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FROM

THE LAWYERS

COLLECTIVE

TRADE UNIONS IN DANGER

EDITORIAL

FROM THE LAWYERS COLLECTIVE

Fairfax Enquiry

While much has been written about the political implications of the Fairfax Enquiry, little or nothing has been said about its legal implications. The first announcement by the Prime Minister that a Supreme Court judge will be requested to inquire into the affair, met with protest from most people who thought it would be a 'private' enquiry by a Supreme Court judge. Madhu Limaye pointed out that in 1978 Morarji Desai made a similar decision to consult Chief Justice Chandrachud on allegations of corruption against his son Kanti Desai. In the face of public protest Y.V. Chandrachud declined to give advice. The announcement by the Prime Minister that the enquiry would be under the Commission of Enquiry Act took care of one objection. But there is yet no assurance that the recommendations will be implemented.

However, the truly major objection is to the very appointment of Supreme Court judges to perform an essentially political task which has nothing to do with their judicial duties. A small news report about the filing of a petition to quash the appointment of the Commission has unfortunately gone without notice. But it reflects the public discontent with the tendency to appoint commissions to diffuse political discontent. The petition questions the power of the Government to remove a Supreme Court judge from his constitutional duties and reduce him to the status of a civil judge. The petition is bound to embarass the Chief Justice of India, as it is his decision to lend Supreme Court judges, which is being called into question.

Commissions of enquiry have been treated with such scant respect that Justice Pathak would have been well within his rights to refuse to become a party to a political game. The Supreme Court itself has held that a Commission of Enquiry can be wound up by the Government before its work was complete, without assigning any reason. It was this very Supreme Court judgement that made it impossible to challenge the decision of the M.P. Government to wind up the Commission of Enquiry presided over by a sitting judge of the High Court to enquire into the disaster in Bhopal. Perhaps the dignity of the Supreme Court would have been better served if its judges were not lent to enquire into political scandles. Thousands of citizens are waiting patiently to be heard. So gross are the delays in Court that petitions filed in 1983 are yet to be numbered and listed for hearing, while political disputes jump the queue and claim priority.

Indira Jaising.

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Provident Funds - Nominee or Beneficiary

Last February Mr. Justice Wad of the Delhi High Court delivered a judgement likely to have serious ramifications for all employees who contribute to a Provident Fund governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952. **Rakesh Luthra** *analyses the judgement and its effect on nominations under the said Act.*

Most workers are under the impression that when they nominate a family member, whether their spouse, child or parent, to receive the contributions made to their provident funds upon their death, then the sum would automatically be given to the nominee to keep as his own, in the same manner as if the money had been bequeathed to him.

This general impression is in fact confirmed by their fellow employees in Central Government Service governed by the Provident Funds Act, 1925 which has a provision to specifically ensure that the nominee receives the sum to the exclusion of all other persons notwithstanding any other legal provision.

But not so, as far as the 1952 Act is concerned, says Mr. Justice Wad in *Om Wati v. D.T.C. & Ors.* (Civil Revision 237/84). According to him, the nominee receives the amount only to hold on behalf of the deceased's estate and distribute it amongst the lawful heirs in accordance with the law of succession as and when necessary.

Shrimati Om Wati was married to Gopi Ram, a bus conductor employed by the Delhi Transport Corporation (D.T.C.) for 11 years until his death in 1982. Gopi Ram never made a will during his life time, but like others, he filed a nomination form nominating his wife to receive the sum standing to his credit in the provident fund on his death. That came to a little over Rs.10,000/-. However, shortly after Gopi Ram passed away, Om Wati found herself thrown out of the matrimonial home by her in-laws. To add insult to injury the in-laws filed a suit against her claiming the amount in the provident fund along with other sums held by the employer as their entitlement upon their son's intestacy. In fact under the Hindu Succession Act 1956, only Gopi Ram's mother and spouse were class I heirs, both entitled to an equal share of his estate, there being no issue. So, the contest was between the wife and the mother.

The starting point in the judgement is the 1952 Act and the Employees' Provident Funds Scheme, 1952 framed under it. Paragraph 61 of the Scheme deals with nominations as follows:

Nominations, Payment and Withdrawals from the Fund

61. Nomination (1) Each member shall make in his declaration in Form 2 a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made.

(2) A member may in his nomination distribute the amount that may stand to his credit in the Fund amongst his nominees at his own discretion.

(3) If a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid.

(4) If at the time of making a nomination the member has no family, the nomination may be in favour of any person or persons but if the member subsequently acquires a family, such nomination shall forthwith be deemed to be invalid and the member shall make a fresh nomination in favour of one or more persons belonging to his family.

(4-A) Where the nomination is wholly or partly in favour of a minor, the member may, for the purposes of this Scheme, appoint a major person of his family, as defined in clause (g) of Paragraph 2, to be the guardian of the minor nominee in the event of the member pre-deceasing the nominee and the guardian so appointed.

Provided that where there is no major person in the family, the member may, at his discretion, appoint any other person to be a guardian of the minor nominee.

(5) A nomination made under sub-paragraph (1) may at any time be modified by a member after giving a written notice of his intention of doing so in Form 8 annexed hereto. If the nominee predeceases the member, the interest of the nominee shall revert to the member who may make a fresh nomination in respect of such interest.

(6) A nomination or its modification shall take effect to the extent that it is valid on the date on which it is received by the Commissioner."

Insurance Act, 1938

In *Om Wati* interpreting the words "right to receive"the Judge relied largely on the interpretation given by the Supreme Court to similar words used for nominations under insurance policies as governed by Section 39 of the Insurance Act, 1938. In a controversial decision, *Sarbati Devi & Anr. v/s Usha Devi* (AIR 1984 SC 346), the Supreme Court held that," a nomination made under Section 39 of the Insurance Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them". As a nominee acquires no interest in a life insurance policy during the assured's life time, the amount payable on the latter's death goes into his estate. The nominee would, at best, seem to be a conduit for the money in order to enable the

insurance company to discharge its contractual liability.

The wording of Section 39 of the Insurance Act is not too dissimilar from Paragraph 61 of the Provident Fund Scheme. Sub-Section 1 of Section 39 allows the holder of a policy of life insurance to "nominate the person or persons to whom the money secured by the policy shall be paid" in the event of his death. Where the nominee is a minor, the provision enables the policy holder to appoint any major person to receive the sum secured in the event of the holder's death during the minority of the nominees.

Mr. Justice Wad was unsuccessfully invited to distinguish Sarbati Devi's case and confine it to insurance policies. After all, the earlier statute, the General Provident Fund Act, 1925 upon which the 1952 Act must have been based categorically protected the nominee's right to receive the money beneficially. Surely, the intention behind the 1952 Act could not have been different? If so, why? Section 5 of the 1925 Act also uses the phrase "right to receive", in the following manner: "5. Rights of nominees (1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to or depositor in a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination duly made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor occuring before the sum has become payable, before the sum having become payable has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless...." Furthermore, a nomination under a provident fund scheme was very different from one under a life insurance policy. For instance, every provident fund scheme was very different from one under a life insurance policy. For instance, every provident fund scheme, including Para 61, provides that a member can only nominate a member of his family, which in most cases is specially defined, or else the nomination will be invalid. In the event of a nominee being a minor and the member predeceasing the nominee there is usually a provision for appointment of a guardian.

There was no question of the employer handing over the money to the nominee merely to discharge a contractual obligation. A member of a scheme is always free to alter his nomination upto the time of his death.

As far as the 1925 Act was concerned, the existing case law merely reinforced this position. The non-obstante clause of Section 5 clearly abrogated the personal law of the depositing member. The Courts have also found compelling reasons of social justice to uphold this view.

In *Malati v/s Dharma Rao* (AIR 1968 Or.8) a Division Bench of the Orissa High Court observed as follows:

"the depositor is called upon to make such deposits with some personal hardships and sacrifice, so that at the end of his service, the money may be available for such use for which it was primarily intended. He may place the funds in the hands of such heirs or dependents or even a stranger who in his opinion, can make the best use of the funds, for such purposes as he desires. The object of the depositor is likely to be frustrated in case the fund is made available for distribution like any of his other assets amongst his heirs".

English Law

As if this was not enough the Judge has also referred to the historical basis for provident fund schemes dating back to the Industrial Revolution in England. Industrial and Provident Societies were established in England as cooperative or registered societies to enable a worker to save his income for his future security. The Industrial and Provident Societies Act, 1893 also contained a provision for nomination. The pattern of Section 25 of the 1893 Act as amended is not remote from our Indian Statutes. Section 25 (1) allows a member to nominate a person or persons to dues "shall be transferred" at his demise. The English Courts have interpreted that the power of nomination is tantamount to a testamentary disposition. In *Re: Barnes Ashenden V Heath* [(1940) Ch. 267], Mr. Justice Farewell adopting observations in an earlier decision of the House of Lords in *Eccles Provident Industrial Cooperative Society Ltd. V Griffiths* [(1912) A. C.483] found that there was nothing unconscionable in allowing a worker to save the expense and time of making a formal will by nominating an intended beneficiary. The Chancery Court adopted the following passage from the judgement of Farewell L. J. in the Court of Appeal:

"Section 25 of the Act of 1893 like several other sections of the same character in similar Acts, is in my opinion intended to confer a benefit on members of societies of this kind by giving them a limited power of disposition in its nature testamentary without the formality and expense of making a will or obtaining probate. The nomination in pursuance of such power i.e. like any other testamentary disposition, is revocable, and, like a will, does not prior to the nominator's death, affect his property, but leaves him free to deal with it as he pleases, either by withdrawing it in accordance with the rules of the society, or receiving payment of his loans to the society, without any power of interference by the nominee. The nominator is in the position of a testator and the nominee of a legatee".

Significantly, a nomination form contains a certified declaration by the member signed before the employer or his authorised representative. This in effect is surely a disposition in writing duly witnessed. Its effect can in any case easily be negated by a subsequent will.

However, Mr. Justice Wad was not readily convinced. On comparing Section 39 of the Insurance Act with Paragraph 61 of the 1952 Scheme the learned Judge found "no material difference in the concept of the right to receive the amount by the nominee". In the opinion of the Judge the wording of Section 5 of the 1925 Act was much more explicit than paragraph 6. Section 5 specifically excluded the applicability of the member's personal law as well as every person other than the nominee. In any event the legislative history of the two statutes revealed that in passing the 1952 statute or the scheme under it, the legislature must have obviously been aware of the earlier 1925 Act. Had there been any intention to make the nominee receive the amount beneficially the legislature would have specifically stated so. Conversely, the legislature's failure to do so indicated its intention to specifically ensure that the nominee would hold the sums merely on behalf of the estate.

The English cases were in the learned Judge's opinion totally inapplicable as we had already codified the law on provident funds suited to our Indian conditions. We, therefore, had our own language and legislative history to interpret.

The implications of the judgement though serious for any employees governed by the 1952 Act can be ameliorated by a simple piece of advice: if for any reason you do not want your personal law of succession to govern the disposition of your hard earned savings in the provident fund, then MAKE A WILL.

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Registration Of Charges Under Companies Act

A charge on a company's property, if filed and registered within the stipulated period, protects the chargee-creditor against other creditors in the event of liquidation. ***K. R. Chandratre*** *argues in the following article that what is important is not the registration, which is the duty of the Registrar, but the filing of the particulars of the charge.*

Validity Of Charge

PART V of the Companies Act, 1956, comprising Sections 124 to 145, deals with registration of charges by companies. A charge is an intention evidenced in a transaction whereby property, existing or future, shall be made available as security for payment of a debt and that the creditors shall have a present right to have it made available. Under Section 124 a charge includes a mortgage. Section 125 provides that a charge created on the property of a company shall be filed with the Registrar of Companies within 30 days of its creation. It further provides that if a charge is not filed within the stipulated period of 30 days, it shall be void against the liquidator and any creditor of the company. Thus an unregistered charge is void against the liquidator and any creditor of the company.However, it is not void for all intents and purposes. It is a perfectly valid and good charge against the company so long as it is a going concern (See *Aung Ban Zeya v/s. C.R.M.A.Chettiar,* AIR 1929 Rangoon 288). The company cannot contend that the chargee (ie. one in whose favour the charge is created) has no right to enforce the security, unless the company has gone into liquidation. The chargee can obtain a decree from the court for the sale of the security and get his debt satisfied even if the charge was not registered with the Registrar. The chargee, however, cannot get a decree or preferential repayment of his debt in respect of an unregistered charge once the company has gone into liquidation. Such a chargee has to stand in the queue of unsecured creditors for satisfaction of his debt which rank *pari passu* with other unsecured creditors of the Company.

Moreover, if a subsequent charge is created on the same property and the earlier charge has not been registered with the Registrar, the earlier charge would become void and the latter charge, if registered, would enjoy precedence, in case the latter chargee intervenes to get the property sold in order to satisfy his debt. It may be noted that even in such a case the earlier charge remains valid vis-a-vis the company and the company cannot repudiate it.

Filing And Registration

It is pertinent to point out that a charge is rendered void ony if the particulars of the charge are not filed with the Registrar within 30 days. It is the omission to file the particulars which makes the charge void in view of the clear wording of section 125 of the Act. However, throughout Part V the words 'filing' and 'registration' are used in such a way as to give the impression that these two words are used synonymously and interchangeably. A close study of various provisons of that Part however, reveals that it is not so, with the result that if is only the omisson to file and not the omission to register that renders the charge void. Registration of a charge is different from filing. The term 'registration' has been used to denote the registrations of the charge by the Registrar in his register of charges.

The Act does not prescribe any time limit for registration of a charge by the Registrar. If, therefore, a charge is duly filed by the company within the stipulated period of 30 days but it has not been registered by the Registrar or unreasonable delay occurs in registering it, the question that may arise is whether the charge is void or not if the Registrar does not issue a certificate of registration. This situation would certainly make the position of a subsequent creditor precarious if he relies upon the register of charges maintained by the Registrar and, upon finding that there is no charge exisitng on the company's property, he grants a loan to the company on the security of the same property. Another question that may arise is whether the charge is void or not if the Registrar does not issue a certificate of registration.

Non-registration On Filing: Charge Valid

In *National Provincial and Union Bank of England v. Charnley* [(1924) K. B. 431], it was held that the charge becomes void only if the particulars of it are not delivered to the Registrar within 21 days (under Section 93 of the English Companies Act, 1908). The neglect to register the charge by the Registrar will not make it void.

Thus where the charge has not been registered by the Registrar despite the fact that the company has filed it duly within the stipulated time limit and the Registrar has nevertheless issued a certificate of registration, the charge will not be void and the chargee's interest will be fully protected. He need not worry whether the charge has been registered or not by the Registrar. A subsequent creditor would not be protectedif he lends money to the company on the security of the same property after having inspected the register of charges in the Registrar's office. The earlier chargee will also be entitled to get the security enforced in the winding up of the company. Thus, this situation would be detrimental to his interest, but it has to be so, otherwise the character of conclusive evidence as to registration of a certificate issued by the Registrar would be rendered otiose (i.e. futile) and the provisions of Section 132 would become a dead letter.

