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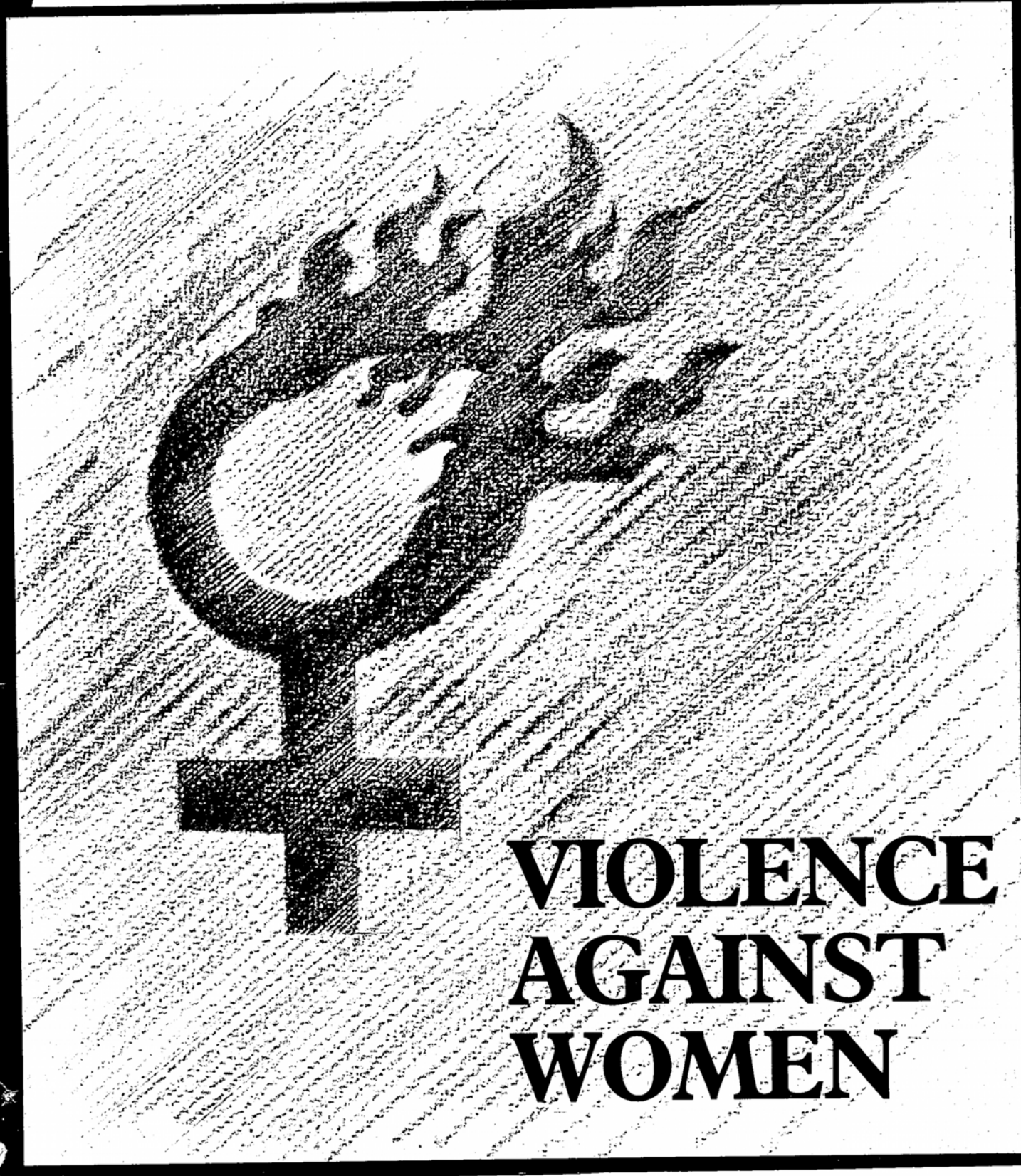
FROM

THE LAWYERS COLLECTIVE



VIOLENCE AGAINST WOMEN

EDITORIAL

A Welcome Exit

A. K. Sen's resignation as Law Minister has come as no surprise to anybody. Most people believe that it was because of his desire to get back into private practice and make quick money that he resigned. A UNI report announcing his resignation did not forget to mention that he is back in practice. It read almost like an advertisement. On the day following his resignation, he was seen appearing in several cases in the Supreme Court, running from court to court, catching up on lost time.

It is generally believed that he had decided to resign even before the West Bengal Election results were announced. His professed reasons for resignation do not seem to have any connection with the election results.

During his 2 1/2 years as Law Minister, he made no significant contribution to law-making. The much talked about and publicised Legal Aid Bill was never introduced despite assurances given on several occasions. Whether in the appointment of judges or of law officers, his tenure was marked by inactivity.

As Law Minister, A. K. Sen was responsible for formulating the litigation strategy for the Bhopal Gas victims, a strategy which has miserably failed to bring justice any closer to the victims. Nay, it has delayed a decision. His attempts to settle the case at low levels of compensation met with widespread criticism, leading to his being kept off the case.

His performance over the Muslim Womens' (Protection of Rights on Divorce) Bill was no better. Having given an opinion that the decision of the Supreme Court in the *Shah Bano* case was proper and did not require any interference, he turned full circle and himself piloted the Bill to defeat the judgement.

The ethics of a Law Minister practicing in Court the day after his resignation are open to serious questioning. He appointed three judges to the Supreme Court and several to different High Courts.

Today A.K.Sen appears as a lawyer on behalf of private litigants in the Court of those very judges whom he was responsible in appointing. The litigants will certainly feel that they are at a disadvantage when he is appearing against them. Apart from relatives and friends of judges appearing in their courts, there are other relationships also which can lead to the conclusion that justice will not be seen to be done. The Law Minister stands in a position of power in relation to the judges he has appointed. Decency demands that he should not practice on behalf of private litigants in the court of the judges he himself has been instrumental in appointing.

Nevertheless, given his non-performance as Law Minister and whatever be his motivation, his resignation will give an opportunity to appoint someone who takes his job a little more seriously. Will the Government take up that opportunity?

Indira Jaising.

FROM THE LAWYERS COLLECTIVE

CONTENTS VOL 2 NO.3

Editor: *Indira Jaising*

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Cover : Suhail Abbasi

LETTERS

Erring Magistrate

I want to acquaint readers of The Lawyers magazine with the pernicious practice prevailing in the Jamshedpur criminal courts. Many innocent persons are arrested and sent to judicial custody when they are not mentioned in the FIR and when there is nothing on record to connect them with the alleged offence. When the advocates ask for bail, the Magistrate simply calls for a memo of evidence from the police station and adjourns the matter date after date without giving bail. Sometimes, more than a month passes with the police not filing the memo of evidence whilst the accused continues to languish in jail. Advocates have repeatedly pointed out to the Magistrate the gross illegality of refusing bail, even provisional bail, in such circumstances but to no avail. The Magistrate simply tells the advocates that it is his right to give such orders as he thinks fit.

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Mobilising Women

I would like to share with your readers the experience of the Singbhum Mahila Kalyan Samiti in mobilising women in one of the most backward areas in the country. The Samiti was formed in 1977 in the wake of the emergency when a large number of activists were released from jails. The objective of the Samiti was to raise womens' consciousness and make them aware of their status as second class citizens, who are dependent first on their fathers, next on their husbands, and finally on their sons.

In 1979, Jamshedpur was gripped by serious communal riots. Most lower middle class families sent their children away. When the curfew was lifted our Samiti organised some 60 women who went in a bus to the Dy. Commissioner's bungalow demanding that a large number of innocent persons who had been arrested should be released, and the real culprits who were roaming around scot-free should be arrested. The D.C. complied with our request, saw to it that the children were brought back and that future arrests made were only of anti-social elements who were identified with our co-operation. This gave the women of the mohalla tremendous self-confidence and a new status.

In 1981, Singbhum district was drought affected. The Bihar Government sanctioned crores of rupees for boring tube-wells. However, only two tube-wells were bored, one on a M.L.A.'s property and another one which caused a bitter dispute between two families, leading to the death of one person. The police refused to register a case on the ground that the deceased was a Naxalite. The Samiti gheraoed the police station, mobilised some 500-600 women and threatened to block the main road indefinitely until an FIR was lodged, the murderers arrested, the S.H.O. suspended and the tube well programme implemented. Thanks to the uproar created by the Samiti the government gave in and all 350 tube wells were bored within a week.

Such tactics have important lessons for the womens' movement in India. It lays stress on developing the strong sense of togetherness which prevails in middle class and lower middle class mohallas. By mobilising the women of the locality, it raises womens' consciousness, makes them aware of their potential and frightens those who are accustomed to seeing women as servile creatures. Moreover, these tactics bring about quick results, are inexpensive and breed self reliance. The need of going to lawyers and getting stuck in court "lafdas" is by-passed. I hope our experiences provide useful examples to other groups working in other parts of the country of whose work I look forward to read in these pages.

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Half-Rounds

The Bombay police indulge in an infamous practice popularly referred to as "half-round" which puts many of innocent people into detention every day. As a labour lawyer I am plagued every week with requests from workers to get their friends released from lock-ups. Their only crime is to be poor and hence suspects in a criminal case.

Kishore Rajan's case is illustrative.

Kishore Rajan, was waiting for a bus at Byculla at about one clock in the afternoon. A police van drew up, half a dozen havaldars jumped out and rounded up many youths standing around, including Rajan. Despite protests, all of these unfortunate youths were forced into the van and taken to Byculla Police Station. They were dumped in the lock-up after their particulars were taken. The next day they were all produced before the Magistrate who granted them bail of Rs.100/-

In the Court, Kishore Rajan tried to tell the Magistrate that he was innocent and did not know why he had been picked up, but he was effectively silenced by a havaldar who pushed him out of the court room and into the van.

In the lock-up, Rajan requested the police to allow him to telephone a friend whose office number he had, but they refused. Then he asked if he could write a post card to the people he lived with so that they could get him released, but in vain. So Rajan had to stay a full seven days in lock-up where the conditions are sub-human, to say the least. At the time of his release Rajan asked the Sub-Inspector on duty why innocent people were picked up in the street. He replied saying that there was always a chance that they could catch a wanted criminal by picking up people at random. The Sub-Inspector then added that Rajan was lucky that he was not wanted in any case.

So Rajan returned home to a roomfull of worried friends who had spent the whole week looking for him in hospitals and even the morgue. They did not think of looking in the police station. But then they were not acquainted with the practice of "half-round" whereby innocent people in the street are picked up and detained in police custody.

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Violence Against Women

Recently there have been several amendments in the laws dealing with crimes against women. **Flavia** *describes the different forms of violence against women and import of legislative changes.*

Violence against women is manifested in several forms. It includes battering, rape, demands for dowry, mental and physical cruelty, harassment to the point where suicide becomes the only means of escape for a woman.

Violence can also lie in prevailing attitudes in society towards women such as sexual harassment at work, assuming that women are "fair game", and acceptance of the myth of male superiority which is endorsed by denigrating the economically dependent woman who does not earn wages for the valuable services she performs as a homemaker and mother.

Women are also violated by the media when they are depicted as sex objects in pornographic works and targets of violence by men in films, on television and in advertisements.

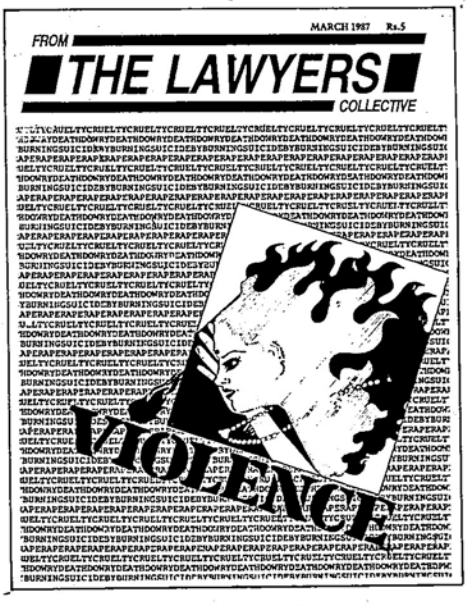
Laws and Amendments

Until recently the laws in India recognised violence towards women only in the form of crimes such as rape. In 1961 the Dowry Prohibition Act was enacted with the purpose of preventing and prohibiting the pernicious practice of giving and taking of dowry. Since convictions under this Act were negligible and the Act was generally ineffective, amendments to it were introduced in 1984 and 1986. By the 1984 amendment dowry was redefined. Earlier, in 1983 the Indian Penal Code was amended to redefine rape to include certain types of marital and custodial rape and section 498A made cruelty by husband or relatives of the husband towards the wife as a cognizable offence. The Indian Penal Code was again amended in and the new Section 304B defined a dowry death as "the death of a woman" who dies within seven years of marriage under suspicious circumstances and with a history of being harassed by the husband or his relatives.

Have these amendments in any way acted as deterrents or have they totally failed in that direction? Have the amendments helped the women in convicting their oppressor? A close look at some statistics indicates a totally different reality.

