 1950, art. 124

³ Justice Y.K. Sabharwal, 'Role of Judiciary in Good Governance' (*High Court Chd*) <https://highcourtchd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/goodgovernance.pdf> accessed 10 March 2022

⁴ M.P. Singh, 'Securing the Independence of the Judiciary- The Indian Experience' (2000) 10 (2) *Ind. Int'L & Comp. L. Rev.*, 245 <<https://mckinneylaw.iu.edu/iiclr/pdf/vol10p245.pdf>> accessed 10 March 2022

belief might overpower their judgment, so in such cases, they withdraw themselves from the given case. This withdrawal is called recusal.

RECUSAL: MEANING, REASONS, AND ITS TYPES

Recusal is a situation in which a judge steps down from a case, on the basis that it is not appropriate for them to deal with it, on the basis that they have a conflict of interest and there might be actual or presumed bias against a party or, because there is a real possibility that a fair-minded observer would conclude that the judge should not try the case because they cannot be impartial (apparent bias).⁵ This practice stems from the cardinal principle of due process of law that nobody can be a judge in her own case. Any interest or conflict of interest would be a ground to withdraw from a case since a judge has a duty to act fair.⁶ A judge can recuse himself from a case either at his discretion or he can recuse upon the request of litigants or lawyers, but it is entirely upon the judge to take the call. Although recusal finds no mention in the Indian constitution, there have been several court rulings and judgments pertaining to it. The courts have always upheld the notion that the judges must follow the rule of impartiality to maintain public confidence in the system. As discussed earlier, recusal can be of types -one where the judge himself withdraws from the bench owing to his pecuniary bias. Any judge who has a vested interest in any form, in any case, is believed to be unjust and thus stands disqualified to act as an impartial judge. Another case is when any party involved in the case might apprehend probable unjust delivery of the verdict by the judge due to his bias in the case involved and thus request the judge to recuse himself from the case. Upon the request, if the judge feels he might not be equally fair to both the parties involved, he might accept the recusal.

⁵ 'Recusal' (*Thomson Reuters Practical Law*) <[https://uk.practicallaw.thomsonreuters.com/2-205-6249?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-205-6249?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 10 March 2022

⁶ Apurva Vishwanath, 'How judges recuse from cases, and why' (*The Indian Express*, 23 June 2021) <<https://indianexpress.com/article/explained/how-judges-recuse-from-cases-and-why-7371106/>> accessed 10 March 2022

CASE STUDY

*Shri S.C. Kainthla v State of H.P. & Others*⁷ on 12 December 2018

This case questioned whether the reporters of Local Papers may be allowed to see the judgment and the bench comprised of Justice Dharam Chand Chaudhary and Justice Vivek Singh. Justice Vivek Singh has already recused himself from the case. Justice Chander Bhushan Barowalia and Justice Ajay Mohan Goel had also recused themselves from hearing the case. Justice Vivek Singh and Sandeep Sharma had prepared the reports Annexure P-12 in question, and they were aware of the fact that the same report was to be considered for its judicial correctness and applicability. Mr. R.L. Sood, who was the counsel for respondents^{3&4} requested Justice Sandeep Sharma to recuse himself from the bench, as he had co-authored the aforementioned annexure, which was not only be relied upon by the petitioners but they also sought implementation of the same. Mr. Sood also asserted that it was quite easy to infer that Justice Sharma, who was a part of the Judges' committee might have formed his definite bias regarding the claim of seniority (which was the cause of dispute between the parties) and he had reasonable apprehension that it would be difficult for the counsel (Mr. Sood) to persuade him (Justice Sharma).

As a result, Hon'ble Justice Sharma expressed that he had already applied his judicial mind while furnishing the Annexure. He said, "it is always in order to uphold the credibility, integrity of the institution that the judge recuses himself from hearing the case." He also mentioned that he had no desire to hear the case, but upon persuasions, he realised it was important for him to hear the matter and pass a reasoned order for recusal in order to avoid apprehension about his partiality. Quoting Schedule III of the constitution which deals with the oath and affirmation of a judge, Justice Sharma explained how a judge is expected to be free from ill will, affection, pressure, or fear while discharging his duties. Schedule III of the Indian constitution deals with the forms of Oaths and Affirmations of different constitutional posts in the country.

⁷ *Shri S.C. Kainthla v State of H.P. & Others* (2018) Civil Writ Petition No. 2061/2018

Article 124(6) and Article 219, which deal with the oath of the Supreme Court Judge and High Court Judge states that he/she solemnly affirms to bear “*true faith and allegiance to the Constitution of India as by law established, 1 [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge, and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.*”⁸ Hence, citing his reason as the ‘interest of justice’ Hon’ble Justice Sandeep Sharma recused himself from the matter.

