AUGUST 1986 RS.5

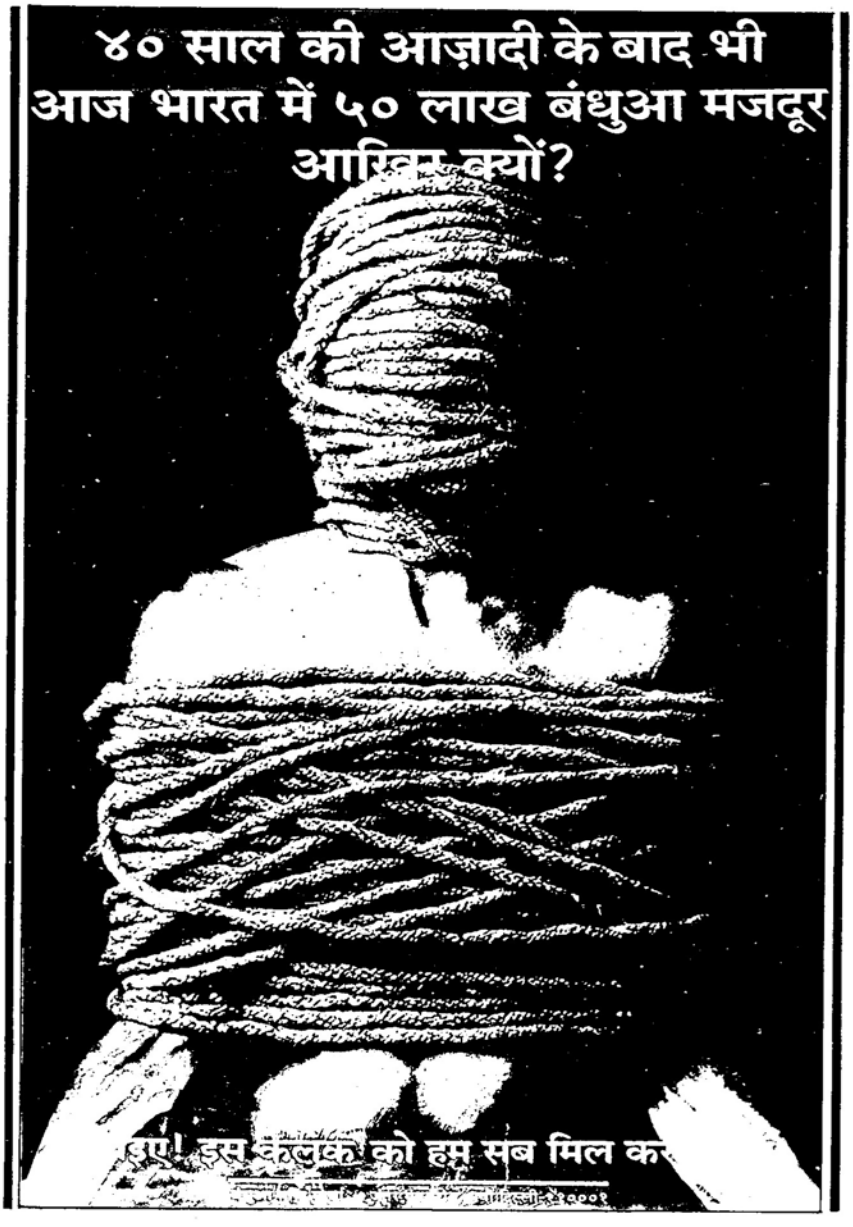
FROM

# THE LAWYERS

COLLECTIVE

Chief Justice P.N. Bhagwati on SAL

Tax Voluntary Disclosure Scheme




Ajit Kerkar Antulay Trial Letting off the big fish

Housing Laws

# SOCIAL ACTION LITIGATION

## EDITORIAL

# Evaluating Social Action Litigation

Social Action Litigation (SAL) has been with us for more than a decade. By any reckoning SAL requires analysis of its gains and losses. As Chief Justice P.N. Bhagwati retires in December this year, the need for such an evaluation is particularly imperative.

The trend is set but the direction is uncertain. The jurisprudence of SAL is fairly developed, but it remains buried in the pages of law reports. Consequently, laymen and even lawyers are ignorant of the legal break- throughs in securing public access to the courts. We have, therefore, interviewed Chief Justice Bhagwati who spotlights the judicial tools which the Court has crafted in constructing the new jurisprudence. We hope this contribution will clear the misgivings about the role of the Court.

The major issues facing the Supreme Court are known. With his limited term in office Justice Bhagwati is unlikely to decide issues other than those currently listed before the Constitutional Bench. The power to withdraw prosecutions, the practice of issuing ordinances and continuing them indefinitely, Ordinance Raj, the liability of Sriram Mills to compensate victims of the Delhi Gas leak tragedy are some of the pending issues. The *Sriram Mills* case is bound to have a decisive impact on the litigation against Union Carbide Corporation, as the Court will lay down principles for awarding punitive damages.

Other major public interest issues are unlikely to be decided before December. It is, therefore, an appropriate time to evaluate the gains of SAL. In this issue we initiate a debate on the role of the Court in delivering social justice to the Indian masses waiting in the queue to receive their fair share of court time.

This issue also takes up the question of whether Justice Shah of the Bombay High Court was right in not framing charges against some of the named co-conspirators in the Antulay trial, namely Ajit Kerkar and J.J. Bhabha.The press, which has been extensively covering the trial, has been strangely silent on this vital question of public importance. Are corruptors not as guilty as those they seek to corrupt? On what considerations should they be let off from prosecution? Readers - you be the judge!

Indira Jaising

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***Editor***
*Indira Jaising*

# LETTERS

## I.D. Amendment Unfair

I have read the letter of Mr. Prakash Raole regarding the amendment in the definition of 'retrenchment' under the Industrial Disputes Act. It is true that Sub-clause (bb) of Sec. 2(oo) is anti-worker. It gives unguided and unfettered powers to the Management to issue appointment orders stipulating a date of termination. Alternatively, this amendment gives the scope for an appointing authority to issue several appointments of fixed duration one after another, and still keep them beyond the scope of retrenchment and that of Sec. 25-F.

However, it should be noted that this amendment can only be invoked in case of genuine vacancies of a fixed tenure. In case the vacancy is permanent or the termination is on the ground of surplusage, it cannot be invoked.

Secondly, by this very amendment, a new chapter V-C has been incorporated wherein employers committing an 'unfair labour practice' defined under Sec.25-T are liable for punishment under Sec. 25-U. Item No.10 of the Fifth Schedule which specifies unfair labour practices provides that the practice of 'keeping the workers on temporary basis and continuing them as such for years' is an 'unfair labour practice'. In the case of *H.D. Singh Vs.Reserve Bank of India* (AIR 1986 SC 132 = 1985(4) SCC 201) the Supreme Court has ruled that such practice and termination of services is liable to be struck down.

With regard to the power to give artificial breaks in service, the judgement of the Supreme Court in the case of *Rattanlal* (1985 LLN 828) is most relevant. In the Gujarat High Court also, Justice R.C. Mankad has held that a series of short-term appointments are offending Article 14 of the Constitution of India.

**NARENDRA R. SHAHANI**
Advocate
Ahmedabad-380 015.

## Advocates Boycott Judge

On 11th July 1986 the members of the Dhule District Bar Association unanimously resolved to indefinitely boycott period the Court of S.B. Chowgule, Senior Division Judge, Dhule. The Bar demanded that Shri Chowgule be transferred.

The Resolution set out 21 grounds which forced the Bar Association to take such drastic action. Amongst the grounds is the complaint that the Judge openly criticises retired Judges of higher Courts. More serious complaints are the Judge's method in disposing of cases without giving a hearing and showing favouritism to certain parties. The Judge is also known to insult Advocates without any rhyme or reason. He refused to grant injunctions against the Collector saying: "If I pass an injunction against the Collector, I will invite his displeasure".

Copies of the Resolution have already been submitted to the District Judge and the High Court.

This Judge has already faced boycott by the Bar Associations of Poona and Bombay.

**Nirmalkumar Suryawanshi**
Advocate
Dhule.

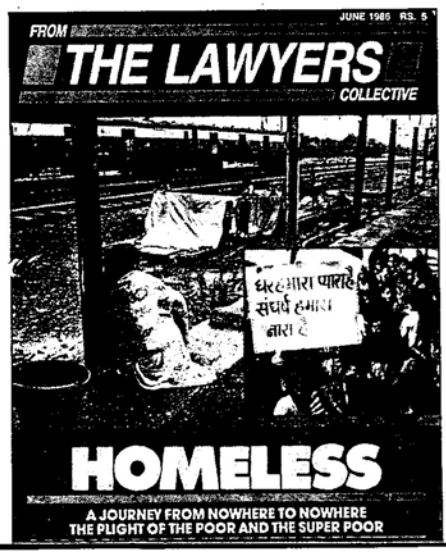
## Paper Tigers

Dr. Meera Bapat's article on the Homeless (Lawyers: June, 86) shows how legal requirements for *pucca* housing work against the homeless. High standards on paper interfere with seeking attainable goals on the ground.

Perhaps something similar happens with many laws. For instance, laws regarding dowry, child labour, minimum marriage age, etc. Legislators solemnly enact statutes which simply cannot be enforced (without jailing millions of ordinary people !) Existing behaviour becomes outlawed, and often secretive; leaving no legal or social-political flexibility for partial and gradual reforms.

Paper perfectionism prevents practical progress.

**J.J.P.**
Australia.




## Certified copy unavailable

I want to point out that despite the fact that Justice Sawant of the Bombay High Court has directed that as soon as the certified copy of an order or judgement is ready, the applicant should be informed (Lawyer Jan. 1986), this procedure is not being followed. I was falsely implicated in a criminal case by my landlady. I was acquitted in Case No.261/P/82 on 19.2.86. I applied for a certified copy on 19.2.86, but i have still not received the certified copy of the judgement.

**Joseph Fernandes**
Bombay 400 064

## The one that got away

The interview with Shri Radhakrishnan (The Lawyers March 86) is an essay in self criticism.