Dowry Deaths and other types of Marriage Related Violence

Karnataka reported 9 cases of dowry deaths in 1982, 31 cases in 1983, and 48 cases in 1984. Andhra Pradesh reported 14 cases in 1983, 27 cases in 1984 and 38 cases in 1985. For U.P.



the figures are 182 in 1984, almost a double 323 for 1985 and 110 for the first four months of 1986. (These figures include death by burning and suicides). Madhya Pradesh reported 42 cases of dowry deaths in just five months-June to October, 1985. In Maharashtra there were 129 cases of dowry deaths in 1984 and here too the figures nearly doubled in 1985, i.e. 211 cases and the figures for the first 10 months (upto October, 1986) have already exceeded the figures for 1985 and are an all time high of 247 cases. In Maharashtra there were 411 suicides by young married women in 1983, 652 in 1985 and 662 for the first 10 months of 1986, again surpassing the total figure for 1985. The corresponding figures for Bombay are: 48 in 1983, 64 in 1985, 68 till October, 1986. There seems to be almost a national trend, state after state, city after city reporting the same phenomenon.

There are two ways to interpret these figures. It is possible to argue that perhaps people today are more conscious and women are more willing to report cases of harassment. Perhaps even a greater number of women died in their homes in earlier years, but they were not registered as dowry death cases, but as accidental deaths. So the figures by themselves need not necessarily mean that there is an actual increase in dowry deaths or suicides by married women. This will of course be an optimistic way of looking at these figures and one almost wishes that it was true. However, the picture is no better when one looks at the conviction rates.

Among the 9 cases reported in 1982 and 31 cases reported in 1983 in Karnataka only one case each year resulted in conviction. What this actually means is that there were just two convictions in two years out of a total number of 40 reported cases in the lower court, with the option to appeal against these convictions in the higher courts. In the capital, things were no better. The new section 498(A) came into force during 1984 to deal with cruelty and harassment for dowry. A special Dowry Cell was set up by the Police Department with a senior committed woman police officer in charge (Ms Kawaljit Deol). But in spite of all these efforts, among the 59 cases reported in 1984 and 106 reported in 1985 under section 498(A) for cruelty so far there have not been any convictions. There were three acquittals in 1984 and three in 1985. 49 cases of 1984 and 78 cases of 1985 are still pending investigations. Among the cases reported in connection with dowry harassments the situation is not any different. Out of the 68 cases reported in 1984 and 146 reported in 1985, so far there have not been any convictions. There were three acquittals in 1984; 59 cases of 1984 and 84 cases of

1985 are pending trial; 54 cases in 1985 are still pending investigation.

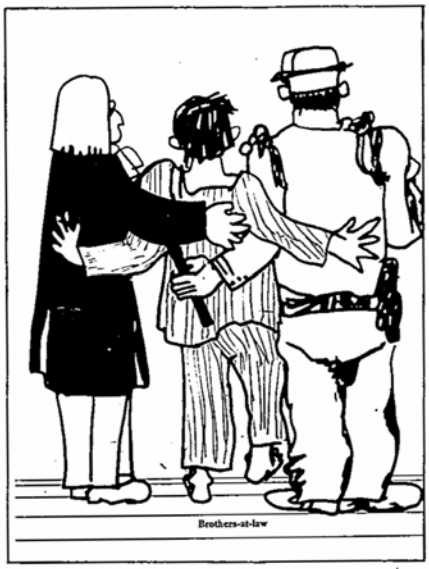
In Bombay under the Dowry Prohibiton Act, one case was reported in 1983, 9 cases in 1984, 24 cases in 1985 and 43 cases in 1986. There have not been any convictions so far. The sole case reported in 1983 has resulted in acquittal and 3 cases of 1985 have also resulted in acquittal. All the nine cases of 1984, 20 cases of 1985 and 23 cases of 1986 are pending trial. 1 case of 1985 and 18 cases of 1986 are still pending investigation. The plight of these few strong and courageous victims, the hardships they suffered while going through the lengthy legal battles, the economic and mental trauma they experienced, the social stigma they had to face within their community, the chances of marriage of the victims themselves or of their sisters, is left to the imagination of the reader, as there is no statistical data available on the subject nor can it be measured in quantifiable numbers and figures.

Internalizing Oppression

In wife murder cases, the situation is a desperate one with an increase in the reported cases. The police, the judiciary and the public blame the girl and her family. It is true that the girl and her family contribute towards her oppression. In the first instance, the parents are willing to pay dowry in order to get their daughters married. Each time the girl returns to her parents, she is sent back. Parents and the girl are reluctant to register cases against the husband and his family while the girl is alive. Each time there is an attempt to patch up the marriage. The victim also clings to the marriage at all costs till the last. And in the final analysis the measures go against the victim and make convictions difficult. The judges conclude that if a woman returned to her husband then she would not have been harassed, if she stayed on in the marriage then there was no cruelty, if there is a discrepancy in the dying declarations then it was not a murder. The women have undergone a life-long socialisation process, have internalised the values that state that it is better to die at the husband's home than fight against it, and would find it difficult to violate this principle at the time of their death.

This is the social reality of a woman's life. The authorities in power need to understand this and be sensitive towards it. Any progressive piece of legislation needs to take this fact into consideration in order to be meaningful and effective. When even the recent Family Courts Act advocates reconciliation and saving the marriage as its primary aim, how can we blame the girl and her family for holding on to this attitude? If there were any real alternatives to marriage then we would not need any protective legislation at all.

Only when we accept that the attitudes of girls and their families will not change unless social conditions evolve, which provide concrete alternatives to


Brothers-at-law

dowry related arranged matches and violent and oppressive marriage and family structure, will we be able to step out of the Victim Blaming Syndrome. This realisation will then help us to look at other social institutions which reinforce this value system and make it difficult to change the present power structure of the family.

Within any oppressive structure, people who have the power will not change and give up that power without a struggle. And within the family, it is the husband and his family who at present enjoy this power, and unless this power is challenged not only by the victims but by other social institutions, can the family structure change to one where the woman enjoys a greater power and makes it impossible for the husband and his family to oppress her. But at present such a situation does not exist and the recent amendments to these laws have in no way contributed towards bringing about these changes.

Rape

The Social Security Cell at Crawford Market Police Station, Bombay, feels that 'genuine' cases of rape are not reported and false complaints are lodged. But what the newspapers report is just the opposite of what the police claim. Newspapers have carried reports of babies one month old, 6 months old, 8 months old being raped, not just by strangers, but even by relatives including the father. One cannot discard these items of news as 'sensational stories' picked up by newspapers. If there was not a genuine case which is registered at the police station, there would not have been the news report at all. Here are some newspaper reports which indicate the types of rape cases which get reported.

"A 14 year old girl was raped by a 65 year old friend of her father when she was asleep at his Bandra home, at about 1.00 a.m. on Sunday, the police said. The Kherwadi police have registered a case against the man Kadar Badshah Mohammed." Free Press Journal 29.7.1986.

"Suresh Sonawane (19) from Kalachowkie was arrested for raping a 5 year old girl." New Statesman 31.12.1985.

On 25th December 1985 Loksatta reported that Suresh Pathare from a village in Ahmednagar was arrested under the charge of rape and murder of a 9 year old girl. Young innocent girls, patients in hospitals, mentally deranged and blind girls, women and girls in 'protective' homes - all seem to be easy victims. The sensational news of a doctor raping a patient at J.J. Hospital, Bombay, hit the headlines some time ago. Recently a young, unwed pregnant girl was raped by a hospital employee at K.E.M. hsopital.

The rape laws were also amended by the Criminal Law (Amendment) Act, 1983 as successful prosecution was difficult under previous laws. One would imagine that the rape cases are thoroughly investigated and dealt with very sternly. But this conclusion is in no way supported by the reality. For instance, in the city of Bombay during the

last few years, out of the 86 cases of rape reported in Bombay in 1983 there have been only 9 convictions. There were 6 acquittals, and 66 cases are pending trial. Even after 3 years, one case is still pending investigation. In the following year 1984 the reported cases dropped down to 69; there were just 2 convictions and an equal number of acquittals; 62 cases are pending trial. During the years 1985 and 1986 there were 85 and 86 cases respectively. There has been one conviction and 4 acquittals for 1985 and 70 cases are pending trial. In 1986, there have been neither any convictions nor acquittals. So far 56 cases are pending trial and 29 cases are pending investigation.

Ghar ki Lakshmi

So one can safely conclude that even after the amendments, there has not been an increase in the reported cases of rape. A large number of women and girls who get raped are reluctant to report the case to the police because the attitude of the police towards women who get raped has not changed. Soon after the traumatic experience of being raped they have to further withstand the humiliation at the police station. They become objects of mockery and ridicule. The police also discourage women from registering the case (the less cases of rape - a better law and order situation) by explaining to them the long procedure, the lengthy and painful medical examinations, and frighten the family by telling them that a minor girl who is raped will be sent to a remand home. So other women who go to the police station return without registering the case. For the minor girl who is raped, the medical examinations are as traumatic and painful as the rape itself.

We have not been able to develop a sensitive police force which will investigate rape cases. There has not been an increase in the rate of convictions. There has not been a significant change in the attitude of society towards a rape victim, although the issue of rape is more publicly discussed now. The victim still lives under the social stigma and will have to pay a high price for reporting the rape case. And even the few brave ones who are willing to take this risk in order to get justice are finally disillusioned.

State And Attitudes

Let us examine the State machinery which is involved in dealing with domestic violence. All the three state organs the legislature, the executive and the judiciary are involved at various stages in enacting, enforcing and interpreting relevant laws. Of these, at least on the surface, it seems that we have a progressive legislature which is eager to bring about social change through legal reforms for women. But so far the efforts have been sketchy, fragmented and superficial, rather than a concerted effort at changing the situation. Most of these deal with extraordinary and sensational issues like 'dowry death' and 'rape' rather than the daily, ordinary and repetitive violence suffered by women in their

homes. There is no law to deal with it at present. The tendency is to link day to day cruelty and humiliation either to 'dowry' and property related matters or divorce and legal separations. At present we do not have a concrete and effective 'Domestic violence Act' like the one in England which gives civil remedies like injunctions to restrain husbands from battering their wives.

In murder cases, the role of the police is absolutely crucial. In the police force, apart from corruption, there is a lethargy and lack of interest in seriously following up the case. Meanwhile, valuable evidence is lost right at the initial stage itself, which makes convictions difficult. Since the murders are committed in the privacy of the husband's home, there are rarely any eye witnesses and circumstantial evidence assumes a crucial position.

Unless there are sensitive and specially trained officials to deal with the investigations, it would be impossible to prove the offence 'beyond reasonable doubt' as is necessary in criminal jurisprudence. The accused is totally protected by our legal system. Since in a criminal case, the state is the prosecutor the victim's case is represented by public prosecutors, who are generally

low paid and overworked whereas the accused, if he has the money and the right connection, can get the services of the best legal counsel in the country. In Vibha Shukla's case, the accused, who is the son of an Assistant Commissioner of Police, was represented by seven prominent lawyers, including Ram Jethmalani, Ramrao Adik, Freny Ponda and H.H. Ponda. So the scales are unevenly balanced against the victim right from the investigating stage. All the authorities who deal with the dowry death case - the police, public prosecutors and judges - are all products of this society which propagates anti-women values. Many a times, they have traditional reactionary and rigid attitudes towards women, marriage, family rape and dowry. We could condone them if these remained as merely 'personal attitudes' but when they are reflected in their functions at the official level they strengthen and reinforce the anti-women biases in society. Any effort by the legislature to bring about

The Domestic Violence and Matrimonial Proceedings Act, 1976

The Domestic Violence & Matrimonial Proceedings Act, 1976 was enacted in England to amend the law relating to injunctions in matrimonial law, to provide the police with powers of arrest for breach of injunction in cases of domestic violence, and to make provisions for varying rights of occupation where both spouses have the same rights in the matrimonial home.

Matrimonial Injunctions

Sections 1(a) and (b) of the Act allow either party to a marriage to make an application to a County Court which has the jurisdiction to grant an injunction restraining the other party to the marriage from molesting the applicant or any child living with the applicant.

Section 1(c) provides for grant of an injunction restraining the other party from entering all or part of the matrimonial home or from a specified area of the matrimonial home.

Section 1(d) provides that if the applicant desires he or she can enter the matrimonial home and remain there.

Section 1 of the Act is biased in favour of the spouse who has suffered physical violence or who has been thrown out of the matrimonial home. In matrimonial disputes it is usually the woman who gets a worse deal especially if she is economically dependent on her husband.

This Act goes a long way in balancing the injustice done to the woman by enforcing her right to enter and stay in the matrimonial home even if it belongs to her husband and also by granting injunction restraining her husband from entering the matrimonial home if he has been molesting the woman or child.

Arrest for breach

When a judge has granted an injunction under Section 1 and if he is satisfied that the other party has caused actual bodily harm to the applicant or to the child, and is likely to do so again, he may attach a power of arrest to the injunction.

A constable can then arrest without a warrant if he suspects that a breach of injunction to which a power of arrest is attached has taken place.

