



ROLE OF AMICUS CURIAE IN CIVIL PROCEEDINGS IN INDIA

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ABSTRACT

There is no settled position on role of amicus curiae in civil proceedings in India. amicus curiae literally mean someone who is a friend of the court. This person is not a party to the case but assists the court with the information he/she has on the subject matter. currently, there are no rules or guidelines which discuss the role and expectations from such a person. However, their role can be understood on a holistic analysis of the history of the institution of amicus curiae and comprehension of cases which they have been a part of. I have also addressed the criticisms of the institution of amicus curiae. In the conclusion, I have enlisted the purpose of appointing amicus curiae in different types of case, which is the outcome of my research on the topic.

Keywords: Amicus Curiae, India, Friend of Court



INTRODUCTION AND HISTORY OF THE INSTITUTION OF AMICUS CURIAE

Through this paper, I have made an attempt to unfold the role played by Amicus Curiae in the proceedings of civil cases in Indian courts. Since there are contesting opinions about the purpose of an amici, through this paper I have made an attempt to look at how this institution developed to its present form. To study this development, it is crucial to have a glimpse of the history of the institution of amicus curiae and the role that such a person used to play. Presently, there are no guidelines or rules that govern the contribution of an amici to a case. There are also no rules guiding when an amicus is supposed to be appointed and how much importance must the court give to submissions made by such persons. Therefore, after looking closely at a set of recent cases, I have analyzed the contemporary role that the amicus curiae play in the Indian courts and the circumstances in which the court is likely to appoint an amicus in a case.

Amicus Curiae is a Latin term, literally meaning ‘friend of the court’.¹ There are two views amongst scholars with respect to the origin of the institution of amicus curiae. Some scholars state that it had its origins in the common law despite its presence in civil law jurisdictions.² The other view is that it originated during the Roman times.³ In Roman law, an appointee was a learned jurist who advised the court at its request. In the common law of the middle ages, since the judicial proceedings took place in the public city squares, spectators could readily intervene as amici to share any relevant information with the judge.⁴ The amicus did not even have to be an attorney, and the general attitude of the courts was to welcome such aid, since “it is for the honor of a court of justice to avoid error”.⁵

This is starkly different from how the amicus curiae are appointed in cases by Indian courts today. Presently, the judge appoints an expert in the field of law, the question of which is before the court (mostly senior advocates), as an amicus to assist the court in making informed and proper decisions. It is only after such an appointment is made that an amicus plays any role in a case. No one can randomly give their insight or opinion in a case, until the court either appoints/allows such individual to contribute as an amici or intervenor. This rule applies regardless of whether a

¹S. Chandra Mohan, ‘The Amicus Curiae: Friends No More?’ (2010) *Singapore Journal of Legal Studies* 352-374

²Frank M. Covey, Jr., ‘Amicus Curiae: Friend of the court (1959-1960) 9 DePaul L. Rev. 30 at 34-35; Alan Levy, ‘The Amicus Curiae: An offer of assistance to the court’ (1972) *Chitty’s L.J.* 94

³Samuel Krislov, ‘The Amicus Curiae Brief: From Friendship to Advocacy’ (1963) 72 *Yale L.J.*

⁴Micheal K. Lawman, ‘The Litigating Amicus Curiae: When Does the Prty Begin after the Friends Leave?’ (1991-1992) 41 *Am. U.L. Rev.* 1243

⁵*Supra*, at 3



person is an expert in the subject of dispute before the court or has any other interest in the matter. The enabling provision for appointment of amicus curiae is under Chapter V of the Supreme Court of India Handbook on Practice and Procedure and Office Procedure⁶. This chapter is titled powers, duties and functions of the registrar, and the provision states that an amicus curiae might be appointed to appear and argue the case in-person, and give opinion by way of office report to provide necessary assistance to the Court for proper disposal of the case.

The concept of amicus curiae is a rather ambiguous one, owing to the absence of rules governing their appointment, appearance and purpose of the institution in many jurisdictions.⁷ Authors have stated that it is rather easier to define amicus curiae as what he is not rather than what he is.⁸ As a result of the varied definitions of the term ‘amicus curiae’⁹, significant questions have been raised by scholars. One of such question is whether an amicus is a friend *of* the court of a friend *to* the court.¹⁰ A friend of the court assists by providing information so that the court will not fall into error. He does not seek to influence the final outcome. A friend to the court attempts to persuade the court to adopt a particular point of view whether or not he has a direct interest in the outcome. Historically, it is believed that the role of amicus curiae in common law was one of oral “shepardizing”, the bringing up of cases not known to the judge.¹¹ These were generally in the form of impromptu oral and written submissions. It is suggested that the amicus submissions were therefore “originally intended to provide the court with impartial information that was beyond its notice or expertise”.¹² Courts continued to cling to the proposition that the amicus was a detached servant of the court- “he acts for no one, but simply seeks to give information to the court”.¹³ The original purpose of amicus brief was most commonly to protect government interests.¹⁴ This practice soon attracted attention of private organizations which began to use it in their own quest

