JANUARY 1986 Rs.5

FROM THE LAWYERS COLLECTIVE

COVER STORY

Union of India
V/s
Union Carbide Corporation

Anand Grover examines whether the decision of the Government to sue in the USA was correct

LAW AND PRACTICE

Dowry Prohibition Law

Gayatri Singh explains the recent amendments to the Dowry Prohibition Act.

HAZIR HAI

An interview with Justice P.B. Sawant

On the role of judiciary and the bar on the justice delivery system and the recently formed Progressive Law Association

Why this Magazine

With this issue we commence publication of a monthly magazine THE LAWYERS on law and issues of socio legal concern. We have witnessed the welcome phenomenon of an activist judiciary willing to get involved with issues of national importance which were hitherto considered out of judicial bounds. The undertrials of Bihar, Construction Workers of Asiad, Bonded Labour, Pavement Dwellers, Hawkers and women of different religions, communities, have all gone to Court in their search for justice. Some have said that the activist judiciary has transgressed its role by meddling with policy matters. Such criticism has come both from a section of the Judiciary itself and from the bar. It needs to be emphasised that the Judiciary in this country has been persuaded by those very critics to be activist to the point of deciding what is the basic structure of the Constitution and striking down Constitutional amendments which judges consider contrary to the basic structure. The decision of the Supreme Court in Kesavananda Bharati's case represents the high water mark of judicial activism in this country or anywhere in the world. It ill lies in the mouths of judges, therefore, to say that they will not be willing to take a fresh look at the social and economic concerns of the working people on the ground that it is not their job to make policy. The question whether or not we want an activist judiciary is a non-issue. The heart of the matter is, what kind of activism do we want from our judges, an activism which fosters and nurtures the professed socialist democratic culture of the Constitution or one that kills it. The results of resort to Courts by social action groups has not shown an upward straight line on the graph. As the recent judgement of the Supreme Court in the Pavement Dwellers case indicates, the Courts was unwilling to spell out a right to shelter. Such ups and downs in the decision making process reflect differences in ideology between the judges. Profits of doom have been quick to bemoan the ideological differences between judges predicting the breakdown of the judiciary with the cry "A house divided against itself cannot stand" We see such ideological differences as inevitable and welcome their emergence in the open instead of being talked about in a hush hush manner in the corridors of the Courts.

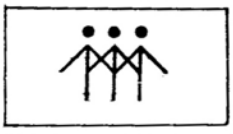
Courts are centres of power and through the pages of this magazine, we hope to encourage their increasing use by the victims of undeserved want in an attempt to tilt the balance of social forces in their favour.

Access to justice is a democratic right and we will campaign for better legal services for the unmet legal needs of the community. Access presupposes far reaching reforms of the system at the grass roots level

continued on page 2

CONTENTS

VOL 1 No.1



NEWS

CONSTRUCTION LABOUR SEMINAR

A National Seminar on Construction Labour was held between 1st and 3rd November 1985 by the Tamil Nadu Construction Workers Union in collaboration with the Committee for the implementation of Legal Aid Schemes at Delhi. The participants included construction workers from U.P., Haryana, Punjab, Delhi as well as respresentatives of various trade unions from all over the country. Justice V.R. Krishna Iyer inaugurated the Seminar.

The participants felt that the existing laws relating to construction workers were inadequate and unworkable and expressed the need for comprehensive legislation to protect construction labour.

The participants felt that legislation to ensure security of employment, payment of minimum wages and social security and welfare benefits were necessary to protect construction workers who were by and large unorganised. The proposed law seeks to create a Construction Labour Board operating at the national and the state level. It ought to be vested with necessary powers to regulate employment of construction labour. The Board would have proportionate representation of construction workers, the Government and contractors. The Conference decided to form a National Campaign Committee to follow up the the task of drafting a Bill for construction labour and for lobbying for its introduction in Parliament.

All those interested in making suggestions on the proposal may contact: The Coordinator, The National Campaign Committee for Legislation on Construction Labour, 3381, Desh Bandu Gupta Road, Karol Bagh, New Delhi 119 005

●

PROPOSAL TO LEGALISE CHILD LABOUR

A group called "The Concerned for Working Children" has prepared a draft Bill on child labour. The Bill seeks to legalise the employment of child labour in factories, commercial establishments and agriculture. According to the drafters of the Bill, the law should recognise the factual existence of child labour and tolerate it as an "unavoidable socio-economic evil"

The Bill seeks to set up a Child Labour Board charged with the responsibility of implementing the scheme and provisions under the Act. It places limitations on working hours, providing for payment of minimum wages, grant of leave and other employment-related benefits. Interested parties can file claims on behalf of the children for violations of the provisions of the law.

The Bill also provides for the unionisation of child workers, but no such union can be affiliated to any trade union organisation or a political party. The Bill, as enacted, will override all other legislation banning child labour.

●

119 CASES OF ATTEMPTED SUICIDE QUASHED

On 13th December 1985, Justice Sachar, the then Chief Justice of the Delhi High Court, passed an order *collectively* quashing 119 cases of attempted suicide pending in various Criminal Courts in Delhi. He also directed the administration and the police not to prosecute such victims in future under Section 482 of Criminal Procedure Code.

Section 309 of Indian Penal Code treats attempt to commit suicide as an offence punishable with simple imprisonment for a year or fine or both. In Western countries since decades and in India since the past few years, strong movements have been developing in support of right to die and against treating attempt to commit suicide as an offence. In many countries attempt to commit suicide is no more considered an offence.

In March, 1985, Justice Sachar upheld the acquittal of an accused under Section 309 and observed that the continuance of this Section "is an anarchronism unworthy of a human society like ours".

He found it paradoxical that a person who was so unhappy "that he makes an attempt to commit suicide, should if he fails in his attempt, instead of being attended to by the medical doctors and psychiatrists be arrested and roughed through by the police and face criminal courts for all these years which would coarsen him further".

Justice Sachar had directed that all the 119 cases pending under Section 309 be placed before him.

Justice Sachar also expressed the hope that Section 309 would be soon removed from the Statute especially because most such accused persons belonged to the poorer sections of Society and could not afford the time consuming and costly legal procedures.

●

FROM THE LAWYERS COLLECTIVE

continued from page 1

for not everybody can afford to run to the Supreme Court with a letter petition — nor should they be compelled to do so. Access to justice also presupposes knowledge of rights and in our Law and Practice section we will try to equip social activists to work in their chosen fields by bringing them information on welfare legislation in a readable form. Courts have escaped public scrutiny partly because of the laws of contempt and partly because of the sycophancy of a submissive bar. Speaking at a conference of lawyers recently, Prime Minister Rajiv Gandhi had to remind that judge can lay down the law in a case, it is the rebel who the law".

This communication gap between the Courts and the ple will have to be broken by subjecting judges, laws judgements to public criticism and we hope to bridg gap. Readers suggestions for improvement of the mag will be most welcome.

NEWS

ACQUITTAL ON DELAY

In the case of *S. Guin Vs. Grindlays Bank* a two judge bench of the Supreme Court held that a delay of six years in deciding a criminal case in a High Court entitled the accused to plead for the confirmation of the acquittal granted by the lower Court.

The employees of the bank had gone on a strike. They obstructed an officer from entering the bank and also obstructed the transaction of the bank business. Some of them were charged under Section 341 of the Indian Penal Code viz. wrongful restraint and under Section 36 AD of the Banking Regulations Act viz. obstructing a person from lawfully entering or leaving the office or place of business of the Banking company.

In 1978, the Chief Metropolitian Magistrate, Calcutta acquitted these employees. An Appeal was preferred by the Company to the High Court. In 1984, the High Court remanded the case for retrial to the Metropolitan Magistrate's Court on the ground that it had missed the essence of the charges levelled against the employees.

The employees approached the Supreme Court which held that the High Court should have dismissed the Bank's appeal due to the inordinate delay and the difficulties which may be encountered in securing witnesses after a long period. The case is significant because it will, to a considerable extent, get rid of the harrassment value of pending criminal cases.

●

PROCEDURE FOR CERTIFIED COPIES

In a Notice of Motion taken out by a Petitioner-in-person* to condone delay in filing an appeal, the Division Bench of the Bombay High Court suggested that the certified copy department of the Original Side follow the procedure obtaining in the Appellate Side of the High Court. At the moment no acknowledgement is given of any application made for a certified copy of any order. No intimation is sent to the applicant when the certified copy is ready. The Division Bench has suggested that applications for certified copies of orders should be submitted with the probable costs of the copy in cash and a receipt ought to be given for it. As soon as the certified copy is ready, it may be sent by the Registry by VPP, if excess amount is to be recovered, and by Registered A.D., if no excess amount is to be recovered. Refund may be sent in the form of stamps or by money order. The Prothonotary and Senior Master has been requested to evolve a proper machinery for supplying certified copies. Any person who has suggestions for improvement of the procedure to simplify and make it less cumbersome is requested to send them to Prothonotary and Senior Master, the High Court, Bombay.

*In Notice of Motion No. 1754 of 1985, *Hasmukh B. Shah Vls. Union of India & Ors.*

●

ADVOCATES ASSOCIATION AGAINST AMENDMENT TO S 125 CrPC

The Advocates Association of Western India at a specially requisitioned urgent general meeting held on the 18th December 1985 passed a resolution unequivocally expressing its opposition to the proposed action of the Government of India in amending Sections 125 and 127 of the Criminal Procedure Code so as to exclude Muslims from the benefits of these provisions.

The resolution states that the proposed action is prompted by narrow considerations of the ruling party and is positively against the fundamental rights of Muslim women. It calls upon the Government of India to desist from yielding to any pressure from fundamentalists and to retain the secular character of laws.The Government of India has been requested to appoint a Commission consisting of leading members of all communities and Muslim reformists to inquire in depth into the conditions of women in general and Muslim women in particular and suggest measures to improve their lot.

●

NOTICE BOARD

SUPREME COURT OF INDIA
INSTRUCTIONS REGARDING PUBLIC INTEREST LITIGATION

A large number of letters are being received by the Chief Justice both in his capacity as Chief Justice of India and as Chairman of the Committee for Implementing Legal Aid Schemes. Every letter must be opened by the Assistant Registrar, In-charge of Public Interest Litigation Cell and examined. Where the letter is by or on behalf of a person in custody, whether in jail or otherwise, or where the letter is addressed on behalf of a class or group of poor or socially or economically disadvantaged persons, the directions of the Chief Justice of India must be sought for treating the letter as a writ petition. Where the letter is by or on behalf of an individual (other than a person in custody) complaining of violation of his fundamental right it must be sent to the Supreme Court Legal Aid Committee after consulting Shri S.S. Srivastava, Deputy Registrar-cum-Principal Private Secretary. Where the letter is on behalf of an individual or individuals complaining of violation of a legal right as distinct from a fundamental right, the letter must be forwarded to the Secretary of the State Legal Aid and Advice Board concerned in the matter.

The forwarding letter must request the Secretary of the State Legal Aid and Advice Board to intimate as to what action has been taken by the Legal Aid and Advice Board in the matter. The author of the letter must also be intimated that a copy of his letter has been forwarded to the Secretary of the State Legal Aid and Advice Board and that he should write to such Secretary or contact him personally. If no reply is received to the letter sent by the Assistant Registrar In-charge of the P.I.L. Cell, then after two or three weeks a reminder must be sent to the Secretary of the State Legal Aid and Advice Board.

●

IN THE SUPREME COURT, OF INDIA

OFFICE CIRCULAR (JUDL) NO. 1/ 1986.

The Full Court in its meeting held on December 13, 1985 had decided that no Court Fees and Process Fee shall be charged in respect of any matter which is filed through Supreme Court Legal Aid Committee. In such cases the Executive Lawyer of the Supreme Court Legal Aid Committee shall file a certificate along with the matter that the matter is filed through the Supreme Court Legal Aid Committee.

The filing counter and the various branches are therefore directed not to insist on the Court Fees or the Process Fee in the matters which are filed through the Supreme Court Legal Aid Committee. However, the copying charges for any copy which is required in any matter filed through the Supreme Court Legal Aid Committee shall be charged.

Sd/-

(A.N. OBERAI)
ADDITIONAL REGISTRAR
7.1.1986

●

IN THE SUPREME COURT OF INDIA

Dated this the 19th December, 1985.

NOTICE

1 Where the advocate on either side is of the view that his arguments are likely to take more than 5 hours, he must file a written brief of his arguments at least 15 days before the date when the hearing of the case is specially fixed and if the hearing is not specially fixed, then within 15 days from the date when the case is first notified in the monthly list. When the written brief is filed by an advocate of one of the parties, the other party or parties shall file their written briefs of arguments within 10 days after the filing of the written brief by the first party. If written briefs are not filed, the arguments on each side will be limited to not more than 5 hours at the outside and closure will be applied as soon as 5 hours are over on each side. Where written briefs are filed, then also oral arguments will be limited to 5 hours on each side and not more, unless the Bench thinks that some more time should be granted for further arguments and in that event also, ordinarily, the oral arguments will not extend to more than 10 hours on either side and in cases involving interpretation of the Constitution the oral arguments may be allowed to be extended upto 15 hours on eith side.