Scrutton L. J. very aptly observed in *National Privincial* as follows:

"Though one can see that this may cause great hardship to a person who gives credit to the company in reliance on a defective register, one can also see that equal hardship would be caused to secured creditors if their security was to be upset for reasons connected with the actions of persons over whom they had no control. For these reasons I take the view... that the giving of the certificate by the Registrar is conclusive that the document creating the charge was properly registered, even if in fact it was not properly registered".

In *State Bank of India v. Haryana Rubber Industries Pvt. Ltd.*, [(1986) 60 Company Cases (P&H)], Mittal J. observed that the

filing of particulars of the charge together with the instrument or copy thereof within 30 days after the date of creation of the charge is necessary and not registration of the charge with the Registrar. The reason is that the registration of the charge is within the jurisdiction of the Registrar and in case he makes delay in doing so, the chargeholder cannot be held responsible....After the particulars (of a charge) have been filed, then the responsibility of the registration of the charge shifts on to the Registrar. A chargeholder (or the company) is absolved of his duty as soon as he files particulars of the charge with the Registrar within 30 days. If the Registrar subsequently delays registration or fails to register the charge, it does not render the charge void.

No Period For Registration

In *C. K. Siva Sankara v. Kerala Financial Corporation & Others*, [(1980) Comp. Cas. 817], decided by the Kerala High Court, a charge was created on Februry 10, 1970, but the particulars of it were filed on May 19, 1970. A petition for condonation of delay, under Section 141 of the Act, was condoned by the Court on August 13, 1970 and the delay was condoned by the Court on November 30,1970. The charge was, however, registered by the Registrar in his register only on October 10, 1972. Meanwhile, a winding up petition of the company was filed on March 20, 1972. It was contended that since the registration of the charge (by the Registrar) was effected at a time when winding up proceedings were pending, the registration of the charge was invalid and the chargee (viz. mortagagee) would not get precedence over the other debts of the company.

The Kerala High Court rejected this contention and held that this contention overlooks the fact that the period fixed in Section 125 is for the filing of the particulars of a charge and not for the registration of it. The delay in registration contemplated in Section 141 of the Act is the delay due to omission to file the particulars in time. This is evident from the fact that Section 125 does not prescribe a period within which the Registrar is to register the charge or make entries in the register of charges. Therefore, the delay in registering the charges even after the Court (now Company Law Board) condoned the delay in filing the particulars and extended the time may not affect the validity and the binding nature of the charge.

Extending The Time For Filing

It is thus abundantly clear that it is only the omission to file the particulars of a charge within 30 days that renders the charge void. Under Section 141 of the Act the Company Law Board (earlier the Court) is empowered to extend the time if a charge is not filed within 30 days or within next 7 days with the permission of the Registrar. The section provides that the Company Law Board may direct that the time for the filing of the particulars or for the registration of the charge be extended. It is not clear why the words 'for the registration of the charge' are used in this provision, when the Act does not prescribe any time limit for registration of a charge. If no such time limit is prescribed there is no quesiton of extension of time. It is interesting to note that in the substantive portion of Section 141 the only words used are: 'the omission to file with the Registrar the particulars of any charge..' The words 'the omission to register the charge' are not found there. It, therefore, appears that the provision that the Company Law Board may extend the time for registration of a charge is superfluous. It is of no practical significance. The Company Law Board would not extend the time for registration of a charge. As a matter of fact the orders passed by the Company Law Board Benches very meticulously and clearly mention that the time is extended for filing of the particulars of a charge (See 'Selected Decisions of the Company Law Board Benches', a publication of the Department of Company Affairs, pp. 395 - 418).

Sub-section (3) of Section 141 provides that where the Company Law Board extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered. Thus here again the word registration is used. Rule 38(3) of the Company Law Board (Bench) Rules provides that certified true copy of the final order passed by the Company Law Board Bench extending the time shall be filed by the petitioner with the Registrar who will take the same on record.

In *Bank of Maharashtra Ltd. v. Official Liquidator*, [(1973) 43 Comp. Cas. 505 (Mysore)], concerning registration of a charge after the time for its filing was extended by the Court, it was contended by the Liquidator that the charge was void against him because the charge was not duly registered in as much as the Court had extended the time for registration of the charge and not for filing of its particulars. Thus, the official liquidator sought to make a distinction between 'filing' and 'registration' of a charge and argue that the Court should have extended the time for filing the particulars, and not registration of the charge.

Rejecting that contention the Court observed that, "Section 125 prescribes only the time within which the particulars of a mortgage have to be filed and does not prescribe the time within which the Registrar should register it. Secondly, Section 141 empowers the Court (now the Company Law Board) to extend the time on an application filed by the company or any person interested in the mortgage or charge or charge being registered, by the Registrar. All that a company is expected to do under Section 125 is to file the particulars in time. The act of registration has to be performed by the Registrar. If there is delay in registration then the only consequence may be that the registration may not prejudice any rights acquired in respect of the property before the mortgage or charge is actually registered. But it cannot be said that the registration itself is ineffective for all purposes".

The probable consequence of delay in registration of a charge as indicated in the above observations of the Court is what subsection (3) of Section 141 states. This means that if a company creates a charge of the same property before the applicant registers his earlier charge under the Company Law Board's order, the latter chargee generally has priority. Otherwise, the earlier charge enjoys precedence even if the charge is registered after the company goes into liquidation.

Conclusion

In conclusion, a charge is valid even if the Registrar does not register it or makes unreasonable delay in registering it, provided the particulars of it are filed duly within 30 days. A certificate issued by the Registrar is conclusive evidence of the fact that the charge is duly registered. However, even if the certificate is not issued by the Registrar there is no reason why the charge should not be said to be valid since the Act makes a charge void only if the particulars are not filed within 30 days. Needless to say, to avoid complications, it would always be advisable for a chargee to be vigilant to ensure not only that the charge is duly filed with the Registrar within 30 days either by the company or by the chargee himself (if company fails or neglects to do that) but also that a certificate of registration of charges is obtained from the Registrar in due course.

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Rules Under The Maharashtra Ownership Flats Act

The Rules under the Maharashtra Ownership Flats (Regulation of Constrution, Sale, Management and Transfer) Act, 1963 together with the Model Agreement to be entered into have been published recently. ***Mahableshwar Morje*** *argues that the new Rules together with the Model Agreement take away the existing rights of the flat purchasers and are heavily weighted in favour of builders and promoters.*

Skillful and ingenious drafting of agreements by solicitors and senior lawyers in favour of the builders and developers had resulted in denying legal rights to purchasers of flats. The Government decided to prescribe rules and Model Agreements which were to be entered into between the promoter and the purchaser of the flat, in order to safeguard rights of purchasers. However, the Draft Rules to amend the Maharashtra Ownership Flats Act (Regulation, Promotion and Construction etc.) Rules 1964, which were expected to protect and defend the rights of the purchasers of the flat within the framework of the Ownership Flats Act would result in denying and depriving the purchasers of their statutory rights.

The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 which have been framed under Clause A-2(E) of Sub-section (2) of Section 15 of the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 ostensibly have been amended to protect rights of purchasers.

Power to make Rules

Sub-section (2) of Section 15 casts a statutory duty on the State Government to make rules in respect of building design and construction materials to be used. This includes the disclosure of information and documents; the contents of the Agreement for Sale, the period within which the promoter shall submit an application for registration of a Co-operative Society or a Company; and the period within which the promoter shall execute the conveyance under Section 11 of the Act. The State Government may also make Rules on any other matter for the regulation of the promotion of construction, sale, management and transfer of ownership of flats. For the enforcement of these statutory obligations, there is no distinction between the failure to comply with the Act or neglect to comply with the Rules. Breach of these Rules also attracts penal consquences.

Draft Rules

What was expected was that the Draft Rules and Model Agreement would prescribe certain dates and particulars in respect of the specific extent of the carpet area and the area of the balconies; secondly, the price of the flat including the proportionate price of the common areas; and thirdly the description of the common areas and other facilities. It was also expected that the Model Agreement would specifically refer to the title of the builder or promoter on the basis of the property card or extracts of village form VI or XXI to avoid various mal-practices committed by the builders and developers. The Model Agreement ought to comply with various other requirements specifically mentioned in Section 3 of the Maharashtra Ownership Flats Act. The provisions ought to have provided safeguards to avoid delays in construction of flats, registration of the society, execution of conveyance and to prevent defective construction.

However, the amended Rules appear inconsistent with the object of the Act and in some respects are beyond the scope of the Act. Some of the amended Rules are more in favour of the promoter, rather than in favour of the purchasers of the flats. In fact, the amended Rules take away valuable rights previously available to the purchasers of the flats.

New Rules

According to the new Rule 3, the promoter is liable to display or keep all documents, plans, specifications or copies thereof referred to in clauses (a), (b) and (c) of sub-section 2 of Section 3 at the site and permit inspection of them.

Clauses (a), (b) and (c) of sub-section 2 of Section 3 provide as follows:

"(a) to make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed; such title to the land as aforesaid having been duly certified by an Attorney-at-Law, or by an Advocate of not less than three years standing;

(b) to make a full and true disclosure of all encumbrances on such land including any right, title, interest or claim of any party in or over such land;

(c) to give inspection on seven days notice or demand, of the plans and specifications of the building built or to be built on the land; such plans and specifications having been approved by the local authority which he is required so to do under any law for the time being in force;"

The new Rule merely repeats the provisions of sub-Clause (i) of Section 3. Normally these documents would be available but ordinary persons are not aware of the existence of these documents and plans and their rights in this behalf.

Under the existing Rule 4, a promoter is bound to hand over copies of all documents of title, plans, etc. Thus the display of documents of title may not help the purchaser of the flat since even previously though the promoters were bound to give copies under Rule 4, in fact such copies were never furnished. Unfortunately, there is no governmental machinery to verify as to whether on every site such documents, plans, etc. are displayed.

The new Sub-Rule (3) provides that the promoter shall, in the advertisement, give the particulars as required by sub-clause (i) to (iv) of clause (m) of sub-section 2 of Section 3.

According to the said clause (m) the promoter is required to state in the advertisement the following information:

"(i) the extent of carpet area of the flat including the area of balconies which should be shown separately.

(ii) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchasers of the flat; and the intervals at which the instalments thereof may be paid;

(iii)the nature, extent and description of the common areas and facilities; and

(iv) the nature, extent and description of the limited common areas and facilities, if any."

As far as giving the description of common areas and facilities and limited common areas and facilities is concerned, if the project consists of one or two buildings it will be possible to give the details; but if the project is big, this will create complications as all the buildings may not have the same common areas or facilities.

Other loopholes also remain unplugged. For example, in case of the prices for sale of flats immediately after the builder has purchased the land, it may be possible for the builder to mention the sale price of a flat. But if the builder sells some flats later he is bound to increase the prices. The increase in prices may be due to the increase in the cost of construction, or due to the mounting interest burden and overheads, or due to a sudden rise in the price of flats as it is a free economy. At this time it will be difficult for the builder to mention or give all the particulars in the advertisement as also in the agreement.

Model Agreement

The Model Agreement to be entered into between the promoter and the purchaser of the flat is given in Form No.5.

It must be pointed out that according to the amended Section 4, the agreement shall be in the prescribed form. Thus the adoption of the form is mandatory.Therefore, if the promoter desires to change the agreement, the question will arise whether he can make changes in the model agreement. The Form is exhaustive and is almost similar to the agreements which are being entered into today by the promoters except for the provisions for apportionment of the price, carpet area and other details to be mentioned.

Floor Space Index

Rule 4 makes it obligatory on the promoter to declare the F.S.I. available. This is a welcome provision. However, the following proviso is contrary to law and against the interests of the society member:

"If at any time prior to or even after the execution of the conveyance or assignment of lease the floor space index at present applicable to the said land is increased, such increase shall enure for the benefit of the promoter alone, without any rebate to the flat purchaser."

It was really surprising that such a provision should be made. In fact, it has always been the contention of the societies that once the conveyance is executed, the property belongs to the Society and if any further FSI is available the same will belong to the Society. It is not understood how after the execution of conveyance the promoter can reserve his rights on the FSI which may be available after conveyance. In fact this directly contradicts Section 7(1) (i) (ii) where it is specifically provided that after plans and specifications for buildings are approved, the promoter shall not make any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in the said building.

Thus, by Section 7 as amended, it is specifically provided that after the plans are sanctioned, the promoter cannot make any additions or alterations without the previous consent in writing of the purchasers of flats. However, the Model Agreement allowed the promoter to reserve his right on the FSI even after the property is conveyed. The effect of these two clauses would have been that neither the flat purchaser nor the promoter will be in a position to utilise the FSI and take advantage of any further FSI which may be availabe. This is also contrary to the undertaking made by the promoter to the Registrar of Societies while forming the Society that all further FSI will belong to the Society and not to the promoter.

It was, therefore, suggested that the flat purchaser or the Society must continue to be entitled to any extra FSI. Therefore, that portion of Rule 7 which disentitles the flat purchaser or the Society to the benefit of any extra FSI ought to be deleted. Fortunately, the Government has accepted this contention.

Clear and Marketable Title

Clause 5 of the Model Agreement provides that in case the promoter is acting as an agent of the vendor, lessor or original owner, he shall, before handing over possession of the premises to the flat purchaser, and in any event before the execution of the conveyance, ensure that the land is free from all encumbrances, etc.

Termination of Agreement

Clause 7 of the Model Agreement empowers the promoter to terminate the agreement and to forfeit the monies paid by the flat purchasers, on the flat purchasers committing defaults in payment on the due date of the amount due and payable by the flat purchaser including his or her proportionate share of taxes levied by the concerned local authorities and other outgoings and/or on committing any breach of any of the terms and conditions contained in the agreement.

This provision is made inspite of clause 6 of the Model Agreement providing for payment of interest. Thus the promoter gets a right to terminate the agreement and to forfeit all the monies paid by the purchaser of the flat if the latter commits a default even of the last instalment. The agreement can be terminated and monies can be forfeited even if the purchaser commits default in payment of his share of the outgoings. Generally, a flat purchaser has to pay outgoings after he is put in possession of the flat. Therefore, the promoter gets a right to terminate the agreement on a default in payment of even a small amount of outgoings.

It is, therefore, suggested that Clause 7 should be deleted. The promoter should not be allowed to revoke the agreement if the purchaser has paid more than 50% of the amount shown in the agreement. This should be so as the present experience in Bombay is that 40 to 50% of the amount or taxes without receipt, can be revoked only with the permission of the Collector or such other Competent Authority.

Significantly, in the proposed amendment of the Bombay Rent Act, the Government wants to provide that even after a suit for ejectment is filed, the tenant can tender the rent; but in the case of ownership flats the Government wants to take away the right of a flat purchaser who has paid lakhs of rupees for purchase of his flat.

