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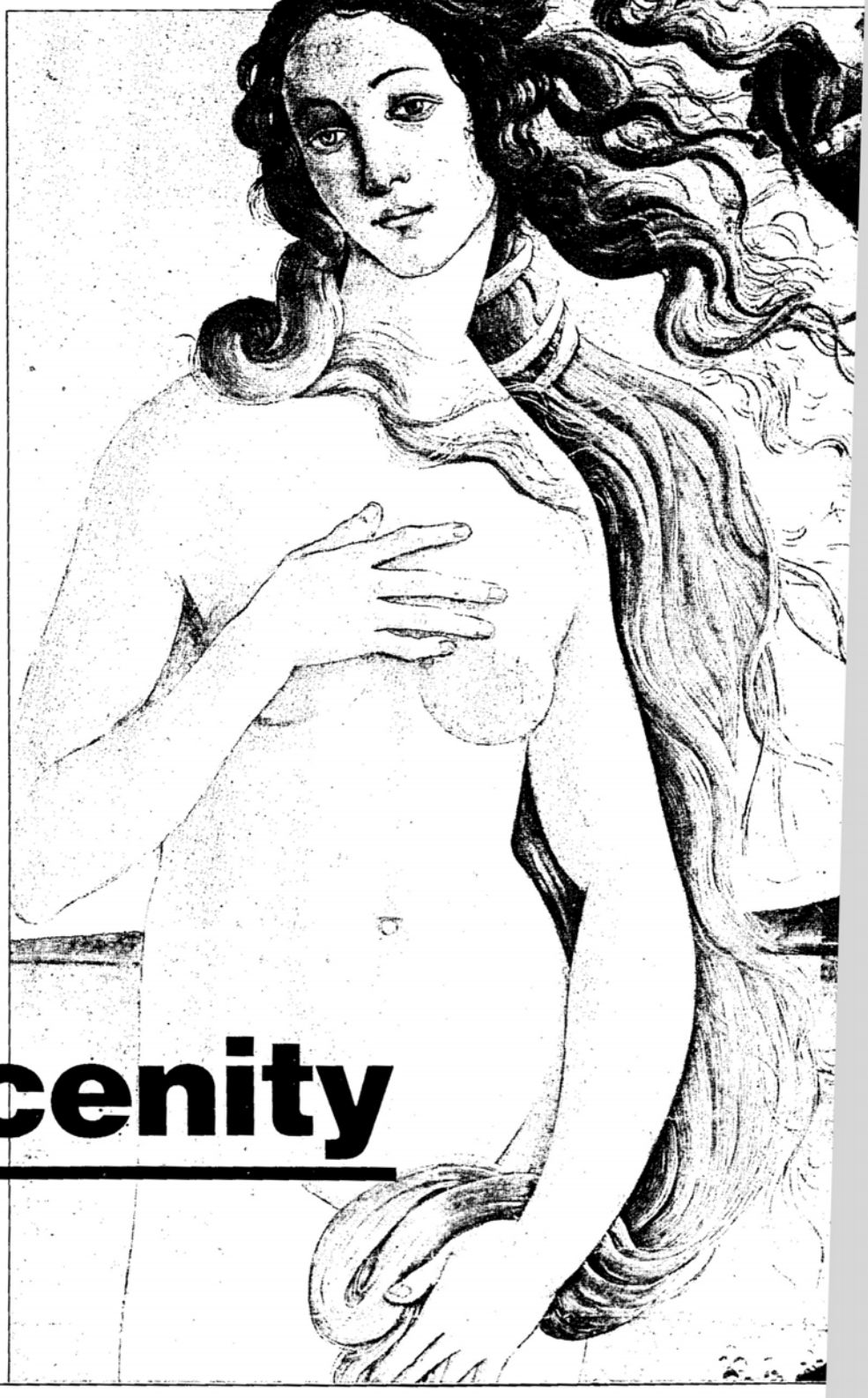
FROM THE LAWYERS COLLECTIVE



The Law of Obscenity

EDITORIAL

The Minister - Builder

While the illegal deals of the Bombay builders continue to make headlines and attract the attention of tax enforcement agencies, the land grab of the Minister Builder has escaped notice.

According to a report appearing in the Telegraph, Law Minister Asoke Sen is a partner in a real estate firm, Penn Properties, along with his wife Anjana Sen, his daughters Krishna Sen and Shyamali Sen, and his son Anindya Sen. The firm purchased two adjoining plots of land which were later amalgamated. A 22 - storey building was constructed on the northern end of the plot. In April 1986, work was started on another building at the southern end.

Residents of the 22-storey building noticed that the new construction was encroaching on their territory and took the matter to court. The Corporation was directed to enquire into the allegations of land grab.

The Deputy Commissioner has now given his report revoking the plan stating that the developers had shown an excess floor area of about 10,000 sq.ft. The report states that," if the facts had been disclosed by Penn Properties, the Municipal Commissioner would not have given his sanction.

Only in a country like India can a Law Minister continue in office after a land grab scandal to his credit.

While the Law Minister-Builder's land grab passes without notice, pavement dwellers, the poorest of the poor, continue to be hounded out of the cities as "encroachers", "trespassers" and a "nuisance."

Immediately after the July 1985 Supreme Court judgement in the Bombay Pavement Dwellers case sanctioning the eviction of pavement dwellers, I had occasion to ask the Law Minister whether the Government would consider legislation to protect them from eviction. His reply was that they were thieves, crooks and trespassers, and deserved to be thrown out.

One wonders whether he would like the same adjectives applied to him that he uses for the pavement dwellers.

Indira Jaising

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Vol. 1 No.10

Editor
Indira Jaising

LETTERS

An Open Appeal To The CJ

The Hon'ble Mr. Chief Justice Kania and other Puisne Judges of the High Court of Judicature at Bombay.

I have been trying for the last many years to campaign for a separate labour bench in the High Court of Bombay for speedy and expeditous disposal of labour matters. The Supreme Court has in fact directed the High Courts to dispose of labour matters within one year [1975 S C C (L S) 460, *Mahabir Jute Mills Ltd. V. S. L. Saxena]*. In the judgement delivered by Mr. Justice Fazal Ali on behalf of the 4 judges-bench, the Court observed:

> "We are constrained to observe that labour matters should have been given top urgency and should not have been allowed to be prolonged for such a long period in the High Court, otherwise the inordinate delay results in a situation, causing embarrassment both to the Court and to the parties. It is, therefore, very necessary and in the fitness of things that such matters should be given top priority and should be disposed of by the High Court within a year of the presentation of the Petition"

This rarely happens. I was told by the 2 former Chief Justices and the Government of Maharashtra, that it was not feasible to have a separate labour bench " at present". The labour matters of 1980-1981 onwards are pending and in all such matters the workers have been out of employment from 1975 onwards. Many have been virtually ruined. Many have their daughters grown up and are ready for marriage. Others have asked their school going children to take up some small jobs. Many have told their wives to accept domestic work. Some are not even alive to see the result of their litigation. Such consequences do not follow in other branches of litigation. In these circumstances, I suggest that: (a) all the labour matters for final hearing may be given top priority according to their respective year of filing (b) All such matters may be kept on the board of this Hon'ble Court and the board may be called "Labour Board" (c) The Labour Board may be taken up exclusively at least for 3 days in a week in the begining till some matters are disposed off (e) After some time the number of Labour Board days may be reduced to 2.

If a Labour Bench is not possible, the system I have suggested above is surely possible. This would reduce hardship to labour and enhance its hopes of social justice.

Rajan Kochar,
Advocate, Bombay.

Restoration of Tribal Lands

Mr. Suryawanshi in his article (Sept.86) mentions that tribals are not able to take advantage of their rights as they are illiterate. This is not correct. I have been associated with the litigation relating to restoration of tribal lands on behalf of the Government, first in the High Court and then in the Supreme Court. This delayed the implementation by 10 years. However, the administration of the Maharashtra Act has proved to be a boon to adivasis. Figures published by the Commissioner for Scheduled Tribes indicate that a large amount of land has been restored to tribals, as is evident from the following table:

	hectares
Total area covered by the Act	38,786
Total land restored to tribals	24,766
Total number of cases registered	47,332
Total number of adivasis to whom land has been restored	22,252
Land to be restored	14,020

Justice Pratap heard several pending petitions in January-February, 1985 clearing the way for restorations of several thousands of hectares of land to tribals.

It is unfortunate that the challenge to the proviso to section 34 Maharashtra Land Revenue code is still pending in the Supreme Court.

M. B. Mehere
Advocate, Bombay

Death Penalty

In awarding the death penalty for murder under Section 302 IPC,the judge has to place the case in the "rarest of the rare" category. Unfortunately, this phrase "rarest of the rare" has nowhere been defined. This has resulted in arbitrary and injudicious punishments. While the assassination of statesmen is anything but rare, Satwant Singh was awarded the death penalty, while the murderer of my son, B.B. Agnihotri, a Food Inspector on 1.3.83, Subhash Jain, a Kirana shopwala in Raipur Borwani of M.P., was punished with only life imprisonment.

To add insult to injury, Subhash Jain escaped from the Indore Central Jail in March 1986 using forged release order papers, allegedly prepared by his father, Deepchand Jain. Over six months have passed but he has not been apprehended despite a reference being made in the Supreme Court.

This emboldened the father, Deepchand Jain, who in mid September, 1986 made an application to the S. P., Indore that he may not be harassed by the police for providing clues to trace his son. Jain further promised that in 2 months time he would surrender his son, the escapee convict. Shockingly, the S.P. agreed and the Jain family is today free of any police pressure although they clearly know about the whereabouts of their son.

Thus,in our country the powerful can kill government inspectors on duty, get light punishment from the courts, escape from prison and remain immune to police enquiries. This is the India we live in to-day.

Shri Agnihotri,
Indore, M.P.

Inspection of Courts

It appears from your article on "Proposed changes in Tax Laws" (The Lawyers, September 1986 issue) that the Government is now keen on recovering tax dues. If the Government is really interested in enhancing its revenue collection it must crack down on those judicial officers, who through registrars and puppet advocates carry on a side business in granting abnormal stay orders.

There are many mal-practices prevailing in the administration of justice. To check the irregularities, the Government must appoint a high powered inspection commitee to inspect any court without giving any notice. The Judicial Department is the only department where no checking exists and that is the main reason for the arrears, chaos and corruption that plagues the courts.

V. M. Chabra
Advocate
Nandurbar, Dhule

COVER STORY

Obscenity - the use and abuse of the law.

The suit filed by J.B. Patnaik, Chief Minister of Orissa, against the Weekly for unprecedented damages of one crore rupees as well as criminal complaints registered by the Orissa police under section 292 (obscenity) I.P.C. against it for publishing articles dealing with the private life of J.B. Patnaik, shows how the legal process can be abused. This assumes importance in the context of the Indecent Representation of Women Bill pending in Parliament. **Indira Jaising** *discusses the Weekly case in the context of the law relating to obscenity.*

Margaret Alva Protecting womens rights

In August 1986, Margaret Alva introduced a Bill in the Rajya Sabha known as the Indecent Representation of Women (Protection) Bill. It seeks to prevent the depiction of the figure of a woman in a manner which is derogatory or denigrating to women, or which is likely to corrupt public morality. Presumably, the proposed new law is intended to ensure that women are not used as sexual objects for commercial gain, for example, to sell cigarettes and alcohol. Though the object is laudable, the proposed new law is likely to spark off a major controversy among civil libertarians over the draconian powers conferred on the police to prevent "indecent representations" in advertisements, books, paintings, or films.

Obscenity and Indecent Representation

The definition in the proposed bill confuses the two related but separate concepts of "indecency" and "obscenity", both of which are forms of censorship over conduct which is considered socially undesirable. Laws prohibiting **"obscenity" punish conduct which is considered immoral and corrupting,** whereas laws which seek to prevent **"indecent representation" seek to prevent public nuisance, and an affront to civic sense of aesthetic propriety.** The distinction is vital. While obscenity laws seek to protect people against themselves, the law relating to "indecent representation" protects the liberty of a person to live free from interference of public displays of what is offensive and indecent to them. Legal controls of indecent representation are more likely to gain popular acceptance than controls of what is considered obscene. This is because the concept of obscenity is essentially a moral one and incapable of precise definition.

In India, the statutory definition of obscenity is contained in Section 292 of the Indian Penal Code (IPC). A writing or representation is considered obscene if it is lascivious or appeals to the prurient interest or if its effect is such that it tends to deprave or corrupt the persons who are likely to read or see it. The predominent characteristic of the definition is its vagueness. For no one has yet been able to define what it is that has a "tendency to deprave and corrupt". In the legal free-for-all, it means what one or two judges hearing a trial decide what is meant by it. No scientific or sociologically accepted definition of what is depraved or corrupting yet exists. The history of obscenity trials indicates that anything which is sexually explicit has been considered obscene, without saying anything more. It is unfortunate that the definition of "indecent representation" which the new law seeks to introduce, confuses between the concept of "indecency", which need not carry any moral overtones, and "obscenity" by introducing the test of "anything that which tends to deprave and corrupt".

The vagueness of the law tends to create abuse of the legal process. In England, in the seventies, the underground press, *International Times* and *OZ* were prosecuted under obscenity laws, but prosecutions were motivated by a dislike for the radical views that the editors of these publications held. The aquittal of the editors at the end of widely publicised trials did nothing for the law except make people lose all respect for it.

The Illustrated Weekly Case

The new Bill assumes importance in the context of the case under section 292 of the Indian Penal Code registered by the Bhubaneswar Police against Pritish Nandy, Editor of the *Illustrated Weekly of India*, in respect of an article describing the alleged sexual aberrations of the Chief Minister of Orrisa, J.B. Patnaik.

In its issue dated 18-24 May, 1986, the *Illustrated Weekly* published an article which it claimed exposed the "systematic sexual exploitation of vulnerable men and women" by the Chief Minister of the State, J.B. Patnaik. The obvious inferences to be drawn from the article were that the Chief Minister was misusing his public office to exploit men and women seeking jobs or other favours. If allegations of sexual abuse of the people with whom Patnaik comes into contact are correct, it is in the public interest to publish them. So damaging were the allegations to Patnaik that he was expected to take action against the authors of the article to protect his reputation. A suit for defamation would have been the obvious remedy. Yet, although the article was published in May, no such suit was filed till 27th June, 1986.

In the meantime, several criminal complaints were lodged in different Magistrates' Courts all over Orissa by

various individuals and also the police. These complaints were under Section 292 of the IPC (obscenity). On the 27th June, 1986, the Chief Minister finally filed a suit at Bhubaneshwar for defamation against the editor and publishers of the Illustrated Weekly, claiming damages of one crore rupees and an injunction restraining publication of any further libels and defamatory statements against him. In his suit he alleged that the article of 18-24th May contained statements which were patently false, fabricated, abusive, scandalous and defamatory. Mr. Patnaik alleges that the story offended all standards of journalistic ethics and public morals and was "designed and intended to degrade and dishonour a public man of high standing in the estimate of the people". Patnaik claims aggravated damages without proof of loss as the publication constitutes "libel per se". The Chief Minister obtained an ad-interim order in the suit on 1.7.1986, restraining the Weekly from publishing any further defamatory material. Opposing the application for an ad-interim injunction, the Defendants argued that no injunction should be granted as the allegations were true. They also argued that they intended to justify the publication and that it was a fair comment on the activities of a man who holds public office. Rejecting these arguments, Judge M.P.Mishra decided: "since each citizen is presumed to be of good moral character, I am of the opinion that the Petitioner has a prima-facie case". This is an amazing proposition, as there is no known presumption in law that every citizen is of "good moral character".

Affidavits of proof

To justify that an injunction should not be granted as the defendants intended to justify the publication he said: "They have not intimated to the Court that the defamatory article, if any, that they are going to publish is justified and the allegations made therein are true". But that is precisely the opportunity that they were seeking which was denied. After the ad-interim injunction was granted, the defendants filed an application to vacate it. To their application they annexed two affidavits by persons stating that they had been sexually abused and exploited by the Chief Minister. What came through very clearly was the allegation that the Chief Minister was misusing his office to exploit and abuse persons in need of jobs or other favours. These affidavits were also published in the issue of the Weekly dated 3-9 August 1986. The Weekly exercised a form of self-censorship while publishing the affidavit. Though the originals contained details of the Chief Minister's alleged sexual perversity, the published versions omitted the details with the note "Obscene detail of oral sex deleted, Editor".