The written brief of argumen shall first set-out the list of dat and events leading upto the fili of the Appeal or the Writ Petitic as the case may be, followed by brief and concise statement of t relevant facts and such statemer of facts shall be followed by the argument and in submissions which are proposed to be advanced in support of or against the Appeal or the Writ Petition together with the decisions in su port of such arguments or subm sions. The written brief shall as far as possible exceed 30 to pages.

2 There should be no pass-over f senior counsel and if the advocat on-record is not present at the m when the case is called on for hearing, he may be granted pass-over b in that event when the case is agai called on for hearing after one pas over, he alone and no other couns will be heard.

3 Where notice on a special leave pet tion or a writ petition has not served for reasons other than the fault of the petitioner the spec leave petition or the writ petition the case may be must be placed b fore the Registrar (Judicial) f directions on the date for which notice has been issued and it shoul not be placed before the Court. S also where the respondent has no filed a counter affidavit on the date specified in the notice and wants t file a counter affidavit, he mu mention the special leave petition the writ petition as the case may to the Registrar (Judicial) and s directions from him in regard to ing of the counter affidavit and special leave petition or the w petition as the case may be sho not be placed before the Court the date specified in the notice.

The members of the Bar are here notified that the above practice dir tions will come into force with eff from 6th January, 1986 and they wi be strictly followed with effect fro that date.

(A.N. OBER
ADDITIONAL REGISTR
19.12.1

COVER STORY

UNION OF INDIA
VS
UNION CARBIDE CORPORATION
Which Court?

While the Carbide litigation in the USA has been receiving banner headlines in the Indian press, the 7000 suits filed in the Court of the District Judge of Bhopal have passed off without notice. Why did the Government of India choose to sue in the USA and not in India, why is UCIL not a defendant in any court? In this article, we argue that the decision of the Government to sue in USA was wrong and both UCC and UCIL ought to have been sued in India.

Anand Grover

On 31st December 1985 the District Judge of the Bhopal Court ordered the stay of all suits filed in the District Court by the gas victims. The stay was ordered on an application by the Government of India. A couple of weeks before that, on 17th December 1985, Motilal Vora the Chief Minister of the Madhya Pradesh, announced in the State Legislative Assembly that the N.K. Singh Commission, set up by the State Government to inquire into, amongst other things, the cause of the tragedy was being wound up. The Chief Minister stated that the decision was taken in the 'interest of the gas victims.' Immediately thereafter, on 19th December 1985, the Central Law Minister, Shri Asoke Sen, announced in Parliament that the Inquiry Commission was being wound up because the Vardarajan Committee had gone into the questions and that the Central Government had accepted it in toto. The report, he added, would form the basis of the Government's claim for compensation.

The two events clearly indicate that the Central Government, which is now taking all decisions relating to the Bhopal tragedy, wants the suits in the U.S. to be pursued at any cost, with no questions asked in India. While the stay of the suits in India will ensure that the Bhopal victims are totally divorced from the litigation, the winding up of the Commission is intended to foreclose any genuine enquiry into the tragedy and avoid bringing to light the complicity of the Government itself. In pursuance of its goal, the Government has gone to the extent of submitting before Judge Keenan that Indian Courts cannot render justice to the victims! This obviously raises the question whether the Government was right in filing the suits in the US in the first place.

The facts which would form the basis of a legal claim are fairly clear and may be summarized as follows:-

* Union Carbide Corporation (UCC) and Union Carbide India Ltd. (UCIL) had exclusive knowledge of the toxicity and the inherently reactive, unstable and hazardous nature of the MIC. Most significantly, the extremely toxic nature of MIC and the fact that it thermally decomposes into hydrogen cyanide was not documented in published literature but was within the exclusive knowledge of UCC and UCIL. These facts were not disclosed to the concerned authorities in India.
* UCC designed the plant for manufacture and storage of MIC which was defective.
* UCC opted for storage of large amounts of MIC, when it could have used small containers as did Bayer of Germany. Given the highly reactive and unstable character of MIC this was highly unsafe.
* The safety systems, those required to neutralize in case of a leak, viz. the Vent Gas Scrubber and the flare stack, were grossly underdesigned, such that they could not have coped up with even a third of the amount stored in tanks, if they leaked.
* UCC and UCIL misrepresented to the Indian authorities that the plant was fail-safe.
* The UCC was in overall control of the operations of the UCIL plant at Bhopal, particularly its safety aspects.
* UCC and UCIL were responsible for the development of operational practices which cumulatively led to the disaster such as:
  (a) leaving the safety systems viz. the Vent Gas Scrubber and the flare stack non-operational when the plant was in a shut down condition, allowing the MIC to be stored for long periods knowing fully well its propensity to polymerize leading to a run-away reaction.
* UCC and UCIL did not have an evacuation plan to deal with a situation in which there could be an episodic discharge.
* All safety systems, viz. the Vent Gas Scrubber, the flare stack and the refrigeration system were non-operational on the night of the disaster..

UCC and UCIL in dealing with an inherently ultrahazardous substance such as MIC had a strict and an absolute duty to ensure that the plant had a fail safe design. This duty has clearly been breached. In any event UCC and UCIL had a duty to take all reasonable care which would avoid all dangers to life and property. That this duty was

breached is clear from the design it adopted in contrast to the design adopted by Bayer of Germany, and from the operational lapses. Moreover, UCC and UCIL by holding out that they had as safe a system as was possible has commited a breach of their warranty. They were also clearly liable for fraudulent misrepresentation. Moreover, by allowing the MIC to escape and cause death, by not taking adequate precautions, knowing fully that it was susceptible to a runaway reaction and would cause death, would attract the charge of culpable homicide not amounting to murder against all those key personnel of the Company having control over its operations.

Delays

The oft-repeated argument that Indian Courts will take years and the US courts will render justice quickly is without foundation. It is true that delays are endemic in the Indian legal system. If the Government had the will, in the Bhopal case, this problem could have been overcome by constituting a special court and assigning all the matters to one single Judge in Bhopal itself who could have been directed to hear the matters from day to day. The trial would have been over in a couple of years.

There is nothing unusual in this. This is exactly what is happening in the Antulay case in the Bombay High Court. If politicians between them can claim precious court time on a day to day basis for nearly two years, surely nobody can grudge 2,50,000 victims of Bhopal taking a year or two of court time.

The American courts are no faster. If the matters go to trial, they can take years. The discovery proceedings alone take years. The Dalkon Shields cases regarding the faulty intra-uterine devices (1UDs), are still going on 10 years after institution in various courts in the US. Yet another example is that of the suit filed on behalf of the Air India crash victims in 1978. The crash occured on 1st January 1978 in Bombay and the suit was filed in the US in the same year. In November 1985, seven years later, the US trial court dismissed the claims of the victims and held that the Boeing Company was not liable on account of strict product liability. There will no doubt be appeals lasting another few years.In the Carbide litigation, the issue of forum is still being debated and the Union of India has said it would be ready to go to trial in September, 1985, almost two years after the disaster. So much for speedier justice in the US.

Class Actions

The argument that class action suits cannot be filed in India is based more on the fact that few class action suits have been filed in India rather than on a correct reading of the law.

Class action suits involve several claims, through suits, on behalf of several persons, having the same interest, being consolidated to determine the main issues. Thus in the Bhopal case, though complaints have been filed in various Federal District Courts all over the US, they have been consolidated in the Southern District Court of New York. All the main issues, viz. the knowledge of UCC or UCIL that it was carrying on ultra-hazardous operations involving an inherently dangerous substance; the absolute and strict duty to have fail-safe operations and the breach of the duty; the negligent way the plant was designed from the safety point of view and the misrepresentation made in this behalf to the authorities are common to all the suits. They could, therefore, be consolidated for decision in the New York Court. This Court is not directly concerned with the individual claims. After the main issues are determined, the matters would revert back to the original Courts for proof of special damages to each individual claimant.

Would this sort of mechanism be impossible under the Indian legal systems? Order I Rule 8 of the Code of Civil Procedure (CPC) as amended in 1976, provides for a procedure for filing **representative suits.** When a group of persons have sustained an injury on account of one accident and have the same interest, one or few of them can file a suit on behalf of all of them. All that is required to be shown is that they have the same interest. It is no longer necessary to show that the **cause of action** is the same. This is made clear by the Explanation to Rule 8. Thus, it is clear that class action suit could have been filed in Bhopal. In any event, under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the Central Government itself has the authority to file suit (as a class action suit) in Bhopal itself. **As a matter of fact, by order dated 31st December 1985, at the request of the Government of India, the Disrict Judge Bhopal has consolidated about 7000 suits in Bhopal. What else is this, if not a class action?.** So much for difficulty on this account.

Strict Liability

Strict liability in tort is based on a no-fault theory. It is not necessary for the Plaintiff to show negligence on the part of the Defendant and obtain a decree of damages. The notion that strict liability has no application in Indian law is incorrect. As there is no statutory tort law, Indian Courts would follow English common law, i.e. judge-made law. The celebrated 19th century English case of *Rylands V/s Fletcher* is still an authority for strict liability both in India and the USA. In that case the Court held that a person who keeps on his land anything likely to do mischief if it escapes does so at his own peril and is answerable for the damage which are the natural consequence of its escape. Even with its developments, the rule in *Rylands V/s Fletcher* will apply in the Bhopal case. It can be shown that not only was UCIL carrying on ultra hazardous operations using MIC with full knowledge of its inherently dangerous nature but also that UCC and UCIL were negligent in the storage of the MIC, both in its design and its operations.

Punitive Damages

Punitive damages are awarded as a measure of punishment to the person responsible for the injury. Such damages are awarded if it can be shown that the Defendant acted in a careless and reckless manner in utter disregard of the consequences. The notion that puni-

tive damages cannot be awarded in Inida is without any foundation.

In a recent case, *Bhim Singh V/s State of JK,* the Supreme Court while dealing with a case of unlawful arrest held that the police officers in dealing with an MLA had acted in a most highhanded and authoritarian way playing with his right to personal liberty. The Court held that police officers acted deliberately and *mala fide* and granted Rs 50,000 as exemplary costs.

In any event, it is anybody's guess what a US Court on a jury trial would award as damages. However, it is important to understand that it is only on a full trial on proof of breach of strict and absolute duty or of gross negligence to take reasonable care that punitive damages can be awarded. Such a full-fledged trial in the US can last anywhere between 10-20 years.

Can UCC be sued in India?

It has been argued that as the main Defendant, UCC, is incorporated in the US, it may be difficult to sue it in India. UCC may not submit to the jurisdiction of the Indian Courts. This argument also is misconceived. UCC can be sued either by the procedure for serving foreign Defendants or, if it can be shown that the UCIL is the agent of UCC empowered to accept service, through the UCIL. There is no reason whatsoever to believe that UCC will not submit to the jurisdiction of the Indian Courts. *In fact the argument by UCC in the US Court that the convenient forum to sue is the Bhopal Courts, presupposes that the Indian Courts have jurisdiction to entertain a suit against UCC and that they will submit to its jurisdiction.* However, if the UCC does not choose to appear in response to the summons from an Indian Court, execution of any decree may pose a problem as execution in the US may require *de novo* proceedings to be instituted. It may not be possible to execute the decree simply through execution proceedings. However, the decree of an Indian Court will be accepted if the American Court is satisfied that it has been awarded on principles and procedures analagous to notion of justice prevailing in the US. There is no reason to believe that it would not recognise a decree passed by an Indian Court on the ground that the decision was not given by due proces of law.

Which is the convenient Forum?

It can well be argued that the US courts are not a convenient forum.

* The victims are all in India. They can't all conceivably be taken to US to depose except at considerable cost, expense and delay.
* The disaster occured in Bhopal. The plant is located in Bhopal. The physical inspection of the plant has to done in India. All the Jury members will have to come to Bhopal for that. This will involve expense all of which will ultimately have to come out of the money due to the victims and delays.
* The witnesses cannot conveniently give evidence in US as most of them are illiterate and speak only Hindi and Urdu.
* Much of the information required to prove the case against the UCC and UCIL is available here in India, through the UCIL. The documents relating to the design, fabrication and setting up of the plant and technology transfer are available in India. Most of the documents relating to control of UCC over UCIL are also available in India.
* In any event, the UCC can be summoned to produce all the necessary documents. If UCC submits to the jurisdiction of Indian Courts, there is no problem. If it does not, procedures are available to get information through US courts provided an order is passed to that effect by an Indian Court.
* Whereas it will be more inconvenient to the Plaintiffs to choose the US courts, the Bhopal Courts will be less inconvenient to the UCC.
* UCC is willing to submit to the jurisdiction of the Indian Courts as its own plea of 'forum non convenience' indicates.

Thus, there is no doubt that for the victims the convenient forum is India and not US.

Which Law will apply?

Most important, despite the filing of the suits in US, the US Courts, even if they retain jurisdiction, may apply Indian law to the Bhopal cases and award compensation and damages at rates which are consistent with the standard of living of an Indian slum dweller, which an Indian Court would award. This is a pure question of law. The rule of private international law in cases of torts is to apply the doctrine of *lex loci delecti commissi,* i.e, the law of place where the wrong has been committed or of the place to which it is most intimately connected. In the present case the faulty design was prepared in the US by the UCC . However, the negligent acts of ommission and commission which were the immediate cause of the tragedy were undoubtedly committed in India. Therefore, what law the US Courts will apply is not free from doubt.

