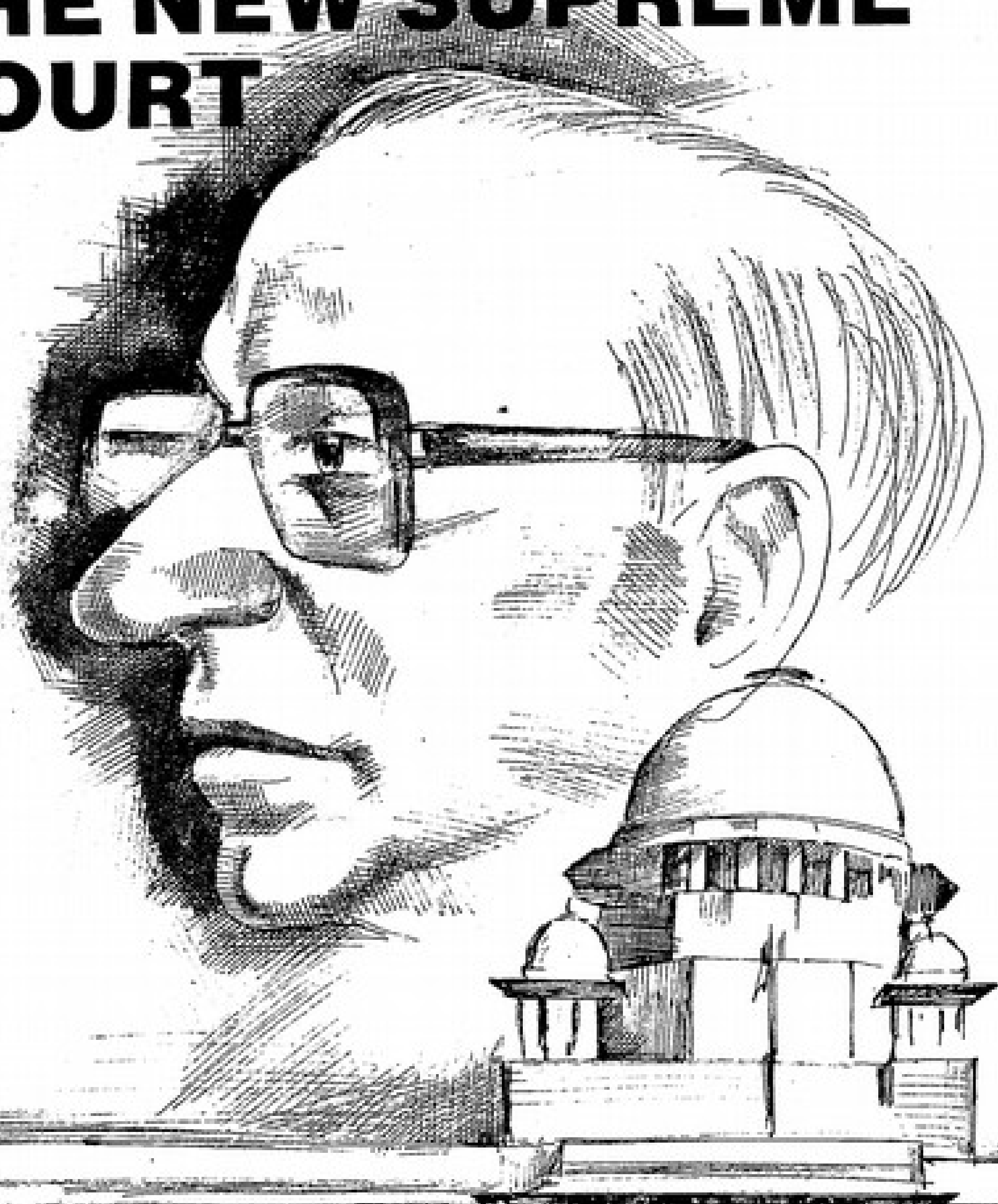
JANUARY 1987 Rs.5

ROM

# THE LAWYERS

COLLECTIVE

# THE NEW SUPREME COURT



# JUSTICE R.S.PATHAK TAKES OVER

# EDITORIAL

## Apna Judge

Speaking at a farewell function for P.N. Bhagwati, Sushma Swaraj said that the ordinary person perceived him as "Apna Judge". The metaphor sums up neatly both his accessibility and the extent of his identification with the problems of the people of the country. It is a measure of his success that he was able to change the perception of the judge from the usual "My Lord" to "Apna Judge". Through his work, he made the institution of the Supreme Court a little more relevant to the needs of the people.

It is interesting to note that Chief Justice R.S. Pathak has said that public interest litigation is here to stay. On him will fall the task of consolidating the gains of the last ten years.

Speaking at the Silver Jubilee function of the Bar Council of India, Chief Justice R.S. Pathak said that in his opinion the judiciary was not "on the verge of collapse" but in an "acute crisis". If this is not to be an exercise in semantics, the Chief Justice will have to spell out what measures he proposes to take to bring the system back to a functional state.

The ordinary remedy of filing a suit to vindicate a claim has become almost dysfunctional. To an extent public interest litigation reflects the failure of the system at the grass roots level. Litigants are driven to a point of madness waiting for justice.

Many regret the day they took the decision to go to court. Even those who wish to get out of court, cannot, having got into the clutches of lawyers, on whom they become totally dependent. In this crucial area of delays, the Chief Justice will be expected to play a leadership role.

Nobody is willing to buy the excuse any more that the delays are entirely due to shortage of judges. The practice and procedure of the courts, the lethargy of judges, the indifference of lawyers, all play a major contributory role. Chief Justice P.N. Bhagwati at least could say that his tenure was too short to be able to introduce major structural changes. Chief Justice R.S. Pathak, however, with a full three years ahead of him, at least will not have that excuse.

The least that will be expected of him is a well worked out system of priorities for court time. It seems unjust and unfair to make all litigants wait in the queue for a hearing as all are not equally situated. Luxury litigation and survival litigation stand in different classes and require different treatment. Employment disputes, life and liberty claims, women and children, all require priority over customs, excise and tax. The situation today in most high courts is that a suit is heard during the lifetime of a litigant only if it is 'expedited' by the Supreme Court. Often the only purpose of filing an appeal in the Supreme Court is to get a suit 'expedited'. The Chief Justice will have to take some hard decisions in working out a cure for this 'acute crisis'.

FROM THE LAWYERS COLLECTIVE

CONTENTS VOL 2 NO. 1


**Editorial** 2

**Letters** 3

**Cover Story**
**Transfer of Power**
*Indira Jaising* 4

**Notice Board**
**Hindu Succession Act (Andhra Pradesh Amendment Act)** 11

**Show Case**
**Absolute liability for Hazardous Industry**
*Anand Grover* 14

**Warrants Attention**
**Amnesty Report on Punjab**
*Naznene Rowhani* 16

**Special Report**
**UCC Appeals Keenan Judgement**
*Indira Jaising* 18

**Comment**
**Social Action Litigation Under Section 91 CPC**
*Nirmalkumar Suryawanshi* 20

**Corruption in legal life**
*Gulam Vahanvati* 21

**Haazir Hai**
*K.G. Kannabiran* 22

**Adaalat Antics**
*Devils Advocate* 24

**LAW AND PRACTICE**

**Right To Know in the U.S.**
*Geoffrey Coll* 1

**Representative Petition Under Companies Act**
*K.R. Chandratre* 3

**Pre-marital sex**
*P.M. Bakshi* 5

**Divorce under Personal laws**
*Nilima Dutta* 7


Editor
*Indira Jaising*

## Construction Labour Bill

Having been associated with the National Campaign Committee on Central Legislation on Construction Labour, I would like to share my experience with readers about the Tripartite Boards for the Unprotected Labour in the Cloth Markets (including cart pullers and loaders) and about the State Contract Labour Board.

1. In case of unorganised or unprotected labour, the concept of a 'tripartite' Board does not work very easily, because :
(a) the labour representatives on the Board are too weak to assert themselves as they are usually governed by a gang system;
(b) the representatives of labour appointed by the Government, most often, happen to be the labour contractors or sub-contractors or gang leaders themselves, who control the labour and always side with the employers;
(c) the employers hardly speak but use these contractos as their own mouthpiece in the Board meetings, who speak in the name of the unprotected labour;
(d) thus, the employers' side in the Board becomes doubly strong;
(e) where the labour is not well organised, it is very difficult for the Government to identify genuine representatives from the actual labourers who can put their case strongly before of the employers' representatives during the Board meetings;
(f) such labour representatives are afraid to attend meetings lest they lose their jobs and, therefore, tend to remain absent during the meetings;
However, I am not opposing the tripartite concept in such cases. I would suggest that the government representative who is usually in the chair, must be given special responsibility to take care for the interests of the workers.
2. In the proposed Bill, special mention of women should be included since 50% of the workers are women and special provisions for them are necessary.
3. Provision for mobile creches is also very necessary and must be included.
4. Moreover, the migrant workers must be given mobile ration cards so they can be used all over the country.

However, after having taken an overall view, I say that this bill is worth supporting.

**Ela Bhatt**
*General Secretary,*
*SEWA,*
*Sewa Reception Centre,*
*Opp. Victoria Garden,*
*Ahmedabad 380 017*

## Progressive Judges Needed

I have been reading The Lawyers with great interest as it provides news and views on issues which concerns us advocates. I am happy that The Lawyers is not content with the principles recognised by the Supreme Court in the Pavement Dwellers case but is campaigning for a review.

It is time that we advocates realised our obligation towards our countrymen. Recently, on 22nd and 23rd November, 1986, the Central India Law Instiute held a Seminar in Jabalpur on "Law, life and liberty." Justice Gulab Gupta who is the Executive Chairman of the Institute wanted everyone connected with the functioning of the judiciary to realise the turn the profession must take. Justice S.N. Awasthi presented the main paper on access to justice. These papers reflect the awareness of certain progressive judges in public interest litigation, which provides hope for India's under privileged masses.

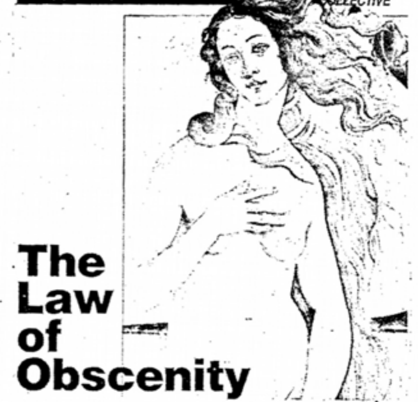
**Narindrapal Singh Ruprah,**
*Advocate,*
*Bar Council Chamber No.15,*
*High Court Chambers,*
*Jabalpur 7*

## Section 193 I. P. C.

Proceedings under Section 193 IPC cannot be initiated by a private party without the sanction of the court. But the law requires the private party to initiate proceedings. However, what happens when the Magistrates of the courts are implicated in such cases. Common sense tells us that the Magistrates will never initiate proceedings in such matters. They will always try to cover the culprits by hook or crook by holding that 'it is a civil wrong' and so on.
If the the judges themselves are reluctant to maintain the honour, dignity of the court, how can individuals be expected to respect the honour, dignity of such presiding officers?

**P. S. Joshi,**
*1245, Kholgalli,*
*Dhulia.*

## Obscene Hoardings




The Indecent Representation of Women (Prohibition) Bill 1986, prohibits the indecent representation of women. However the crude sensuality exuded by and hoardings all over India would easily shame the "come -hither" advertisements in red-light areas in London's Soho, Paris's Pigalle and New York's Forty-Second Street.

The worst hoarding which I have seen in India is not in any red light area - but is at the Boat Jetty at Kumarakan in Kottayam District, Kerala. This highly objectionable hoarding depicts a three-year old girl, completely naked, covering her highlighted pubis with both hands while a gleeful look adorns her face. This is nothing but child pornography ! Variations of this disgusting theme are found on tempos and lorry boards advertising nothing but comtempt for the body and dignity of the girl child and the frustrations of our sick society.

The public sees, but does not care. Knows, but refuses to think. Only time will tell whether this Bill will put an end to such perversity.

**Mary Roy**
*Principal*
*Corpus Christi High School*
*Kottayam -686010.*

# The Transfer Of Power

*A new Chief Justice always has to contend with the legacy of his predecessor. Particularly so, if the predecessor happens to be Chief Justice Bhagwati. Indira Jaising discusses the context of Justice Pathak assuming the Chief Justiceship and prospects for the Court.*

**Justice Pathak assuming power**

With the new year comes a transfer of power from former Chief Justice P.N.Bhagwati to Chief Justice R.S.Pathak. This is perhaps a personalised way of describing the change over, but a necessary way to focus on the tremendously important role played by the Chief Justice, in setting the tone and values of the national judiciary.

### Smooth and Silent Transition.

It a was smooth transition, the choice fell on the seniormost. Judging from the sound and fury, the prolonged strikes that have taken place over the appointment of High Court judges this last year, Justice Pathak's entry on centre stage was almost a non-event - no debate, no media coverage, no controversy, only the usual round of dinners, congratulations and farewells.

The silence over the appointment can be accounted for by the fact that the most non-controversial method of appointment was used - seniority. The Bar in India, a powerful lobby, vocal beyond its numbers, takes it as an article of faith that appointments to the highest court must be made strictly in order of seniority, regardless of policy considerations, regardless of the personal,political and social background of the prospective appointees. Even to suggest that decision makers make a study of the ideology of judges based on judgements delivered is considered heresy - inviting allegations of "political interference" with the "independence of the judiciary."

The contrast with the recent appointment of Justice Rhenquist as Chief Justice of the Supreme Court of the U.S.A. could not be more evident.He was not the seniormost. More importantly, his background was subjected to public scrutiny before confirmation. Not wanting any allegations of intereference, the Government opted for the path of least resistance.

The decision has been welcomed by most people who are concerned with law and justice. Justice Pathak has been described at various times as "the Gentleman Judge" and "a Judges' Judge." Everyone agrees that he is courteous and civilised with his brother judges and with lawyers appearing in his court. Everyone expects a period of "relative calm" during his regime.

But relative to what one might ask? The obvious reference is to Chief Justice P.N. Bhagwati's tenure, described by some as "turbulent". The outgoing Chief Justice himself, when asked what he felt about his own experience on the Bench described it as "exciting and exhilarating." Developing a human rights jurisprudence during the 70's and 80's was a grand adventure and if his tenure was turbulent, it was in part a reflection of the turbulent times the nation has been passing through. Government lawlessness, the total breakdown of administrative remedies made it necessary to turn to the court as a last resort for relief. Once access to victims of undeserved want was assured, social action litigation became an indelible part of the profile of the Supreme Court.

Not surprisingly, Justice P.N. Bhagwati himself, when asked which of his judgements he considered most significant, said it was *Maneka Gandhi's* case. It was this judgement that knit together Article 14, 19 and 21 into a "golden triangle" enabling the court to question the reasonableness of state action. The scope of judicial review was vastly expanded enhancing the policy making role of the court. A conscious use of judicial power to tilt the balance of social forces was now possible. Justice Bhagwati himself did not hesitate to use that power based on this understanding of the need for social change through law.

### Administrative Role

While the jurisprudencial gains of the court are well known, it is necessary to focus on the administrative role of the Chief Justice of India, for court and case-work management or the lack of it can determine the outcome of a case. Though Justice Bhagwati's tenure as Chief Justice was too short to expect major changes, it is necessary to focus on some of the policy decisions taken. Firstly, there was a noticeable policy in the matter of assignment of work. Cases were being assigned subject-wise to special benches. The assignment of work in this manner, if continued for a length of time, will allow uniformity of approach on different subjects.