The horrifying picture disclosed in the affidavits of the University seems to have motivated the Government to unsuccessfully seek the copy of the affidavit of the University before they were filed.

The turning point seems to have been the fateful meeting held on 21st February 1986 in the Raj Bhavan at which the Registrar and Shri Sawant the Advocate General were present. It was decided to change the Advocate for the University. The purpose of the meeting was to initiate "Operation cover up". The circumstances clearly indicate that the mechanics of the attempted cover-up were suggested by the Advocate General.

Perhaps an easier way of getting his daughter to pass would have been for Shri Nilangekar Patil to talk to Dr. Rawal in advance. Ultimately the truth must lie with Dr. Rawal and the Advocate General.

With the resignation of the Chief Minister and the Governor, the M.D. marks scandal case claimed two victims. Two more got away.

Incidentally, when a lawyer dies the best epithaph is: "He lies there still".

**Ms. A. Writer.**
Bombay

# Social Engineering through SAL

*Social Action Litigation (SAL) has been with us for nearly a decade. It is an appropiate time to examine this experiment. through the law. In this article* **Indira Jaising** *evaluates this development*

Social engineering through law is well known to jurists and sociologists. In the last ten years, this country has witnessed the beginning of an era of social engineering through the law. However, what is unique about the experiment in India is that it has been done through social action litigation (SAL) at the instance of the judges of the highest court. It would not be an exaggeration to say that if it were not for the initiation by the judges, SAL would not have taken off.

## Letters treated as Petitions

The precise date when SAL began cannot be pin-pointed. The turning point was sometime in 1978, when the Supreme Court took cognizance of letters written from prison by Charles Sobraj and Sunil Batra complaining about the torture to which they and their fellow prisoners were subjected. The Court, seizing the opportunity, treated the letters complaining of violations of fundamental rights, as writ petitions and entered into the hitherto "out of bounds" prisons.

The Courts then started taking cognizance of newspaper articles, drawing attention to the plight of the undertrials who had languished in prisons and lock-ups for years awaiting trial. A series of articles in the *Indian Express* motivated the Supreme Court to question such prolonged detention. From those early beginnings, the arena of SAL has spread to a whole host of areas from environmental questions to issues relating to children.

SAL is premised on the acceptance of the role of the judge as being something more than an 'umpire' between two disputants. The judge of a court is seen more as a statesman-judge and the courtroom, as a forum for participating in a democratic decision-making process, where different interests compete for recognition of their legitimate expectation.

Courtesy: Daily

***Justice for all***

What accounted for this turning point in the perception of the role of the judge and the judiciary?

## The Entry of Krishna Iyer

The phenomenon cannot be attributed to an accident. It is clear that in the early seventies the ruling Congress Party took a conscious decision to induct leftists into positions within Government and the State apparatus. This appears to have been part of a larger national strategy of the formulation of the programme of 'Garibi Hatao', a programme on which the ruling party itself had come to power. While the ramifications of this policy were evident in different Government decisions, one of them was the appointment of Justice V. R. Krishna Iyer as a Judge of the Supreme Court.

There can be no doubt that his appointment was a turning point in the judicial process. A man with a clear vision and perception of the role of a Judge and the nature of the judicial process, he went about his job seizing every opportunity to translate the promise of social justice in the Constitution into his judgements.

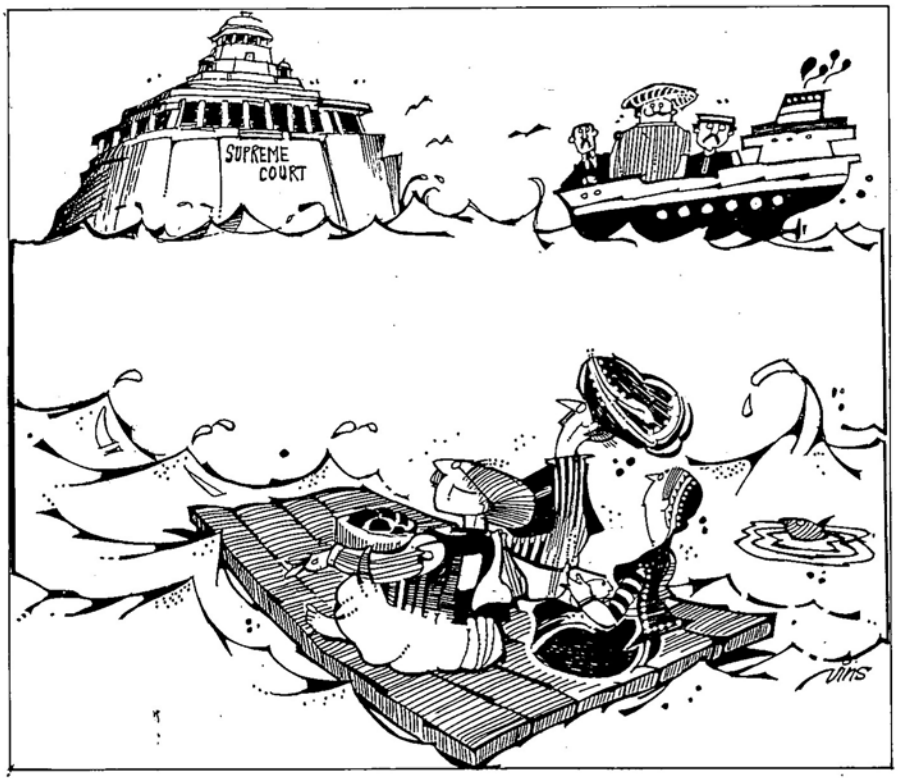
A debtor complaining that he could not afford to pay an admitted debt provided the occassion for Krishna Iyer to hold that no person can be put into prison by reason of poverty alone. He held that in deciding whether or not a person should be sent to jail for non-payment of a debt, the court would consider whether the default in payment was deliberate and wilful. In the case which went before the Court, the Petitioner complained that his wife was suffering from cancer and whatever limited resources he had went into her treatment. The court held that it would be cruel and inhuman to imprison a debtor simply because in these circumstances he could not pay (*Jolly v. Bank of Cochin* AIR 1980 SC 470).

The *Ratlam Municipality* case (AIR 1980 SC 1622) provided another opportunity to activate a dormant remedy under Section 133 of the Criminal Procedure Code for removal of nuisance. The Ratlam Municipality was compelled to submit a plan to provide a proper drainage system for the residents of the area to avoid dirt, filth and disease.

In the *Azad Rickshaw Pullers* case (AIR 1981 SC 14), an attempt was made to ensure that a new law requiring the rickshaw puller to be the licenced owner of the rickshaw did not result in mass unemployment of the rickshaw pullers. Banks, lending institutions and the Government were invited to submit schemes and patiently led into finalising a funding proposal which would rehabilitate those for whom the law was intended. The trend was thus set and the role played by Justice Krishna Iyer certainly affected favourably the climate and culture of the entire Court.

The development cannot be divorced from parallel developments taking place in other social spheres. The emergence of voluntary groups working in the rural and unorganised sec-

tor, the availability of funding to such groups, the commitment to legal aid through legal aid schemes which encourged the spread of legal aid and literacy through shibirs and the active involvement of judges in live issues all played their role in shaping the future course of SAL. The bar was conspicuous by its absence from the scene while all this was happening.




## Appointment of Bhagwati

The appointment of Justice P. N. Bhagwati, who had a known history of consistent work in the field of legal aid was yet another important step in the direction of ensuring social change through the legal process. In his judgements, one sees a very clear pattern, both at the jurisprudential and practical level, of a conscious effort at enforcing entitlements of rural and urban poor and insisting on implementation of social welfare benefits.

The *Asiad* judgement (AIR 1982 SC 1473) turned out to be something of a charter of economic rights for victims of underserved want. For the first time, we had a legal definition of 'forced labour'from the Court. It is worth mentioning that even the International Labour Organization does not have a definition of this concept till this day and Justice Bhagwati's opinion in the case today has become an internationally accepted one. The full impact and ramifications of this judgement are yet to be worked out, its potential remains unexplored, hidden and buried in the pages of the law reports.

Broadly, the Court has entered into the field of prison rights, rights of undertrials, rights of inmates in womens' remand homes, construction labour, bonded labour, hawkers & pavement dwellers, environment, violations of civil liberties requiring immediate release of persons in illegal detention and compensation for wrongful imprisonment, employment related benefits such as equal pay for equal work and rights of children.

There have been no really significant judgements on women, except for those that fall into the 'atrocities' category such as dowry deaths and *stridhanam* by invoking criminal law for return of dowry.

*D. S. Nakara's* case (AIR 1984 SC 130) was and will continue to be for a long time to come,a turning point in the interpretation of Article 14, the right to equality, and hopefully it will bury once and for all the perverse use made of the doctrine of "classification" to justify and perpetuate inequality.

## The Gains of SAL

Having very briefly outlined the areas into which the Court has entered, what exactly is the balance sheet of social engineering through law, the ostensible purpose of SAL? The answers to these questions must necessarily be tentative and incomplete as there exists no complete compilation of all the material that has been generated by SAL and no field studies on impact. Yet at the jurisprudential level its gains are clear and institutionalised.

**First** and foremost of the gains is access to a national forum of decision making and power by those who were until now voiceless and invisible. The liberalised rule of locus standi envolved in the Judges case (AIR 1982 SC 149) gave them that access albeit mediated through *social action* groups or socially concious individuals.

**Secondly,** a simplification of procedures makes it possible for social action groups or individuals to approach Courts through writing letters, which can be treated as writ petitions complaining of violations of fundamental or legal rights. This allows access to Courts without recourse to lawyers in the first instance.

**Thirdly,** the appointing of Commissions by the Court as fact finding bodies to check into the allegations made in the Petitions has established a new mode of proof. These Commission reports have formed the basis of directions of the Court in cases complaining of violations of rights.

**Fourthly,** the monitoring by the Court of the implementation of the directions at periodic intervals, to ensure compliance, enable the vindication of rights in practice. The monitoring function has also often been vested in vigilance bodies with participation of social action groups.

These can be said to be the four major long term institutional gains of SAL.