Order Restricting Occupation

Where either spouse is entitled to occupy the matrimonial home, he or she may make an application for an order prohibiting, suspending or restricting the other from occupying the matrimonial home.

This Act applies not only to parties to a marriage but also to a man and woman who are living with each other in the same household as husband and wife.

Table I: Dowry Deaths Reported in Different States

STATE ANDHRA PRADESH KARNATAKA MADHYA PRADESH MAHARASHTRA UTTAR PRADESH					
Source	News week 22.2.85	Deccan Heralad 8.8.85	Daily 11.12.85	DGP Maharashtra	TOI 24.7.86
1982	-	9	-	-	-
1983	14	31	-	-	-
1984	27	48	-	129	182
1985	38	-	42 (June-Oct.)	211	323
1986	-	-	-	247	101

Table II: Cases Relating to Cruelty

	Reported	Pending Inestigation	Pending Trial	Acquitted	Convicted
Delhi (S498A)					
1984	59	-	49	3	-
1985	106	22	78	3	-
1986	114	98	13	-	-
(Dowry Harassment)					
1984	68	-	59	3	-
1985	146	54	85	1	-
1986	172	164	5	-	-
(Dowry Harassment)					
1983	1	-	-	1	-
1984	9	-	9	-	-
1985	24	1	20	20	-
1986	43	18	23	23	-

Table III: Rape Cases - Bombay

Year	Reported	Pending Invetsigations	Pending Trial	Acquitted	Convicted
1983	86	1	66	9	6
1984	69	-	62	2	2
1985	85	3	70	1	4
1986	86	29	56	-	-

Table IV: Suicide Cases: Bombay

Year	Bombay	All Maharashtra
1983	411	48
1985	652	64
1986 (Upto October)	662	68

justice to women becomes redundant unless it is supported by the attitude of police and the judiciary. The spirit in which the amendments to these laws concerning women were enacted is not reflected during the investigation of the case or when passing the judgement. Unless changes are brought about here, no meaningful change can possibly occur.

Ms Flavia is an activist of the womens movement.

COVER STORY

Rape, Abetment of Suicide and Cruelty

Rape

Section 375 of the Indian Penal Code defines rape as sexual intercourse with a woman either

1) against her will,

2) without her consent, or

3) with her consent when consent is obtained by putting her or any person in whom she is interested, in fear of death or hurt, or

4) with her consent when the man knows that he is not her husband and her consent is given because she believes that he is her husband

5) with her consent when she is incapable of giving consent because of unsoundness of mind or intoxication, or

6) with or without her consent when she is under sixteen years of age.

Sexual intercourse by a man with his wife (the wife not being under fiteen years of age) does not come within the ambit of rape. Marital rape or forced sexual intercourse by a husband with his wife is excluded from Section 375 and as a consequence this extreme form of marital violence by a husband against his wife is sanctioned by law.

Section 376 imposes a minimum term of seven years and maximum of life imprisonment for the offence of rape. If the wife is judicially separated from the husband, and the latter rapes her, he will be punished only for a period of 2 years as provided by Section 376A. Section 376B makes it a cognizable (i.e. arrest can be made without a warrant) and bailable offence for a public servant who induces or seduces a woman in his custody to have sexual intercourse with him, to be punished with imprisonment of upto five years. Section 376C makes a Superintendent or the Manager of the Jail, Remand Home or other places of custody punishable for the cognizable and bailable offence of rape with imprisonment upto five years. Section 376D makes sexual intercourse with any woman in the hospital an offence punishable with imprisonment for a maximum period of five years.

Abetment of Suicide

Section 306 of the Indian Penal Code provides that if any person commits suicide, whoever abets the commission of such suicide shall be punished with simple or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section 113A of the Indian Evidence Act, 1872 which states that if a question arises whether suicide committed by a woman is abetted by her husband or any of his relatives and it is proved that she has committed suicide within a period of seven years of the marriage and further that she was subjected to cruelty, the court may presume that the suicide had been abetted by her husband or his relative.

The importance of this section lies in the fact that persons who drove the woman to suicide can be convicted for abetment of suicide. The prosecution must establish that the woman had been subjected to cruelty by her husband and his relatives and 2) she committed suicide within seven years of the date of her marriage, to get a conviction for abetment of suicide.

Cruelty relatives

Section 498A which was introduced in the Indian Penal Code in 1984 states that a husband or any relative of the husband who subjects his wife to cruelty shall be punished with imprisonment for a term of upto three years and be liable to fine.

Cruelty has been defined for the purposes of this section to mean,

a) any wilful conduct of such a nature as is likely to drive the woman to commit suicide or to cause grave injury to her physical or mental health, or

b) harassment of the woman with the intention of making her or any person related to her to meet an unlawful demand for any property or harassment because of her failure to meet such a demand.

Section 498A is a cognizable non-bailable offence. By providing for imprisonment upto three years, it acts as a deterrent against such offences. However, an offence under this section is cognizable when the First Information Report (F.I.R.) relating to the commission of the offence is given to the police station concerned by the woman herself or by any person related to her by blood, marriage or adoption. If there is no such relative, any public servant notified by the State Government can lodge the F.I.R.

Several women have died in suspicious or inexplicable circumstances within a few years of their marriage. If it is shown that before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for dowry then the latter shall be deemed to have caused her death known as 'dowry death' which is an offence under section 304B of the Indian Penal Code. It is a cognizable and a non-bailable offence, the punishment being imprisonment ranging from a minimum of seven years to a maximum of life.

The important distinction between Section 498A and 304B as far as the prosecution is concerned is that a complaint can be lodged for cruelty under section 498A while the woman is still living, whereas 304B provides for punishment after the woman is dead.

By the 1984 amemndment to the Dowty Act, the definition of dowry was amended. Earlier, dowry was defined as property or valuable security given in consideration of marriage. Now dowry is defined to mean "any property or valuable security given or agreed to be given either directly or indirectly

(a) by one party to a marriage to the other party to a marriage; or

(b) by the parents of either party to a marriage or by any person to either party to the marriage or to any person, at or before or after the marriage in connection with the marriage of the said parties."

However, *dowr or mehr is excluded.*

NOTICE BOARD

Proposed amendments to the Industrial Disputes Act, 1947 and the Trade Unions Act, 1926.

Recently a note has been circulated to concerned parties by the Government about the proposed amendments to the Industrial Disputes Act, 1947 and Trade Unions Act, 1926. We reproduce the entire text for our readers. This is the final portion.

D. Procedure for dealing with disputes

Individual disputes

Direct reference by individual workman in individual disputes relating to discharge, dismissal, retrenchment or otherwise termination of service referred to in Section 2A may be allowed.

This direct access will not bar the workers from raising disputes with the conciliation machinery. It may, however, be provided that if a workman raises his dispute with the conciliation machinery and the conciliation does not result in settlement or arbitration within a period of 60 days from the date of raising the dispute, the conciliation should be deemed to have failed and the workman should be at liberty to approach the Labour Court. Section 2A is available in case of such disputes on dismissal, termination, etc. which are raised by the workman himself. Such disputes raised by the trade unions or otherwise collectively do not get this facility of direct access. It should also be open to the union to take up such disputes of dismissal, termination, etc. directly to the Labour Court. Further, it should also be provided in their case that if the conciliation proceedings do not result in settlement or arbitration within the period of 60 days, the conciliation will be deemed to have failed and the sponsoring union or group of workmen may take up the case directly with the Labour Court.

As in the case of Government servants (including industrial workman) covered by the Administrative Tribunals Act, 1985 the facility of direct access to a Labour Court may also be provided to a workman in disputes relating to his conditions of service, such as,

(1) Remuneration (including allowances), pension and other retirement benefits;

(2) Tenure, including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(3) Leave of any kind;

(4) Disciplinary matters, or

(5) Any other matter whatsoever.

Collective Disputes

(a) Collective disputes would be resolved through mutual discussions and where collective bargaining fails, the parties shall avail of conciliation, arbitration or adjudication.

(b) All awards shall remain valid for a period of three years or for such longer period as may be specified therein.

E. Procedure for Strikes & Lock-outs

(a) Procedure for Strikes

The right to call for a strike can be exercised only if 3/4th of the total membership of the Bargaining Council vote in favour of the strike. The role of the Principal and Associated Bargaining Agents will be worked out in detail by the Ministry of Labour. The procedure shall provide that

(i) The strike notice should be only after mutual discussions have failed;

(ii) The strike notice should be served only after conciliation has failed or the employer has refused arbitration; and

(iii) There shall be a strike notice of 14 days for all industrial establishments.

(b) Procedure for Lockouts

The law in this regard should provide that

(i) No lockouts can be declared by an employer unless collective bargaining has failed.

(ii) Conciliation has failed or the union has refused arbitration.

(iii) There shall be a notice and the period of notice shall be 14 days provided that where there is imminent threat of violence or damage to property, the requirement of notice for lockout may be done away with but post facto approval for the lockout should be obtained from the appropriate Government within 14 days.

There should be provision for appeal to the Labour Court by an employer who is affected by an order refusing grant of post facto permission. Such appeal should be preferred within 14 days of the order and the Labour Court shall as far as possible within 14 days pass an order either affirming or setting aside the order of the appropriate Government.

(iv) Government shall continue to enjoy power to prohibit lockouts.

(c) Legality of Strikes/Lockouts

The Labour Court will be the authority to decide whether a strike or lockout is legal.

The collective bargaining agent or an employer or a workman or Government can approach the Labour Court directly. The Labour Court shall give its decision within 10 days.

(d) Wages for strikes and lock-out period

(l) Where a Labour Court has decided that a strike or lock-out is illegal, it shall incorporate in its operative order a determination of admissibility of wages as an incidental order.

(2) It may, thereafter, proceed to compute the same and order payment, where necessary.

F. Court of Inquiry

The provisions in the Industrial Disputes Act relating to Court of Inquiry could be deleted as these could be taken care of otherwise under the law.

G. Go-slow

(l) Go-slow to be defined and the definition will be on the lines of definition in ESMA, i.e. "Any other conduct which is likely to result in or results in cessation or substantial retardation of work".

(2) This will be enquired into by the Labour Court and if established, the union will lose its status as a Collective Bargaining Agent, etc. and the workmen will lose proportionate wages.

(3) These punishments would be decided and imposed by the Labour Court.

H. Public Utility Services

Instead of issuing notification every six months declaring a particular industry as a public utility service, industries added to Schedule-I shall come under public utility services permanently till such time the relevant items are deleted from the First Schedule to the Industrial Disputes Act.

I. Validity of Settlements

Settlements including conciliation settlements shall be valid for not less than three years and would be applicable to all workers unless the settlement specified a shorter period.

J. Time Limit for Applications

The time limit for filing applications before Labour Courts is to be restricted to 12 months which it may relax upto three years for sufficient reasons.

K. Power to issue Interim Orders

When an industial dispute is before the Labour Court or the Industrial Relations Commission, the Court or the Commission,as the case may be, may issue an interim order during the pendency of the case, requiring the employers, workmen or both to observe the terms as may be specified.

L. Powers to regulate conditions of service

A provision may be made along the following lines

State Government may lay down terms and conditions of employment and prohibit strikes, etc. Notwithstanding anything contained in the Act, if in the opinion of the State Government, it is necessary or expedient so to do, for securing the public safety or convenience or the maintenance of the public order or supplies, and services essential to the life of the community or for maintaining employment or maintaining industrial peace, it may by a general or special order, make provision,

(a) for requiring employers, workmen or both to observe for such period as may be specified in the order, such terms and conditions of the employment as may be determined in accordance with the order; and

(b) for prohibiting, subject to the provisions of the order, strikes or lockouts generally in connection with any industrial disputes.

M. Proposal for deterrent punishment to the employer for non-payment of legal dues in cases of closure/retrenchment

Failure to pay legitimate dues admissible to the workman concerned by the employer at the time of closure and retrenchment would entail punishment to the employer with imprisonment for a term which shall not be less than six months but which may extend upto two years and with fine not exceeding Rs.5,000/-. The Court may, however, for any adequate or special reasons to be recorded in the judgement, impose a sentence of imprisonment for a term of less than six months.

Application for retrenchment/closure should be considered only when there is a clear evidence from management that it will discharge this liability or it is supported by adequate bank guarantee.

N. Proposal for stringent penal provisions for violation of the I.D. Act

(i) The penalty for the breach of settlement or award in Section 29 is not adequate. There should be deterrent punishment and imprisonment should be compulsory.

(ii) The existing penal provisions for resorting to illegal strikes and lock-outs etc. under Sections 26, 27 and 28 and also for illegal lay-off are not adequate. Imprisonment may be made compulsory in all such cases.

(iii) The penal provisions for violation of provision relating to retrenchment and closure should be strengthened and imprisonment should also be made compulsory in all these cases.

Institutional preference in medical college admissions

While there has been a lot of talk of national integration in other spheres, medical institutions steadfastedly cling on to the parochial preference for its own students for graduate and post-graduate courses. ***Rustom Bhagalia*** *examines the law as it has been evolving in this sphere.*

Today entrance to medical colleges depends not on merit nor on caste but on success in litigation. The admission season marks a high tide of student litigants who rush to the courts for orders that whisk them through the exalted portals of our medical colleges.