Pre-publication ban

J.B. Patnaik once again applied for an order banning publication of the affidavits, but this time, asked for the ban to be extended to all newspapers and publications all over the country. Patnaik also asked for proceedings to be held in camera. On 11th August 1986, the Court passed an order which is highly unusual, to say the least. The Court ordered that "further publication of Annexure B (the two affidavits already published in the issue dated 3-9 August) or any reference to the obscene contents thereof or any reproduction in any form whatsoever cannot be made in any newspaper, journal, book or pamphlet". This effectively put an end to any further discussion on J.B. Patnaik's alleged sexual perversions and misuse of public office for personal gain.

It is surprising that such a pre-publication injunction was granted, as the law relating to pre-publication is well settled. When the author pleads justification, such an injunction is not granted. In other words, if the author defends a defamation suit by saying that what he has published is true and that it is a fair comment, injunctions restraining publication are not granted. This is because the public interest in the publication of true facts is of great importance [See *Fraser V Evans* (1969) 1 ALL E.R.8]. In this case, the Weekly did file a reply in which they substantiated the story and said they intended to prove the truth of the statements. It is surprising that an injunction was granted at all, preventing all further publication.

Seizure of copies

In the meantime, the police lodged

J.B.Patnaik Gagging the press

a complaint that the issue of the Weekly dated 3-9 August 1986 contained obscene material and that, therefore, an offence had been committed under section 292. The complaint was lodged even without opening the parcels containing the *Weekly* and all copies were seized and confiscated from Railway Stations immediately on their arrival in Orissa. Copies of the very same issue were freely circulating in all other parts of the country.

The *Weekly* applied to the S.D.J.M., Bhubaneshwar, to return the seized copies. They argued that there was nothing obscene about the publication of the affidavits filed in Court. However, whether by coincidence or by design, the very same issue of the *Weekly* had also reproduced photographs by Swapan Mukerji of semi-nude women. Surprisingly, the Magistrate refused to release the seized magazine on the ground that "the photographs printed on page 36, 37, 38 and 39 (of semi-nude women) were obscene, highly lascivious and appealing to the prurient interest and the sum total of its effect tends to deprave and corrupt persons who are likely to read it". The order also mentions that the affidavits reproduced at pages 22 and 23 of the Weekly are obscene in nature.

It is, therefore, not very clear from the order whether the magazine was seized because of Swapan Mukerji's photographs or the affidavits. Whatever be the reason, the law of obscenity became a convenient tool to put out of circulation any discussion on J.B. Patnaik's activities.

Discussion Scuttled

The circumstances surrounding the

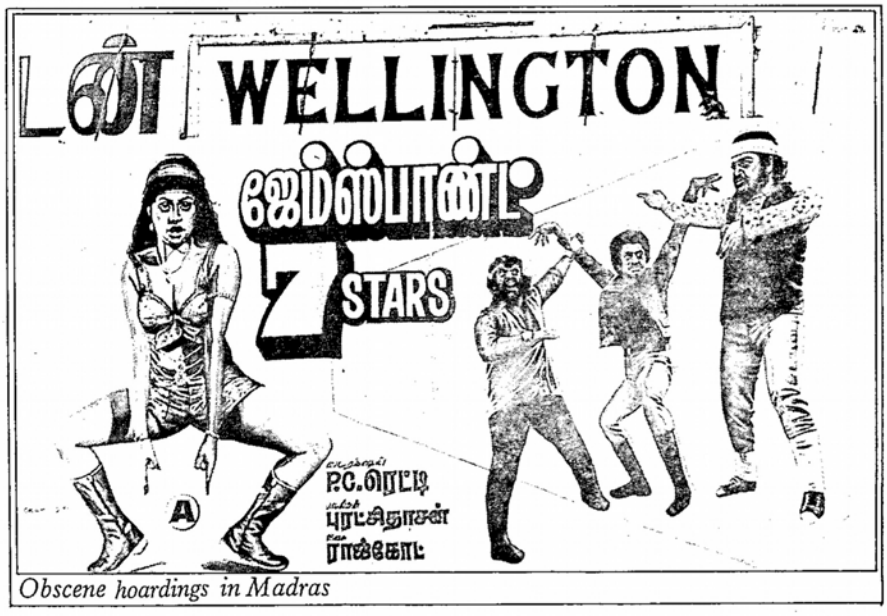
civil and criminal proceedings indicate clearly that the civil and criminal law has been set in motion only to scuttle discussion of a subject of public importance. Both the civil and criminal cases raise issues of far reaching importance. The trial in the criminal court is likely to call into question the entire law relating to obscenity. It has often been said that obscenity lies in the beholders eye. As a consequence, convictions are dependent on the individual views of judges. In *Ranjit V State of Maharashtra* (AIR 1965 SC 881) a case relating to D.H. Lawrence's *Lady Chatterley's Lover,* it was argued by the publishers that Section 294 violated the right to free speech guaranteed under Article 19(1)(a) of the Constitution. This argument was rejected. The Supreme Court, was however, clearly unable to give a precise definition of "obscenity". Apart from saying that the test of obscenity is the tendency of the matter to deprave and corrupt those whose minds are open to immoral influences, no attempt was made to explain what was meant by "deprave" , "corrupt" or "immoral". The Court took the easy way out by saying "it will always remain a question to decide in each case".

All that this means is that the Court is the best judge of what is obscene and what is not. Mr. Justice Hidayatullah,

Obscene Hoardings in Tamil Nadu

In 1986, the State of Tamil Nadu passed a law to take over all public hoardings. The purpose of the law was "to prevent haphazard growth of hoardings." The Act has been challenged by private owners and advertisers as being violative of their right to carry on business.

Several public interest groups have welcomed the new law but maintain that it does not go far enough. Taking over hoardings is not an end in itself, they argue. The Tamil Nadu Joint Action Council for Women has filed a petition in Court supporting the new law but asking the Court to direct the Government to frame a scheme to regulate the content of the hoardings. It is not the ownership of the hoardings alone that is relevant but the contents that are objectionable. Since 1979 they have been trying to persuade the



Obscene hoardings in Madras

Government to prevent obscene representation of women on hoardings, without much success.

They expect the new law to prevent the exploitation of the image of women in the advertising and publicity media. The new law has done nothing but create a monopoly in hoardings in the Government, without altering the obscene content of the hoardings. The Joint Action Council would like the new law to cover wall posters also.

Hoardings in Tamil Nadu are notoriously large and obscene. The nexus between the film world and the politicians has made any regulation of the content of the advertisements impossible. Ironically, the new law which is intended to ensure that public hoardings are not a public nuisance, has changed nothing at all. It is as if all that has happened is that the ownership of obscene hoardings has changed hands. Not one advertisement or hoarding has been changed or removed after the new law came into force.

Consumer Action Groups have also approached the Court protesting that the new law has not succeeded in checking the size or content of indiscriminately large hoardings, ruining the aesthetic value of the city and worsening environmental standards.

While private advertisers and womens' organizations continue to be divided over the issue, the Government appears unconcerned about the dignity of women. It 's business as usual for the film world, the largest single owners of the hoardings.

who wrote the judgement, found *Lady Chatterley's Lover* obscene "as it treated sex in a manner offensive to public decency and morality judged of by our national standards and considered likely to pander to lascivious prurient or sexually precocious minds". Explaining, the Court said that, "the law seeks to protect not those who can protect themselves but those whose prurient minds take delight in secret sexual pleasure from erotic writings".

It is difficult to understand the basis of this judgement but the underlying assumption seems to be that anything which is sexually explicit is obscene.

Obscenity equated with sex

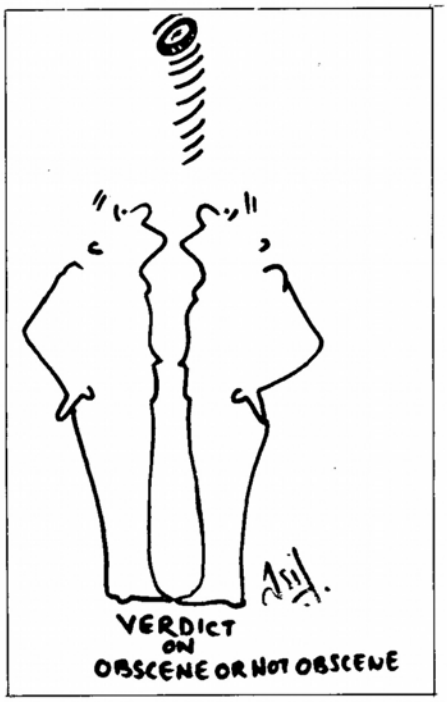
Unfortunately, this is implicit in the definition of obscenity under section 292 itself. For anything is obscene if it is lascivious (i.e. lustful, desire for sexual indulgence) or if it appeals to the prurient interest [giving to or arising from indulgence in lewd (lustful) thought].This concept of obscenity is a nineteenth century christian concept according to which anything to do with sex is dirty and obscene. To treat a natural instinct, such as sex, as obscene is obviously outdated. The fundamental basis of obscenity is, therefore, unsustainable.

Today, therefore, the attention has shifted to treating those acts as obscene which depict sex with crime or violence or depict women in humiliating circumstances. This is what the Indianapolis ordinance, enacted at the instance of feminists, attempted to do. Unfortunately, this was struck down by the Supreme Court.

Ranjit Mahanty, who is representing the Weekly in the defamation case, feels that times have changed and it is doubtful whether the Court would today consider such a book obscene.

A recent case decided by the Supreme Court does indicate that a liberalisation of attitudes has occured. In *Samaresh Bose V Amal Nitra* (AIR 1986 SC P. 967) the Supreme Court held that a novel written by a well known writer which was intended to expose various evils and ills pervading society cannot be said to be obscene only because slang and unconventional words have been used, in which there is an emphasis on sex and description of the female body. The Court explained that portions of the book may appear to be vulgar to persons of refined taste who may feel shocked and disgusted, but that was not the test of obscenity. The Court distinguished between vulgar and the obscene and said that what is vulgar does not necessarily corrupt the morals but obscenity does.

This case illustrates how different judges can form different opinions on the same subject. While the High Court judge thought that the description of the female anatomy offered as literature for the general public remained obscene, the Supreme Court judges did not think so. What the High Court considered obscene, the Supreme Court found merely vulgar and in bad taste, but not obscene. Though this decision liberalises attitudes towards depiction of sex in literature, it still does not clarify the definition of obscenity.



The act and its publication

Moreover, whereas a particular act may be obscene the depiction of it may not be. This distinction was well brought out by Richard Neville Co-editor of *OZ*, in his cross-examination in a trial for obscenity. He explained that "a man actually urinating in court is indecent. We all agree on that, but a drawing of a man urinating in court need not be indecent. A drawing does not smell, does not trickle over the exhibits, does not wet the lawyers' shoes and splash over the court papers and make the ushers work overtime to clean it up. This is what makes urination in court indecent and offensive". Yet the prosecution have time and again failed to make the elementary distinction between portraying an indecent action and the indecent action itself.

The J.B. Patnaik case, both civil and criminal, will decide several important issues. To what extent is it permissible for journalists to write that the private lives of public officials are in the public interest without being sued for defamation? To what extent are courts justified in granting prepublications injunctions? Do such injunctions not constitute a serious violation of free speech and expression? Does the public not have a right to know about the private lives of politicians in so far as they are relevant to their public activities?

Precision in definition required

In the context of the recent experience, the proposed new law requires serious reconsideration. The extent to which the purpose of the law is achieved depends on its manner and method of implementation. That the Weekly should be prosecuted for exposing J.B. Patnaik while the pavements are cluttered with thousands of hard core pornographic magazines is nothing short of laughable. At a time when a new law is sought to be introduced in Parliament, which gives draconian powers to the police to enter homes and seize materials, a more precise definition of "indecent representation" is required.

Will we continue to see women in suggestive postures being used to sell cigarettes and alcohol or will that be indecent? Will Hindi films which are today subject to censorship laws continue to mix sex and violence as the formula for success? Will contemporary society continue to assert the subordinate position of women as a desirable state? Indecent attiudes towards women entail their treatment as sexual objects to be exploited for commercial gain. Perpetuating sexual false stereotypes is indecent and not sexual explicitness by itself. Today's obscenities are not the same as yesterday's. It is violence, castism, communalism and sex discrimination that are obscene.

Obscenity law in other countries

There is hardly a country in the world that has succeeded in defining obscenity or banishing it legally.

In 1967-68, **Denmark** lifted all legal control on sexual explicitness. No corresponding decline in public morals was observed. This leads one to the conclusion that there is no causal connection between literature and depravity. Hardly any satisfactory alternatives to the vague law of obscenity exist. Some nations have decriminalised the offence and replaced it with administrative systems of censorship. This at least has the merit of certainty. Several European countries have resolved the problem by abolishing obscenity and maintaining laws against public display. By this method they have sought to balance the competing values of liberty and privacy.

In **England,** law reformers have not favoured the abolition of the offence but suggested more precise definitions which include 'indecent', 'outraging the recognised standards of propriety', 'undue emphasis on sex', 'grossly affronting contemporary standards of decency', 'appealing to lewd and filthy interest in sex' and 'depicting sexually criminal acts'. Yet none of these suggested definitions is any more precise than 'tendency to corrupt' and will be liable to the same kind of abuse and misuse. The problem of obscenity does not admit of a ready made legal solution. Geoffrey Robertson believes that in England a large measure of liberty can be preserved if the Obscene Publications Act, 1959 is repealed and replaced by a system of licences.

The **Canadian** Criminal Code defines obscenity as 'undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence'.

In **New Zealand,** the Indecent Publication Tribunal is empowered to classify reading material as unsuitable for sale to persons below eighteen. 'Indecency' is defined as 'describing, depicting, expressing or otherwise dealing with matters of sex, horror, crime, cruelty or violence in a manner injurious to public good'. The hearings of the Tribunal are public. Expert evidence is also permitted. A right of appeal against the decision is provided.

In certain **Australian** States obscenity has been decriminalised and a classification system introduced. Criminal law is confined to those who induce children to participate in indecent activities.

Under current **United States** Supreme Court decisions, 'Obscenity' is defined as that which "taken as a whole, appeals to the prurient interest, must contain patently offensive depictions or descriptions of specific sexual conduct, and on the whole have no serious literary, artistic, political or scientific value". Such 'obscenity' is not protected by the Constitution's guarantee of freedom of expression. However, the vagueness of this definition has led to uneven case-by-case applications that primarily turn on the individual views of the judge involved.

Boticelli's Venus-obscene?

Frustrated by the ineffectiveness of this definition in curbing the spread of sexually degrading advertising and hard core pornography in the United States, American womens' organizations and feminists have fought hard in recent years to pass an innovative statute that attempts to outlaw what it defines as "pornography". The city of Indianapolis, Indiana, was one of the first to pass the statute in the form of a municipal ordinance. The statute defines "pornography" as "the graphically sexually explicit subordination of women, whether in pictures or in words," if it showed them enjoying "pain or humility" or in "positions of servility or submission or display," among other things. The Indianapolis law did not make the creation, distribution or use of pornography a crime, but rather created a system of civil penalties and cease and desist orders, and gave women and others a right to sue for damages for assault and other harms said to be caused by pornography. Unlike the Supreme Court definition of obscenity, the law made no reference to prurient interest or offensiveness and no consideration of the work as a whole.

The ordinance was quickly challenged by civil libertarians and book publishers as a violation of the Constitutional right to freedom of expression. In an unusual coalition, conservatives and religious groups joined feminists in its support. In February 1986, the Supreme Court unfortunately affirmed without opinion lower court decisions that had struck down the statute as an unconstitutional violation of freedom of expression guaranteed under the First Amendment. The Court's decision to issue a summary affirmation of the lower court decisions is somewhat unusual, and allows future courts to interpret its ruling narrowly. This reflects the Court's own uncertainity and ambivalence on this difficult issue.

NOTICE BOARD

The Indecent Representation of Women (Prohibition) Bill 1986

As introduced in Rajya Sabha
20th August 1986
Bill No. XXVIII of 1986

A Bill

to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows :-

1. Short title, extent and commencement: (1) This Act may be called the Indecent Representation of Women (Prohibition) Act, 1986.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions: In this Act, unless the context otherwise requires.

(a) "advertisement" includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas;

(b) "distribution" includes distribution by way of samples whether free or otherwise;

(c) "indecent representation of women" means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or of being derogatory or denigrating women or is likely to deprave, corrupt or injure the public morality or morals of any person or persons of any class or age group notwithstanding that persons in any other class or age group may not be similarly affected;

(d) "label" means any written, marked, stamped, printed or graphic matter, affixed to, or appearing upon, any package;

(e) "package" includes a box, carton, tin or other container;

(f) "prescribed" means prescribed by rules made under this Act.

