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Curative Petition: Last Remedy in the Court of Last Resort

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ABSTRACT

Curative Petition is viewed as the 'last remedy in the court of last resort' and the concept has been evolved following the Doctrine of ***Ex Debitio Justiciae****,ie., the requirement of justice must be fulfilled and* ***Actus Curiae Neminem Gravabit*** *meaning the act of court cannot prejudice anyone. But there is a conflicting principle that restricts the application of curative petition like* ***Interest Reipublicae Ut Sit Finis Litium*** *that fosters the attainment of finality of judgment in order to settle the lis between the parties and manifest certainty of rights and liabilities.*

The author will trace the law of curative petition under the Constitution of India and also the laws prevailing in other countries of the world namely, the United States of America and the United Kingdom. It is to be borne in mind that before the decision of the Apex Court of India the case of ***Rupa Ashok Hurra****v.****Ashok Hurra***[3]*, the laws pertaining to curative petition which is akin to a request for second review petition was obscure and the Supreme Court has made scintillating efforts to elucidate the law with respect to Curative Petition. There lies a certain level of dichotomy between curative petition and various other principles of law namely, Finality of judgment, Doctrine of* ***Stare Decisis****, correctional jurisdiction of the Supreme Court. These principles have been balanced by the Court and have been interpreted applying the 'Doctrine of* ***Harmonious Construction****' which ensures that curative petition is not vulnerable to misuse thereby opening floodgates of litigation or opening a Pandora's Box which will not at all be docile. This approach is reflected in the guided principles exhibited by the Court like violation of principles of natural justice, lack of jurisdiction of the court, gross miscarriage or palpable injustice. The requisites enunciated by the Court are not exhaustive and has to be applied according to the facts and circumstances of the case.*

Keywords: *Curative Petition ,ex debito justitiae.*

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I. INTRODUCTION

"*No one will dare maintain that it is better to do injustice than to bear it."*

-Aristotle (The New Dictionary of Thoughts, p.370)

"Error is not a fault of our knowledge, but a mistake of our judgment giving assent to that which is not true"

- ***Locke (The New Dictionary of Thoughts, p.181)***

The Supreme Court sailed through the golden age where brilliant judges carved the shape of the judicial system in the most efficient manner engraving their names in the judicial history and it is pertinent to note that time there was almost no feeling amongst the litigants that they did not get proper justice and the records of the Court will indicate that number of review petitions were rare. Contrary to this picture a situation had emerged in which litigants are not more or less happy with the orders on the Review petition, passed in chambers.[4]

A act of innovation for public good was undertaken by the Supreme Court of India in *Rupa Ashok Hurra* v. *Ashok Hurra*[5]where the apex court laid down that even after the dismissal of a review petition through the process of circulation, a petitioner entitles himself to relief on the principles of ***ex debito justitiae.***[6]However, the remedy has been limited on certain reasonable grounds, which are not exhaustive and also encompasses certain procedural safeguards to avoid frivolous cases. The available grounds on which a Curative petition may be entertained will be discussed in the later part of the project.

Curative statutes are those which attempt to cure or correct errors and irregularities in judicial or administrative proceedings and when seek to give effect to contracts and other transactions between private persons which otherwise would fail to produce their intended consequences on account of some statutory disability or failure to comply with some technical requirement.[7]

In simple words, a Curative petition is the petition available to the parties on limited grounds after the dismissal of review petition. Curative petition has to be used sparingly as it invoked after the Review Petition that is the general known remedy of last resort.

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[4]Justice B P Banerjee, *Writ Remedies Remediable Rights Under Public Law, 5th edition, 2010, Volume 1, Lexis Nexis, Butterworths Wadhwa, Nagpur.*
[5] (2002) 4 SCC 338
[6] Supra Note 4.
[7] Madras Maintenance of Public Order (Removal of Doubts and Amendment) Act (1 of 1949). *In Re Valayudam,* AIR 1950 Mad 324.

