

## **Doctrine of Foregone Conclusion versus Doctrine Against Self-incrimination: A Case Note on *Sanket Bhadresh Modi v Central Bureau of Investigation***

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### **Abstract**

*In the modern world technology has reached its zenith. Though technology has showered many blessings it has also created problems for us. The use of technology has also come in the enjoyment of certain fundamental rights of the citizens. One such fundamental right is the right not to be compelled to give testimony against oneself. In a recent judgment given by the High Court at Delhi in *Sanket Bhadresh Modi v Central Bureau of Investigation* in 2023 the Court has looked into this perspective. The Delhi High court ruled that access to passwords or passcodes or biometrics of the suspect accused by the investigating authorities would amount to self-incrimination. In consequence it would result in the swallowing of the fundamental right against self-testimony. It needs to be mentioned that this ruling was different from the earlier precedents of Karnataka High Court and Kerala High Court on the same issue.*

### **Objective:**

- 1) To analyse the ruling on *Sanket Bhadresh's* case on the latest view of the higher judiciary on the right against compulsion to give testimony against oneself guaranteed under Clause 3 of Article 20 of the Constitution.
- 2) To find out if the doctrine relating to Foregone Conclusion have find its way in the Indian jurisdiction and
- 3) To find the relationship between the Production doctrine and the doctrine of Foregone Conclusion.

**Research Methodology** – The research methodology for this paper is doctrinal in nature. Primary sources like judgments of the higher judiciary are adopted. Secondary sources like journal articles are used for the study.

### **I. Introduction**

The facts of the case are that *Sanket Bhadresh Modi*, a suspect accused sought a regular bail under Sec 439 of the Criminal Procedure Code, 1973. The accused, a director along with other directors of the Company named *E-Sampark Softech Pvt. Ltd.* were alleged to make millions of phone scams. Calls were made from different call centers in India to the US citizens

impersonating as US Officials coercing them with detention, filing criminal complaints, imposition of reparations, compensation or seizure of possessions. The prey was pressured for sharing with their money through various online means like wire transfers, bank or cash transfers, payment through I-tune cards, various other gift cards and vouchers etc. The prey in the US had been fooled and dodged by the accused and 12 other partners of his company to the tune of about twenty million American Dollars. The suspect accused got bail for two hundred and three days as he satisfied the triple test for bail. The accused appeared for interrogation when called for except for one occasion. But he refused to co-operate with the CBI, the investigating agency for providing them with password(s), email accounts and digital wallet accounts. Hence the CBI prayed for rejection of the bail of the accused and for a direction to access the accounts of *Sanket Bhadresh Modi*. The accused made a plea for protection against compulsion to testimony against oneself guaranteed by Clause (3) of Article 20 of the Constitution. The Court remarked that involuntary access to the passwords(s) and biometrics of the suspect accused amounts to testimony against oneself protected under Clause 3 of Article 20 of the Constitution. The High Court at Delhi further observed that the “As an investigating authority the CBI must not anticipate a suspect accused, to chant a mantra which is holy to their earhole” as the suspect accused was protected under Clause (3) of Article 20 of the Constitution.

## II. Applicability of the Doctrine of Foregone Conclusion

The principle of Foregone/Bygone Conclusion is applied in the United States legal system as an exception to the Fifth Amendment of the American Constitution which protects from double jeopardy and against self-incrimination. It is an exception to the principle against self-incrimination which compels the accused to submit password(s), biometrics to the investigating authorities when the government already knows what is there on the electronic devices. The doctrine of Foregone Conclusion firstly applied by the American Apex Court in *Fisher v. United States* in the year 1976.<sup>1</sup> The issue was whether the documents handed over to the lawyer by the client are protected from incrimination by the Fifth Amendment of the American Constitution. The Bench answered in positive. According to the Court once the documents are handed by the client to the lawyer it is not compelling and hence does not amount to self-incrimination and hence not protected by Article 20 (3) of the Constitution. In *Fisher V. United States* and in *United States v. Kashmir*; the Court judged that a summons ordering a lawyer for production of documents delivered to the lawyer by his client can be implemented and that observance with the summons would not create a violation of both the client's fifth amendment privilege against compulsion to be a testimony against oneself and his right of communication in confidence with his lawyer.<sup>2</sup>