Moreover, if it is held that the injury resulted from faulty design prepared in the US, Indian Courts could very well apply American law on the doctrine of *lex loci delecti commissi.*

However, the greatest disadvantage in pursuing suits in the US is that Indian industry will not be deterred by any decree of a US Court. Bombay, with its giant Chemical plants can suffer a fate worse than Bhopal. If it happens in an Indian Chemical Company where will the victims go? To the US? Ultimately, we must aim towards developing long term legal strategies to control the operations of multinational corporations as also Indian business houses. Moreover, the victims of the disaster would have more control if the litigation is in India. They are totally divorced from the US litigation.

Why then did the Government decide to sue in the US.

No convincing answer has been given by the Government to this question till today. It was not as if the Central Government took the initiative of filing the suits in the US. With hordes of American lawyers descending on Bhopal to sign-up the victims, and the outcry that it caused, the Government was forced to intervene.

Though the Government passed the Act which gives the authority to the Central Government to institute procedings in India or outside, it chose to file the suits in US and not in India.

The excuse that it was done to cut off the US lawyers simply does not wash. Suits filed in India by the Government of India would have sounded the death knell of the US litigation. So what is it that motivated the Central Government to sue in the US rather than in India? It was primarily because the Government did not want its own negligence in the episode to come to light and suppress the truth that it has decided to file the suits in US. This is also the reason why the Government has decided to wind up the Commission.

Immediately after the tragedy on 6th December 1984, the Government of Madhya Pradesh, announced the setting up of the Commission of Inquiry and appointed a sitting Judge of the High Court, Justice N.K. Singh, as the Commissioner. The terms of reference of the Inquiry were quite wide. The issues to be determined include the cause of the tragedy, the adequacy of the measures to stop the leakage, the adequacy of the safety measures in the plant and their implementation including the culpability of the State agencies, the responsibility for the leakage and recommendations for prevention of such tragedies in future.

Non-Cooperation with the Commission

Immediately after the Central Government filed the suit in US in April 1985, the State Government started its non-cooperation campaign with the Commission. It was clear that the State Government was acting on the dictates of the Central Government.

The Commission held its first sitting on 25th March 1985. All the parties, except the State Government, filed their Statements of Case. One of the excuses of the State Government for not filing was that it did not have in its possession facts relating to the tragedy. The other excuse being that it had no 'access to the documents as they were in the possession of the CBI', and that they wanted to take inspection of documents in possession of the UCIL and the CBI.

Ultimately on 29th November 1985, almost a year after the tragedy, the State Government filed its Statement of Case.

After prolonging the filing of the statement before the Commission of Inquiry the State Government, on 17th December, 1985 after the anniversary, decided to wind up the Commission of Inquiry. The State Government gave the impression not only to the Commission but also to the people of Bhopal as recently as on 29th November 1985, that it was going ahead with the Commission. If the Government had wound up the Commission before 2nd December, the wrath of the people of Bhopal may have been difficult to bear, even for seasoned politicians. So it was decided to deliberately mislead the people and wind up the Commission only after 2nd December 1985.

Prolonging it any further would have only exposed the complicity of the Government as the Commission had ordered that evidence would start to be recorded in January 1986.

Vardarajan Report

The stated reason for the winding up of Commission is that it is in the interest of the victims of the tragedy. However, the real reason can be gleaned from the statement made by the Central Law Minister, Asoke Sen, who told Parliament that the Commission had no function to perform as other investigating agencies, like the Vardarajan Committee, had submitted a report which the Government accepted in toto.

A casual glance at the Vardarajan Committee Report will show that it was neither meant to, nor did it, go into the questions which were to be determined by the Commission of Inquiry. The Vardarajan Committee was only meant to investigate into the cause of the leakage, and nothing else. None of the other questions were even supposed to be touched by it. The Vardarajan Committee report relies exclusively on the analyses of the residue in Tank 610 for arriving at the cause of the leakage. There is not a word in the report about the composition of the gases that possibly leaked out in the fateful night of 2nd/3rd December 1984, or on the cause of the deaths.

Hydrogen Cyanide

Significantly the Vardarajan Committee has practically omitted to investigate into the possibility of hydrogen cyanide having been released on thermal decomposition of MIC. This is all the more important as independent observations of Government scientists themselves show that cyanide could have caused the deaths. The Central Pollution Board had detected cyanide in the air on 4th December. The first post-mortem analyses also led to the conclusion that hydrogen cyanide could have been the cause of death. The Vardarajan Committee has reached the conclusion that as the tank could not have attained temperatures over 250° C, practically no hydrogen cyanide would have been produced. This is in contrast to other studies reportedly carried out by the Defence Research and Development Laboratory (DRDL) at Gwalior which has shown that temperatures did rise to above 250° C and that hydrogen cyanide could have been produced. To say the least, Vardarajan Report does not inspire confidence.

Thus, the statement of the Law Minister that the terms of the reference of the Commission have been answered by the Vardarajan Committee Report is simply not true. The further statement that the Government will rely on the Vardarajan Report to claim compensation is positively dangerous as it cannot form the basis of any successful claim in any court. The whole purpose of the Commission was to learn from past mistakes, by inquiring into the tragedy and making positive recommendations. To prevent more Bhopals. The Government obviously does not want that. Therefore, the winding up of the commission and applications in the Bhopal Courts to get the suits stayed.

Thus the Government succeeded in stopping all litigation in India and an inquiry into the truth and its complicity. But for how long and at whose cost? 'No more Bhopals' will remain an empty rhetorical slogan unless Indian industry, both foreign and indigenous, knows fully well that they will be punished in India by Indian Courts for their wrong doing. A historic opportunity to develop the law of corporate liability, national or multinational, has been lost. The reasons why the Government decided to sue in the USA will forever remain a mystery, until such time as it can come up with a convincing answer.

LAW AND PRACTICE

DOWRY PROHIBITION LAW

The Dowry Prohibition Act, 1961 was enacted with the primary object of preventing and prohibiting the practice of giving and taking dowry. During its long existence, the Act has failed to achieve its object. The total lack of its effectiveness can be gauged from the fact that in its over two decade history, convictions were obtained in less than half a dozen cases, besides the fact that practically no cases have been registered under this Act. Two of the major deficiencies of the Act were a) the definition of dowry was too narrow - only property given "in consideration of "marriage" was dowry, it was given as a condition of the marriage taking place, and b) prosecution for the offence of taking dowry required prior sanction of the State Government. Instead of rectifying the basic weakness in the Act, the Government explained its failure by arguing that the Act had failed to take into account the diversity of customs in different States. Though several States made their own amendments, the institution of dowry continued unabated. As more and more "dowry deaths" started being reported attempts were made to amend the law. Gayatri Singh examines the changes in the law relating to dowry.

Gayatri Singh

With a view to remedy the inherent weaknesses of the Dowry Act, a private member's bill was introduced in Parliament by Pramila Dandavate, M.P. on 13th June 1980. The Bill was considered and the question of the working of the Dowry Prohibition Act, 1961 was referred to the Joint Committee of both the Houses. Pramila Dandavate then withdrew her Bill.

In order to correctly understand and comprehend the weaknesses in the Act and the reasons for its failure, the Parlimentary Joint Committee heard evidence on the working of the Act from representatives of various women's organisations and social welfare institutions. The Committee attributed the failure of the workability of the Act mainly to three reasons. Firstly, the definition of "dowry" in Section 2 of the Act was too narrow and vague. Secondly, the Act was not being rigorously enforced. Thirdly, the court which was competent to try offences under the Act by virtue of Section 7(a), could not take cognizance of any offence except on a complaint made within one year from the date of offence. This, according to the Committee, had proved to be a major obstacle in dowry complaints being argued and disposed off on merits. The Committee, therefore, sought to make drastic amendments in the Act so as to make the Act more effective and meaningful.

Recommendations

The Committee suggested that the words "in consideration for the marriage" from the definition of dowry ought to be totally deleted. The Committee rightly felt that the Explanation to Section 2 virtually nullifies the objective of the Act. The Explanation excluded presents from the definition of dowry.

In *Surinder Mohan's*[1] case it was held that presents not made "as consideration for marriage" were not dowry. Anything given after the marriage would be dowry only if it was agreed or promised to be given "as consideration for the marriage". It thus became obvious that it was virtually impossible to prove that anything given was "as consideration for the marriage." The Committee, however, did not think it desirable to impose a ban on presents given to the bride, bridegroom and relatives, as well as expenses incurred by the bride's parents and relatives for the marriage ceremony. The Committee, therefore, sought to introduce a ceiling in respect of the presents given as well as the expenses incurred for the wedding.

The second recommendation made by the Committee was that the gifts given to the bride should be listed and registered in her name, and in the event of the bride's death, the gifts should revert back to her parents, and in the event of divorce to her. Moreover, the presents could not be transferred or disposed off for a minimum period of five years from the date of marriage without the prior permission of the Family Court on an application made by the wife. These provisions, according to the Committee, would ensure that the gifts would remain exclusively for the bride's benefit.

Thirdly, a separate section on enforcement was sought to be introduced by the Committee. The Committee suggested that the State Government should appoint Dowry Prohibition Officers for different local areas in their respective States. It was suggested that the respective State Governments should also associate with each Dowry Prohibition Officer, a non-official advisory body consisting of women social workers well known in the area, within the jurisdiction of the officer, for the purpose of "advising and assisting him in the efficient performance of his functions."

The Committee submitted its report to Parliament. Finally the Dowry Prohibition (Amendment) Bill, 1984 was introduced by Jagannath Kaushal, Minister of Law, Justice and Company Affairs. However, unfortunately, the Bill failed to take into consideration some of the positive recommendations of the Committee.

The Dowry Prohibition (Amendment) Act, 1984

The Dowry Prohibition (Amendment) Act, 1984 was ultimately passsed, and came into force with effect from 2nd October 1985. Its purpose, ostensibly, was to make the 1961 Act more stringent and effective. The Amendment Act virtually ignored all the significant suggestions made by he Committee.

It defines dowry under Section 2 "as any property or other valuable security given or agreed to be given **in connection with marriage** to the bride or bridegroom or any other person". The amendment Act, therefore, substituted the words "in connection with the marriage" for the words "as consideration for the marriage". It was felt that the omission of the words "as consideration of marriage" without anything more would make the definition not only wide but also unworkable, for, if these words are omitted, anything given, whether before or after or at the time of the marriage by any one may amount to dowry. Dowry was, therefore, defined as any property given "in connection with the marriage".

This section will, as it previously did, prove a major stumbling block in the implementation of the anti-dowry laws, since presents made as pure gifts are not considered to be dowry, unless it can be shown that the gifts have been given or taken "in connection with marriage". The present definition of dowry thus fails to take note of the fact that in the majority of cases

marriage transactions are underhand. There are unwritten understandings between the parties and such transactions are neither recorded nor do they fall within the strict legal definition of "in connection with marriage". The gifts may be given by the bride's parents not "in connection with marriage" but due to subtle community pressure and for fear that their daughter may remain unmarried. There may be no demand from the other side. This fact was repeatedly pointed out by the Committee, but has been completely ignored by the drafters of the amendment Act. Another difficulty which the present definition of dowry poses is the fact that the financial liabilities of the parents of the bride are incurred not merely on the occasion of marriage but are continuous and spread out over a period of years even after the marriage ceremony is over. The present definition fails to take this fact into consideration. Instead of clearing the confusion, the amendment is likely to lead to protracted litigation on the meaning of the words "in connection with marriage". The Committee had proposed a ceiling in respect of presents given to the bride, bridegroom and marriage expenses incurred by the bride's parents. This suggestion does not find a place in the Amendment Act. Presents and expenses can be unlimited, and would be "dowry" if they fall within the definition of Section 2 of the Act.

Gifts

In many cases it may be difficult to prove that the gifts given to the bride were "in connection with marriage". However, if the woman could prove that the gifts were given for her exclusive use and that the gifts had been dishonestly misappropriated and converted by her in-laws for their own use, it was not necessary that the victim had to proceed under the provisions of the Dowry Prohibition Act. Cognizance of the said offence could be taken under Section 406 of the Indian Penal Code. In *Bhai Sher Jang Singh's* case[2] it was held that presents made to the bride either by her relatives or her in-laws will form part of her *Stridhan* and will not be affected by the provision of the Dowry Prohibition Act. In *Pratibha Rani's* case[3] the Supreme Court held that gifts given to a bride at the time of marriage and thereafter were her "absolute property" and the husband or her in-laws could be prosecuted under Section 406 IPC if they refused to part with these items. The judges overruled the decisions of the Punjab and Haryana High Court and the Allahabad High Court which had held that *Stridhan* property of a married woman becomes joint property when she enters the matrimonial home.

Section 3 of the Act is being amended to make the punishment for giving and taking "dowry" more stringent. Any person giving, taking or abetting the giving or taking of dowry will be subject to imprisonment for a term if not less than three months which may extend to two years and fine which may extend to Rs. 10,000/- or the value of the dowry, whichever is higher.