*Gautam Navlakha Case*⁹

Civil Rights activist, Gautam Navlakha’s name was added to the FIR in the Bhima Koregaon violence case in August 2018. On September 13, the Bombay High Court declined to quash the FIR citing the need for a thorough investigation. Navlakha moved to the Supreme Court to challenge the verdict of the Bombay High Court.¹⁰

The case was listed before a bench consisting of the then Chief Justice of India Ranjan Gogoi, Justice S A Bobde, and Justice S. Abdul Naseer. Justice Gogoi recused himself from hearing the matter and asked to list the case before a bench of which he wasn’t apart. Following the procedure, the case was listed before a bench headed by Justice N V Raman which also included Justice R Subhash Reddy and Justice B R Gavai. This time, all the three judges recused themselves from hearing the matter. It has to be noted that none of the judges had cited any reason for their recusal, and nor were they asked in public or in writing by any of the parties to recuse themselves. Following the recusal of the new bench, the matter was therefore listed before a fresh bench headed by Justice Arun Mishra, which also included Justice Vineet Saran and Justice Ravindra Bhat. Now this time, Justice Ravindra Bhat recused himself from the bench.

⁸ Constitution of India, 1950, Sch. III, art. 124(6) and art. 219

⁹ *Gautam Navlakha v National Investigation Agency* (2021) Criminal Appeal No. 510/2021

¹⁰ ‘5 SC Judges recuse from Gautam Navlakha Case in 4 Days’ (*The Times of India*, 4 October 2019) <<https://timesofindia.indiatimes.com/india/5-sc-judges-recuse-from-navlakha-case-in-4-days/articleshow/71431926.cms>> accessed 12 March 2022

As stated earlier, none of the judges had mentioned any reason for recusal. Though the reasons were not mentioned, it was speculated that the reason for such a decision might be either conflict of interest because some of the judges might have represented either of the parties like lawyers or it could have been the paucity of time. Upon being asked Senior Advocate A M Sanghvi had stated that Justice Ravindra Bhat might have recused himself from the case because he may have appeared as a lawyer for the organization with which Gautam Navlakha was associated. Following the recusal of five judges from a case, the matter was finally listed before a fresh bench of Justice Arun Mishra and Justice Deepak Gupta.

Justice Arun Mishra's Non-Recusal in the re-examination of Section 24 of the land acquisition law of 2013

In 2019, a five-judge bench, headed by Hon'ble Justice Arun Mishra, including Justice Indira Banerjee, Vineet Sharan, MR Shah, and S Ravindra Bhat, concluded the hearing on the plea made by various farmers' associations and private individuals seeking the recusal of Justice Mishra. Justice Mishra had on February 8, 2018, authored a majority judgment that conflicted with a 2014 verdict of the Supreme Court. The 2014 judgment was the bench(of which Justice Mishra was also a part)held that land acquisition would be void under Section 24 if the compensation amount was not deposited in the landowner's bank account or with the court within five years. The judgment said payment of money in the government treasury would not be construed as payment to the landowner.¹¹

The constitutional bench was initially headed by Justice Deepak Mishra, followed by Justice Ranjan Gogoi, but upon their failure to hear the matter, the case was set up under Justice Arun Mishra. With this news, a fuss over social media was created and people started questioning the principle of natural justice. Farmers association Justice Mishra had on February 8, 2018, authored a majority judgment that conflicted with a 2014 verdict of the Supreme Court. The 2014 judgment was the bench(of which Justice Mishra was also a part)held that land

¹¹ Krishnadas Rajagopal, 'Land acquisition case: Justice Arun Mishra refuses to recuse himself from the Constitutional Bench' (*The Hindu*, 23 October 2019)<<https://www.thehindu.com/news/national/land-acquisition-case-justice-arun-mishra-refuses-to-recuse-from-constitution-bench/article29775301.ece>> accessed 16 March 2022

acquisition would be void under Section 24 if the compensation amount was not deposited in the landowner's bank account or with the court within five years. The judgment said payment of money in the government treasury would not be construed as payment to the landowner. Farmers association and individuals had sought the recusal of Justice Mishra from hearing the pleas on the ground that he had already delivered a verdict on the issue in February 2018 and they were the apprehension that justice Mishra might have already formed a bias as he had been a part of the 2018 constitutional bench that had heard the aforementioned plea.

Despite public commotion created by different elements of the society, Justice Mishra did not give in to the demands of recusal and stood stern in his stance. He had said that accepting the plea for recusal will "sound a death knell" for the "independent system of justice delivery". Justice Mishra gave detailed reasoning as to why he did not recuse himself from hearing the matter and what his recusal would have meant had he succumbed to those demands. Hon'ble Justice stated, "In my opinion, I would be committing a grave blunder by recusal in the circumstances, on the grounds prayed for, and posterity will not forgive me down the line for setting a bad precedent. It is only for the interest of the judiciary (which is supreme) and the system that has compelled me not to recuse." He also reiterated the rule that recusing himself from a case is totally up to the judge to decide, and no public pressure can force a judge to take such decisions. Adding to his reasoning, he mentioned that his decision to not recuse himself does not stem entirely from his opinion but is concretely backed by various rules of the law. His recusal from the case would have been a dereliction of duty, injustice to the system, and to other Judges who are or to adorn the Bench(es) in the future.'¹²