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II. LIMITATION UNDER ARTICLE 32 OF THE CONSTITUTION

The Supreme Court after a meticulous examination of the historical background and the very nature of writ jurisdiction enunciated the view that the Writ of **Certiorari** cannot be issued to coordinate co-ordinate courts and a fortiori to superior courts. Thus, a High Court cannot issue a writ to another High court and the same principle is followed in respect of different benches of the same High Court. Also, the High Courts are not constituted as inferior courts in the constitutional scheme so the apex court would not issue a writ of Certiorari to the High Court but orders, judgments etc of the High court are liable to be corrected under the appellate jurisdiction.[8]

In ***Naresh Shridhar Mirajkar*** **v.** ***State of Maharashtra***[9]some journalists filed a writ petition in the Supreme Court under Article 32 of the Constitution challenging an oral order passed by the High Court of Bombay, on the original side, prohibiting publication of the statement of witness given in open court, as being violative of Article 19(1)(a) of the Constitution of India. A Bench of nine learned judges of Supreme Court considered the dual question of the order violating the fundamental rights of the petitioners as well as the maintainability of Writ of Certiorari for the same. The bench unanimously decided that the order passed by this Court was not amenable to the writ jurisdiction of this Court under Article 32 of the Constitution. Moreover, a judicial order cannot contravene the fundamental rights was the view taken by eight judges.

Thus, the position of law in respect of issuance of Writ of Certiorari was settled by the above decisions and the more important question of the remedy available to the litigant after the dismissal of review petition became the cornerstone of discussion. The court opened its doors even after the dismissal of review petition in cases where the intervention the Court became imperative so as to make justice available to the parties.

III. EVOLUTION OF THE CONCEPT OF CURATIVE PETITION

The Supreme Court made a lot of deliberation on the question of finality of the judgment whether the principle of finality of judgment rendered by the Supreme Court should prevail, in other words finality to protect the illegality or to cure the defects in the judgment where against the order of the Supreme Court a review petition was filed but the same was dismissed through circulation (which means not sitting in the open court or giving any hearing but sitting in the chamber).[10]

[8]*Rupa Ashok Hurra* v. *Ashok Hurra***,** (2002) 4 SCC 338, Para 7.
[9] (1966) 3 SCR 744.
[10]Justice B P Banerjee, *Writ Remedies Remediable Rights Under Public Law, 5th edition, 2010, Volume 1, Lexis*

The author would like to throw light on some of the important doctrines that need to be analyzed in order to better appreciate the Concept of Curative Petition.

- ***Interest Reipublicae Ut Sit Finis Litium*:** The maxim in simple words means that it is in the interest of society as a whole that the litigation must come to an end. ***M.Nagabhushana* v. *State Of Karnataka & Ors*[11]** held:- "The principles of Res Judicata are of universal application as it is based on two age old principles, namely, `**interest reipublicae ut sit finis litium**' which means that it is in the interest of the State that there should be an end to litigation and the other principle is `**nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause**' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest."
- ***Actus Curiae Neminem Gravabit*:** *The maxim "***Actus Curiae neminem gravabit***", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court.*[12]
- ***Ex Debitio Justiciae:*** A matter ex debito justiciae is one which a litigant is entitled merely upon the asking for it; as opposed to something which may be a matter of judicial discretion or determination.

The Supreme Court in *Rupa Ashok Hurra* v. *Ashok Hurra*[13], held "The Judges of the Apex Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare case, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such a case it would not only be proper but also obligatory both legally and morally to rectify the error. The duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment."

Nexis, Butterworths Wadhwa, Nagpur. Pg. 73.
[11]Civil Appeal No.1215 OF 2011, para 14.
[12]*Jaipur Municipal Corporation*v. *C.L. Mishra,* (2005) 8 SCC 423. Para 15.
[13]*Rupa Ashok Hurra* v. *Ashok Hurra,* (2002) 4 SCC 388 at P.413, Para 42.

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The Grounds for filing Curative Petition are as follows[14]:

1. Upon a violation of principles of Natural justice, meaning thereby, the aggrieved party filing a curative petition was not a party to the 'lis'but the interest of the party was adversely affected by the judgment or if he was a party to the 'lis', the notice of the proceeding was not served upon him and the proceeding of the matter continued as if he had the notice.
2. Where a learned judge in the proceeding failed to bring out his connection pertinent to subject matter or the parties, opening the scope for an apprehension of bias and the petitioner is adversely affected. Moreover, in a Curative Petition in addition to the above-mentioned grounds, the 'curative petitioner' must aver specifically that the grounds mentioned in the curative petition were furnished in the review petition and that such review had been dismissed by circulation.[15] Also, a curative petition has to have a certificate by a Senior Advocate indicating that grounds in the curative petitions had also been the grounds for consideration in the Review Petition.[16] Further, as a matter of procedure, the curative petition has to be circulated to a bench of the three senior most judges and the judges who passed the judgment complained of, if available.[17]If the Bench at any stage holds that the curative petition is without any merit and is vexatious, it could invite exemplary costs upon the petitioner.[18]