⁶ Supreme Court of India Handbook on Practice and Procedure and Office Procedure, 2017 <https://sci.gov.in/sites/default/files/Practice%20%26amp%3Bamp%3B%20Procedure%20and%20Office%20Procedure%202017%20%28FINAL%29.pdf>

⁷Supra, at 1

⁸Ibid

⁹ See the section “dictionary definitions” in the journal article S. Chandra Mohan, ‘The Amicus Curiae: Friends No More?’ (2010) *Singapore Journal of Legal Studies* 352-374

¹⁰Supra, at 1

¹¹Ibid

¹²Allison Lucas, ‘The ethics of Amicus Brief writing in first amendment litigation’ (1998-1999) 26 *Fordham Urb. L.J.* 1605 at 1607

¹³Supra, at 3

¹⁴ Frank Pommersheim, ‘Amicus briefs in Indian law: the case of Plains Commerce Bank v. Long Family Land & Cattle Co.’ (2011) 56 *SD L Rev.* 86



for policy adjustment or social change within the law.¹⁵ Scholars critical of the modern development of the institution of amicus curiae say that, apart from not keeping with the original purpose of the amicus curiae, his modern counterpart has turned the courts into a political arena for advancing the private interests of social, political and commercial groups.¹⁶

In the recent case of *Mukesh v. State (NCT of Delhi)*¹⁷, the Supreme Court answered the question of the role and responsibility of amicus curiae in a case. They stated that the duty of the amicus curiae is to assist the court with regard to the case and not with regard to any particular petitioner. Amicus curiae appointed by the court is meant to have the perceptions from all spectrums. Clarifying further, they stated that when the court appoints an amicus curiae, even when the counsel are engaged by the parties, it does not mean that the counsel are not able to assist. The court appoints amicus curiae depending upon multiple factors like regard being had to the gravity of the matter. After analyzing the cases where the courts invited participation of amicus, the following circumstances can be concluded. There are at least two cases mentioned in each of these circumstances and where I found it necessary, I have written an insight about amici participation in the case.

NON APPEARANCE OF COUNSEL OF EITHER PARTY

In a catena of cases¹⁸, the court appointed senior advocates as amicus curiae when legal representatives of either of the parties failed to appear before the court. In such instances, the amicus curiae is expected to step into the shoes of the counsel who is absent and act in the interest of the party it is appointed to represent. In most of the cases, the court appoints such substitution noticing the importance of the question of law raised or if it thinks that the interest of the petitioner/respondent will be prejudiced if he is not represented and the case is dismissed. Furthermore, such an appointment also supports the purpose of right to legal representation.

¹⁵ Ibid

¹⁶ Supra, at 1

¹⁷ (2016) 14 SCC 416

¹⁸ *State Bank of India v. Jab Developers Pvt. Ltd.*, AIR 2019 SC 2854; *SREI Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd.*, Civil Appeal No. 15036 of 2017 (arising out of SLP(C)No.16636 of 2015); *Ramakant Dattatraya Deshpande v. Dadu Bhagoji Patil* [2003] Insc 631; *All India Reporter Ltd. v. Ramchandra D. Datar* AIR 1961 SC 943



CASES WHERE IMPORTANT QUESTION OF LAW IS RAISED BEFORE THE COURT

In the case of *State of Meghalaya v. All Dimasa Students Union, Dima-Hasao District Committee*¹⁹, the court dealt with an important question regarding measures to be taken to check and combat the unregulated coal mining in the tribal state of Meghalaya. For the purpose of assisting the court to decide the matter, a senior counsel was appointed as amicus curiae. He refuted the claims of both the parties in the case and drew the attention of the court to certain data and reports to help decide the matter. The suggestions laid down by him were relied upon by the coram.

In the case of *Ramrameshwari Devi v. Nirmala Devi*²⁰, the court stated that the civil appeals raised several important questions of law and looking at the nature of the matter, a distinguished senior advocate was appointed to assist the court by representing the appellants in the matter. This judgment is particularly important for the purpose of this paper since it laid down the duties of amicus curiae appointed by a court in a civil case. The judges recorded deep appreciation for the extremely valuable assistance of the amicus curiae and said that he has discharged his obligation towards the profession in an exemplary manner. They mentioned that he not only provided assistance on the questions of law but inspected the entire record of the trial court and filed the entire court proceedings, other relevant documents, such as plaint, written statement and relevant judgments. They acknowledged that it is extremely rare that such good assistance is provided by the amicus curiae.