The length of oral arguments was restricted to five hours for each side, with discretion to extend the time limit up to ten hours. In important cases, written arguments were directed to be filed

well before the commencement of arguments. This practice helped save judicial time.

The system of a 'pass over', a particularly Indian phenomenon which was meant to accommodate busy senior counsel was abolished. Every lawyer had to be present in court when the case was called out. The change produced the desired result. Cases were dealt with on the assigned date and time instead of being adjourned.

The Chief Justice sat after court hours to hear applications for listing urgent matters.Anyone familiar with the functioning of the Supreme Court would know that this work would take anything upto an hour of court time.

### Law clerks

The system of employing law clerks for the judges was introduced. The Chief Justice himself had two law clerks - one in the rank of Deputy Registrar, Moolchand Sharma, a lecturer, recruited from the Delhi Law Faculty, and another in the rank of Assistant Registrar, Amita Tandon a student from the Delhi Law Faculty. When asked about the usefulness of the system, Justice Bhagwati said it helped a lot, given the heavy work load, to have competent research assistants. Though only two appointments were made and both were working with the Chief Justice, a research cell has been created consisting of one post of Deputy Registrar (Research) and three Assistant Registrars (Research) who would assist any judge, if so required by the judge. The posts remain vacant and have not been filled up as yet, nor have the qualifications for the post been prescribed so far. According to present reports, the other judges of the Supreme Court have not yet expressed a desire to take the assistance of research clerks. It, therefore, remains to be seen what will happen to this recently introduced change.

In addition to doing research, their functions could include fact finding commission, pursuant to orders of the court in Social Action Litigation. Such commissions have been appointed so far by nominating social scientists, lawyers or District Magistrates to make local enquiries. The practice could now be formalised through the office of the Supreme Court. They could also be assigned the task of monitoring the implementation and execution of orders of the court.

### P.I.L. Cell

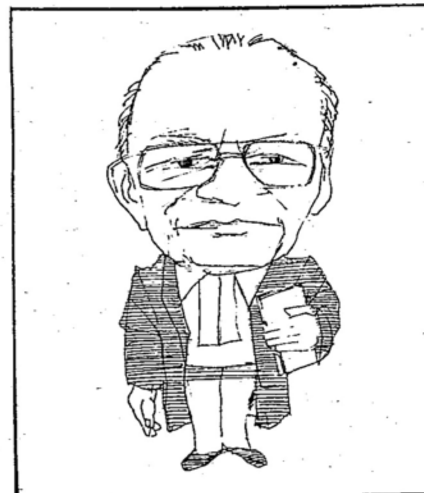
A special Public Interest Litigation Cell was created whose function it was to provide direct assistance to those wishing to approach the court in public interest litigation. Letters received by the Chief Justice or any other Judge of the court were sent to this cell. Where the letter complained of violation of fundamental rights, or was addressed by a person in custody, or was written on behalf of women or children or socially and economically disadvantaged persons, it was to be placed before the Chief Justice for being assigned to a Bench for orders. If the letter related to an individual grievance, it was sent to the Supreme Court Legal Aid Committee of which Justice Venkatramiah is President, set up by the Committee for Implementation of Legal Aid. If the letter originated from a State and complained of violation of a legal right, it would be sent to the State Legal Aid Board for necessary action at the High Court level.

### Case management

Case management was proposed to be handled by computerization. A feasibility study was commissioned and is ready which has proposed a plan for case flow management. This would enable the Supreme Court to find out how many cases are pending on what issues and for how long. All orders passed by any Bench of the Court could also be made immediately available in the central computer system. The committee proposed a main-frame computer for the Supreme Court with terminals in all High Courts. Though the initial phase of computerization was to be confined to case flow management, it could be extended to providing an updated legal information service throughout the country. The Committees'proposals are awaiting acceptance by the Government.

### All India Judicial Service.

Another proposal made to the Central Government is the setting up of an academy for Judicial Officers. The blue print submitted in July 1986 has been sent to the Law Commission for its comments.



**P.N.Bhagwati: the final exit**

Yet another proposal made by the outgoing Chief Justice awaiting clearance with the Government is the creation of an All India Judicial Service. According to reports, the proposal is likely to be accepted. It is believed that the acceptance of this proposal will help improve conditions of service of the subordinate judiciary and ensure appointment of better equipped judges.

### Appointment of Judges

Justice Bhagwati, during his tenure as Chief Justice, made only five appointments to the Supreme Court, G.L. Oza, K.N. Singh, M.M. Dutt, B.C. Ray and S. Natrajan. Out of the old sanctioned strength of 18 judges, three appointments were not made for more than six months. Another three Judges were locked up in various enquiry commissions, resulting in severe depletion of judicial resources. Moreover it is no secret that not less than 5 recommendations for appointment to the Supreme Court made by Justice Bhagwati were pending clearance with the Executive viz. P.D. Desai, Sandhanwalia, M.L. Kania, P.B. Sawant and Jaganath Shetty. The Law Ministry sat on the recommendations and communicated neither its acceptance nor rejection of the recommendations.

## The New Chief Justice

It is in this context that the tasks of the new Chief Justice have to be seen.

Justice R.S. Pathak became a Judge of

the Allahabad High Court at the age of 38 with a reputation for being a successful tax lawyer. He was appointed to the Supreme Court in March, 1978, well after the traumatic emergency period. The *Maneka Gandhi* decision had already been delivered in January, 1978, and in a sense the shape of things to come had already been set. During his first year in the Supreme Court, Justice Pathak seems to have participated mainly in tax judgements.

From 1979 onwards, he was a party to several judgements which raised questions of national and public importance. In 1979, he participated with Justice V.R. Krishna Iyer and Justice V.D. Tulzapurkar in *Bai Tahira's* case (AIR 1979 SC p 362) which decided that a Muslim woman could claim maintenance under Section 125 of the Criminal Procedure code, a judgement which acquires great importance today after the *Shah Bano's* controversy and in view of the fact that the Muslim Womens' (Protection of Rights on Divorce) Act 1986 is now under challenge and will almost certainly come up for decision during his tenure.

In 1979, he participated in several judgements which raised questions of interpretation of Article 14, 19 and 21. In *Hussainara Khatoon* (AIR 1979 SC 1360) he wrote a separate but concurring judgement with Justice P.N.Bhagwati and Justice A.D. Koshal and held that incarceration for long periods without trial was unconstitutional. In many of the cases where Justice Pathak agreed with Justice V.R. Krishna Iyer and Justice P.N. Bhagwati, he has written separate judgements, taking care to point out that he differs with their reasoning. He was a party to the judgement in *Ramana Dayaram Shetty v/s International Airport Authority* (AIR 1979 SC 1628), a judgement which controlled the grant of licences by the states.

**Chief Justice Pathak with his wife**

In 1981, he participated with Justice V.R. Krishna Iyer in the *Azad Rickshaw Pullers Union V/s State of Punjab* (AIR 1981 SC 19) a case unusual by any standards, as a funding scheme was worked out by the Court to enable rickshaw pullers to become owners of their rickshaws. The Court held that the ban against non-owners being given licences would be meaningless unless it was coupled with a supportive scheme enabling those likely to be thrown out of employment to purchase rickshaws through bank loans.

Chief Justice Pathak's attitude to holding the public sector amenable to Article 226 and Article 32 jurisdiction seems conservative. In *Som Prakash V/s Union of India* (AIR 1981 SC 212) in deciding whether Burmah Shell Corporation was 'State' within the meaning of Article 12, he said: "I must confess that I have some hesitation in accepting the proposition that Bharat Petroleum Corporation Ltd. is a 'State' within the meaning of Article 12 of the Constitution. But in view of the direction taken by the law in this court since *Ramana Dayaram Shetty V/s International Airport Authority*, I find I must lean in favour of that conclusion." If this is any indication, then it is quite likely he would not be in favour of holding enterprises in the private sector amenable to proceedings under Article 32, a question expressly left open by Chief Justice P.N. Bhagwati in the Sriram Mills case.

In *A.B.S.K. Sangh V/s Union of India* (AIR 1981 SC 298) he had occasion to deal with the politically sensitive issue of reservations in employment. Having written a separate judgement, his difference in approach to the problem is quite clear as compared to Justice V.R.Krishna Iyer. He says: "An excess of reserved quotas would convert the State service into a collective membership predominently of the backward classes." He emphasised that the paramount need was to "maintain efficiency of the administration." Justice Krishna Iyer on the other hand emphasised that going by the actual figures of SC and ST candidates employed, it was clear that extending the carry forward rule to three years was not going to confer a monopoly upon SC and ST candidates and deprive others of their opportunity. Both agreed that in any given year, the selection of SC and ST candidates should not be considerably in excess of 50%.

In *Sanjit Roy V/s State of Rajasthan* (AIR 1983 SC 328) he agreed with Justice P.N. Bhagwati's conclusion that famine relief workers cannot be exempted from paying minimum wages but again took care to write a separate judgement. While Justice Bhagwati held following the *ASIAD* judgement that non payment of minimum wages violated Article 23 and amounted to forced labour, Justice Pathak preferred to make no comments on Article 23 and decided instead that Article 14 was violated.

Justice R.S. Pathak participated in one of the most important public interestj cases in 1984, *Bandhua Mukti Morcha V/s Union of India* (AIR 1984 SC 802) but once again preferred to write a separate judgement. It was in this judgement that the scope of Article 32 was spelt out and the foundation laid for appointing commissions in cases where violation of fundamental rights was alleged. Justice Pathak, while agreeing with Justice Bhagwati, felt it necessary to strike a note of "caution." It will perhaps be this judgement of his which will require further explanation in future public interest litigation. Given Justice Bhagwati's firm commitment to social action litigation, fears have been expressed that this era in the courts history is coming to a close. Speaking at the Silver Jubilee function of Bar Council of India, Chief Justice Pathak referred to his Bandhua Mukti Morcha judgement to explain that public interest litigation was here to stay, but that it required 'disciplining'. Unfortunately, he did not care to point

*continued on page 8*

## COVER STORY

# The Supreme Court Line-up

*As the Iyer-Bhagwati era draws to a close, the complexion of the Supreme Court has also changed. For our readers we do individual profiles of the judges of the Supreme Court.*

**Pathak, Raghunadan Swarup**
M.A. LL.B.

Born on 25th November, 1924. Educated at St. Joseph's High School, Allahabad; Ewing Christian College, Allahabad; Allahabad University. Enrolled Advocate of the Allahabad High Court on 8th November, 1948. Practised at Allahabad in Constitutional Law, Income-tax, Sales Tax and other Taxation Laws; Civil Law, Company Law and Industrial Disputes cases. Appointed Additional Judge of the Allahabad High Court for a period of two years from 1st October, 1962. Appointed Permanent Judge of that High Court on 27-6-1963. Appointed Chief Justice of the Himachal Pradesh High Court on 18th March, 1972. Appointed Judge of Supreme Court on 20-2-1978. Appointed Chief Justice of the Supreme Court on 21-12-1986. Due to retire on 25-11-1989.

**Reddy, Ontethupali Chinnappa,**
M.A. B.L.

Born on 25th September, 1922. Educated at London Mission High School, Ooty, Loyola College, Madras, Law College, Madras. Enrolled Advocate of the High Court of Madras on 21st August, 1944. Did Civil and Criminal work at Hyderabad. Appointed Additional Judge of the High Court of Andhra Pradesh with effect from 21st August, 1967 and Permanent Judge on 27-11-1967. Transferred from Andhra Pradesh High Court to the Punjab and Haryana High Court on 28-6-1976. Retransferred to the Andhra Pradesh High Court on 9-9-1977. Appointed Judge of Supreme Court on 17-7-78. Due to retire on 25-9-87.

**Sen, Ananda Prakash,** B.Sc. LL.B.

Born on 20th September, 1923. Educated at Dinanath School, Hislop Collegiate High School, Science College and Law College, Nagpur. Enrolled Advocate of the Nagpur High Court in 1947. Shifted his practice to the Madhya Pradesh High Court at Jabalpur from 1st November, 1956. Had been practising in Civil, Criminal, Revenue, Constitutional and Taxation matters. Served as Advocate-General of the Madhya Pradesh High Court with effect from 7th November, 1967. Appointed Permanent Judge on 29-7-1968. Transferred to the Rajasthan High Court on 20th June, 1976. Appointed Chief Justice of the Madhya Pradesh High Court on 28-2-1978. Appointed Judge of Supreme Court on 17-7-1978. Due to retire on 20-9-1988.

**Venkataramiah, Engalaguppe Seetharamiah,** B.A. LL.B.

Born on 18-12-1924. Educated at D. Banumajah's High School, Mysore; Intermediate College, Mysore, Maharaja's College, Mysore; Law College, Poona and Raja Lakhamangouda Law College, Belgaum. Enrolled Pleader in Bangalore Division on 2-6-1946 and on 5-1-1948 as Advocate in the High Court of Mysore at Bangalore. Practised on both Original and Appellate side in Civil, and Criminal Courts and in High Court of Karnataka at Bangalore. Special Government Pleader, Government of Mysore from 2-6-1966 to 4-6-1969. Advocate Government of Mysore from 2-6-1966 to 4-3-1970 and Advocate General, Mysore from 5-3-70 to 25-6-70. Appointed Permanent Judge on 20-11-1970. Appointed Permanent Judge on 20-11-1970. Appointed Judge of Supreme Court on 8-3-1979. Due to retire on 18-12-1989.

**Mukharji, Sabyasachi,** B.A. (Hons.) Bar-at-Law

Born on 1st of June, 1927. Educated at Mitra Institution (Bhowanipore), Calcutta; Presidency College, Calcutta. The Hon'ble Society of Middle Temple, London. Enrolled as an Advocate of the Calcutta High Court on 23-11- 1949. Did Civil and Revenue cases at the Calcutta High Court. Appointed as permanent Judge of the Calcutta High Court on 31st July, 1968. Appointed Acting Chief Justice of the Calcutta High Court on 1-3-1983. Appointed Judge of the Supreme Court on 15-3-1983. Due to retire on 1-6-1992.

**Thakkar, Manharlal Pranlal,** LL.B.

Born 4th November, 1923. Educated at National High School. Gvobingavak, Burma B.E.T. High School, Rangoon (Burma). Enrolled Advocate of Saurashtra High Court on 10-8-1948. Did Civil, Criminal, Revenue, Income-Tax, Industrial Disputes Cases, Company Law petitions, etc. before the Saurashtra High Court at Rajkot (till 1956), in Bombay High Court (till 1960) and in the Gujarat High Court from 1960 to 23-1-1963. Appointed Special Judge for Ahmedabad from March, 1969. Appointed Additional Judge Gujarat High Court on 2-7-1969. Appointed Permanent Judge from 27-11-1973. Appointed Chief Justice of the Gujarat High Court on 20-8-1981. Appointed Judge of the Supreme Court on 15-3-1983. Due to retire on 4-11-1988.

**Misra, Ranganath,** M.A. LL.M.

Born on 25th November, 1926. Educated at Banpur High Court; P.M. Academy; Ravanshaw College, Allahabad University. Enrolled Advocate of the Orissa High Court on 18th September, 1950. Handled all types of cases at Cuttack. Appointed Judge of the Orissa High Court on 4-7-1969. Apppointed Judge of the Supreme Court on 15-3-1983. Due to retire on 25-11-1991.