List

One of the reasons why the original Act had proved to be totally ineffective was the fact that penal consequence were imposed on both the "giver" and the "taker". Under such circumstances, the "givers" who were the victims, being the bride's parents and relatives, were naturally reluctant to report the matter for fear of being prosecuted. The amendment does not seek to remedy this major deficiency though the Committee had suggested that only the "taker" should be liable for prosecution. A provision to the amendment Act has been added whereby the "giver" could escape prosecution if the presents given at the time of marriage are entered in a list maintained in accordance with the Rules[4] under the Act, notified in the Gazette of India, Extraordinary, dated 19th August, 1985. However, the presents should be given without any demand being made. This presumes that at the time of making the gifts, the "giver" will diligently record all the articles presented. Similarly, certain presents given to the bridegroom are proposed to be excluded from the purview of the offences under the Section. These presents will not be regarded as "dowry" if the presents are given without any demand being made and if they are entered in a list maintained in accordance with the rules made under the Act. According to the rules, the list is to be maintained by the bride or bridegroom at the time of the marriage or soon thereafter. This will be prove to be a futile requirement as any list can be prepared and back dated after a dispute arises. The lists ought to be maintained by the Registrar of Marriages and prepared at the time of the marriage. To make matters worse, the proviso states that such presents must be of a customary nature and their value must not be excessive, having regard to the financial status of the parties. Thus, the husband and his relatives have only to show that the presents are of a customary nature to exclude them from the purview of the Act. The only qualification then is that the value of the presents should not be excessive. No guidelines have been specified as to what is "excessive" and what is not. Nor is there any way of determining whether or not the presents are of a customary nature.

No Sanction required

An important amendment made by the Act is that the requirement for obtaining sanction of the State Government for any prosecution under the Act, for demanding dowry, has been done away with. Any aggrieved person can file a complaint before a Magistrate. She does not have to seek the sanction of the State Government in order to file a complaint under Section 4 of the Act. The punishment for demanding dowry is the same as under Section 3 of the amended Act. In *L.V. Jadhav's* case[5], the Supreme Court held that the initial demand for giving the property or valuable security would itself constitute an offence under Section 4 of the Act, even though property did not pass hands. Having regard to the object of the Act, a liberal construction has to be given to the word "dowry" in Section 4 to mean that any property or valuable security which if consented to be given on the demand being made, would constitute "dowry" under Section 2.

Transfer of Dowry

Section 6 provides that if any dowry is received by any person other than the woman in connection with whose marriage it has been given, the person has to transfer it to the woman **within three months** from the date of its receipt and if he fails to do so, he will be punishable with imprisonment form a term between 6 months and two years or with fine upto Rs. 10,000/- or both. The present amendment seeks to reduce the time from 1 year to three months within which the dowry received has to be transferred to the woman. This time limit will in many cases, work against the woman. For just on the ground of expiry of the limitation period, a number of complaints have been dismissed. In several cases decided under the unamended Act it has been held that prosecution after expiry of one year prescribed would amount to misuse of the process of law[6]. On the other hand, complaints filed under Section 6 before expiry of one year were not competent and were premature[7]. Under Section 6, it is obligatory on the part of the person who has received dowry to

transfer it to the woman. He can transfer it at the place where the woman is residing.

If he fails to do so, the woman can file a complaint at the place where it should have been transferred to her. *In P.T.S. Saibaba's* case[8] it was held that a complaint can be filed by the woman where she resides.

Sub-clause (3) of Section 6 provides that where a woman entitled to any property dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being. Sub clause (3-A) has been added to Section 6. This Sub-Clause is an important addition since the Court can *suo-moto* take action against the erring husband.

One year time limited omitted.

The one year time limit for lodging a complaint under Section 7 of the Act has been deleted. There is now no time limit for filing a complaint. A complaint under Section 7(b)(ii) can be filed not only by the aggrieved person but also by a parent or relative or by any recognised welfare instituion or organisation. Recently in the Union territory of Delhi, four organisations have been recognised to lodge complaints, and have been empowered to file FIRs related to the crime.

The entire section on the reversion of gifts presented to the bride to her parents/children, as the case may be, in the event of her death, has not been included in the present amendment. Neither is there a provision regarding what is to happen to the presents gifted to the bride at the time of divorce.

Section 8 of the amended Act makes the offences cognizable, bailable, and non-compoundable.

It is difficult to understand how the amendments will make the Act stringent and effective. The definition of dowry is as vague and narrow as it was under the unamended Act. The "giver" will be equally liable for prosecution. There is no separate section on enforcement as suggested by the Committee. Removing presents from the purview of the definition of dowry will virtually reduce the Act to a dead letter.

Criminal Law (Second Amendment) Act, 1983.

The Criminal Law (Second Amendment) Act, 1983 which seeks to amend the Indian Penal Code (IPC), Code of Criminal Procedure (CrPC) and the Evidence Act, is an important addition to the laws relating to violence against women. Section 498A IPC, makes cruelty to married women with a view to coercing her or any person related to her to meet any unlawful demand for any property by her husband or any of his relatives punishable with imprisonment upto ten years as also with fine. Further, Section 174 of the CrPC has been amended to make a post-mortem mandatory if any woman commits suicide or dies within seven years of her marriage. Section 198A has been inserted in the CrPC and provides that cognizance of an offence under Section 498A IPC could be taken only on a police report or upon a complaint made by the aggrieved person or her father, mother, brother, sister or by her father's or mother's brother or sister or with the leave of the court by any person related to her by blood, marriage or adoption. Any offence under Section 498A is cognizable, and non-bailable.

Proof

Section 113A has been inserted in the Evidence Act whereby the onus of proving that harassment was not the cause of death is shifted on to the husband and the woman's in-laws, if the death has occured within seven years of the marriage. The Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act have been amended in order to deal effectively not only with cases of dowry deaths but also with cases of cruelty on account of any demands for property made to married women by their in-laws. Though, for the first time cruelty by a husband and his relatives towards his wife with a view to coercing her to meet a demand for property has been made a criminal offence, yet the Act is inadequate in its definition of 'cruelty'.

Wife beating does not fall within its purview. It still remains a non-cognizable offence of simple assault. Cruelty, according to the amending Act, has to be linked to the problem of demanding property. All other forms of cruelty do not fall within the definition and will not constitute an offence under Section 498A. It remains to be seen how courts will interpret the definition of 'cruelty'. What will constitute cruelty? Will it include only those forms of cruelty whch are blatantly violent and only those which can be easily proved or will it also include mental and more subtle forms of cruelty? Since penal statutes are to be strictly construed, investigating officers look only for direct and circumstantial evidence which would, according to them, be of "probative value", such as bruises and wounds.

Therefore, if there is no tangible physically visible evidence, the accused is acquitted. In the absence of outward obvious indications of violence, what tests are the judges to apply? Should not the surrounding social melieu and the circumstances leading upto the murder or suicide play an equally important role in proving the culpability of the accused? Should not the dying declaration of a woman exonerating her husband or in-laws be of doubtful value? For, while making the statement, unlike other dying declarations a number of matters must weigh on her mind, her child's future, her sense of loyalty towards her husband, her family's reputation etc. Judgements on dowry often reflect the social conditioning and the personal predilections of the judges. This is most glaringly reflected in two "dowry death" cases - *Munjushree Sarda* and *Sudha Goel* cases.

Sudha Goel, a young woman, died of burns in her matrimonial home on 1st December 1980. The Delhi Additional District and Sessions Judge, S.M. Aggarwal, convicted Sudha's motheer-in-law, husband and brother-in-law of murder and sentenced them to death. The accused went in appeal and the Delhi High Court reversed the judgement and acquitted the accused. The Sessions Court had relied upon the testimony of Sudha's neighbours. The dying declaration exonerating her husband was disregarded on the ground that it had not been properly executed. There were a number of thumb impressions on the papers, no Magistrate was called and the doctor had not certified that Sudha was in a fit state to make a statement. The High Court, on the other hand, completely disbelieved the evidence of the neighbours and relied heavily upon the dying declaration. Both the Sessions Court and the High Court arrived at two varying conclusions based on the same facts. What is redeeming, however, is the fact that the case came up before the Supreme Court, where the judges reversed the judgement of the High Court and held the husband guilty of murder though acquitting the mother-in-law.

More unfortunate has been the *Manjushree Sarda* case. The Sessions Judge held her husband guilty of murdering his wife by poisoning. In appeal, the High Court confirmed the Session Court's Order. However, when the case came up before the Supreme Court, both the late Fazal Ali J. and Vardarajan J.

held that the prosecution had failed to proved its case against Sarda beyond "reasonable doubt" as a result of which the High Court order convicting the accused should be set aside and the accused acquitted. Mukharji J. agreed, but "with some hesitation and a good deal of anxiety."

Conclusion

In such dowry death cases it is necessary that Vigilance Committees consisting, amongst others, of representatives from womens' organisations be formed to collect information on dowry offences and to aid the investigating officers during the investigations. The initial investigation into a suspicious death case is extremely important. The F.I.R. has to be properly recorded, the Panchanama has to be properly drawn up and recorded in the presence of neutral witnesses. The woman's parents or relatives should be allowed to be present when the Panchanama is being drawn up. The Vigilance Committee should oversee the entire investigation from the beginning till the report is submitted before a Magistrate. This will, at least, if nothing more, prevent the tampering of evidence that normally occurs at the investigation phase.

The problem of dowry is inseparable from marriage and inheritance. So much importance is placed on getting a woman married that parents of unmarried women are willing to meet any demands in order to get their daughters married. Marriage is projected to mean much more for a woman than for a man. A woman's worth is measured according to whether she is married or not. She achieves her identity not as an individual but as an appendage to her husband. Dowry will not cease until and unless women are viewed as individuals worthy of respect. The laws relating to inheritance will also have to be drastically amended so as to enable a woman to have an equal share in her ancestral property. Laws such as the Dowry Prohibition Act, 1961 and the Criminal Law (Second Amendment) Act, 1983, however laudable, will remain on paper until and unless women are given equal share in property rights.

1. *Surinder Mohan V. Kiran Saini*
   1977 Chand L. K. (Cri.) 212 (P & H)
2. *Bhai Sher Jang Singh V. Virinder Kaur*
   1979 Cri. LJ 493: (1978) 80 PLR 737
3. *Pratibha Rani V. Suraj Kumar & Anr.*
   AIR 1985 SC 628
4. The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985
5. *L. V. Jadhav V. Shankarrao Aba Saheb Pawar*
   (1983) 4 SCC 231: 1983 SCC (Cri.) 813
6. (1979) Cri. LT 286: 1980 Marriage LJ 128 (Punj)
7. *Raghbir Singh V. Jatinder Kaur*
   (1976) 3 Cri LT 386
8. *P.T.S. Saibaba V. Mangatayare*
   1978 Cri. LJ 1362

EMPLOYEES PROVIDENT FUND

RI & SRI

Introduction

Prior to August 1925, there was no law in India governing Provident Funds. The Provident Funds Act, 1925, dealt only with provident funds relating to Government, railways, and local authorities and certain other provident funds. In 1929, the Indian Income Tax Act, 1922 was amended and a provision was made for the recognition of provident funds by the Commissioner of Income Tax to enable the employers to claim deductions for income tax purposes. The Royal Commission on Labour (1929-31) and the Labour Investigation Committee (1946), appointed by the Government of India, commented on the absence of social security measures like provident fund etc. for industrial workers. The matter also came to be discussed in 1947 and 1948 at the Indian Labour Conferences. In 1949, a private member, Shri Rustom Sidhwa introduced the Workers' Provident Fund Bill in the Legislative Assembly. The Bill sought to provide for compulsory provident funds in all factories for all employees earning more than Rs.20/- per month, the employer's contribution being double that of employees which was to be fixed at 6% of the total wages. The Bill was circulated for public opinion but nothing further was done about it. The Bill was withdrawn by Shri Sidhwa on an assurance given that the Government itself would soon consider the introduction of a comprehensive bill.

Employees' Provident Fund Act, 1952

On the eve of the first general elections under the Constitution of India, the Government promulgated the Employees Provident Fund Ordinance, 1952 instituting contributory provident funds in six industries viz. cement, cigarettes, electrical, mechanical or general engineering products, iron and steel, paper and textiles. This was replaced by an Act, which is now called "The Employees' Provident Funds and Miscellaneous Provisions Act, 1952". The Act applies to the whole of India except the State of Jammu & Kashmir. It came into force with effect from 1st November 1952. The Act now extends to nearly 200 industries and classes of establishments. Initially, the scope of the Act covered factory establishments only. It was subsequently extended to cover non-factory establishments such as plantations, mines and commercial establishments. Originally, factories and establishments employing 50 or more persons were covered under the Act. The minimum limit for coverage was subsequently reduced to 20 or more persons. The membership of the scheme was initially restricted to employees whose monthly pay did not exceed Rs.300/-. The pay limit has been subsequently raised from time to time and the present pay limit is Rs.2,500/- per month.

