CASE COMMENTARY: RIGHT TO BE FORGOTTEN

Dharamraj Bhanushankar Dave v. State of Gujarat and Ors. **[SCA No. 1854 of 2015]**

Sri Vasunathan v. The Registrar General

[W.P. No. 62038/2016]

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I. Introduction

'RIGHT TO BE forgotten' is a concept whereby a person would have the right to lead an anonymous life in reference to data retention and digital memory on the internet. This idea was first developed and recognized by France.[1] Gradually, the issue was discussed at length by the European Union and later, Argentina also recognized the same. However, this right comes with its' own controversies. Recently, political voices have stressed the need to introduce a right to be forgotten as new human right. Individuals should have the right to make potentially damaging information disappear after a certain time has elapsed. Such new right, however, can come in conflict with the principle of free speech.[2]

This issue has recently cropped up in two cases in the High Courts of Karnataka and Gujarat. This commentary divulges into questions regarding the same and seeks whether such a right must be provided in a country like India.

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[1] The origin of this right can be traced back to the French jurisprudence on the '*right to oblivion'* or *droit à l'oubli*.

[2] Rolf H. Weber, The Right to Be Forgotten More Than a Pandora's Box? 2 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 120 (2011).

Right to be Forgotten

As mentioned before, European Union developed the concept of 'right to be forgotten' whereby every individual would have the right to anonymity in context of digital media and online portals. This was echoed in the European Data Protection Directive[3] in 1995 to control the processing of data. This stand was legally solidified in *Google Spain SL, Google Inc.* v. *Agencia Española de Protección de Datos, Mario Costeja González*[4], wherein the Court of Justice of European Union (CJEU) reiterated the theory of right to be forgotten and also, acknowledged the liability of search engines to remove personal data that appear to be irrelevant, inadequate or excessive.

This right has also been sanctioned by the European Union in the General Data Protection Regulation (GDPR).[5] The same shall be brought into application on 25 May 2018. Google on 13 June 2017 released data which showed that it had received about 732,528[6] removal requests involving more than 2,075,155 URLs[7]. Thus, it may now be considered as a constituent of international human rights.

Yet, the Indian judiciary, which has from time to time upheld and respected world human rights, has failed to recognise this right or even discuss about the matter in detail. In *Kharak Singh* v. *State of U.P.*[8], the Honourable Supreme Court recognized the right to privacy as a part of Article21, *i.e.*, right to life and personal liberty. The court also has gone on to hold that right to privacy is an implicit right which includes the 'right to be let alone' and to safeguard one's personal life. No one would have the right to publish such details

[3] Directive 95/46/EC.
[4]Case C-131/12.
[5]Regulation (EU) 2016/679. See Article 17 of the regulation.
[6] Google Transparency Report, *available at* https://www.google.com/transparencyreport/removals/europeprivacy/ (last accessed on June 13, 2017)
[7] Uniform Resource Locator, address of a World Wide Web page.
[8] (1964) 1 SCR 332.

without his/her permission.[9] However, such a right is subject to publication in public records, including court records.

The Delhi High Court in 2016 dealt with this issue as well. Herein the petitioner pleaded before the court to delete his personal details from search engines involving him in certain legal dispute. The Honourable High Court called upon Google and other online servers to submit their reply to the petition, so that the court could continue its' investigation regarding the same.[10]

However, it was only in these two recent cases where this concept has been discussed in greater detail. But, both the High Courts have taken opposing stances.

II. Issues Raised

The subsequent cases have put forth the following issues to be discussed for the legislators and the Supreme Court, to be decide upon.

i. Should 'right to be forgotten' be recognized in India?
ii. How 'right to be forgotten' shall affect the freedom of speech and expression?
iii. Whether 'right to be forgotten' is a recognized international human right which must be respected by India?

The two recent cases, which touched upon these questions, are: *Dharamraj Bhanushankar Dave* v. *State of Gujarat and Ors*.[11] and *Sri Vasunathan* v. *The Registrar General*[12]

A. *Dharamraj Bhanushankar Dave* v. *State of Gujarat and Ors.*

A case came up in the Gujarat High Court in 2015, the court, for the first time in India, talked about this concept in its' judgment dated 19th January 2017. In this case the petitioner was charged with

[9] *See, R. Rajagopal* v. *State of T.N.*; (1994) 6 SCC 632.
[10] *LakshVir Singh Yadav* v. *Union of India*, WP(C) 1021/2016.
[11] Special Civil Application No. 1854 of 2015.
[12] Writ Petition No. 62038 of 2016.

various criminal offences, including culpable homicide amounting to murder. He was acquitted by the Sessions as well as the High Court. The petitioner filed a case under Article 226[13] praying for 'permanent restraint of free public exhibition of the judgment'.