In the case of *SEBI v. Sahara India Real Estate Corporation Ltd.*²¹, a series of appeals and petitions were decided. The court appointed a senior advocate as amicus curiae owing to the crucial nature of law in question. An observation drawn from this case is that the amicus curiae supported the same argument advanced by the advocate representing the petitioner, which was accepted by the court. This is rather interesting and can be disputed because technically the role of amicus is to present the position of law with respect to the issue in question before the court. The amicus is not expected to advance the arguments or support the claims of either of the parties, until and unless the court's purpose to appoint him is to represent them.

¹⁹MANU/SC/0877/2019

²⁰ (2011) 8 SCC 249

²¹ (2018) 15 SCC 296



In the case of *MC Mehta v. Union of India*²², the court appointed three senior advocates as amicus curiae to seek assistance in the matter before the court owing to the importance of the legal question.

CASES DEALING WITH OFFENCES WHICH ARE GRAVE IN NATURE

Courts often appoint amicus curiae when they have to decide a case that deals with an offence which is grave in nature. This is usually done by the courts to decide the issue efficiently. Although there is no objective standard to determine which offence is grave in nature, the courts have usually invited the submissions of amicus curiae in certain cases, the decisions of which they believe has to be taken with extra care and caution. Few examples of such cases are *Ali Ibrahim v. The State of Kerala*²³ and *S.D. Bandi v. Divisional Traffic Officer, Karnataka State Board Transport Corporation*²⁴.

CASES DEALING WITH MATTERS OF PUBLIC INTEREST

The amicus curiae has been a mean of fostering partisan third party involvement through the encouragement of group representation by a self-conscious bench.²⁵ As amicus curiae participation allows groups to influence public policy, this method has become the main lobbying technique used by interest groups.²⁶ This is rather an interesting application of the institution of amicus curiae: In the case of *Salem Advocate Bar Association v. Union of india*²⁷, a writ petition was filed by the petitioner challenging the amendments made to the code of civil procedure. After issuance of notice, they wished to withdraw the petition. This request was denied by the court as the petition had been filed in public interest. At the request of the court, two advocates were appointed as amicus curiae to represent the petitioner, who drew the court's attention towards some amendments, the implementation of which might be practically difficult. The court in this case found out a middle ground by ordering that a committee be set up which would consider the said difficulties and make necessary suggestions in its report. The contribution of the amicus to the case was appreciated by the court.

²²(2016) 13 SCC 781

²³ W.P.(C).No. 11125 of 2015

²⁴ (2010) 14 SCC 513

²⁵ Supra, at 3

²⁶ Supra, at 1

²⁷(2005) 6 SCC 344



APPOINTMENT OF AMICUS CURIAE IN EXCEPTIONAL CASES (TO DEAL WITH A SPECIFIC MATTER)

In the case of *Holicow Pictures (Pvt.) Ltd. v. Prem Chandra Mishra*²⁸, the court laid down a significant point in relation to the purpose of appointment of amicus curiae in a certain case. The court stated the position that ‘it is true that in certain cases even though the court comes to the conclusion that the writ petition was not in public interest, yet if it finds that there is scope for dealing with the matter, this can be done by keeping the writ petitioner out of picture and appointing an amicus curiae. This can only be done in exceptional cases and not in a routine manner.’

CASES WHERE THE COURT CALLS FOR SUGGESTIONS REGARDING A FACT OR LAW

In the case of *K N Thankappan v. The Tribunal for Local Self Government Institutions*²⁹, the court requested appointment of an advocate as amicus curiae when it found some of the precedents cited by both the learned counsel seemingly conflicts. The court placed on record its deep appreciation of the admirable assistance of the amicus curiae. In yet another case, the court appointed an amicus curiae to seek suggestions with regard to members who shall form part of a committee of administrators.³⁰

CASES WHERE COURTS HAVE EXAMINED THE POWERS OF AMICUS CURIAE

In certain cases, the courts have delved into the question of the extent of power that can be exercised by an amicus curiae. In the case of *Sadhana Patra v. Subrat Pradban*³¹, the question before the Orissa high court was whether an amicus can be allowed to cross-examine prosecution witness. In the judgment, the coram stated, “a legal practitioner appearing as an amicus curiae is a friend of the Court and the amicus curiae is not appointed as a private counsel by the parties to represent them. Although the Court may hear the communications of an amicus curiae, it is within the discretion of the Court whether it will need the advice given and the amicus curiae has no right to complain if the Court refuses to accept his suggestions.” Hence the court concluded that the role

²⁸ (2007) 14 SCC 281

²⁹LNIND 2015 KER 14268

³⁰*Board of Control for Cricket vs. Cricket Association of Bihar* 2017(1)SCALE665

³¹AIR 2006 Ori 105



of an amicus curiae is limited to rendering assistance to the court in matters of facts and law whenever required by the court.