The Schemes framed under the Act

The Central Government has framed the following three schemes under the Act-

(i) the Employees' Provident Funds Scheme, 1952 for the institution of provident funds;
(ii) the Employees' Family Pension Scheme, 1971, for the institution of Family Pension Fund, for the purpose of providing family pension and Life Assurance benefits; and

(iii) the Employees' Deposit-Linked Insurance Scheme, 1976, for the institution of the provident fund deposit-linked insurance fund, for the purpose of providing life insurance benefits.

These three Schemes came into force with effect from 1-11-1952, 1-3-1971 and 1-8-1976 respectively. This note briefly deals with the Employees' Provident Fund Scheme, 1952.

Administration of the Act

For administering and enforcing the Act and the schemes framed thereunder both the Central and State Governments are the appropriate Governments. The Central Government is responsible for administering the Act in regard to establishments belonging to, or under the control of, the Central Goverment, establishments of a railway company, a major port, a mine, an oil field and an industry declared by the Central Act to be a controlled industry. For other establishments, the responsibility lies with the State Government. The funds under the Act and the Scheme vest in and are administered by the Central Board of Trustees which is a tripartite body.

Membership of the Fund

Every employee of an establishment to which the scheme applies is entitled to and is required to become a member of fund from the first of the following month, if he/she has completed three months continuous service or has worked for not less than 60 days within a period of three months or less or has been declared permanent, whichever, is the earliest. It is not necessary that the service should be in the same factory or establishment. It is enough if he works under the same employer. In the case of a seasonal establishment or an establishment not declared as seasonal establishement but in which seasonal operation is being carried on, an employee is entitled to become a member of the fund, if he has worked 2/3rd of the period for which such seasonal or other establishment was in operation during three months. For computing the period of work for 60 days the following days are deemed to be the days on which the employee has worked,

(a) period of involuntary unemployment caused by stoppage of work due to shortage of raw materials or fuel or changes in the line of production, breakdown of machinery or any other similar cause;
(b) period of authorised leave;
(c) Sundays and other holidays intervening the days of actual work;
(d) in the case of a female employee maternity leave for any number of days not exceeding 12 weeks.

Attendance of an employee for half-a-day is to be treated as one day's work for this purpose.

The following categories of employees are not eligible for membership:

(a) One who having been a member of the fund has withdrawn his full accumulations in the fund owing to superannuation or on account of permanent migration from India;
(b) One whose pay (basic wages, dearness allowance, including cash value of food concession, if any) at the time he is otherwise entitled to membership of the fund exceeds Rs.2,500/- per month. In the case, however, of newspaper establishments, there is no such pay restriction;
(c) An Apprentice in terms of the certified standing orders or so declared by the authority specified by the State Government.

The membership continues until the member withdraws the amount standing to his credit in the fund. The amount standing to the credit of any member of the fund cannot be in any way assigned or charged or be liable to attachment under any decree or order of the Court in respect of any debt or liability incurred by the member.

Contributions

To start with, the statutory rate of contributions both for the members of the fund and the employer is 6.25% of basic wages, dearness allowance (including cash value of any food concession) and retaining allowance, if any payable to each of the employees. By an amendment of the Act, the statutory rate was first raised to 8% from 1st January 1963 in respect of the establishments employing 50 or more persons in four industries viz. cigarettes, electrical, mechanical or general engineering products, iron and steel and paper, other than hand made paper. The enhanced rate of 8% has been gradually applied to numerous other industries and classes of establishments covered under the Act.

Advances from the Fund

The members of the Employees' Provident Fund are entitled to avail advances from the Fund under certain conditions for the following purposes:

(a) For financing of Insurance policies of members,
(b) For the purchase of a dwelling house/flat/or for the construction of a dwelling house, including the aquisition of a suitable site for the purpose,
(c) For re-payment of loans in special cases,
(d) In the event of closure or lock-out of an establishment for more than 15 days or if any employee is not in receipt of wage for a continuous period of two months or more; in the case of closure for more than 6 months refundable advance is also allowed,
(e) For illness of the member or his family in certain cases,
(f) For marriages (self/daughter's/son's/sister's/brother's) or for the post matriculation education of children,
(g) In case of damage to the property due to a calamity of an exceptional nature, such as floods, earthquakes or riots,
(h) Loss of wages due to cut in the supply of electricity,
(i) For purchasing equipment required to minimise the hardship of a member on account of handicap,

Withdrawals

A member may withdraw the full amount standing to his credit in the Fund in the following contingencies:

(a) On retirement from service after attaining the age of 55 years or attaining the age of 55 years before the payment is authorised,
(b) On retirement on account of permanent and total incapacity for work due to bodily or mental infirmity. A member suffering from tuberculosis, leprosy or cancer, even if contracted after leaving the service of an establishment on grouds of illness but before payment has been 'authorised' shall be deemed to have been permanently and totally incapacitated for work,
(c) Immediately before migration from India for permanent settlement abroad,
(d) On termination of service in the case of (mass or individual) retrenchment,

LAW AND PRACTICE

(e) On termination of service under voluntary scheme of retirement framed by the employers and employees under a mutual agreement,

(f) In any of the following contingencies the actual payment will be made only after completing a continuous period of not less than two months immediately preceding the date on which a member makes the application for withdrawal,

(i) Where a factory or other establishment is closed but certain employees who are not retrenched, are transferred by the employer to another factory or establishment not covered under the Act;

(ii) Where a member is transferred from a covered factory or other establishment to another factory or other establishment not covered under the Act but is under the same employer; and

(iii) Where a member is discharged and is given retrenchment compensation under the Industrial Disputes Act, 1947.

Final Payment Involving forfeiture

A member may withdraw his accumulations if he (a) being a foreign national is leaving India for at least a year or (b) has not been employed in any establishment to which the Act applies, for not less than two months preceding the date of his application; but such withdrawal will be subject to forfeiture of employee's contribution as follows:-

Period of membership in the Fund	Amount of forfeiture (Employer's contributions and interest thereon)
(a) Less than 3 years	75%
(b) 3 years or more but less than 5 years	50%
(c) 5 years or more but less than 10 years	25%
(d) 10 years or more but less than 15 years	15%

Accumulation of a deceased member

In the event of death of the member, the accumulation is payable to the nominee(s) or to the family members or to the legal heir(s), as the case may be.

Rights of Employees

An employee has a right to:-

(a) Be a member of the Provident Fund if he is not an excluded employee under the Act,

(b) Be exempted from the Provident Fund Scheme on the ground of better existing benefits.

(c) Nominate members of his family, or any other person, if he has no family who may receive the amount standing to his credit in the fund in the event of his death,

(d) Distribution in his nomination of the amount that may stand to his credit in the fund amongst his nominees at his discretion. He can change the nomination after giving a written notice for the same in a prescribed form,

(e) Withdraw from the fund for making payment towards insurance policy upto his own contribution on the date of withdrawal. The policy, however, is to be assigned to the fund within 6 months after the first withdrawal,

(f) Take non-refundable advances from the fund for the purposes and on terms specified in the scheme, and

(g) Receive annual statement of his Provident Fund account showing opening balance, amount contributed during the year, the total amount of interest credited to his account at the end of the year and the closing balance and get rectified any error or omission noticed by him in the statement.

Penal Provisions

The dues payable by the employers under the Act are required to be deposited in the branches of the State Bank of India on or before 15th of the month following the month to which dues relate. However, five days grace period from the due date is allowed to the employers for the remittances. Thus any remittance made beyond 20th of the following month is treated as delayed remittance and damages are leviable on all such delayed remittances.

The Act provides for the following action against the defaulting employers as a measure of penalty and also for the realisation of the arrears due.

Section 8 of the Act provides for realisation of the arrears due as arrears of land revenue.

Section 11 of the Act establishes the priority in payment of Provident Fund dues in preference to other dues in case of insolvency or winding up.

Section 14, 14A, 14AA, 14AB and 14AC of the Act provide for prosecution of defaulting employers. These sections also provide for an imprisonment for a term upto one year or fine upto Rs.4,000/-. These sections also provide for a minimum imprisonment for three months and fine in case of prosecution after previous convictions.

Section 14-B provides for recovery of damages to the extent of 100% of dues in case of non-remittance of dues on or before the due date (i.e. 15th of the month following that to which the dues relate).

Section 14-C provides for powers to the courts to direct the employers at the time of conviction, to pay the contribution to the Employees' Provident Fund, or in the payment of past accumulations in arrears. By an Explanation added to Section 405 Indian Penal Code, any employer who fails to deposit the employee's share of contribution deducted from his wages, is deemed to have misappropriated the money attracting sections 406/409 of Indian Penal Code.

Despite these penal provisions, PF arrears recovery has always posed problems.

These Grey Pages will be a regular feature of the magazine. They will have different page numbers from the rest of the magazine, enabling the reader to maintain them separately as a ready referencer.

EMPLOYMENT GUARANTEE

N Suryawanshi

The Employment Guarantee Scheme first came into existence in Maharashtra on 1st May 1972. It was revised on 20th September 1979. The Maharashtra Employment Guarantee Act of 1977 was enacted by the Legislature and was brought into force on 25th January 1979.

The Employment Gurantee Scheme of 1972

The Scheme was intended to provide for productive employ ment to the rural population and to solve the problems of unemployment in the rural areas. Gainful employment was to be provided to all able-bodied adults in rural areas who were unable to get employment but who demanded work. The guarantee given by the State was restricted to providing unskilled manual work. Employment had to be provided within 15 days of the demand.

A State level Committee was appointed, headed by the Chief Minister, for the implementation and supervision of the Scheme. District Level and Tahsil Level Committees were also appointed. The Collector of the District was put overall incharge of the implementation of the scheme in the District.

The Scheme underwent a revision in 1974.

The plans, incorporating the budgetary provisions, estimates of the work, and the quantity of the employment to be generated by the work, were prepared by various departments of the Government. Having regard to the estimated umemployment and likely demand for work, a blue print for the District was then prepared for a period of two years. From time to time an assessment of the implementation of the Scheme was made by the State Level Committee and many changes were made in the Scheme by issuing various orders, notifications, resolutions and circulars which are now compiled by the Planning Department of the Government into a Compendium of Orders.

The Maharashtra Employment Guarantee Act, 1977

After the experience of five years of implementation of the Employment Guarantee Scheme in the State, the Legislature enacted the Maharashtra Employment Guarantee Act (E.G. Act) of 1977. Its object is to make effective provision for securing the right to work referred to in Article 41 of the Constitution of India by guaranteeing employment to all adult persons, who volunteered to do unskilled manual work in rural areas in the State of Maharashtra.

The Act is applicable only to the rural areas of the State. Urban areas are excluded from its application.

Guarantee of Work

Under the Act every adult person in the rural areas in Maharashtra has a right to work, that is, a right to guaranteed employment doing unskilled manual work and receive wages on a weekly basis in accordance with the provisions of the Act. Three conditions have been laid down in the Act to secure guaranteed employment, viz.

1) The person must be adult;
2) He must be a resident of a rural area; and
3) He must be willing to do any unskilled manual work.

Procedure for securing work

An adult person willing to do manual work has to get his name registered with the registering authority in the village in which he resides. He should apply to the authority in a prescribed form. Though, for the registration of his name, an oral application is sufficient, it is always advisable to apply in writing.

The registering authorities for each village are appointed from among the Talathis, Gram-Sevaks and Assistant Gram-Sevaks working in Panchayat Samiti Area. The idea of appointing them as registering authorities is to ensure nearness to place of residence. They are bound to maintain a register of all those who apply for registration.

On registration, the authority is bound to issue a non-transferable identity card to such a person. It has to be issued free of cost. A person who has registered under the Act does not automatically get employment. He has to apply for work in the prescribed form to the registering authority or to the Samiti Officer. Ordinarily, the Tahsildar of the Tahsil is appointed as a Samiti Officer. The authority receiving the application is bound to acknowledge receipt of the application in the prescribed form. A register regarding such applications is to be maintained by the authority. It is necessary for the applicant to ensure that he gets the acknowledgement as it not only constitutes proof of the application having been made and entitles the person to receive work, but is also necessary to claim unemployment allowance.

The Samiti Officer has to consider these applications immediately, and direct the applicant by a letter in a prescribed form to a place of work sanctioned under the Scheme within the Panchayat Samiti area. Work has to be provided within 15 days of the date of the demand.

Unemployment Allowance

A person who has registered under the Scheme and who has applied for employment but has to be provided with work, is entitled to receive unemployment allowance at the rate of Rs.2/- per day. A separate application in the prescibed form has to be made for umemployment allowance. The application has to specify the period for which unemployment allowance is being claimed. This period, however, cannot exceed thirty days. The application must be made within seven days of the last day of the period for which umemployment allowance is claimed.

If the application for umemployment allowance is rejected by the Samiti Officer, the applicant can appeal against the order to the Sub-Divisional Officer within 15 days from the date of such order.