**Khalid, Vazhakkulangarayil,** B.Sc. B.L.

Born 1st July, 1922. Educated at Municipal High School, Cannanore; Government Brennen College, Tellicherry; Presidency College, Madras and Law College, Madras. Enrolled Advocate, Madras High Court and Tellicherry; Did Criminal, Civil and Writ proceedings at Ernakulam. Appointed Additional Judge, Kerala High Court from 3-4-1972, and Permanent Judge from 7-3-74. Appointed Chief Justice, Jammu & Kashmir on 24-8-83. Appointed Judge, Supreme Court with effect from 25-6-84. Due to retire on 1-7-87.

**Singh, Kamal Narain,** M.A. LL.B.

Born on 13-12-1926. Educated at L.R.L.A. High School, Sirsa, Allahabad. Ewing Christian College Allahabad, University of Allahabad. Enrolled Advocate on 4th September, 1957 in the Allahabad High Court. Practised in Civil, Constitutional and Taxation matters at Allahabad. Appointed Junior Standing Counsel for U.P. Government from 28-1-1963, Senior Standing counsel for U.P.

Government. from 26-4-67, Acting Advocate General U.P. from 3-3-70 to 3-5-70. Appointed Additional Judge, Allahabad High Court from 25th August, 1970. Appointed Permanent Judge from 25-8-1972. Appointed Judge of Supreme Court on 10.3.1986. Due to retire on 13-12-1991.

**Dutt, Murari Mohan,** B.Sc. LL.B.

Born on 30-10-24. Educated at I.R. Bellilios Institution, Howrah; Nara Singh Dutt College, Howrah; St. Xavier's College, Calcutta; Vidyasagar College, Calcutta; Ripon Law College, Calcutta. Enrolled in the Calcutta High Court on 29-1-1952. Practised mainly in Civil and occasionally in Criminal matters. Appointed Additional Judge, Calcutta High Court from 18-9-69. Appointed Permanent Judge on 25-5-71. Appointed judge of the Supreme Court on 10-3-86. Due to retire on 30-10-1989.

**Oza, Govardhanlal Jamnalal,** M.A., B.Sc., LL.B.

Born on 12th December, 1924. Educated at Madhav College, Ujjain; Holkar College,Indore and Christian College, Indore. Enrolled Advocate, Madhya Bharat High Court on 11th February,1949 at Indore. Conducted Civil, Criminal, Constitutional and Labour cases. Part-time Lecturer in Law, Government Arts and Commerce College, Indore. Appointed Additional Judge, Madhya Pradesh High Court from 29-7-68, and Permanent Judge from 19-12-70. Appointed Judge of the Supreme Court 29-10-1985. Due to retire on 12-12-1989.

**Nataranjan, Sivasankar**

Born on 29th October, 1923. Educated at Municipal High School, Salem; Municipal College, Salem; Loyala College, Madras and Law College Madras. Enrolled as an Advocate of the Madras High Court on 4-8-1947. Practised in Civil, Criminal and Taxation cases and also concerning Industrial and Labour Laws. Appointed District and Sessions Judge (Grade-II) on 2-9-1965 and District and Sessions Judge (Grade-I) on 18-12-1971. Appointed Additional Judge, Madras High Court from 15-2-1973. Appointed Permanent Judge from 27-2-74. Appointed Judge of the Supreme Court on 10-3-1986. Due to retire on 29-10-1989.

**Chief Justice Pathak at the recent Bar Council meet**

out what this meant and so, further clarification will have to await further litigation.

## The Agenda for the Court

It seems obvious that politically sensitive issues of national importance will come up for decision in the near future. The *National Anthem* case, together with its aftermath, a contempt petition filed against Mohammed Yunus who said that those who decided the case were neither judges nor Indians, the challenge to the Muslim Womens (Protection of Divorce) Act, 1986, are in this category. Obviously policy considerations will determine their outcome.

A shocking fact about the Supreme Court is that there exist no published and known practice directions. Information is hard to come by. Litigants are left at the mercy of a few advocates on record who have access to information through informal channels. A publication on Procedure and Practice explaining the administrative set up of the court is long over due.

### Appointments of Judges

A Chief Justice is judged as much by the judgedments he delivers as by the quality of appointments he makes to the court. The old sanctioned strength being 18, there are already five vacancies. Chief Justice Pathak will have to fill up at least these vacancies immediately. According to some source, Justice Pathak is reported to have said that recommendations already made by the outgoing Chief Justice will be endorsed by him. Given the secrecy surrounding the process of appointments, there is no way of confirming this. There will be six vacancies during Chief Justice Pathak's tenure. Justice V.Khalid will retire on 1.7.87; Justice O.C.Reddy on 25.9.87; Justice A.P.Sen on 20.9.88; Justice P.M.Thakkar on 4.11.88; Justice S.Natrajan on 29.10.89 and Justice M.M.Dutt on 30.10.89.

### Law Minister's role

Given that the sanctioned strength having been increased to 25, the number of appointments to be made by him is phenomenal. He can decisively determine the character of the new Supreme Court, well into the 21st Century. While Chief Justice R.S.Pathak has asserted the primacy of the recommendation of the Chief Justice, there is precious little he can do if the Government refuses to accept his recommendations, or just sits on them.

Law Minister, A.K.Sen and Minister of State for Law and Justice, H.R.Bharadwaj, have, in different way, been far more powerful than the Chief Justice of India in the matter of appointments. H.R.Bharadwaj is known to have exercised effective vetos, and has been able to block appointments, if not make them.

The two law ministers, between them, have exploded the myth that the recomendations of the Chief Justice are accepted. But a time has come when the involvement of the Congress (I) in the politics of the Bar and the Judiciary is so heavy, that the danger of the opinion of the Chief Justice becoming redundant is only too real.

At the recently concluded Silver Jubilee Celebrations of the Bar Council of India, representatives of the ruling party outnumbered all others. H.K.L.Bhagat, V.Sathe, A.K.Sen, H.R.Bharadwaj, Ajit Panja, were all guests of hon our and the Chief Justice of India, the Chief Guest, was almost marginalsied by what looked like a mini cabinet committee meeting.

Only time will tell what the new Supreme Court will look like. With Maharashtra totally unrepresented Justice Chandurkar, presently Chief Justice of the Madras High Court, has

already made his claim to appointment. Speaking at a function recently Margret Alva regreted that Chief Justice Bhagwati had not appointed a woman to the Supreme Court. That is perhaps an indication of things to come.

That apart, the Chief Justice will also have to pursue the administrative changes initiated in the last one year, awaiting implementation. He could well turn out to be the man who radically reorients the administrative and justice system in the highest court.

Apart from the more dramatic cases with political overtones, and the publicity over appointments of judges the daily oppression of women and children, the continued implication of police misconduct,and the erosion of the rights of the poor, will all claim a fair share of court time. One of the foremost expectations from the Supreme Court will be a policy on priorities in allocating court time. In a situation in which arrears have become totally unmanagable and people seem to have unlimited amounts of money to litigate, the battle between the haves and the have nots is sure to get sharper, making demands on the precious little court time. It remains to be seen who will get early hearing in the court, those who have money enough to protest against delays in the hearing of princely fights over succession to fortunes or those who live in daily bondage and wage slavery. The failure of the court in this crucial area will make it irrelevant to the needs of most, except the monied.

**A.K.Sen: The last word in appointments**

*Long before the dawn of civilisation, nature reigned supreme on earth. Then with passage of time, came wonders of progress. With a view to lead a better life, man harnessed natural resources to bring more comforts. And this was the beginning of industrialisation which utilised the earth's bounties for the welfare of mankind. Man's instinct for self-preservation manifested in a world -wide drive for the improvement of his environment. And so, science and technology were used to avoid harm to the environment.*

*RCF JOINED THIS DRIVE and spent approximately Rs. 30 crores to create fresh environment in and around its factory complex and is advancing forward to make tommorow even fresher and greener.*

**" ENVIRONMENT FIRST AND EVERY-THING ELSE NEXT"** Duleep Singh ( Chairman and Managing Director )

**RASHTRIYA AND CHEMICAL FERTILISERS**

# COVER STORY

## "Public Interest Litigation Has Come To Stay"

### Chief Justice R. S. Pathank

*While Chief Justice R. S. Pathak has not granted many interviews, he delivered a valedictory address to the Bar Council of India on 31st December 1986 where he expressed his views on many legal issues. For the benefit of our readers, we give in verbatim the excerpts of the speech of the Chief Justice.*

### On Arrears

"The back-log of pending cases continues to increase in almost every court in the country, and the staggering volume of arrears has given rise in some quarters to the bleakest despair. I do not subscribe to the view that the judicial institution is in a state of collapse. To my mind, it can be more accurately described as a state of acute crisis. It is my profound conviction that we can still pull back and, although the process of reinstating the judicial institution to a satisfactory condition may take time, the pending arrears of cases can be brought within manageable proportions.

The question has often been asked: What is the solution to this very difficult, almost insurmountable problem? There can be no single answer to that question. It must not be forgotten that the administration of justice is affected by several different inputs, each one of which determines the quality of justice and the expeditiousness with which it is administered. Within the present context and the limitation of time, I shall refer to two aspects only which concern the role of the legal profession and of the judiciary and which by themselves can make an effective dent into the problem. Of all the reasons influencing the speed with which the justice delivery system functions, there is none more important than the observance of discipline within the institution. There is a discipline which must be observed by the legal profession. So also there is a discipline which must be observed by the judge or judicial officer. There is need for the lawyer to remind himself of the old principle that no case should be brought to court which is not statable. Frivolous litigation constitutes an abuse of the process of the court, and it is a lamentable fact that a fairly large proportion of cases clamouring for admission into the court are matters which should never have been filed. The lawyer should be conscious that he is primarily an officer of the administration of justice, and has important responsibilities in relation to the court. The courts, likewise, must at every level ensure that they observe the court hours punctually, that adjournment of cases are not granted readily when they are applied for without sufficient reason, and that adjournments should be a matter of exception rather than the rule. Another significant reason for the delay in disposing of pending cases is the inordinate time which counsel are permitted in making their submissions during the hearing of cases. A good judge is one who, while courteous to counsel, is firm in controlling the duration of the proceedings."

### On Public Interest Litigation

"There has been a compulsion to enter upon new areas of curial jurisdiction by reason of the increasing demand for justice by sections of our population whose right to remedy was not so far sufficiently acknowledged. A greater awareness of human rights has been one of the phenomenal features of the last three decades, and plainly both national laws as well as international law in this regard operate in the same area. It is inevitable that, more and more, the demand for implementing the human rights creed should increase in amplitude, in pace and in urgency. That is particularly so in an evolving society, whose egalitarian constitutional philosophy requires it to consider and give due weight to the aspirations of the diverse sections composing it. It is for this reason that the Supreme Court of India has found it necessary to affirm that in appropriate cases the procedural requirement of filing a formal petition may be waived, and even a letter or a newspaper article may be accepted as an originating proceeding. There are bound to be cases where a citizen seeking justice cannot, by reason of financial disability or other equally serious handicap, find it possible to approach the court through a regular petition. In all such cases, it will be for the court to decide whether it is a suitable case where what is stated in the letter can be regarded prima facie as material on which the court may proceed and act within the jurisdiction invoked by the applicant. That is also the test which may be applied when the court decides whether to act on the contents of a newspaper article brought to its notice. It may be observed that this is a matter relating to procedure, and should not be confused with the question of standing.

The rules relating to standing have already been spelt out by the Supreme Court in repeated cases, notably in those cases where the court is called upon to deal with what has been popularly described as Public Interest Litigation.

The expression, "Public Interest Litigation", is suggestive in itself. It refers to matters in which the public, or a significant identifiable section of the public, are interested. Public Interest Litigation has served to highlight the problems suffered by the poor and the weaker sections of the people, and if employed appropriately it can, in certain cases, result in bringing relief to them with an expeditiousness and a directness not ordinarily conceivable through the traditional procedures of litigation. I believe that, used wisely and subject to the limitations of the court's jurisdiction, it can be of much benefit as a vehicle for focussing judicial attention on matters affecting the public welfare. Public Interest Litigation has come to stay, a conviction expressed by me some years ago in the Bandua Mukti Morcha case. With the benefit of the experience the courts have had since, I think it may be time for the courts to lay down some broad norms and principles which without adversely affecting the flexibility necessary to the proper consideration and disposal of such matters, may provide some guidance in their task. The need arises because a mystique appears to have surrounded this jurisdiction. It is desirable to analyse the concept, to evaluate its degree of success and to put it on a firmer constitutional footing. Public Interest Litigation cannot be put into a strait - jacket, but it is certainly amenable, as all judicial proceedings should be, to the observance of certain principles - principles which will promote and guarantee its healthy development without retarding its effectiveness as a vehicle of justice. It is only proper to dispel the misgivings of those who feel that Public Interest Litigation is "the unruly horse" which will unsettle public faith in the administration of justice, as well as to remove the fears of those who apprehend that this chapter in the court's jurisdiction is drawing to a close."

# Hindu Succession (Andhra Pradesh Amendment) Act, 1986

*Andhra Pradesh is the only State in the country which has amended the inequitous law relating to Succession amongst Hindus. We reproduce the text of the Amendment Act.*

The Act of the Andhra Pradesh Legislative Assembly which was reserved by the Governor on the 10th October, 1985 for the consideration and assent of the President received the assent of the President on the 16th May 1986 and the said assent is hereby first published on the 22nd May, 1986 in the Andhra Pradesh Gazette for general information.

**Act No.13 of 1986**

*An Act to amend the Hindu Succession Act, 1956 in its application to the State of Andhra Pradesh.*

Whereas the Constitution of India has proclaimed equality before law as a Fundamental Right;

And whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

And whereas such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social ills;

And whereas this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the condition of women in the Hindu society;

Be it enacted by the Legislative Assembly of the State of Andhra Pradesh in the Thirty Sixth Year of the Republic of India as follows:-

1. **Short title, extent and commencement:** (1) This Act may be called the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

2. It extends to the whole of the State of Andhra Pradesh.

3. It shall be deemed to have come into force on the 5th September, 1985.

2. Insertion of new Chapter II-A in Central Act 30 of 1956: In the Hindu Succession Act, 1956 (hereinafter referred to as this Act) after Chapter-II, the following Chapter shall be inserted, namely:-

**Chapter-II-A**
**Succession by Survivorship**

**29-A. Equal rights to daughter in coparcenary property:** Notwithstanding anything contained in section 6 of this Act-

(i) in a Joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabllities in respect thereto as the son;

(ii) at a partition in such a Joint Hindu Family the coparcenary property shall be so divided as to a daughter the same share as is allotable to a son;

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be alloted to the surviving child of such pre-deceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) Nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986;

**29-B. Interest to devolve by survivorship on death:** When a female Hindu dies after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act;

Provided that if the deceased had left any child or child of a pre-deceased child, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary of intestate succession, as the case may be, under this Act and not by survivorship.

Explanation-1.-For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been alloted to her if a partition of the property had taken place immediately before her death irrespective of whether she was entitled to claim partition or not.

Explanation-2.-Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the deceased, had separated himself or herself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

**29-C.Preferential right to acquire property in certain cases:** (1) Where, after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under section 29-A or section 29-B upon two or more heirs, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation:- In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Andhra Pradesh Gazette, specify in this behalf."

Just a chop at the rope Could mean a downslide

A few strands going awry could make everything go haywire. The total weight comes rolling down; progress is at a standstill and development goes downhill. Unified strength is the only way up.

A nation is not merely a geographic entity but a mass of men and women endowed with equality and a strong will that forever strives for solidarity.