Pointing out the judicial powers bestowed to the Supreme Court of India and the Chief Justice, Justice Mishra cited that the constitution empowers the CJI to list a matter before the judge best suited for a case so that the litigants do not get to choose a judge best suited to their will. He stated, "he is a constitutional functionary who has been enjoined with this task at the

¹² 'Justice Arun Mishra justifies his non-recusal from the case on land acquisition' (*Business Standard*, 8 January 2020) <https://www.business-standard.com/article/pti-stories/recusal-on-litigants-whims-will-be-death-knell-for-justice-delivery-system-sc-119102401686_1.html#:~:text=%22In%20my%20opinion%2C%20I%20would,compelled%20me%20not%20to%20recuse%22> accessed 16 March 2022

highest pedestal to exercise the power of roster making. He is the repository of faith. Once he has exercised his power, it is not for the judges to choose.” All in all, justice Mishra cleared the air of confusion that he would not succumb to baseless apprehensions regarding his just delivery of justice and that he shall discharge his duty irrespective of the consequence for nothing shall come in the way of judicial decision making hence, there is no room for bias.

ANALYSIS OF THE CASE STUDY

The above-mentioned cases had their own peculiarities, these cases highlighted not only how the judge’s conflict of interest compelled them to recuse from a case but also how they need to follow the rules and precedents from various cases. What also has to be noticed is that it is the judge and only the judge who has the right to decide if he/she is fit to hear the case or if he/she deems it fit to recuse himself/herself from the case in order to maintain the integrity of the institution.

While the case studies 1 (*Shri S.C. Kainthla v State of H.P. & Others*¹³) and 3 (Non-Recusal of Justice Mishra from the re-examination of land Acquisition Case) can be said to be somewhere on similar lines, in the former case, the litigant requested Justice Sharma to recuse himself on the basis that he had authored the annexure which was being relied upon in the case by the petitioners while in the latter case, the farmers’ associations and organisations requested Justice Mishra to recuse himself from hearing the case because being a part of the bench hearing the plea, he had co-authored the order passed in February 2018. But what majorly differentiates these cases from each other is the fact that in the former case, Justice Sharma recused himself citing the reason as ‘interest of justice and because Justice Vivek Singh had already recused himself from the case as he had also authored the case. In the latter case, Hon’ble Justice Mishra said that he would not succumb to the unreasonable question of bias and he did not wish to set a bad precedent.

What made activist Gautam Navlakha’s case differently was the fact that five judges recused themselves from hearing the matter. In the public light, there was no official request for

¹³ Shri S.C. Kainthla (n 7)

recusal made by either of the parties involved yet the judges recused themselves without citing any concrete reason thereby leaving the public at large in speculations.

CONCLUSION

The Indian Constitution bestows the ultimate power of delivering and ensuring justice to the Supreme Court and its Judges. They, under their oath and affirmation, are expected to deliver unbiased justice and if they are under the impression that they might not be able to discharge their duties in the best possible way, they choose the path of recusal. As discussed above, there is no concrete rule of recusal in India as a result of which the judges are driven by their conscience as well as different precedents arising from different causes. A judge is not expected to reveal the reason for his recusal in the judicial order in detail, as it might lead to several more requests being made on similar reasonings even if the grounds for which the recusal is being requested do not fit in the case thereby delaying the delivery of justice. Internationally, there have been several instances where the lawyers have tried to take undue advantage of this customary practice if they are of the view that they might not receive a favourable verdict. It has to be noted that apprehension of bias should be made on stern grounds. In the case of non-pecuniary bias, the real-likelihood test has to be preferred over reasonable suspicion. If we look at the other side of the coin, owing to the unavailability of any regulated law related to recusal gives the judiciary the absolute power to decide which case they want to entertain. It not only brings opaqueness to the system for they are not needed to cite their reasons, but it also helps the judiciary to escape from the clutches of media, which is said to be the third pillar of our democracy. The fact that the judiciary is not answerable to anyone gives the judges the ultimate power to enjoy their discretion and hear the cases at their convenience. It also gives them the power to use it as a tool to threaten the litigants of contempt of court for questioning the bias of a judge and their discharge of duty can be assumed as a disrespect to the judge concerned. Recusal also gives rise to uncertainty and judicial backlogs, for the cases might be dragged for a prolonged period. As seen in the Navlakha Case, had it not been because of the urgency of the case, the case might have been

dragged for a longer period as one after the other the judges were recusing themselves without citing any apparent reason.¹⁴

Hence, there is a dire need for regulations for recusal to enhance the transparency in the system, preserve public trust in the system, and not entertain the profusion of power vested in the hands of the judges. Absolute powers on any hand are meant to corrupt absolutely so to uphold the credibility and integrity of the judiciary and conserve the public from the scourge of injustice, a sound, and cogent law is needed.

¹⁴ Sanjay, 'Recusal of Judges in India: Need for More Regulations' (*Legal Service India*)
<<https://www.legalserviceindia.com/legal/article-949-recusal-of-judges-in-india-need-for-more-regulations.html#:~:text=If%20there%20is%20a%20reasonable,be%20seen%20to%20be%20done%E2%80%9D>>
accessed 16 March 2022