In the accompanying interview, Chief Justice P.N. Bhagwati explains the jurisprudential basis of these developments. As is clear from the interview, to some extent, the success of SAL depends on the conception of the State as a welfare state, a benevolent

## The SEWA Case

In 1982, Ela Bhat, General Secretary of SEWA, along with three female vegetable vendors, also members of Sewa, filed a Writ Petition in the Supreme Court challenging certain provisions of the Bombay Provincial Municipal Corporation Act 1949.

Manek Chowk Market, which has been the traditional fruit & vegetable market of Ahmedabad for the past 40 to 50 years, accomodates hundreds of vegetable vendors or *topliwalis*. The *topliwalis* have been squeezed out on to the 'footpath' where they sit with *toplis* (baskets) full of vegetable and fruits. They live in the slums of the city and hawking is their only means of livelihood. As their prices are low, they attract a lot of customers from the middle and lower class. *Topliwalis* are a part of the economic life of the community and are performing a very valuable service to the city. From time to time they have been harassed and prevented from conducting their lawful business by the Municipal Corporation of Ahmedabad and Commissioner of Police.

*Courtesy: Amdavadma*

The *topliwalis* submitted that they were exercising their rights under Article 19(1)(g) of the Constitution of India in carrying on their business of selling fruits and vegetables.

On the one hand the Municipal Corporation of Ahmedabad was refusing to licence the hawkers and on the other hand it was removing, with the help of the Commissioner of Police, the articles sold by vegetable vendors at Manek Chowk.

The Municipal Corporation had been collecting fines which runs into Rs.12.50 per week from the topliwalis on grounds that their hawking vegetables in Manek Chowk Market was unlawful. The fine was collected as 'expenses' for removing encroachments. Unlicensed vegetable vendors paid more by way of fine to the Municipal Corporation than licensed vendors pay by way of licence fees.

The Supreme Court gave an interim order restraining the Municipal Corporation from evicting the vegetable vendors and from recovering any penalties imposed on them. The order also restrained the Commissioner of Police from prosecuting the vegetable vendors for alleged violations of the Bombay Police Act.

On 5th September, 1984 the Supreme Court gave its final order in favour of the *topliwalis*. The Municipal Corporation was directed to accommodate 218 female vegetable vendors, members of SEWA, along with 95 male vegetable vendors, associate members of SEWA, on the terrace of the newly constructed Manek Chowk market.

The Municipal Corporation was directed to allocate to each vegetable vendor space on the terrace admeasuring 4' x 4' which would be reduced to 4' x 3.5' if 313 all vegetable vendors could not accommodated.

The Municipal Corporation is to provide a roof on the terrace, a broad staircase for vegetable vendors and customers to go to the terrace and water and lighting facilities for the vendors.

The Municipal Corporation was also directed to issue licences to the vegetable vendors.

The Municipal Corporation, in consultation with SEWA, was directed to appoint a Topla Bazaar Committee, consisting of an equal number of representatives from the Municipal Corporation and vegetable vendors. This Committee would manage the day to day affairs of the vegetable market.

state, willing to be a participant in the proces of social change.

### SAL to tilt balance of forces

Both Justice V.R. Krishna Iyer and Justice P. N. Bhagwati have emphasized that the Constitution of India is not a neutral parchment but aimed at tilting the balance of social forces in favour of the have-nots. It contains within itself the policy of distributive justice and points the direction in which social change is to take place.

The constitutional acceptance of the welfare State by governments in the post war period has made it necessary for them to set up 'neutral' institution for dispute resolutions, including the courts. Whether or not the judiciary actually plays that role depends on the balance of social forces at any given point of time. SAL is to some extent a reflection of an attempt by the underprivileged to compel the judiciary through a combination of strategies, to play a neutral role and not align itself with the ruling classes. In doing so, SAL and the courts have not aligned themselves with the poor and downtrodden by exceeding the limits of their judicial role as is suggested by the critics of the SAL. The courts have played their expected role as neutral arbiters, enforcing entitlements and not aligning themselves with the powers that be. They have tried to right a historical wrong done to the victims of underserved want. As social action groups realised that courts were willing to listen, they started approaching the courts on diverse issues. The approach has been rather to defend themselves against repression or to enforce entitlements due under law.

The question has often been asked and continues to be asked: should social action groups resort to the judicial process to remedy their grievances? The question is absurd, the answer obvious. This history of the recent past has shown that the social costs of reliance on agitation alone in attempting to tilt the balance of social forces in favour of the oppressed have been too high. Recourse to courts can cut down on avoidable social costs. Secondly, such litigation gives to their struggle a legitmacy it rightly deserves, which has been unlawfully denied to them. Thirdly, the courts provide the public and democratic arena

which is badly needed for them for a dialogue and participation in the decision-making process on issues which concern their lives intimately. Last, but not the least, SAL has proved beyond doubt that it is capable of producing results in terms of getting concrete relief to the victims of the social system.

Till now the Court had been hijacked by the moneybags to serve their own ends. For the first time, the oppressed are claiming their share of Court time. This is not to suggest that the evils and ills of society are going to disappear with the filing of petitions or judgements. The process has to be a sustained and ongoing one. The implications of the decision in Brown V. Board of Education of the United States Supreme Court on desegregation are being worked out to this day from case to case. What is being talked about here is a historical phenomenon, a new jurisprudence, a new court culture that will have to be built painfully and slowly brick by brick. On the building of this culture will depend the credibility of the Supreme Court as a relevant institution.

### Apprehensions on SAL

However, the progression of SAL has not been a straight line upward curve. Perhaps the largest single failure of the Supreme Court so far has been the judgement in the Bombay Pavement Dweller's case. Many a jurist and sociologist has unsuccessfully tried to come to terms with this judgement . Many do not understand the acceptance by the Court of the right to livelihood as part of the fundamental right to life on the one hand and the final order of the Court sanctioning evictions without alternatives on the other. If squatting was recognised as an inevitable consequence of poverty and loss of livelihood the inevitable consequence of the eviction, the right to livelihood was surely deprived. The answer to this riddle must await a decision on the Review Petition

The Bombay Pavement Dweller's case has led people to ask the question whether the outcome of social action litigation depends on who is writing the opinion of the Court. It is obvious that decisions are made on the basis of the jurisprudence which a Judge accepts as the foundation for decision-making. We are not here concerned with individuals but with trends and issues. This discussion throws up the obvious question of the criteria on which Judges are selected. We have had several kinds of Judges, the good, the bad and the indifferent. But a system of appointment of Judges to the highest Court which brings in the bad with the good is obviously not good. Appointments made in secrecy to the highest Court of the land for unstated and unknown reasons do not further the cause of justice or enhance the credibility of the Court. Nominations for appointments should be announced in advance and debated in Parliament before confirmation. The Judge's known jurisprudence as reflected in judgements should be a definite criteria for judging the merits of the proposed appointment.

However, by far the most important weakness in the strategy of the SAL in the model put forward by its proponents is the conception of the State and its role in it. The State by its very nature rules through consensual and the coercive modes.The consensual mode is manifested in justice delivery systems, the coercive 'in the bodies of the armed men' It is the consensual aspect which is amenable to change. It is not a monolith as has been accepted by a lot of its critics. The law, in form, grants equality but rests, nay is premised, on inequality in society, its content. SAL in one sense tries to infuse content into that form by actually realizing the goal of equality in practice. The challenge before SAL is to infuse the content of equality into law which today exists only in form.

## The Case of Nari Niketan

Chinnamma Sivadas was until October, 1980, the central organiser in the Association of Social Health in India. During her tenure in the Association, she had several occasions to visit Nari Niketan in Delhi, which had been declared a Protection Home under the Suppression of Immoral Trafficing of Women and Girls Act, and was managed and run by the Delhi Administration. On the basis of what she saw during her visits to Nari Niketan, she filed a writ petition in the Supreme Court. She listed several instances of denial of basic amenities like food and clothing to the inmates. She said that women were being used as a source of cheap labour. There were no facilities of occasional training and for social, economic and psychological rehabilitation.

Mentally deranged inmates and those suffering from infectious diseases were herded together, thus exposing them to the very dangers that the home was to protect them from. Some of the inmates were being forced into prostitution and under cover of legalised marriage they were finding their way back into the brothels.

The Court appointed a panel to ascertain whether these allegations were correct. They visited Nari Niketan, interviewed the inmates and submitted a detailed report which substantiated most of the allegations.

On the basis of the report of the panel, the Court ordered that basic amenities such as food, boarding, clothing, health check up and so on should be provided.

The Court further directed that a member of the panel would visit the place once a week to interview the inmates and provide them any legal assistance needed to redress and resolve their problems, complaints and grievances.

Inmates found to be mentally disturbed were to be sent to a Mental Hospital. All inmates suffering from infectious and contagious diseases were to be segregated from the rest of the inmates.

Recreational facilities, like indoor and outdoor games, picnics, excursions and radio and television were to be introduced.

No inmates could be married off without obtaining prior permission of the Court, to ensure that the person seeking to take the inmates in marriage was acting *bonafide* and not with a view to turn her into a prostitute under cover of marriage.

## COVER STORY

# Chief Justice P.N. Bhagwati

**Chief Justice P.N. Bhagwati, along with Justice Krishna Iyer, has been the chief architect of the development of public interest litigation in India. We talked to him about his evaluation of it. Here are the excerpts.**

*Courtesy: Daily*

**Q.** *How does public interest litigation differ from any other ordinary litigation?*
**A.** First of all, the expression public interest litigation does not accurately describe the kind of litigation which we have been trying to promote in this country. I would prefer to call it social action litigation (SAL). Public interest litigation has an American flavour to it. It originated in the US two or three decades ago. It is totally different from our model. Our model seeks to bring about or produce what I would call turn-about situations where we try to enforce the rights and entitlements of the poor and disadvantaged sections of the community to help them to end exploitation and injustice and to realise the constitutional objectives, particularly the building up of a new social-economic order where there will be social justice for all. SAL is essentially a strategy for realisation of the constitutional objectives and goals.