A major issue in medical college admissions has been the bar on "outside" candidates. This means that talented students from other states or from different universities within the same state are denied admission for being "outsiders". The Supreme Court has negated this approach and struck down rules barring "outsiders". The object is to ensure that every student has a right to an equal opportunity to be considered on his merit.

No Bar To Meritorious Outsiders

It is mainly in the eighties that the Supreme Court has taken a consistent line that the bar to "outsiders" must go. The issue has always revolved around whether rules barring non-institutional claimants are sound or not. The case for institutional candidates takes care of itself. The real question is whether non-institutional candidates can be allowed to apply at all, and if so, to what extent can a quota of seats be validly made available for them.

In *Jagdish Saran's* case (AIR 1980 SC 820) the Supreme Court was dealing with a rule framed by the Delhi University whereby more than 70% of the Post-graduate (PG) seats were made available exclusively to Delhi students. This quota was sought to be justified on the plea that even other Indian Universities excluded non-institutional candidates. The basic approach of the court was to ensure that every Indian citizen has an equal opportunity to apply for these highly specialized seats. At the same time it was also recognized that in the normal course students prefer to continue their studies at the same college and not at any other. To start with, this in itself required a sizeable quota of seats for institutional candidates. The difficulty was in arriving at a harmonious mean. Even though a majority of the seats could initially be made available exclusively for institutional candidates, total cornering of all seats was not permissible in guise. However, a higher quota of seats for institutional candidates could be justified on the basis that the institution catered to the needs of a backward rural region. But even here, 100% cornering of seats was not valid. The court made it clear that an illegality cannot be allowed to beget another illegality . Just because one institution barred candidates from other institutions from applying, it was no answer to retaliate in like fashion. By doing so there would never be a beginning. Also the fixing of quotas for non-institutional candidates could not remain constant at all stages.

To put it simply, where the issue pertains to admission to a professional college, a lower quota of seats may be kept available for non-institutional candidates. At the stage of post-graduation and super-specialities this quota has to be increased and not decreased. Merit alone has to be the sole criteria when selecting candidates for higher courses, regardless of whether the claimant is of the same institution or belongs to another institution.

Continued Violations

Unfortunately, though six years have passed since *Jagdish Saran,* medical colleges continue to violate the rules laid down by the Supreme Court by pleading practical difficulties. If any aggrieved non-institutional candidate has the time, money and energy to move a court there is a confrontation qua only the petitioner and not the class of claimants who are non-institutional. With a growing awareness of the rights of non-institutional candidates, the situation has now snow-balled that even in the same institution the January and July batches are daggers drawn. After all who wants to let slip an M. D. or M.S. seat (even to a fellow colleague).

Quotas - A Transitory Phase

Thus, any rule framed by any State, University or other statutory body governing distribution of medical seats would be open to challenge if violating this quota in any guise. It should also be remembered that these are not fixed quotas which stagnate for eternity. These are merely the outside limits which the Supreme Court finds should in any event be maintained as a starting point to reach an ultimate stage where the entire concept of institutional and non-institutional claimants will go so as to be replaced by an All India competition where merit alone will be the criteria at every stage. Thus, if a State frames a rule whereby 30% seats are kept open to non-institutional candidates but in the same breath creates a preferential right whereby institutional candidates will alone be considered first so that only vacant seats go to non-institutional candidates this would certainly be taking away by the back door what is purportedly given on paper. The validity of such a rule would be open to challenge since it creates in reality a situation where 100% seats are initially offered exclusively to institutional claimants. Even at the initial stage the accent on merit is heavily underscored by fixing varying quotas at varying stages. Thus, for super-specialities; domicile, residence, University and State confines can have no role to play.

'Difficulties' In Implementation

Jagdish Saran in 1980 was a clear pointer to the shape of policies and rules to be promulgated. With *Pradeep Jain* in 1984 actually fixing an outside quota there were signs of stirring on the part of the rule-making bodies. The problems and practical difficulties facing the various states towards immediately fixing the required quotas and/or to holding the entrance exams were brought to the notice of the Supreme Court. Because of these difficulties, All India exams or entrance exams could not be held. Accordingly,the Supreme Court deferred implementation of its directions till the following academic year was to help the authorities to tide over difficulties in enforcing them at

once; and not to create any back door loophole whereby the firm foundation that 100% seats cannot be cornered by institutional candidates itself is set aside. This aspect was appreciated by the Bombay High Court recently in Roopkumar's case (1986 MLJ 229).

In P. Rajendran's case (AIR SC 1968 1012) the Supreme Court was dealing with rules whereby candidates from one district were barred from being considered for admission in another district. This district-wise segregation was negatived on the ground that in the net result the main casualty is merit. Since the aim was to select the most meritorious applicant it mattered little as to which district he belonged to. This trend was followed by the Supreme Court in Periakaruppan's case (AIR 1971 SC 2303). However, the law at that stage did not go as far as to chart out or define a particular quota of seats as being available to every applicant irrespective of geographical confines. Moreover there was a trend of thought in other decisions which justified such valuable seats being made available only to institutional candidates prior to any further claims being considered.

As far as Maharashtra is concerned, there is precious little reason to plead ignorance of the judgement in *Jagdish Saran.* The Nagpur Bench of the Bombay High Court judgement (unreported) upheld the plea of one Dr. Deopujari who claimed he was illegally denied a post-graduate seat despite high merit, on the sole basis that he was not an institutional candidate. The court made it clear that the rules framed by the State of Maharashtra cannot be so interpreted as to deprive a meritorious claimant of a seat on the sole ground that he was not an institutional candidate. The basis of selection ought to be merit, pure and simple, irrespective of which college the applicant belonged to. The High Court relied heavily on *Jagdish Saran* in taking this view and made it explicit that a 100% exclusive cornering of seats by institutional candidates was open to challenge as being violative of Article 14.

Bombay High Court's Preference To Institutional Candidates

After the Deopujari case the various benches of the Bombay High Court by and large interpreted the rules promulgated by the State of Maharashtra so as to favourably consider the claims of non-institutional candidates denied a seat. In *Samina Khatib's* case [(1983) MLJ 771] the Bombay High Court (O.S.) upheld the contention of the petitioner that a preference rule comes into play only when an institutional and non-institutional candidate have equal marks; in which eventuality, the institutional candidate's claim is to be preferred. But this preference rule can never come in play where the non-institutional candidate secures higher marks than the institutional candidate. In such an eventuality the non-institutional candidate is to be selected. This decision was ultimately referred to a full Bench. The full Bench of the Bombay High Court made a complete about-turn by holding that a preference rule can be validly interpreted as to ensure that institutional candidates are selected irrespective of their merit vis-a-vis non-institutional candidates. This simply meant that a 100% cornering of seats by institutional candidates is neither invalid nor violative of the constitutional mandates of equality and equal opportunity. The claim of a non-institutional candidate higher on merit would emerge only if there were any vacant seats left after the claims of institutional candidates were exhausted. This also meant that the judgement of the Nagpur Bench in Deopujari's case did not lay down the law correctly and stood overruled by the full Bench. Later, developments in the law, particularly the Pradeep Jain and Dinesh Kumar judgements of the Supreme Court negate the approach of the full Bench in *Samina Khatib's* case.

Quota For Institutional & Non-Institutional Candidates

It was the *Pradeep Jain* case (AIR 1984 SC 1420) that prompted the Supreme Court to fix for the first time, a quota for institutional and non-institutional candidates. The question of a quota can never arise unless non-institutional candidates are entitled to apply. The significance of this judgement comes in the establishment of a quota which was hitherto never spelt out in concrete terms. The court fixed the outside quota of seats to be made available to institutional and non-institutional candidates for admission to medical colleges at 70 : 30; for post-graduate seats at 50: 50; and for super-specialities, totally (100%) open to all Indian students on pure merit. However, where a region is particularly backward and catering to the upliftment of rural students it was open to the State to fix a higher percentage of seats as reserved for institutional candidates of that region. But even in a backward region the Supreme Court emphatically ruled out a 100% cornering of seats by institutional candidates. This underscores the total commitment of the apex court to try and ensure that nowhere should institutional candidates be permitted to corner all the seats irrespective of the claims of non-institutional candidates higher on merit.

Scaling Down Quotas Temporarily

Since the various directions of the Supreme Court deferring implementation of its directions in *Pradeep Jain,* the Supreme Court has also for the time being scaled down the institutional/non-institutional quota as earlier fixed in *Pradeep Jain.* In the last of the *Dinesh Kumar* series of judgements (AIR 1986 SC 1877) the Supreme Court has on consideration of the difficulties faced by various states, fixed higher quotas than those initially fixed in Pradeep Jain. Thus as of today at least 15% seats ought to be open to non-institutional claimants for medical college admissions; while upto 25% ought to be kept for such claimants for the post graduate seats. Of course this is a transitory stage until an All India central body or regional bodies for entrance exams are formed. The Supreme Court in its later directions held that its directions are deferred till 1988 to help the authorities to tide over their alleged difficulties. This does not mean that non-institutional candidates are debarred from applying.

In *Nidamarti's* case the Bombay High Court dismissed the petition on the view that since the directions of the Supreme Court are deferred a non-institutional claimant cannot be entertained at this stage. This matter was taken up in Special Leave to the Supreme Court. The Supreme Court (AIR 1986 SC 1362) negated the view taken by the Bombay High Court, while holding in favour of Nidamarti.

Thus, medical colleges cannot reserve all their seats for their own candidates. There has to be a quota for institutional/non-institutional candidates. For practical reasons the Supreme Court has diluted the quota for non-institutional candidates to give time for centralised examination holding bodies to be established. However, this does not mean that in the transitory phase non-institutional applicants are to be excluded.

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LAW AND PRACTICE

Medical Negligence

From time to time, one reads in the newspapers and in the law reports, of the award of damages to patients harmed by medical negligence. Until now, this was not a tort very familiar on the Indian scene. But things seem likely to change in the near future. Hence some of the principles applicable on the subject deserve to be elaborated. **P. M. Bakshi** *elaborates.*

Questions of medical negligence arise in a medical setting. But the principles determining liability are legal. Medical negligence is thus the inter-face of law and medicine. It is the point at which purely medical judgments leave off and legal standards begin to operate.

Liability In Two Situations

A doctor may be liable to pay damages in tort, in two principal situations:-

(a) where he resorts to an "invasive" medical procedure without consent of the patient, or
(b) where, though the doctor has taken such consent, he has not taken reasonable care in diagnosing the ailment or in prescribing or administering treatment or in some other manner.

Consent Of The Patient

As stated above, a surgical operation or, for that matter, any interference with the body is illegal, if it is resorted to without the consent of the patient or of someone competent to consent on his behalf. A Canadian case *[Murry v. McMurry* (1949) 2 D.L.R. 442] illustrates this principle. A surgeon, while performing a caesarian operation, discovered tumours in the walls of the uterus of the woman. He tied off the fallopian tubes, so as to render the patient sterile. This step was taken by the surgeon because of the serious risk which was involved, if the woman again became pregnant. However, the surgeon had not taken the consent of the patient before rendering the woman sterile. The only evidence was that the tumours might constitute a hazard, in the event of a further pregnancy. The court held, that this was not a sufficient justification for taking such a drastic step without the woman's consent. The case illustrates the principle that intentional interference with the person, without legal justification, is a civil wrong, for which damages have to be paid by the wrong-doer.

Informed Consent

It is a general rule of law that "informed consent" is needed prior to the performance of therapeutic bio-medical procedure on any person. If the patient is mentally competent and major and conscious, his consent is to be obtained. If he is a minor or mentally incompetent, consent of his guardian suffices. If the patient is unconscious, and the matter is of urgency, consent can be dispensed with. All these propositions are confined to situations where the proposed procedure is expected to be beneficial to the patient. Informed consent is also a pre-requisite to non-therapeutic procedure, such as experimentation for the purposes of medical research. However, since non-therapeutic procedures are not directly for the patient's "benefit", the consent for experimentation must be of the patient himself, if he is legally competent to consent. Proxy consent is not enough for any non-therapeutic procedure.

Informed consent postulates three important requirements:-

(a) The person whose treatment (or participation in research or experimentation) is desired, must be competent to consent.
(b) Such person should give his consent with a full knowledge of the risks and benefits of the proposed procedure, the possible results, the appropriate alternative procedures and whatever else is necessary for him to make an informed consent.
(c) He should give his consent voluntarily, without force, fraud, duress, deceit, coercion or constraint, direct or subtle.

Negligence.

As to negligence, the principles of liability of doctors are well known. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person owes the patient certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; a duty of care in his administration of that treatment and a duty of care in answering a question put to him by a patient, in circumstances in which he knows that the patient intends to rely on his answer. A breach of any of these duties will support an action for negligence by the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. A person is not liable in negligence because someone else of greater skill and knowledge would have prescribed a different treatment or operated in a different way. Nor is he guilty of negligence if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practice would be negligence, if the course adopted is one which no professional man of ordinary skill would have taken, if he had been acting with ordinary care. It is, therefore, wise to take instructions of a consultant who takes over responsibility for the case, if the case is a difficult one.