The procedure for claiming unemployment allowance is cumbersome and overduly bureaucratised. Social action groups and trade unions of EGS workers have found that any false and flimsy ground is utilised to deny unemployment allowance. On the one hand, receipts for the application for work are never issued and, on the other hand, the demand for unemployment

allowance is rejected on the ground that the receipt is not produced. Applications have been turned down on the ground that the period covered by the application exceeds 30 days and that two separate applications ought to be made. Applications have also been turned down on the ground that applications have not been made individually but collectively by 200 to 300 workmen at a time. Such frivolous grounds for defeating the grant of unemployment allowance betray a lack of desire to implement the Act in its letter and spirit. Till date, the State Government is not known to have disbursed any unemployment allowance, except in one case to 234 women pursuant to an order of the High Court in the case of *Ahmednagar Zilla Shetmajur Union.* (see Box)

Preparation of Scheme

The State Government is charged with a duty of preparing the Employment Gurantee Scheme. Only productive works in the rural areas can be taken up under the Scheme. The Collector of the District has to prepare the blue print of the works to be taken up under the Scheme in his District. The blue print must include the manpower budget. Wages disbursed are to be directly proportional to the quality and quantity of the work under the Scheme, and are to be paid according to the schedule of rates. They are also related to the minimum wages payable to agricultural labourers in the four zones divided for that purpose. The wages are so fixed that a person working diligently for 7 hours a day would get a total wage equal to the minimum wage for agricultural labourer for that zone. The State Government, through its officers, is bound to provide all kinds of tools and implements required for any work. Where they are not provided, the applicant has to be paid his wages.The Scheme so prepared has to be published in the Official Gazette and a summary of it must be published in the local newspapers.

Employment Guarantee Council

A State level Committee known as the Employment Gurarantee Council has been established under the Act. The Council has to supervise the implementation of the Act and Scheme. It has also to undertake the evaluation of and make a periodical review of the implementation of the Act and the Scheme, as well advise the Government on specific questions and problems connected with it. The Council is the overall coordinating authority at the State level. The District Level Committees and Panchayat Samiti Level Committees (at the Tahsil level) have also been established to implement and supervise the implementation of the Act and Scheme. The Collector of the District is responsible for the implementation of the Scheme in the District. All Officers of State Government, Zilla Parishad and all other Officers functioning in the District are responsible to the Collector. The Zilla Parishad, the Public Works Department, the Forest Department, the Soil Conservation Department and such other departments carry on the works as the implementing agencies under the Scheme.

Implementation of Scheme

Many complaints have been made to the effect that there is total unwillingness on the part of the State to seriously implement the Act and the Scheme. There is a general tendency to deny work to the people. The procedure for obtaining work or unemployment allowance is extremely cumbersome. At least three forms have to be filled in and acknowledgements obtained to get unemployment allowance. For a poor illiterate person, it is virtually an impossible task. The EGS is a partial success only where organisations of the unemployed are active at the grass roots level such as Dhule, Ahmednagar and Gadchiroli. There are also a number of complaints of corruption in the implementation of the Scheme. The former Collector of Dhule District, Arun Bhatia, after making a survey in the District, claimed that he had unearthed a fraud in a minimum of 13% of the work. The Chairman of the Legislative Committee, Mr. R. S. Gavai, has also admitted that malpractices and corruption are rampant in the implementation of the Scheme. Several cases have come to light where workmen are shown to have been paid wages, when in fact, no such workmen exist. Similarly, work is stated to be completed and wages disbursed, when spot inspections have shown that the work was not done or completed. The money thus siphoned off has gone into the pockets of bureaucrats.

The Case of the Ahmednagar Shetmajur Union

A Writ Petition under Article 226 was filed by the Ahmednagar Zilla Shetmajur Union in the High Court at Bombay alleging discrimination in the rate of wages paid under the Act and Scheme to EGS workmen and wages paid for agricultural work. For the purposes of wages to agricultural workers, Maharashtra is divided into four zones, each having different minimum wages. Section 7 (vii) of the EG Act provides that the rate of wages shall be so fixed that a person working diligently for seven hours a day would normally get a total wage equal to the minimum wage for agricultural labourer for the **lowest-zone.** This Section was challenged on the ground that the EGS workers were entitled to a wage equal to the agricultural wage of the zone in which they worked.

It was also challenged on the ground that compelling a worker to work for a wage less than the wage fixed for the zone in which he worked amounted to extracting forced labour within the meaning of Article 23 of the Constitution. The Petitioners also challenged Section 8 (4) under which an unemployment allowance of not less than Re. 1/- per day was to be paid, if work could not be provided. It was submitted that unemployment allowance was intended to ensure survival at subsistence at Re. 1/- per day was not possible. The Petitioners sought a direction against the State to increase the allowance. The High Court allowed the Petition and held that the latter part of Section 7 (vii) of the Act is *ultra-vires* Articles 14 and 23 of the Constitution, and directed that EGS workmen be paid wages equal to the minimum wage of the zone in which they work. The challenge to the unemployment allowance fixed at Re. 1/- was also upheld. The Court held that unemployment relief must bear some rational relation to the minimum wage, and directed the State, as a first step, to increase the unemployment allowance from Re. 1/- to Rs. 2/- per day.

The State Government amended the schedule of rate of wages on 31st January 1985 in view of the judgement.

Ahmednagar Zilla Shetmajur Union & Ors. Vs. State of Maharashtra & Ors. Writ Petition No. 4554 of 1985 by Dharmadhikari & Kantharia JJ. Decided on 20th September, 1984.

WARRANTS ATTENTION

Dulharibai, victim of rape, acquitted of murder charge

Deepti Gopinath

In December of 1985. Dulharibai was acquitted by a District and Sessions Court Judge D.P. Pande in Durg, Madhya Pradesh on charges of having killed a man who had attempted to rape her.

Dulharibai, wife of Mehtar Lodhi, lives in a village called Supila in Madhya Pradesh. Mehtar Lodhi and his best friend Sukdev had been through the rites of a local ritual called "Mahaprasad" which pronounced them blood brothers. Since the ritual, the two families came close together, trusting each other as would the families of brothers.

On April 30th 1985 at about 1.30 p.m. while Dulhari's husband was away at work at the Bhilai Steel Plant, his friend Sukdev who worked with him left his shift midway and went to Dulhari's home. Sukdev went straight to the bedroom and called Dulhari for a glass of water. When Dulhari came in, Sukdev forced himself on her and attempted to rape her.

The prosecution's story ran that Dulharibai kicked Sukdev in his groin and then strangled him with a piece of electric wire. Then she informed Sukdev's wife and both women called a doctor who found him dead. The defence case was that Sukdev committed suicide. Judge D.P. Pande dismissed both the prosecution and the defence theories on the ground that the available evidence was only circumstantial.

Right to self-defence

He held that the evidence established that Sukdev attempted to rape Dulhari, that she resisted the attempt and that Sukdev died in the ensuing struggle. "In our opinion", the judge said "the accused in such circumstances had a right to kill the deceased in self defence. I treat it as my duty to extend to the accused the benefit of the same".

It is only in a society of some enlightenment that such justice can be realised. Judge Pande's judgement is a historic and momentous one which reflects the mood of the people. It is a powerful tool for social transformation. It must be used and its implications made clear to victims and perpetrators of rape alike. For victims it brings a ray of hope. It should make women aware that they are not helpless to resist an attempted rape. Women have the right to self defence and this right extends to the use of physical force, such that can even result in the death of the rapist.

This judgement creates the context for further follow up and action. It makes it possible for women to seek support to bring about a society in which honour is not something you just speak about but live by.

The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. There is nothing more degrading to the human spirit than to run away in the face of danger. The right of self defence is thus designed to serve a social purpose to be fostered within the prescribed limits.

I asked a leading criminal lawyer, Freny Ponda, for her reactions to the judgement. This is what she said:

"Under Section 100 of the Indian Penal Code a person has a right of private defence if there is an assault with the intention of committing rape, and this right extends to the voluntary causing of death. Thus homicide is justified upon the plea of necessity and such necessity arises in the prevention of forcible and atrocious crimes. The only thing that has to be seen is whether the right of private offence has been exceeded.

We must take into consideration the confusion, the fear and the apprehension in the mind of Dulharibai and not weigh the means adopted by her in a pair of golden scales. I am of the view that the two acts of kicking and strangulation are products of fright and apprehensions of a woman who is threatened. They are not acts which can be termed as unreasonable vindictiveness. Law always makes allowance for the sentiments of honour and apprehension of dishonour of a woman in peril, who has no time to think".

Right of private defence

Section 100 IPC - When the right of private defence of the body extends to causing death - The right of private defence of body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right, be of any descriptions hereinafter enumerated namely;

First - Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly - Such an assault as may reasonably cause the apprehension that grievious hurt will otherwise be the consequence of such assault.

Thirdly - **An assault with the intention of committing rape.**

Fourthly - An assault with the intention of gratifying unnatural lust.

Fifthly - An assault with the intention of kidnapping or abducting.

ADALAT ANTICS

Devil's Advocate

Wanted Judges

Law Minister Asoke Sen is reported to have said that several posts of Judges in Andhra Pradesh are vacant as a result of differences of opinion between the Chief Justice of the Andhra Pradesh High Court and the Chief Justice of India. He is also reported to have said that several other posts of High Court Judges are lying vacant as the Chief Justice of India has not forwarded any names and was sitting on the files. According to available information, no files are pending with the Chief Justice of India. A Petition has been filed in the Supreme Court for a Writ of Mandamus directing the Government to fill up the vacancies. Notice has been issued and the Petition is directed to be heard on 14th January 1986. The Petitioner has called for files relating to the filling up of vacancies, which, if produced, will reveal a lot about the much talked about conflict over appointments between the Chief Justice of India and Law Minister Asoke Sen.

Free Tickets

The Government of India gave free tickets on Air India to Justice Kripal and Justice Prakash Narayan of the Delhi High Court to attend a conference of lawyers at Madrid.

Shortly thereafter Air India aircraft Kanishka crashed and Justice Kripal was appointed to enquire into the cause of the crash. Many are the ways in which independence of the judiciary can be subverted.

Somersault

The National Labour Law Association held a Seminar at New Delhi on Constitutional Law, Labour Jurisprudence and Industrial adjudication. Former Chief Justice of India, Y. V. Chandrachud, was one of the faculty members. In reply to a question whether the judgement in Tulsiram Patil's case on Article 311 (to which he was a party) did not take a view contrary to at least three other judgements of the Court, he is reported to have said that the judgement was not necessarily correct, that a review petition was pending and that in his opinion, there was a good case for review. Of course, as we all know, the review petition is no longer pending and has been rejected. The judgement belongs to the eve of retirement group.

Block Bookings

According to a news report appearing in the Indian Express of 10th January 1986, the House of Kirloskar has resorted to various methods to protect themselves against raids. One of them is retaining several senior lawyers of the High Court in order to prevent them from appearing in the cases against them. The same tactics were reportedly resorted to by Nanda of Escorts when his Petition was being heard in the High Court. These tactics to which the bar is a willing party reminds one of advance block bookings of cinema tickets for sale in the black market. It raises questions of the ethics of the legal profession. The booking of these lawyers is to prevent the Government from making use of their services. Perhaps the Government will be better off without them after all, as the Escort's Supreme Court judgement has shown.

Corrupt Judge

Magistrate Moholkar went to the residence of Labour Court Judge Malgaokar to plead the case of an employer Mahalaxmi Glass Works. A reference in respect of a dismissed workman was pending before him. The request made was that the workman should not be reinstated. The Labour Court judge told the Magistrate to get lost. The following morning Judge Malgaokar informed the parties of the incident. A news report of the incident appeared in Maharashtra Times. The High Court took *suo moto* notice of it held an inquiry and found that Maholkar had attempted to influence the Labour Court Judge. The Magistrate was dismissed. The story does not end there. The State Government did not extend the term of the upright Labour Court Judge as a result of which he lost his job. He has now been forced to file a Petition, which has been admitted in the High Court questioning the refusal to extend his appointment. Under the Industrial Disputes Act, a Labour Court Judge must retire at the age of 62. Malgaokar was only 58. He paid a heavy price for refusing to submit to the demands of a corrupt Magistrate.

Inside Outside

"To deny judicial activism to the courts is to nullify the judicial process and to negate justice.

The collective will of society today wants that if the rich sleep in luxury apartments, the poor should at least sleep with a roof over their heads, that if the rich eat both bread and cake, the poor should at least be able to afford the basic comforts of life. If the law is to operate today so as to secure justice to all, who else can do it but judges whose constitutional task is to apply and interpret the law? Nature abhors a vacum. Take away judicial activism, and tyranny will step in to fill the vacant space."

Guess who said this? Neither Justice V.R. Krishna Iyer, nor Chief Justice P.N. Bhagwati but His Lordship, Mr. Justice D.P. Madon in the Indian Bar Review. One wonders what kind of metamorphosis a judge goes through in the transition from High Court to Supreme Court or from extra-judicial writing to judgement writing.

Extension and Appointment

Somebody did everything within his power to prevent the appointment of Justice D.A. Desai as Chairman of the Law Commission. When all else failed, he used his power of extension to extend the term of Justice K.K. Mathew by one month and used that period in a final attempt to reverse the decision

NEWSHOUND By Rap

REVIEW

CONSTITUTIONAL RIGHTS FOR THE WORKING PEOPLE–1

To anyone somewhat familiar with Human Rights and Civil Liberties issues in India, H.M. Seervai is no stranger. Leading light the Peoples Union for Civil liberties in Bombay and acknowledged theoretician of the organisation, he is a public speaker much in demand on civil liberties matters. His third edition of Constitutional Law in India has been universally acclaimed.