The difference between social action litigation and ordinary litigation is that ordinary litigation is intended to deal with private right/duty patterns, where A seeks to enforce a right or an obligation against B. It is essentially individual in character. SAL deals with rights and entitlements of large groups of disadvantaged persons where the obligation of the State is to end exploitation, to give social justice to the weaker sections of the community and to implement the various legislative and administrative programs which are social economic rescue programs. Therefore, it is more in the nature of class litigation if you may call it.

**Q.** *What about access to Courts? You have developed the expanded notion of locus standi. Can you explain that?*
**A.** It was not possible for the poor and the disadvantaged to have legal access. Largely because of three major difficulties viz., lack of awareness, lack of assertiveness and lack of availability of machinery.

The very basis or the basic postulate behind our system of administration of justice is that a person should be able to identify a wrong or injury done to him as a legal wrong or legal injury which is capable of legal redress, or judicial redress. If a person does not know that a legal injury has been done to him, he can never think of enforcing his rights. It is obvious that ignorance and legal illiteracy stand as an impediment to access to justice.

Secondly, our poor and deprived sections of the community lack the capacity to assert their rights because of their weak socio-economic position. Therefore, the mere setting up of a legal office is not going to help them.

Apart from that, how are large numbers of people who are suffering from a common wrong or a common exploitation, going to approach the Court? Each one cannot file a separate action.

One of the major impediments in the way of access to justice so far as the poor are concerned was the doctrine of locus standi which we have inherited from the Anglo-Saxon system of jurisprudence. This doctrine requires that it is only a person who has suffered a legal wrong or a legal injury who can go to a court of law for redress. He must have a cause of action to approach the court. Otherwise he cannot. No one else can file an action on his behalf.

This doctrine of locus standi was evolved during the period when individual rights were predominant in a *laissez faire* era and where the function of the courts was essentially to adjudicate upon private and individual rights and duties.

Now, as we have entered into new age, where collective rights, meta-individual rights, have become more important, the old doctrine of locus standi cannot be adequate to meet the needs of a modern, developing society, where we are trying to mitigate the rigors of poverty and to reach social justice to large masses of people. The Court, therefore, evolved a new doctrine which marks a radical departure from the doctrine of locus standi.

Where legal wrong is done or legal injury is caused to a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a court of law for justice it should be open to any public spirited individual or social action group to file an action on behalf of these poor and disadvantaged groups of people in order to enforce their rights and entitlements.

We derived inspiration from the practice which is being followed in habeas corpus matters where any citizen is entitled to approach the court for the release of another person who has been illegally detained.

Why do we allow anyone else to file such actions? The reason is that the person illegally detained is not in a position to approach the court. Similarly, we reasoned that if the person or group of persons cannot approach the court because of social or economic disability, then another person or another social action group should be entitled to file an action for the purpose of vindicating their rights.

We provided jurisprudential foundation to this doctrine in the *Bandhua Mukti Morcha* case. The language of Article 32 and Article 226 of the Con-

stitution does not say that the person whose fundamental right is infringed or whose legal right is infringed alone should be entitled to approach the Court. Those provisions talk of the power of the court to grant relief to enforce fundamental rights.

When I look back, it is really an amazing development. As situations arose, cases came, we started dealing with them. The two cases that I consider of the greatest importance are the *Judges* and *Bandhua Mukti Morcha* cases. The Asiad case gives expression to my social philosophy.

**Q.** *Another problem that crops up in social action litigation, is the question of proof.*

**A.** The *Bandhua Mukti Morcha* case deals with that issue fairly and squarely.

When we started dealing with SAL, at some stage we began to feel the difficulty of obtaining evidence. Often social action groups may bring litigation before us on the basis of reports of investigative journalism or on the basis of their own experience working among the people on the grass roots level, in the rural areas or the slum areas, but the question was how to prove these allegations.

Now, it was very difficult to expect social activists or social action groups to bring all these materials before the court because their resources are limited.

If there is no evidence or no material, we, as judges, do not fold our hands in despair. We would be failing in discharging our constitutional duty by just telling the social action group: well, you are not producing the evidence, we cannot do anything. And even if this is true, let the poor suffer. Well, that is something which the court could not do and cannot do because the court in discharge of its constitutional functions under Article 32 and Article 226 has to enforce fundamental rights.

In the Continental model the judge takes upon himself a certain investigative role. Under the Anglo-Saxon system, the adversary model, the judge sits like an umpire. He merely sees that the rules of the game are observed and nothing more and both parties produce their evidence, argue their cases, and on the basis of the material produced and the arguments advanced, the court decides which way the truth lies - whether there is any violation of a right or not. Well, this adversary model just cannot function in a country like India where there are large numbers of poor, disadvantaged, deprived and exploited sections of the community who just cannot present their case.

So we decided to depart from the adversarial model and we started appointing commissions of inquiry with a view to investigate facts. The Court started this, I believe, in the *Chamars* case of some of the districts of Uttar Pradesh where for the first time the court appointed a commission consisting of Dr. Upendra Baxi and Krishan Mahajan to go to those districts in order to carry out a socio-legal investigation for finding out what the conditions in which the Chamars were living and working were. This practice became more and more frequent. In the last 3-4 years we have appointed a number of commissions consisting of district judges, district magistrates, social scientists, professors of law and journalists.

**The Asiad Case gives expression to my social philosophy**

In order to meet their expenses we direct the government which is the respondent, to deposit their costs. The commissioners go to the spot where the inquiry is to be carried out. They hold an inquiry, and make a report to the court. In the *Bandhua Mukti Morcha* case the Supreme Court held that the report made by the commissioner is prima facie evidence and copies of the report should be supplied to both parties and they should be given an opportunity to contest the facts if they want to. On the basis of the report and the affidavits which may be filed by the parties the court will decide and adjudicate upon the case.

**Q.** *Doesn't the success of SAL depend on a benevolent State? If there is a real conflict with the state, do you envisage that oppressed groups, will be able to succeed through the medium of the court?*

*A.* No, I would not say that SAL is a panacea for all social social and economic ills or the problems and difficulties from which the poor suffer. It is a strategy which is intended to help them. I have found the State governments and the Union government as also their officers extremely cooperative in SAL and whenever any orders have been made or directions given, they have by and large carried out these orders and directions.

Sometimes there has been default, but where there is this default, the social action group which brings the litigation must draw the attention of the court to such defaults.

But the Government also cannot adopt a different stand for two reasons. Firstly, what the court is trying to do is merely to enforce constitutional and legal obligations on the state and the courts have made it very clear that SAL is not an adversary litigation but it is a collaborative effort on the part of the court, the state, and the petitioner to achieve social justice for the people. The state is under an obligation both by virtue of the Constitution and by virtue of the laws to see that the rights and entitlements that are given by the Constitution and the laws are made meaningful for the large masses of people and what the court is seeking to do is merely to draw the attention of the government or the state to its obligations and to see that those obligations are enforced.

Moreover, no state can possibly say that it will not carry out what the court orders because it will be contrary to their professed commitment to Constitutional values and to its anti-poverty programmes. If they oppose our judgements and directions, they will be creating an impression that they are not interested in alleviating the rigors of poverty or in enforcing the rights and entitlements. Therefore, SAL does not proceed upon a distrust of the government or of its officers but it seeks to really draw their attention so that they can carry out those obligations.

**Q.** *There is also the other problem of implementation of court orders. There is not much of a spread effect. How do you plan to overcome this problem through the judicial or the litigative process?*

**A.** There are two ways in which this can be done. The first, of course, is the traditional way where if an order or

direction given by the court is not implemented, action by way of contempt can be taken.

The second way is by the court itself setting up its own monitoring mechanisms. This again can be done in two ways. One is that the court, when it makes an order or gives a direction, sets up a monitoring agency by its own judgement directing the monitoring agency to report to the court after a period of time as to whether the orders or directions have been obeyed or not.

The Supreme Court cannot possibly monitor everything but the Supreme Court can definitely set up a monitoring mechanism. In the *Bundhua Mukti Morcha* case the supreme court set up a monitoring mechanism by asking the Joint Secretary of Labour to visit the stone quarries after three months and make a report to the Court. That report has been made, hearing has taken place only two days back and is awaiting judgement.

There is yet another way. The court itself can set up a SAL cell as part of its own machinery which should consist of social scientists and officers whose function should be two fold. One to investigate and make a report on the case just like a Commissioner. Second, to monitor the implementation of the orders. I hope to set up a SAL cell in the Supreme Court soon.

**Q.** *How do you now assess the development of SAL and what are the likely future developments?*

**A.** I think the SAL has made fairly good progress because it is not only the Supreme Court which is taking up SAL but the High Courts have also picked up the lead of the Supreme Court. Several High Courts have started treating letters addressed on behalf of the deprived and exploited sections of the community as writ petitions. There have been cases in Bombay, Gujarat, Himachal Pradesh, Kerala and some other High Courts. So I personally think that SAL has a fairly bright future but of course everything will ultimately depend on the leadership which is provided by the Supreme Court.

**Q.** *This brings me to the next question. We have seen in the US for example the way the government and courts have changed their attitudes over a period of time towards, let us say, public interest litigation, depending on who is the Chief Justice. Rehnquist has now been appointed. There is an apprehension amongst a lot of the public interest groups in the U.S. that things will go from bad to worse. Doesn't it really depend on the judges, especially of a Chief Justice's view how these things develop?*

**A.** Ultimately the process of judging is to some extent a subjective process. Judgements which are given in many of these cases are value judgements, and the ultimate decision depends upon the value preference of the judge. Where a judge is faced with problems of this kind, competing values clamour for acceptance by him. He has to make his choice between competing values and the choice is ultimately dictated by the social philosophy of the judge. His social philosophy, in my opinion must be in tune with the social philosophy of the Constitution, because our Constitution is not a neutral document like the American Constitution. It is a document with a social purpose and an economic mission. Every provision of it is infused with the concept of social justice, distributive justice, and therefore a judge must be in tune with those Constitutional values and objectives.