Of course, a charge of negligence against a doctor stands on a different footing from a charge of negligence against the driver of a motor car. The consequences are far more serious. It affects his professional status and reputation. With the best will in the world, things sometimes go amiss in surgical operations or medical treatment. A doctor is not to be held negligent simply because something went wrong. He is not liable for mischance or misadventure; or for an error of judgment where there is no negligence. He is not liable for making one choice out of two. [Whitehouse v. Jordan (1981) W.L.R. 146] He is liable only when he falls below the standard of a reasonably competent practitioner in his field, so much so that his conduct might be deserving of censure or even inexcusable.

The legal principles applicable for determining liability for medical negligence are illustrated, in a striking manner, by

Lal's case. [Ram Bihari Lal v. Dr. J.N. Srivastava A.I.R. 1985 M.P. 150]. Damages were granted against a doctor for his rash and negligent act in causing the death of a patient, by removing her gall bladder during an operation. Ram Bihari Lal (the plaintiff) was the Collector, Shahdol (Madhya Pradesh). His wife, deceased Kantidevi, was aged 32 years. She had given birth to her seventh child, prior to her death. The defendant was posted as Civil Assistant Surgeon Grade I and was in-charge of the Sohagpur Government Hospital at Shahdol. It was a 28 bedded hospital.Shahdol was the district headquarters, but the district hospital was at Umaria. On the night intervening between 27th and 28th September, 1958, the deceased Kantidevi got severe abdominal pain. The defendant was called to the Collector's bungalow at about 1 a.m. Defendant gave her an injection for Streptopenicillin and a tablet of Largactyl, to reduce the temperature. This treatment continued till the morning of 30 September, 1958, when the defendant advised Ram Bihari Lal that his wife should be operated upon for appendicitis, because, according to him, the deceased was not responding to the treatment. Her blood test for a differential blood count was taken. After some hesitation, the Plaintiff and his wife agreed for the operation. The wife was taken to the hospital at Sohagpur. The Plaintiff contacted the District Medical Officer, Dr. Misra, on the telephone, but he advised against the operation. However, the Plaintiff was persuaded by the Defendant to get his wife operated for appendicitis. The operation was started at about 2 p.m. by the Defendant. He was assisted by two doctors, who were also posted in that hospital as Assistant Surgeons. The operation was completed at 4 p.m. The patient was put under chloroform anaesthesia. Before the operation, consent of the plaintiff (husband of the patient) was taken for the operation of appendicitis. But the defendant who had made a "grid iron" incision, found that there was no inflammation in the appendix. Defendant therefore made another incision ("Kocher's incision") and then removed the gall bladder, as it has been found to be blackish, with stones. The defendant did not obtain the husband's consent for removal of the gall bladder. After the operation was over, the defendant came out and disclosed that he had removed the gall bladder and the operation had been successful. The patient gained consciousness in the evening but some time into the night, her condition started deteriorating. She later died. It was held that the doctor was guilty of negligence and was liable for damages. It may be mentioned that the trial court had granted damages. The defendant won on first appeal, but again lost on second appeal.

It will be convenient if the above judgement is analysed from the point of view of the legal propositions on which it is based. These appear to be the following:-

(i) The operation was performed in an ill-equipped hospital, having no anaesthetist and other basic facilities like oxygen or blood tranfusion.
(ii) The operation was performed without carrying out necessary preliminary investigations (such as a urine test) and without "preparing" the patient for the operation.
(iii) Consent had been given only for removing the appendix. The gall bladder was removed without taking consent, even though the patient's husband was waiting outside the operation room.
(iv) The gall bladder was neither gangrenous, nor was there any pus formation. It was not a case of emergency operation.
(v) The operation took two hours, when the patient was under the effect of chloroform. The patient had died on the third day of the operation, owing to the toxic effects of chloroform and renal failure, as her liver and kidney (which were already damaged) were further damaged by the chloroform.

Failure To Operate

Medical law has it that a doctor, when he performs an operation, is legally required to procure the consent of the patient to the proposed operation. At the same time, it holds the doctor legally liable if owing to want of reasonable care and skill, he fails to give an advice or to undertake the treatment which was necessary in the circumstances. What is the position if the patient fails to consent to an operation necessary in the circumstances? The reasonable answer is that in such cases the doctor, in order to protect himself, should put on record the fact that the patient refused consent to a necessary operation. This situation was involved in a recent Kerala case *[Dr.T.T. Thomas v. Elisa* AIR (1987) Ker. 52 (Feb)].

The patient came to a surgeon, complaining of severe abdominal pain. The general practitioner who had advised the patient had diagnosed it as a case of appendicitis and the patient was admitted to the hospital. But the operation was not performed on that very day. The next day, the patient died owing to bursting of the appendix . The plaintiff's case was that the patient should have been operated upon immediately. He produced overwhelming expert evidence to establish that in such cases, if the operation is performed on the first day, the patient's life would most probably be saved. But the surgeon (the defendant) took the plea that on the first day the patient did not give his consent to the operation, which was the reason why the operation could not be performed on that day. However, neither the trial court nor the High Court accepted this counter argument. The case sheet of the patient nowhere stated that consent to the proposed operation had been sought from the patient and refused by him. Further, on behalf of the plaintiff, evidence was given that this was invariably done in practice. The High Court of Kerala held that the burden of proof that the defendant had sought consent and that it had been refused, lay upon the defendant if he takes such a plea, particularly when the patient himself had died. In the circumstances, the defendant was held liable for negligence. The principle which one can deduce from this judgment of the Kerala High Court is that a surgeon's failure to operate where, according to customary medical practice, an operation is urgently required, amounts to negligence for the purposes at least of civil liability, and that it is for the surgeon to keep on the record proper evidence of the fact that the patient had been requested to give consent but had refused to do so.

Negligence In Diagnosis

The diagnosis of ailments is normally the first matter with which the medical man is concerned. A wrong diagnosis which causes harm to the patient may lead to liability in law. Thus, a girl complained of severe abdominal pains and vomitting. On being asked by the doctor where exactly the pain was, she indicated generally her stomach and winced when the right side of her abdomen was palpated. The doctor was held to have been negligent in failing to diagnose appendicitis.

Negligence In Diagnostic Aids

Modern medicine resorts to many types of examination for arriving at, checking or confirming a possible diagnosis. These aids, when used for the purpose of diagnosis in the above manner, have to be interpreted with care. Sometimes, expertise may

be required for proper interpretation. For example, interpretation of X-ray films is an expert's job. Forgetting this, a doctor before whom a patient was brought in after a motor accident, X-rayed the patient and tried to interpret the X-ray slide without consulting an expert radiographer. Later, it was discovered that the patient's neck had been broken. The doctor was held to have been negligent in not taking the opinion of an expert radiographer who would have detected the broken neck.

Failure To Take Precautions

How the failure to take reasonable precautions can amount to negligence on the part of a doctor, finds illustration in a case decided by the Supreme Court of India in 1969 *[Laxman v. Trimbak* A.I.R. 1969 SC 128]. A patient died owing to shock resulting from "reduction" of the fracture. The reduction had been attempted by the doctor without taking the elementary precaution of administering anaesthesia to the patient. The doctor was held to have been negligent and damages were awarded against him.

Administration Of Drugs And Injections

There have been several instances of doctors, nurses or hospitals being held liable for negligence in the administration of a drug or injection. We have a Canadian case *[Bugden* (1947) 2 D.L.R. 336] in which a doctor was preparing to set a dislocated thumb under local anaesthesia. He asked Nurse A (an employee of the hospital) to get Novocaine. Nurse A asked Nurse B (who was in charge of drugs) who gave a labelled bottle to Nurse A. Nurse A, without reading the label, gave the bottle to the doctor. The doctor, again, without reading the label, injected the drug. It was adrenalin (and not Novocaine which was the required drug). The patient died. Both the nurses and the hospital employing them were held to be liable.

We have also a case from California *[Helliman v. Prindle* (1963) 62 Pa 2d 107] on the same point. The patient had a swelling on the dermoid (near the eye). Instead of the usual anaesthetic novocaine, a solution of formalin was injected by mistake of the nurse. The administration of formalin caused necrosis (death of a tissue). The mistake was committed by the hospital nurse, who was trained and qualified and was an employee of the hospital. It was held that -

(a) the surgeon was not liable since there was no visual change in the solution given for being injected and he could not have discovered the mistake of the nurse, but
(b) the hospital was liable for the negligence of the nurse.

The Operation Theatre

The operation theatre seems to present the most fertile ground for legal controversies. In earlier years, swabs figured frequently in litigation. In later years, many other situations arising within the premises of the operation theatre have come to be involved. These relate to negligence in respect of the following activities connected with the operative process:-

(a) the warming apparatus;
(b) the sterilisation of instruments, gowns, sheets and robes;
(c) the painting of the patient, prior to operation;
(d) leaving forceps or other instruments inside the patient's body;
(e) burns received in the course of operation or other treatment;
(f) non-removal of sponges used in the operation (e.g. in tonsillectomy).

Mishaps In The Operation

A curious accident occurred in Australia, a few years ago. A bottle of ether was knocked down (or fell down by accident) to the floor of the operation theatre. The fumes of ether were ignited by the exposed wires of an electric fire used to heat the theatre, causing severe burns to the patient's hand. The patient sued the surgeon as well as the anaesthetist. The High Court of Australia held that
(1) The surgeon should be absolved of liability. He had a right to assume that the anaesthestist would take all precautions.
(2) The anaesthetist was liable. He should have taken precautions. Ether was known to be an explosive in the presence of air and oxygen. The bottle had fallen while ether was being administered.

Family Planning Camps

It is nowdays common to hold "camps" for performing various types of surgical operations en masse. Sometimes in such camps, quality may be sacrified for number. Recently, Gujarat Samachar, 14 February 1987 carried an account of a family planning camp held at Vartak (Gujarat State), in which a woman died after an operation was performed at the camp. The woman (Savita Dahyabhai Patel) had come from a nearby village to get herself operated upon, for sterilisation. The operation was performed by a doctor who had come from Ahmedabad to participate in the camp. No post-operative care was provided. When the woman reached her village, she started experiencing agonising pain in the abdomen. She came back to the camp the next day but the doctor who had performed the operation had already left. She was being taken to the hospital, when she died on the way. A postmortem inquest was held and it was found that the doctor who had performed sterilisation had, in a hurry, also punctured the woman's intestines, which was the cause of her death. The case had not yet gone to courts. Incidentally, in India, in a case of rash and negligent conduct alleged to have caused death, people rush to invoke the criminal law forgetting (or unaware) that a civil remedy is also available and that the standard of proof in a civil proceeding is less stringent than that required in a criminal prosecution.

Failure Of Contraceptive Procedures

With the advance of modern technology, questions of possibility of conception (even after contraceptive surgery) may arise. Such controversies, directly or indirectly, involve questions of medical negligence. The issues that may arise could be one of the following:-

(a) If a child is born to a woman even after contraceptive surgery performed on either parent, can the parents sue the surgeon
(i) if he has been negligent; or
(ii) irrespective of proof of negligence?
(b) If a child is born to a married woman even after contraceptive surgery performed on the male parent, can the child still be regarded as a legitimate child of the marriage?

The second question was at issue in a recent Kerala case. *[Chiruthakutty v. Subramaniam,* A. I.R. 1987 Kerala 5] The parties were married in 1969. After the birth of three children, the husband underwent a vasectomy operation in January 1976. In August 1978, the wife gave birth to a child. The husband asserted that the child could not be his (as he had already undergone vasectomy). He petitioned for divorce, on the ground that the wife had committed adultery. The wife, in her

reply, denied that she had sexual relations with any other person. The Kerala High Court found that in this particular case, the post-vasectomy test about the success of the operation had not been properly carried out. Moreover, medical textbooks such as Williams' *Obstetrics* and Pepperell's *The Infertile Couple* had pointed out, that vasetomy operations did carry a failure rate of one per cent. No doubt, the presumption of legitimacy under section 112, Evidence Act, can be displaced by a successful vasectomy operation. *[Chandramathi v. Pazhely Balan* (A.I.R. 1982 Ker. 68.)]. But it must be proved that post-vasectomy tests had been done to ensure success of the operation. Because of this deficiency in the evidence produced by the husband, the High Court refused to hold that the wife had been guilty of adultery.

Wrongful Birth

Legal liability of the doctor for negligence leading to the birth of an unwanted child is an equally difficult question. Claims by the parents for negligence in such cases have been made in India in several pending cases, but no High Court decision on the subject has been reported so far. In several Western countries, such claims have been made and have, at times, succeeded. [See Hodginson, *"Medical treatment, information and negligence"* (1985) Public Law 235].

In England, some years, ago, damages were awarded in favour of a parent, against a doctor when, after an unsuccessful vasectomy on the male parent, the wife conceived and gave birth to a child. *[Thake v. Maurice,* (1984) approved in Emeh v. *Kensington Health Authority* (1984) 3 ALL E. R. 1044 (C.A.). English courts have also decided that a Health Authority in whose hospital an unsuccessful operation of sterilisation has been performed, cannot insist that the woman should agree to terminate the pregnancy. *[Emeh v. Kensington Area Health Authority* (1984) 3 All E. R. 1044 (C.A.).