In the case of *Amicus Curiae v. Prashant Bhushan*³², the dominus litis in the case was the appellant as amicus curiae. The court concluded, “merely because information regarding contemptuous statements is furnished to the Court by Amicus Curiae, the proceeding cannot lose its nature or character as a suo motu proceeding.”

CRITICISM OF THE INSTITUTION OF AMICUS CURIAE AND ITS EFFECT

It has been contended that amicus participation in decision making is not a success every time, since sometimes the points made by the amicus are duplicative and they lead to wastage of judicial resources.³³ Collin argues: “Amicus briefs are able to light the fires of dissensus, motivating justices to express their displeasure with the majority’s interpretation of the law. Moreover, by providing the justices with a well researched basis on which they can cultivate a separate opinion, amicus briefs reduce the resource-costs implicated by the decision to author or join a separate opinion.”³⁴ Rejected amicus briefs are also influential, as they demonstrate that the court believed they are important enough to be addressed.³⁵ Even criticism of amicus curiae brief as “political propaganda” has not seriously stemmed the growing reliance upon it.³⁶

CONCLUSION

“The ‘friends’ who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluablely aid the decision making process and often influence the result or the reasoning of our opinions.”³⁷ The amicus curiae continues to have been sustained over the centuries as an institution, not only to preserve the “honour of the court” to deliver proper judgments in individual cases, but also, in the public interest, to continue the rational development of the law “as a safeguard against judicial arbitrariness and for the preservation of the free

³²(2010) 7 SCC 592

³³ Supra, at 1

³⁴ Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008)

³⁵ Matthew L.M. Fletcher, ‘The utility of amicus briefs in the supreme court’s Indian cases’ (2013) *American Indian Law Journal* Vol.II, Issue I

³⁶ Supra, at 3

³⁷ Quoting Justice O’Connor, cited in the book Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008)



government”³⁸. It has also been contended that arguments and information raised by amici in Indian law cases before Supreme Court have had dramatic impacts on the court’s decision-making process.³⁹In Indian law, an area of federal common law, where the Supreme Court’s policymaking and legislative functions are in play, policy-oriented amicus briefs are very relevant. One survey of former Supreme Court clerks strongly suggests that amicus briefs offering information expanding upon the positions of the parties are very helpful.⁴⁰ In none of the cases discussed above, has the court criticized the submissions made by the amicus curiae. Even if the court does not decide in line with such submissions, it always appreciates the participation and assistance offered by the amici in deciding cases. While it remains difficult to calibrate the exact effectiveness of amicus briefs in general and in Indian law in particular, the weight of authority is that they are effective to some degree, especially in the context of judicial concern for “legal accuracy” as opposed to “ideological preference”.⁴¹ To summarise, the role of amicus curiae can be categorized in as: Kinds of cases in which amicus are appointed:

- 1) To represent either of the parties in a case when appointed for that purpose
- 2) To present before the court any insight, knowledge or piece of information with regard to the question of law or fact before the court
- 3) To assist the court or give legal suggestions when an important/significant point of law is in question before the court
- 4) To represent the interests of the society in PIL cases
- 5) To assist the court to decide a matter when the nature of the offence committed is grave (this might include a case where wither of the party is vulnerable)
- 6) To give suggestions to the court regarding a particular point of fact or law
- 7) To fulfill the role for which it has been appointed in a specific matter

An amicus curiae’s role in any case might be either one or more of the above mentioned points. These are overlapping and not exhaustive, owing to the limitation of my research and paucity of time.

REFERENCE: [HTTPS://LEXFORTI.COM/LEGAL-NEWS/](https://lexforti.com/legal-news/)

³⁸ Edmund Ruffin Beckwith & Rudolph Sobernheim, “Amicus Curiae- minister of Justice” (1948) 17 Fordham L. Rev. 38

³⁹ See the impact of amicus briefs filed by the United States Chamber of Commerce in the cases of *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) and *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005)

⁴⁰Supra, at 35

⁴¹Supra, at 14