3. Prohibition of advertisements containing indecent representation of women: No person shall publish or cause to be published, or arrange or take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form.

4. Prohibition of publication or sending by post of books, pamphlets etc., containing indecent representation of women: No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.

Provided that nothing in this section shall apply to —

(a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure —

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used *bona fide* for religious purposes;

(b) any representation, sculpture, engraved, painted or otherwise represented on or in —

(i) any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958); or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose;

(c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952) will be applicable.

5. Powers to enter and search: (1) Subject to such rules as may be prescribed, any Gazetted Officer authorised by the State Government may, within the local limits of the area for which he is so authorised:

(a) enter and search at all reasonable times, with such assistance, if any, as he considers necessary, any place in which he has reason to believe that an offence under this Act has been or is being committed;

(b) seize any advertisement or any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which he has reason to believe contravenes any of the provisions of this Act;

(c) examine any record, register, document or any other material object found in any place mentioned in clause (a) and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act;

Provided that no entry under this sub-section shall be made into a private dwelling house without a warrant;

Provided further that the power of seizure under this clause may be exercised in respect of any document, article or thing which contains any such advertisement, including the contents, if any, of such document, article or thing if the advertisement cannot be separated by reason of its being embossed or otherwise from such document, article or thing without affecting the integrity, utility or saleable value thereof.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall so far as may be, apply to any search or seizure under this Act as they apply to any search or seizure made under the authority of a warrant issued under section 94 of the said Code.

(3) Where any person seizes anything under clause (b) or clause (c) of sub-section (1), he shall, as soon as may be, inform the nearest Magistrate and take his orders as to the custody thereof.

6. Penalty: Any person who contravenes the provisions of section 3 or section 4 shall be punishable on first conviction with imprisonment; of either description for a term which may extend to two years, and with fine which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees.

7. Offences by Companies: (1) Where an offence under this Act has been committed by a company, every person, who at the time the offence was committed, was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be proceeded against and punished accordingly.

NOTICE BOARD

Explanation — For the purposes ot this section, —

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm, means a partner in the firm.

8. Offence to be cognizable and bailable: (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be bailable.

(2) An offence punishable under this Act shall be cognizable.

9. Protection of action taken in good faith: No suit, prosecution or other legal proceeding shall lie against the Central Government or any State Government or any officer of the Central Government or any State Government for anything which is in good faith done or intended to be done under this Act.

10. Power to make rules: (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the manner in which the seizure of advertisements or other articles shall be made, and the manner in which the seizure list shall be prepared and delivered to the person from whose custody any advertisement or other article has been seized;

(b) any other matter which is required to be or may be prescribed

(3) Every rule made under this Act, shall be laid as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Memorandum Regarding Delegated Legislation

Clause 10 of the Bill seeks to empower the Central Government to make rules for carrying out the provisions of the Act. The matters in respect of which rules may be made relate to the manner in which seizure of advertisements or other articles shall be made, and the manner in which the seizure list shall be prepared and delivered to the person from whose custody any advertisement or other matter has been seized or any other article, which is required to be, or may be, prescribed by rules under the Act.

The matters in respect of which powers are proposed to be delegated to the Central Government under the provisions of the Bill pertain to matters of administrative detail or procedure.

The delegation of legislative power is, therefore, of a normal character.

Statement of Objects and Reasons

The law relating to obscenity in this country is codified in sections 292, 293 and 294 of the Indian Penal Code. In spite of these provisions, there is a growing body of indecent representation of women or references to women in publications, particularly advertisements, etc. which have the effect of denigrating women and are derogatory to women. Though there may be no specific intention, these advertisements, publications etc. have an effect of depraving or corrupting persons. It is, therefore, felt necessary to have a separate legislation to effectively prohibit the indecent representation of women through advertisements, books, pamphlets, etc.

The salient features of the Bill are :-

(a) Indecent representation of women has been defined to mean the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or of being derogatory to or denigrating women or is likely to deprave corrupt or injure the public morality, of any person or persons of any class or age group, notwithstanding that persons in any other class or age group may not be similarly affected.

(b) It is proposed to prohibit all advertisements, publications etc, which contain indecent representation of women in any form.

(c) It has also been proposed to prohibit selling, distribution, circulation of any books, pamphlets etc. containing indecent representation of women.

(d) Offences under the Act are made punishable with imprisonment of either description for a term extending to two years and fine extending to two thousand rupees on first conviction. Second and subsequent convictions will attract a higher punishment.

2. The Bill seeks to achieve the aforesaid objects.

Margaret Alva New Delhi 13th August, 1986.

TAXFILE

Pre-emptive Purchase under Tax Laws

The Government has introduced new provisions in the Income Tax Act for transfer of property for value of over ten lac rupees in certain metropolitan cities. The new provisions require a new form to be submitted, failure of which will render the property liable for acquisition. **R.L. Kabra** *explains the new provisions.*

The provisions of the new Chapter XXC under the Income Tax Act comes into force from 1st October 1986 .The new provisions gives the Central Government the right of pre-emptive purchase of immoveable properties for an apparent consideration exceeding Rs.10 lacs in certain cases of transfers in metropolitan cities. This provision will also be applicable in respect of transfer of a flat in a co operative society or in a company.

As understood from press releases, even properties which have been sold prior to 30th September 1986 and not registered with the registering authority will be covered by the new laws. In other words, if the transfer of property required registration by a registering authority, and if the registration had not been effected before 30th September 1986, it will be necessary to file form No. 37-I under the new provisions. This is irrespective of the period when the original transfer deed was executed, even though form No. 37 EE under the old rules might have been filed. This would be tantamount to stretching the rules beyond what the Act envisages and hence can be challenged as ultravires. The new rule has been challenged in the Bombay High Court. However stay has been granted only in the case of the Petitioner. In fact the idea of the Government is to check cases of ante-dated sale deeds or agreements. However genuine cases where litigation is pending may also be affected.

Compulsory Agreement

It will be obligatory for the transferor and transferee to enter into an agreement in writing, at least 3 months before the intended date of transfer. Moreover, under section 269 UC of the I. T.Act, parties have to submit a statement in duplicate in form No. 37-I giving particulars outlined in the Annexure. This must be duly signed and verified by both parties before the appropriate authority.

The statement in form No. 37-I has to be furnished before 16th October 1986 for transfers entered into before 1st October 1986 or within 15 days from the agreement for transfer in other cases.

The form No.37-I is very simple and asks routine and basic information about seller and buyer. It contains an Annexure giving particulars of the agreement as to name, address and permanent account number of transferor and transferee, locational description of the property, particulars of the person in occupation and interested person of the property and mode and cost of acquisition of the property by the transferor. The department in form 37 EE earlier wanted the particulars like estimated fair market value of the property which is now not required.

No Objection Certificate

No registering officer can register any document purporting to transfer an immoveable property exceeding the value of Rs.10 lacs unless a no-objection certificate from the tax authorities has been obtained.

As provided under Section 260 UO, the new provisions shall not apply to transfer of properties to relatives on account of natural love and affection, if a recital to that effect is made in the agreement for transfer. However, such cases might attract gift tax. Therefore, careful drafting of the agreement and proper tax planning is very essential.

Moreover, the appropriate authorities may after recording reasons in writing, pass an order within two months from the end of the month in which the statement in 37-I has been submitted, for purchase of the immoveable property at a price equal to what is declared (and not 15% more as in case of 37EE provisions). Thereafter, such property will vest in the Central Government under section 269 UE free from all encumbrances. Accordingly, the occupant will have to surrender or deliver the possession to the Government within 15 days of the service of such an order.

Tenanted properties under dispute and those carrying defective titles will be hard hit by Chapter XX C. If a buyer buys a property at a rate less than the prevailing rate because of defective title or some other peculiar factor, even then the new provisions will apply. If the Government decides to exercise its pre-emptive right of purchasing the property at the agreement price (which is naturally lower than the prevailing market price), the buyer will suffer a huge loss while the Government will get a valuable property at a very low price and that too free from all encumbrances. Thus, the buyer will always have a sword hanging over his head until the no objection certificate is received.

It is noteworthy that in accordance with section 269 RR, the provisions of Chapter XXA of Income Tax Act in relation to filing form No. 37EE and other related provisions, shall not apply to or in relation to the transfer of any immoveable property made after the 30th day of September 1986. Hence persons dealing in properties valued below Rs.10 lacs in metropolitan areas need not comply with the filing of form 37EE. However, agreements showing lower values or where the real market value may exceed Rs.10 lacs may still come under the clutches of the new provisions though no statutory provisions are presently prescribed.

Penalty for Non-Compliance

Failure to comply with the new provisions of Chapter XXC or any contravention of it shall be punished with rigorous imprisonment for a minimum period of six months, extendable to two years, as also a fine. Therefore, one has to be very careful in complying with the law before dealing in any property worth Rs.10 lacs or more.

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LAW AND PRACTICE

Guarantees, Indemnities and Letters of credit

Anil Mehta *continues his piece.*

The Calcutta High Court held that it was not necessary to say whether the performance guarantee stood on the similar footing of a letter of credit but so far as the Court of appeal had held that the Bank must pay according to the guarantee on demand, if so stipulated without proof or conditions, that view was correct. The Calcutta High Court suggested that apart from the exception of a fraud there would be **another exception in the form of special equities** arising from a particular situation which might entitle the party to an injunction restraining the performance of Bank Guarantee and in the absence of such special equities and in the absence of any clear fraud, the Bank must pay on demand if so stipulated and whether the terms are such must be found out from the performance guarantee as such.

The Harprasad Case

Then came the landmark judgement of the Division Bench of the Delhi High Court of *Harprasad & Co. Ltd. Vls Sudarshan Steel Mills.* (AIR 1980 Del 174) In this case, Punjab National Bank (PNB) furnished a Bank Guarantee in favour of Messrs. Harprasad & Co. Ltd. which contained the following material words:

"In case Messrs. Sudarshan Steel Rolling Mills fails in the judgement of Messrs. Harprasad & Co. to carry out or fulfil any of the obligations assumed under the said contract, we undertake to pay promptly the Punjab National Bank, Parliament Street, New Delhi, in favour of Harprasad & Co. or to their order purely upon receipt of first written notice, any amount of Rs.12,13,618 that may be claimed by them for any reason or purpose at their own discretion without it being necessary for Harprasad & Co. Ltd. to issue a declaration or take action through administration, legal or any other channels or to prove the default of Sudarshan Steel Rolling Mills and/or a veracity of the affirmations made by them."

When Harprasad & Co. invoked the Bank Guarantee, Sudarshan Steel filed a suit and obtained an order of temporary injunction restraining Harprasad & Co. from recovering the amount guaranteed by the Bank. In appeal against the order of the Learned Single Judge granting temporary injunction, the Division Bench of the Delhi High Court held that the law was well settled that the amount due even on an irrevocable commercial credit can be recovered provided that the terms and conditions of the credit were complied with.

After discussing the terms of the Bank Guarantee in question, the Delhi High Court held that notice of the claim must be given in compliance with the terms of the Bank Guarantee and that unless the terms of the Bank Guarantee were complied with, the liability of the Bank to pay the amount did not arise. The first rule of construction of a contract or a document was to ascertain the intention of the parties. What was the intention of the parties conveyed by the language of the Bank Guarantee?

The Court held that there was a distinction between absolute liability to pay and absolute liability which arose after the terms of the Bank Guarantee was fulfilled. If the intention of the parties according to the language of the Bank Guarantee was that absolute liability should arise only after the terms of the bank guarantee were fulfilled, it was necessary for the beneficiary under the Bank Guarantee to show that it has become entitled to recover the amount under the Bank Guarantee because in its judgement Sudarshan Steel had failed to perform any of the obligations under the contract. The Court held **that the Bank has itself a duty to satisfy itself that the demand by the beneficiary under the Bank Guarantee was made in accordance with the terms of the Bank Guarantee.** It was not sufficient for a beneficiary under the Bank Guarantee merely to reiterate parrot-like words of the Bank Guarantee. The duty of the beneficiary in making demand on the Bank was like the duty of the Plaintiff to disclose a cause of action in the Plaint. The High court held that just as a Plaint was liable to be rejected for non-disclosure of the cause of action, a demand by the beneficiary of the Bank Guarantee was also liable to be rejected by the Bank if it did not state the facts showing that the conditions of the Bank Guarantee had been fulfilled. Just as the allegations in the Plaint are to be assumed to be true at the stage when a Plaint is entertained; similarly, allegations in the demand would have to be assumed to be true by the Bank provided that proper allegations were made just as a proper pleading had to be made in the Plaint. The Bank was certainly not required to inquire into the truth of the pleadings at the stage of the filing of the Plaint.

It was argued on behalf of the beneficiary of the Bank Guarantee that the liability of a Bank was absolute even without showing whether the beneficiary had stated in its notice that in its judgement, Sudarshan Steel had failed to fulfil an obligation under the contract.

Rejecting these arguments, the Court held that until the terms of the Bank Guarantee were fulfilled the amount was not and could not be placed into the pockets of the beneficiary. It will remain with the Bank.

The Court then observed that the Bank Guarantee was an autonomous and an independent contract and must have effect according to its own terms. The Court rejected the contentions advanced by the beneficiary of the Bank Guarantee because the terms of the Bank Guarantee had not been fulfilled and hence the Bank Guarantee had not become due for payment to the beneficiary. **The Court further observed that the beneficiary of the Bank Guarantee was simply seeking to grab the amount of the Bank Guarantee without any equity or justice in its favour.**

It appears that having regard to the observations made by the Division Bench of the Delhi High Court in the case of *Harprasad & Co. Ltd. Vls Sudarshan Steel Rolling Mills* (AIR 1980 Del. 174) Harprasad & Co. filed an application under Order 39 Rule 4 of the Code of Civil Procedure for permission to encash the Bank Guarantee. Without in any way disturbing the earlier decision reported in AIR 1980 Del. 174, the Delhi High Court decided the application of Harprasad & Co. by holding that the conditions contained in Clauses 4 and 5 of the Guarantee in question were fulfilled and that therefore the amount had become payable. (AIR 1983 Del.128) The earlier view expressed by the Delhi High Court (AIR 1980 Del.174) was not disturbed, nor was it dissented from in the latter decision.

Then followed a spate of cases:

Banwarilal Radhe Mohan Vls Punjab State Co-operative Supply & Marketing Federation Ltd. (AIR 1982 Del.357); *Road*

These Grey Pages are a regular feature of the magazine. They have separate running pages numbers. At the end of the year they will be compiled and indexed allowing the reader to use them as a ready reference.

Machines India Pvt. Ltd. Vls Projects & Equipment Corporation of India Limited (AIR 1983 Cal. 91); *Vinay Engineering Vls Neyveli Lignite Corporation & Anr.* (AIR 1985 Mad.313); *ACC Babcock Ltd. Vls Straw Products Ltd.* (AIR 1985 Del.237); *National Project Construction Corporation Ltd. Vls G.Rajan* (AIR 1985 Cal.23); *DTH Construction Pvt. Ltd. Vls Steel Authority of India Ltd. & Another* (AIR 1986 Cal.31).

In each of the aforesaid decisions, the Court was considering the language of the guarantee which was unconditional, irrevocable and without demur promising to pay the beneficiary concerned. In each of these decisions, the Court on interpretation of the documents held that the Bank Guarantee was in the nature of a Promissory Note and therefore payable on demand.

Conclusions

A. *Tarapore's* case, (AIR 1970 SC 891), was a case which interpreted an Irrevocable Letter of Credit and not a Bank Guarantee. In that case the Court for the protection of International Trade, held that interference with the mechanism of a Letter of Credit would not be desirable. It was however held that the terms of the Letter of Credit must be complied with by the beneficiary to obtain payment thereunder.

B. The *UCO Bank* case, (AIR 1981 SC 1427) was also a case of a Letter of Credit and not a case deciding interpretation of a Bank Guarantee. The passing observation of the Supreme Court in that case relying on 1966 LILR 495 and *Barclays Bank* Case [(1978) 1 All E.R. 976] was a misplaced reference in comparing a Performance Guarantee with a Letter of Credit and observing that they were similar. Firstly, in the case of *Barclays Bank*, the Court was considering the language of the Guarantee which clearly indicated that it was in the nature of a promise to pay. In England the law of contract is not codified. In India it is. The provisions of Sections 124 and 126 of the Contract Act respectively defining a contract of Indemnity and a contract of Guarantee do not seem to have been pointed out to the Supreme Court. Hence, there has been a blind following of the decision of the *Barclays Bank International* and the observations made by Lord Denning in that case, forgetting that he held so only on account of the language of the Performance Guarantee and not as a general proposition. In any case, *UCO Bank's* case cannot be and is not an authority for the proposition of interpreting Bank Guarantees.