**Q.** *There are other conflicts in SAL, e.g. the Bombay environmental groups have taken up cases of environmental issues as they want a "green Bombay". This affects, say, hawkers, their right to trade, to live. Thus certain types of public interest litigations imply impinging upon the interests of other disadvantaged groups. What should be the role of the courts in these cases?*

**A.** The courts have to strike a balance. It is here that the courts have to perform a delicate task which requires wisdom, sagacity, awareness of social issues and statesmenship. They ought to be able to foresee the social and economic consequences of the decisions which they make. It is a very heavy responsibility which lies on the judges where the power of judicial review is given and the courts have expanded the limits of their own jurisdiction. It is a power which we should exercise wisely and sagaciously and if it is exercised with a full awareness of the consequences or the implications of what I call, what Justice Holmes calls, the prudential radiations, then it can do a large amount of good. But if it is exercised recklessly, without taking into account the consequences, the implications on the society,on the community, on the nation, it can also be dangerous.

**Q.** *Can I put you a very simple nitty-gritty question in a case of that type. For example, would you say that it is preferable to have a clean Bombay and not allow hawkers to ply when that would mean that hawkers would not be able to trade and survive?*

**A.** No, I am of the view that we can reconcile both.

# REVIEW

## Bhopal Disaster

*Anand Grover*

Normally an author has the prerogative in choosing his subject matter for his study and the reviewer has to accept that as axiomatic. A book dealing with the Bhopal case, when it only publishes original case papers relating to the litigation, admits of an exception to the above rule. Particularly, when the documents presented relate only to the litigation in the U.S. and is published by the Indian Law Institute. No documents relating to the litigation in India have been published.

The Introduction by Upendra Baxi, now the Director (Research) of the Indian Law Institute, discloses the basis of this unusual situation. The rest of the book is a compilation of the key documents of the Bhopal litigation in the U.S.

Baxi argues for the Bhopal case to be continued in the U.S. Court. (It was written before Keenan delivered his final verdict). Hence the bias for publishing documents relating only to the U.S. litigation. Baxi was quite confident that the U.S. Court would dismiss the Carbide motion on forum non conveniens.

Baxi is derisive about Palkhivala's stand about the 'extra ordinary act of a foreign sovereign government seeking justice in an American Court', while he has nothing to say about Marc Galanter's affidavit, except that 'Galanter celebrates in his unimitable ways and in striking detail the infirmities of the Indian legal system.

Did it require a Judge of an American Court to tell us how to put our own house in order?

However, the fatal flaw in the reasoning of the proponents of retaining the U.S. forum is the oft-repeated mistake by academics of extrapolating the general to the particular. Simply because there is an endemic delay in the justice delivery system in India, a general and an indisputable proposition, it does not follow that the Bhopal case, a historic case by all accounts, would follow the same pattern.

Hopefully, after the import of the Keenan's verdict becomes clear to the doyens of the Indian Law Institute, they will consider publishing all documents relating to litigation in India and correct the bias in the present publication.

**Mass Disasters and Multinational Liability**
**The Bhopal Case**
Published by the
Indian Law Institute
New Delhi, 1986
Price: Rs.80/

## Legal Myths

*Shehnaaz Sheikh*

"Demystification of Law for Women", by Nandita Haksar, a Supreme Court Lawyer, is stated to be the first illustrated book which exposes the judicial bias against Indian women. It attempts to do this through captioned illustrations.

How far has the book been able to serve this purpose? What is it's practical utility to the womens' movement in general and the ordinary Indian woman in particular? Has it really been able to demystify the law or has it created another set of myths by using jargon?

Extracts from various religious texts to show their anti-women content are absolutely uncalled for at this stage. One cannot disagree with Ms Haksar that religion has been used with impunity by vested interests to oppress women and strengthened the patriarchal structure of our society. But the question is: Whom has this book been written for? Surely, it is not just for progressive people. If the average Indian woman is to identify with it, things have to be put forward differently.

Personal experiences of those working at the mass level and even with middle class women, shows that these women are religious. Religious identity is stronger amongst women of the minority community. Such references may be seen as an attack on religion and will put off these women.

The stress on a Uniform Civil Code as an alternative to the present Personal Law throughout the book is again questionable. What is this Code that Ms Haksar is so strongly recommending? Has it been framed in a manner so as to guarantee justice and equality to all women? Is it non-sexist and secular? Such jargon can definitely be avoided. Instead, one could start by formulating something concrete in the interest of all women. Concrete illustrations in the book would have gone a long way to convey the same point. One cannot forget that similar demands for a Uniform Civil Code have been made by Hindu communalists. In the recent *Shah Bano* controversy, the slogan of an Uniform Civil Code was used as a stick to beat the already persecuted Muslim minority and with what result? There was a similar reaction from Muslim fundamentalists asking for the exemption of Muslims from the provisions of Section 125 Cr. P.C., under the guise of protecting minority rights. In the bargain, Muslim women lost their right to maintenance under this section. The aim of this book is surely not to strengthen the hands of communalists and fundamentalists.

Moreover, there are uniform laws such as those relating to rape and dowry. Are they all pro-women? Certainly not. How then can this imaginary Uniform Civil Code help women when it is not yet formulated?

There is also a serious legal flaw in the book. Ms. Haksar tries to make out that it is because of Article 25 (Freedom of conscience and freedom to profess, practice and propagate religion) that rights under the equality provisions (Articles 14, 15 and 16) are denied to women. Unfortunately, Ms. Haksar forgets that Article 25 is subject to the provisions of Chapter III (fundamental rights) which includes Articles 14, 15 and 16. Twisting an argument for 'the sake of simplicity' does more harm than good in the long run. 'Demystification' of this type can only creat worse myths.

**Demystification of LAW FOR WOMEN**
by Nandita Haksar,
Lancer Press, New Delhi
Rs.30/-

'Channelize energy into unity'

# PHILIPS WORKERS' UNION

Kalwa

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# LAW AND PRACTICE

**Contract Labour Abolition Act** *(cont.)*

But inspite of the statutory requirements under Section 13 of the Act, the Planning Commission in its Report of the Programme Evaluation Organisation (1984) noted that, **"Out of 18 districts under study, Vigilance Committees were set up in only 10 Districts... most of the Committees were defunct and were not effective as required. Regular meetings were not held by these Committees since their inception. Adequate guidance was not provided. Effective steps were not taken to ensure the implementation of the decisions taken..."**

## Registers

The Central Rules framed under the Act required the following statutory registers to be maintained. These are registers containing:-

* the name and address of the freed bonded labourer;
* statistics relating to the occupation and income of every freed bonded labourer;
* details of benefits given to the freed bonded labourer; and
* details of cases under different sections of the Act. (Rule 7)

The Planning Evaluation Organisation observes that, **"in most of the States, the statutory registers were not maintained properly. Names of beneficiaries, type of assistance given and number of beneficiaries were not recorded properly."**

It was also observed that, by and large, the administrative arrangements in various States were not satisfactory for the enforcement of the Bonded Labour Act and consequently for the implementation of the rehabilitation programme for the released bonded labourers.

Under Section 22, every offence mentioned above is considered to be serious and is therefore cognisable. This means that a person charged with such an offence can be arrested by a police officer without a warrant.

However since the time the Act came into force there have been negligible convictions of persons under the aforesaid offences. In fact, the experience all over shows that the local law and order machinery always side with keepers of bonded labourers and not against them.

**These Grey Pages are a regular feature of the magazine. They have separate running page numbers. This will be indexed at the end of the year allowing the reader to keep it as a ready reference**

An offence under this Act has to be tried by an Executive Magistrate. It may be tried summarily.

### Offence by Companies, Firms, etc.

Section 23 stipulates that if an offence under this Act is committed by a company or association or other bodies, every person who was at the time directly responsibile for the conducting of the business of the Company or association, as well as the Company and Association, would be proceeded against and punished as guilty of the offence.

If it is proved that such offence has been committed with the consent and connivance of or due to neglect on any part of the Director, Manager, Secretary or any other officer of the Com pany, Association or any other body, every such officer is liable to be proceeded against and punished as guilty of that offence.

## Rehabilitation

There are only two provisions in the Act which deal with rehabilitation.

Section 11 states that the District Magistrate authorised by the State Government under Section 10 or the officer specified by the District Magistrate under that Section **shall, as far as practicable,** try to promote the welfare of freed bonded labourer by securing and protecting the economic interests of such bonded labourer so that he may not have any occasion to contract any further bonded debt.

Section 14(b) also provides for the social and economic rehabilation of freed bonded labourers.

Under Section 11, as the term 'shall' is qualified by the ex-

**The offences and Punishments stipulated under the Act are as follows:-**

| Offence | Punishment |
|---|---|
| Compelling any person to render any bonded labour (Section) | Punishable with imprisonment which may extend to 3 years and also with fine which may extend to Rs. 2000/- |
| Advancing any loan under an agreement providing bonded labour (Section 17) | - same as above - |
| Enforcing any custom, tradition, contract or agreement by which a labourer or his family members are required to render any service under the bonded labour system (Section 18) | - same as above - and out of the fine, if recovered, payment shall be made to the bonded labourer at the rate of Rs. 5/- for each day for which the bonded labour was extracted from him. |
| Accepting any payment against any bonded debt which has been extinguished (Section 9) | Punishable with imprisonment which may extend to 3 years and also with fine. The Court may, in addition to the penalties, direct the person to deposit the amount in Court for being refunded to the bonded labourer. |
| Failure to restore to the bonded labourer possession of any property which was seized from him for the recovery of a bonded debt (Section 19) | Punishable with imprisonment which may extend to one year or with fine which may extend to Rs. 1000/- or with both. Out of the fine, if recovered, payment shall be made to the bonded labour at the rate of Rs. 5/- each day during which possession of property was not restored to him. |
| Encouraging (abetting) or helping another person to commit one of the above offences (Section 20) | Punishable with the same punishment as has been provided for the offence which has been abetted. |

pression 'as far as practicable' it excuses the District Magistrate from promoting the welfare of freed bonded labourers. Further, experience shows that Vigilance Committees have either not been formed or wherever they have been formed, they are defunct. In this situation identification, release and rehabilitation of bonded labourers remains a big question mark. In most States, the concerned officials are unaware of the provisions of the Act.