The petitioners' chief concern was that despite the judgment being declared as 'non-reportable'[14], the copy of the judgment with his name was available on various legal portals and could be searched on Google. They contended that the respondents were overzealous and had acted without any authority. It was also alleged the same had affected the personal and professional life of the petitioner. Another argument was that the Registrar of the court has exclusive control over such orders and the respondents would have to power over it to openly display them.

The judgment was parted in form of an oral order by the Honourable Mr. Justice R. M. Chhaya. The court dismissed the petition and held the following:

1. The High Court is a Court of Record[15].
2. The Gujarat High Court Rules, 1993[16] provide that copies of any judgments or proceedings can be accessed.
3. The same statute states that only parties to the case can ask for the copies and no other person can ask for them until an order is given by the Assistant Registrar. An affidavit by the third party must be accompanied specifying the grounds for obtaining them.

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[13] The Article provides for power of the citizens to approach the High Court to exercise its' jurisdiction to issue orders, directions or writs.

[14] A non-reportable/ unreportable judgment cannot be published in any newspaper or in any journal. If one wants to cite the same in a lower court, s/he must produce a certified copy.

[15] Article 215 of the Constitution of India.

[16] Rule 151 of the Gujarat High Court Rules provides parties to proceedings entitled to copies and application by third parties to be accompanied by affidavits.

4. The petitioner has been unable to prove the violation of any law to be redressed under Article 226. However, his claim does not violate Article 21[17] of the Constitution.
5. The publishing of any judgment or proceeding on a website would not come under the realm of 'reportable' as understood in context of judgments reported in a law reporter.

In the light of the following the observations, the petition was disposed of and the Gujarat High Court did not recognize the 'right to be forgotten'.

B. ***Sri Vasunathan* v. *The Registrar General***

The case was filed in the Karnataka High Court in 2016. The judgment of the same was given on 23rd January 2017. In this case a woman, herein after called X, had filed an FIR against a man, Y, involving crimes of grave nature such as forgery, compelling to get married and extortion. She also filed a civil suit for annulment of her marriage with him. She requested an injunction to restrain Y from claiming any marital rights. Later, both reached an out-of-court settlement and the cases were closed.

Subsequently, X got married. However, her father filed another petition realizing that an online search would reveal his daughters' connections to all the legal disputes. This could result in affecting X's personal life and her public image. The father pleaded the court to mask X's name in cause title of the cases and prayed the same for any other copy available at online portals.

In the judgment pronounced by Honourable Mr. Justice Anand Byrareddy, the court observed the following:

[17] Article 21 of the Constitution of India provides that no one shall be deprived of right to life and personal liberty except according to the procedure established by law.

1. It was recognized that there was a serious trepidation that X's name on an online search portal would have repercussions on her relations with her husband and also, on her public image.
2. The petitioners' special request was accepted and if X's name was mentioned in any cause title, the Registrar would try to mask the same.
3. However, as far as the High Courts' website is concerned, if a certified copy is asked for, the petitioner's daughter would be reflected in the it.
4. It was ordered that it would be endeavor of the Registry to mask X's name in any internet search on any online public realm.

Thus, the Court upheld the petitioners' claim and recognized the 'right to be forgotten. Justice Byrareddy concluded the judgment in the following terms: "This would be in line with the trend in the Western countries[18] where they follow this as a matter of rule 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned."

Thus, the court recognized the need to maintain privacy of women in certain delicate and complex cases wherein her status and character are called into question. Such a law could protect them in their personal and social lives from any kind of discrimination or ridicule in public or private lives.

III. Critical Analysis of the High Court Judgments

The question of 'right to be forgotten' came up in the Gujarat and Karnataka High Courts, both adjudicating the matter with contradictory views. The Gujarat High Court declared that no one

[18] European Union, Argentina, South Korea, Spain, South Africa, United States and Germany are the countries that have exclusively recognised this right.

has the right to prevent publishing of any judicial and public proceedings. The judgment can be seen to be resting upon two elements.

Firstly, the petitioner was unable to satisfactorily provide proof that his fundamental rights, especially Article 21[19], had been encroached upon by the publishing of the judgment. And since there was no infringement of any right, the court could not take any action. However, here is a flaw. It has been seen that Article 21 is a storehouse of innumerable rights. As mentioned earlier, the right to privacy has been declared a part of Article 21.[20] Herein as well, if the details of the petitioner are released, it could hamper his privacy; revealing issues of his personal life on an online public portal for anyone to see.

The question before the court should have been, whether such a revelation would be considered as a violation of right to privacy; which the court failed to bring under consideration. However, at the same time, such rights are only available against the State; and therefore, their function regarding private parties continues to be uncertain and undecided.