**Togetherness makes a nation great.**

**Directorate General of Information and Public Relations, Government of Maharashtra**

# Right to know in the U. S.

*In the previous issue of* ***The Lawyers,*** *we discussed the partial right to information in India.* ***Geoffrey Coll*** *explains the law relating freedom of information in the U.S.*

In the United States, individuals are granted access to the records of the federal government and have a right to know about most government activities under the Freedom of Informatiŏn Act [(FOIA) 5 U. S. C. 552]. The basic concept of the American FOIA is that all records of federal agencies must be accessible to the public unless specifically exempted from this requirement. There are nine exemptions to the requirement of full disclosure and the Supreme Court has held that the exemptions are specifically made exclusive and must be narrowly construed. *[Department of the Air Force v/s Rose,* 425 U.S. 352, 361 (1976)]. However, the broad nature of some of the exemptions, which include records implicating national security or an ongoing investigation, does limit the reach of the Act.

In the past American journalists and scholars have used the FOIA very effectively to expose government abuses. In 1972, an American journalist obtained information from the Department of Defence through the FOIA which uncovered a 1968 American military massacre of hundreds of Vietnamese civilians at the village of My Lai. In 1985, a public interest health group used the FOIA to obtain the names of 249 work places in the United States where the Government had indentified but not notified about 250,000 workers being exposed to increased health risks resulting from their working conditions. Finally, American historians have also used the FOIA to uncover important facts about the Roserberg spy trials of the 1950's and FBI harassment of civil rights leaders in the 1960's.

## Operation of the FOIA

Under the American FOIA "any person" (including a non-citizen) is entitled to access to all records of all federal agencies, unless those records fall within one of nine categories of exempt information which agencies are permitted (but not required) to withold. The person seeking the information is generally required to submit a written request to the federal agency which has the desired documents. Once the written request has been submited, the burden is on the government to promptly release the documents or demonstrate that they are exempt from disclosure under the FOIA. Under the FOIA, the agency must respond to a written FOIA request within ten working days, but may request an extension if it has a backlog of requests to process. However, all agencies are required by the Act to develop a procedure for handling the backlog which ensures that responses will be made in a timely manner.

If an agency refuses to disclose all or part of the information, or does not respond within the required ten days, the requester may appeal to the head of the agency. If the agency head then denies the appeal or does not reply within twenty days, the requester can then file a law suit in the most convenient federal court. Upon demostration of the need for prompt consideration (because of the news value of the information, for example), the court is authorised by the FOIA to give expeditious consideration to any case. After a *de novo* hearing, the court may order the agency to release all or part of the records, award attorney's fees and court costs, and may recommend sanctions against agency officials who improperly witheld information.

## FOIA Application

The FOIA applies to every "agency", "department", "regulatory commission", "government controlled corporation", and "other establishment" in the executive branch the federal government. This includes Cabinet Offices, such as the Departments of Defence, State, Treasury, Interior, and Justice, the Federal Bureau of Investigations (FBI), the Immigration and Naturalization Service, and the Bureau of Prisons. It also includes independent regulatory agencies such as the Federal Trade Commission, Nuclear Regulatory Commission, and the Consumer Produce Safety Commission, as well as government-controlled corporations, such as the Postal Services and the Legal Services Corporation (which administers legal aid). The FOIA does not apply to the President or his immediate staff, the Congress, the federal courts, private corporations, or the States. However, documents generated by these organisations and filed with federal agencies become subject to disclosure in the same manner as documents created by the agencies.

The range and types of agency records available under the FOIA is very broad. The FOIA covers all "records" in the possession or control of a federal agency. This term has been defined expansively to include all types of documentary information, such as papers, reports, letters, films, computer tapes, photographs, and sound recordings. The Supreme Court has held that to be so. *[Forsham v/s Harris,* 445 U. S. 169 (1980)].

However, even if an agency has possession of requested records, they may not constitute "agency records" when control is retained by someone else. For example, the Supreme Court held that notes of telephone conversations made by Henry Kissinger while he was the National Security Adviser in the Nixon Administration but transferred to the State Department when Kissinger became the Secretary of State, did not constitute agency records of the State Department. *[Kissinger v/s Reporters' Committee for Freedom of the Press,* 445 U. S. 136 (1980)].

Finally, agencies may charge "reasonable" fees for the "direct" costs of searching for and copying requested records. Such fees generally range from $ 10 to $18 an hour for professional personnel, such as lawyers and accountants. Search fees may be charged even if few or no documents are located in response to a request. If requested to do so, agencies are required to provide estimates of such fees. The FOIA requires agencies to waive or reduce fees when it decides that furnishing the information would "primarily benefit the general public," and therefore be in the publice interest.

## Disclosure Exemptions

The FOIA contains nine exemptions which permit an agency to withhold access to requested records. The Supreme Court has held that these exemptions "are specifically made exclusive, and must be narrowly construed." *[Department of Air Force v/s Rose,* 5425 U.S. 352, 361 (1976)].

The exemptions cover documents relating to:

*National Security and Foreign Policy;

*Internal Agency Personnel Rules;

*Information exempted by dozens of federal laws already in place;
*Trade secrets and confidential commercial information;
*Internal agency memoranda and policy discussions;
*Personal privacy;
*Law enforcement investigations;
*Federally regulated banks; and;
*Oil and gas wells;

The most often used and significant of the above exemptions are those related to National Security, trade secrets, internal discussions and law enforcement investigations.

## National Security

The FOIA does not apply to matters that are:

"A) specifically authorised under criteria established by a Presidential Executive Order to be kept secret in the interest of national defence or foreign policy, and

B) are in fact properly classified pursuant to such Presidential Executive Order".

Documents which generally fall under this section are those that are specifically stamped "Top Secret", "Secret," or "Confidential", terms which are defined in the Presidential Executive Order. However, under the FOIA, the courts have a duty to determine whether the claim of national security classification is justified or not. The Government has the burden of proving that the information is in fact "properly" classified, according to both the procedural and substantive criteria of the applicable Presidential Executive Order.

President Reagan issued the current Executive Order on National Security Information, Executive Order No. 12356, 3 C. F. R. 166 (1982) on April 2, 1982. Under that Order, information can be withheld if its disclosure could reasonably be expected to cause some "damage" to the national security.

Unlike the past Presidential Executive Orders, the present one does not require an agency to consider the public interest when deciding to classify partiucular documents. As a result, courts are more likely to refer to an agency's expertise when determining if the information is properly classified or not.

## Trade Secrets

The FOIA also does not apply to "trade secrets and commercial or financial information obtained from a person and which priviledged or confidential". This exemption is designed to protect two different categories of information. One is "trade secrets" such as customer lists and secret formulae. The other is sensitive internal commercial information about a company which, if disclosed, would cause the submitting company competitive harm.

Recently, the U. S. Court of Appeals for the D. C. Circuit severely restricted the reach of this exemption by holding that "trade secret" should be limited in meaning to: "a secret, commercially valuable plan, formula, process or devisd that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation of substantial effort." *[Public Citizen Health Research Group vs FOIA*, 704 F. 2d 1280, 1288 (D. C. Cir. 1983)].

This definition is much more restrictive than the traditional definition of trade secrets reflected in the Restatement of Torts (Sec. 257). Under the Restatement definition, virtually any compilation of business information which provides a competitive advantage constitutes a trade secret and would be entitled to virtually an automatic protection in FOIA cases. In sharp contrast, the definition formulated in the *Public Citizen* case is limited to information which relates directly to the production process.

## Internal Agency Memoranda

The FOIA also does not apply to matters that are: "Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption is intended to incorporate material normally privileged in civil litigation. It is widely used by the Government to protect working papers, studies, and reports prepared within an agency or circulated among government personnel as the basis of a final agency decision.

In effect, this provision creates an "executive privilege exemption" with agencies that protects advice, recommendations and opinions which are part of the deliberative and decision-making process. Its purpose is to encourage open discussions on policy matters among agency personnel, and protect the quality and clarity of agency decisions. Therefore, it covers documents such as preliminary policy drafts, letters between agency officials, and staff proposals. These pre-decisional documents remain exempt even after a final agency decision is announced, unless the agency clearly adopts the position set forth in a particular pre-decisional document.

The Supreme Court has recognised the distinction between pre-decisional documents, which are not protected, and post-decisional documents, which are not protected by this exemption. *[NLRB v/s Sears Roebuck Co.*, 421 U. S. 151-53].

In addition, this exemption incorporates the attorney-client privilege, which protects most communications between an agency and its own attorney or another agency acting as its attorney, such as the Department of Justice.

## Law Enforcement Records

Finally, the FOIA does not apply to,

"investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:-

*interfere with enforcement proceedings;
*deprive a person of a right to a fair trial or an impartial adjudication;
*constitute an unwarranted invasion of personal privacy;
*disclose the identity of a confidential source;
*disclose investigative techniques and procedures; or
*endanger the life or physical safety of law enforcement personnel.

This exemption is primarily designed to protect the confidentiality of documents whose untimely disclosure would, jeopardize criminal or civil investigation.

In 1974, Congress amended this provision to avoid a broad agency claims of exemption for almost anything which could be called an "investigatory file". As amended, the FOIA requires the Government to prove that documents were compiled for specific criminal, civil or other law enforcement purposes, and that disclosure would actually result in one of the six listed harms. The first of the six enumerated harms, covering interference with enforcement proceedings is the one most often cited by agencies. This exemption generally applies only when an enforcement proceeding has actually begun or when there is a "concrete prospect" that an ongoing investigation will lead to an enforcement proceeding. It does not apply after enforcement proceedings have ended, such as after a trial, conviction, or sentencing.

All in all the FOIA has proved to be a valuable tool for the citizen and non-citizen alike to get access to information which the public needs for the democratic process to work more efficiently. Other countries, including some Commonwealth countries (Australia), have enacted similar legislation.

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

# Representative Petitions under Companies Act

*The Companies Act provides for representative petitions to be filed. These require consent of the persons (members of the company) who are being represented. In this article* **K.R. Chandratre** *examines the position in regard to the content and form of the consent required.*

With the object of safeguarding shareholders interests, the Companies Act, 1956 provides for several measures. Relief against oppression and mismanagement as provided for in section 397 and 398 of the Act is one of such measures. Shareholders aggrieved by or desiring to bring to an end oppressive conduct or management of the company's affairs can avail of the relief provided for under these two provisions.

To have their grievances remedied, the complaining shareholders can move the court which can issue suitable orders with a view to bringing to an end the oppression and mismanagement complained of. The number or strength of shareholders who can make an application to the court is prescribed under section 399. The criteria prescribed in the case of a company having share capital is one hundred members of the company or not less than one-tenth of the members of the company, whichever is less. Alternatively, any one or more members holding not less than one-tenth of the issued share capital of the company can file a petition.

## Form of Petition

It is thus evident that when one member is unable to file a petition alone, because he does not fulfil the criteria, he can take the help of others to file the petition. In other words, when it is impossible for one member to move the court, the petition can be filed jointly or in concert by the requisite number of members fulfilling any of the criteria under Section 399. When more than one member has to file the petition jointly it can be done by signing the petition by all of them. Alternatively, any one of such members can file the petition under his own signature provided he has obtained consent of other members to file the petition. Needless to state that in such an eventuality all the members must fulfil the eligibility criteria as mentioned above.

According to rule 88 of the Companies (Court) Rules, 1959 where a petition is to be presented on behalf of any members of a company entitled to apply under section 399(1), the letters of consent signed by the rest of the members so entitled authorising the petitioner to present the petition on their behalf must be annexed to the petition and the names and addresses of all consenting members must be set out in a schedule to the petition. In the case of a company having share capital, the schedule so annexed must also state whether the petitioners and the consenting members have paid all calls on their shares. Petitions under sections 397 and 398 have to be presented in Form Nos.43 and 44 respectively as prescribed under the rules. The information in respect of the consenting members has to be set out in accordance with the schedule contained in the said forms.

## Consent

The language used in rule 88 suggests that the consent contemplated in section 399(3) and rule 88 is the consent to be given for authorising the petitioner to present the petition on their behalf (i.e. consenting members' behalf). A difficult question which arises is whether the consent envisaged is a consent merely for presenting the petition under section 397 or 398 or the consent for approaching the court against the company with certain specific complaints or charges of oppression and mismanagement and praying for specific relief. If it is construed as a consent merely for the purpose of authorising the petitioner to file a petition, then it is quite likely that the consenting members may have given their consent by signing a letter or letters of consent authorising a member to present a petition under section 397 or 398, but they (consenting members) may not know anything about the contents of the petition. They may be totally unaware of the charges against the company management proposed to be set out in the petition as also the reliefs claimed. They may well be kept in dark by the petitioners about the charges or grounds, or the complaints justifying the petition presented to the Court. Moreover, the requirement of section 399(3) and rule 88 might be said to have been perfectly complied in the letter of the law.

Is such a consent in consonance with the spirit of that section and that of sections 397 and 398? Such blind consent could not have been intended by the legislature in enacting these provisions providing for a vital remedial measure for the protection of shareholders' interest. If such a consent is said to be a valid and sufficient consent then disastrous results may follow. A disgruntled shareholder or a group of shareholders may launch a "signature drive" to gather signatures of the requisite number of members in order to fulfil the eligibility criteria and may succeed in keeping the signatories in dark about the contents of the petition. Thus, the remedy provided for in sections 397 and 398 could well be abused with ulterior motives to harass company management by dragging them into litigations.

It is pertinent to note that subsection (3) of section 399 ends with the words "on behalf of and for the benefit of all of them." The expression "for the benefit of all of them" is significant in connotation and must be construed to mean that the action of presenting the petition and seeking relief must not only be 'on behalf of', but also 'for the benefit of' all the consenting members. Now, whether the action will benefit the consenting members or not can only be decided by them on knowning the charges of oppression or mismanagement to be contained in the petition and the relief sought to redress the grievances. They must, therefore, necessarily know as to the contents of the

petition at least, or an outline of it in clear terms. To put it differently, the consenting members must give consent only after they have applied their minds to the matter. Thus, the consent must be valid, constructive and thoughtful consent and not a blind or formal consent. It should be a consent given after applying mind to the proposed contents of the petition or the petition itself (even in a draft form). This appears to be true meaning of the consent contemplated in section 399(3) and Rule 88.

## Blank Consent

In *Makhanlal Jain and another v. Amrit Banaspati Co. Ltd.* [(1953) 23 Comp Cas 100] decided by the Allahabad High Court there were signatures on a blank sheet. Nothing was mentioned above or below the signatures. In the case of a few signatures, however, there was an endorsement made at the top of each of the signed sheet to the effect that the signatory was expressing his or her approval of the petition already filed by the petitioner. Thus, consent was given subsequent to the filing of the petition apparently, in order to fulfil the eligibility criterion. To fill up the lacuna of signatures on blank sheets, an affidavit was filed to the effect that the petitioners had obtained the consent of the signatories. All these facts led to the conclusion that the consenting members did not know about contents of the petition and they had given the consent for filing the petition blindly or 'in vacuo' or to a document which they were unaware of.The Allahabad High Court held that it was not a true consent. The court held that the expression "consent in writing" obviously implied that the writing itself should indicate that the persons who have affixed their signatures have applied their minds to the question before them and have given their consent to certain action being taken. If a petitioner obtains another shareholder's signature on a blank piece of paper and wishes to supplement it by his affidavit or his agent's, the signature on a blank piece of paper does not become consent in writing.

In *Bengal Laxmi Cotton Mills Ltd.*, [(1965) 35 Comp Cas 187], however, the Calcutta High Court held that it is not necessary under section 399 that the consenting members must have before them a petition at the time of signing consent letters. The court held that there is nothing in section 399 or in Rule 88 to indicate that the members giving their consent should have the petition before them at the time of signing the consent.