Possession and Refund of Amount

By clause 9, it is provided that if the promoter fails or neg-

lects to give possession of the premises to the flat purchasers by the specified date, the promoter shall forthwith refund to the flat purchaser the amount already received by him for the premises with simple interest at 9% per annum from the date the promoter received the same till the date the amount and interest thereon is repaid.

This will intensify malpractices by the promoters as any promoter can take advantage of such a clause particularly when the prices of flats are rising every day and when the promoters and builders are paying interest to the investors at a higher rate. Every one knows that the purchaser of a flat also has to pay black money and this will not be refunded because there is no record of it. Thus a promoter, without constructing any building, can go on entering into agreements, refund the white money and go on earning higher rate of interest if he invests the monies elsewhere, particularly when even banks and corporations pay high interest rates.

It is important to note that under Section 13, any promoter who without reasonable excuse fails to comply with or contravenes any provisions of the Ownership of Flats Act, is liable for punishment. Section 8 gives an option to the promoter for termination and refund. Thus the promoter can easily escape from the provisions of Section 13 and escape the criminal liability. Clause 9, therefore, should be deleted.

The Government has contradicted itself completely. On the one hand the Government wants the promoter to escape from liability, and on the other hand the amendment to Section 13 of the principal Act makes a show of increasing the punishment for default by promoter. It is, therefore, suggested that the promoter should be required to refund the money on the basis of the market value of the flat at the time of refund, with a rate of interest at 10%. The promoter should be made to pay adequate compensation and should not be allowed to escape by making payment only of the principal amount.

Formation of the Society

Clause 12 of the Model Agreement empowers flat purchasers, along with purchasers of other spaces and garages and/or car parking areas, to form and register the Society. The definition of 'flat' includes a garage but does not include space or parking place.

The Rules, therefore, are wider in scope than the Act. Thus, a person who has sold open parking space can become a member of the Society. This is even contradictory to the Development Control Rules of the Municipal Corporation of Greater Bombay.

The effect of Clause 12 of the Model Agreement is that the duty is now cast on the flat purchasers to form a Society, assuming that the promoter shall co-operate with the flat purchasers in forming the Society. This is also contrary to Section 10 which makes it mandatory on the promoter to form and register the Society as soon as the minimum number of purchasers have bought and taken possession of the flats.

It was brought to the notice of the Bombay High Court that builders avoid registering a society on flimsy grounds. Thereafter, it was found that the Deputy Registrar of Co-operative Societies was deliberately declining to register the societies. The Courts had held that applications for registration could not be refused. (*Dr. Devendra Chimanlal Shah v. State of Maharashtra*, CTJ 1642 of 1986 - No.1642 of 1983 dated 20th August, 1984). A Rule must be made to grant provisional certificate of registration to the Society, when purchasers of the flats are put into possession.

The amended Rule will enable the promoter or builder to escape from his statutory obligation arising under Section 10 of the Act, and delay the registration in order to retain the control over the property. This clause is also against the interest of the purchaser of the flat. It is, therefore, suggested that promoter should not be allowed to escape from his statutory obligation to register the Society, and the member should be made to extend all co-operation. If there is delay on account of non co-operation by the member, the promoter should not be held responsible.

It must be noted that where the promoter failed to take any action to form a Co-operative Society, it was held to be an offence under Section 10 Rule 8 of the existing rules [*Bhupal Anna v. State* (1982) 1 Bombay C.R. 340]. It must also be noted that executing a conveyance in favour of the Society under Section 11 of the Act, is held as a statutory obligation [*Vrindavan (Borivli) Co-operative Housing Society v. Karmarkar Bros.* (1982) MLJ 607] whereby under Rule 9 of the existing Rules the promoter was required to take necessary steps for executing the conveyance within a period of four months from the date of registration.

With regard to the provisions relating to the conveyance, it is suggested that once the Society is registered as required under the Maharashtra Co-operative Societies Act and Rules thereunder and if the promoter does not execute the conveyance within a period of four months or within a reasonable period, the property should automatically vest in the Society, so that the Society can take up necessary steps to regularise further transactions, if any. In case any stamp duty is required to be paid for the transaction that should be recovered from the promoter.

Payment of Legal Charges and Other Dues

Clause 15 of the Model Agreement casts a duty on the flat purchasers to pay to the promoter on or before the delivery of the possession, amount for legal charges, share money, entire fee for formation and registration, etc. This throws an additional burden on the purchasers of the flats. Normally, legal expenses should be borne by the promoter. However, the promoter is allowed to collect money on account of share money and expenses for the registration of the society, stamp duty, etc.

The amount should be deposited in a separate account as many times it is found that once the amount is collected, the promoter avoids taking any further steps for registration and payment of stamp duty, etc, without reasonable cause.

Transfer of Flat

Under Clause 29, a flat purchaser cannot transfer his possession without the previous consent in writing of the promoter. It is important to note that when the purchaser of the flat is put in possession of his flat, he has paid the entire price and all deposits required to be paid and thereafter nothing remains due and payable save and except his share of maintenance charges.

It is not understood why at that stage he should obtain the previous consent in writing of the promoter for sale of his flat. This Rule will result in forcing the transferee to pay additional transfer fee as a result of which the promoter will delay the registration and conveyance of the society.

Terrace Flat

By Clause 35, it is provided that when the terrace is sold to the flat purchaser for his exclusive use, the same will belong to him exclusively. It must be noted that normally the terrace should be a common property of the society, and therefore, it is suggested that unless the majority of the members agree, no one

person should be allowed to have the terrace exclusively for himself.

Welcome Amendments

While pointing out the objections to the Rules, it must be noted that there are some good amendments also which are in the interest of the purchasers of flats.

For example, under Rule 9, a charge is created in favour of a purchaser on the building where it is situated or where it is likely to be situated.

Rule 10 provides that if the flat purchasers bring to the promoter's notice the defects in the premises or in the building in which the premises are situated or materials used therein or unauthorised construction of the said building within a period of three years, it shall be rectified by the promoter at his own cost.

There is also a provision in the Rules which further provides that inspite of the defects or unauthorised changes brought to the notice of the promoter at the expiry of the period of 3 years, the flat purchaser, along with other purchasers in the said building, shall be entitled to receive from the promoter the compensation for such defects or changes.

However, it must be noted that where the promoter fails to carry out the defects within a reasonable time, the purchasers of the flats or the Society should be allowed to remove the defects and should be allowed to recover the cost with interest thereon from the promoter and at least 10% of the total amounts collected by the promoter should be kept in a separate account for this purpose.

In order to avoid the payment of money without a receipt, restriction should be imposed not to take an amount over Rs.1,000/- in cash, so that there will be some check on cash transactions.

Under Section 6 of the Ownership Flats Act, the promoter is supposed to be a trustee and therefore, one expects him to look after the difficulties of the purchaser of the flat in the capacity of a trustee. It is, therefore, suggested that additional Rules be framed whereby it will be obligatory on the part of the promoter to get an occupation certificate within a period of one month from the date of occupation, and if the Municipality has allowed the occupant to stay in the premises for more than 3 months with all necessary amenities, it should be deemed that the occupants are entitled to the occupation certificate and the Municipal Corporation should not be allowed to take steps under Section 353-A of the Municipal Corporation Act.

At times on account of alleged non-payment of taxes the promoter avoids the registration of a society and/or avoids the conveyance in favour of the Society. The purchasers are virtually blackmailed into paying the taxes in order to avoid the property from being auctioned off. To avoid this the purchaser of the flat should be allowed to have a lien on the property to that extent and they should be allowed to adjust that amount against the deposit lying with the Municipal Corporation and other authorities.

On inspection of title deeds, including the extract of village records and property register and the agreements for sale and copies of the original plan, the promoter should be made to enclose these copies along with the agreement for sale itself in order to avoid any further disputes or delays.

Unfortunately, the provisions for inflicting punishment on delinquent builders or promoters are inadequate and insufficient. These provisions are merely on paper as they are made subject to a number of 'excuses', such as the absence of building material, unexpected riots or disturbances, etc. In the absence of specific provisions relating to reasonable cause, builders will always try to seek some excuse or other to avoid construction and delay in delivering the possession and thus continue to exploit the purchasers of the flats.

READERS CAN CORRESPOND WITH THE EDITOR, THE LAWYERS AT 818, STOCK EXCHANGE TOWERS, DALAL STREET, BOMBAY 400 023. INDIA. ☎ 272794

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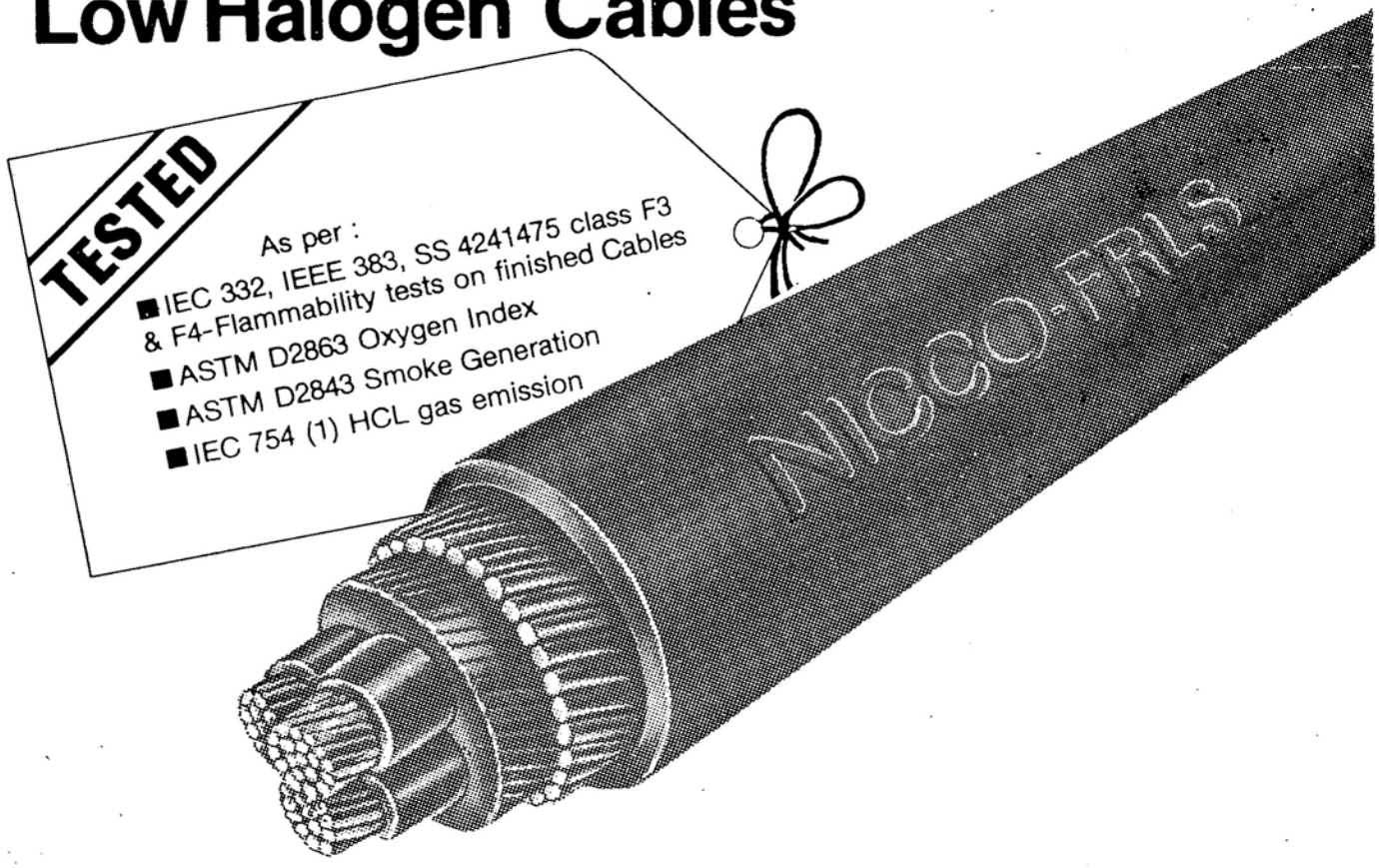

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LETTERS

PUCL Activist Jailed In Raipur

Raipur Municipal Corporation (RMC) has started the eviction of small shopkeepers and vendors for "illegal encroachment". Armed with an order from the MP High Court, and mis-interpreting the Olga Tellis Case Judgement of the Supreme Court, the Municipal Administrator, Ajay Nath, and the Commissioner R.D.Pandey, have rendered many self-employed people jobless and site-less. In the name of "beautifying the city" the administration has discriminated, particulary in Sadas Bazar, in favour of the rich and powerful While, on the one hand, small vendors have been shifted to Shashtri Bazar, the rich business community's "illegal encroachments" have been spared by the RMC.

The entire demolition drive of the RMC has raised the following issues:-

A) Is the RMC justified in demolishing the footpath vendors and self-employed people without providing any systematic alternate arrangement for a reasonable livelihood?

b) Is the RMC biased against the small and poor vendors and self-employed, and deliberately benefitting the rich and influential under its present demolition drive?

c) Whether or not the RMC is following the rules of natural justice and humanitarianism by abruptly demolishing the self-employed during the night hours resulting in damage and loss to the life and properties of the poor and oppressed? (Two poor vendors have sustained multiple fracture of legs due to the night activities of the RMC)

At the same time, eight vendors and hutment dwellers in the Lendi Talab area were evicted by the RMC, although they are covered under a stay order granted by the Supreme Court in May 1983, resulting in a clear-cut case of Contempt of Court. As PUCL protested against the illegal demolitions, the police arrested Mr.Sail PUCL Regional Secretary on the charges of obstructing government officials from performing their duty under Cr.P.C.341 and 353 and under Sec.506B for threatening the life of government officers. He was released on bail the same evening through the efforts of lawyer members of the PUCL. Through such highhanded means RMC robs the poor and muzzles protest.

PUCL & DR
Raipur

Women's Right To Home And Housing

In India women only have the right to a temporary shelter in the house of their fathers, brothers or husbands. Society and the religions deny the woman a right to property in her own capacity. Thus a woman who is the caretaker of the family property, the children,the home has no right to the very house she has nurtured to make a secure heaven, whether be it in a village hut, in a slum jhopadi or a palacial bungalow.

Womens' Organisations have pointed out that:-

1 Though there is a uniform personal law recognising the obligation of the husband to maintain his dependent wife, the right of a wife to part ownership of the property acquired by the husband and wife during marriage is not recognised.

2 Contribution of a female to family economy is not recognised. A larger number of women participate in the family's effort to earn a livelihood but are unpaid family workers.

3 Most married women do not have an independent source of income. Many give up their employment after marriage to devote all their time to house work.

4. Women are economically dependent on their hushands. Any property moveable or immovable acquired during marriage is paid for out of the husband's earnings. The matrimonial home is registered in the name of the husband.