The second aspect was regarding reportable and unreportable judgments. The Supreme Court in its' 2008 judgment held that a law reporter publishes both reportable and non-reportable judgments.[21] In the present case as well, the court clarifies that the term 'reportable' would be only in regard to a law reporter and not for any other areas of publication on the internet and the like. This facet of the judgment is precise and does explain the jurisdiction of the court to prevent publication of any proceedings. However, this does crop up a requirement to introspect the foundation of such

[19] *Supra* note 16.
[20] *Supra* note 7 and 8.
[21] *Eastern Book Company and Ors.* v. *D. B. Modak and Anr.,* Appeal (civil) 6472 of 2004.

arrangements of judgments as no clear demarcations of their distinction has been made by any legislation or court judgment.

Absence of privacy legislations and data protection directives have resulted in privacy violations that hinder prospects of people both in personal and professional lives. One cannot deny that, at its' root, the main aim of 'right to be forgotten' is empowering the citizens to have control over their lives which is a prerequisite for the functioning of a democratic nation. This judgment, though a positive step towards data protection, has failed to take all these matters into consideration.

The Karnataka High Court had a different take on the matter. It decided to protect the petitioners' daughters' right to be forgotten. The court recognized the need to protect and maintain the modesty and reputation of a woman. It did not deny the right to control ones' personal information. The acknowledgement of special cases wherein a woman's dignity is called into question, thereby making it necessary for her to protect her name, is laudable on part of the court.

But then again, the judgment is not as simple as it may seem. The decision is directly contradictory to freedom of speech[22] and the right to information[23]. The foundation of democracy is based on openness of the system, that is, on the right to know[24]. For years, the right to privacy and the right to freedom of expressions have been at loggerheads. Recently, right to privacy has been recognized as fundamental right by the Apex court in *Justice KS Puttaswamy* v. *Union of India*[25].

If the Karnataka judgment is to be followed, then the petitioner must prove that it would be reasonably possible that s/he

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[22] The Constitution of India, art. 19(1)(a).

[23] See *State of U.P* v. *Raj Narain*, 1975 AIR 865; *Peoples Union for Civil Liberties* v. *Union of India*, Writ Petition (Civil) No.161 of 2004.

[24] See *Reliance Petrochemicals Ltd* v. *Proprietors of Indian Express*, 1988 SCR Suppl. (3) 212.

[25] Writ Petition (Civil) No. 494 of 2012.

would suffer in his/her personal, social or professional life, if the information about him/her shall be published. S/he must prove that there is a reasonable apprehension that such revelation of information would tarnish their reputation. In this regard, the judgment is satisfactory as the main intention behind the same is to protect one's dignity and honour. However, it should be the endeavor of the judiciary to maintain equality and provide this protection to men as well and not only restrict itself to women. Despite accepting this norm for the first time in India, many issues continue to remain incomplete regarding its application.

Another flaw which is common to both these judgments is that search engines like Google and other online portals or websites were never made party to the case. The right in question is related to the very sources on which such information is provided. It is necessary to call these public domains to present their side of the story as well.

Though the judgments on both the parts are flawed with many omissions, one cannot deny that it is a welcome decision that would affect the data protection and digital memory system for the years to come. However, a new law by the Legislature and a more detailed judicial decision by the Supreme Court is still awaited.

IV. Challenges and Suggestions

It is of utmost importance to recognize that the doctrine of 'right to be forgotten' is very wide-ranging and comprehensive. With the current manias and trends of fast-speed internet, any information is available in seconds; everything is a click away. At such times, strict and supervisory measures are required for regulating the same.

This doctrine must not be out rightly disregarded and discarded. It is impertinent for the judiciary to strike a balance between privacy and freedom. It must not violate the rights of others to protect anothers. An attempt for equilibrium between the two shall result justice for all.

However, in providing such a right, a significant amount of thought must be given to making sure such a right is not absolute. Reasonable restrictions must be imposed. For example, the claimant must prove the special circumstances of his/her case that are relevant and adequate enough for him to demand for exercise this right.

A software may be developed, similar to that developed by researchers at CISPA[26] and University of Auckland called the Oblivion[27], which seeks to mechanize the whole procedure of authenticating a person's data that may be available on the internet.

The Indian judiciary must endeavor to bring in a uniform solution with detailed observations so as to provide a concise and precise precedence for all the matters that may come up in the future concerning this right.

V. Conclusion

Though the decisions have proved to be full of gap holes, it must be acknowledged that the matter is very complex. No one decision or legislation can cover all the questions and issues that arise. It is an evolving concept. As development and expansion of the realm of internet keeps on advancing, such issues would continue cropping up. The judiciary would continue to play an important role in humanizing the ever-growing domain of technology.

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[26] The Centre for IT-Security, Privacy and Accountability.

[27] Tal Malkin, Vladimir Kolesnikov, *et al.*, *Applied Cryptography and Network Security* 431 (Springer, New York, 2015).