## Application of Mind

It thus appears that what is material is application of mind by the consenting members to the act of giving consent. It is, however, a patent absurdity to say that a consenting member would be said to have applied his mind unless he is aware of the contents of the petition proposed to be filed. At the least, a draft proposal or a gist of the contents intended to be included in the petition being the specific charges or grounds for seeking specific relief must be made known to the members whose consent is sought.

In *M.C. Duraiswami v. Sakhi Sugar Ltd.* [(1980) 50 Comp Cas 154], the Madras High Court has observed thus : "Before a member can be said to have consented to a particular action, the said member should have known what was the action to be taken, what was the relief to be prayed for and what was the ground to be urged in support of the relief claimed. It is one thing to say that the member who gives consent should have applied his mind to the question before him before giving consent; it is another thing to say that before a member gives his consent, the actual petition prepared, to be filed, must be before him." The Court further held, quite rightly, that though it is not necessary that before the members give their consent they should have the petition before them, for which purpose the petition should have been prepared well in advance of the consent being given by them. This would be quite different from saying that the consenting members need not know anything about what the petition should contain.

From these observations it follows that the consenting members must know what exactly the petitioner is doing and that he is acting for their benefit. They can know this only if they have been fully apprised of the grounds to be set out in the petition and the relief to be prayed for to remedy the alleged oppression and mismanagement. Therefore, the consent contemplated under section 399 (3) is intelligent consent, that is, the consent given for the purpose of making a particular allegation in the petition and for the purpose of claiming a particular relief therein, and therefore, a blanket or blind consent cannot be said to be a consent contemplated in that section.

## Constituted Attorney And Guardian

In *Killick Nixon Ltd. v. Bank of India*, [CNR (1983) C/1], an interesting question that arose before the Bombay High Court was whether the consent under section 399 (3) can be given by a constituted attorney of a member to whom the power to give consent has been delegated by the member. The single judge of the court held that the consent may be given by an attorney. The court observed : "It is true that the person who gives consent is required to apply his mind. But a person who appoints an agent, thereby authorises the agent to apply his mind and then gives his consent..... a person can delegate his authority to give consent. In that case the agent may apply his mind to give consent on behalf of his principal."

In *A.Brahmraj v Sivakumar Spinning Mills Pvt.Ltd. & Others*, [(1986)3 Comp LJ 109], the Division Bench of the Madras High Court has held that in the case of minor shareholders the guardian has the authority to give consent. The court observed that in a broad sense, every person who is required to exercise any right or privilege is required to apply his mind. But if a person has appointed an agent and thereby has authorised the agent to apply his mind, the application of mind by the agent becomes the relevant factor as held in Killick Nixon case. Similarly, in the case of a minor, the application of the mind by the guardian is the relevant factor. When the petitioner, as guardian of the minors, had given consent to his filing a petition under section 397 or 398, it is impossible to argue that he did not understand what he gave the consent for or that there was no consensus ad idem. For the purpose of Section 399, the minor would be counted a separate number and the petition containing a minor's consent through his guardian would be maintainable.

It is worth noting that though the power conferred on shareholders under section 397, 398 etc. is an important membership right to appoint a proxy to attend a meeting of the company, the right exercisable by a member under section 399 (3) may be delegated to someone else for the purpose of giving consent. To this extent this membership right may be exercised by the agent of the member if the agent is properly authorised for that purpose.

## Consent by Corporate Bodies

Yet another very interesting aspect of this matter is a consent to be given by a body corporate or a company, when it is a mem-

ber of another company. When a company is member, the consent may be given by the Board of Directors of the share-holding company by Board resolution. It is not necessary that the consent must be given by means of a resolution passed at a meeting of members of the company. The Board is competent to exercise this membership right and it may again delegate the operation of this power to some official of the company, that is to say, the actual letter of consent may be signed by such official pursuant to the order and authority delegated to him by the Board. However, without a proper authority being given by the Board of Directors, no official of the company, not even managing director or chairman, can give consent and issue the consent letter.

In *Mohan Lal Mittal v. Universal Wires Ltd.*, [(1983) 53 Comp Cas 36] the Calcutta High Court has held that a Secretary of the company has no power, without being properly authorised by the Board, to give consent under section 399 (3) of the Companies Act. The Secretary may sign and issue a consent letter but only on the authority of the Board through a resolution passed at Board meeting whereby the Secretary has been authorised to sign and issue the consent letter in a particular case.

It was also held that consent under section 399 of the Act, to present a petition under section 397 or 398, is not a function of a Secretary. It can neither be said to be a ministerial nor an administrative function of the Secretary. Such consent must be backed by the authority of the Board by a resolution or by subsequent ratification by a Board meeting. In short, it is left to the Board to decide who should actually sign the consent.

### Misrepresentation

If the signatures of the consenting members are obtained by misrepresentation, it cannot be said that they were consenting parties to the petition at the time of institution. In Narman Singho v. Edward Public Welfare Association & other, [(1983) 54 Comp Case 330 )P & H)] the petition was to have been filed by 468 members. However, some of them later on stated on an affidavit that their consent was obtained by misrepresentation in that they were requested to sign a blank paper to accord their consent to the filing of a suit against the Municipal Committee from stopping it from demolishing the new encroachments made by some of them and subsequently they came to know that instead of filing a suit against the Municipal Committee, the signature - seekers had filed a petition under section 397 and 398 of the Act. The court held that the consent was obtained by misrepresentation, and therefore, it could not be deemed to be a consent for filing the petition.

In conclusion it may be stated that consent is valid if it is done with application of mind. This requires that persons giving consent should have the knowledge of the contents of the petition, even in a draft form. For the purposes of consent, the authority can be delegated.

*K.R. Chandratre is Company Secretary in Thermax Private Limited, Pune.*

# Pre-Marital Sex.

*With liberal attitudes on sex on the increase, there is increasing likelihood that women are likely to be deceived into pre-marital sex with a promise of marriage.* **P.M.Bakshi** *discusses what remedies, if any, are possible in such situations.*

With increasing urbanisation and Westernisation of Indian society, gradually, though imperceptibly, freedom in sexual matters is invading the Indian scene. This phenomenon may create social and family conflicts, as also individual tensions, occasionally leading to legal controversies also. Of such controversies, one that requires consideration from the legal point of view is that of pre-marital sexual relations. Such relations may be with full and free consent of both the parties, or they may be accompanied by oblatant or latent fraud.

### Fraud

The situation of fraud practised by the boy on the girl may first be considered. In many cases, the boy makes a promise to the girl that he would marry her or, by his conduct, makes the girl understand that he will marry her. It is in reliance on such promise or understanding that the girl agrees to surrender her chastity. However, if the boy resiles from his promise after a few months and the question then arises whether the conduct of the boy amounts to the offence of "cheating" as defined in the criminal law. The answer to the question requires an analysis of the legal definition of "cheating". That definition provides that the person charged must have made a fraudulent or dishonest representation, and on the score of that representation, he must have induced the person deceived to part with some property, or to do something which harms the person deceived in body, mind, reputation or property. At the first sight, it may appear that a breach of promise of marriage will amount to cheating, since non-performance of the promise causes mental agony to the other party, particularly when the other party is a woman who allows intimacies in reliance on a fraudulent representation. However, the matter is not so simple. The law requires dishonesty or fraud at the time when the representation was made. If, at that time, his intention was honest, then subsequent failure to carry out the promise does not amount to "cheating".

Now, it is not always easy to arrive at a definite finding that the accused had such dishonest designs from the very beginning. Sometimes, the courts adopt a positive attitude. Thus, in a case decided by one High Court, the accused, by practising fraud and deceit, used to show affection to the complainant girl

and induced the girl to allow him to take liberties with her. The court had no difficulty in holding that these allegations, if true, would amount to the offence of cheating.[ *Gopal Chauhan v. Satya,* (1979) Cri.L.J. 446 ).

## Misconcept of fact

However, not every High Court necessarily takes the same view. Thus, two years ago, the Calcutta High Court had occasion to consider a similar situation, in the context of a charge of rape. A young man promised to marry a girl who, in reliance on the promise, consented to sexual intercouse with him. Later, the young man refused to marry her. The question arose whether the girl's consent had been given under a mis-conception of fact within the meaning of the Indian Penal Code, so as to vitiate the consent. The High Court held that in the circumstances, the consent was not so vitiated. The failure to keep the promise at a future uncertain date owing to reasons which were not very clear on the evidence would not amount to a "misconception". The intention not to carry out the promise must be at the very inception of the act itself. If a full-grown girl consents to sexual intercouse on a promise of marriage and continues to indulge in such activity till she becomes pregnant, it is an act of promiscuity on her part, and not an act induced by "misconception" of fact. The law cannot be called in aid to fasten criminal liability on the other person, unless the court can be assured that from the very incepion, the accused never really intended to marry the girl. *[Jayanti Rani Panda v. State of West Bengal,* (1984) Cri. L.J. 1535 (Cal.) ]

This narow interpretation of "dishonesty" or "misconception" is not peculiar to the topic of representations about marriage. It has created problems in regard to dishonoured cheques also.If a person gives to a shopkeeper a cheque in payment of goods received by him from the shopkeeper and the cheque is dishonoured, that person is not necessarily guilty of cheating in every case. It must be proved that he had no genuine intention of making payment and that, from the very beginning, he had knowledge that he did not have sufficient funds in his bank for meeting the cheque. In the absence of such any intention, the mere dishonour of a cheque does not fasten criminal liability on the person issuing the cheque. In fact, this problem exists as regards every case of breach of promise. Courts generally treat the situation as one of civil liability not justifying a criminal charge.

## Third Parties

Pre-mmarital sex with a third person can also create legal controveries. If the fact that one spouse had, before marriage, sexual relations with another person is proved, will it give the other spouse a right to nullify or terminate the marriage? In some circumstances, the law permits a marriage to be nullified on the ground of "fraud", but every case of pre-marital sex is not treated as one of fraud. However, in one special and narrowly defined situation, the law does afford relief. Where the husband discoveres that at the time of marriage, his wife was pregnant by some other person, he can submit a petition for annulling the mariage, provided the pregnancy was unknown to him at the time of marriage. The petition must be presented within one year of the marriage. But even this situation does not seem to create a criminal liability. This question arose a few years ago before the Bombay High Court. The parents of a girl had induced the complainant to marry their daughter by concealment of the fact of her pregnancy at the time of marriage. It was held that as no wrongful gain or wrongful loss of property was involved, the dishonest concealment of facts cannot be said to have been *[Ramakrishna Baburao Miske v. Kisen Shivraj Shelka,* (1975) Cr. (Bom)]. The court held that when there is a dishonest concealment of facts, that should be with intention of causing wrongful gain to one person or wrongful loss to another. The object of concealment of fact should be for wrongful gain of profit by unlawful means.

## Unwed Mother

Where no marriage takes place at all, questions of a different nature arise if a child is born. In law, the child is illegitimate. Besides this, the social problem of the "unwed mother" can arise. As the law stands at present, she has no remedy for maintenance against the father of the child. However, she can claim from him maintenance for the illegitimate child. This is by virtue of the section 125 of the Code of Criminal Procedure, 1973. Under this section, procedings for maintenance, even of an illegitimate child, can be instituted before the competent Magistrate. The benefit of this provision is available to women of all communities, because the remedy is a statutory one under provision, not dependent on, or linked with, personal law.

The sample survey of judicial decisions presented above demonstrates the truth of two propositions. The first is, that the spheres of law and morality are not co-extensive with each other. A part of morality is inappropriate for legal regulation. Conversely, some legal rules may have no counterparts in the rules of morality., In other words, law and morailty are interesecting circles. All rules of morality cannot be legislated into legal commands. The second proposition that emerges from the above discussion is that even where it is decided to convert a proposition of ethics into a rule of law, one should not always expect a precise and unambiguous formula in the staute as it is drafted. Language is an imperfect medium, not capable of giving a totally accurate reflection of the nuances of the mental processes of the law-makers.

## Blackmail

There have been cases of blackmail also. An accused, who got himself photographed with a girl, wanted to blackmail the girl so as to get her married to him or to force her to illicit intercourse. The girl later committed suicide. The accused was charged with "abetting" suicide. It was held, that there could not be said to be any intention on his part that the girl should commit suicide. It was primarily to save her father from shame that she decided to commit suicide. It was an independent act by her to meet her end. *[Surinder Kumar v. State of Punjab.,* (1983) Cri. L.J.NOC 25 (P&H) ].

There is one point on which the law appears to be in need of reform. The right of claiming maintenance should be extended to the unmarried mother herself. This could be achieved by an amendment of section 125 of the Code of Criminal Procedure, 1973, so that the right will become available to women of all communities. The right should cease if the man agrees to marry the petitioner woman.

*P.M.Bakshi was formerly member of the Law Commission.*

# Divorce Under Different Personal Laws

***Nilima Dutta** explains the provisions relating to divorce under different 'personal laws'*

Matrimonial laws in India are strongly linked to religion and reliefs are granted to reflect the religious dogmas prevailing, resulting in inequitable remedies to parties seeking judicial separation or divorce. Divorce by mutual consent is available under the Hindu Marriage Act, the Special Marriage Act and also under the uncodified Mohamedan Law but not under the Indian Divorce Act or the Parsi Marriage and Divorce Act.

The Special Marriage Act is the only central statute which allows any person domiciled in India to marry irrespective of his or her religious faith. Obviously therefore, persons married under this Act can avail of the more liberal modes of dissolving marriage not available under the respective personal laws of the parties.

At present, petitions for dissolution of a marriage have to be filed in different courts according to the law which is applicable to the parties. The implementation of the Family Courts under the Family Courts Act, 1984 will centralize jurisdiction but matrimonial reliefs will be granted under personal laws applicable to the parties.

There are certain matrimonial offences which entitle the aggrieved spouse to file for a divorce available under all or most of the matrimonial laws. These are cruelty, desertion, adultery, impotency or non-consummation of the marriage and bigamy.

## Cruelty

Cruelty has been defined in the classic judgement of *Russel v/s Russel* (1895 PD 315) as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mentally, or as may give rise to a reasonable apprehension of such a danger.

In India, in *Dastane v/s Dastane* (AIR 1975 SC 1534) the Supreme Court has held that cruelty does not have to be proved under principles of English law but the petitioner should be able to prove that the respondent treated him or her with such cruelty that a reasonable apprehension is caused in his or her mind that it would be harmful or injurious for him to live with the respondent.

Any conduct can constitute cruelty. An allegation made by the wife of her husband's impotency was also held to be the worst form of cruelty. This was held in *Shanti Devi Vs Raghav Prakash* (AIR 1986 Raj.13), where the wife's accusation of her husband's impotency was considered not just a form of abuse, but a serious stigma on his manhood and bound to cause great mental agony and pain, resulting in cruelty to the husband. Further, the act of burning the doctoral thesis of her husband who was a lecturer also constituted cruelty.

In *Harbhajan Singh Monga Vs Amarjeet Kaur* (AIR 1986 Madhya Pradesh 41), threats of committing suicide by the wife, slapping her husband, keeping the husband waiting outside the door of the house on his return from office at times for half an hour, were held to be cruel behaviour.

The court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the petitioner to live with the respondent. In order to decide this it is necessary to maintain facts in the petition relating to the impact of that conduct on the petitioner *[Balraj Vs Balraj* (1981) 11 Fam Law 110 AT 112 CA]

A single act of violence, neglect, coldness and insult whereby the petitioner's health is injured, mental turmoil in the form of accusation of adulterous conduct, refusal of husband to allow his wife to have children all constitute acts of cruelty. Acts of cruelty must be specifically pleaded and evidence in corroboration must be led.