Most unfortunately, the officials are a constant impediment in the release and rehabilitation of bonded labourers. As has been observed by the Supreme Court, "the Commissoners and Collectors have multifarious duties to attend and even if they are anxious to help in eradication of the vice of the bonded labour system...they would not find time to make any personal inquiries or investigations. They would have to rely on their subordinate officers, tehsildars and patwaris. At many places, the patwaris and tehsildars are either in sympathy with the exploiting class or lack in social commitment or are indifferent to the misery and suffering of the poor and the downtrodden. Hence the task of identification, release and rehabilitation through the official machinery would be very difficult to achieve.

The Supreme Court in *Neerja Chaudhary v/s State of MP* (AIR) 1984 Sc 1104) observed:

"We had sometime back a case where, pursuant to a direction given by the Collector as a result of an order made by this Court, the Tehsildar went to the villages in question and sitting on the dias with the landlords said that they were not bonded but they were working freely and voluntarily, and he made a report to the Collector that they were no bonded labourers."

However, the procedure for procuring grant (for rehabilitation) is complicated. After a bonded labourer is located, his case is first put up in the Sub-Divisional Officer's Court. After the evidence is heard, he is formally freed and then a scheme for his rehabilitation is prepared on a standard proforma thereafter the viability of the scheme is looked into. The file then proceeds to the labour department of the State concerned. When the Department is satisfied, the file proceeds to Delhi - since the Central Government contributes half the amount - where it is inspected by a screening committee comprising officials of the Labour and Home Ministeries. The file is then returned to the State concerned. (India Today, April 15, 1983, p.127). **The shifting of file from Labour Department of the State to Delhi and then back to the State sometimes takes from a few months to 2-5 years.** As has been observed by the P.E.O. study:... as many as over 60% of the selected beneficiaries were rehabilitated anywhere between 2 and 5 years" (p.93)

The experience of Social Action Groups has been frustrating. Whenever they have presented lists of bonded labourers to the administration, not only their lists have not been accepted by the local District bureacracy but such groups are intimidated by the keepers of bonded labour and the local law and order machinery invariably sides with the vested interests. With the result, some of these groups have had to file writ petitions in the Supreme Court for directions to District administration and the State Government. The Act envisages a summary procedure for release of bonded labour but the District administration ensures by placing constant obstacles, lengthy proceedings during which the bonded labour is left with two options - freedom which offers him intimidation and starvation or return to the old masters under worse conditions of service.

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# Federal Discovery Rules in the U.S.

*Judge Keenan of the Southern District Court of New York while deciding that the Bhopal case should be tried in India laid down that US Federal Rules for Discovery would be applicable to the trial in India. In this article* ***Jessica Hagen*** *explains the US Federal Rules of Discovery.*

A person goes to Court to enforce his right or to restrain a wrong being committed against him. However, when a person takes out an action he only knows of facts in his possession. He is not aware of the facts in the possession of his opponent. The pretrial procedure of discovery allows either of the parties to an action to **discover** the facts in possession of the opponent. This procedure of discovery is very wide in the US. Discovery in the US can be of various modes, viz.:

(a) Depositions : These are statements of fact made under oath reduced to writing. They can be either upon oral examination or written questions.
(b) Written interrogations : These are written questions which require answers to be given in writing under oath.
(c) Production of documents or things : This obliges the adverse party to produce documents and things for inspection and allows the party requesting to enter upon land and property for that and other purposes.
(d) Physical and Mental Examination : This allows the parties to have persons examined physically or mentally.
(e) Request for Admissions: This allows the requesting party to call upon the other party to admit particular facts.

## Liberalization

Since 1970 the Federal Rules of Civil Procedure governing discovery in the U.S. have been greatly liberalized to allow freer access to information before trial. These revised rules not only make more information subject to discovery, but they also allow discovery to be carried on more easily, independent of judicial oversight. The rationale behind this liberalization is that more discovery will prevent surprises during the trial, meaning cases will be decided on their merits instead of on which side was able to hoard a crucial piece of information and then use it at the trial. In addition, the framers of the Rules hoped that more discovery would also promote settlement of cases before trial because the merits would be clear at that point and a party could more accurately assess the chances of success.

The built-in flexibility of these Rules is reflected in several common provisions which run throughout almost all of them. Except in a few instances, each party has access to discovery methods without having to obtain prior judicial approval. Generally the only limit to this is that the party filing the suit must wait 30 days before initiating the discovery process in order to allow the other party to obtain counsel. No particular

sequence of discovery is required and one party's discovery cannot act to delay another's. [Rule 26(d)] Several time-saving devices which further reduce judicial intervention were introduced in 1970. Answers and objections are to be served together with an enlarged time for response. The party seeking discovery rather than the objecting party is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. Finally, almost no limit to the amount of discovery possible exists, although a party can move for the Court to give him or her a protective order if the discovery requested appears to be solely to harass the other party.

The parameters of the discovery rules are set out in the Federal Rules of Civil Procedure.

## General Provisions

Rule 26 initially lists the methods of discovery available and then gives a broad definition of the scope of material subject to discovery. Rule 26(b)(1) states that "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". The provision goes on to state specifically that the information need not be admissible at trial as long as it is "reasonably calculated" to lead to the discovery of admissible evidence. "Relevant" has been very broadly construed by the courts in the U.S. This provision thus makes available much more information since the discovering party need not demonstrate some direct relationship between the information being sought and the case at hand. This provision is, though, subject to sub-rule 6(c) which allows the court to regulate or prevent discovery. For example, although a person's income tax return is generally not privileged, courts have recognized that interests in privacy may call for a measure of extra protection. In addition, judges are encouraged to identify instances of needless discovery and to accordingly limit the use of discovery. Rule 26(b)(l) also includes a series of measures added in 1983 aimed specifically at preventing over-discovery. Sub-rule 26(b)(l)(i) allows judicial intervention if discovery is unreasonably redundant or more easily obtainable some other way. 26(b)((1)(ii) allows intervention where the party has already had an opportunity to obtain the information and sub-rule 26(b)(l)(iii) tries to prevent discovery which is disproportionate to the individual law suit.

Sub-Rules 26(b)(2)to (4) more specifically outline special rules governing discovery of insurance agreements and work product. Sub-rule 26(b)(2) makes insurance agreements discoverable although they are not admissible at trial, the rationale being that it will help prevent excessive claims and promote settlements since the plaintiff will be aware of the amount realistically available.

More important are sub-rules 26(b)(3) and (4) which govern discovery of work product - documents and things prepared in anticipation of litigation or for trial.Sub-rule 26(b)(3) covers trial preparation materials stating that these are only subject to discovery if the other party has a substantial need of the materials in preparation of the case and that he or she cannot without undue hardship obtain the substantial equivalent of the materials by other means.One example might be where a witness gave a fresh and contemporaneous account in a written statement to one party but was unavailable to the party seeking discovery until a substantial time later. This, therefore, is one of the new areas subject to judicial scrutiny. The reasoning behind this rule is that each side's informal evaluation of its case should be protected and that each side should be encouraged to prepare independently and should not automatically have the benefit of the detailed preparatory work of the other side. Even if the court orders discovery of such materials upon a showing of the required necessity, it will still protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a lawyer or the representative of a party concerning the litigation. Although not fully settled, this appears to be an absolute protection. A major exception within this sub-rule allows any person to obtain his or her own statement concerning the action or its subject matter without any showing of necessity. This means that one side may be able to gain access to information for which it could not make the required showing of need by gaining the help of the person who originally made the statement. This would even give it access to the mental impressions of the counsel if these were included in the statement.

## Expert Opinions

Sub-rule 26 (b)(4) covers trial preparation concerning the use of experts and the facts known and opinions held by them. The use of experts is broken down into three categories and governed by three different standards of discovery available. Under paragraph (A) the identity and opinions of experts who will be called as witnesses in the trial are subject to discovery through interrogatories. In addition, upon motion, the court may order further discovery by other means. Basically, total discovery is available concerning these experts. Under paragraph (B), a party can discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial who is not expected to be called as a witness only as provided in Rule 35 (b) (discussed later) or if the other party can show exceptional circumstances where she cannot obtain the facts or opinions on the same subject by other means. Finally, no discovery can be had on experts who are only informally consulted by the other party. Generally, the court will require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery. The discovery of expert witnesses is considered crucial to narrow the issues and avoid surprise at the trial since, without it, lengthy and fruitless cross-examination may result and there would be no time to prepare rebuttal material. The limitations on discovery of experts also prevents one side from unduly benefitting from another's preparation. The discovery can only occur when the parties know who the expert witnesses will be and as a practical matter a party must prepare his own case in advance of that time.

## Protective orders

The discovery rules also have a built-in procedure for protecting parties from having discovery used to harass. Rule 26(c) allows the court to issue a protective order for a party or a person against whom discovery is sought, if he or she can show good cause that the discovery is being used to annoy, embarrass, oppress or cause undue burden or expense to him. These protective orders can be, for example, that discovery cannot be had or that the discovery can be had only by a different method of discovery than the one originally sought, or that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. This rule, therefore, makes some attempt to prevent abuse of the discovery process.

Sub-rule 26 (d) eliminates any fixed priority in the sequence of discovery but makes clear the court's power to establish priority by an order issued in a particular case.

## Duty to Supplement

Finally, sub-rule 26(e) requires a party to supplement her responses to requested discovery under certain circumstances. These are when the question directly addresses the identity and location of persons having knowledge of discoverable matters, the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In addition, a party must reasonably amend a prior response if he obtains information upon the basis of which he knows that the response was incorrect when made or that he knows the response, though correct when made, is no longer true and that the circumstances are such that a failure to amend the response is in substance a knowing concealment. Finally, the court may impose a duty to supplement responses, parties themselves may agree to it, or the parties can request such supplementation themselves. This

rule thus forces parties to supply crucial information where a failure to do so would substantially change the value of the original information. This mandatory supplementation thereby reduces the proliferation of additional sets of interrogatories.