The Deformed Child And Its Right To Sue

When a child in the womb receives injuries, owing to the negligence of some person, can it sue that person in tort? This question has arisen, involving the difficult question whether unborn children have any right at all. It seems that there is a gradual recognition of such a right. [A Taylor, *"Compensation for unwanted children"* (1985) Fam. Law 147.] Such a claim has been recognised in the following countries:-

(a) Australia in *Watt v. Rama,* (1972) V. R. 358
(b) Canada in *Duval v. Seguin,* (1972) 26 D.L. R. 3d 418
(c) U.S.A. in *Sinkeer v. Kneel,* (1960) 164 A 2d. 93 (Supreme Court of Pennsylvania)

A leading American author (Prosser) after reviewing the authorities on the subject concludes that now there is no denying a claim for damages for injury suffered while the child was in the womb, being an injury which has led to a physical or mental abnormality of the child. Incidentally, in England, early juristic writings favoured such a claim. (Lovvel Griffith Jones, *"The Sins of the Father- Tort Liability for Pre-Natal Injuries"* (1974) 90 l.Q.R. 531). Now, by statute in England, (Section 1, Congenital Disabilities (Civil Liability) Act, 1975) it is provided that a person responsible for an occurrence affecting the parent of a child, causing the child to be born disabled, will be liable to the child, if the person so responsible for the accident, would have been liable in tort to the parent affected.

Free Treatment

It should be mentioned that a doctor may be liable for negligence, even when he does not charge any fees. He may be liable for negligence, even when he attends a man rendered unconscious by an accident on the streets. The duty to take care is independent of contract. It arises out of the mere fact that the medical man has undertaken the care and treatment of the particular patient.

Experimentation On Human Beings

Apart from medical treatment and surgery, legal problems sometimes arise when experimentation is done on a patient (a) without the patient's consent; or (b) with the patient's consent, but in a negligent manner. The legality of such experimentation is now at issue in India also. In April-May, 1986, newspapers reports appeared about litigation commenced by the Stri Sangathana, Hyderabad, against the Indian Council of Medical Research and against the Government, in respect of certain experiments said to have been conducted on certain women in violation of human rights conferred by Article 21 of the Constitution. It was alleged that by way of research and experimentation, a certain contraceptive drug was being administered to women with the possibility of causing serious harm. The drug was known to have caused serious complaints of the liver and other physical disorders in other countries, where similar experiments had been conducted in the past. Stri Sanghatana had sought an injunction for discontinuing the experiment.

Of course, the controversy relating to legality and propriety of experimentation is not a totally new controversy. Since the Second World War, codes of ethics of various medical organisations have come to include specific provisions prohibiting medical experimentation of an unethical character. The Council of International Organisations of Medical Sciences has been holding seminars on medical ethics, which cover, inter alia, experimentation on human beings.

Litigation In The United States As To Experimentation

The legality of experimentation performed on a human being without consent has been agitated in the United States on several occasions. The principle laid down is that experimental drugs or experimental procedure cannot be resorted to, without the informed consent of those subjected to such experimentation. In a landmark decision, a Circuit Court in the United States specifically held that the residents of an institution could not be subjected to experimental research or to unusual or hazardous treatment, without the express and informed consent of the residents (if they are competent to give such consent) or of their guardians or next of kin (if the residents are not legally competent to give such consent). *[Wyatt v. Hardin,* Suppl. 781, affirmed in Wyatt v. Adaholl, 5th Cir. 1974].

In another case *[New York State Association for Retarded Children v. Carey* 393 F. Suppl. 714 (1975)] which has come to be known as the *"Willowbrook"* case, the District Court in New York held that mentally retarded individuals, who had been institutionalised involuntarily, have a constitutional right to protection from harm. In that case, retarded inmates of a mental institution had been subjected to vaccines and medication in order to test the effect of those vaccines and medication. Newly admitted individuals were infected with live hepatitis. They were children between the ages of 3 and 10, physically healthy,

but mentally retarded. The court issued an injunction to prohibit further experimentation.

A third case from the United Case *[Kaimowitz v. Department of Mental Health*, 42 U.S. Law Week 1063 (1973)] decided by the Michigan Circuit Court, Wayne County, which has become well known, involved psycho-surgery performed on a mental patient. The experimentation, in this case, had been performed upon residents committed to mental institutions. The patients and their parents had signed the "consent" forms and the procedure had been approved by the Scientific Review Committee and the Human Rights Review Committee of the institution. It was, however, found that the "benefit" to the patient was minimal, while the risk was high. The court held that where there was a high risk-benefit ratio, "informed consent"was impossible to obtain. The court further held that institutionalisation, by its very nature, diminished the capacity of the individual to provide consent to the procedure, even if he could comprehend the circumstances individually. Further, the parent or guardian of a person could not give legally adequate consent for experimentation on that person.

Liability Of Hospitals

It remains now to consider the question how far hospitals are liable in various situations involving (1) negligence in administrative matters, (ii) negligence of full-time medical staff of the hospital, (iii) negligence of full-time para-medical staff, (iv) negligence of nurses (some instances of which have been already noted above) and so on. This could be the subject matter of a separate study in itself. However, the following broad propositions appear to be worth noting:-

1. A hospital authority must use reasonable skill and care in carrying on the hospital administration.

2. As regards negligence in respect of treatment concerning the plaintiff's complaint, the hospital is certainly liable for the negligent acts or omissions of its permanent staff (whether surgeons, physicians, nurses or any other) in the course of their employment. This is merely a specific application of the wider principle of the law of torts, namely, that an employer is liable for the torts of his employees which are committed in the course of the employees' employment. (Some instances of liability of hospitals under this head are given later).

3. A hospital is probably liable, even for the negligence of part-time or visiting consultants or specialists, if they are employed as a part of the hospital's organisation for providing treatment. This is so, whether the consultants or specialists are employees of the hospital authority or not. The reasoning is, that the hospital authority undertakes the obligation of giving to any patient a treatment of the kind which consultants and specialists are employed to provide.

4. A hospital authority is not liable for the acts or omissions of a consultant or specialist who is selected and employed by the patient himself.

Of the four propositions enunciated above, the first proposition relating to hospital administration is illustrated by an English case *[Heafile v. Crane* (1937) The Times, 31 July, 1937] relating to a communicable disease contracted by the plaintiff during her stay in a college hospital. The plaintiff, a woman, had been admitted to the hospital at a time when the hospital was infected with puerperal fever. She had contracted that disease during her stay in the hospital. Her suit for damages was against the chairman of the hopsital, as also against her own doctor, who had attended to her in the hospital. In the general ward, there was a woman patient, who was later found to be suffering from puerperal fever and it was from her that the plaintiff got the infection in question. The other patient was also attended to by the same doctor. The plaintiff had alleged negligence as well as breach of contract on the part of both the defendants. The negligence being her admission at a time when the hospital was infected with puerperal fever. The hospital and the doctor denied knowledge of the infection. The further plea of the hospital was that medical treatment of the plaintiff was the sole responsibility of her doctor. It appeared that after the birth of her child, the plaintiff was removed from the maternity ward to the general ward. The court held that the matron of the hospital in admitting the plaintiff was acting as an employee of the hospital. The hospital authorities ought to have known, that the stay in the hospital was likely to be dangerous. They should not have put the plaintiff in a ward where there was a gravely suspicious case. Therefore, the hospital was negligent. The doctor of the plaintiff was also negligent, in not isolating the plaintiff from a suspicious patient. Both were held liable to pay damages to the plaintiff.

Heafile's case was partly concerned with hospital administration. More frequent are cases of hospitals being held liable for the negligence of their medical and other staff - proposition No.2 above. Following instances would be of interest:-

(i) A hospital is liable for the negligence of its resident junior house surgeon, who administers a lethal dose of cocaine (instead of "procaine") *[Collins v. Hertfordshire County Council* (1947) 1 All E.R. 633]
(ii) A hospital is liable for the negligence of a full-time assistant medical officer and also a house surgeon, whose negligence results in rendering a patient's hand useless *[Cassidy v. Minister of Health* (1951) 2 All E.R. 574].
(iii) A hospital is liable for the negligence of a full-time radiographer, who causes burns while treating warts with Grenz rays *[Gold v. Essex County Council* (1942) 2 All E.R. 237]
(iv) A hospital is liable even for negligent failure to guard a suicide risk. *[Selfe v. Ilford District Hospital Managing Committee* (1970) 114 S.J. 936]

Evidence

In most cases of negligence - particularly, alleged medical negligence - the role of evidence is crucial. Though ,the principles of liability for medical negligence are fairly clear, their application to the facts of the particular case is not always easy. The master test for fixing liability is that of reasonable degree of skill and knowledge and reasonable degree of care. Whether the care exercised in a particular case was reasonable is a question very largely depending upon the facts as assessed and interpreted mostly by experts. Facts in a medical negligence action and opinions relevant to it, are presented in the form of:-

(a) oral testimony of the patient and his family;
(b) oral testimony of experts, called in by the parties;
(c) medical records;
(d) cross-examination of the defendant and his witnesses by the plaintiff; and
(e) medical treatises;

Item (b) mentioned above requires the plaintiff to search out for suitable experts who will give evidence for him. This work involves industry, as well as tact. Item (c) mentioned above pre-supposes that the plaintiff has procured and preserved all

the relevant medical records. Item (d) mentioned above can be successfully carried out, only if the plaintiff has engaged a lawyer who (i) is hardworking, (ii) has mastered the facts, (iii) has studied the literature, and (iv) has applied his mind rigorously to all these materials.

How crucial is the evidence of experts in actions for medical negligence could be illustrated from the facts of an English case decided in 1981. *[Sheridan v. Boots Co. Ltd. & Kensington Area Health Authority*, New Law Journal, 30 April, 1981 page 479, Q.B.D. Dec. 19, 1980]. In 1974, S suffered from minor disabilities in his hands and ankles. He went to a hospital controlled by the Area Health Authority. He was attended to there by the senior Registrar in the orthopaedic out-patients clinic. The senior Registrar prescribed "Butazoldin". S took the drug and became virtually blind. He now claimed damages from the Health Authority on the ground that the Senior Registrar had been negligent and that the Health Authority was liable to pay damages for his negligence. The allegation was based on two principal counts:-

(i) In view of the medical history of S, in the shape of symptoms of peptic ulcers three years ago it was incorrect to prescribe Butazolidin.

(ii) Even assuming that S had not the relevant medical history, it was incorrect to prescribe this particular drug.

However, S failed in his suit, because the overwhelming majority of the doctors gave evidence which did not support the allegation of negligence on either of the counts mentioned above. As to the first count, it was testified that the senior Registrar who had prescribed the drug would not have been guilty of a failure to exercise the care and skill of a reasonably competent doctor in prescribing Butazolidin to a patient who had given him the medical history which S would have given him. As to the second count, the majority of the doctors said that they would have also reached a presumptive diagnosis of rheumatoid arthritis and there were no grounds for faulting the decision of the senior Registrar to institute treatment immediately. Further, they said that a reasonably careful and skilful doctor might well have prescribed Butazolidin and, accordingly, the senior Registrar was held not guilty of negligence in prescribing Butazolidin.

P. M. Bakshi was a member of the Law Commission.

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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Attention Readers

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

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

WARRANTS ATTENTION

Judicial Misconduct

That oft-chanted mantra, judicial independence and uprightness requires vigilance not only on the part of the judge himself, but also on the part of the legal fraternity and the public. In this respect labour has an impressive record. It has spoken out when required. Now comes the case of Mrs. N.A. Kadam, the Presiding Officer and Member of the Industrial Tribunal and Industrial Court, Thane, Maharashtra. **Anand Grover** *reports.*

On 26th March 1987, about 10,000 workers marched through the streets in Thane demanding the removal of the President of the Industrial Court, Thane, Mrs. N. A. Kadam. The morcha was to highlight the campaign by trade unions and workmen over the functioning of Mrs. N. A. Kadam. The trade unions and the workmen were alleging that Mrs. N. A. Kadam had conducted herself in a manner which rendered herself liable for disqualification and, therefore, she should be removed.

Gone are the days when judges used to closet themselves in their ivory towers. Judges are now openly seen at parties thrown by advocates. Few bat an eye lid at these goings on. When High Court and Supreme Court judges can do this, the practice is bound to rub on to the lower judiciary.

The Industrial Tribunal of Maharashtra, once the pride of Asia is no exception. Though allegations are made against some members regularly, there has been no concrete evidence to substantiate them. In Mrs. N. A. Kadam's case, however, there appears to be evidence to show that she has acted in violation of judicial norms of independence. The evidence put forward by trade unions and workers being that the learned member was entertained by one of the parties viz, the Maharashtra Electricity Board (MSEB) which has a number of disputes pending before her.

The Outing

On 14th December 1986, the officers of the MSEB had arranged an outing for Mrs. N. A. Kadam and her family to Roha. All the arrangements and expenses were paid for by the MSEB.