## Desertion

Desertion is the deliberate forsaking or abandonment of a spouse and all marital obligations without reasonable cause. It is not a withdrawal from a place but from a state of things. Desertion involves two elements (1) a withdrawal of cohabitation (2) absence of consent of the deserted spouse. *(Labh Kaur v/s Narain Singh* AIR 1978 P & H 317).

There can be no desertion without previous cohabitation by the parties or without the marriage having been consummated. Desertion commences from the time the physical separation takes place and the intention to bring cohabitation permanently to an end. A separation, however, may take place without there being an intention to end cohabitation permanently, or animus *deserendi*, as in the case of compulsory separation, but if that *animus* supervenes, desertion will begin from that moment unless there is consent to the separation by the other spouse.

Desertion is not determined by the act of leaving the house first. The spouse who compels the other to leave the matrimonial home by words or conduct would be guilty of desertion although it is the latter who has physically separated and left the house. *(Parihar v/s Parihar* AIR 1978 Raj 140)

## Adultery

When one spouse has voluntary sexual intercourse with a person of the opposite sex who is not the husband or wife, during the subsistence of the marriage, then he or she is guilty of the offence of adultery [*Clarkson* v/s *Clarkson* (1930) 46 T. L. R. 626] For adultery to exist there has to be voluntary sexual intercourse between a married person and another who is not the spouse.

Adultery is difficult to prove because of the secrecy usually involved. So direct proof of adultery is very rare. Adultery is proved based on circumstantial evidence; evidence of visits to a brothel, contracting venereal disease from a person other than the petitioner and admissions and evidence of non-access and birth of children.

In *Hargovind Soni Vs Ramdulari* (AIR 1986 Madhya Pradesh 57) while considering the husband's petition for divorce on the ground of his wife's adul-

tery, the court relied on a blood grouping test to establish the disputed paternity of a child as good circumstantial evidence.

To obtain a divorce on this ground, the petitioner should give particulars such as the person with whom adultery (Co-respondent) was committed and dates, places and times. The co-respondent should also be made a party to the petition.

## Impotency

Impotency means incapacity to consummate the marriage i.e. to have sexual intercourse which is one of the objects of the marriage. (R. *Varghese v/s T. J. Ponnen* AIR 1968 Ker 129). Impotency does not signify sterility but incapacity to have normal sexual intercourse. (*Shevanti v/s Bhaurao* AIR 1971 M. P. 168). In order to determine whether impotency existed at the time of the marriage, the courts have to take into consideration future medical and surgical treatment which may rectify the disability to have sexual intercourse. In case impotency can be cured without causing harm to the person suffering from it, the courts will provide an opportunity for such treatment before proceeding to grant a decree on the ground of impotency. (*S v/s S* [(1954) 3 All E. R. 736].

## Whereabouts of respondent unknown for seven years.

To obtain a divorce on this ground, the petitioner must prove that for a period of seven years or more, the whereabouts of the respondent have not been known to the petitioner or any of the respondent's relatives or friends who in the normal course would have heard from him or her.

## Rape, sodomy or bestiality

The wife may present a petition for a divorce on the ground that her husband has been guilty of rape, sodomy or bestiality since the solemnization of the marriage. Rape is forced sexual intercourse by the husband with another girl or woman (not being his wife). Rape is defined u/s 375 of the Indian Penal Code. The Indian Penal Code does not recognize marital rape. Sodomy and bestiality are acts of unnatural intercourse and a divorce can be granted to the wife on these grounds. The petitioning wife can plead that she herself was sodomized although she cannot plead that she was raped.

## Non-cohabitation after obtaining decrees of judicial separation or restitution of conjugal rights

Cohabitation means living together as husband and wife and behaviour towards each other as spouses. If the spouses have obtained decrees of judicial separation or restitution of conjugal rights but do not resume cohabitation for a period of one year or upwards, then this non-cohabitation becomes a ground for divorce.

## Mutual consent

The amended Hindu Marirage Act, and the Special Marriage Act recognise that parties to a marriage may be incompatible and allow dissolution of a marriage, when both parties declare that they are unable to live together and mutually agree to the divorce. A period of living separately for one year is required prior to the filing of the petition.

The courts will not dispose of the petition for six months immediately following the mutual consent petition presumably to give an opportunity to the parties to change their minds.

In *Jayshree Londhe Vs Ramesh Londhe* (AIR 1984 Bom 302) the question of withdrawal of consent by one of the parties arose before the court. The judge held that there cannot be any abandonment of a petition filed u/s 13 B of the Hindu Marriage Act without the consent of both parties and permission to do so would nullify the purpose of a joint application.

In *Nachhattar Singh Vs Harcharan Kaur* (AIR 1986 Punjab and Haryana 201) the court held that a mutual consent petition cannot be dismissed as withdrawn at the instance of one party. Both parties must ask for the withdrawal.

## Leprosy/Venereal Disease

If the petitioner has contracted leprosy or venereal disease from the respondent, this constitutes undue hardship and suffering and is a ground for divorce.

**This article will be continued in the next issue of The Lawyers, when differences in divorce laws under different personal laws will be discussed.**

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

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# Absolute Liability For Hazardous Industry

*In a recent judgement the Supreme Court has held that hazardous industry has an absolute and non delegable liability for any injury sustained by any person on account of its activity.* **Anand Grover** *explains the background leading up to this landmark judgement.*

Just before his retirement, Chief Justice P.N. Bhagwati, heading a 5-judge bench, decided in the Shriram case that any hazardous industry is strictly liable for an injury sustained by any person because of the activity carried on by it. This is the first decision of its kind. Therefore, it is bound to affect future personal injury litigation in the country. The order and judgement passed by the Supreme Court on 22nd December, 1986 does not dispose off the pettion arising out of the leakage of oleum gas (concentrated sulphuric acid). It is the third order passed in that litigation.

## Hazardous Industry

Shriram Foods and Fertilisers Industries (SFFI) is an enterprise of the Delhi Cloth Mills Company Limited. Set up in 1949, it has number of units including unit manufacturing Caustic Soda, Chlorine, Hydrochloric Acid, Sulphuric Acid, Alum, Stable Bleaching Powder, Superphosphate, Vanaspati, Soap and Active Earth, all extremely hazardous chemicals. All the units are housed in a single complex in a 76 acre plot, surrounded by thickly populated residential colonies. Within a 3 kilometer radius there is a population of about 2 lac people.

Though SFFI directly employs about 263 persons, nearly 4000 workmen are indirectly dependent on its running.

The Bhopal tragedy in December, 1984 shook the lethargy of the Government about the safety of hazardous operations, especially in the Capital. On questions raised in Parliament in March, 1985, the Minister concerned assured that all possible steps will be taken to ensure safety.

"Zehrili gas chhooti hai — bhago!".

"And we ran — 150,000 of us — eyes burning, choking, breathless, vomiting. Leaving even our children behind".

## Expert Committees

A number of expert committees were appointed to look into the safety at SFFI. The Slater Committee, comprising experts from the U.K., had submitted its report in July, 1985. It characterized SFFI as 'a major hazard facility.' The Manmohan Committee also inspected the chlorine plant and submitted recommendations for minimising risk to the public.

On 4th December, 1985 the pressurised tank containing oleum burst, resulting in a major leak. An advocate practicing in the Tees Hazari court died as a result. Before the public could recover from the shock of the leak, there was another leak on 6th December. On 4th December itself the Lt.Governor appointed an expert committee (Sethuraman committee) to investigate the leak. The District Magistrate also issued orders under section 133 Cr.P.C. prohibiting the manufacture of hazardous chemicals at SFFI. In the meantime a writ petition under article 32 of the constitution (to enforce fundamental rights) was filed. Substantially, it contended that continuation of the activities at SFFI would be hazardous to life and, therefore, violate the right to life guaranteed under article 21.

Initially the question that arose was, pending the final decision on the petition seeking relocation of SFFI, whether SFFI would be allowed to restart some of its units, specially the chlorine plant.

## Relocation necessary

All the expert committees were of the view that the plant was hazardous. Risk to the public could not be completely eliminated without relocating the plant. It could only be minimized. The Manmohan committee had made recommendation for minimizing the risk to the lowest.

By an order of 17th February 1986 [(1986) 2 SCC 175], the Supreme Court allowed the restarting of the chlorine plant on certain stringet conditions. These included an expert committee monitoring the implementation of the Manmohan committee recommendations; delegation of reponsibility of monitoring safety instruments to workmen; mandatory inspections by the Pollution Board and Inspectorate of Factories; undertaking from Chairman and Managing Director to be personally responsible for any leak that may occur in future; appointing a workers committee to look after safety; putting up notices about effects of chlorine; training workers for safety precautions; installing loudspeakers for proper announcments during an emergency; proper vigilance of safety and Shriram depositing Rs.20 lacs and furnishing a bank guarantee for another Rs.15 lacs to meet any future claims.

SFFI had made an application to vary

the order, specially regarding personal responsibility of the Chairman and Managing Director and the deposit of money. This application was substantially rejected.

### Constitutional Issues

As applications had been made for compensation, a number of issues of constitutional importance, including the scope of articles 32 and 21, were raised. The three-judge bench referred the matter to a five-judge constitutional bench.

The two questions raised were: (a) whether a private enterprise like SFFI would be subject to writ jurisdiction under article 32 of the constitution? and (b) what liability is foisted by law onto enterprises carrying on hazardous activity?

In the judgement given by the five judge bench headed by Chief Justice Bhagwati, the first question, though elaborately discussed, has been left open. One of the new criteria which was raised and accepted was the nature of the activity carried on in the context of the industrial policy of the Government, and in particular the classification of the industry under the Industries (Development and Regulation) Act, 1951.

The policy categorises industries in three types, viz.(a) those which are exclusive responsibility of the state, (b) those in which the state should take the rsponsibility to establish, and (c) those which could left to the initiative of the private sector. The SFFI falls in the second category. The act places chemical and fertilizers industry in the first schedule, which it declares to be in public interest for the Central Government to take under its control. Thus, the argument was that the excessive regulation and control of a private enterprise, such as SFFI, by the state would make it an 'authority' under article 12 of the constitution and amenable to writ jurisdiction. The argument was supported by the American doctrine of State Action based on similar grounds. However, this interesting question was not decided.

### Absolute Liability

The court was quite clear on the second issue viz. liability. It ruled that "an enterprise which is engaged in hazardous or inherently dangerous industry which poses a potential hazard to the health and safety of persons working in the factory and residing...... owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken." Such enterprises ..... " must be held strictly liable for causing harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity." And, " in case of an escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher.*" Moreover the court held that, " the larger and more prosperous the enterprise the greater must be the amount of compensation payable by it ..."

The ruling is of a far reaching importance. For the first time the highest court of the land has held that industry carrying on hazardous activity is strictly liable for any harm caused. The litigants in Bhopal will directly benefit from this ruling. However, it remains to be seen whether tort litigation will take off in this country after this judgement.


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# WARRANTS ATTENTION

# Amnesty Report on Punjab

*With developments in Punjab taking on a violent turn, a number of innocent persons have fallen victim to the might of the armed machinery of the State, which has now been invoked to quell the volent agitation. Naturally, Amensty International, the premier world body on civil liberties, is concerned about the developments in Punjab.* **Naznene Rowhani** *reports on the latest report of the Amnesty International on Punjab.*

## Recent developments

Recent political conflict in the Punjab has centered around the demands, by sections of the Sikh community, for greater recognition of the Sikh faith and identity.

The Sikhs in Punjab number over 10,199,000 and make up 60.7% of the present population in the State; all over India, they number less than 2% of the total population (figures from 1981 census).

A central role in voicing the demands of many Sikhs has been played by the Akali Dal. The Akali Dal (literally "Army of Immortals) had its origins formed in the 1920's with the objective of obtaining control over Sikh shrines in order to ensure that they would be administered in accordance with the principles of the Sikh faith. In recent years, members of the Akali Dal have increased the pressure for the implementation of their demands.

Listing demands of a political, economic and religious nature, its aim was to obtain greater autonomy. The demands include that Chandigarh should become the sole capital of the Punjab and that Punjabi speaking areas from Haryana should be incorporated into the State of Punjab.

Most controversial were the demands for greater autonomy for the State with a distinct Sikh identity coming close to the establishment of a separate homeland for the Sikh community, and thus separatism. Such a demand was openly made in 1986 by a group of young Sikh militants, issuing a declaration of an independent Sikh State - "Khalistan" - land of the Khalsa - ("Khalsa" means company of the pure). Demands of this nature have always been strongly resisted by the Central Government in Delhi, particularly so in the case of Punjab, which is strategically placed, bordering Pakistan.

## Amnesty International's concerns

At present, over 360 detainees, are reported to be held on political grounds at Jodhpur Jail in Rajasthan. All are Sikhs from the Punjab. They were arrested immediately about the time of Operation Bluestar from 5-7 June, 1984, to remove the Sikh fundamentalist leader, Sant Jarnail Singh Bhindranwale and his armed followers from the Golden Temple at Amritsar.

Amnesty International believes there is a possibility that among these detenus there may be men or women who were arrested simply as a result of having been present in the Golden Temple for religious or peaceful political purposes. Amnesty International is, therefore, taking up the cases of these detenus, especially now that they remain detained beyond the maximum period of two years detention, without trial, permitted by the National Security Act.

## Preventive Detention Laws

### National Security Act

The 1980 National Security Act, permits under Section 3, detention without trial for a maximum of two years in order to prevent activities alleged to be "prejudicial to the defence or security of India." Cases are to be reviewed by an Advisory Board within six months of the date of detention.

A Second Amendment to the NSA permits the continued detention of persons held once the two year maximum period has expired.

Amnesty International is concerned that the NSA permits people to be detained for the legitimate and peaceful expression of their political views. Moreover, preventive detention legislation, by-passes the ordinary process of criminal law by which persons are protected by legal safeguards enacted to prevent cases of arbitrary or illegal detention. The two Amendments to the NSA have further limited the scope of judicial review of detentions. Preventive detention is specifically prohibited under Article 9 of the International Covenant on Civil and Political Rights, to which India is a party, which the Amnesty International belives is violated by the NSA.

**Search, a common occurence in Punjab**

## The Terrorist Affected Areas (Special Courts) Act

The Terrorist Affected Areas Act became law in August, 1984 and permitted Special Courts to be established to try persons for offences such as "waging war" and also for activities involving advocacy of violence (such as making "imputations, assertations prejudicial to national integration").

### Trials In Camera

Section 12 of the Act specifies that it is mandatory for Special Courts to sit *in camera* (behind closed doors). The Union Minister of State for Home Affairs was reported to have said that these provisions were made for the protection of the identity of witnesses.

Amensty International believes that such provisions could seriously inhibit defence lawyers cross-examining witnesses to question the authenticity of their statements.

# WARRANTS ATTENTION

**Burden of proof**

Section 20 of the Terrorist Affected Areas Act transfers to an accused person the burden of proving his innocence, if arrested. The Act adds a new section 111A in Indian Evidence Act. This provides that a person found in an area declared to be a disturbed area is to be presumed guilty of the offence allegedly committed merely if the prosecution shows that the accused person was in the declared area at a time when firearms or explosives were being used against members of the armed forces discharging their duties.

Amnesty International is concerned that there is a possibility that innocent persons could be arrested and held in prison for trial by Special Courts *in camera*. It would appear, for example, that these legal provisions could be used to imprison journalists covering a news event or persons known for their views opposed to the government in power. These legal provisions appear to Amnesty International to contravene Article 14(2) of the International Covenant on Civil and Political Rights, which reads:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"

**Restriction on appeal**

Article 14 of the Terrorist Affected Areas Act provides that appeals against decisions by Special Courts are to be limited only to the Supreme Court and have to be made within 30 days of judgement. Under ordinary law, an appeal is first to the High Court and then to the Supreme Court. The time limit for appeals is normally 90 days.