In case of divorce or separation women without any earning, without any right to the matrimonial home are deprived of all security.

The Joint Women's Programme has recommended that :-

1. In programmes for the distribution of house-sites, houses and pattas for agricultural land, efforts be made that all such distributions are registered in the names of husband and wife jointly.

2. Government should encourage giving house sites, agricultural land and houses to single women, heads of households who are dependent on others and have no other means of livelihood and survival.

The Delhi Development Authority's decision to give joint ownership to husband and wife for the houses registered under their schemes is a laudable step. This should set housing agencies of different states and state administrative bodies rethinking on the question of joint ownership.

Joint Women's Programme New Delhi 110 014

Sphinx-like Silence

In AIR 1968 SC 754, a Constitution Bench of the Supreme court of India had occasion to deal with Rule 6A(2) of IAS (Recruitment) Rules, 1954. The court decided that: "The transition of a member of the service from one scale to another does not depend upon selection or the consideration of the comparative merits of the officers in the junior scale inter se but only upon a consideration of his seniority."

Relying on this law, an IAS officer of Maharashtra Cadre filed a petition for appointment to the senior scale of IAS.

The Petition was finally heard and dismissed by the Central Administratitive Tribunal, New Bombay Bench, New Bombay.

Unfortunately there is no mention in the judgement though the petitioner relied on that case. The Tribunal has acted as if it is ignoranmt of Article 141 of the Constitution of India. It need hardly be said that disregard of the Constitution by the Tribunal will only pave the way of lawlessness in the country, because if the judiciary of the country is disrespectful towards the Constitution, there cannot be a rule of law in the country.

It is increasingly becoming a tendency in the courts not to record arguments of the litigant thereby eliminating the necessity to give reasons. This results in great miscarriage of justice, leaving litigants with no remedy. If an appeal is filed, the judges of the appellate court rely on the judgement and not on the statement of the lawyers.

A reader

COVER STORY

Shackling Labour

Recently the Central Government circulated a note proposing substantial changes in the Industrial Disputes Act, 1947 and the Trade Unions Act, 1926. The note has been reproduced in the Notice Board section of 'The Lawyers' of February and March 1987. **Madhav Chavan** *in this article argues that the proposals are, in effect, anti-labour and need to be countered.*

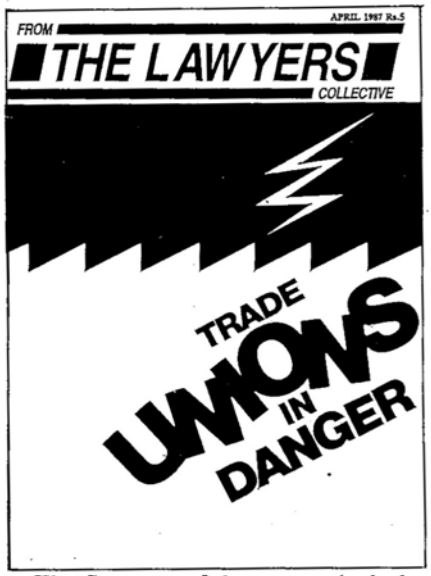
The proposed amendments to the Industrial Disputes Act, 1947 and the Trade Unions Act, 1926 have been circulated, presumably by the Union Labour Minister's office, in order to initiate a discussion. The theme of the amendments is not new. In 1976, under the Indira Gandhi government and in 1978, under the Janata government, similar proposals were toyed with and shelved. Clearly the industrialists, and not just the present ruling party, have a keen interest in getting the amendments through. While trade unions have protested against the amendments, no section of the industrialists have found it necessary to say anything against the amendments. The amendments are against labour and cannot pretend to be otherwise.

The present government, the representative of the industrialists as a whole, has a dream. Economic progress without industrial conflict. Strikes (and of course lock-outs) stand in the way of realisation of this dream. Industrial disputes stand in the way. Class conflict stands in the way. So, says the government, make laws and do away with industrial disputes (by calling them 'relations'!) and wish the class conflict away. Unfortunately, as long as production relations based on exploitation exist, disputes will continue.

Yet one cannot but agree with the proposal that laws enacted forty and sixty years ago must be changed. However, the question is, in whose favour? Those who say changes should be in favour of the working class, including the so called "well paid", are quite forthright about it. Those who want the scales to be further tipped in favour of the industrialists are not in a position to openly voice that view. They 'try' to be 'even-handed'.

At this point, when everybody is crying wolf and nobody really knows if the wolf is about to really come, it may not be worthwhile debating the effects of each and every amendment proposed by comparing it with the laws as they exist today. It is necesary though to look at the proposals and pick the theme. If it is anti-labour, it must be defeated and a proper philosophical framework should be laid down to oppose changes in the present law.

The New Machinery



The first part of the proposals deals with the organisation of a new machinery for resolution of disputes. Since there is no preamble to the proposals, we must hazard a guess that the new machinery is expected to speed up the process of litigation. Whether this will actually happen or not remains to be seen. Yet there is nothing in the proposals to indicate that it will actually speed up the process.

The Industrial Relations Commissions proposed to be set up are to comprise non-judicial members in addition to judicial members, both being equal in number. These non-judicial members will be 'eminent' people in the fields of trade unions, business and management. The goddess of justice is naturally blind to the differences between trade unions and management. However, the author(s) of the proposed amendments is (are) not. In the sections dealing with strikes, union recognition and so on, they make it clear that they are out to finish off, with a stroke of a pen as it were, the unions which "instigate" or call for "illegal strikes". They will have such unions derecognised and their registrations also may be cancelled.

The Industrial Relations Commissions, comprising different members, are to adjudicate disputes. Has it not occurred to the authors that for obvious reasons the "non-judicial" members may not agree amongst themselves over a ruling? This is an obvious lacuna, which is not expected in such a detailed note. The details of how the machinery works, its design etc. need not take up our time. Let us look at its product. If it is going to manufacture the bitter pill we should not fall for the salesman's sweet talk.

The Right To Strike

According to the Directorate of Economic and Statistical Survey, Government of Maharashtra, on January 1, 1986, the ratio of number of workers affected by lockouts to those on strike was 1:1 . In January 1987 the workers affected by lockouts had increased and the ratio was 3:1. A guided tour of the industrial area will make the picture more vivid. The lock-out has become a regularly used weapon of the industrialists. Any excuse will do. In fact, excuses are contrived. An eminent management lawyer candidly declared recently in a private conversation that since the employer cannot retrench, lay-off or close down, his hands are tied and he resorts to lock-outs. Apparently a lock- out hurts less, when profits-losses are the issue. Otherwise the company has to be kept running, with huge wage bills. It is a war of attrition in which the workers must lose. The industrial environment today is characterized by an offensive on the part of the industrialists. The offensive

is linked with modernisation and higher productivity at the cost of the working millions.

Yet, the proposed amendments are making strikes (illegal ones of course!) their target. Finish them off while they are down is the name of the game.

Proposals 4 and 10 in section A.VII.B of the circulated note are designed so that no trade union (and its office bearers) engages in or even instigates "illegal strikes". Further, the office bearers of the trade unions are expected to stay out of trouble with not only the criminal law but also under the Industrial Disputes Act. It is common knowledge that the entire strategy of the capitalists, er.. employers, is always based on proving a strike to be illegal and the strategy of the trade union is exactly the opposite. Now our elected government would like to hang a threat of derecognition on the heads of the unions as soon as workers contemplate a strike without following the new procedures for going on strike as proposed in Section E(a). Advantage: capitalists.

Most trade unionists worth their name, at one time or another, are prosecuted under some provision of the Indian Penal Code (IPC) or the other. These prosecutions need not necessarily be concerning a trade union dispute but even a simple political satyagraha. Prosecution under IPC is one of the weapons the government tries to use to harass trade unionists at all levels. Anybody familiar with the working of a trade union can easily imagine a hundred scenarios which could lead to prosecution and conviction of a bona fide trade union leader. Here is another way of increasing litigation. Appeals and counter-appeals regarding the criminal cases go on. Mr. Billionaire or his nephew, Mr. Millionaire, refuse to negotiate with a union or a leader whose registration is likely to be lost. The government pretends that it is only out to get rid of the professional instigators. But, in effect, it is going to deny the workers their right to be represented by an organisation or an individual of their choice. Down with the fundamental democratic rights is the clarion call of the Government. First set: to the capitalists.

Recently in the north-eastern suburbs of Bombay, I had an opportunity to discuss this point with some workers. The suggestion that emerged from the workers is as follows.

"You want our leaders to follow all the laws. If they don't, you will take away our fundamental right to get organised in the union of our choice. We'll accept the suggestion provided you accept ours: Anytime an employer or his manager breaks a law, whether a tax, civil, labour or criminal law, THE EMPLOYER AND HIS FAMILY SHOULD LOSE THEIR RIGHT TO OWN PROPERTY AND A MANAGER SHOULD BE BARRED FROM HOLDING A MANAGERIAL POST."

The problems of unorganised workers working in small units are of major concern. The government has repeatedly taunted the organised working class in this context and yet there is no proposal incorporated in the note to give relief to the weaker, inhumanly exploited wage slaves in the small units.

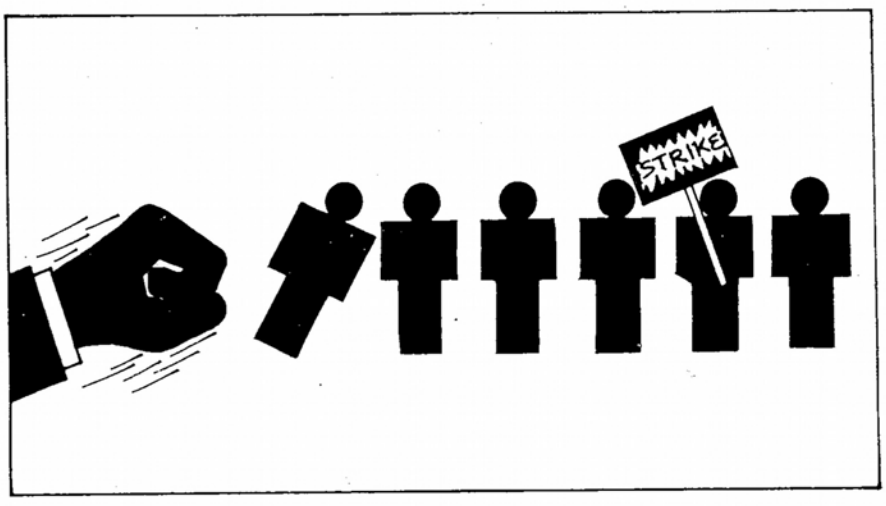
Section E pretends as though strike action is on par with lock-outs. This is unacceptable . Perhaps to add a touch of humour, Section E.b.iv pompously declares that the "government shall continue to enjoy power to prohibit lock-outs". What the government enjoys is obvious. As noted above, 75% of workers engaged in disputes are subjected to lock-outs today. All the government can do is to note this fact. Should we appreciate the Union Ministry's sense of humour?

Multiciplity of Trade Unions

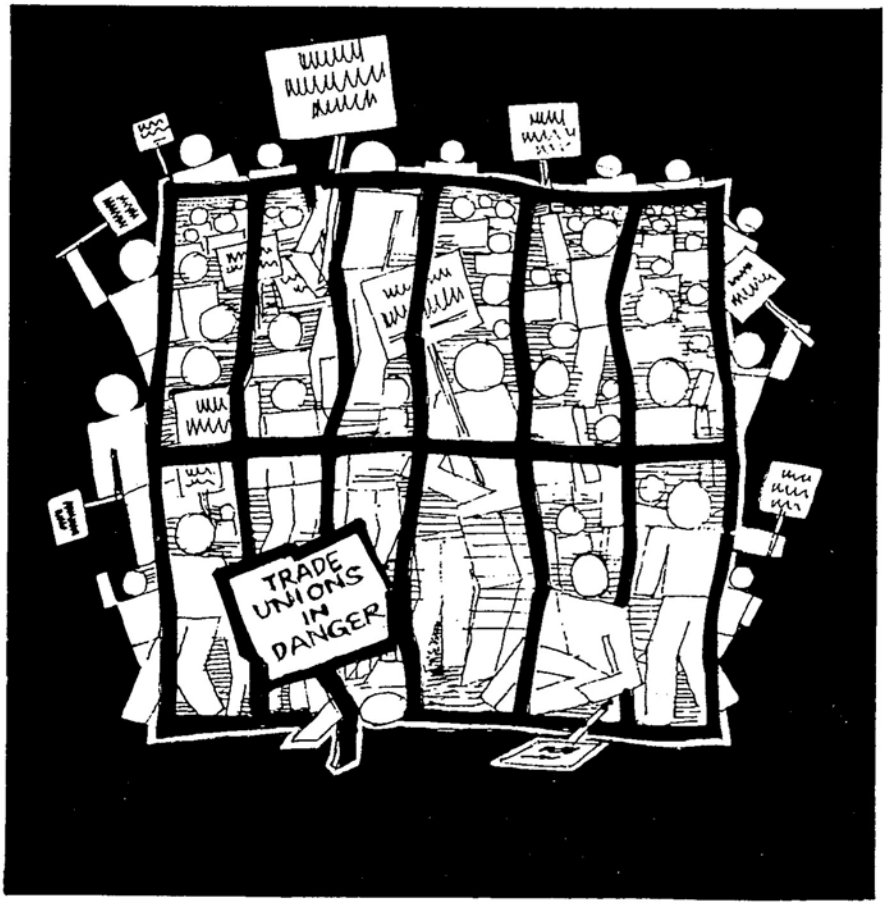
One third of the proposed amendments, sections B and C, deal with an issue of prime importance, the issue of multiplicity of trade unions.

No trade union leader worth his/her name wants the problems due to multiplicity to continue. The specific reasons why multiplicity is undesirable to any trade unionist varies depending on one's approach to trade unions and working philosophy. Interestingly, management representatives also declare that they would like the business of multiplicity to be settled. They would like, they say, to be able to deal with one single representative of the workers. What they will not declare openly is that they want a representative who does what they want. In the event that the particular representative becomes a stumbling block, the management does everything in its power to break up the unity of workers and promote another union. It would be erroneous to think that this happens only at the unit or industry level. A glance at the history of trade unions clearly bears out this point.