C. In any event the Supreme Court in the case of *UCO Bank* did observe that injunction could have been granted if it had been established that GSL had a prima facie case meaning thereby that there was a bona fide contention between the parties or a serious question to be tried.

D. In *MSEB's* case (AIR 1982 SC 1497) the Supreme Court has suggested that if the payment of the amount guaranteed by the Bank had been made dependent upon proof of any default, injunction could have been granted. But since in that case the liability of the Bank was absolute and unconditional, the Bank could not be restrained.

E. It is only when one reads with some care the decision of the Calcutta High Court in the case of *State Bank of India Vls The Economic Trade Co.* (AIR 1975 Cal. 145) that one finds that a clear attempt has been made to distinguish a Letter of Credit from a Letter of Guarantee. The Calcutta High Court has also considered the definition of a Contract of Guarantee.

F. This was followed by the case of *Harprasad & Co. Ltd. Vls Sudarshan Steel Rolling Mills Ltd.* (AIR 1980 Delhi 174), where the Delhi High Court has interpreted a Bank Guarantee and held that the beneficiary of the Bank Guarantee cannot demand payment until the terms of the Guarantee have been fulfilled and that there was no such thing as an absolute liability to pay under a Bank Guarantee.

G. Having regard to the definition of a Contract of Guarantee under Section 126 of the Contract Act it is absolutely necessary that the Bank ought not to pay any amount in case of dispute between the client of the Bank at whose instance the Bank Guarantee had been issued and the beneficiary of the Bank Guarantee. The provision of Section 126 of the Contract Act indicates that the third party has a locus and even if the language of the Bank Guarantee was in the nature of an on demand promise to pay, no such payment ought to be made by the Bank to the beneficiary. So soon as the Bank was informed that disputes and differences under the original contract between the third party and the beneficiary existed the Bank should refuse to pay until the disputes were resolved by a suit or an arbitration as the case may be. It would be a special equity to restrain the Bank from paying, such an equity being in favour of the client on whose behalf the guarantee was issued by the Bank.

H. Banks in India are nationalised bodies and are dealing with public money. It is in the interest of the public that monies were not paid away merely on demand to the beneficiary of a Bank Guarantee. It is also not necessary for the Banks to issue guarantees in the form of a promise to pay "on demand to the....." as in the case of genuine dispute between the parties, the beneficiary would take away the money and in the case of a genuine dispute by a client against the beneficiary such a claim would be lost as there would be no money available for the third party to recover from the beneficiary.

I. A Contract of Guarantee can in no event be compared with the Letter of Credit, particularly when, a Bank Guarantee is defined under Section 126 of the Contract Act. The bank also cannot and ought not to contract contrary to the statute which does not entitle the bank of necessity to give a promise to pay. If, therefore, the bank issues any Bank Guarantee in violation of Section 126 of the Contract Act then such a guarantee is ex-facie in violation of law and therefore every such contract of guarantee should be and would be void.

J. Injunction restraining the Bank from paying under a Performance Guarantee and/or a Letter of Credit could be granted in case of fraud and/or special equities.

K. The moral - Do not follow the decisions of the English Courts blindly.

Attention Readers

In order to cater to the readers needs, we will be carrying articles in these Grey Pages on topics specially suggested by the readers. Would you like any particular topics of law to be discussed in the Grey Pages?

If you have any suggestions, send them to us. We will make sure that your needs are served, and the topics you suggest are covered.

Home-based Workers

Home-based workers are outside the purview of almost all labour laws. The few laws which recognise their existence are not of much help as the way the system of home-based workers functions does not allow it to prove an employer-employee relationship. **Renana Jhabwala** *explains the position in law of home-based workers and poses certain questions for our consideration.*

Socio-economic background

In almost all developing countries, more particularly in Asia, there are innumerable women workers working on piece-rate in highly exploitative conditions in their homes. The home-based workers are invisible to society, literally, in that they work within their homes; and officially, in that they practically do not appear in the Census or on any other official statistics. A small example will suffice.

In the 1981 Provisional Census the number of workers listed under household industry is 8.8 million. However, according to the labour statistics of the Government the number of workers who roll bidis at home alone is 3.25 million. (This number is an estimate because no official agency has collected precise statistics). Does this mean that one minor product like bidi alone constitutes one-fourth of the household industry work-force? In that case what about carpenters, potters, black-smiths? What about the various categories listed by the Khadi and Village Industries? What about localized trades such as 1 lakh lace makers in one district in Andhra alone? Clearly 8.8 million is a gross underestimation.

Home-based workers can be classified into two types. First, those who are given the raw materials by another person (the employer) who pays them by the piece rate on the amount of work they produce. Second, those who buy all their raw materials themselves, and earn by selling their finished goods. These are the piece-rate workers.

Piece-rate work

The workers are given the raw materials, they take it home, process it and return the finished goods to the employer. They are paid according to the number (or weight or size) of items they have produced. Bidis, aggarbattis, paper bags, garments, cotton pod shelling, groundnut-pod shelling, hand embroidery, zari work, cleaning grain, block printing, match-stick making, papad rolling, sub-assembling electrical and electronic items, packaging and labelling industrial goods, are some of the products worked this way.

Although data on these workers are scarce, some detailed case studies are available. The I.L.O. studies by Zarina Bhatty on Bidi Workers in Allahabad, by Maria Mies on Lace Makers of Naraspur, for example, have given an excellent picture of the socio-economic life of piece-rate workers. It is possible, on the basis of these and other case studies, to generalize certain socio-economic traits of these workers.

Piece-rate home-based workers are generally women who combine their household tasks with production work. The hours of work vary from part-time work of 4 to 5 hours to an over-extended day of 15 hours. Their earnings for an 8 hours working day are not more than Re.3 as in the case of skilled zari workers in Delhi and as low as Re.1 for lace makers. Home based workers earn the lowest of all categories of workers. Jenefer Sebstad in her study finds that in Ahmedabad the average monthly income for home based workers is Rs. 130 as compared to Rs. 250 for vendors and Rs. 170 for labourers. Most workers are found to be in debt. The amount of the debt is, however, rarely more than Rs.2,000. Illiteracy rates are higher than 70 per cent in all trades.

Child labour is very common among these workers because the children help their mothers by doing the unskilled tasks such as washing and drying bidi leaves or arranging cloth to sew into garments. Sometimes the child is considered more skilled and does the major part of the work. In agarbatti rolling, for example, children are said to have nimbler fingers and flexible bodies to bend over their work.

The Employer

The employers vary from the biggest iron and steel manufacturers to the smallest papad makers.

Manufacturing companies often 'put out' to home based workers their labour intensive piece work, which does not need heavy machinery. This may vary from fringing and hemming for textile companies, to seat-cover making for truck companies, to packaging and filling for pharmaceutical companies, to sub-assembling for electrical and watch industries.

Another type of employer is the company in which the main processing is done not by the company itself but in the homes of piece rate workers. The company maintains a godown where it stores the raw material, measures it for the women to take home, receives the finished product, and puts a brand name on it. This type of employer sometimes contracts the work out to a contractor.

The smallest and most numerous employer is the small trader or contractor. He usually has no brand name. Sometimes he produces for sale himself. On other occasions he contracts for a bigger company. However, he lives in the same community as the workers. Often he himself is a former worker.

The employer's advantage — The worker's dis-advantage

The employer has no overhead costs in the form of buildings or shelters. The worker's tiny room also serves as a workplace. Often this is hazardous to the health of the family members, as when in bidi rolling, tobacco leaves get into the air. Often the worker has to spread out the work all over the room so the family members have no place to live.

The employer is saved investment in machinery. The workers have to provide their own tools or machines. Not only do they have to make the initial capital expenses but they also have to maintain it, oil it, pay for repairs, etc. When the employer does give his machine to the worker, he charges a rent which soon compensates for the price of the machine. And they still have to pay for its maintenance and repair. Often, the worker has to pay for some of the raw materials also. For example, in papad rolling they buy the oil, in paper bag making the glue, etc. The price of these items is not linked to their wage rate. Sometimes, if the price of these items rises, they may labour all day and still make a loss.

As the workers are neither unionized nor covered by labour

laws, the employer pays them well below the minimum wages. He provides them no welfare at all — neither health insurance nor maternity coverage nor provident fund nor paid holidays.

The home-based producers are a pool of workers for the employers. He employs them whenever and as frequently as he needs them and dismisses them when he no longer needs them. Employment is irregular and uncertain for the workers. They may have to work 16 hours a day during a peak season and sit idle for 3 months during the lean season. Since most families buy from what they earn everyday, no work often means no food. Work is given according to the needs of business with no consideration for the needs of workers.

Legal Status of Home-based (Piece-rate) Workers

Definitions

The earlier labour laws such as **Factories Act, 1948, Bombay Industrial Relations Act, 1948** etc. were enacted keeping in view the workers in factories. These acts therefore generally exclude workers outside the factories from their purview. Thus the **Factories Act, Section 2(m)** defines a factory as follows:
"**Factory** means any premises including the precincts thereof

(i) where ten or more workers are working, or were working on any day in the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or
(ii) where twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid, or is ordinarily so carried on."

This definition clearly excludes home-based workers even those like agarbatti workers who take raw materials from and return the finished products to the factory. In this definition the law is confined only to those workers inside the premises of a factory.

However the **Minimum Wages Act 1948,** formulated about the same time does explicitly include the home-based worker in its purview, being one of the few Acts to explicitly mention them. **Section 2(i)** defines **employee** as: "any person who is employed for hire or reward to do any work skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum wages have been fixed, **and includes an outworker** to whom any articles or materials are given out by any other person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purpose, of the trade or business of that person, where the process is to be carried out either in the home of the outworker or in some other premises not being premises under control and management of that other person."

Subsequent laws (not including laws applying to particular industries such as Mines Act, Plantations Act etc) have generally broadened this definition so as not to exclude homeworkers, even though homeworkers may not be clearly specified.

The broadest definitions are found in the **Beedi and Cigar Workers (Conditions of Employment) Act, 1966.** The definition of employee under Section 2 is as follows:
"**Employee** means a person employed directly or through any agency, whether for wages or not, in any establishment to do any work, skilled, unskilled, manual, or clerical and includes —

(i) any labourer who is given raw materials by an employer or a contractor for being made into beedi or cigar or both at home, and
(ii) any person not employed by an employer or a contractor but working with the permission of, or under agreement with, the employer or contractor"

The key issue as far as the homebased worker, is concerned is to establish whether the worker, is covered under the law or not, i.e. to establish whether there is any 'employer-employee' relationship. To establish this relationship, two important aspects to be considered are: firstly, the interpretation of the law and secondly, evidence available to establish the relationship.

Intrepretation

Interpretation of law by the courts has been changing over time. The earlier interpretations were more restrictive in their definition of employer-employee relationship using mainly the common law tests of control and supervision and the necessity of an express or implied contract of employment. (e.g. **Chintanan Rao Vs Madhya Pradesh,** AIR 1958, SC 388). Later on however the tests of employer-employee relationship were broadened (**Mangalore Ganesh Bidi Works Vs Union of India,** AIR 1974 SC 1972). And in **Hussainbhai Vs Alath Factory Tezhilali Union** (AIR 1978 SC 1980), Justice Krishna Iyer lays down a "conspectus of factors" to determine "who is an employee in labour law". This conspectus has to take into account whether —

(a) work done is an integral part of the Industry;
(b) raw material came from the proprietor;
(c) factory premises belonged to management;
(d) equipment belonged to management;
(e) finished product is taken by management;
(f) workmen are broadly under control of management;
(g) defective articles are rejected by management

Although the courts are more liberal in their interpretation of the employer-employee relationship, the actual implementing agency i.e. the Labour Ministries are much narrower in their outlook. Interpretation of the law by Labour Ministries and the Labour Departments, is usually very restrictive leaving almost all home-based workers out of the scope of the acts.

In general most inspectors of the Labour Department, responsible for implementation of the labour laws believe that "homebased workers are not covered under any act". The Gujarat Government has actually written a letter to us (SEWA) stating that home-workers are not covered under the provisions of the Bidi and Cigar (Conditions of Employment) Act.

The Minimum Wages Act explicitly in its definition includes homeworkers within its purview. However, the employments that are covered by the Minimum Wages Act have to be notified by the State Government and until those employments are notified and the minimum rates fixed, the workers will not be covered under the Act. Minimum Wages Act defines Employer under Section 2(e) as follows:

"Employer means any person who employs, whether directly or through another person or whether on behalf of himself or any other person one or more employees in any scheduled employment in respect of which minimum rates have been fixed under this Act."

Thus, until an employment is declared to be a "Scheduled employment" and until minimum wages are fixed, the workers in that trade will not be employees under the Act. In most States, the employments which employ a large number of homebased workers have not been included in the schedule. In Gujarat for example, garment stitching and agarbatti making, two large employers of home based workers, are not included in the schedule under the Minimum Wages Act.

Sale Purchase system

A further complication on account of interpretation of the statutes are the devices employed by the employer to avoid the provisions of the laws. One such device is the Sale-Purchase system. The employer declares that he is only a trader and that his erstwhile employees are also independent traders. The workers are then made to 'buy' raw materials from the owner and to 'sell' the finished products back to him. The buying and selling usually take place on paper and the owner continues to give the workers piece rates as before. As a further refinement, the owner registers two different companies, so that the workers 'buy' raw materials from a different company to the one to which they 'sell' the finished products. The Labour Departments when faced with this system, declare that workers under 'sale-purchase' system are not employees as defined in Labour Acts.

Evidence

The employer-employee relationship can be established in court if enough convincing evidence can be shown to prove that the worker is indeed an employee as defined under that Act. However collecting evidence to prove the employee status is always a problem.

The owners rarely keep registers with the names of the workers. The workers are not given log books, records of materials taken and work done is written in *kuccha* notebooks or slips of paper which are torn up every week. When a register of workers does exist, for instance for tax purposes, the owner deliberately changes the names of the workers every week so that no worker can claim to be an employee. There are no pay slips or cash vouchers. Workers are generally illiterate and are made to put their thumb impressions on blank pieces of paper.

Owners often try to break the direct employer-employee link by employing middlemen or contractors. These contractors have no fixed establishments and are often ex-workers themselves. Their record keeping is even worse than that of the owners, and it is very difficult to pin them down. Just as the owners refuse to acknowledge the employer-employee relationship with the worker, so also they refuse to acknowledge the owner-contractor relationship. The contractor in turn refuses to acknowledge the contractor-worker relationship. So it becomes doubly difficult to collect evidence to prove the employer-employee relationship.

Issues for future action

The basic reason why homebased workers are oppressed and are exploited is because they are unorganised. So the first task is to organise them, which Self Employed Womens Association (SEWA) in Ahmedabad, has been trying to do. But given the attempt at organising, which are the legal issues that can or should be taken up? Here I would like to pose some questions for future action:

(1) Should there be a new Act to cover homebased workers?
(2) Should the present labour acts be amended to cover them?
(3) How to make implementing agencies more liberal in their interpretation of law?
(4) How to make workers more aware of the laws?
(5) How to collect evidence and what kind of evidence to prove employer-employee relationships?

Conclusion

On the whole, the law is not unfavourable to home-based workers. However, it is not explicitly favourable either. The interpretation of the law in the courts has been positive, but interpretation by the labour departments has been extremely restrictive. The owners try to evade the acts by avoiding the employer-employee relationship on paper and so evidence is difficult to collect. The main issue to be considered is how the law can be helpful in organising the home-based workers.

Renana Jhabvala is an activist with the Self-Employed Womens Association (SEWA), Ahmedabad, Gujrat.

Readers are invited to respond to issues that the author has raised.

Towards a Review of the Bombay Pavement Dwellers Case

As we enter the International Year of the Homeless (1987), the question of the right to shelter assumes importance. The judgement in the Bombay Pavement Dwellers case figures prominently in preventing the right of the poor to shelter in our country. Fortunately, the Petitioners in that case did file a review Petition which has been directed to be heard. We examine the case for review in this article. For only by upholding the contentions in the Review Petition will the Court square up with the long line of constitutional decisions on the right to life and aspirations of persons aroused by the International Year of the Homeless.