But the doctrine of Bygone Conclusion is not implemented in India. Jurisprudence revolving this doctrine is yet to be developed in India. The development has faced challenges in view of the technological advancements made in the modern era. In the recent rulings in *Virendra Khanna's case*,<sup>3</sup> the Karnataka High Court and in *P Gopalakrishna alias Dileep's case*,<sup>4</sup> the Kerala High Court ruled that compelling to produce password(s), biometrics does not amount to self-incrimination and hence does not violate Clause (3) of Article 20 of the Constitution. But recent High Court of Delhi verdict was a different opinion and held that compelling to

<sup>1</sup> 425 US 391 (1976)

<sup>2</sup> Anon, Compelled Production of Documents--Fourth and Fifth Amendments: *Fisher v. United States*, 425 U.S. 391 (1976), *United States v. Kashmir*, 425 U.S. 391 (1976), *United States v. Miller*, 425 U.S. 435 (1976), *Journal of Criminal Law and Criminology*, Volume 67, Issue 4 (December 1977), pp. 373-388 at p.373

<sup>3</sup> *Virendra Khanna v. State of Karnataka*, 2021 SC Online Kar 5032.

<sup>4</sup> *P. Gopalakrishna v. State of Kerala* 2022 SC Online Dis Crt. (Delhi) 48.

produce password(s), biometrics results in compulsion against oneself and hence contradicts Clause (3) of Article 20 of the Constitution.

The Doctrine of Foregone Conclusion seems to be applied by the Karnataka High Court and the Kerala High Court in their respective judgments. But this doctrine was not applied in the recent Delhi High Court judgment delivered in 2024. Thus, the judicial approach in applying the Doctrine of Foregone Conclusion seems to be inconsistent and diversified.

In the earlier cases in *Selvi* and *Nandini Satpathy*, the Apex Court gave a broad interpretation to Clause (3) of Article 20 to protect the suspect accused's right from self-incrimination. In *Selvi*, the Court interpreted the protection of mental privacy as included in the basic right against compulsion to testify against oneself under Clause (3) of Article 20 of the Constitution.<sup>5</sup> In *Nandini Satpathy*, the Court included even the compelling of production of documentary evidence amounts to self-incrimination. Thus the doctrine of Foregone conclusion was not applied in the above two cases<sup>6</sup>.

### III. Findings

Looking at the background of the above discussion it can be concluded that the Principle of Bygone Conclusion as an exception against compulsion to be a testimony against oneself is facing challenges in the era of modern technology. Initially it was applied in certain cases for compelled production of documents where the government was already aware of the facts mentioned in the documents. But whether the same doctrine can be applied in the modern technology era where documents are mostly digital in form and are available at the swipe of a finger. "Technology has outdated the American Supreme Court's jurisprudence on the Fifth Amendment which has created twin different but related disagreements – firstly with regard to the review of application of this doctrine to digital documents and secondly, what are the ingredients of a testimonial act for applying the modern devices as evidence."<sup>7</sup> Thus time has come where there is an urgent need to revisit the doctrine of Foregone Conclusion in its application to production of digital documents and to finalize as to what are the ingredients to constitute a "testimonial act". The higher judiciary must come out with specific guidelines or principles in these matters. Otherwise the cauldron over these issues will continue to engulf the legal circle. It will give unbridled powers to the investigative authorities to decrypt the suspect accused's personal encrypted technological devices. It will also disillusion the citizens regarding their assurance against self-incrimination guaranteed through constitutional provisions in many democratic countries.

### IV. Conclusion

Thus it can be concluded that the latest view of the Indian judiciary has rejected the doctrine of Foregone Conclusion in its application to Article 20 (3) in *Sanket Bhadresh Modi's* case. From the judgments given by Karnataka High Court and Kerala High Court it appears that the Doctrine of Foregone Conclusion has find its way in the Indian jurisdiction. But the same doctrine has been rejected in the recent judgment in *Sanket Bhadresh Modi*. The Doctrine of Foregone Conclusion is an exception to Production Conclusion which compels the suspect accused to produce documents under the statutory provisions.

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<sup>5</sup> AIR 2012 SC 1974.

<sup>6</sup> AIR 1978 SC 1025.

<sup>7</sup> Vivek Mohan & John Villasenor, DECRYPTING THE FIFTH AMENDMENT: THE LIMITS OF SELF-INCRIMINATION IN THE DIGITAL ERA, Journal of Constitutional Law Heightened Scrutiny, Vol. 15, pp. 11-29 at p. 11