While discussing the problem of multiplicity of unions, it is necessary to separate trade unions which have arisen out of fractionation of the political mainstream of the Indian working class movement from those which have been born and/or promoted as a divisive tool of management aided by the political environment at the time. Until 1946, barring some intermediate phases of political disunity the organised working class mainly in large-scale industries, was united under the All India Trade Union Congress (AITUC), these days identified with the CPI. The birth of Indian National



Trade Union Congress (INTUC) was the introduction of class conciliation approach in the trade union movement in India, except in Ahmedabad, where M. K. Gandhi had already organised the Mazdoor Mahajan on a purely class conciliatory basis much before independence. The Hind Mazdoor Sabha (HMS) was born out of a split within INTUC in 1948 and could be considered a welcome event and a sign of the political maturity of a section of the working class. The split within AITUC to give rise to Centre of Indian Trade Unions (CITU) was entirely different. Nonetheless all these organisations were born as a result of a lack of consistent environment promoting unity of the working class. The organisations, or more accurately the gangster leaders, who appeared on the trade union scene later, were born out of a need of industrialists a time when the working class, under tremendous pressure was waging numerous battles. The group of number of industrial disputes registered in Maharashtra since 1960 to 1986 against the corresponding year show a high peak in 1966. This year and the following period upto 1974 saw the birth and rise of gangster "trade unionists", coincidentally operating under the INTUC banner. This was the period when strike breaking activity also peaked with Shiv Sena plying a trade union among workers which has also split in recent years.



How to deal with Multiplicity

One may distinguish between the trade unions by the interests they serve but it would be wrong to insist that they exist, barring those protected by the BIR Act only because of the employer and/or legal sanction. Without some support from the workers (for whatever reasons) a union can not continue to survive.

All trade unionists worth their name demand that the principle of ballot should be accepted as the sole criterion to decide which union has how much following among the workers. Mr. Y. B. Bhonsale of the Tata Labour Services has (See Box) three reasons to disagree viz. i) non-members would be able to vote, ii) the trade union movement would be weakened (since) iii) membership will not be considered important. Without raising any doubts about his sincerity in giving the second reason, let us tackle the reason which would be central to the problem of "verification of membership" and to the problem of appointing the recognised union and/or the Bargaining Agent/Council.

The "union", which is wrongly considered synonymous to the leader(s), are the workers. The appointed office bearers of a recognised union, which under the current provisions is also the sole bargaining agent, represents ALL workers in a collective dispute regardless of whether they are PAID MEMBERS of that union or not. The agreements signed by the union representatives are binding on ALL workers within the unit or industry. The non-members may or may not have active objection to the recognised union representing their interests as a Collective Bargaining Agent. Payment of membership dues, or better still, a record of payment of membership dues is not a reliable criterion to identify the representative union. Coercion, collection of membership at the salary counter, variations of check-off system, a bulk collection of annual or quarterly membership are methods typically used by recognised unions. These modes of payment of membership cannot prove that the workers are paying the money of their own free will.

Why should a worker have to pay even a paisa to prove that he is a member of a particular union? The union membership is to be paid to raise funds for the running of the day to day affairs of the union and is entirely a business of the workers. They may raise these funds monthly or as and when the need arises. What right does the government or the employer have to interfere with this process?

On the other hand, in a secret ballot, a worker chooses the union he wants to join. The final tally of votes will not say who belongs to which union but the numbers will clearly give a picture of which union has what "membership", or better, what following. Why should a management representative object to non-members voting? A worker may have paid membership dues to a particular union but on the

day of the ballot he may vote for another union. Why stop him?

Since the recognised union, the bargaining agent, represents all the workers any way, they must be allowed to vote on their choice with no money coming in the picture.

The acceptance of the principle of a secret ballot must necessarily be the first step towards attacking the problems arising out of multiplicity of unions.

Bargaining Councils And Associate Bargaining Agents

The concept of Bargaining Councils is a welcome one but has little meaning without a proper procedure to ascertain the following each trade union has by a secret ballot.

The constitution of the Bargaining Council makes the issue of union 'recognition' redundant because all unions will have a proportionate representation on the Bargaining Council. Since 'recognition' has to do with the authority to enter into collective agreement, once a Bargaining Council of all unions is formed, 'recognition' has no real meaning unless even in a Bargaining Council the recognised union has the sole and final say. In such a case the significance of formation of a Bargaining Council is lost.

Section C.26 (ii) proposes representation of more than one registered union (having at least 25% membership) on the Bargaining Council as an Associate Bargaining Agent. Most trade unionists welcome this step. The disagreement appears to be, and is bound to crop up time and again in practice, about what to do in case the representatives of a minority of workers on the Bargaining Council disagree with the majority of the workers, say regarding some crucial clauses of an agreement to be signed? Democratic principles dictate that views of the majority should be binding on the minority. If this business of decision making is restricted to the Bargaining Council, the very foundation of democratic principles is thrown out of the window.

The purpose of proportional representation is not to make a show of democracy. It should be recognised that the representatives of a majority of workers could be wrong in the best case and purposely working against the interests of the workers in the worst. In such a case a minority union should have the right to go before the general body of all the workers and present its arguments against the draft agreement worked out by the majority representatives. The general body of all workers should be the decisive factor. In such a case all the workers' general body should have the right to appoint the minority union representative(s) as the chief Bargaining Agent(s) until the next ballot is due.

To some this suggestion may sound very chaotic and undesirable. However, it puts workers in the driver's seat. Running of a union is NOT purely 'a business of the leaders unless they are forthright and truly represent the workers. The workers are continually educated as they participate in the workings of a union. In time they can tell apart the good, the bad and the ugly.

Working class democracy is no sham democracy. Unfortunately the present legal burreaucracy and its conceptual framework is intellectually incapable of comprehending it because it's ways of thinking always runs counter to that of the working class whom it holds in utter contempt.

Out of three trade unionists interviewed by the 'Lawyers', two have rejected the proposed threshold limit of 25% membership for a union to be certified as registered. It may appear, superficially, that continuing to allow 7 persons to form a union while in the same breath denouncing multiple trade unions is contradictory. However, the root cause of the multiplicity problem is not that more than one union exists. The cause lies in the history of that unit or industry and state of affairs as regards the relationship between the recognised union and the employer.

Some other minor points regarding the proposal of minimum 25% membership in order to grant certification/ registration need to be made. First of all, it is too sweeping a condition. Most large industries and industrial units have several branches in different regions varying in the number of employees. In addition, it is quite possible that within a large unit, workers engaged in different categories of work may desire, as groups, to be represented by different unions. In fact in the last twenty years there has been a rise of category based trade unoions. They have come into existence because the 'general unions' have not effectively represented such industrial categories. In such cases the condition of 25% membership is undemocratic.

Conclusions

The proposals put forth are ridiculously specific about unimportant issues such as salaries of members of the Industrial Relations Commssions. On the other hand in case of important issues such as decision making and operations within the Bargaining Council, they have nothing to say.

The proposed amendments are specifically aimed at the 'conduct' of office bearers and unions and are blatantly against the working class. However, an eminent management lawyer pointed out that although BEST workers' recognised union could not call for a strike under the BIR Act, George Fernandes never once lost recognition on account of illegal strikes. All calls to strike work were given by an action committee leaving the recognised union out of the picture. In case the amendments are approved, he felt, trade unionists will counter the government's gimmicks by their own counter-gimmics.

The proposal to form Bargaining Councils in units/industries where multiple unions exist is a welcome one but a good apple once thrown into a basketful of rotten ones cannot remain as appetising as earlier. The rejection of check-off system and a universal acceptance of the principle of the secret ballot is a must if a serious effort is to be made to correctly resolve the problems arising out of multiplicity.

Finally the problems arising out of multiplicity of trade unions are more serious with regard to the working class unity against the class of industrialists. It is a political problem that has to be solved by the working class and will not be resolved by legislation imposed from above.

Madhav Chavan is actively associated with the 'Shramik Vichar', a working class paper published in Marathi.

COVER STORY

We asked trade unionists and management representatives for their views on the proposed changes in the industrial laws. Extracts from their responses follow.

The right to form a union and the right to strike are fundamental rights of workmen, which are sought to be abrogated by the proposed changes.

Multiple unions exist because workers feel their grievances are not being redressed, so they move to other unions. Anti-union laws like the Bombay Industrial Relations (BIR) Act and the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices (MRTU & PULP) Act, which allow for recognition of unrepresentative unions form the basis for multiple unions. Multiplicity can be avoided by introducing and implementing the secret ballot system, where the sole recognised union is the majority union chosen by the workers. The Congress Government cannot afford union recognition by secret ballot because the INTUC, its union, would be eliminated. The 25% membership rule for formation of a union would also make it difficult to get rid of management sponsored unions which have been undemocratically imposed on workers. Similarly, the restriction on 'outsiders' to two or 25% of the office bearers is aimed at depriving workers of the services of professional and political trade union activists.

Proportional representation of majority and minority unions in the Collective Bargaining Agent by secret ballot is desirable, but when a consensus cannot be reached on certain issues, the viewpoint of the majority should be binding on the minority. Workers cannot really have their grievances redressed through a forum while there exists an unequal relationship between the employer and employees. Elimination of capitalism itself will remove bias against workers- **Vivek Monteiro**, *C.I.T.U., Maharashtra.*

Both political parties and independent trade unions (not affiliated to any political party) have tried to establish their own unions in as many establishments as possible. An absence of a common philosophy has also led to workers shifting loyalties from one union to another for monetary benefits.

Multiplicity cannot be avoided as the Constitution grants the right to form associations. The proposed changes recognise that multiplicity of unions cannot be avoided but it can be reduced. It would be in the interests of the working class to avoid multiplicity.

"One unit - one union" would be an ideal situation but is not likely to materialise soon.

I do not agree with the secret ballot method as a worker who is not a member of a union would also be able to vote for election of the bargaining agent. The trade union movement would be weakened as membership will not be considered important.

The check-off should be valid for two years instead of three years, because the membership for the third year would be taken into account by the Labour Court on the expiry of the three year term. If the employees want to elect another Union, they should have been its members during the whole of the third year, otherwise the earlier bargaining agent will continue for another 3 year term.

The 25% membership rule would reduce multiplicity of unions in one unit and also limit the number of contestants for the principal bargaining agent and the associated bargaining agent.

Reduction of outsiders would make the internal unions stronger.

Proportional representation can be ascertained through the check off system. Whether the collective bargaining agent comprising the majority and minority unions is effective or not, cannot be anticipated.

The industrial disputes Grievance Settlement Authority has been provided for in Chapter II-B of the IDA Act, 1947 which has not yet been implemented. This may provide unbiased hearings for employees.

Y. B. Bhonsale, *Tata Services Ltd.*

Root cause of multiplicity of unions is the employers' need to divide the employees. Multiplicity of unions may represent various stages of consciousness amongst workers. If workers are conscious that unity is their strength, there would be no multiple unions. Ideally, there should be one union per unit and one trade union centre in the country. This can be implemented not by the State but by workers and their leaders. Secret ballot which allows workers to participate in electing their representatives on a one-to-one basis may help the process. Union leaders should not be allowed to sign agreements without a discussion in a general body meeting and without a majority vote. The check-off system opens doors for management intervention. It takes union leadership out of control of the workers for the stipulated period and reduces accountability.

The 25% membership rule for mere registration restricts the formation of new genuine unions which initially may not have sufficient members. It also perpetuates existing unions which may not have the confidence of workers.

Restricting 'outsiders' from the union leadership will hurt interests of workers who get outsiders because of fear of victimisation, and insufficient knowledge of law and economics. The bias against outsiders is so strong that severe punishment has been provided in the proposed changes. This is uncalled for.

The principle of proportional representation in the collective bargaining agent is recognised in the trade union movement as a step towards uniting workers. However, bureaucratic implementation may be divisive.

The 'strike' provisions are very restrictive, prohibitive and penal under the proposed changes. Strike is a weapon of honour for workers and exigencies such as dismissal of a leading activist, a serious accident due to the employer's negligence, delay in wage payment, violation of an agreement, etc. necessitate a strike for which prior notice cannot be given. There is no equity as the employer is allowed to declare a lock-out without prior notice. Workers must have the freedom not to sell their labour power without striking a satisfactory bargain. That is what strike allows.- **Yeshwant Chavan,** *Sarva Shramik Sangh.*

The causes of multiplicity are mushroom growth of trade unions devoid of any ideology or philosophy; such unions being formed by careerists with vested interests; outdated provisions of the Trade Unions Act; forma-


Vivek Monteiro


Y.B. Bhonsale


Yeshwant Chavan


P. M. Mantri


Datta Samant

tion or division of any political party/ regional party giving rise to a new union; and industrial workers, being individualists, joining unions only for securing benefits from employers and, therefore, easily switching their loyalty to another union which they feel will secure more benefits.

There is no doubt that the multiplicity divides the working class. There should be only one recognised union in an establishment. Any method of determination of a recognised union, whether secret ballot or verification of membership, has certain advantages and disadvantages. The Sanant Mehta Committee considered this and recommended the check-off system for the purpose. This seems to be the best system in the circumstances.

The authorisation for deduction of membership fees for 3 years will curb the tendency of workers to switch loyalty from one union to another; otherwise the check-off system will not serve any useful purpose. This also presumes that once a recognised union is determined it will enjoy that status at least for a period of 4 years. In the 4th year, the workers can be asked to give fresh authorisation for deduction of membership fees.

Registration of a union must be in respect of an establishment. "General unions" should be discouraged. For registration, the limit may be 15% or 10% whichever is higher.

Restrictions on outsiders in an Executive Committee of a union will be very helpful. This must be coupled with the restrictions that an outsider should not be an office bearer of more than, say, 5 unions at the unit level. This will reduce mushroom growth of unions and the consequential inter-union rivalry.

Selection of the Collective Bargaining Agent is difficult in the present circumstances. As recommended by the Sanant Mehta Committee, there should be a statutory provision for the purpose. A union with maximum support, which shall not be less than 40% for a unit or 25% for an industry-wise union, should be the sole Bargaining Agent. If there is no such union, the Bargaining Council consisting of representatives, on a pro-rata basis, of all unions in the establishment, excluding unions with less than 20% membership, should be formed.

Strike is a legitimate weapon with unions but it is to be used sparingly and that too when all other constitutional methods of settlement are exhausted. Unfortunately, it has often been misused. While doing so unions do not observe any scruples. Further, a large number of strikes arise out of inter-union rivalry but the industry (along with workers) suffers on that account. The provisions relating to "strikes", therefore, deserve to be supported - **P. M. Mantri,** *General Manager (Personnel), Stanrose.*

Several unions in the same industrial establishment reflects a division amongst the leaders rather than the working class. In Bharat Petroleum, Life Insurance Corporation of India, Railways, Banks, etc., the Government recognises all the unions, even those which do not have any sizeable membership. It insists that all the unions should discuss the issues in joint meetings and the bargaining power of the individual unions is thereby lessened. The politicisation of trade unions ever since independence is another reason for the multiplicity of unions.

A union can be established by a secret ballot after educating the workers and avoiding coercive methods.

The check-off system is against the principle of secret franchise and is detrimental to the interests of the workmen.

The proposed requirement of 25% membership for formation of a union is a good proposition to eliminate unions which function without any membership. This requirement should be made statutory in the case of BIR Act, where the union enjoys recognition even though it does not have a single member in some of the units and the settlements are forced on those workmen who in fact oppose the functioning of that union.