The book is voluminous which is probably the reason why so many lawyers refer to it with reverence and awe. A close perusal however gives rise to a second impression quite contrary to the first, for it reveals a consistent point of view strikingly and forcefully opposed to the interests of the working people.

We perused this point with some dismay and it is this enquiry that forms the core of this article. We deal with Seervai's position, **as stated by him,** *on Civil liberties, Religious matters, Religious property, Reservation, Education, the Working Class, the Right to Property, the Directive Principles and Fundamental Rights.*

Colin Gonsalves

Civil Liberties.

In *Kameshwar Prasad's* case, the Supreme Court hed that a person does not lose his fundamental rights by joining governmental services and that a government servant has a right to demonstrate as this was part of the freedom of speech and assembly.

Following *Kameshwar Prasad's* case government servants could also take part in politics and elections *(Gopi Nath's* case), become member of political parties *(Director of Education* case) and teachers could be associated with political institutions.

Seervai comments:

> "The position which emerges from the Supreme Court judgement cannot be considered satisfactory. A law which upholds the right of a government servant to take part in political controversies and which upholds his right to comment in public on the incompetence or incapacity of his department or political head, has nothing to commend it. Such a law must destroy the high standards required of the civil service ..." (p-554)
>
> "*Kameshwar Prasad's* case was wrongly decided and is productive of public mischief and ought to be overruled." (p-555)

Religious Matters

In *Sardar Syedna Taher Saifuddin Salub's* case, the Privy Council struck down an Act to prevent the abhorrent practice of ex-communication of persons by the head of the Dawoodi Bohra Community and held that ex-communication was an essential part of religion for maintaining the strength of that religion. Thus, a brutal and inhuman practice was legitimised.

Seervai agreed:

> "It is submitted that the majority judgements are clearly right." (P 909)

Seervai arguing in favour of the tyrranical rule of the Syedna was a revelation. Not only human rights activists but most people know how despotic his rule has been and how viciously the social reformers within the Dawoodi Bohra Community have been treated for daring to campaign for legitimate social reforms.

Religious Property

In *Kameshwar Singh's* case the Supreme Court held that the property belonging to religious denominations or dedicated to religious purposes could be acquired. In *Laxminarayan Temple* case the Supreme Court held that the right of religious denominations to own and acquire property was subject to reasonable restrictions in the interest of the general public. In *Narayan Nair's* case provisions of the Kerala Land Reform Act 1964 that were near-confiscatory and in public interest were challenged by religious denominations. In all these cases, the Supreme Court widened the power of Government to apply reasonable restrictions in public interest on ownership of religious property.

Seervai disagreed...

> "It is submitted that the *Laxminarayan Temple* case was wrongly decided"..(p930).It is also submitted that *Narayan Nair's* case was wrongly decided.. (p935). The Courts should hold that a law which takes away the property of religious denominations without compensation or on payment of grossly inadequate compensation would be void"..(p934).

Right to Property

Faced with continuous opposition by the Courts to the land reforms proposed to be carried out, the Government introduced the 44th Amendment to delete Article 19(1)(f), the fundamental right to property. The Government also simultaneously inserted Article 300A - "No person shall be deprived of his property save by authority of law."

Seervai criticised this deletion

> "The proposition that the right to property was not a fundamental right is too wide and cannot be accepted as it stands". (p1654)

He found the "ostensible reasons for the property amendments neither candid nor convincing...(p1072). At any rate, the framers of these amendments have provided no solutions for the problems which the amendments inevitably raise..(p1078). The 44th Amendment has, in effect, removed every signpost in the field of property rights, leaving lawyers and judges to find their way with no guidelines..

consequently lawyers and judges must start all over again and try to give a coherent account of the "right to property" (p1082).

Reservation

Seervai argues that reservation for Scheduled Castes and Scheduled Tribes should, by and large, be done away with as it results in the induction of "third class" persons into public service causing a decline in the standards of "excellence".

Commenting on the judgement of Justice Subha Rao in favour of the SC s and ST s in *Devadasan's* case, Seervai writes:

> "Subha Rao J. spoke of giving backward classes a handicap to secure equality of opportunity.. but once there, **a third class candidate** will, ordinarily remain third class and a first class candidate will ordinarily remain first class. Public service cannot be efficiently run by handicapped person." (p439,emphasis ours).
>
> And he goes on,
>
> "32 years have gone by since our Constitution came into force and every year that passes increases the (advanced classes) sense of injustice and injury. The future will denounce.. the injustices suffered by members of the advanced classes since 1930." (p449).

Referring to the question of reservation in another case Seervai said:

> "Injury to public is that they have to deal with less able public servants. The injury to the State is a less efficient public service and the blame which government must shoulder for the shortcomings and blunders of its servants." (p392)

Almost as if in reply to this kind of blind prejudice Krishna Iyer J. said in the *Karmachari Sangh's* case:

> "The fundamental question arises as to what is merit and suitability. Elitists whose sympathies with the masses have dried up are, from the standard of Indian people least suitable to run government.. a sensitized heart and vibrant head, tuned to the ears of the people, will speedily quicken the developmental needs of the country, including its rural stretches and slum squalor... Unfortunately the very orientation of our selection process is distorted and those like the candidates of the SC and ST who from the very birth have had a traumatic understanding of the conditions of agrestic India have, in one sense, more capability than those who have lived under affluent circumstances and are callous to the human lot of the suffering masses. I divagate and make these observations only to debunk the exaggerated argument about harijans and girijans being substandards." (p448)

Education

In *A.V. Chandel's* case, the Delhi High Court held that education was a fundamental right. Seervai disagreed:

> "The major premise of the judgement that education is a fundamental right is so obviously wrong." (p562)

Working Class

In *Bijay Mills* case the Supreme Court held that the securing of living wages to labourers, which ensures not only their physical subsistence but also the maintenance of health and decency, was conducive to the general interest of the public and was in fact a Directive Principle of State Policy.... the fixation of mimimum wages was necessary to prevent exploitation of labour by employers and the interests of the general public required restriction on employer's fixing wages as low as they pleased. The inability of the employers to pay the amount required and their good intentions were irrelevant.

Seervai comments:

> "It is submitted that this case is illustrative of the unwillingness to criticise current dogmas in employer-employee relationships." (p-594)

Almost as if to admonish Seervai, the acting Chief Justice P. Subramanyam Poti and Justice T Chandrashekharan B. Menon of the Kerala High Court wrote in the case of the prisoners from the open prison, Nettukaltheri, as follows:-

> "The minimum wage laws of this country prescribe what minimum wage has to be paid in each industry. These minimum wages, it must be understood, are fixed at a much lower level than living wages. Irrespective of the capacity of the industry to pay, it has obligation to pay minimum wages and if it cannot pay even such minimum wage it does not deserve to exist." (p-33)

Parliament recently amended the Industrial Disputes Act to put restrictions on the rights of employers to close establishments (Section 25-0) and retrench workmen (Section 25-R), to grant certain benefits to the workmen and to secure the employment of workmen in the background of high levels of unemployment. The Supreme Court struck down these amendments. Seervai writes:

> "It is submitted that Section 25-0 and Section 25-R were rightly struck down as they placed unreasonable restrictions on the right to carry on business." (p546)

Waiver of Fundamental Rights

In *Basheshar Nath's* case the Supreme Court laid down for the first time that all fundamental rights are based on public policy and cannot be waived. In Indian conditions of economic and social backwardness and almost total ignorance of law it was deemed to be against public policy to permit waiver of fundamental rights and the State took upon itself the task of defending the fundamental rights of the poor even in the face of an apparent waiver.

Subha Rao J. held:

> "A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively they cannot be pitted against the state organisations and institutions, nor can they meet them on equal terms. In such circumstances, it is the duty of this court to protect their rights against themselves."

Seervai disagreed saying "if fundamental rights are primarily for the benefit of the person they can be waived."(p-257-Vol.II).

To be continued in the next isssue.

THE POLICE THE COURTS AND THE MINERS

The Miner's Strike in Britain in 1984 had the entire nation divided into two, for and against it. Henry Spooner writes from London on this unequal yet courageous fight of the miners against an Establishment and Judiciary which were united to crush their legitimate rights.

Henry Spooner

For some years now the police have been heard to complain loud and long that their powers are insufficient. A Criminal Evidence Bill which though killed off by the 1983 General Election is soon to be reincarnated. In between these two Bills came the 1984 Miners Strike which ironically demonstrated that no such Bill was ever needed. Perhaps a greater irony was that neither the Government nor the National Coal Board (NCB) opted to bring into play the considerable arsenal of anti-union legislation which they had been building up since their return to power in 1979. Instead, they chose to throw into the front line the police, armed supposedly with their inadequate powers in order to crush the most sustained and organised resistance to Thatcher's policies. From the police point of view, it was a success. How was it achieved?

It was done essentially by a two-stage operation:-

(1) The police taking full advantage of the somewhat ill-defined limits of police powers and hoping that if challenged by the Courts the latter would either acquiesce or at the very least look the other way. Such hopes were not to be disappointed.

(2) The police also taking full advantage of their position of being in control of the prosecution process. The process of legal proceedings became in effect more important than the outcome of the cases themselves.

The Use of Police Powers

The police operation was by no means confined to the pit villages. Anyone travelling in a vehicle often within a 100 mile radius of any of the coal mining areas was liable to be stopped and questioned. Stories about this, of people being stopped in absurd circumstances, for example, priests on their way to church were commonplace.

There was to be no argument. The pretext used for stopping people at random in this way was that there was a reasonable belief on the part of the police that the person was on his/her way to participate in violent picketing. If the police had any qualms about the reaction of the Courts to this practice, they were soon put to rest by Mr. Justice Skinner, who stated in a case involving the stopping of a convoy going towards a pit in Nottinghamshire, inter alia:-

The police, egged on by the Home Secretary, and supported, at times almost hysterically, by an overwhelming pro-Tory media, rapidly warmed to their task. A nationally co-ordinated police force under the thinly veiled guise of a National Reporting Centre was instituted and thus pit villages found themselves being inundated with vast numbers of policemen from all parts of the country. Many miners found themselves under house arrest and subject to fierce questioning whenever they attempted to emerge from their homes. Overnight, the whole apparatus of a police state had come into play. Any notions of local police forces being subjected to local control was swept aside in a tide of enthusiasm for the police operations

> "On the Justices findings of fact, anyone with knowledge of the current strike would realise that there was a substantial risk of an outbreak of violence. The mere presence of such a body of men at the junction in question and the context of the current situation in Nottinghamshire coalfield would have been enough to justify the police in taking preventive action. In reaching their conclusion, the police were bound to take into account all that they had heard and read and to exercise their judgement and common sense on that material as well as on the events that were taking place before their eyes."

Thus, the police were fully entitled, according to the Divisional Court, to "take into account all that they had heard and read" (From the Tory media) as well as the actual facts surrounding the particular case. The police were, in effect, given a *carte-blanche* to act much as they liked as far as its operation was concerned.

The police's apparent influences over the media was equally crucial in the "hearts and minds propaganda campaign". Nightly, the nation was treated to television reports which seemed to show that the pickets were in violent confrontation with the police. Yet during one of the big "riot trials" (Orgreave, 18th June 1984) it emerged clearly that television allowed itself to be shamefully manipulated by the police. Evidence at the trial from the police's own video showed that the thirst for violence was undoubtedly stimulated by the initial police charges, yet news coverage actually reversed the sequence so that miners defending themselves against police attacks were made to appear the aggressors. In other incidents, aggressive sounds of picketing were actually dubbed-in by news crews so as to give extra effects to the pictures.

The Police Control of Prosecution Process

The police's strategy towards the miners who actually got through to the picket outside the pit was greatly assisted by the police's control, both

over the arrest and prosecution procedures. Thus, not only were police able to effect mass arrests but were also, with the obliging assistance of the Magistrates Courts, able to impose rigorous and uniform bail conditions. Thus, the arrest and judicial process became more important than the outcome of the cases, many of which were not concluded until after the end of the miners strike.

Thousands of miners found themselves subjected to conditions which in effect forbade them from going to any other pit other than their local one for the purpose of picketing. Thus, the police were able, in effect, to control the movement of these people who had yet to be dealt with by the Courts. Special Magistrates Courts sitting were instituted to deal with the vast number of arrestees and they were dealt with in their droves, processed by the Courts in a sausage-machine like way. In every case, police would ask what became known as "usual bail conditions" which would invariably be granted by the lay-Magistrates and the Court Clerks had even written out these conditions and stapled them on the back of the bail form before the applications had been dealt with. When complaint about this was made to the Divisional Court, Lord Lane C.J. had this to say:-

> "By the time these Defendants appeared in the Court, it must have been clear to everyone and to the Magistrates in particular that any suggestion of peaceful picketing was a colourable pretence and it was question of picketing by intimidation and threat. It must have been obvious to all those participating in the picketing that their presence in large numbers was part of the intimidation and threats ... where large numbers of pickets assemble as they have been doing in the East Midlands Coalfield (EMC) the intention of trying to prevent working miners going to work by threats of violence and by force of numbers, there is no doubt that each of the picketing miners who is proved to be party to such intimidation and bullying is guilty at least of an offence under Section 5 of the 1936 Act. Against that background the Magistrates in our judgement were right to conclude that if no conditions were imposed, offences would be committed by these Defendants whilst on bail, they are right to conclude therefore that such a condition was necessary."