Sub-rule 26(f) which allows the court to direct a discovery conference between the parties was added in 1980 in response to the widespread criticism of abuse of discovery. The framers decided abuse of discovery, while very serious in certain cases, was not so general as to require basic changes in the rules of discovery. Instead, they decided the best way to curb abuse was through intervention of the court as soon as abuse is threatened

Sub-rule 26(g) which requires the signing of discovery requests, responses and objections was added in 1983, again to curb discovery abuse by explicitly encouraging sanctions. It requires the lawyer to consider the reasonableness of this request, response or objection, to enable a reasonable effort to ensure that discovery is fully carried out. Generally, however, despite their explicit authority, judges are reluctant to impose sanctions.

## Privilege

Not directly delineated in the Federal Rules but just as integral a part of the discovery process is the concept of privilege, which is determined by common law. Certain relationships and information are either absolutely or partially privileged. The attorney-client or doctor-patient relationship is absolutely privileged, depending on the circumstances. In addition, information relating to certain areas like national security also involve privileges. The court can weigh the circumstances and decide whether it should be made available and if so by what means.

## Depositions

Rules 27-32 cover the use of depositions, both oral and written, a major tool in the discovery process. Rule 27 covers the narrow area of when depositions can be taken before action or pending appeal. Under Sub-rule 27(a) to obtain a deposition before an action is commenced a court order is necessary. The Petitioner must file a petition showing she expects to be a party to an action cognizable in a court where the federal rules apply but currently cannot bring it, the subject matter of the expected action and her interest therein, and the facts which she wants to establish by the proposed testimony she hopes to elicit from each. If the court orders such depositions they will be taken in accordance with the other rules governing depositions and then can be used in any action in accordance with Rule 32 (a) governing the use of depositions in court proceedings. Under Sub-rule 27(b) depositions can also be taken pending appeal if it is necessary to perpetuate the testimony in case of further proceedings, and if the party requesting it gives the substance of the testimony he hopes to elicit from the persons to be deposed and the reasons for perpetuating their testimony.

Rule 28 covers the relatively technical matter of persons before whom depositions may be taken. Rule 29 covers stipulations regarding the discovery procedure, saying that unless the court orders otherwise the parties may make written stipulations about how the depositions will be taken.

Rules 30 and 31 cover conditions governing depositions upon oral and written examination. Basically, under each,testimony can be had of any person, including the other party, after the commencement of the action and after adequate notice to the party is given. In addition, some special circumstances cover the two different types of depositions. Under Rule 30,(oral depositions), sub-rule (b)(1) other parties to the action must be given at ateast 7 days notice of the time and place of the deposition plus the name and address of the person to be examined or if the identity of the person is not known, a general description sufficient to identify him or the particular class or group to which he belongs. In addition, under sub-rule (b)(2) certain circumstances exist where the leave of the court is not necessary even though the deposition will fall within the first 30 days of filing the suit. These circumstances include instances where action is pending the person is about to leave the country and go more than 100 miles from the place of trial or is about to leave the U.S.and will be unavailable unless the deposition taken before the 30 day period, and the person requesting the deposition sets forth facts to support the statement. However, if a party served under these circumstances shows she was unable to get counsel to represent her at the time of the deposition, it cannot be used against her at the trial.

Other provisions covered under sub-rule (b) include non-stenographic recording, production of documents and things in accordance with Rule 34, and how a corporation, partnership, association, or governmental agency can be named as a deponent and the organization can designate one or more officers to represent it. Finally, sub-rule (c) covers examination and cross-examination; record of examination; oath; and objections. Sub-rule (d) covers motions to terminate or limit examination. Sub-rule (e) submission to witness; changes; and signing, sub-rule (f) certification and filing by officer; exhibits; copies, notice of filing, and sub-rule (g) failure to attend or serve subpoena; expenses.

Rule 31 governing written depositions has similar notice requirements as Rule 30, and also provision regulating when and how often cross-questions and redirect questions may be made.

## Use of depositions at trial.

Rule 32 governs the use of depositions in court proceedings. They can be used at trial, upon hearing of a motion or at an interlocutory proceeding so far as admissible under the rules of evidence. Sub-rule (a)(1) allows any party to use them to contradict or impeach the testimony of the deponent as a witness. Sub-rule (a)(2) allows an adverse party to use the deposition of a party or one who was an officer testifying on behalf of a corporation, which is a party, for any purpose. Sub-section (a)(3) allows the depositions of a witness, whether or not a party, to be used by any party for any purpose under limited circumstances relating to the unavailability of the witness. These circumstances are: if the witness is dead, or if the witness is further than 100 miles from the place of trial or hearing or is out of the U.S. unless her absence was procured by the party offering the deposition, or that the witness cannot attend or testify due to age, sickness, infirmity, or imprisonment, or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or upon application and notice that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court. In addition, a party can require that the adverse party to introduce the entire deposition for consideration if she has only offered part of it. The sub-rule thus strikes a balance between allowing the use of depositions freely against the parties themselves, but limiting their use against other witnesses.

## Interrogatories

Another important discovery device is interrogatories which are governed by Rule 33. Interrogatories can be served by a party only on other parties to the action. In addition a provision exists for serving them upon a corporation and these, unlike depositions, can be served any time after the commencement of an action.

The scope of the use of interrogatories at trial is governed by Sub-rule 26(b). Interrogatories can relate to any relevant matter and the answers can be used to the extent permitted by the rules of evidence. Rule 33(b) also provides another loophole to the work product doctrine. It allows an interrogatory to involve an opinion or contention as long as it involves a fact or an application of law to fact. This allows for issues to be narrowed and sharpened before trial. Pure questions of law are still prohibited. The court can also order that the interrogatory need not be answered until after other designated discovery has been

completed. This prevents one side from tailoring its testimony to fit the circumstances it has learned of through an interrogatory. Generally the answers to interrogatories do not limit proof by chaining parties to misconceived contentions or theories. Only in exceptional circumstances where reliance on an answer may cause real prejudice will the court hold the answering party bound to his answer.

Rule 33(c) covers the rather narrow situation where an answer to an interrogatory can be had from business records of the party on whom it has been served. If the burden of ascertaining the information would be the same for the party requesting the interrogatory as for the party requested, the latter can answer the interrogatory by specifying the records and allowing the former to inspect them and gather the needed information. This places the burden and costs on the party who will benefit. In addition, the records must be presented in a manner allowing reasonable access to information.

## Productions

Rule 34 covers the production of documents and things as well as entry upon land for inspection and other purposes. Again, the scope of this rule is governed by Sub-rule 26(b) and only applies to parties to the action. The request must specify the items to be inspected by either the individual item or by category, and they must be described with reasonable particularity. The party who produced the documents must also present them in the manner in which they are normally kept in the usual course of business. This is to prevent a party from making the records so confusing that the information will be impossible, or very difficult, to ascertain. In addition, under sub-rule (c) the rule leaves open the opportunity for an independent action against a non-party for production of documents and things and permission to enter land.

## Physical and Mental Examination

Rule 35 covers physical and mental examinations of people. This is one of the few rules which requires court approval, primarily because it directly impinges on a person's privacy. To get court approval the requesting party must show good cause for the need for the examination. Most often this rule is used by a defendant in a personal injury suit to see if the plaintiff truly has received the injuries claimed. The Supreme Court held that this rule did not violate the Constitution by invading a person's privacy because the plaintiff essentially submits his injury to inspection by the court by filing the law suit. Later, the Supreme Court held that even a defendant may be subject to the rule, despite having no choice in the matter, although the court must exercise strict control in ensuring the absolute necessity of the exam. In addition, this rule was broadened to cover not only parties but also those under the custody or legal control of parties so that children on whose behalf parents were suing would be subject to it. Under sub-rule (b) of this rule, if the examined party requests a copy of the exam, then she must give the other party access to any exam she herself had conducted. In this way each party has equal access to information.

## Admissions

Rule 36 covers requests for admission, its purpose being to reduce trial time by facilitating proof of issues that cannot be eliminated from the case, and by narrowing issues by eliminating those that can be. In a request for admission, therefore, one party just asks the other to agree to the admission of the truth of any matter within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents. The other party can object by specifically denying the matter or setting forth in detail why he cannot truthfully admit or deny the matter. It is not enough for the other party merely to say that the admission requested presents a genuine issue for trial. The answering party also cannot give lack of information or knowledge as a reason for failure to admit or deny unless he has made a reasonable inquiry into the matter and the information available is insufficient to allow him to admit or deny. The court acts as the final arbiter in whether the answers or objections are sufficient and can either order a matter admitted or that an amended answer be served if it finds them insufficient. Finally, under sub-rule (b) any admission made by a party under this rule is only for the purpose of the pending action and is not an admission which can be used by or against him in any other proceeding.

## Sanctions

The final rule governing discovery is Rule 37 - Failure to Make Discovery: Sanctions. Basically this rule governs when a party can get a motion compelling discovery and what sanctions are available for a party who fails to comply with discovery. If a party fails to comply with Rules 30 to 34, the discovering party may move for an order compelling an answer, a designation, or an inspection in accordance with the request. An evasive or incomplete answer is treated as a failure to answer. In addition, if the motion is granted the court can require the party or deponent whose conduct necessitated the motion to pay the reasonable expenses incurred in obtaining the order unless the objection was substantially justified. The reverse holds true if the motion is denied.

Sub-rule 37(b) covers the sanctions for failure to comply with a court order. Under Sub-rule (b)(i), if a deponent fails to be sworn in or answer a question after being directed to do so by the court, the failure can be taken as contempt of court. Under Sub-rule (b)(2) if a party, managing agent of a party, or person designated to testify on behalf of a party fails to do so after the court orders it, the court can resort to the following:

(A) Order that the matters regarding which the order was made or any other designated facts shall be taken as established for the purposes of the action in accordance with the requesting party's claim.

(B) Prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence.

(c) Strike out pleadings or parts of pleadings or stay further proceedings until the order is obeyed, or dismiss the action or proceeding or render a judgement by default against the disobedient party.

(D) In lieu of or in addition to the above sanctions to treat as a contempt of court the failure to obey any orders, except an order to submit to a physical or mental exam.