Outsiders, who are experts in conducting negotiations, departmental enquiries and handling legal battles are essential to the trade union movement. Outsiders can be militant in their demands and they do have to fear victimisation and loss of jobs.

I do not believe in the representatives of all the so-called existing unions in an establishment coming together and discussing the issues with the managements as they are based on different ideologies or different ways of functioning. This type of joint collective bargaining is being proposed in order to maintain an artificial division amongst the workmen.

Strike is an effective retaliation to any injustice meted out to a workman or to all workmen in an establishment by the employer or his agents. Under certain acts like the B.I.R. Act, Essential Services Maintenance Act, etc. strikes are totally banned. On the other hand, the employer is given all the legal provisions of suspending the operations with immediate effect, which totally humiliates the workers and challenges their trade union activities. Except for a few provisions in the MRTU & PULP Act, 1971, there is no law in the country to prevent the employers from committing these unfair labour practices.- **Datta Samant,** *Kamgar Agadhi.*

NOTICE BOARD

The Payment of Gratuity (Amendment) Bill, 1987

A Bill further to amend the Payment of Gratuity Act, 1972.
Be it enacted by Parliament in the Thirty-eighth Year of the Republic of India as follows:-

Short title and commencement:

1. (1) This Act may be called the Payment of Gratuity (Amendment) Act, 1987.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act.

2. Amendment of Section 2:

In Section 2 of the Payment of Gratuity Act, 1972 (39 of 1972) (hereinafter referred to as the principal Act), -

(i) in clause (e), -

(a) for the words "one thousand and six hundred rupees per mensem" the words "two thousand and five hundred rupees per mensem, or such higher amount as the Central Government may, having regard to the general level of wages, by notification, specify" shall be substituted;

(b) in the Explanation, -

(i) for the words "one thousand and six hundred rupees per mensem", occuring for the first time, the words, brackets and letter "the amount for the time being specified by or under clause (e)" shall be substituted;

(ii) in clause (h), -

(a) in sub-clause (i), for the words "and the widow", the words "and the dependent parents of his wife and the widow" shall be substituted,

(b) the proviso shall be omitted.

3. Amendment of Section 2A:

In section 2A of the principal Act, -

(a) in clause (1), the words "imposing a punishment or penalty or" shall be omitted;

(b) in clause (2), the following Explanation shall be added at the end, namely:-

"Explanation:- For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which -

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.".

4. Amendment of Section 4:

In section 4 of the principal Act, -

(a) in sub-section (1), for the second proviso, the following shall be substituted, namely:-

"Explanation:- In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.";

(c) in sub-section (3), for the words "twenty months' wages", the words "fifty thousand rupees" shall be substituted.

5. Insertion of new section 4A:

After section 4 of the principal Act, the following new section shall be inserted, namely :-

"4A. Compulsory Insurance: (1) With effect from such date as may be notified by the appropriate Government in this behalf, every employer, other than an employer or an establishment belonging to, or under the control of, the Central Government or a State Government, shall, subject to the provisions of sub-section (2), obtain an insurance in the manner prescribed, under this Act, from the Life Insurance Corporation of India established under the Life Insurance Corporation of India Act, 1956 or any other prescribed insurer:

Provided that different dates may be appointed for different establishments or class of establishments or for different areas.

(2) The appropriate Government may, subject to such conditions as may be prescribed, exempt every employer who had already established an approved gratuity fund in respect of his employees and who desires to continue such arrangement, and every employer employing five hundred or more persons who establishes an approved gratuity fund in the manner prescribed from the provisions of sub-section (1).

(3) For the purpose of effectively implementing the provisions of this section, every employer shall within such time as may be prescribed get his establishment registered with the controlling authority in the prescribed manner and no employer shall be registered under the provisions of this section unless he has taken an insurance referred to in sub-section (1) or has established an approved gratuity fund referred to in sub-section (2).

(4) The appropriate Government may, by notification, make rules to give effect to the provisions of this section and such rules may provide for the composition of the Board of Trustees of the approved gratuity fund and for the recovery by the controlling authority of the amount of gratuity payable to an employee from the Life Insurance Corporation of India or any other insurer with whom an insurance has been taken under sub-section (1), or as the case may be, the Board of Trustees of the approved gratuity fund.

(5) Where an employer fails to make any payment by way of premium to the insurance referred to in sub-section (1) or by way of contribution to an approved gratuity fund referred to in sub-section (2), he shall be liable to pay the amount of gratuity due under this Act (including interest, if any, for delayed payments) forthwith to the controlling authority.

(6) Whoever contravenes the provisions of sub-section (5) shall be punishable with fine which may extend to ten thousand rupees and in the case of a continuing offence with a further fine which may extend to one thousand rupees for each day during which the offence continues.

Explanation:- In this section "approved gratuity fund" shall have the same meaning as in clause (v) of section 2 of the Income-tax Act,1961.".

6. Amendment of section 5:

In section 5 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely :-

"(3) A notification issued under sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of this Act, but no such notification sha'l be issued so as to prejudicially affect the interests of any person.".

7. Amendment of section 7:

In section 7 of the principal Act, for sub-section (3), the following sub-sections shall be substituted, namely :-

"(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.".

8. Amendment of section 8:

In section 8 of the principal Act, -

(a) for the words "at the rate of nine per cent per anum", the words "at such rate as the Central Government may, by notification, specify" shall be substituted;

(b) the following provisos shall be added at the end, namely :-

"Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate :

Provided further that the amount of interest payable under this section shall, in no case, exceed the amount of gratuity payable under this Act.".

9. Amendment of section 9:

In section 9 of the principal Act, -

(a) in sub-section (1), for the words "one thousand rupees", the words "ten thousand rupees" shall be substituted;

(b) in sub-section (2), -

(i) for the words "which may extend to one year, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted, namely :-

"which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both";

(ii) in the proviso, for the words "three months", the words "six months but which may extend to two years" shall be substituted;

STATEMENT OF OBJECTS AND REASONS

The Payment of Gratuity Act, 1972, provides for payment of gratuity to persons employed in factories, mines, oil fields, plantations, ports, railway companies, shops and certain other establishments employing ten or more persons and for matters connected therewith or incidental thereto. The Labour Ministers' Conference held in 1980 and 1982 had recommended interalia that the time limit for payment of gratuity might be prescribed in the Act itself and that there should be a suitable provision for recovery of interest in cases where the payment of gratuity is delayed. The Indian Labour Conference held in November, 1985, had recommended that a provision for compulsory insurance of employers' liability and setting up of Gratuity Fund for payment of gratuity be incorporated in the Act. The Trade Unions have been representing for suitable enhancement in the wage limit for coverage and ceiling for payment of gratuity.

2. Based on the above recommendations and representations, it is proposed to carry out certain amendments in the Act. Some of the important amendments are:-

(i) The coverage of the Act is being extended to persons drawing wages upto Rs.2500/- per month and an enabling provision is being made for raising the wage limit for coverage from time to time;

(ii) Provision is being made for depositing the amount of gratuity payable to a minor with the controlling authority who shall invest the money in a bank or a financial institution for the benefit of the minor;

(iii) The existing ceiling of 20 months' wages for payment of gratuity is being replaced by a monetary ceiling of Rs.50,000/-;

(iv) Provision is being made for compulsory insurance of employer's liability to pay gratuity under the Act or in the alternative for the setting up of a gratuity fund under the provisions of the Act in relation to establishments employing five hundred or more employees;

(v) Provision is also being made for payment of simple interest at a specified rate, if the amount of gratuity is not paid within thirty days at a specified rate, or if the amount of gratuity is not paid within thirty days from the date it becomes payable;

(vi) Penalties prescribed under the Act are being made more stringent.

The other amendments proposed in the Bill are of a minor and inconsequential nature.

3. The Bill seeks to give effect to the abovementioned proposals.

New Delhi The 23rd February 1987 — Purno A. Sangma

SPECIAL REPORT

Equal Pay For Equal Work

Deepti Gopinath reviews one woman's pathbreaking crusade to wipe out the discrepancy in remuneration on the grounds of sex.

Audrey D'Costa was a confidential Lady Stenographer to a Senior Executive in the Shipping Company, Mackinnon Mackenzie Ltd. On 13th June 1977 her services were terminated. After she was removed from service she instituted a petition before the Authority appointed under the Equal Remuneration Act 1976 (No. 25 of1976) complaining that during the period of her employment after the Act came into force she was being paid remuneration at the rates less favourable than those at which remuneration was being paid by the company to the stenographers of the male sex in its establishment for performing the same or similar work. She claimed that she was entitled to recover from the company the amount equivalent to the difference between what she was being paid and that which was paid to the male stenographer who had put in the same length of service during the period of operation of the Act.

The Authority which heard the complaint found that, male and female stenographers were doing the same kind of work, but however rejected the complaint holding that in view of the settlement which had been arrived at in 1975 between the Employee's Union and the Management, the Petitioner was not entitled to any relief.
This order was reversed by the Appellate Authority which held that discrimination on the grounds of sex had been committed in jobs which were similar. Both the High Court and the Supreme Court upheld this view. Mackinnon Mackenzie Ltd., was finally ordered to pay to Audrey the difference in basic salary and dearness allowance between the rates paid to her as a confidential Secretary and that paid to the Stenographers of the Secretarial pool, and also to contribute towards the company's share of provident fund on the same raised scales.

Origin of the Act

Article 39(d) of the Constitution of India provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. The Convention Concerning Equal Remuneration for men and women workers for work of Equal Value was adopted by the General Conference of the International Labour Organisation on June 19, 1951. India is one of the parties to this convention. Article 3 of the convention provides that each member shall by means appropriate to the methods in operation, for determining rates of remuneration, promote and in so far as is consistent with such methods, ensure the application to all workers the principle of equal remuneration for men and women workers for work of equal value, and that this principle may be applied by means of (a) national laws or regulations (b) legally established or recognised machinery for wage determination (c) Collective agreements between employers and workers and (d)a combination of these various means.

In order to implement Article 39(d) of the Constitution of India and the Equal Remuneration Convention 1951, the Equal Remuneration Act was passed in 1976.

Remuneration means the basic wage or salary and any additional emoluments whatsoever payable, either in cash or in kind, to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment express or implied were fulfilled. Same work or work of a similar nature means work in respect of which the skill effort and responsibility required are the same when performed under similar working conditions by a man or women and the differences if any between the two ~~are not of~~ practical importance in relation to the terms and conditions of employment.

The Crux: Job Evaluation

The point which arose for consideration in this petition was whether Audrey was entitled to any relief under section 4 of the Act. In order to grant such relief under this Section it had to be established that the remuneration paid to her either in cash or kind was at rates less favourable than those at which remuneration was paid by the company to the employees of the opposite sex for performing the same or similar work. In determining whether the work performed is same or similar in nature, the judge held that the authority should take a broad view. In ascertaining whether any differences are of practical importance, the authority should take an equally broad approach, for the very concept of similar work, implies differences in details, but these should not defeat the claim for equality on trivial grounds. It should look at duties actually performed not those which are theoritically possible.

Wherever sex discrimination is alleged, there should be proper job evaluation before any further enquiry is made.

No Takers For Equality

That discrimination on the grounds of sex in jobs of same or similar nature is being committed all the time, everywhere, is a forgone conclusion.
The Equal Remuneration Act came into force in the year 1976 and yet Audrey D'Costa's case in the year 1981 was the first application filed for claims under this Act. It took her six years of wading through the various authorities and courts to finally get a judgement in her favour in the Supreme Court.

It is interesting to note that Audrey only filed for claims after she was dismissed from service. It seems that female employees are prevented from claiming equal pay for equal work while still in service for fear of being victimised. Ironically the female stenographers now working in Mackinnon Mackenzie have still not filed their claim for equal pay with the male stenographers, inspite of Audrey's victory. Neither has the management made any move to equate their scales. Since no prosecutions have ever been made under this Act, the Act itself remains a dead letter.

Joint Sector Company Stopped From Cultivating Eucalyptus

Ranu Basu reports on the recent case from Karnataka where the Supreme Court has stayed the operation of the Joint Sector Company engaged in Eucalyptus mono culture.

On March 24 1987, Chief Justice R. S. Pathak and Justice R. N. Mishra of the Supreme Court of India passed an order in the matter of the possession of land affecting five lakh villagers living in the Districts of Chickmangalur, Shimoga, Belgaum and Dharwad in Karnataka situated in the heartland and eastern slopes of the Western Ghats.

By two lease agreements, dated November 14, 1984 and July 15, 1985, nearly 78,000 acres of land were leased out by the State of Karnataka to the Karnataka Forest Plantations Corporation Ltd. (the State owns 51% of its shares. Harihar Polyfibres holds 49%.), for growing Eucalyptus trees primarily for the benefit of the latter. The stay order prohibiting the joint sector company from taking any action was pursuant to a petition submitted to the Supreme Court by concerned citizens emphasizing the enormous economic harm to the people of the region as well as the irreparable ecological damage to the Western Ghats and challenging the constitutionality of the agreements made between the State of Karnataka and the Joint Sector Company.

Land Transfer and Its Effects

These lands which were vested in the village communities from time immemorial for the purpose of common use and conservation amounted to 70,625 acres and 7,475 acres. Although classified as C and D class of lands i.e. non-cultivable land under the Karnataka Land Revenue Act, experts have pointed out that such classification was only for the purposes of payment of revenue to the State and that this land contained evergreen thick and semigreen shrubs and bushes which fulfill the minimum basic needs of the villagers such as fuel wood, leaves, oil, agricultural manure and much needed cattle fodder. Some of this land had also been cleared by the local people and converted into cultivable land. Therefore, deprivation of such land, which was the only available land as far as the villagers were concerned and was totally indispensable for their life system, would invariably cause them great economic harm.

The ecological damage which would result from this land transferrence to a joint sector company, which is created with the object of cultivating monoculture trees like eucalyptus, is also calculated to be enormous. This is borne out by the experience of eucalyptus cultivation in similar Western Ghat forests in 1961 which led to the spread of a pink disease and created a serious ecological imbalance and by recent scientific research on the subject. This situation also poses a very real threat to the environment of Western Ghats through injury to the nutritive quality of the soil and watertable in the area as well as injurious effects on the pattern of rainfall in the region. There has been a growing awareness among the people of Karnaktaka of the harmful effects of these and other pulpwood schemes. There has also been considerable critism and protest from many quarters including the affected rural masses.

Constitutional Issues

In the petition under Article 32 of the Constitution of India, it has been argued that the act of the State of Karnataka causing serious harm to the economic conditions in the area as well as the ecosystem, which together might result in the uprooting of nearly five lakhs of forest village dwellers, constitutes a clear violation of the right to life and liberty of the village community vested under Article 21. It has been further argued that by its acts the State of Karnataka has contravened the interests of the public, protected under Article 39(b) of the Constitution which imposes, an obligation on the State in the performance of its public functions and prohibits the concentration of material resources in the hands of a chosen few.