Lawyers have pointed out that under the new procedures, many persons, if convicted, may not have the means to approach qualified lawyers and arrange for an appeal to be made to the Supreme Court sitting in New Delhi.

Amnesty International believes that access to customary appeal procedures is all the more important to persons arrested under the Terrorist Affected Area and that sufficient time and facilities be provided, especially since the Special Courts may even impose the death penalty.

The Indian Constitution itself recognises the importance of the principle to uphold customary legal safeguards. Article 21 of the Constitution reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

## Conclusion

It is on these and other grounds relating to the suspension of legal safeguards specified above that Amnesty International is greatly concerned that innocent persons, prisoners of conscience among them, might be detained under the provisions of the preventive detention Acts and that they might even be subjected to the death penalty.

Trials in which a category of persons, all labelled to be "terrorists", are tried *in camera*, under procedures which shift the burden of proving a person's innocence to the accused person and which reduce the possibilities for appeal, appear to establish a second class system of justice for political offenders. This is what Amnesty International is concerned about.

*Naznene Rowhani is a student of law at the University of Bombay.*

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## SPECIAL REPORT

# UCC Appeals Keenan's Judgement

***Indira Jaising** reports from New York on the arguments in the Appeal filed by the UCC in Second Circuit Court of Appeals.*

Following the decision of Judge Keenan in May 1986, the Government of India filed a suit in the District Court at Bhopal against Union Carbide Corporation, U.S.A. claiming unspecified damages in respect of the disaster which occured from the gas leak at the plant of Union Carbide India Ltd. at Bhopal in December 1984. The claim in the suit was a repetition of the complaint filed in the New York Court, based primarily on strict product liability of the parent company. The Government, on behalf of the victims also claims in its suit that the multi-national enterprise was engaged in the manufacture of a dangerous substance, MIC, and that it did not disclose the exact toxic nature of the substance prior to licensing.

With the filing of the suit in Bhopal and the consent of UCC to submit to the jurisdiction of the Indian Courts, one would have thought that the stage was set for the hearing in Bhopal. Surprisingly, the the UCC has filed an appeal in the Second Circuit Court of Appeals in New York against some of the conditions imposed by Judge Keenan. The Plaintiffs lawyers, Stanley Chesley and Lee Bailey, have also appealed, claiming that American Courts shoud retain jurisdiction. Thus, though the suit has been filed in India, the future of the litigation remains uncertain until such time as the appeal is decided.

### Fair Settlement

Arguing at the hearing of the appeal last month in New York, the Plaintiffs lawyers main concern was to get a hearing on the fairness of the offer for settlement made by UCC. They maintain that a settlement had been reached between the Plaintiffs and UCC at $ 350 million and insist that this is a fair settlement. Stanley Chesley maintained that at one stage even the Government of India was agreeable to this settlement but backed out due to political pressure. The main thrust of his argument was that the case should be sent back to Judge Keenan for a finding on the fairness of the settlement.

All the three judges hearing the appeal, George C. Pratt, Walter R.Mansfield and Frank X. Altimari, seemed convinced that the tort had the closest connection with Bhopal and the suit should be heard there. At the opening of the hearing there seemed no chance that Judge Keenan's decision would be reversed. On the question of settlement, the Judges did ask Michael Ciresi, appearing for the Government of India, whether there was any chance of settling the dispute in the region of $ 350 million, to which he categorically replied in the negative.

Once the Government indicated that it would not accept anything near $ 350 million, all talk of settlement seemed useless. Neither Stanley Chesley nor Lee Bailey were able to answer the repeated pointed questions as to why the suit should be heard in USA. The only answer given was that Government of India did not represent the victims but that they, the private lawyers, did. They demanded a decision on representation. When it was pointed out to them by the Judges that their representation had been specifically withdrawn, they retorted that this was done under police pressure and insisted that the court decide whether Government of India was entitled to represent the victims at all. Michael Ciresi was quick to point out that deciding the question of representation at this stage was not in the interest of the victims as it would take no less to two years to find out whether the victims had withdrawn their authorization from the American lawyers, thus delaying a decision on merits.

### Which Law ?

When asked again by the Judges why the suit should be heard in the USA, Stanley Chesley replied that in New York, unlike in India, the cases can be tried on a representative basis and that Indian Courts had no experience in dealing with mass disaster. Surprisingly, in answer to a question which substantive law would apply if the case was heard in USA, he said it would be Indian law and not US law, indicating quite clearly that in his opinion, the question of liability and damages would both be determined by Indian law. It is perhaps this approach that explains his stand that $ 350 million is a fair amount. He was quite clearly of the view that there was no need for a decision on punutive damages.

None of the Judges seemed impressed by the argument in favour of retaining the case in the USA. They pointed out that at the time of the disaster, there were no Americans operating the plant. Apart from UCC, none of the other potential defendants were in USA. Clearly, in their opinion, the question of the way the plant was operated could not be overlooked, concentrating only on questions of plant design. It was almost as if they were arguing the UCC case on liability for the American company.

Bud Holman for UCC who had also appealed the judgement of Judge Keenan was not able to explain his case or the reason for the appeal. The Judges were at a loss to understand whether Bud Holman, for the UCC, wanted the suit heard in India or in the USA. Holman claimed that UCC was not being given a fair hearing in India. Their mail was opened and telephones tapped,he said.He complained that on the 17th November 1986, UCC was restrained from disposing off its world wide assets and maintained that it had not agreed to have its world wide assets being subject to the jurisdiction of the Indian courts. The injunction, he said, violated due process. The Judges asked him whether he had not studied the Indian system before agreeing to submit to its jurisdiction. When asked pointedly to specify whether he wanted the suit heard in India or in the USA, he said the suit should be in India but its conduct supervised by Judge Keenan, to which the Judge rhetorically asked: "How would you like it if you were a judge in India and had an American judge breathing down your neck telling you what to do?"

His position was so clearly unsustainable that he quickly gave it up, Bud Holman also complained that

*Frank X. Altimari*

*George C. Pratt*

*Walter R. Mansfield*

UCC had no access to documents as they were all seized by the CBI. He was suggesting that India was therefore not an adequate forum. The complaint was patently incorrect as UCIL has been given a complete list of documents seized, photocopies and the right to inspect originals. In fact for those familiar with the happenings in the Company town of Bhopal, it is common knowledge that UCIL has direct access to CBI and all its documents. In fact, quoting CBI sources, UCIL has claimed that the investigating authority has absolved it of all liability.

## One-sided Discovery

Although the Judges were not impressed by Holman's complaint of violations of due process, they did seem to agree with him that it was unfair to submit UCC to Federal Rules of Discovery but not impose the same condition on the Government of India. They said this did raise serious questions of due process and hinted that discovery should be "mutual". Michael Ciresi was asked whether he would agree to submit to Federal Rules of Discovery in India, to which he replied that he would in relation to events that occured in the USA only. Holman also insisted that the settlement offered was fair and the case be sent back to Judge Keenan for settlement. He insisted that during the negotiations for settlement, the Government of India had demanded substantially less than $ 1 million and in fact was willing to settle for $ 4 million. So vehement was his opposition to the Indian Courts that one Judge remarked: "I am not sure if you are arguing the Plaintiffs case." Holman also alleged serious violations of "due process" as he said that "Government of India was Plaintiff and Defendant in the same suit."

Michel Ciresi for the Government of India, maintained that he wanted the suit heard in India. He denied that UCC was prevented from having access to documents. If due process was being denied, they could raise the issue in the Indian Court. He was however not able to justify the one- sided discovery with the judges insisting there was nothing wrong with Government of India submitting to discovery also. In fact they wondered whether UCC would be permitted to withdraw its consent to submit to jurisdiction in India as they felt due process was not assured. Bud Holman pointed out that at no stage did UCC say to Judge Keenan that they needed broad discovery but maintained that rules of Civil Procedure in India were adequate. Ciresi opposed any move to send the case back to Judge Keenan and maintained that no settlement was possible.

Stanley Chesley concluded by alleging that Government of India was obstructing settlement but not providing data on the vicitims which would help a settlement. He insisted that $ 350 million was a "generous" offer in Indian terms. Bud Holman maintained that they would be willing to settle even without Government of India but that they wanted a "global settlement."

## Issues Arising

Amidst the confusing and complicated arguments, the two most serious issues that emerged were, whether one-sided discovery was not violative of due process and what is the implication of having Government of India as Plaintiff and Defendant in the same suit in Bhopal. The judges seemed to think both raised issues of "fundamental constitutional fairness".

In Bhopal, only in November 1986 did Government of India, for the first time claim $ 3 billion as damages on behalf of 5.2 lakh claimants. According to Government figures, 2,889 died and 40,000 are still in the category of seriously injured. To secure the claim, UCC has given an undertaking to give bonds of that

UCC has finally filed a defence in the Court at Bhopal disclaiming all liability and alleging sabotage. They have also made a counter- claim against Government of India as a joint tort- feaser alleging the Government had full knowledge of the toxic nature of the substance MIC. They claim that the State is responsible for irresponsibly permitting human settlements in the region of UCIL plant. Carbide also claims that the contract for the transfer of technology contains a clause absolving UCC from any legal liability on account of any accident.

## Future Prospects

A judgement on appeal in the Circuit Court New York is not normally delivered in less than sixty days. The Executive Officer of the Court seemed to be of the opinion that this appeal may take longer to decide. While the US Court of Appeals is almost certain to endorse Judge Keenans decision on the forum issue and allow the suit to continue in India, it seems highly likely that it will impose reciprocal and mutual rules of discovery in India. The court is likely to hold, that one-sided discovery violates due process The far more formidable objection is the fact that Government of India is clearly the Plaintiff and Defendant in the same suit. When asked how such a situation can be dealt with, some lawyers believe that Government can resist by pleading the doctrine of sovereign immunity, a defence most unlikely to succeed as it has chosen to invoke the jurisdiction of the Court on its own behalf. It would be too tragic, if the already protracted legal battle comes to nought if UCC succeeds in its contention that such a procedure violates due process. But who will wait for the tragic end to this complex litigation? Would it not be better for Government of India to anticipate questions of due process and permit victims to be represented independently.

## COMMENT

# Social Action Litigation under Section 91 CPC.

*The introduction of Section 91 in the Civil Procedure Code has allowed public spirited individuals to file suits in ordinary civil courts to stop a public wrong. This important amendment has been little used. However, it provides scope for Social Action Litigation ( SAL ) at the grass roots level.* **Nirmalkumar Suryawanshi** *explains the provisions under section 91 C.P.C.*

To protect public rights and public terest, the Civil Procedure Code (CPC) was amended in 1973 by enacting a new section 91 in the Chapter titled "Special Proceedings".

Prior to 1976, in case of public nuisance, the Advocate General, or any two persons with his consent, could institute a suit, for a declaration and injunction under section 91 of the Civil Procedure Code. No special damage had to be shown or pleaded in such a proceeding. In 1976, this section was amended creating a new right to file a suit, not only in case of public nuisance but also for any "other wrongful act" affecting the public. Moreover, it is no longer necessary to obtain the consent of the Advocate General. Leave can be obtained directly from the court. The 1976 amendment has, therefore, greatly liberalised access to the courts for members of the public in respect of wrongful acts by other persons.

### Relator Actions

The concept embodied in Section 91 is based on the practice followed in England which is known as "Relator Action". The Attorney General in England can bring an action at the relation (i.e. at the instance) of some other person claiming an injunction or declaration to prevent public wrongs or public nuisance. While injunctions and declarations are the principal safeguards for private rights, under Section 91, they are made available for the protection of public rights and public interest by means of a relator action. Thanks to this innovation, two persons can initiate an action even though they do not sustain any particular damage or injury themselves or they do not have any personal interest in the matter.

Under the new amendment, the scope of the provision has been widened. Unfair and unjust acts of public authorities or local authorities can now be questioned under section 91 by obtaining injunctions or declarations or any other appropriate relief. These remedies are also available against persons, individuals or corporate entities.

**Drought in Maharashtra**

### Wrongful Act

The term "wrongful act" is not defined in the Civil Procedure Code. The ordinary dictionary meaning is an act characterized by unfairness or injustice, or an act contrary to law. It can also include improper acts, illegal acts, tortuous acts, malicious and vexatious acts and omissions resulting in a breach of law, which cause damage or injury.

The amendment to section 91 therefore, opens new ground in the field of Social Action Litigation (SAL)in India.

In the *Judges* case (*S.P. Gupta V UOI*, AIR 1982 SC 149) Justice P.N. Bhagwati, while discussing the procedural law regarding public interest litigation emphasised the importance of section 91 of the Civil Procedure Code.

Most of the SAL actions till date have been filed through writ petitions, either in High Courts or in the Supreme Court. The lower courts, that is the District Courts, have not been activated by SAL. Section 91 now allows public spirited persons and social activists to approach the courts at the lowest level, i.e. District Courts. Moreover, unlike a writ petition, where disputed questions of fact are not entertained, a suit under Section 91 would allow all such questions to be gone into, thus allowing evidence to be led. Additionally, unlike in writ petitions, proceedings under section 91 can be instituted against all private parties.

Actions under section 91 has been successfully concluded in Dhule to enforce the State to provide drought relief as well maintain hygienic environment in and around Dhule. In an order in a proceedings under section 91, the Dhule District Court had ordered the State to provide relief for victims of drought. Against the order the State had filed a writ petition in the Bombay High Court, which was rejected by Justice Pratap.

Action under section 91, therefore, provides a useful device available not only to cater to the private needs of ordinary citizens but also to enforce public rights and interest. It really imposes a measure of control on all those bodies, public and private, who are guilty of infringing or abusing the law.

*Nirmalkumar Suryawanshi is an advocate practicing in the District Court at Dhule, Maharashtra.*

# Corruption in Legal Life

*Corruption has become a part of Indian public life. The legal system bears no exception.* ***Gulam Vahanvati*** *comments on the state of affairs today and prescribes a dose of over reaction as a first step towards a remedy.*

Corruption is not peculiar to India. All the world's nations play this game. Some openly; some crudely; some discreetly; some skillfully. If this game was recognised at the Olympic level, our performance in several categories would surely win medals. One area where we have always had occasion to feel confident about the lack of corruption is our higher judiciary. Since corruption in other walks of life has become so rampant, the time has come to look more closely at the problem and its different ramifications and to start speaking about corruption **openly.** It is no longer possible to treat corruption in the traditional hear-no-evil, see-no-evil manner and deal with it in hushed whispers.

What is corruption? Corruption is not just purchasing or selling favours. It assumes many colours. Basically, it must be treated as any attempt to influence any determination otherwise than on merits. The purpose of this article is to try and identify areas of such influences as may concern the judiciary.

The most obvious form of corruption could be **Tipping the scales.** People do believe that our judges are honest and scrupulous, even to a fault. Since, however, people have started accepting corruption as a fact of life and make insinuations about anything, it is the duty of all those concerned with the administration of justice to identify any sign of erosion and **react to it.** We owe this to the system; we owe this to the litigant; we owe this to all our judges who are honest. Any loose talk of **sale of justice** must be exposed with ruthlessness, however unpleasant. Judges and the bar must deal firmly with such elements. Letting them get away with it is a sin. Turning a blind eye is a crime of almost equal proportion. The lead must be taken by Senior Advocates, and "leaders" of the bar who must stop convenient rationalisations and give up their ostrich-like attitude. If they fail to do so, when one raises one's head from the sand, the glare of the sun will be blinding.