At 10.00 a.m. that day Mrs. N. A. Kadam and her husband and her two sons were picked up by private ambassador car from her home at Thane,

Mrs. Kadam

Maharashtra and taken to Kolad. The family was accompanied by, Mr. Tirthappa, a Senior Engineer of the MSEB. They reached Kolad at about 1 p.m.

At Kolad the party was met by B.H.K. Shetty, Controlling Officer of the MSEB and Maruti Dhondu, a jeep driver of the MSEB at Roha. They were in a jeep, bearing No. MHU 7187. From Kolad, the party in the ambassador and jeep proceeded to Roha. They reached Roha at about 1.30 p.m. In Roha the party had lunch at the guest house of Paper Products (P) Ltd. All the arrangements had been made by the MSEB personnel. After lunch Mrs. N. A. Kadam and the party rested for some time, presumably for a siesta.

After some time the party left for Murud where they reached at about 7.30 p.m. They proceeded to the MIDC rest house where Mrs. N.A. Kadam was received by Rale Raskar, Industrial Relations Officer, MSEB and Hanumanta Raya, Junior Engineer, MSEB.

At 8 p.m. they started having dinner. It was a leisurely dinner. It lasted for one hour finishing at about 9 p.m. After dinner Mrs. N. A. Kadam and the party walked around the grounds of the rest house. Ultimately at 10 p.m. the party left for Thane.

It is quite clear that all the arrangements and hospitality for Mrs. N. A. Kadam was arranged by the MSEB. The only apparent connection between the MSEB and Mrs. N. A. Kadam is that MSEB is a disputant party before Mrs. Kadam. It has nearly 34 cases pending before her concerning the MSEB.

Quite obviously the learned member had no business to be entertained by the MSEB. The conduct of the learned member is such that it renders her liable for disqualification from her post as Presiding Officer of the Industrial Tribunal and a Member of the Industrial Court under the BIR and the MRTU & PULP Acts.

Mrs. N. A. Kadam has been functioning in the capacity of the Presiding Officer, Industrial Tribunal and Member, Industrial Court under the BIR Act,MRTU & PULP Actsince 1982.

Independent person

It is an established principle of law that judicial and quasi judicial authority must be an independent person and not biased. In 1948, the Appeal Court through Lord Thackerton in England, had held, "I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute". [Franklin V Minister of Town and Country Planning (1948)

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Industrial law accepts this principle statutorily. Persons are appointed to the Industrial Tribunal under Section 7A of the ID Act 1947, which prescribes the qualifications for such appointments. Section 7C of the ID Act further provides that no person shall be appointed to or continue in the office of the Presiding officer of a Labour Court, Tribunal of National Tribunal, if (a) he is not an independent person.

However the ID Act does not define an independent person.

Under the BIR Act, Section 10(3) provides that every member of the Industrial Court shall be a person who is not connected with the industrial dispute referred to such court or with any industry directly affected by such dispute. The proviso to Section 10(3) further provides that mere holding of shares in a company does not disqualify a person from being a member of the Industrial Court , but in that case he shall disclose the extent of share holding in the company connected with the dispute to the State Government.

The MRTU and PULP Act has a similar provision. Section 4(3) requires that every member shall be a person who is not connected with the complainant referred to that court, or with any industry directly affected by the complaint. However the proviso to section 4(3) provides that every member shall be deemed to be connected with the complaint or industry if he has shares in a company which is connected with or likely to affected by such a complaint. However, this deeming provision will not operate if the member discloses his shares and in the opinion of the Government, to be recorded in writing, that such a member is not connected with the complainant or the industry.

Thus, under the ID Act the requirement is that of an 'independent' member. Under the BIR and the MRTU & PULP the requirement is that the member should not be connected with the dispute or complainant and/or the industry in respect of which complaint of or dispute relates. The principle on which these provisions are premised is that the member should be independent.

While under the BIR Act mere holding of shares does not disqualify the member, under the MRTU & PULP Act the provision is otherwise, viz holding of shares disqualifies the member.

Holding shares is only one aspect of independence of the judicial or quasi-judicial authority. There are several other aspects to independence. Not being entertained by parties before the member in pending dispute is certainly one of them.

Memorandum

The question that arises in the minds of an impartial observer is whether such conduct affects the judicial work of the member. According to the memorandum presented to the Chief Minister of Maharashtra, the trade unions and workers have alleged that Mrs. Kadam "does not apply her mind, to the subject, gives illogical, arbitrary, biased and irresponsible decisions and gives unfair treatment to workers and their representatives".

The trade unionists have pointed out to various decisions which substantiate their allegations. Thus they have pointed out that she has vacated ad-interim reliefs granted in favour of workers without the other side (management) filing any affidavits; not granted interim order when on the facts there was a clear case for it; passed cryptic orders when cases required good reasons; given orders in favour of management when there was no evidence to support the judgement; dismissed complaints of workmen on grounds of limitation when it was within limitation; passed orders in revision against ad-interim orders of the labour court in favour of the management when the management had not even approached the labour court for vacating the stay; passed orders without looking in to the records of the case, allowed managements to file ordinary applications when review was called for; allowed applications for clarification to orders to be filed when none were called for; not passed orders on application for interim relief relating to lock outs; passed two conflicting orders in respect of the same subject matter resulting in a tussle between the workmen and the management .

These are no doubt serious allegations. It is not only the trade unions who have had cause to complain about the judicial orders. The Bombay High Court in matters before it also had occasions to remark on the way Mrs. N. A. Kadam has been passing orders.

Preposterous Reasoning

Justice S. K. Desai and Justice A. H. Kantharia in writ petition No. 4220 of 1985 were constrained to remark that Mrs. N. A. Kadam had adopted a "preposterous process of reasoning". The writ petition was filed by a union whose application for recognition was rejected. Recognition of the other union had been cancelled eight months earlier. Only the management had opposed the application for recognition on the ground that the workmen had resorted to an illegal strike and were therefore not entitled to recognition. Only the applicant union had led unimpeached evidence through its secretary who had deposed that no strike had been instigated or abetted by the Union. Despite this, the application for recognition was rejected. Moreover, Mrs. N. A. Kadam held that the contention of the applicant union that it had majority of workers as its members could not be accepeted "without consulting the other union" which did not bother to appear and whose recognition had been cancelled eight months earlier.

No wonder, the High Court was constrained to observe that "all canons of judicial appraisal have been thrown overboard. It is sad that such responsible posts are being held by people who exercise their power in such an irresponsible manner."

Again in writ petition No. 3826 of 1986, Justice Puranik of the Bombay High Court deprecated the practice of Smt. N. A. Kadam who he found had passed cyclostyled orders. He found that, "while dealing with and disposing off a group of complaints of similar nature the learned member has used cyclostyled copy of the order in one to be the order in other matters. This is highly objectionable and would bring the learned member in grave trouble if such acts are found to be repeated. It is patent negligence and carelessness on the part of the judge".

There appears to be sufficient ground for the Government to investigate the conduct of the Learned Member and to take appropriate action. However, the Government is, as usual, reluctant to do anything.

COMMENT

An Open Letter To The Chief Justice Of India

Recently the Supreme Court witnessed senior counsel, Shri Nani Palkhivala, mentioning a Special Leave Petition, against the order of the Delhi High Court granting an adjournment in a matter involving appointment of a court receiver. No wonder it got the backs of a lot of people up. Madhu Limaye, MP was constrained to write to the Chief Justice of India. We reproduce the letter in extenso as it involves questions of public interest.

Dear Chief Justice,

I am an ordinary citizen. But in that capacity may I draw your attention to the news item published in the Hindustan Times of 10th January 1987.

I am a lover of the democratic institutions, especially Parliament and the Supreme Court. I am therefore much pained by the behaviour of some members of the highest judicial tribunal of the land.

Chief Justice Pathak

Have things come to such a pass that senior counsel like Shri N.A.Palkhivala can so overawe the judges as to induce them to permit "mentioning" of frivolous and bogus appeals against the order of adjournment of the proceedings by a high court in the open court?

Is this not against the directions framed by the court on the question of mentioning by senior counsel which is a blatant device for earning unmerited fees from rich but foolish clients? Is this not an abuse of procedure with regard to special leave petitions which permit appeals against any judgement, decree or final order. Was any judgement or final order involved in this case? Was a substantial question of general importance or involving interpretation of the Constitution argued in this matter?

I am also informed that the judges constituting the Bench almost rose in their seats to show their respect for the appearance of the "august" lawyer who cares only for money and is indifferent to moral values. This gentleman always talks of liberties, but has never taken the cause of a poor man or woman who cannot afford to pay his astronomical fees. He appears only for bankers, landlords, industrialists, foreign companies, maharajas and prime ministers. It might be recalled that he had advertised the "fact" that he would argue the Wadhwa Repromulgation petition without charging any fees, but when, finally, the matter was put down for final hearing this senior counsel was nowhere to be seen.

Is this publicity seeking by senior counsel not unethical? Cannot the Supreme Court punish this man for his violation of the norms, procedures and directions of the Court?

When the case relating to the Repromulgation of Ordinances could not be taken up by the Supreme Court for two years and when the J.K.Anti-Defection case has still not been heard despite its great constitutional importance, what was the overriding and extraordinary significance of this application for appointment of receiver pending before the Delhi High Court? Does it lie in the mouth of this Court to lecture on expeditious hearing of cases from day to day? Can this kowtowing before rich counsel by judges be surpassed? Can this exhibition of inferiority complex go further?

The public is entitled to ask: Palkhivala and Sorabjee earned fat fees for mentioning and for remaining present at the mentioning respectively, what did the Supreme Court judges gain? Only loss of dignity and prestige?!

Cannot the Chief Justice prohibit this scandalous mentioning business by senior counsel, curb self-serving adjournments by the consent of opposing counsel of proceedings in this Court,

Madhu Limaye

ask for short and pithy written briefs, and restrict oral arguments to a maximum of two hours per case ? When will the Court stop the shameless exploitation of clients by men like Palkhiwalla?

I knew your father Gopal Swarup Pathak when he was Law Minister. He was ponderous in his expression sometimes, but he conducted himself at all times with dignity. Will it be too much to expect his son to behave with dignity in the high office he has reached?

Madhu Limaye
B-11 Pandra Road,
New Delhi 110 003.

SPECIAL REPORT

RAPISTS EXONERATED

On 12th February, 1987, a judgement passed by the Sessions Court (Greater Bombay) reduced the punitive measures for the offence of rape to a dead letter. **Naznene Rowhani** *reports.*

A minor girl, Shanti entered the Antop Hill police station on 22 September, 1984 and lodged a complaint, on the basis of which five men were charged u/s 376 (Rape) read with section 114 of the I.P.C. for having kidnapped or abducted the minor girl, Shanti from the lawful guardianship of her sister, with the intention of compelling her to marry against her will.

Three of the accused were charged with the offence of rape for having had illicit sexual intercourse with the minor, Shanti in a hut at Bombay.

The probe revealed that Shanti, aged about 13 years, resided with her family in rural Maharashtra. Her eldest brother (accused No.5) brought her to Bombay to live in the house of her older sister.

Affidavit, kidnap and rape

On 6th August 84, i.e. the next day, the elder brother and Shanti met two men (accused Nos.3 and 4) and invited them for a cup of tea. One of the men (accused No.3) was known to Shanti as a neighbour of her sister. A little while later, they met accused No.1, who took them to Esplanade Court where an affidavit was procured stating the agreement to a marriage between the minor, Shanti, and accused No.1. The affidavit misrepresented that Shanti was aged 19 years.

Shanti was then taken to Mumbadevi Temple where a mangalsutra was tied around her neck and then taken to the hut at Kandivli. In the hut, the accused No.1 "lived" with her as her husband, and accused Nos. 2 and 3 occasionally visited her and also had sexual intercourse with the minor Shanti against her will, claiming a custom that the brothers in their community treated the wives of the other brothers as their own.

Shanti escaped from the hut after being detained there against her will and gave information at the Antop Hill police station, on the basis of which the case was lodged.

Issues

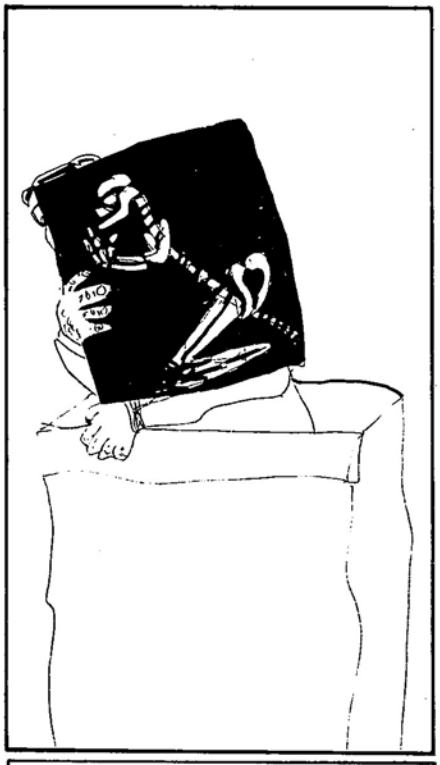
In his judgement the Addl. Sessions Judge, Shri Y.N. Athalye, states that the points which arose for determination were:

1. Whether Shanti was below the age of 16 years on 22nd September 1984?

2. Whether a valid marriage was solemnised between Shanti and the Accused No.1

3. Whether the accused Nos.1, 2 and 4 had sexual intercourse with Shanti?

He finally decided that Shanti was below 16 years of age and that no valid marriage was performed between her and the accused No.1. He was convicted for rape. The others were found not guilty.