Syed Shah Mohammed Quadari, J. held that the next step is to specify the requirement to entertain such a curative petition under the inherent power of this court so that floodgate are not opened for filing a second review as a matter of course in the guise of a curative petition under inherent power[19]

The inherent power of the Supreme Court under Article 142 of the Constitution of India empowers the review of the final decision of the court if the same is resulting in the miscarriage of justice. [20]Article 137 of the Constitution grants the power of Review to the Supreme Court. Such power is not provided anywhere else in the Constitution. The Supreme Court has defined review to mean reexamining or reconsidering a final decision. [21]

IV. LAW PREVAILING IN US

We all make mistakes. Often, once we become aware of our mistakes, we are able to fix them.

[14]*Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388 at P.416, Para 51.
[15]*Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388 at P.417, Para 52.
[16]*Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388 at P.417, Para 52.
[17] Ibid, Para 53.
[18] Ibid.
[19]Supra Note 5,p.416.
[20]*Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388 at P.416, Para 49.
[21]*S. Nagaraj* v. *State of Karnataka* 1993 Supp (4) SCC 595, 619, Para 19.

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We retrace our steps, and the second time around, we do correctly what we could have done and should have done in the first place.[22] In United States, the local governments under the Florida Law have the opportunity of correcting their mistakes through curative legislation.

The case of ***Jasinski*** v. ***City of Miami***[23] helps in the illustration of the aforementioned curative legislation. Jasinski was about a citizens' challenge to the City of Miami's twenty-five-dollar administrative charge where towing of privately owned vehicles was nonconsensual.[24]

Jasinski and similarly situated other citizens were encumbered with fees which they subsequently paid.[25] Contending that the fees were invalid, The Jasinski plaintiffs-initiated suit against the City on the contention that the fees was invalid. Three years after the adoption of the resolution, and following the commencement of the federal court challenge, the city passed a curative ordinance amending the City Code to ratify and validate the twenty-five-dollar administrative fee. [26]

Encapsulating the law regarding curative legislation and its retroactive application, the Jasinski court explained that

"[w]hen a legislative body, in good faith, enacts a curative law to ratify, validate and confirm any act that it could have authorized in the first place, it would contravene public policy to award plaintiffs a windfall for asserting a cause of action that the legislative body may constitutionally eliminate by curing any defects in the law."[27]

V. CONCLUSION

The evolution of the concept of Curative Petition is based on the premise that if because of the limitation of human fallibility, miscarriage of justice occurs then the same should be rectified and not drown itself in the effervescence of principle of finality of judgment embedded under the notion of certainty of law. The Apex Court has followed a balanced approach so as to prevent floodgates from opening and ensuring adequate caveats so as to tackle frivolous or vexatious petitions and also marking a clear demarcation between a 'Review Petiton' and 'Curative Petition.' The Doctine of ***Ex Debitio Justiciae*** clubbed with the Inherent Powers of the Court has entitled the petitioner to avail this remedy of last resort in the rarest of rare cases,

[22]MISTAKES HAPPEN: FIXING THEM THROUGH CURATIVE LEGISLATION, 37 Stetson L. Rev. 459 2007-2008, Laura K. Wendell.
[23] 269 F. Supp. 2d 1341 (S.D. Fla. 2003), *affd* 99 Fed. Appx. 887 (2004).
[24]Ibid. at 1343.
[25]Ibid. at 1344.
[26] Ibid. at 1345. The ordinance expressly declared "the administrative fee to be legaland valid" and recited that its purpose was "to ratify, validate and confirm in all respects the administrative fees imposed prior to the adoption of [the] ordinance." Id. at 1346.
[27] Ibid. (citing Metro. Dade Co. v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 (Fla. 1999)).

thereby, furthering the cause of justice.

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