Thus, one of the most senior judges in the land had declared that any suggestion of peaceful picketing was "colourable pretence" and that the correct assumption to apply was that all the Defendants arrested in these circumstances will automatically commit further offences, if granted bail. Furthermore, it was apparently clear to them that their very presence would at least encourage others to violence. So much for the presumption of innocence! As for the practice of Clerks stapling the standard conditions to the bail form before the bail conditions were made, the following mild rebuke is given:-

> "However, whatever pressure a Court is subject to, the practice is one to be discouraged. Nor does it do the Bench credit if their Clerks continue to affix standard conditions to the bail forms even while applications are being made for unconditional bail as happened in some of the instant cases but the fact that the outcome of the application was correctly anticipated does not vitiate the decision."

Victorian Laws

The police's overall control of the way cases were to be processed could clearly be seen in the unearthing of old Common Law offences which most people (including lawyers) had long forgotten about. Thus Affray, Riot, and Unlawful Assembly staged remarkable judicial comebacks sending lawyers scurrying to decipher authorities laid down in the times of Queen Victoria and before. The great advantage to the police was that large numbers of miners could thus be charged with serious offences only before the Crown Courts, necessitating long delay and justifying rigorous bail conditions. The disadvantage to the police of Jury Trials (e.g. the Defence knowing in advance the Prosecution's case, the fact that a Jury and not a Judge or Magistrate deciding on the facts) would not manifest itself until, hopefully, the strike had been concluded. It was in this area that the police control of the Prosecution procedures was seen to its best advantage. In the shorter trials when there was a good chance the case would come up whilst the miners strike was still in progress, it was in the Prosecution's interests that the matter should be tried in the Magistrates Court rather than before a Jury. There was often then little attempt to deny by Prosecutors that their motives for charges to be reduced from Actual Bodily Harm, where there is a right of Jury, to one of Assault on Police (where there is not) was purely so as to deny the Defendants a Jury Trial. Thus the police could either "play it long" and go for mega-trials which necessitated long delays hopefully beyond the conclusion of the miners strike or "play it short" but ensure that trials co-existing with the miners strike would be before the Magistrates Court.

When the huge Affray, Riot and Unlawful Assembly cases did finally come before Juries, the results were indeed a fiasco for the police. Two huge trials revolving around the events of the Orgreave picket (18th June 1984) ended before they even reached the Juries. Another large trial centred on picketing at the Coal House in Doncaster ended with a Jury acquitting all 14 Defendants. In Mansfield, in Nottinghamshire, in a trial involving 18 people, 10 of whom were acquitted at half time, the remaining 8 were acquitted by the Jury after retiring for just 15 minutes at the end of a trial occupying some two and a half months. Virtually all the outstanding cases, both in Yorkshire and in Nottinghamshire, are now subject to review by the police and it seems almost certain that most of them will be abandoned. Over 200 miners have been processed by the Crown Courts on these charges and not one has been convicted by a Jury. The police now say that it is all the fault of these frightful old laws (which they were so keen to revive in the first place!) and are calling for changes!

A final irony, therefore, persists. In order to pass the Criminal Evidence Act of 1985 the police were obliged to throw some sops to the "civil liberty lobby". Also, a new "independent" police prosecution service is shortly to come into force. This, in theory, will take some of the influence away from the police as far as the prosecution process is concerned. The police may yet look wistfully back to the miners strike of 1984 and think there wasn't as much wrong with the old law as they at first thought. Ill-defined powers supported by acquiescent Courts may well reap for them more dividends than ones reduced to a more refined code.

Henry Spooner is a barrister working with the Wellington Street Chambers, a radical barristers' chamber in London.

HAZIR HAI

Justice P.B. Sawant

Justice Sawant of the High Court Bombay was one of the main organisers of the Progressive Law Association conference held recently in Bombay. We interviewed him on a large variety of subjects of general interest relating to the administration of justice.

***LC** . What would you characterise as the main defects of the justice delivery system?*

PBS. Ill-equipped and indifferent judges, self-interested lawyers, dilatory procedures and lawyer oriented as against litigant-oriented legal system are the main defects of our judicial system.

***LC** . Would you agree that the law as it stands today, both in its substantive and procedural aspects, is heavily weighted in favour of the 'haves' against the 'have-nots' though formally it treats all persons equally?*

PBS. In a social system such as the one we have, it is inevitable that both substantive and procedural laws should be weighted in favour of those who control it. The concepts of the Rule of Law and Democracy are themselves deceptive in such a society. Property is valued more than human beings and everything is sacrificed at the altar of profits. The values get perverted, since money is the only measure of all things in life. Unless the economic structure is changed, laws whether procedural or substantive, and their interpretation, will continue to be slanted in favour of the haves.

***LC** . Public interest litigation has been with us for the last nearly 10 years. Its proponents see it as a tool to remedy the imbalance in the unequal legal system. How do you evaluate its development over the last 10 years?*

PBS. As far as my information goes, the type of public interest litigation that we have developed in this country is unique in many respects. Through it the judiciary essentially exercises an executive power by requiring the State and the statutory bodies to discharge their obligatory duties. It is only to this extent that it can be said that it corrects the imbalance. However, when the imbalance is not between the State and the statutory authorities on the one hand and the citizens on the other, but between two individuals, it is, in its present state, powerless to correct the same. Public interest litigation should be welcomed by an enlightened executive as it is supplementary to its duties. It helps to set right the commissions and omissions of the executive and at the same time redresses the grievances of the citizens forthwith. Public interest litigation thus discharges the unique function of a watch-dog institution correcting the erring and defaulting administrative machinery while giving solace to the citizens. If properly shaped and developed it will help to cleanse and gear up the administration and to redress the legitimate grievances of the citizens. The instrument however has to be further chiselled, shaped and sharpened and the ground rules for its use have to be laid down lest it comes in conflict with the functions of the executive.

***LC** . Litigants facing big corporations, including public sector corporations, always find it difficult to have any access to information crucial for their case. Courts are also reluctant in ordering disclosure and cases are dismissed for want of adequate information. Do you think that a legislation of the type of "Freedom of Information Act" as existing in the U.S.A. and Australia is necessary in India?*

PBS. I am in favour of legislation on the lines of the Freedom of Information Act as in the United States and Australia. Pending the enactment of such legislation, the Courts should use their powers to give directions for discovery and inspection requiring the concerned Corporations to furnish all information that is necessary to adjudicate properly the matters before them.

***LC** . Suggestions have been made that in cases of violation of fundamental rights, the burdern to prove otherwise should always be on the State. What do you think of these suggestions? Would you agree that this principle can be extended in other cases also.?*

PBS. Whenever there is a violation not only of fundamental rights but any of the rights of the citizens, the burden to prove the contrary should be on the individual or the institution violating such rights. The State cannot be an exception to this rule. Every citizen is entitled to enjoy his rights uninhibitedly. The restrictions on the exercise of the rights can only be in the larger interests of the society and the larger interests have to be proved by those who profess them.

***LC** . Everybody agrees that delays are endemic in the legal system in our country. What are the causes? To what extent are the judges responsible for the delays and to what extent are the lawyers responsible? Will merely increasing the number of judges speed up the process? What would be your suggestions to curtail delays?*

PBS. The answer to these questions is incorporated in my first answer. To the extent that the judges are inadequately equipped and incompetent, they are responsible for the delays, but the lawyers who have only self-interest to serve are no less responsible for the same. The delays are inherent in the legal system in the present structure of the society. However even within the present structure, the delays can be curtailed by suitably modifying the procedures and attracting competent and socially responsible judges, and by adopting measures in the interests of the litigants, however detrimental they may be to the interests of the lawyers. A mere increase in the number of judges will not speed up the process of justicing.

HAZIR HAI

***LC** . What are the present salaries of H.C. Judges? It has been suggested time and again that the emoluments of judges are so unattractive that the best lawyers do not come forward to accept the position on the bench. What are your comments? Do you think increase in salaries will improve this situation?*

PBS. There is no doubt that a judge should be paid adequate emoluments both during his tenure as well as thereafter to ensure that competent lawyers join the Bench and serve the cause of the administration of justice without material worries. However, mere increase in the salaries will not attract good lawyers to the Bench. What is necessary is the all-round security and the provision of reasonable amenities even after retirement from service. Today only those lawyers accept judgeship who have other sources of income and who do not have to depend on the salaries for their maintenance. If this continues, in time to come, the result will be that most of them will be drawn from the rentier class which is interested in the maintenance of the status quo.

***LC** . What is your opinion of the method of appointment of judges? Would you agree that the process is shrouded in secrecy and undemocratic? What would be the criteria for appointing judges of Constitution Courts, namely the High Courts and the Supreme Court?*

PBS. The appointment of judges should be made not on the basis of the income at the bar but on the basis of their competence as lawyers and their commitment to the Constitution. A lawyer who has no commitment to the Constitution, however brilliant and prosperous in practice, should be scrupulously avoided for appointment as a judge at any level and more so at the level of the High Court and the Supreme Court. Any method which ensures the appointment of persons who are competent and committed to the Constitution should be welcomed.

***LC** . Allegations of corruption in the judiciary are growing day by day. What can be done to restore confidence of the litigants? Would you recommend the formulation of a Code of Conduct for judges?*

PBS. There is a need of a Code of Conduct for judges, and this Code should be strictly enforced. Corruption can be both patent and latent. The latent corruption creeps in when people favour economic interests in the promotion of which they have a stake.

***LC** . The quality of work of Government pleaders leaves much to be desired. What are the causes for this? Is it, as has been suggested, because rates of renumeration paid to them are low, or is there something fundamentally wrong with the way they are selected?*

PBS. The Government lawyers are seldom selected on the basis of their competence. Most appointments are made for extraneous reasons. A mere increase in the rates of remuneration paid to them without ensuring that the best of the talent committed to the Government policy is recruited to the Government side will not improve the quality of the work put in on behalf of the Government. There is no doubt that in the matter of payment to their lawyers, the Government is practising a pennywise and pound-foolish policy. There are many competent lawyers who are prepared to take up the Government work provided they are paid adequately and promptly. They do not desire fabulous fees but a reasonable remuneration which will ensure to them a decent standard of living. Government can attract good talent to plead their cases by devising a proper mode of recruitment of and ensuring remuneration to their lawyers.

***LC** . What is your experience with the ethics of the legal profession? To what extent do lawyers play their rightful role as officers of the Court? Are there any effective sanctions against professional misconduct? Have the Bar Councils played their role in setting and enforcing norms of proper conduct amongst lawyers?*

PBS. The legal profession today is not practised as a service profession but mostly as a business enterprise. The profession has been commercialised with a consequent commercialisation of its ethics. Money is the only God that lawyers know and most of them stoop to any level to earn their fees. In the quest for money, some of the lawyers do not hesitate to indulge in unprofessional conduct and even to play a fraud on the litigants and the Courts. The Courts have some powers even today to take action against the erring lawyers. They should, however, be vested with more powers for the purpose. The Bar Councils have by and large taken action against their erring members. But such actions by their very nature are taken only when complaints come before them. As against the few complaints which reach them, there are many which remain uninvestigated.

***LC** . You have been associated with the Progressive Law Association. Can you tell us something more about it? Critics say that no progress can be made by having such diverse points of view, often antithetical to each other in an Association like the PLA. Comment?*

PBS. The Progressive Law Association has been founded to attain the goals of:-

(a) Socialism, secularism and democracy in practice.

(b) Equality, social and economic, liberty and justice, and

(c) Ensuring speedy justice cheaply, consistent with the Constitution and make people aware of their rights.

In short, the PLA has been organized to break the present stalemate and the status quo and to move towards a change. It is only those who are committed to the above objects who can become members of the PLA. There is, therefore, no question of having diverse or antithetical points of view as far as the objects of the Association are concerned. It is possible that diverse measures may be suggested to translate the aforesaid objects into practice. That is not only inevitable but should be welcomed.

It is only through discussion and debate that the best solution can be found out. The prospect of diverse views on the means to be employed should not deter us from forming such organizations, unless we expect an association of the yes-men. Even in an organization of individuals closely knit together by an ideology,differences on views on the best means to be employed to attain the objectives cannot be ruled out. In fact such differences do exist. The most important thing is to bring together all those who are agreed on the ends to be achieved.

Published by Mihir Desai for Lawyers Collective, 818, Stock Exchange Towers, Dalal Street Bombay 400 023, Phototypeset at Fotocomp System, 42, Karim Chambers, Ambalal Doshi Marg, Bombay 400 023, Designed by: Satish Kulkarni and Printed at Selprint, A to Z Industrial Estate, Fergusson Road, Bombay 400 013.