The Protagonists

A look at the opponents in this legal battle reveals the recurring tension between the promoters of public interest and government-backed industrialists. On one side are the villagers adversely affected by the decisions and acts of the State of Karnataka. They are represented by Dr. Kota Shivaram Karanth, a Janapith award winner, a doyen of Kannada literature and noted human rights and environmental activist, the Samaj Parivartana Samudaya (SPS), an organisation of social workers as well as farmers engaged in environmental awareness activities in and around the State of Karnataka, S. P. Hiremath, the founder and President of SPS and also a member of the Karnataka Pollution Control Board, Anil Grewal, Director, Centre for Science and Environment, New Delhi, and four farmers and residents of the said transferred lands.

The Respondents in this case are the State of Karnataka, Karnataka Forest Plantations Corporation Ltd., Gwalior Rayon Silk Manufacturing Co. Ltd. of the Birla Group which owns Harihar Polyfibres, Karnataka Pulpwood Ltd., and finally the Union of India.

In the final analysis, the clash between public interest in common property resources such as forest lands on the one hand and corporate interests in such resources supported by the Government on the other hand, makes this case one of great interest and concern to people in all parts of India. The fact that the Western Ghats are crucial to the ecology of the entire region south of the Vindhyas lends an added significance to this complex issue.

Ranu Basu is an Attorney-at-law practicing in the U.S.

Maintenance Ruling Confirmed

The recent Subanu judgement by the Supreme Court confirms the right of a Muslim wife to maintenance. ***Shehnaaz Sheikh*** *explains the ruling and argues that to be effective the practice of talak-e-biddat (divorce in one sitting) ought to be declared unconstitutional.*

On 3rd April 1987 the Supreme Court delivered a judgement under Section 125 of the Cr. P. C. granting maintenance to a Muslim woman whose husband has either married again or has taken a mistress. In this case, Begum Subanu married Abdul Gafoor on May 11, 1980. The couple had a daughter a year later. Soon after, on grounds of neglect and failure to provide maintenance, Begum Subanu filed a petition in the Magistrate's Court in Kasargod in Kerala. Her petition was dismissed on grounds that she had failed to establish adequate justification to live separately.

While her revision petition was being heard, Gafoor married again on October 10, 1984. Begum Subanu then pleaded that, irrespective of other grounds, the second marriage was itself a cause for the grant of maintenance. Once again her petition was dismissed.

She then filed a petition in the Kerala High Court which declined to interfere. She then approached the Supreme Court.

The Supreme Court awarded maintenance to Subanu fixing the quantum at Rs.300/- per month from the date when her husband married a second wife. Her minor daughter was awarded maintenance at Rs.200/- per month.

This judgement, delivered by Justice A. P. Sen and Justice S. Natrajan, rules that if a husband has contracted marriage with another woman or keeps a mistress, it shall be considered a just ground for the wife's refusal to live with him and also for claiming maintenance. What matters is the injury to the matrimonial rights of the wife and not the husband's right to marry again.

The judgement is based on the explanation to Section 125 of the Criminal Procedure Code which provides that, "If a husband has contracted a marriage with another woman or keeps a mistress, it shall be considered to be just ground of his wife's refusal to live with him and also claim maintenance".

A Muslim wife is also entitled to maintenance under uncodified Muslim personal law. Her husband is bound to provide her with food, clothing, shelter and other comforts or an equivalent amount of money. If he neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance. According to the Shafei School of Muslim Law, the wife is entitled to past maintenance though there may be no agreement in that respect. An agreement between a Muslim man and his first wife, made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is valid in Muslim Law. Similarly, an agreement by a Muslim man with his second wife that he would allow her to live in her parents' house and pay her maintenance is not against public policy and is recognised by Muslim Law. A Muslim woman can also stipulate in her 'Nikahnama' (marriage contract) that her husband will provide her with a certain amount as maintenance every month or separate residence and maintenance in case he takes on a second wife. If the husband fails to abide by the conditions in the 'Nikahnama' the wife can sue him for breach of contract.

The concepts of equality and justice constitute the 'spirit' of Islam. Therefore, if a man has more than one wife he is bound to treat all of them equally. Equality here implies equal treatment i.e. physical, emotional and financial. Thus, if the first wife feels that she is being discriminated against by her husband and/or her privacy is being intruded upon, she can refuse to live under the same roof as the second wife and claim separate residence and maintenance.

Thus we see that the Supreme Court judgement in *Subanu* only re-inforces a Muslim wife's right to maintenance under Muslim Law and does not contradict or attack the Shariat in any way whatsoever.

The laws relating to marriage, divorce and maintenance as they operate in India today are all heavily biased in favour of the man. Even if the woman manages to get a court order granting her maintenance, the man may just give her a 'talaq' to avoid paying maintenance. The Court procedure for getting maintenance is long and traumatic for her, whereas giving her a divorce is very simple for him. He may either give her a 'verbal' talaq or a written 'talaqnama', both of which depend on his unilateral decision. So, what really needs to be declared unconstitutional and thus unlawful is the horrendous practice of talaq-e-biddat (divorce in one sitting) which is widely prevalent in our country. It is noteworthy that this innovatory form of divorce was introduced by the Omeyyads in the second century of the Mohamedan era and has no reference in the Quran or the Sunnah of the Prophet.

In cases where the 'meher' is a large amount the man keeps harassing the woman but does not give her a 'talaq' because then he becomes liable for immediate payment of 'meher' and has to return the wife's belongings and jewellery.

All this harassment drives her to a point where her only escape is to end the marriage. And what happens when she takes recourse to Khula (a divorce by the husband at the instance of the wife)? She forfeits her 'meher'. After this she is not entitled to maintenance either. Either way, it is a trap. Whether the husband exercises his right to 'talaq' or the wife exercises her right to 'Khula', she is the loser.

In this process a woman gets caught in the vicious circle of marriage, divorce and maintenance heavily biased against her. All these laws will have to be reformed simultaneously, if Muslim women are to get any semblance of justice.

COMMENT

Tribals And Legal Aid

Legal aid camps in rural areas lack the pomp and ceremony of their urban counterparts. They give confidence to the people who really need them to fight for their rights. ***Susan Abraham*** *reports on one such Camp in Chandrapur.*

The small township of Aheri, is the main centre for the densely forested region of southern Gadchiroli. The town witnessed a unique event when a programme arranged by the Free Legal Aid Society was held for the first time on March 14, 1987. Two High Court judges, Justices P.B. Sawant (Bombay) and G.G. Loney (Nagpur), who inaugurated and presided over the programme respectively,

Justice Sawant at the meet

The Repression

Such programmes may have become routine and lacklustre affairs for the bigger urban centres, but not so for our rural backwaters. Aheri has a 41% Adivasi population. The tribals are recognised as the traditional inheritors of these forests. Ever since the arrival of the British and through the enactment of various forest laws which did not even try to hide their actual mercenary intentions to exploit these forests, the saga of the alienation of the tribal from his social and cultural roots began and it continues after independence.

The Organisers

Free legal aid assumes special significance for the forest dwellers in this multi-dimensional context. The Aheri programme was jointly organised by the Chandrapur Free Legal Society and the Sardar Patel Law College, Chandrapur.

Most of the speakers spoke of the need to begin a legal aid movement in the backward areas. Justice Loney emphasised that it was the ignorance of the law which led to such large-scale exploitation of the tribals. Shri Potdukhe, M.P., spoke of the need to remove from the minds of the tribals the apprehensions they have for the administrative or judicial machinery and particularly the fear of the police.

Justice Sawant stated that poverty was the root cause of the numerous ills affecting the large masses of our population.The Government's development programmes were heavily urban-oriented and neglected of the vast rural areas.

Justice Sawant minced no words in equating the fight for legal justice with the fight for socio-economic justice. He concluded by emphasising the need for equal distribution of the country's wealth for which it was necessary that power reached the hands of the people.

Right To Land Denied

There was serious and lively participation in the next session. The most serious were those regarding land-holding rights for the forest dwellers. For instance, though there is a government regulation which states that those in possession of forest land prior to 1978 should have their rights regularised by the local government authorities, these people have not been elevated from the status of "encroachers". Others pointed out that the Maharashtra Restoration of Tribal Lands Act was not implemented. The residents of Allapally township pointed out that when the town was a forest village under the Indian Forest Act, 1927 many of them were given pattas. The town was handed over to the revenue authorities subsequent to the abolition of 460 forest villages in Maharashtra in 1969. On February 16, 1987, the residents who were staying around the town's chowk found that the revenue officials had given orders to demolish their structures.

Misuse of Powers

A Madia tribal related how he spent three weeks in Chandrapur jail, sent there by the Aheri Tehsildar in clear misuse of powers reposed in him under S.107 of the Criminal Procedure Code. This brought forth numerous other examples of the high-handedness of the local tehsildars and cases where people spent three months under S.107. Cases were cited of people being remanded to jail by the tehsildars under S.151 (3) of the Criminal Procedure Code although they had no jurisdiction.

An Anganwadi teacher with two children, who had been deserted by her husband eight years ago stated that because of lack of resources she could not prosecute her husband. A primary school teacher with 15 years of service spoke of how he had been abruptly removed by the zilla parishad because he did not bring family planning cases. These and other problems were reviewed by the lawyers who promised to take them up with the legal aid committees.

Protected Status Sought

During this session, one of the leading social activists of the area, Shri B.V. Shekhar, pointed out that on the one hand numerous tribal-oriented laws had been enacted and numerous tribal development programmes floated in recognition of the special status deserved by adivasis in our society. But the way the various civil and criminal laws deal with the adivasis, they have been reduced to 'encroachers' and 'offenders' having to suffer untold humiliation and misery only because they are poor and socially backward. It is necessary, he said, that in the same way the law gives a protected status to the underprivileged in society, like women and minors, so too, the tribal ought to be given such a protected status.

Susan Abraham is an activist lawyer practicing at Chandrapur, Maharashtra.

The Broadwater Farm Inquiry

The initiative of civil libertarians in India to set up a Human Rights Tribunal in response to the police atrocities is not an isolated one. In England also, where a section of the police is now officially recognised to have racist attitudes, activist groups took an initiative to set up an Independent Commission of Inquiry to inquire into the role of the police in the Broadwater Farm riots. Tony Gifford, who chaired the Commission, sends us the following report.

Death And Riot

On 5th and 6th October 1985 two people lost their lives in Tottenham, North London in circumstances which were to have devastating consequences. On 5th October, Mrs.Cynthia Jarrett died inside her home during a police raid. Her family said that she had been knocked over by the police. The official police version had suggested that she had collapsed after her family had been abusive to the police. On 6th October, Police Constable Blakelock was stabbed to death during a riot which was taking place on the Broadwater Farm Housing Estate, predominantly housing black people. For many hours, policemen were pelted with missiles and petrol bombs, and barricades of burning cars were created to stop the police coming onto the Estate. The policeman, who happened to be a popular community constable, was one of a group who had gone onto the estate to protect firemen putting out a fire. He had tripped and fallen, and was surrounded by a group of angry youths.

It was the first occasion in recent times on which a police officer had been killed during a riot. The reporting in the press was hysterical and distinctly racist. The rioters, who had been mainly black youths, were described as "savages" and "butchers". There were glowing tributes to the police officer, but little was said about Mrs. Jarrett, who had been a well known figure in the black community.

The police set up a military-style reign of terror in the Estate. During the following weeks, 350 people were arrested, 18 doors were smashed down, armed police were regularly on patrol. The arrested people, many of them children, were taken off to unknown police stations and questioned over many days. Access to legal advice was strictly refused, even to the children; 160 people were charged, 6 with murder and over 60 with vague charges of "riot" and "affray".

Tony Gifford

The Inquiry

The local Council led the call for a full public inquiry into the causes of the riot. The Government refused. They said it was sufficient for the police to carry out an internal inquiry. But when the police report was published, it angered local people intensely. The report put all the blame on the Broadwater Farm community, describing it as a criminal community which hated the police. It claimed that the riots had been planned in advance, and spoke of "lakes of petrol" created to trap the police.

So the Council decided to commission an independent inquiry. I was asked to be Chairman. We had a panel of six people, including a Catholic Bishop and a Canon of Westminister Abbey. The police refused to cooperate with the Inquiry in any way, although some senior officers agreed to meet us unofficially.

The method of our Inquiry was different from the usual official inquiry carried out by a senior judge. Normally the Judge hears evidence in a formal manner, and then pronounces his own conclusions. We were determined that the Inquiry should be the opportunity for the ordinary people of Broadwater Farm to have a voice, to make public their ideas on why this terrible riot had taken place.

Accordingly, in addition to the formal methods of hearing evidence in public and asking for written submissions, we held many private interviews, we visited people in their homes, held informal meetings, with young people to understand what they had felt, and commissioned an expert public opinion survey in order to compare the evidence of witnessess with a measured test of local opinion.

Broadwater Farm Organised

We produced a report which told a remarkable and in many ways an inspiring story. We were told of the building of the Broadwater Farm Estate in 1973, an example of modern industrial building which looks fine on the drawing board but made no provision for community living. We described how it quickly became a "sink" estate with a high rate of crime and vandalism, rubbish and broken glass everywhere. Families were placed there, many of them black, who were homeless and had no other choice. There were no community facilities except a small social club where black people were not made welcome.

Then, from about 1981 things began to change. The Broadwater Farm Youth Association was formed by a number of dynamic black residents. They demanded adequate community facilities such as centre for unemployed youths, a nursery for children,

a play centre for children after school and a number of co-operative shops, and the Council began to respond. They negotiated with the Council for the installation of improvements which would make burglary more difficult. They organised a festival every summer, where the various cultures could create enjoyment and unity for the Estate. The crime rate dropped by half, and many agencies recognised the Estate as a model of what could be done. In February 1985, there was a visit from Princess Diana.

Hostility of the Police

But the one institution which failed to recognise the good work was the Metropolitan Police. Although some senior officers maintained friendly relationships with the Youth Association, junior Officers were so infected with racism that they could only see the Estate as a nest of criminals. They refused to make contacts with the Youth Association and continued a pattern of arrogant and oppressive policing which had been notorious in North London for many years. Countless black witnessess, young and old, spoke of the petty indignities to which they had been subjected. Often there were critical situations when squads of riot police swooped on the Estate in an attempt to stir up trouble.

In the late Summer of 1985, there had been riots in Birmingham and in Brixton in South London, after a black woman had been shot and paralysed in her home during a police raid. The police documents indicated that they were waiting for a riot to happen at Broadwater Farm. In fact, if it had not been for the death of Mrs. Jarrett, we are sure that no riot would have occurred.

The events leading up to Mrs. Jarrett's death epitomised the policing of the black community. Her son had been stopped for a traffic violation, arrested on an assault charge which turned out to be false, and kept at the police station. Then a decision was made for no good reason to search his home on the off-chance of finding stolen goods. During the search which revealed nothing, Mrs. Jarrett was carelessly pushed aside by one of the officers as she stood in her kitchen doorway. She fell to the ground precipitating a heart attack, and she died instantly.