The arguments before the Court

The judgement of the Supreme Court in the *Bombay Pavement Dwellers* case *[Olga Tellis v/s Bombay Municipal Corporation* (1985) 3 SCC 545] was delivered on 10th July 1985. The petition was filed on behalf of the pavement dwellers of Bombay, under Article 32 of the Constitution of India, challenging their forcible eviction from pavements in purported exercise of powers under Section 314 of the Bombay Municipal Corporation Act, 1888. It was argued on behalf of the pavement dwellers that they had a right to reside on the pavements in exercise of their right to life, enshrined in Article 21 of the Constitution of India. The submission was that the vast majority of pavement dwellers were gainfully employed, that their earnings were insufficient to enable them to afford any kind of formal housing and that economic necessity compelled them to live on pavements near their place of work. The

issue raised by the Petition was one of redistribution of material resources of the community, namely land, so as to subserve the common good. It was argued that the eviction of pavement dwellers from their dwellings would have the direct and inevitable consequence of depriving them of their livelihood, thus violating their right to life. The deprivation of life and livelihood was without authority of law. It was also argued that as the pavement dwellers were living on or below the poverty line, any act of the State which had the effect of pushing the individual below the poverty line was violative of Article 21. The eviction of pavement dwellers from their dwellings would have the consequence of pushing the pavement dwellers below the poverty line and the direct and inevitable consequence of the eviction would be loss of livelihood. It was also argued that it was the bounden duty of the State to provide all such persons with housing and the Court by an appropriate order could compel the State to formulate a housing scheme to resettle the pavement dwellers. Such a scheme had to be affordable and feasible i.e. ensure nearness to place of work.

As no notice was given prior to evictions nor was any alternative housing provided, it was also argued that the procedure by which life and livelihood were sought to be deprived was unjust, unfair and unreasonable, thereby violating Articles 14 and 21.

Whether the deprivation of right to livelihood is lawful?

The third question which arose for consideration was, whether the deprivation was in accordance with the procedure established by law. The Court answered it as follows:

> "But the Constitution does not put an absolute embargo on the the deprivation of life or personal liberty. By Article 21, such deprivation has to be according to procedure established by law. In the instant case, the law which allows the deprivation of the right conferred by Article 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in Sections 312 (1), 313(1)(a) and 314".

In the Review Petition, it is contended that the error of law apparent on the record lies precisely here in the third stage of reasoning.

B.M.C. Act has no application

Section 314 of B.M.C. Act is not a law which has for its object deprivation of life, nor does it even vaguely address itself to the question of deprivation of life. Section 314 of the B.M.C. Act is not attracted to the facts of the case at all, since there is no direct and reasonable nexus between the object of the law and deprivation of life. There is, therefore, no authority of law for depriving the life and livelihood of the pavement dwellers. The very first requirement of Article 21, namely, that there should be a law authorising deprivation of life is not satisfied. The subsequent questions, namely, whether the law which authorises deprivation of life is substantively or procedurally reasonable does not even arise for consideration.

In *A. K. Gopalan's* case [(1950) SCR-88] Patanjali Shastri J. held:

> "And the first and essential step in the procedure establised by law for such deprivation must be a law made by a competent legislature authorising such deprivation".
>
> Similarly, in the same case, Mukherjee J. pointed out:
>
> "It is not correct to say, as I shall show more fully later on, that Article 21 is confined to matters of procedure only. There must be a substantive law under which the State is empowered to deprive a man of his life and personal liberty and such law must be a valid law which the legislature is competent to enact within the limits of powers assigned to it and which does not transgress any of the fundamental rights."

Right to 'life' includes right to livelihood

The Supreme Court held that the right to life includes the right to livelihood and that the eviction of the pavement dwellers from their dwellings would result in loss of livelihood. The Court, however, held that the evictions were authorised by law, namely Section 314 of the B.M.C. Act.

It held that the procedure prescribed for removal of encroachments on pavements over which the public had a right of way was not unreasonable. No person had a right to encroach on pavements. The Municipal Commissioner had the discretion to issue notice or not to issue notice before eviction, which discretion he was required to exercise reasonably. In the case before the Court, no notice was given by the BMC. The Court held that normally it would have directed an opportunity to be given to the pavement dwellers to show cause why the encroachment should not be removed. In the opinion of the Court, the opportunity which was denied by the Municipal Corporation, was granted in ample measure by the Supreme Court and no further notice was, therefore, required to be given.

While interpreting Article 21, the Court held:

> "That, which along makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life".

Having held that the right to life included within its scope and ambit the right to livelihood, the Court addressed itself to the next question namely, whether the right to livelihood was deprived by the evictions and held:

> "These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constituional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life". (Emphasis supplied).

Direct and Inevitable consequences test

In a long line of decisions culminating in *Maneka Gandhi's* case [1978) 2 SC R 621] the Supreme Court held that whether a particular fundamental right can be invoked or not will depend on the direct and inevitable consequence of the action of the State or operation of the law. The Review Petition contends that unlike in the case of other fundamental rights, if the State action has the direct and inevitable effect of depriving life, it would be incumbent on the State to show that the statute on which the impugned action draws its authority, has for its object and intendment, the deprivation of life.

Section 314 of the B.M.C. Act which has for its object the regulation of streets, has no application and cannot be considered as authority of law for deprivation of life within the meaning of the Art. 21. The Court offers no reasons for stating that Section 314 has authority of law for deprivation of life. The

law on which reliance is placed for deprivation of life must be one which has for its object, the deprivation of life. If there is no such law, which in terms authorises deprivation of life, then it must be held that the act of deprivation of life is unsupported by law. Not any law, which has the consequence of deprivation of life can be said to be authority of law for depriving life. It cannot be said to be "procedure established by law".

It is contended in the Review Petition that Art. 21 postulates a consonance between the object of a statute and the direct and inevitable consequence of the State action taken under the statutue. If there was no such law, the threshold requirement of Art. 21,namely "procedure establshed by law" for deprivation of life would not be satisfied.

There being no law authorising deprivation of life, the subsequent questions namely whether the law is substantively and procedurally reasonable does not even arise.

It is obvious that Section 314 is not a law, which has for its object deprivation of life and livelihood.

BMC Act not for deprivation of life

Sections 312, 313(1)(a) and Section 314 appear under the Chapter titled "Regulation of Streets" and the under group of sections entitled "Projections and obstructions". The legislature in enacting Sections 312 to 314 could not be presumed to have authorised deprivation of life. If it is held that life can be deprived by a law which does not in any manner authorise deprivation of life or address itself to the question of deprivation of life, but which has the effect of depriving life, the consequences will be that such a law will be deemed to be procedure established by law. The protection of Article 21 will be rendered absolutely meaningless. A law which authorises removal of encorachments or projections on streets will be held to be law authorising deprivation of life. Such could never been the intention of the framers of the Constitution. The test of "direct and inevitable consequences" was evolved to expand the protection of fundamental rights against arbitrary State action and not to narrow it down. The Court, while purporting to follow *Maneka Gandhi's* case has misunderstood the ruling and drastically eroded the guarantee of Article 21 to the extent of rendering it redundant. There is no authority for the proposition that life can be deprived by a law authorising removal or nuisance, much less is *Maneka Gandhi's* case an authority for a such a proposition. The "direct and inevitable consequences" test evolved in *Maneka Gandhi's* case was evolved to determine whether a particular fundamental right can be invoked and not to determine whether a particular law has any application to the facts of the case. *Maneka Gandhi* does not dispense with the "object" test to determine whether a law applies to the facts of the case.

The minimum guarantee afforded by *A. K. Gopalan's* case, namely, that deprivation of personal liberty can only be by a law which has for its object such deprivation, has been dispensed with. Thus the Constitutional clock has been put back more than 35 years and the intervening Constitutional history has been virtually written off by this one judgement.

Substantive & Procedural Reasonableness

The Review Petition, however, contends that assuming that the B.M.C. Act can be said to be procedure established by law, the Court will have to examine whether such a law is substantively and procedurally reasonable. This is implicit in Art. 21 itself. For example a law which provides that a person who steals a loaf of bread should be done to death cannot be considered to be reasonable, despite the fact that it may provide for all procedural safeguards such as the giving of notice, opportunity to be heard, trial by an impartial Court, and the presumption of innocence in favour of the accused. However fair such a procedure may be, the Court would be bound to strike down such legislation, not on the ground that it lacks procedural fairness but on the ground that it lacks substantive fairness. Article 21, therefore, protects a person against any deprivation of life by an unreasonable law.

In *Bachan Singh's* case [(1983) 2 SCR 145], which considered the question of constitutional validity of the death penalty on the touchstone of Art. 21, both the majority and minority judgements have expressly determined and adjudicated on the substantive reasonablenes of the law; the majority holding that it is substantively reasonable, the minority judgement holding that it is not. The majority, speaking through Sarkaria J. held:

> "For the purpose of testing the constitutionality of the impugned provisions of the death penalty in Section 302 of the Indian Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these antithetical views held by the Abolitionists and retentionists is correct. It is sufficient to say that the very fact that persons of reason, leaning and light are rationally and deeply divided in their opinion on this issue, is a ground, among others, for rejecting the Petitioner's argument that the retention of death penalty in the impugned provision is totally devoid of reason and purpose".

The minority opinion speaking through Bhagwati J., as he then was, stated:

> "The word procedure in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjective but also the substantive part of the law. Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21".
>
> Further, Bhagwati J. stated:
>
> "Now it is an essential element of rule of law that the sentence imposed must be proportionate to the offence. If a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational for it would not pass the test of reason and be contrary to the rule of law and void under Articles 14, 19 and 21".

It is thus well settled that the substantive reasonableness of a law authorising deprivation of life can be tested on Article 21. It need hardly be mentioned that in *Bachan Singh's* case, the law which was being tested was Section 302 of the Indian Penal Code, a law, which had for its express object the deprivation of life. Thus, the threshold requirement of Article 21 was satisfied, namely the existence of a law which had for its object deprivation of life. What was being tested was the substantive reasonableness of the law.

Substantive reasonableness overlooked

In the *Olga Tellis* case, the Court has not only overlooked the fact that the impugned action was unsupported by authority of a law which had for its object deprivation of life, but has slurred over the substantive reasonableness of Section 314 of the B.M.C. Act. A law which deprives a pavement dweller of life and livelihood for the reason only that he is sqauatting out of sheer necessity, cannot be said to be just and reasonable. Since the judgement has held that Section 314 is authority of law for deprivation of life, it was necessary for the Court to examine the law for its substantive reasonbableness. The judgement accepts that it is poverty in the rural areas leading people

to the brink of starvation which drives people to urban areas in search of livelihood and that in metropolitan cites like Bombay the poor can eke out a meagre living by honest means only to survive. It further accepts that any kind of shelter is totally out of reach of their pockets "and perhaps also their dreams" and that they are, therefore, compelled to live on the pavements for their survival.

It would follow that eviction or demolition without a feasible alternative is unreasonable. There is no attempt in the judgement to evaluate the reasonableness of the law. It seems to proceed on the assumption that such a question does not arise at all. The Court has fallen into grave error in failing to come to a finding on the question.

Procedural fairness overlooked

The enquiry does not end with substantive reasonableness. The next question that arises is whether the procedure by which life is sought to be deprived is just, fair and reasonable. This is now well settled by *Maneka Gandhi* case. In dealing with Section 10(3)(c) of the Passport Act, which authorised the impounding of a passport without notice, Bagwati J., speaking for the Court, held :

> "The law must, therefore, now be taken to be well settled that even in administrative proceeding which involves civil consequences, the doctrine of natural justice must be held to be applicable".

The Court then proceeded to hold that Section 10(3)(c) of the Passport Act would be held to include, by implication, the principles of natural justice. It needs to be emphasised that in *Maneka Gandhi's* case the Court was a testing a law, namely the Passport Act, which had for its object the grant or denial of passports in specified circumstances. The object test was, therefore, satisfied.

The Review Petition contends that the ruling in *Maneka Gandhi's* case has not been overruled in its aplication to Article 21. Therefore, on the doctrine of *stare decisis,* the Court was bound to follow it, which it has failed to do.

On the question of procedural fairness, the admited position was that no notice had been given prior to the eviction. The Court, however, has held that the principles of natural justice can be excluded, as in this case, the result would not have been any different, if notice were given. Reliance was placed on *S.L.Kapoor's* case. [(1981) SCR 746]. That was a case relating to supercession of a Municipality without notice. In that case it was contended that non-compliance with principles of natural justice would vitiate the action. No fundamental rights were claimed, much less fundamental rights under Article 21. The case held that principles of natural justice could be excluded, if the decision of the authority would not have been any different, had a notice been given. The Review Petition contends that *S.L. Kapoor's* case does not overrule *Maneka Gandhi's* case. On the doctrine of stare dicisis the Court was bound to follow *Maneka Gandhi.* To follow *S.L. Kapoor,* in derogation *of Maneka Gandhi's* case is clearly an error on the face of the record which requires to be corrected. Following *Maneka Gandhi,* the Court was bound to hold that the "procedure" by which the impugned action was taken was not just, fair and reasonable. Moreover, even if *S.L.Kapoor's* case was followed, it would have no application to the facts of the case. That case decided that natural justisce could be excluded if the result would not be any different, if notice had been given. In *Olga Tellis,* the Court itself had held that it would be open to the pavement dwellers to satisfy the Commissioner that his dwelling was not an obstruction. In fact, by an interim order Justice O. Chennapa Reddy had held:

> "I have examined the observations of Shri Rajpurkar in light of what I have said above, and I am fully satisfied that however dirty and ugly they (pavement dwellers) may be the hutments in Kamraj Nagar, Senapati Bapat Marg, E.Moses Road do not obstruct the free and safe flow of pedestrian and vehicular traffic along the road". (Order dated June 1982 in Writ Petition No.4610-12 of 1981)

By another order, Justice A.P.Sen had held:

> "I am satisfied that the hutments built by the pavement dwellers in Sion, Baburao Jagtap Marg and Sant Sawat Mali Marg do not constitute an obstruction to the free and safe flow of pedestrian and vehicular traffic along the road". (Order dated 29 June 1982 in Writ Petition No. 4610-12 of 1981)

Thus, even on the ratio of *S.L.Kapoor's* case, there was no basis for holding that the rules of natural justice could be excluded.

Implications of the Judgement

The consequences of the approach taken can be disastrous viz.,

(i) that it is not necessary to examine whether the statute on which reliance is placed by the State for depriving life has for its object the deprivation of life or whether the law has any application to the facts of the case at all in the sense that there is no reasonable nexus between the object of the statute and the deprivation of life;

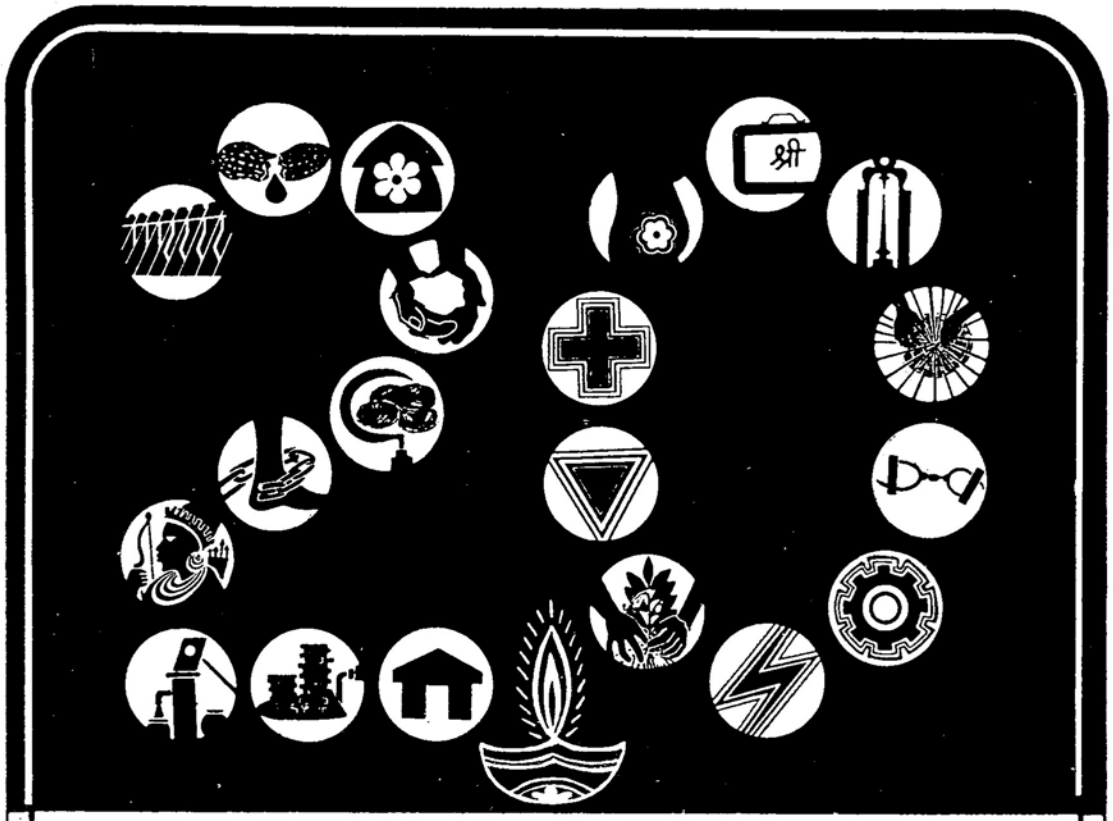
(ii) that in cases under Article 21, where deprivation of life is shown, the procedure for deprivation can exclude principles of natural justice altogether.