**Playing favourities** has always been an area of concern. This, of course, is not new. A certain measure of this is mere human frailty and subconscious respect for individuals. A judge cannot be faulted if he reacts negatively to an advocate who has consistently tried to mislead the court, or positively to an advocate who is known to be fair and honest. However, what is not acceptable is the influence of other considerations such as regional or caste backgrounds which has been cited in justification of the policy of transfer of judges. Such are the reasons which lead a large section of the bar to support transfers; what is disheartening is that the sweep of the wand may uproot and effect and many judges who are in no way susceptible to these pressures.

Playing favourities raises another basic question: to what extent can the judges and the bar maintain contact. Seminars and conventions are necessary for a healthy exchange of points of view on areas of mutual concern. Nevertheless, people are concerned about the socialising that is said to be taking place. Some advocates specialise in maintaining a high-profile posture. The problem of judges accepting invitations from lawyers is a very ticklish and sensitive one. Close relations are forged at the bar and if these are maintained without sacrificing impartiality there can be no objection. What becomes troublesome is if it is sought to be taken advantage of by some lawyers. The manner in which some lawyers suddenly remember "old" friendships when they hear of an elevation is as amusing as it is artificial! The judge does now know if at all but his name can be cleverly dropped. The result is a totally wrong impression in the mind of a litigant. A person whose name was being mentioned for elevation told me that a judge must eschew all contact with the bar. This may appear to be a very rigid standard, but if public confidence is to be maintained strict rules may become inevitable.

**Lobbying for the seat** is another problem which has now reached epidemic proportions. It is trite to say that appointments must be solely on merits, but unfortunately merits could well be the last consideration if advocates 'jockey' for appointments. The controversy between the Union Minister of State for law and the Karnataka Chief Minister suggests that several extraneous pressures are brought to bear in this regard. A person who owes his appointment to such considerations may not be able to resist collection of the IOU. This does not merely concern judicial appointments.

**Purchaseable lawyers** inhabit the lower levels of the system. Lawyers who betray their clients are criminals of the worst kind. They sell their souls when they sell their clients. Similarly, lawyers who grab more than they can handle, neglect their clients, and swallow fat fees without reading the brief or even turning up, are guilty of cheating. Why should you read the Paper-Book if the judge is going to do all the work anyway?! Instead of the Indian Rope Trick, we now have the SADA ( Senior Advocates Disappearing Act). How much incalculable harm can be caused to a litigant in this fashion, particularly in the highest court, can well be imagined.

**Despatch Money** is the order of the day. It is almost impossible to get an order issued, petition verified, plaint lodged, papers produced, copies obtained without the necessary payment. Papers can disappear as easily as matters can vanish from the board. Boards are manipulated in a manner which causes grave concern. Some lawyers indulge in such activities as a fact of life, and this now forms part of the rules of the game.

The worst thing about corruption is that very soon one stops reacting to it and accepts it as something one has to live with. Unless we start overreacting, it will inundate us all.

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*Gulam Vahanvati is an advocate practicing in the Bombay High Court.*

# K.G. Kannabiran

*Andhra Pradesh has the dubious distinction of an Indian State having the worst record on civil liberties. K.G. Kannabiran has been active in the civil liberties and democratic rights movement in Andhra Pradesh for over two decades. We talked to him about his involvement as a lawyer and as an activist in the movement.*

**Q.** *How did you get involved in the civil rights movement?*

**A.** In 1964, after the Shrinakulam movement, there was tremendous amount of repression. Large number of persons were arrested illegally. Most of them were political dissidents. This was the time that the phenomena of encounter deaths began in Andhra Pradesh (The U.N. calls them extra judicial executions).

At the time I started appearing as a lawyer for some of the detenues. There was a group of poets. They included personalities like Jwalamukhi and Nikhileshwar. They called themselves revolutionary poets. Their writings were proscribed under of the Indian Penal Code (I.P.C.). A large number of poets had their poems proscribed.

**Q.** *What was the nature of this poetry?*

**A.** They contained exhortations for the overthrow of the 'system'. With other colleagues at the bar, I started appearing for these poets. Most of them were detained under the Andhra preventive detention law. The peculiar feature of the preventive detention law was that it provided that even if one of the grounds of detention was sustained then the preventive detention could be sustained. This is similar to the National Security Act as amended today. The Andhra Pradesh law was challenged by us as being violative of Article 22(5) of the Constitution. The law was struck down by the High Court through Justice O. Chinappa Reddy and Justice A.D.V. Reddy.

Also between 1969 and 1974 there were a number of conspiracy cases, about 22 in all, mostly under Chapter VI of the I.P.C. Most of the cases were thrown out by the courts. The Secunderabad conspiracy case was the biggest of them all. That case is still going on. Moreover, between 1969 and 1974 there were about 450 "encounter deaths."

**Q.** *How did the lawyers manage all these cases?*

**A.** Fortunately, the lawyers acting in these cases of encounter deaths and preventive detention, formed a Defence Committee at the High Court level. In 1973, the Andhra Pradesh Civil Liberties Committee (APCLC), was also set up. The first President of the APCLC was the famous poet Sri Sri.

**Q.** *What happened during the emergency?*

**A.** Most of the activists of the Defence Committee and the APCLC were detained and they stopped functioning. The detentions were challenged as was MISA itself. It was upheld by the Andhra Pradesh High Court (P. Venkataseshamma versus State of Andhra Prasdesh AIR 1976 AP 1).

**Q.** *Did the situation improve after the emergency?*

**A.** In 1977, in a meeting of the Conference for Democracy (C.F.D.), it was strongly felt that the physical liquidation of political dissidents (whatever their political affiliations) could not be permitted. So it was decided to set up an unofficial committee of citizens to investigate 'encounter deaths'. That is how the Tarkunde Committee came into existence.

Because the Janata Government was in power, it was compelled to appoint an enquiry commission, headed by Justice Bhargawa, under the Commission of Inquiries Act, to investigate such encounters.

The Bhargawa Commission thoroughly exposed the encounter deaths. To prevent such exposures, the A.P. Government passed a Government Order (G.O.)to hold the proceedings in camera (not open to public gaze).

**Q.** *How were you able to intervene in Bhargawa Commission to your advantage?*

**A.** During the emergency, the police used to hold the detenues illegally in the forest guest houses or inspection bungalows. I personally went to the guest houses and bungalows where I found the names of police officers in the register.
Initially Justice Bhargawa was apprehensive about out contentions of encounter deaths. He was slow to change. But the registers and other documentary evidence was compelling enough. That is when they clamped down with the G.O. We walked out after the G.O. was issued. It was impossible for witnesses to be protected after that.

**Q.** *You became the president of the APCLC in 1980. How has the APCLC fared since then?*

**A.** Well, between 1977 and 1980, during the janata days, there were no encounter deaths. But on the return of the Congress in A.P., the encounter deaths increased dramatically. Between January and February there were about 12 deaths. On N.T.R.'s Government assuming power, in the

# HAAZIR HAI

first phase, encounter deaths went down. There were about 3 in the first phase. But after the 'restoration of democracy' (N.T.R.'s return), the A.P. Government became very repressive. The police was given unbridled power. In 1984, 20 persons were killed in encounter deaths. In 1985-86 64 persons were killed in police lock ups.

**Q.** *How has APCLC been tackling this problem of encounter deaths?*

**A.** APCLC has been protesting against these at various levels, but to no avail. We have also raised question of nearly 525 persons who were taken into illegal custody and tortured between 1983 and 1985. We argued that public servants who had been systematically violating constitutional provisions have no right to continue as public servants.

Unfortunately, the protests about such illegalities resulted in the State attacking civil liberties activists by arresting and detaining them illegally. At one time in 1985, half of the APCLC exutive were in detention.

On 7th November, 1986, after the death of a Dy. S.P., an activist of the APCLC, J.Laksha Reddi (nearly 65 years old) was shot dead.

**Q.** *What is the attitude of the APCLC towards violence?*

**A.** In the civil liberties movement and APCLC we do not and will not support any violent activities by any political party.

Violence by political parties is counterproductive and results in a set back in the civil liberties movement and the democratic process.

Having said this, I must add that if the State and its officers act outside the law, and act like armed brigands,it forfeits its respect and claim to immunity for its actions, especially if they systematically flout all constitutional and legal provisions.

**Q.** *Do you belong to any political party?*

**A.** No, I do not, though the State brands me as a "Naxalite."

An interesting thing happened in one case. A letter petition was filed from Fakirkondapam village in Karimnagar District. There was complaint of police excesses when one person lost his life. I was appointed as a Commissioner to investigate the facts. The State filed an appeal making allegations against me personally - stating that as I had been appearing for 'Naxalites' and taking up their cases and as I was the president of the APCLC and the Organising Secretary of the PUCL, I was a "Naxalite."

I was then compelled to file an affidavit arguing that if the logic of the State's argument was extended all lawyers appearing for tax evaders would be tax evaders and those appearing for smugglers would be smugglers. Fortunately it was not so. Only lawyers appearing for "Naxalites" were labelled as "Naxalites."

**Q.** *You are not only the President of APCLC but also the Organising Secretary of the PUCL. Some people feel that some persons in the PUCL especially lawyers , have dual attitudes. For example, a lot of them while paying lip-sympathy for civil liberties, appear for sections which are opposed to civil liberties. What do you have to say about that?*

**A.** I feel that we should involve as large a section of the people as possible in order to prevent the erosion of democratic rights. The theological approach is otherwise quite destructive of the civil liberties movement.

**Q.** *The encounter killings in A.P. seemed to be never ending? Do you see any change?*

**A.** Well, I think they will never end. Since the Telangna movement nearly 2,500 persons have been killed. On account of the communist movement of that period the people are still politically active despite a number of set backs. In the 30 years since independence, socio-economic conditions have deteriorated. Popular movements centered around basic demands are driven underground by labelling them as 'revolutionary' or 'naxalite'.

The basic flaw is that the courts are impervious to the sentiments of the people at large. The State resorts to force to quell the just demands of the people. We have to constantly remind ourselves that democracy in our country is purely formal.

**Q.** *What are the future plans of the civil liberties movement?*

**A.** Some of the groups, activists, lawyers and judges have got together and set up the Human Rights Commission (H.R.C.). The H.R.C. is supposed to take up grave or gross violations of human rights. Not each every case of human rights violations will be taken up by the H.R.C., only the most grave and gross.

**Q.** *The H.R.C. is supposed to be headed by judges. I take it? What is the creteria for their selection?*

**A.** Judges will be mostly those who have served on the Supreme Court or on the High Courts. The criteria will be whether or not they have a strong human rights commitment as is evident from their judgements.

**Q.** *What do you hope to achieve with the H. R.C.?*

**A.** H. R. C. hopes to compel the Government to recognize that it is violating human rights as well as make the people alive to human rights so that they do something to stop the situation from deteriorating further.


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## Arbitrary Arbitrators

*Unemployed retired Supreme Court Judges have found themselves a lucrative niche in legal Delhi. There are the new band of arbitrary arbitrators. Increasingly, they are being patronised not only by the parties to the dispute but also by the Supreme Court judges.*

*Often, in pending disputes, one hears the judges saying: "Why don't you refer the dispute to arbitration?" Even names are suggested. What an ingenous way of getting rid of arrears!*

*The current market for a retired Supreme Court judge is Rs. 5000/- per day for "Non effective hearing" and Rs.7500/- for "effective hearing." Before the award is delivered an arbitrator can pick up Rs.70,000 to Rs.80,000/- each. There are two of them per case. What a good way of catching up on the lost earnings while you were a judge.*

* * *

## Border Disputes

*Mr. V. D. Tulzapurkar's remarks, lamenting the fact that insurance companies were hosting Lok Adalats, reminds one of the border disputes endemic to super powers resulting in occassional skirmishes. He took offence that insurance companies were tresspassing into the realms of the judiciary.*

*To judge is the birth right of a judge. The border line is clearly drawn. You stick to your territory, me to mine!*

*The reaction is typical of a professional's panic in danger of losing the mysticism surrounding his work. Solicitors in England reacted in a similar fashion when they lost their monopoly in conveyancing, a reform , by the way, long overdue in India. And who cares if the involvement of the insurance companies results in quick settlement of disputes.*

*Who said lawyers wanted speedy settlements. Judges must have the monopoly of judging first and last.*

* * *

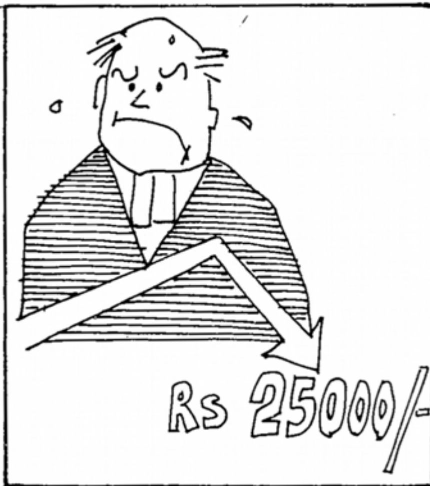
## *Parties And More Parties*

*Any occasion is good enough for having a good time, is'nt it? And if you can continue business with pleasure in true corporate style, why not? With the appointment of Chief Justice R. S. Pathak, beautifully timed with the festive season, New Delhi had more than its fair share of parties. Everybody was keen to demonstrate their affection and appreciation of the new Chief Justice - what better way than to throw a party? L.M. Singhvi, G.N. Sanghi and Kapil Sybal are all reported to be good entertainers of incoming and outgoing Chief Justices.*

* * *

## Slash down Rates

*Genuinely surprised by the criticisim that Rs. 5000/- per appearance for a Special Leave Petition is excessive, senior lawyers of the Supreme Court have actually decided to do something about it. Murli Bhandare is reported to have recommended to the Supreme Court Bar Association that the fees be reduced to Rs.2500/-. What a come down! But what irritates the Delhi lobby is the fact that*




*they are overtaken by the Bombay lobby of lawyers which lands up every week in Delhi in unlimited numbers to appear with the Delhi Seniors in the Supreme Court. Four and five Bombaywallas land up to appear as fourth and fifth counsel and stay at the Taj and bill Rs.40,000/- odd as their fees! Why, the Delhi Seniors ask, should they charge only Rs. 2500/- when one trip to Delhi costs the client Rs.40,000/- for the Bombaywallahs? Good question that!*

* * *

## The Missing Judgements

*"I have been looking for Justice R. S. Pathak's notable judgements." said one lawyer to another in the corridors of the Supreme Court. "Haven't found anything as yet", said he. Promptly came the reply. "How can you possibly find them , you haven't seen the unwritten ones"!*

* * *

## Opinionated Judges

*It seems that judges never tire of being judges. A lot of them enter lucrative arbitration practice. Others render expert opinions. Being an ex-Chief Justice of Supreme Court also helps. Thus both Justice Shah and Justice Hidayatullah gave 'expert' opinions for contesting parties on Indian law in a matter pending in an English Court. Naturally, being experts, their opinions were contrary to each other. But they had no interest in the matter, except the fees part of it.*

*The new brand of retired judges have taken a leap forward. They have interest in the matter, apart from fees. Justice D.P. Madon for instance, was kind enough to render an opinion to the effect that his own judgement in S.G.C. & D.T.E.U. and S.G.C. & D.T. Ltd. & Anr. [(1986) I. LLJ 498] was not applicable to the Scindia establishment in Bombay.*

*When the Management lawyer produced the written opinion, the Member of Tribunal very aptly remarked: "Any judge's opinion, like any other opinion, is a matter of opinion."*

*You might say that Justice Madon is an opinionated judge.*

* * *

## *Devil's Advocate*

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