As the news flashed through the community, community leaders implored the police to suspend the officers concerned so that the people would appreciate that the matter was being taken seriously. They refused. There was an angry demonstration in the afternoon, which went off without violence. But when a crowd of young people tried to leave the Estate to continue their demonstration in the evening, they found their way blocked by riot police. It was in these circumstances that they started to stone the police, and the riot was on.

We concluded that there could be no hope of peace between the police and the community in the future, unless senior police officers were seriously prepared to tackle the issue of racism within their ranks. Official surveys had been published showing that racist attitudes amongst police officers were "prominent and pervasive", yet nothing effective had been done. Instead, the police had treated a section of the community as a kind of enemy. In those circumstances, casualties were almost inevitable.

The Present Situation

Eighteen months have passed. There are some signs of progress. The Police Superintendent has accepted the recommendations of our Inquiry. The Commissioner of Police has visited the Estate. But considerable tension remains, as the long trials make their slow progress through the Courts. Young people have been sentenced to four years imprisonment just for throwing stones. Recently three people were convicted and sentenced to life imprisonment for the murder of P.C. Blakelock. Three juveniles were acquitted because the Judge ruled that their "confessions" had been obtained by oppressive means. One boy aged 13 had been placed for three days in a police station dressed only in a blanket and underpants, before he "confessed".

Our Inquiry team has been asked to return to Broadwater Farm in September 1987 to see how far our recommendations have been implemented. The future remains unclear. But I am certain that the fact of having an independent Inquiry has served a good purpose. It has corrected the falsehoods which were being told about the Estate. It has made people realise that the police have a deep responsibility for community unrest. It has raised wider questions about the management of housing estates and about the creation of jobs in an unemployed community. One community leader said to me "You have recorded our history faithfully and well; now it is up to us to create the future."

Lord Tony Gifford is a Queens Counsel practicing as a barrister in England with the well known radical chambers at Wellington Street.

HAAZIR HAI

G.S. Jaiswal

Bihar is notorious for being the worst-administered State in India where the rule of law exists only on paper. Despite, or perhaps because of this lawlessness Bihar has one of the most active, privately run, legal aid programmes run by Free Legal Aid Committee (FLAC), Jamshedpur. "THE LAWYERS" interviewed ***G. S. Jaiswal,*** *Director of FLAC, on the trials and tribulations in providing legal aid.*

Q. *How did FLAC start?*

A. We started in February, 1978. During the emergency a large number of activists and innocent persons had been jailed without reason. This created a great fear psychosis. When the Janata Party took over government, those people who were previously terrorised regained their voice. We were amongst them. The first case we took up was the case of Bihar undertrials, who remained for long periods in jail without trial for petty offences like cutting wood in reserved forests, dealing in illicit liquor and minor property thefts. They had been kept in jail for longer periods than for what they would have been sentenced if found guilty. For example an 8 year old boy was kept in jail for 8 years for stealing 5 kilos of coal. Thanks to FLAC, he was released when he was sixteen years old. Another Adivasi boy, Manglia Khedia, was kept as an undertrial for three years for cutting wood in a protected forest for which the maximum sentence was only six months. His trial had not even commenced. There were 200 such cases in Jamshedpur jail alone. FLAC investigated and made a list of such cases. On the basis of a representation all such persons were released without any release bond.

Q. *Who were the persons who formed FLAC?*

A. They were basically socially conscious individuals who came from lower middle class or middle class backgrounds. They were Premchand, a Hindi journalist; Mrs. Anjali Bose, a social activist who fought for Naxalites and other left wingers; Prakash Abraham, a TISCO employee; Jawaharlal Sharma, a small businessman who after his business failed, became a full time social worker; and an advocate mainly practicing on the criminal side. In Hazaribagh, Miss Veena Sethi, Advocate, was our representative. In Ranchi, we had Uttam Sengupta who is presently a staff reporter for The Telegraph.

Q. *How were your activities received?*

A. In the beginning we restricted our activities to the jails. We avoided any publicity as initially our work was not well received. The local lawyers were very hostile towards us and regarded us as vagabonds and briefless advocates who were resorting to legal aid to get cases. But the undertrials and the inmates of jails were very happy, that someone at last had come to help them.

Q. *In what way did your intervention help the inmates of jails?*

A. In 1979, we filed a writ petition in the Supreme Court *(FLAC v/s State of Bihar)* regarding the terrible conditions prevailing in the Bihar jails. We argued that prisoners retained their human rights even in jail and had a right to live in dignity and not in animal-like squalor. By that time the Supreme Court had already decided the first *Sunil Batra* case. In our petition we had alleged that the Jamshedpur jail, against a capacity of 172 persons, actually contained some 972 inmates. Due to overcrowding, jail conditions were filthy and unhygienic. The food was inedible. The bathrooms were overflowing. There were no medical benefits. There was no elec-

tricity. Nor were there adequate provisions for drinking water. FLAC demanded decent facilities for the prisoners. Justice Untwalia dismissed our petition by directing the State of Bihar to give reliefs expeditiously. This was in 1980. In 1981 as nothing had happened we were forced to move a contempt petition in the Supreme Court. The Bihar Government then presented a blueprint for jail improvement costing about Rs.1 crore. Part of this blueprint has been implemented and as a result now Jamshedpur jail provides better facilities to its inmates.

We also filed another writ petition in the Supreme Court demanding that the prisoners with tuberculosis be provided proper medical facilities and they be kept segregated from other prisoners. The Supreme Court gave notice to the Bihar Government and the District Judge to inspect the jail premises and to take the follow up measures to give relief as prayed for. This was done. The case is *Mirza Majhi v/s State of Bihar.*

Q. *How did you build up FLAC?*

A. Initially, we tried to get in touch with as many socially conscious individuals as we could. We organised various meetings and conferences. We went to villages to learn first hand the legal problems the villagers faced. When we first approached a village, all the men would run away thinking that we were Government officials on a Nasbandi (sterilization) campaign. Later when they realised that we were lawyers who had come to help them with their legal problems, they flocked around us and poured out their woes. FLAC appointed lawyers who charged minimal or no fees to take up the cases of these villagers. FLAC also supervised the work of these lawyers.

Q. *How did you identify lawyers who would work for FLAC?*

A. It all started when FLAC identified some 540 cases where the police had not filed any charge sheet from 1961 to 1978. The accused were forced to attend court regularly where only dates were being given and yet without a charge sheet they did not even know what they were charged for. There was no question even of a trial commencing. FLAC compiled a list of these 540 cases, police stationwise and sent the list to the concerned police stations demanding an answer as to what the charges were, the evidence, and said that if there was no reply within a certain period FLAC would approach the Supreme Court for necessary reliefs. There was no reply from the police. In our Writ petition to the Supreme Court (*FLAC V/s State of Bihar* AIR 1982 SCP) it was held that no persons need appear in Court unless charge sheets are filed and the Court sends notice. All the 540 cases were quashed. The Supreme Court further directed that in future all those accused who were on bail need not appear in Court unless they had been charge sheeted.

With this ruling the local lawyers started looking at us differently. FLAC had criticised not only the jail officials, police, and judiciary but also the advocates. These advocates now bitterly opposed FLAC as they felt that we were ruining their practice. However, a section of the Bar Association became supporters of FLAC and hence joined us as our panel lawyers.

Q. *What has been your experience with the local judiciary?*

A. The local magistrates and judges were apprehensive of FLAC as they felt that we were tresspassing into their domain and doing work which they had neglected to do. Individually, neither the police nor the judges were against us. But as an administrative set up they were suspicious of our activities. There were some judges who were our supporters and attended FLAC meetings. In 1982, Justice Bhagwati addressed a FLAC gathering which changed the establishment's attitude towards us.

Q. *What is your source of finance?*

A. In the beginning we funded our activities from our own pockets. Each of us contributed Rs.10 to Rs.15 per month. This was the situation from 1978 to 1980. In 1981 Oxfam India approached us and gave us a grant of Rs.32,000 for lawyers' fees, typing, stationery and court charges. This lasted for one year and eight months. We also got money from the Committee for the Implementation of Legal Aid. They gave us Rs.20,000 on a project basis. Recently, an Australian organisation, Community Aid Abroad, has given us Rs.30,000 for holding training camps for socio-legal activists.

Q. *What kind of cases do you handle?*

A. Candidates who qualify for legal aid from us must earn less than Rs.5000 per year. Most of them are deserted women who require maintenance, tribals and landless labourers whose lands have been grabbed, contractors' labourers who are deprived of their statutory dues, dowry cases and other matters where women are tortured on some pretext or the other.

Q *What headway have you made in your cases?*

A. In the majority of the maintenance cases we have succeeded in obtaining monthly amounts ranging from Rs.200-450 per month. We also have a system of conciliatory platforms in every police station in Jamshedpur. These platforms are mini-lok adaalats, which try to reconcile cases referred to them by FLAC. The conciliatory platforms are staffed by businessmen, professionals and service people. They manage to settle more than 50% of the cases referred to them. They take it very badly when they cannot settle a case. Where there is a case pending, consent terms are filed in terms of the settlement. Where there is no case in court, the parties sign an agreement.

Q. *What is your organisational structure?*

A. FLAC has 8 branches covering Jamshedpur, Hazaribagh, Ranchi, Chaibasa, Saraikela, Kodarmal, Mosabani, Potamda. Each branch sends 2 persons who are their office bearers to the Central Board, plus one nominated member. The Central Board is empowered to appoint other persons. Every branch has an executive committee and a general body and is autonomous in its operations. The Central Board only gives general guidelines to the branches and audits their accounts. Persons who are interested in becoming members of FLAC must attend notified meetings for at least one year before being accepted as members. Jamshedpur head-quarters files and contests some 50-60 civil cases and some 90 criminal cases per year. Advice is given to 1-2 persons daily. A panel consisting of 35 hand picked advocates serves FLAC. Membership of the Jamshedpur head-quarters is approximately 300 persons.

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Fair Exchange

Have you noticed that there has been a fair exchange in the Supreme Court over the Fairfax deal? In exchange for releasing two judges for the probe, two others have been appointed, Madhukar Kania, Chief Justice, High Court Bombay and K.Jagganath Shetty from Allahabad. That's what you call maintaining the balance. After all, with so much criticism about delays in court, the government must at least appear to be doing something about it. It is almost as if the two Fairfax judges have cleared the seats for the two incoming judges. Must we wait for another commission of enquiry into the Defence deal with three judges and anaother Commission into the Swedish arms deal with four judges to get some more judges. After all, there are 12 vacancies and twelve newcomers are due so that the old ones can get on to commissions and make way for the new. But the question still remains as to why Justice Thakkar and Justice Natarajan were appointed for the Commission in preference to any others. Justice Thakkar is known to have said in his Commission Report on Mrs. Gandhi's assassination that his report should be kept secret. Could that be the reason for selecting him? According to another story, the ten other judges refused while Justice Thakkar and Justice Natarajan were the only two who agreed. Who knows what the truth is?

Congratulations Chief Justice

You have guessed right. With Chief Justice Kania being appointed to the Supreme Court, the round of parties has started. This time it's judges entertaining judges. It appears that City Civil Judges have much to gain by entertaining their High Court Judges. Judge Sonar, the man against whom one advocate of the City Civil Court went on strike for his alleged misconduct threw a party at the N.S.C.I. for Justice Kania, Justice S.K.Desai and Justice Lentin. Several Judges of the City Civil Court attended. It is reported that the bill of about Rs.10,000/- was paid by someone else. We have heard of judges being felicitated by lawyers, by industrialists, by clients, by politicians, all of whom presumably have some stake in entertaining them. By now it seems judges also are getting wise to the entertaining game.

A Welcome Strike

For the first time ever, lawyers have gone on strike in support of a demand for litigants. Lawyers in Jaipur are on strike demanding the repeal of the increased court fees. The State Government, disregarding the fact that revenue from court fees is already high and more than sufficient to meet the requirement of the administration of justice, has proposed a steep increase in court fees. The Chief Justice said recently at a press conference that if justice was to be accessible to all, court fees should be abolished. There is obviously no policy decision at the all India level. A total abolition of court fees would mean that the rich would be able to get precious court time free of charge. Perhaps what we need is a means test for court fees. Justice should be free for the poor and very very expensive for the rich.

Diamond Bright Justice

When Madhu Limaye and the Devil's Advocate complain about the rich folk getting priority in courts, nobody cares. But when a judge of the Supreme Court complains that his brother judge is giving priority to diamond dealers, it's time to take note of what's going wrong in the Supreme Court of India. Petitions filed by diamond exporters get decided in record time while others wait patiently till death do them part with their litigations. There is a case here for classification of litigation according to the hardship to the litigant.

Sons-In-Law

Chief Justice Hiralal Agarwal of the Orissa High Court claims the right to communicate with his brother judges on the merits of a case pending before him. In April this year he wrote to Justice P.C.Misra discussing a case pending before him. When asked why he did this, he said, 'Theoretically and ethically, it is within the limits of our operation.' An added complication was the fact that Justice Misra's son-in-law was appearing in that very case before the Chief Justice. He was, he said, "unaware" of this. The son-in-law was appearing for the respondent. The appeal which related to a land dispute was dismissed.The son-in-law succeeded! Chief Justice Agarwal claims that consultations among judges is routine-whether or not sons-in-laws appear and that his letter to Justice Misra was a "Confidential Communication". All this friendly consultation makes you wonder whether a judge's judgement is really the product of his own thinking.

Law Minister-In-Waiting

Once again the newspapers in Bombay are busy with the news that B.A.Masodkar, ex-judge of the High Court is waiting patiently to fill in the seat vacated by A.K.Sen. He is among one of the few one-time judges in Parliament and therefore stands a good chance. The two other obvious contenders are Murli Bhandari who has been waiting for too long for that slot and Shiv Shankar, who can claim some experience in the the job with Mrs.Gandhi. But if the country was without a Law Minister for one month, don't you think the post can be abolished without any great loss to the nation? The Supreme Court is always available for legal advice to the Government of India.

Supreme Court Mills

Did you know that Swadeshi Cotton Mills has been renamed Supreme Court Mills? Every year, just before the Annual General Body Meeting, the battle begins for control over the management of the Mills. Suits are filed in the names of different shareholders in different parts of the country. This year it was in Allahabad and Delhi. Contradictory orders are obtained by warring groups. Against each interim order, an appeal is filed in the Supreme Court. Every move has the ultimate blessing of the Supreme Court. How to hold the meeting, where to hold it, who should be the presiding officer, what is the method of counting votes are all matters of great national importance. Hence, the Supreme Court itself decides on these issues and meetings are held under the direct supervision and control of the Supreme Court. Corporate control through the Supreme Court has indeed become very fashionable. It has, therefore, been decided in a Special General Body Meeting of Swadeshi Cotton Mills to rename the company as Supreme Court Mills Ltd.

Devil's Advocate

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