All that State need do is simply point to a statute under colour of which is purports to act. The State need not show any nexus, let alone a reasonable nexus, between the object of the statute and the deprivation of life. The State will thus be free to place relianace on any statute for its action to deprive life. This could amount to giving the State a carte blanche for arbitrariness. For, if the nexus between the object of the statute and deprivation of life is not be be examined, the whole concept of rule of law itself would flounder and fail. That is the necessary implication of the judgement.

For example, a person can be deprived of personal liberty by a law, which does not address itself to the question of deprivation of personal liberty. One wonders whether the court in *A.K.Gopalan's* case would have upheld preventive detention under a law which did not address itself to the question of preventive detention, but which nevertheless had the effect of depriving a person of his liberty. If *Olga Tellis* is good law, the only requirement under Article 21 would be that the procedure by which life is deprived ought to be fair, just and reasonable. Take away that and what are you left with ? Nothing but legislative and executive arbitrariness. The protection of right to life the "most fundamental of all rights" is rendered hollow. By making the application of the principles of natural justice discretionary, the Court has in fact, taken away even the minimal requirement of ensuring just procedure.

The consequences can well be imagined. Who is to decide that principles of natural justice need not be complied with because the result is not going to be any different ? Apparently this power is vested in the authority absolutely. The authority can on its whims and fancy, for malafide reasons, deny the opportunity to be heard. A valuable oportunity to prove that the dwellings are not in fact an obstruction, which in this case was successfully established in respect of the dwellings at Senapati Bapat Marg, E.Moses Road, Reay Road, L.B.Shastri Marg and others, will be totally lost.

To be continued



सर्वेऽपि सुखिनः सन्तु

Dipavali is a festival of lights. It aims at kindling a flame of prosperity, joy and peace in our lives. It is towards the attainment of this objective that conscious efforts are being made in Maharashtra to implement vigorously the 20-Point Programme, kindling new hope in the lives of common people. The new 20-Point Programme for 1986 announced by the Prime Minister Shri Rajiv Gandhi is a solemn affirmation to dispel darkness from the minds of the detractors.

The programme initiates a number of novel developmental schemes like new direction to agriculture, special programme for landless labourers, drinking water for all, expansion of education, social justice to backward classes and a host of other programmes. Let us fervently hope that this flame of 20-Point Programme will illuminate the life of the people with serenity, happiness and prosperity.

Directorate General of Information and Public Relations,
Government of Maharashtra

COMMENT

Amniocentesis Petition Admitted

Deepti Gopinath reports ona recent petition admitted in the Bombay HighCourt seeking to out law sex determination tests.

Twenty one old Sunita Chaturvedi was married and had two girl children. She lived in Mathura with her husband Girdhari Chaturvedi, his parents, and the children. Early this year Sunita conceived for the 3rd time. She was persuaded by her husband and in-laws to go to Bombay and have an amniocentesis test performed, so they could know the sex of unborn child.

Sunita was 4 1/2 months pregnant. She consulted Dr. Meenakshi Merchant who carried out an amniocentesis test. The test revealed that the foetus was female. Sunita was advised to have an abortion.

The abortion was performed by the suction method. She was sent home after being prescribed amplicillin and pain killers. The next day she developed slight pains, and so consulted Dr. Rajaben Arya who advised her to continue the same medication. As the day wore on Sunita became worse. She complained of breathlessness, palpitation, severe pain and weakness.

On the next day a relative of Sunita's contacted either Dr. Merchant Dr. Arya or both, who advised her to bring Sunita to their clinic. Sunita and her relative immediately left Andheri in a taxi. On the way Sunita became unconscious. Alarmed, her relative admitted her to Nanavati Hospital which was the closest.

Sunita died the next day at the Nanavati Hospital. Her death was caused by secondary peritonitis which occurred due to penetration or blunt injuries to the abdomen which is associated with post-operative rupture in that region or due to injury while performing an amniocentesis test.

This is used by parents and unscrupulous doctors to get rid of unwanted female foetuses. However amniocentesis is ordinarily performed in the 16th week of pregnancy which renders it illegal under the Medical Termination of Pregnancy (MTP) Act, 1971 (See the Lawyers, March 1986 - Amniocentesis or female foeticide)

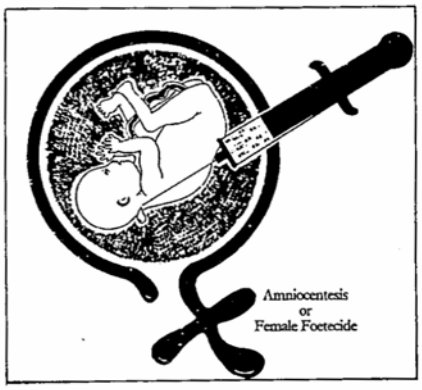
The Mahila Dakshita Samiti Trust filed a writ petition in the Bombay High Court, which seeks to prevent prenatal Amniocentesis or any other sex determination tests, and selective abortions on the basis of the sex of the foetus. The petition also seeks to punish those who had participated in such illegal practices which resulted in Sunita's death. The Petitioners submitted that such sex determination tests and selective abortions are violative of Article 14 and 21 of the constitution, as they take away life and liberty without any reasonable proceedure laid down by law.

While it is possible to argue that selective abortions of a female foetus is an offence under Section 312, 315 and 314 of the Indian Penal Code, it is positively dangerous to suggest that an unborn child has a right to life guarenteed by Article 21.

The Petitioners have also requested the Court to direct by a mandatory injunction the prohibition of any Amniocentesis test or any other sex determination test to be carried out by any medical practitioner.

On 20th October 1986, the Petition was admitted by Justice Jahagirdar of the Bombay High Court. However no interim relief was granted as the State made a statement that they will produce the relevant records. Meanwhile, a Bill has been introduced in the Lok Sabha by Shri Sharad Dighe seeking to amend the MTP Act. It seeks to prevent the performing of an abortion by any registered practitioner if he or she has reason to believe that the pregnancy is being terminated with intention to commit female foeticide after having determined the sex of the unborn child.

A Bill has also been introduced in the Maharashtra State Assembly by Mrinal Gore, Sharayu Thakoor and Shri Shyam Wankhede, seeking a total ban on tests of pre-natal sex determination within the State of Maharashtra. It seeks to prohibit any medical authority from carrying out an amniocentesis tests or any other biotechnological test or medical techniques which may be developed in the future in order to carry out selective abortions of female foetuses. The Bill requires all sex determination tests to be carried out only by approved Medical Centres and, such practitioners should keep exact and clear records to be maintained for a period of 5 years, and be available for production to authorities when required. The Bill also provides that patients only be permitted to take the test after being informed of all possible side effects. The Bill also recommenends stringent action against defaulters which includes rigororous imprisonment, up to a period ten years with a fine. It also recommends revoking the practitioners licence for five years granted for the purpose of the Act.



In response to the controversy,the Public Health Department of the Government of Maharashtra appointed a committee. To study the different laws governing the issue and the magnitude of the problem and to make recommendations for amendments to the existing legal provisions under relevant Acts, or suggest new legislation.

Though the setting up of this committee by the State Government seems a step in the right direction, one wonders how Dr. Pai (of the Pearl Centre) who is a self confessed performer of Amniocentesis for the purpose of sex determination and who even publicly defends it (The Lawyers, March 1986) as having legal sanction, has found his way on this Committee.

The committee has been given a deadline of November to present its report.

CONTROVERSY

Discharge Simpliciter —The Other View

In a reply to P.D. Kamerkar's article on Discharge Simpliciter in the July issue of The Lawyers, **Firoze Damania** *argues that there is good reason to allow the employers to simply discharge employees. Following it we have a rejoinder by P.D. Kamerkar.*

The doctrine of discharge simpliciter already riddled with holes is not dead as a dodo, at least so far as public sector employers are concerned. If after the *West Bengal Electricity Board* case [(1985) 3 SCC 116],there was even some faint glimmer of hope of reviving the doctrine, Justice Madon's judgement in the *Central Inland* case [(1986) 3 SCC 156] has performed the last rites.

So sweeping are some observations in the judgement that trade unionists and others who always held a brief against the employers'right to terminate the service of an employee in simpliciter are already looking forward to the day when even private employers will be denied the power to remove any employee except for proved misconduct. The veteran and eminent labour lawyer, P.D.Kamerkar has already argued persuasively in this very magazine (The Lawyers, July 1986) that Model Standing Orders and Certified Standing Orders vesting this power in private employers should also be struck down.

Basic Assumptions

To lend credibility and respectability to a view that may be characterised and dismissed as archaic or medieval or feudal,it is best to make one's position clear at the outset. Nobody, today can argue or plead for a revival or acceptance of the classic theory of hire or fire. Indeed, certain basic assumptions must inform any debate on this subject and these are :-

(a) In a poor country like India with a vast pool of unemployed persons, a good job with a decent employer is perhaps the most valuable possession a man can have.

(b) It follows that a person already holding such a job should not be deprived of it arbitrarily or capriciously and without good reason.

(c) This power has been often abused. For considerations other than the bona fide interests of the organisation or undertaking, employees have been removed.

(d) There is a propensity that the power may also be used on crass considerations of packing an organisation or undertaking with sons of the soil or other religious, communal or caste considerations.

(e) No system of jurisprudence can, therefore, sit by idly and allow a citizen to be deprived of his most valuable possession on any irrelevant, non-germane, arbitrary or capricious grounds. It is precisely because of these assumptions which are accepted as realities that industrial and service law already limited the employers' right to terminate an employee's services. Even before new directions were charted by the Supreme Court, the law was that an employee can be removed only for good and sufficient reasons.

Circumstances for simple discharge

The good and sufficient reasons may be (a) reaching the age of superannuation, (b) ill health or disability whereby the employee could not render the service for which he was employed, (c) genuine redundancy or surplusage, (d) proved misconduct of such a nature that warranted removal. In the last case the law provided that misconduct should be established either in a domestic inquiry properly held or before the industrial adjudicator.

On these, there is now no dispute. But the law also envisaged that there may be other circumstances and factors where an employee may not have committed any act or misconduct as such or may not be redundant and yet the employer may genuinely feel that the retention of a particular employee may not be in the interests of the organisation and, therefore, he should be asked to go without attaching on him any stigma or pecuniary loss. It was this right which till recently was available to both public and private employers which is now under attack. What then was the nature of this employer's right or power and is there a case for it's total exorcism?

Right not unrestricted

The right was not unrestricted. It was circumscribed by many rigid limitations so that, by and large, responsible employers shied away from even taking recourse to it. Where recourse was taken, it was for compelling reasons. The right could not be used arbitrarily or capriciously. It could not be used for ulterior reasons or motives, nor to victimise an employee. It was not allowed to be used as a subterfuge to dispense with the procedure of a fair enquiry where misconduct was the cause for removal. In fact, the predicament of an employer was such when it came to justify an order of discharge simpliciter that the analogy of a tight rope walker in a circus comes to mind. If he revealed too little of the reasons that prompted him to take action, he ran the risk of having his action struck down as arbitrary and capricious. If he revealed too much, instantly the order was branded as punitive and the action struck down as mala fide exercise of powers with a view to get round the obligation of proving the misconduct on the part of the employee.

Still despite all these limitations, orders of simple discharge passed by several employers were after careful scrutiny fount to be bona fide, proper and lawful. Orders passed by 'states' and other authorities were subjected to greater scrutiny and the Supreme Court itself upheld several such orders passed amongst others by *Air India*[(1972) 1 LLJ 501], *B.E.S.T. Undertaking of B.M.C.*[(1978) 2 LLJ 168]; *Delhi Transport Undertaking* [(1970) 1 LLJ 20], *Gujarat State Minerals Corporation*[(1974) 1 LLJ 97] *Andhra Pradesh University* (AIR 1976 SC 2049), which involved authorities all 'states' under Article 12.

Surely, if the power was so patently bad or reminiscent of Henry VIII's reign or of 1881 vintage, as now described in its two recent decisions, the Supreme Court would not have upheld such actions taken. And is it an answer to say that the *vires* of the rule or regulation under which action was taken was not directly challenged? If the power is not offensive as to be labelled 'medieval' and 'feudal' then surely any order made in exercise of such power would have been instantly set aside without anything more. In any event, the Supreme Court did uphold the *vires* of the regulations providing for compulsory retirement not once but several times, and though there may be a slight difference, in essence, what is the power to compulsorily retire but a modified version of discharge sim-

pliciter. To an employee, who is asked to go, it matters not that he has reached the age of 50 or has completed 30 years of service. He still had eight or ten more years of service.

Practical and Realistic

It is not that, prior to 1985 the Supreme Court, the various High Courts, tribunals and arbitrators were all medieval or feudal in their approach or even insensitive. They were being just practical and realistic. After all, who amongst us, though claiming to be most liberal in our approach, would not as employers, dispense with services of our own employees, if it appeared to us hazardous, risky and unwise to retain an employee.

Would any of us retain for even a day in our employment a domestic servant if a well meaning and good intentioned friend or neighbour informs us with due responsibility that our domestic servant is constantly in company of drug peddlars and crime lords? What would we do? Confront our neighbour or friend with the domestic servant and request him to subject himself to cross-examination by the servant? Would we even reveal his identity to the servant? Certainly not. In fairness to the employee, all we would ascertain is whether the information was given bona fide with good intentions or was it due to animosity or ill will. At best, we would make discreet enquiries to satisfy ourselves whether the information is correct. But on being satisfied, would we not act instantly to protect our children and homes?

Not fair — my critics may complain. Domestic servants are not entitled to any job security and the illustration given is an extreme one. Certainly domestic servants may not have been able so far to secure job security, but does this invalidate the argument. What if the domestic servant is employed by a big bank or other organisation and allotted duties at the residence of one of the officers? What is then the employer to do. Transfer him from one officer's house to another?

We all know what decision each one of us would make under these circumstances and we do not have to be ashamed to admit it. For the removal of such a servant is justified not because he has committed a miscounduct but only because good reason, responsibility, bona fides and reasonable basis for the apprehension that his retention in service would be prejudicial to the safety of our children and homes prompted us to take a decision. This saves the order from attack.

Other instances

This is not an isolated instance. I can think of several other illustrations. A surgeon who has lost his skill, a driver who involved the vehicle in numerous collisions, a foreign exchange dealer on account of whose faulty judgment a bank may have lost crores of rupees. None of them may have committed an act of misconduct. No carelessness or negligence can also be proved, but does this mean that an employer is saddled with such an employee for the rest of his working life.

Cooking up false cases

If then the power itself is taken away, what are these employers to do? You only drive them to cook up false cases of misconduct or redundancy and with perhaps one employee whose services are not wanted, others may also be asked to go just to lend credibility to the case of surplusage. Does this serve public policy?

The exercise of this power however may be controlled. But the power should be retained to be used sparingly and only for compelling reasons, for bona fide and not for ulterior reasons or motives. Not to victimise or as an unfair labour practice. And the exercise of that power must always be open to scrutiny by courts and tribunals.

Suggestions

It is not as if job security for employees is incompatible with this power. It is quite possible to harmonise these apparently conflicting rights and the suggestions that follow aim to do precisely that.

Firstly, the Service Regulations or the Standing Orders must give proper guidelines as to under what circumstances this power should be exercised.

Secondly, the power should be vested in a manager sufficiently high up in the organisation. He would be able to take perhaps a more dispassionate decision and the frictions and animosities of the officer or manager under whom the employee is directly working will not cloud his decision.

Thirdly, at least a modicum of a chance to make a representation against a proposed order of removal should invariably be provided so that arbitrary and capricious decisions would not be taken. An employee would then have a chance to show that he is just being made a scapegoat or is a victim of a witch hunt based on plain rumours, gossip or loose talk.

Fourthly, an appeal should be provided against any such order to the highest executive of the organisation.