The expert witness:
Yes, I can be certain about this one, Your Honour. Early Pleistocene, and well above the age of consent.

Forensic misexamination

For determining the age of Shanti , the accused relied on the evidence of Dr.Sudhakar Sane, who is a Professor in Forensic Medicine and has been a Deputy Coroner since 1978. He also has a Ph.D. in law from the University of Bombay.

Dr. Sane, after examining the girl, and basing his observations on various European authorities, claimed ".....in my opinion, the age is between 20-24 years on the date of my examination. The girl Shanti could not be below the age of 20 years on 15.1.87". However, Dr. Sane never examined the girl physically, but based his opinions merely on the radiological findings relating to the growth of bones.

The prosecution refuted the evidence of Dr. Sane and in turn, relied on Dr. Kelvekar to determine the age of Shanti. Dr. Kelvekar, after recording the history and observations of his examinations sent her for various X-rays. In his opinion she was 13-14 years of age, with a margin on either side of 6 months.

The judge totally discarded the evidence of Dr. Sane and accepted the opinion of Dr. Kelvekar.

Marriage by affidavit okayed

On the question of the marriage, he held as follows:

"The burden of proving that the marriage was solemnised between the accused No.1 and Shanti is on the acused, as he relies on the fact as a justification for having had sexual intercourse with Shanti. In the evidence of P.W.1, Shanti, she has stated that a mangalsutra was tied around her neck in the presence of an idol, but she does not refer to the presence of a priest.

The photograph, Exhibit 19, by itself

would not show that accused No.1 was married to the victim. The affidavit only refers to their desire to get married, but it would be too much to conclude that as the desire had been expressed in the affidavit, it must have been put into practice.

The accused had not led any evidence to show a custom by which such marriage is accepted in the community. ..... Thus, taking into consideration all the aspects brought on record, answer Point No.2 (marriage) in the affirmative."

In the case of sexual intercourse by accused No.1, Shanti's version was corroborated by the admission of her "husband". He justified having had sexual intercourse with her on the ground that he considered her to be his wife, and consequently, it would not amount to rape. However, the prosecution could not sufficiently prove that accused Nos.2 and 4 had sexual intercourse with Shanti and "they being entitled to reasonable doubt", no convictions could be made.

Presumption of consent rebutted

Section 114(a), a newly added section to the Evidence Act, states that if a victim deposes before the Court that sexual intercourse was against her will in a custodial rape situation, the burden shifts to the accused to prove that she consented. In this case, though not bound to statutorily. the judge had drawn the presumption that the girl had not consented. The judge, however, held that this presumption was rebutted. The circumstances that the judge relied on to justify the fact that she consented were:

(a)that the girl lived in the hut with the accused No.1 for about 1 1/2 months (This, in spite of the fact that Shanti deposed that she was being held there against her will and she could escape only when accused No.2 had left the hut for a brief while to eat a paan.)

(b) that she willingly posed for a photograph;

(c) that her elder brother, accused No.5, visited the hut and found that she was "happily" settled with her husband;

(d) "her resistance, if any, to initial sexual intercourse by accused No.1 with her, would not necessarily indicate that it was against her will, but would be indicative of the fact that the experience, being new, out of shyness, she might have made some attempts to resist accused No.1 initially." A totally unconvincing justification for her resistance by any means.

The judge concludes that "this situation is sufficient to rebut the presumption raised by S.114(a). The fact that accused No.1 had sexual intercourse with her against her will, has not been established. However, her consent would not absolve the accused of the offence under section 376."

Accused No.1 was thus found to be guilty of having had sexual intercourse with a person below the age of 16 years. Accused Nos.2 and 4 were acquitted.

Lenient Sentence

A far greater shame was the sentence eventually meted out to accused No.1 . Having being found guilty under section 376 I.P.C., he would have to be sentenced to 7 years R.I. unless there were mitigating circumstances. The circumstances which influenced the judge to justify a lenient sentence was the contention that the accused did not subject Shanti to sexual intercourse "out of his lust" and also the contention that the accused actually "believed" himself to be the husband of Shanti and that Shanti did not depose about being ill-treated by him. These flimsy points impressed the judge enough for him to pass, instead of the 7 years R.I., a sentence of R.I. for 2 months and a fine of Rs.500/-.

All told, a 13 years old girl was made to live as a wife against her will and subjected to sexual intercourse by 3 men. Two of these men were entirely exonerated; one received only 2 months R.I. and a paltry fine; and the girl's elder brother, who probably engineered the entire so called "marriage" was set scot-free.

A telling instance of justice.

Statement showing ownership and other particulars about 'From THE LAWYERS Collective' required under Rule 8 of the Registration of Newspapers (Central) Rules, 1956

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Sd.
RABINDRA HAZARI

I, RABINDRA HAZARI, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dated: 15th March, 1987

TAXFILE

Finance Bill, 1987

By R. L. Kabra *details the main provisions of the Finance Bill, 1987*

1. Amendments Affecting All Assessees (Section 194E)

From 1st June 1987, all assesses excepting individuals and Hindu Undivided Family (HUF), whether they be companies, firms or Association of Persons (AOPs), will have to deduct tax at source at prescribed rates before paying a resident any income in a financial year by way of:

a) Fees for professional services exceeding Rs.5,000/- @ 20% for other than a company and in the case of a company @ 25%.

b) Rent exceeding Rs.36,000/- @ 10% and if exceeding Rs.48,000 then on balance @ 20%.

c) Royalty or fees for technical services exceeding Rs.5,000/- @20% for other than a company and in the case of a company @ 25%

d) Commission/brokerage exceeding Rs.5,000/-

e) Payments for goods supplied to Government authorities or to a company exceeding Rs.1 lac @ 5%.

These tax deductions must be paid in time into the Treasury and monthly or quarterly or annual returns will have to be submitted to the Income Tax Authorities specifying various details. If the tax is not deducted or deducted but not paid, then consequences of penal interest, penalty and prosecutions will have to be faced. The assessees will have to apply for allotment of TAN (Tax deduction Account Number) under the new provisions of section 203-A.

The Budget proposals will snare many new assessees in the tax net. However with the rates and limits prescribed above, the assessee may find it difficult to do business and may face cash liquidity problems as the profit margins, and in some cases, even their own capital, will be blocked for about one to four years.

It is hoped that with the hardship which is likely to arise with these changes, some amendments will be made in the proposed limits & rates for deducting tax at source.

2. Amendments Affecting Companies

a) Companies will be required to pay minimum corporate tax on at least 30% of book profits (Section 115 J). The carried forward business losses and unabsorbed depreciation will not be considered. The existing Section 80 VV A will be omitted.

b) At present certain closely held companies are liable to pay additional Income Tax under the provision of Sec. 104 to 109 of the Income Tax Act. This is now proposed to be omitted. This will benefit investment companies particularly, as the effective tax rate will be @ 25% only.

c) The deeming provisions regarding dividend under section 2(22) (e) are applicable to closely held companies. Earlier any payment by way of advance or loan by a company to a shareholder having a substantial interest was included as dividend. Now the amendment seeks to secure that any payment by way of advance or loan to any shareholder or to any concern in which the shareholder is a member or a partner having substantial interest shall be included as dividend. The 'concern' will include HUF, or a firm or AOP/BOI (Body of Individuals) or a Company.

d) Companies were charged lower rates of tax in respect of long term capital gains under section 115 but now companies are also put in a uniform scheme of deductions which are incorporated in Section 48 itself. The present section 115 will be omitted. Companies will be allowed a flat deduction for long term capital gains @ 10% for land and buildings and @ 30% on other assets, subject to a 100% deduction for first Rs.10,000/- gains.

e) The long term capital losses will be deemed as business losses for the purpose of set off and carry forward. This will also apply to other assesses.

f) Capital gains arising on transfer of long term capital assets in the nature of machinery, plant, building or land for shifting from an urban area to a non-urban area will be exempt on satisfaction of certain conditions.

g) The income tax rates for depreciation on plant and machinery are liberalised with three rates @ 100%, @ 50%, @331/3% only.

3. Amendments Affecting Individuals, Firms, HUFs

a) Section 43 B is amended to provide that disallowance for statutory liability outstanding as on the last day of the previous year will not be made if the sum is actually paid on or before the date on which the return of income is due to be furnished. So far as provident fund, superanuation fund, gratuity or any other contribution is concerned, it should be paid on or before the due date.

b) The definition of short term capital assets (section (42A) is suitably changed providing that in the case of a share held in a company, the share shall be treated as short term capital assets if it is held by the assessee for 12 months or less instead of 36 months as earlier. Therefore for the purpose of long term capital gains on shares, assessees will be able to get substantial advantages @ 60% deduction of gains by holding it for 12 months and will be taxed @ 20% maximum on total gain.

c) The provisions of Section 80CC for deductions in respect of investments in new shares is extended for a further period of 3 years.

d) It is proposed that any loan or instalment repayment made by the tax payer for the cost of purchase or construction of a new residential house property will also qualify for deduction under section 80-C(1) subject to a maximum limit of Rs.10,000/- and subject further to a overall monetary limit under section 80 C. However if such house is transferred within 5 years from possession, the aggregate amount of deductions allowed in earlier years shall be chargeable to tax under the head of other income sources in the year in which such transfer takes place.

TAXFILE

e) New section 80 CCA is introduced whereby if an individual, HUF, etc., makes deposits under the National Savings Scheme, he will be allowed a 50% deduction subject to a maximum deposit of Rs.20,000/-. If it is withdrawn it will be added to the income in the year of withdrawal.

f) The long term capital gains deductions as provided in section 80 T are inserted in section 48 and section 80 T is omitted. The rate of deduction remains the same. However there is an important amendment that if the assessee opts for reinvestment in new assets corresponding to the old assets within the permissible time limit, he will have to either utilise or appropriate for acquisition of new asset before the date for filing return or he will have to deposit the amount in a bank account or institution and utilise it as per the specified scheme . If no utilisation is made within the specified period, the capital gains will be taxed, gross without deductions.

g) The exemption provisions of section 53, 54 and 54 F relating to long term capital gains are extended to the HUF also. This is a welcome development.

h) In the new section 54 H, capital gains arising on transfer of shares to notified public sector companies will be exempt outright.

i) In some cases, pending disputes, legal as well as beneficial owners are assessed to tax in respect of some income from house property. The amendment seeks to enlarge further the meaning of the expression "owner of house property" by providing that a person who comes to have control over the property under section UA(f) will also be deemed to be the owner of the property under section 269 UA(f) and will also be deemed to be owner of the property.

j) With a view to preventing misuse of entities such as partnerships to escape capital gains tax, the amendments provide for charging tax on the profits or gains arising from the transfer of a capital assets by a partner to the firm or vice versa and also on distribution of asset as a result of dissolution of the firm. Likewise transfer of goodwill will now also be taxed. In other words, the decision of the Supreme Court in *Sunil Siddharthbai v/s CIT* (156 ITR 509), CIT *v/s Bankey Lal Vaidya* (79 ITR 594) and *CIT v/s. Srinivasa Setty* (128 ITR 294) will cease to be good law.

Other Amendments

a) Under the existing provisions of Section 192 ,persons making salary payments cannot take into account other incomes of their employees for the purpose of deduction of tax at source. The recent amendments now enable employers to deduct from the dues to owing to their employees, the tax due on their total income subject to prescribed conditions.

b) The limits under Section 194 for deduction of tax at source out of payments of 'Dividends' is proposed to be increased from Rs.1000/- to Rs.2500/- Likewise the limits under section 194A for deduction of tax at source from payments of 'interest' is being increased from Rs.1000/- to Rs.2500/-. This is also a welcome development.

c) Section 32 AB entitles deduction @ 20% of the assessee's profit from eligible business or profession. The amendments now provides for such deduction before loss, if any, brought forward from earlier years is set off. Also it brings about a drastic change that in case of firms or AOP/BOI, no deduction shall be allowable to partners or members.

d) An important amendment is being made (Section 245 H(1) proviso) whereby the settlement commission will not be able to grant immunity from prosecution in cases where prosecution has been launched prior to the date of receipt of application for settlement. It has also been provided that an immunity granted by the commission to any persons shall stand withdrawn on failure of such person to pay taxes etc. within the time allowed as per order of settlement, or non-fulfillment of conditions. Also the tax payer will have to furnish return of income before an application is made to the Commission. This is all done to ensure that the settlement commissioner is not used as an escape route by tax evaders.

e) Deduction under section 80 U for blind andd handicapped is being increased from Rs.10000/- to Rs.15000/-.