Fifthly, make it expensive for an employer so that he may not act recklessly. Any and every termination is now held to be retrenchment. Notice pay and compensation are thus payable as conditions precedent. Even so, certain amendments to Industrial Disputes Act are necessary. The explanation to section 2(oo) introduced in 1984 should be recast to eliminate the uncertainty brought about by the amendment, and such employees who are discharged must also get notice pay, retrenchment compensation as condition precedent. Correspondingly, Sections 25-G and 25-H should not apply to these cases. Though these terminations may amount to retrenchment, nevertheless they are not related to redundancy, so the principle of last come first go and the right to be re-employed in future vacancies does not arise. Section 25-N would also have to be suitably amended to take out of its purview these cases.

Sixthly, provide a direct access to Industrial Tribunals or Labour Courts to such employee and invest these authorities with jurisdiction to scrutinise whether the decision has been taken bona fide, for good, sufficient and proper reasons and that the order is not vitiated on account of mala fides unfair labour practice, victimisation or because it is punitive. Why direct access? Because Governments abuse their power to refer or not to refer a dispute more frequently than employers abuse their power of simple discharge.

Lastly, arm the adjudicating authority with necessary powers, either to reinstate or to grant higher compensation, if the order of termination is vitiated on any account except technical breaches.

The employers have themselves to blame for the present state of affairs. Despite all the limitations laid down by the Supreme Court, which scared off all responsible employers from using this power of discharge simpliciter, except under most compelling circumstances, quite a few employers continued to recklessly terminate the services of employees many times only in the hope, vain or otherwise, that by prolonging the litigation, they would tire out the workmen. No wonder then that the Supreme Court has virtually stripped State Bodies of the power and private employers are also in danger of losing this right. The pendulum has swung to the other extreme. The question is: do we wait for the pendulum to swing back again, or realising the realities of the situation, correct the balance and set the scales even between employers and employees?

Firoze Darasha Damania is a senior advocate practicing in the Bombay High Court.

CONTROVERSY

P. D. Kamerkar replies

It is surprising that of all others Mr. F. D. Damania should apprehend chaos in the event of the discharge simplicitor provided in the Model Standing Orders being struck down following the ruling of the Supreme Court in the *Central Inland Water Corporation* case. In his characteristically persuasive manner he offers justifications for the retention of the so-called inherent absolute right of the employer to fire any one who has been hired. It appears that he expects the pendulum to contradict itself some day and fears much damage to industrial relations in the meanwhile.

Practical consequences

Is the prospect so disturbing ? After all, in practical terms what will be the situation if the employer is deprived of the powers of discharge simplicitor ? Will it present insurmountable problems for a bona fide administrator ? All that it means is that for terminating the services of a permanent employee, the employer must have reasons which can be articulated and which must be germane to the conduct of his business. They must not be arbitrary or personal.

Says Damania: if discharge simplicitor has been so subversive surely the Supreme Court would have abolished it long ago ? The issue was squarely raised for the first time in 1985 in the *West Bengal Electricity Board* case and decided as squarely. Even if there had been any earlier ruling to the contrary, that by itself does not affect the efficacy of the law now declared. Nor does the character of discharge simplicitor became any less subversive.

Mr. Damania then contends : if compulsory premature retirement can be upheld, why not discharge simplicitor ? These are two different and distinct categories of determination of the contract of employment. In the former, the employer, usually the State, gets the right to reassess the competance of an employee at an age when senility is likely to set in. I do not justify the legitimacy of that right nor would I justify its vindication by the Courts. I would make use of the logic of the *Central Inland Water Corporation* case to call in question the right of the employer to effect premature retirement.

Mr. Damania then cites the services of the domestic servant and questions whether he cannot be discharged without assigning reasons in case there are good reasons to believe, but no evidence to prove, that his retention involves a suspected risk ? A very sensitive question indeed. The distinction between an industrial worker and a domestic servant is very vital. Personal relations and confidence are essential in domestic service, whereas these two have no place left in modern industrial relations. These two are, therefore, not comparable.

Mr. Damania would have us believe that there are trade unionists who have obtained the removal of employees, presumably in order to eliminate opponents. If there be such disreputable specimens, we need to identify and weed them out. An employer who succumbs to such pressures and victimises an innocent worker must bear the consequences.

Facts admitted

Mr. Damania's piece deserves a reply because it does not disputed, nay admits and bemoans, the two vital facts of life viz. that the power of discharge simplicitor has been abused by employers and that a good job is a valulable possession of a working person. We must, therefore, devise sound safeguards against being deprived of this precious right to continued employment. This right has particular relevance in this country where there is a vast sea of the hungry and the unemployed. The problem is of preserving what one possesses.

Mr. Damania admits that the power of discharge simplicitor has been abused by employers. He also admits that with the vast multitude of unemployed, a job is the most valuable possession a man can have. With these premises, if he still offers apologies for the employer's right to discharge simplicitor and begs for its retention, it is because he cannot divest himself of the concepts of the civil law that the contract of employment is a continuous contract terminable at the will of parties and that there can be no vesting of the right to employment. These concepts have been buried several fathoms deep ages ago.

"What are the employers to do, if this power of discharge is taken away ?" asks Mr. Damania and answers it: "They will be driven to cook up false cases" As if this practice is unknown. If the curtailment of certain rights is otherwise justified, can it be argued that those affected will resort to circumvention or subversion?

Natural Justice

The negation of the right to terminate service without assigning reasons is but the application of the right to natural justice, meaning the right of the employed person to be shown the reasons why he will be deprived of his means of livelihood and that he will be given an opportunity to show cause against it. One has only to look at it from the standpoint of the vast sea of the employed to realise that the employer's right of discharge simplicitor is just the other side of a prohibition upon a worker questioning the reason why he should lose his menas of livelihood. To quote Mr. Damania : no system of jurisprudence can sit idly by and allow a citizen to be deprived of the valuable right to his continued employment, for any consideration not germane to it. It means not only that there must be a reason why any one should lose his employment but that the reason must be a good reason, germane to his employment, and that it be made known to the employee concerned.

The power of discharge simplicitor should be controlled but retained for compelling circumstances, urges Mr. Damania. But it is now too late. When the Supreme Court ruled that the clause providing this absolute power was opposed to public policy and therefore,void under Section 23 of the Indian Contract Act, it abolished this pernicious practice from both sectors, private and public. Discharge simplicitor is now as dead as a dodo. What now remain are only the formalities

SPECIAL REPORT

General Vaidya's Assassination the privilege of silence

Gen. A.S. Vaidya's assassination in Pune on August 10 prompted Shri N.M. Tilekar, a social worker from Pune and eleven others to file a criminal complaint under Section 166 of the Indian Penal Code against the Police Commissioner of Pune, Shri Bhaskar J. Misar, for dereliction of his duty in protecting the life of Gen. Vaidya. **Nilima Ditta** *reports on the legal proceedings*

In an unprecendented move, private citizens, outraged at the appalling lack of security which led to Gen. Vaidya's assassination, filed a criminal complaint in the Court of the Judicial Magistrate (first class), N. M. Gosavi, at Pune. The main submissions made in the Complaint are that the accused-respondent Bhaskar Misar, Police Commissioner of Pune, is a public servant as defined under Section 21 of the Indian Penal Code. He is, therefore, bound to carry out his public duty diligently and honestly. The Commissioner had appointed constable Ramchandra Baburao Shirsagar on 3rd August 1986 as the security guard for Gen. Vaidya, under Sec. 21 and 22 of the Bombay Police Act. He had previous knowledge of the incompetence of Shirsagar, who was about 45 years of age, and had not undergone any medical tests for physical condition and alertness and was, therefore, unfit to protect Gen. Vaidya. The security guard made no attempts to pull out his revolver or to defend Gen. Vaidya from the assassins. By appointing an incompetent security guard , the Commissioner had violated Sec. 166 of the IPC and disobeyed the law. The Commissioner had called a press conference in Pune on August 10, 1986 and admitted that there was laxity on the part of the police in protecting Gen. Vaidya. The behaviour of the Commissioner and the head constable also points to corruption within the police force which allowed the assailants/terrorists to claim Gen. Vaidya's life.

The Complainants contended that after the killing of Gen Vaidya, there were riots in some parts of Pune city and considerable public and private property was damaged. The Comissioner should have anticipated the events followed by the killing. But he failed to protect public and private

property and is responsible for all the losses.

The complainants further stated that the appointment of an incompetant security guard per se is a criminal offence under section 166 of IPC. All papers concerned with the security arrangements for Gen. Vaidya including the appointment of Shirsagar and the letters containing threats to his life should be produced before the Magistrate, the Complainants contended. They expressed fears about tampering of evidence and prayed that all letters and documents should be seized by the Court from Gen. Vaidya's office.

Summons to produce documents

The Judicial Magistrate issued summons to the clerk of the Police Commissioner's office requiring him to produce the documents prayed for by the Complainants under section 91 of the Criminal Procedure Code returnable on 19th August 1986, in the interests of justice.

The District Government Pleader (DGP), Shivaji Takawane moved the Sessions Court and challenged the jurisdiction of the Magistrate's Court in ordering the production of documents relating to security arrangements made by the Pune City Police and requested the Court to grant him permission to file a criminal revision application challenging the issuance of the order directing production of the documents. He argued that disclosure of the documents would be injurious to public interest.

The Complainants argued that the DGP could not appear on behalf of the Police Commissioner as both he and his client did not have any locus standi in the hearing at that stage. However, the Magistrate gave him leave to appear on the behalf of any witness from the office of the Pune Police Commissioner, who would be assigned to produce the relevant documents.

Revision Application

The DGP filed a Criminal Revision Application on behalf of the Commissioner of Police, Shri B. J. Misar, on the following grounds:

1. The Magistrate had no jurisdiction to pass an order under section 91 of Criminal Procedure Code(Cr.P.C.) without taking cognizance of the complaint and without proceeding into an inquiry in the said complaint.
2. That an application to produce documents without an inquiry held by the Court was unwarranted and patently illegal.
3. The Applicant was a public servant and prior sanction of the Government was required under section 197 of the Cr. P. C. to prosecute him.
4. The communication regarding security of Gen. Vaidya made to the Commisioner is in his official capacity and is protected under sections 123 and 124 of the Indian Evidence Act, and that the disclosure is likely to seriously affect the progress of the investigation, public interest and public

safety.

The Commissioner prayed that the Complaint and Order passed by the Judicial Magistrate be quashed and set aside.

The Additional Sessions Judge dismissed the Revision Application made by the State against the lower Court's order for production of documents pertaining to security arrangements for the late Gen. Vaidya, holding that the said application was premature and not maintainable. The judge also added that the lower Court had taken cognizance of the proceedings and passed the order to make inquiry in accordance with the provisions of Sec. 202 of Cr.P. C. The Court also observed that the Magistrate had issued summons to the Commissioner to produce the document through his clerk.

The DGP asked for an injunction which was granted by the Court on the execution of the order passed by the Sessions Judge, which was stayed up to September 12. The Commissioner being aggrieved by the order of Sessions Judge, filed a writ petition in the High Court.

Petition in the High Court

The Writ Petition in the High Court has been filed on the following grounds:

1. The magistrate has not conformed to the provisions of Sec. 202 of Criminal Procedure Code and the order passed by him under section 91 of Cr.P.C. for production of documents was bad in law.
2. The order passed by the Magistrate amounts to testimonial compulsion barred under Art. 20(3) of the Constitution. In State of Gujarat v/s Shyamlal (AIR 1965 SC 1251), Art. 20(3) was construed to mean that an accused person cannot be compelled to disclose documents which are self incriminatory and based on his knowledge.
3. The Sessions Judge had not given any reason for not accepting the Commissioner's claim of non-disclosure u/s 123 and 124 of the Indian Evidence Act and this would hamper investigations being conducted by the Central Bureau of Investigation.
4. Previous sanction should have been taken under section 197 of Cr. P. C. for prosecution of Police Commissioner as he is a public servant.
5. The Criminal Revision Application was maintainable under 539 of Cr. P.C.

The Commissioner prayed that the order passed by the Judicial Magistrate for production of documents should be set aside, the Criminal Complaint should be dismissed by the High Court under section 482 of Cr. P. C. and a stay granted on the hearing of the complaint in the meanwhile.

Justice Kamat who admitted the petition on September 10, 1986 granted a stay of further proceedings in the court of the Judicial Magistrate.

Right to Information

Several important issues have been raised in the litigation pending in the various Courts, notably 1) right to information 2) duties of public officials 3) rights of private citizens.

Under the prevailing laws, information is available partially if you take an action in Court.

To file an action in Court, the legal rights of a person must be infringed and there must be a cause of action. In the present case, the Commisioner refused to disclose documents on the ground that it would be injurious to public interest. The manner in which public interest is injured is not specified. There seems to be a general secretiveness regarding all governmental operations which dont't seem to have any rationale other than being a hangover from the colonial days.

Affairs of State

The Police Commissioner in his criminal revision application contended that all communication made to him in his official capacity concerning the security arrangements for the late Gen. Vaidya is protected under sections 123 and 124 of the Indian Evidence Act (IEA). Section 123 of the IEA states that "no one shall be permitted to give evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he deems fit."

By definition, "any affairs of state" is very wide and inclusive of all kinds of activities. Any public agency can thus withhold information u/s 123.

Section 124 states that " no public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure." This section also allows secrecy to be maintained under the guise of official communication. The case law concerning the above issues are fully discussed in *S. P. Gupta and others v/s Union of India* (AIR 1982 SC 149), also known as the Judges case. The question which arose was whether correspondence between the Chief Justice of India and the Law Minister ought to be disclosed. The Supreme Court laid down:

1. We have adopted a democractic form of government.
2. Every citizen has a right to know what the government is doing.
3. Those who govern are accountable for their conduct.
4. Accountability means that the people should have information about the functioning of the government.
5. An open government or accountability of the government would assure the people of an efficient administration.
6. Secrecy in government excludes public accountability and this secrecy promotes corruption and oppression and abuse.

In the earlier case of *State of Uttar Pradesh v/s Raj Narain* (AIR 1975 SC 865) the S. C. upheld the citizen's right to know.

Reffering to S 124 and S 162 of the Indian Evidence Act in S. P. Gupta's case, the Supreme Court observed that there are two competing public interests- the public interest in maintaining justice clashes with the public interest sought to be protected by non-disclosure and the court has to balance these two aspects and decide which one predominates. It was also laid down that there are certain classes of documents which are protected from disclosure, but this class is not absolute or inviolable. The courts have to decide whether disclosure of these documents would promote justice or hurt public interest.

It is essential that the Courts decide whether production of the documents regarding security arrangements for the late Gen. Vaidya would serve the interests of justice or be injurious to public interest. Their decision will be momentous if disclosure is permitted, for not only would it fix responsibility for Gen. Vaidya's death but also endorse the citizen's right to information of public acts by public functionaries.

American Judges Under Attack

The American system of appointment and confirmation of judges is subject to close scrutiny, reflecting an openness totally absent in India. In this article, ***Geoffrey Coll*** *evaluates the recent controversy surrounding three justices of different Courts in the U.S., Chief Justice Rehnquist, Chief Judge Harry Claiborne and Chief Justice Elizabeth Rose Bird.*

Following Warren Burger's resignation, President Reagan nominated Associate Justice William Rehnquist, a staunch conservative, as the new Chief Justice. (See The Lawyers July 1986 issue "A Dis-appointment"). Under the United States Constitution, Presidential nominations to the federal bench must be confirmed by a majority vote of the one hundred member Senate. In most instances, Senate confirmation is routine. However, Rehnquist was subjected to a grueling three month attack that focused on his personal integrity, as well as his conservative views on civil rights and womens' rights. While Rehnquist was ultimately confirmed by a 65-33 vote, his was the most seriously contested nomination to the Supreme Court since the Senate rejected two of President Nixon's nominees in the early 1970's. No successful Supreme Court nominee has drawn as many negative votes in this century.

Perjury and Voter Harassment

The most serious allegation levelled against Rehnquist was that he illegally harassed blacks and hispanics (people of Spanish origin) attempting to vote in 1962, and then lied about his involvement in the harassment during his Senate confirmation as an Associate Justice in 1971. A former Federal Bureau of Investigations (FBI) agent, who investigated alleged incidents of voter harassment in the State of Arizona in 1962, testified before the Senate that Rehnquist was part of a small group that aggressively challenged minorities waiting to vote. Rehnquist allegedly demanded that hispanics prove that they could read English, and blacks prove that they could read at all, by insisting that they read portions of the Constitution while waiting in line to vote. English literacy challenges (which were later prohibited by the Civil Rights Act of 1964) were permissible in Arizona in 1962 provided that they did not amount to harassment.

During his 1971 confirmation hearing as an Associate Justice, Rehnquist testified that he never personally challenged voters. However, the FBI agent's testimony to the contrary was corroborated by four additional eye witnesses. When asked to explain this apparent perjury, Rehnquist replied that his memory had grown faint, and that he "did not believe" that he had challenged minority voters.

Discriminatory Deeds

An FBI investigation conducted for the Senate also revealed that two of Rehnquist's homes contained illegal discriminatory restrictions on ownership. The deed to his former home in Arizona included a covenant barring its sale or rental to "any person not of the white or caucasian race." In addition, the deed on his Vermont vacation home that he purchased in 1974, while sitting as an Associate Justice, contains a restrictive covenant prohibiting the rent or sale of the property to "any member of the Hebrew race." Both restrictions are illegal as discriminatory. Initially, Rehnquist claimed that he was totally unaware of either restriction arguing that few people fully read their deeds. However, Senate investigators later revealed that Rehnquist was informed in writing by his attorney that the Vermont property contained the restriction against Jews. Again, Rehnquist offered no explanation for his apparent memory loss.

Unethical Conduct

Many Senators were also disturbed by Rehnquist's failure to disqualify himself from a 1972 case in which the Supreme Court rejected a challenge to the Army's Surveillance of anti-Vietnam war protesters. Rehnquist, who handled the case as an Assistant Attorney General in the Nixon Administration prior to his nomination as an Associate Justice, chose not to disqualify himself when the case reached the Supreme Court on appeal. He then cast the deciding vote in a 5-4 decision won by the Nixon administration he had just left.

Reactionary Views

In addition to concerns over Rehnquist's personal integrity, many Senators also challenged his conservative views on civil rights and womens' rights. Dr Benjamin Hooks, the Director of the National Association for the Advancement of Colored Peoples (NAACP), led a liberal coalition that denounced Rehnquist as "an extremist and an enemy of civil rights" whose rulings in civil rights cases involving segregation share a consistent hostility to minorities. Eleanor Smeal, the President of the National Organization for Women (NOW), also denounced Rehnquist as a "disaster for women" who advocates the view that the State can do anything it wants in sex discrimination.

While the final confirmation vote of 65-33 suggests that Rehnquist's appointment was never seriously threatened, the confirmation process helped focus the public's attention on the Reagan adminstration's insensitivity to minorities and women. In addition, the open process tarnished the credibility of Rehnquist who previously was considered one of the country's

brightest conservatives. Most importantly, the constitutional requirement that there be an open debate on the qualifications of appointed judges provided the public with a forum in which it can express its disatisfaction with trends in judical decision making.

Claiborne Removed

Last month Chief Judge Harry Claiborne of the federal district Court of Nevada became the first federal judge to be unanimously impeached by the House of Representatives and then removed from the bench on conviction by the Senate. Under the United State's Constitution, once a federal judge is nominated by the President and confirmed by the Senate, he is appointed for life. A federal judge can only be removed from office if the House of Representatives votes for impeachment (which is akin to an indictment) by a majority, and two thirds of the Senate votes for conviction. Grounds for removal as listed in the Constitution include "treason, bribery or other high crimes and misdemeanors."

In practice the impeachment process is rarely used because most judges and high federal officials resign from office when faced with the possibility of impeachment. For example, former President Nixon chose to resign as the President in the wake of the Watergate scandal rather than be impeached by the House of Representatives. However, Claiborne refused to resign from the bench despite the fact that he is currently serving a two-year sentence in federal penitentiary on a tax evasion conviction. As a result, he continued to collect a $78,700 annual salary while in prison and could have returned to the bench after completing his prison term.

Claiborne is the first federal judge to be convicted of crimes while serving on the bench and the first sitting judge to go to prison. Appointed in 1978 by President Carter, Claiborne was convicted in 1984 on two counts of tax evasion for failing to report nearly $ 107,000 in income on federal tax returns for 1979 and 1980. An additional bribery charge was dropped by the Government after the jury failed to reach a verdict. Prosecutors proved that while sitting on the bench, Claiborne surreptitiously cashed checks in Nevada gambling casinos for deferred payments of legal services and then failed to report the payments as income to tax authorities.

His impeachment by the 435 member House of Representatives was the first unanimous impeachment vote in United States' history, and the first House impeachment vote in fifty years. Under rules established by the Senate, a committee of twelve Senators then presided over a hearing with nine selected House members acting as prosecutors. Following the hearing the full Senate overwhelmingly voted his conviction and removal from the bench.

Bird Faces Reconfirmation

California Supreme Court Chief Justice Rose Elizabeth Bird faces a reconfirmation vote by the electorate in late November. Under the California State Constitution, judicial appointments by the state's Governor must be reconfirmed by a majority vote of the electorate every fifteen years. While there are no similar reconfirmation provisions in the federal Constitution (federal appointments are for life) or most state Constitutions, some other western states also have provisions similar to California's.

Bird is almost certain to become the first California justice ever to lose a reconfirmation election. Appointed by the liberal former Governor Jerry Brown, she has consistently stressed the importance of careful judicial due process in cases involving the potential use of the death penalty. In the United States, the Supreme Court has upheld the right of states to employ the death penalty, provided that they meet very stingent Constitutional requirements of due process.

Conservative opponents of her reconfirmation constantly point to the fact that she has affirmed none of the sixty death penalty cases that she has considered. They have spent nearly $ 5 million in a media campaign that has covered the State with sensational descriptions of the murders committed by the men she has temporarily stayed from the gas chamber. In some of their radio and television advertisements, her opponents falsely implied that the murderers had been released by Bird rather than confined to life imprisonment.

In addition, in a highly controversial move, California's present pro-Reagan conservative governor, George Deukmejian, has actively opposed Bird's reconfirmation. No California governor has ever taken a stance on the reconfirmation of a state Supreme Court justice in the past. If Deukmejain succeeds in winning his own re-election in November, and persuades voters to reject Bird and two other anti-death penalty justices he opposes, then he could appoint a conservative pro-death penalty majority to the seven member court that already includes two of his nominees.

Statewide opinion polls indicate that two-thirds of the electorate will vote against Bird's reconfirmation, and seven-eighths of her opponents strongly favour her ouster. The overwhelming majority of those who plan to vote against her cite her view on the death penalty as their primary reason.

Depending on one's viewpoint, the apparent success of this single issue campaign is either a triumph for California's historical commitment to the popular will or a warning about the pitfalls of exposing judicial independence to the ballot box. The well-financed nature of her ouster campaign raises serious questions as to whether her pending defeat genuinely reflects the popular will. In addition, the highly visible participation in the campaign against her by Governor Deukmejian raises further questions as to whether justices in California can exercise independent judgement.

The careful public scrutiny that Justice Rehnquist, Judge Claiborne, and Justice Bird have been subjected to in recent months reflects an American emphasis on openness in selecting judges and evaluating their competance. This differs dramatically from the closed nature of the judicial selection process in India. The importance of the questions raised in Rehnquist's confirmation concerning issues of judicial integrity and impartiality highlights the benefits of an open process of judicial selection. In contrast, the experience of Justice Bird suggests that the independence of the judiciary can be compromised if public accountability is abused through well-financed media campaigns and political manoeuvring.

Geoffery Coll is a law student at the Columbia Law School, New York.

HAAZIR HAI

Ela Bhatt

Ela Bhatt, Secretary of the Self Employed Womens Association (SEWA) recently nominated to the Rajya Sabha, takes her job as an M.P. seriously. Known for her organizational work among the self employed urban and rural women, Ela plans to make full use of her access to the Rajya Sabha. We talked to her about her work as an M.P. Here are the excerpts.

Q. *Being an M.P. is a new experience for you. How did you react when you first sat in the Rajya Sabha?*
A. My initial reaction was one of surprise. As an M.P. you are really pampered. Facilities for travel and communication are practically unlimited. There is ample scope to work if you really want to. Every possible assistance is given in the house, office, library and access to information, to enable you to perform your functions. As I was used to working on a modest scale, the sheer availability of services was overwhelming.

Q. *Don't you think that being an M.P. takes you away from actively organising women and will this not affect the movement for which you have worked?*
A. Shortly after becoming an M.P. and participating in the proceedings of the House, I was overcome by a sense of depression. I felt that M.P.s were only interested in talking and not doing any useful work. I felt I was wasting my time. I considered the possibility of quitting. When I discussed this with my members, they felt I should continue and try to utilise the access to decision making for furthering the cause of self employed women. I saw the wisdom of what they were saying and decided to stay on. It is too early for me to assess my work.

Q. *What is the reaction of other M.P.s to you?*
A. Very few take their job seriously. I try to attend the sessions regularly. Their attitude was at first one of indifference. On one occasion, I voted with the Congress (I). Suddenly, they became interested in me and went out of their way to lobby for my vote. On another occasion also, I voted with the Congress (I). They became convinced I was one of them. On yet another occasion I voted with the opposition and this time, the opposition parties started taking an interest in my vote. It is the same old vote catching game. The issues are irrelevant.

Q. *What are the issues you plan to raise in the Rajya Sabha?*
A. For several years SEWA has been trying to draw attention to the plight of the self employed. These include home based workers and contract workers who are given work by contractors and middle men to work at home for miserable wages. Today they are not covered by any labour legislation and have no security. Whereas the problems of the organised working class have drawn attention, those of the unorganised have gone without notice. I will try to persuade the Government to introduce a HOME BASED WORKERS (EMPLOYMENT PROTECTION) Bill and if they don't, I plan to introduce it as a private member's bill. SEWA is presently working on such a Bill and would welcome assistance and support for its efforts.

Q. *What are the main problems of the self employed?*
A. The major problem is one of invisibility. Today decision makers are not willing to admit that they exist. We have approached the Prime Minister and asked him to appoint a Commission on the self employed.

Q. *What will be the functions of the Commission?*
A. The Commission will be expected to collect authentic data about the nature of work of the self employed, the different sections in which they work and to recommend legislative and administrative measures to regulate their employment. Today there is a mental block against the self employed. How can they form trade unions, they ask. As a consequence of which, the established trade unions have not cared to unionise the self employed.

Q. *Have you received a positive response to your demand for a Commission on the self employed?*
A. The Prime Minister has indicated that a Commission on self employed women can be set up. But I would prefer the Commission to examine the demands of both men and women in the self employed sector. There is no reason why its work should be confined to women workers alone.

Q. *What has been your experience with the Labour Ministry?*
A. The response of the Labour Ministry has been quite positive. However, the Labour Ministry has its limitations. All trade unions have to be consulted on any major decisions and they never agree with each other, for political reasons. As a result, no decisions are taken. The Tripartite Labour Boards have not been able to safeguard the interests of labour. In Gujarat, for example, we have a Tripartite Board for Mathadi workers. It is the gang leaders who are picked up and nominated as representatives of labour on the Board. They are in truth, representatives of the management and not labour. The functioning of the Board is frustrated by employees. The tripartite model cannot function in a situation in which the workers are themselves unorganised. In such cases it is up to the Government to take the initiative and correct the imbalance and exploitation.

Q. *What has been your experience with the Labour Ministry in Gujarat?*
A. Raising industrial disputes is a te-

dious process. Conciliation Officers are indifferent to the problems of the unorganised.

Q. *The Government has intoruduced a Bill on Child Labour which is due for discussion in the next session. It virtually legalises child labour. What is your attitude to the Bill?*

A. In principle, I am myself opposed to child labour and I think legalization will be very harmful to the long term interest of the child. However, our organization has not yet taken any decision on the question. Several of our members feel that child labour is a reality and the interests of the working child needs to be protected by law. They feel the economic compulsions of work. I am torn between two conflicting emotions on this subject. We plan to debate the Bill among our members to arrive at an understanding of what is to be done.

Q. *But don't you think child labour in hazardous employments should be banned?*

A. Yes, obviously. It is disturbing to think that the Bill will legalise child labour in hazardous occupations. One of our members lost three sons who were working in a fire works factory.

Q. *What kind of demands have you made on behalf of rural women in Gujarat?*

A. For a long time, we were demanding maternity benefits for agricultural workers. Our demands fell on deaf ears. We approached the LIC and asked them to start a group health insurance scheme for women employed in agricultural work. They refused saying women are a high risk group. We decided to take the initiative and started our own maternity benefit scheme for agricultural workers. Under the scheme, any woman could register with us at the rate of Rs.15.00. We then ensured that they got prenatel care at the primary health centres and had their deliveries at the local hospital after child birth. They were entitled to maternity benefits. The scheme was so successful that about seven thousand women registered with us. Soon rural women started saying: "If you register with SEWA you will not die in child birth". The mortality rate among women came down dramatically. We were able to motivate them to pay attention to their health.

Q. *What was the response of the State Government?*

A. After seeing the success of our scheme, they were forced to declare a maternity benefit scheme for all agricultural women in Gujarat. Under the scheme, full wages are paid for 6 weeks for the first delivery, for five weeks for the second delivery and for 2 weeks for the third.

Q. *There seems no basis for this declining benefit from the first to third child?*

A. Yes. I am opposed to this scheme. It seems an insidious form of family planning with which I do not agree. But it is a beginning.

ADAALAT ANTICS

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Trust me

'Trust me' is what Mr. B.A. Masodkar, one time judge of the High Court, Bombay, must have said to A. R. Antulay, when the two first met. The meeting must have been a mutually beneficial one for Masodkar soon went on to become a co-trustee with A.R. Antulay on the IGPP. Though he later resigned as co-trustee, it would appear that the relationship of trust continues to this day.

Having chucked in his High Court judgeship, B.A. Masodkar has opened up shop in the Supreme Court and can be seen pacing the corridors of the Supreme Court everyday.

According to some reports, he will be representing A.R.Antulay in his appeal in the Supreme Court. The relationship between client and lawyer is, after all, a relationship of trust and what better person to trust could A.R. Antulay find, but B.A. Masodkar? Others deny these reports and say the brief is too heavy for him to pick up at short notice - a lame denial it would seem. Yet others believe that B.A. Masodkar will appear for his friend Ajit Kerkar. There is, of course, no way of knowing for sure one way or the other. We will just have to wait and watch which way the wind blows. After all, no law prevents a trustee from appearing for his co-trustee. It is all a matter of trust, isn't it?

$32m for Bhopal suit

At the recently concluded conference of the International Bar Association held at New York, Law Minister A. K. Sen, in an attempt to convince the international legal community that the Government is doing a lot for the Bhopal victims, said that the Government spent $ 32 million on litigation alone. That's a lot of money to pay for your suit to be thrown out.

Good News Good News

The campaign against the Gentlemen Squatters of the High Court seems to have succeeded. According to some reports, these Gentlemen were called by the Chief Justice and asked to quit. They asked for time and said they would quit by May 1987. But what about their reliability? The State of Maharashtra has been requested to be kind to them and help them find alternative accommodation. Jahangir Wadia Building on M.G. Road where the Motor Accidents Tribunal is currently situated is likely to be derequisitioned. The Gentlemen Squatters plan to approach the Trust which owns the building for resettlement, with a helping hand from the State Government. With the exit of the squatters the landscape of the High Court will change and the "nuisance" that squatters are generally known to cause will hopefully disappear.

Publisher's Notice

Being published from New Delhi shortly, are the following invaluable contributions:

1. The Law of Brevity in Arguments, Abridged Edition, in eight volumes by an eminent Senior Counsel of the Supreme Court.

2. The Law of Adjournments and How To Get Them - the writing of which is adjourned to the next edition, authored by other eminent Senior Counsel of the Supreme Court with the largest number of adjournments to their credit.

Look out for these useful publications to be released shortly.

Combining business with ...?

Conferences, especially International ones do prove useful for more reasons than one. The I.B.A. conference at New York provided the occassion for Chandrika Kenia, Minister of State for Law, Maharashtra, to take off to the US and visit her friend, Arun Nehru, on a courtesy call. The man was in hospital. After all he was responsible for her present position.

Thats what you call combining business with business.

The Rag Pickers

A keen observer of the Supreme Court who has seen the court over the years, remarks that today's Senior Counsel are the rag pickers - and what does it matter if the rags happen to be currency notes. The formula for a successful senior is (a) the ability to read papers overnight, (b) general familiarity with the law acquired in the by-gone days, (c) energy to run from court to court, (d) mental energy to pick up oral instructions on the run, and (e) last but not least, the ability to badger, cajole or cringe in court, as the circumstances of the case may require.

Now that you know the success formula, rush to join the elite gang of rag pickers.

Time Off

Exhausted, running from court to court, chasing the mischief-makers, the Devil's Advocate needs a good holiday. What better way to beat the heat than climb the most impossible mountains? After all nothing is impossible for the Devil's Advocate.

Devil's Advocate

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