(E) Where a party has failed to comply with Rule 35, (a), require him to produce another person for examination. Here, the orders listed in paragraphs (A), (B) and (C) of this sub-rulen are available unless the party can show he is unable to comply. In lieu of or in addition to any of the foregoing orders the court can order the disobedient party to pay reasonable expenses caused by the failure to comply.

In addition, under Sub-rule 37(c) if a party fails to admit the truth of any matter or the genuineness of any document which is later proved, she is subject to pay for reasonable expenses incurred unless the failure was due to the admission's importance, or the party failing to admit had reasonable grounds to believe he might prevail on the matter or there was some other good reason for failure to admit. Finally, under Sub-rulr 37(d) if a party fails to make a deposition, serve answers or objections to interrogatories or serve a written response for a request for inspection the court may "make such orders in regard to the failure as are just and among other actions can take those authorized under paragraphs (A), (B) and (C) of sub rule (b)(2)".

Again, reasonable fees are also recoverable. Basically, all these sanctions are aimed at giving the court some clout to force compliance with discovery by unwilling parties when the discovery requested meets the standards rtequired by the rules.

### Conclusion

Despite the overall advantages of the liberalized discovery process, problems with these rules do exist.Primarily, discovery is a very expensive process due to the enormous amount of time it requires and the resulting legal fees. In addition, much of the information gained is redundant. For fear of missing a crucial point, information concerning a particular area will be requested in several different forms. Often, rather than gaining information over a broad area, discovery is done too much in depth in one particular area. Discovery can also be used as a delay tactic wherein one party stretches out the length of the litigation thereby taxing the other side's resources. Finally, despite the protective orders of Sub-rule 26(d) because of the broad scope of discovery it can still be used to harass, all in the name of gaining more information. One criticism levelled at these rules which has generally not proved to be the case, however, is their use for "fishing expeditions" where a party will request information about tangential areas hoping something will turn up. In addition, according to a field survey done by the Project for effective Justice of Columbia Law School, there is no evidence that discovery promotes settlement. Despite all these problems, these rules are generally accepted and approved of by both judges and lawyers because ultimately too much information is preferable to a dearth of it in preparation for trial.

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# Housing Laws: Effects and Defects

*There are a number of acts affecting housing. In this article we explain the provisions of the main Acts.*

***Mahabaleshwar Morje***

### Introduction

Some of the important Acts affecting housing accommodation in Maharashtra are:
(a) Maharashtra Co-operative Societies Act, 1960
(b) Maharashtra Ownership Flats Act, 1963
(c) Maharashtra Apartments Ownership Act, 1970 and
(d) Urban Land (Ceiling & Regulation) Act, 1976

### Maharashtra Co-operative Societies Act, 1960

This Act was passed bearing in mind the Directive Principles of State Policy enunciated in the Constitution of India. Certain privileges were granted to housing societies. These included exemption from compulsory registration of shares and debentures. The Act also empowered the State Government to reduce the stamp duty or other fees relating to the registration of documents as also the court fees and other fees, taxes or duties payable by or on behalf of the Society. The object was to enable a member of a Co-operative Housing Society to buy accommodation without the burden of the stamp duty or registration charges and other fees payable.

Chapter IX of the Co-operative Societies Act also provided separate Co-operative Courts. One of the objects of creating this Special Court was to reduce costs. Unfortunately, the disputes filed in the Co-operative Courts are time consuming as well as expensive.

### Maharashtra Ownership Flats Act, 1963

Subsequently, when several malpractices in the construction of houses, sale, management and transfers of flats were discovered, a separate Act, known as the Maharashtra Ownership Flats Act, 1963 was passed. The object of this Act was to impose certain liabilities on the promoter who intended to construct blocks or buildings of flats.

Under Section 3 of the Act, the promoter is required to:
(a) make a true disclosure of the nature of the title;
(b) disclose all encumbrances on such land;
(c) give inspection of documents;
(d) disclose the nature of fixtures and fittings;
(e) disclose the date of possession and meet other requirements specifically set out in Section 3 of the said Act;

### Advance Payments

Under Section 4 of this Act, the promoter is prevented from taking any advance payment or deposit unless an agreement to sell flats is entered into in writing and registered under the Indian Registration Act, 1888.

The Bombay High Court has decided that the registration of agreements under section 4 is mandatory. In the absence of such registration specific performance is not possible. It was held that if the agreement was not registered it will not be admissible in evidence. (*Associated Commerce House Owners' Association V/s Kishindas* 83 B.L.R. p.339)

As a result of this judgement, no suit can be filed for the specific performance of the contract in a Civil court and it is not possible to prosecute the promoter or his agents under Section 13 of Maharashtra Ownership Flats Act. Subsequently, the Bombay High Court in the case of Abdul Jabbar Ibrahim held that there is no warrant in the decision of Associated Commerce *House Owners' Association* (85 Mah.L.J. 163) for the proposition that promoters cannot be liable for criminal prosecution unless there is a written agreement duly executed by him and registered under the provisions of Indian Registration Act. In *Abdul Jabbar Ibrahim,* Justice S.N. Khatri has held that on a plain interpretation of the language of Sections 4, 5, 7, 10 and 11, it is clear that the penal liabilities for breach of these provisions will flow even in cases where the written agreement remains unregistered.

### Misuse of Money

In order to prevent the misuse of money, Section 5 of the Ownership Flats Act makes it obligatory on the promoter to maintain accounts of the sums taken, to act as trustee thereof and to disburse them for the purpose for which they were given. It was found that some of the promoters were misusing the amount for their personal needs. It was also found that though some of the promoters had collected moneys from the purchasers of the flats for the purpose of making payments of outstanding bills, such as ground rent or other Municipal charges, they never made such payments. Section 6 of the Maharashtra Ownership Flats Act imposes responsibility on the promoter for the payment of outstanding bills till the property is transferred.

### Unauthorised Alteration

Promoters often used to make alterations or additions without the consent of the flat purchasers. At other times promoters justified unlawful construction on the pretext that purchasers

had given their consent. Section 7 was therefore enacted stating that the promoter shall not make any alterations in the structures described in respect of the flats.

Taking advantage of the flat purchaser's ignorance, promoters often took blanket consent at the time of entering into an agreement for sale or at the time of handing over possession to make alterations. Such consent would result in nullifying the provisions of section 7. The High Court of Bombay, therefore, held that the promoter cannot under the cloak of blank consent obtained under the proforma agreement for sale, carry out illegal construction and set at naught the provisions of law. (Smt. Neena Sudarshan Wadia V/s Deepakbhai Shah and others). In case of defective building material, the aggrieved person is given the right to file a complaint before the Housing Commissioner, appointed under the Bombay Housing Board Act, 1948.

## Refund of Money with Interest

Where the promoter has avoided giving possession of the duly completed flat according to the dates specified in the agreement, he is required to refund the amount along with interest. In order to prevent wrongful mortgages in respect of the properties, the promoter is prevented from creating any mortgage without the consent of the purchasers after execution of the agreement of sale.

## Registration of the Society

Some promoters used to delay the formation of the co-operative society to retain their control over the property and the proposed society. It was therefore made obligatory on the promoter to take steps for the formation of the co-operative housing society. Section 11 of the Maharashtra Ownership Flats Act made it obligatory on the promoter to take necessary steps to complete his title and convey the title to the Co-operative Society and execute all relevant documents.

Some of the builders used to avoid the registration of the society on flimsy grounds. Whenever it was found that the Deputy Registrar of Co-operative Societies was deliberately declining the registration of the society, the Court has held that the application for registration of the society could not be refused. (Dr. Devendra Chimanlal Shah V/s State of Maharashtra 1985 Co-Operative Tribunal Judgement (C.T.J.) page 37, Writ Petition No. 1642 of 1983 decided on 20th August ,1984).

In case of disputes, the Manager or the Promoter was prevented from cutting off or witholding essential supplies, such as water and electricity.

## Execution of Conveyance

The Promoter is under an obligation to convey the title and execute the documents according to the agreements within a period of four months from the date of registration of the society. The promoters, however, avoid doing so without reasonable cause, with a view to retain control over the property of the society.

In order to avoid execution of conveyance, some dishonest builders took the plea that no suit for specific performance can be filed unless court fees are paid on the full consideration mentioned in the agreement. The High Court of Bombay has now decided that executing a conveyance is a statutory obligation. The relief for claiming enforcement of the obligation was not susceptible to the mandatory flaw and it was not otherwise provided under the Bombay Court Fees Act, and therefore, suits can be valued under Section 6(iv)(j). (Ref. *Brindavan Borivli Co.op. Housing Society Ltd. V/s Karmarkar Buildings & Others).*

## Punishment

The Maharashtra Ownership Flats Act has also made provisions for punishing the promoter and his agents if they commit offences, by committing a breach of an agreement. Section 13 states that if the promoter, without reasonable excuse, fails to comply with the provisions of this Act, he is liable to be punished with imprisonment for one year or a fine of Rs.2000 or both. He is also liable for criminal breach of trust of any amount given as advance or deposit to him for the purpose mentioned in Section 5 and on conviction, he is liable to be punished for four years.

## Maharashtra Apartment Ownership Act, 1970

This statute was enacted with a view to provide for the ownership of an individual apartment in a building and to make such apartments heritable and transferable property. Under this Act, each apartment owner is entitled to the exclusive ownership and possession of his apartment. The apartment owner who is required to make a declaration as required under the Act, is also liable for separate assessment. Since some of the privileges and benefits available under the Maharashtra Co-operative Societies Act, are not available in the case of the Maharashtra Apartment Ownership Act, 1970, the tendency of forming Associations under this Act is not so great.

## Urban Land (Ceiling And Regulation) Act 1976

Inspite of the enactment of the Maharashtra Ownership Flats Act, malpractices continued on account of acute shortage of land available in the city of Bombay and other metropolitan cities. Therefore, in order to regulate prices or urban land by imposing a ceiling on ownership, Urban Land (Ceiling and Regulation) Act 1976 was enacted to provide for the imposition of a ceiling on urban land. The Act was passed to prevent concentration of land in the hands of a few persons and to prevent speculation and profiteering and to bring about a distribution of land in urban agglomerations so as to serve the common good.

The object of the Urban Land (Ceiling & Regulation) Act was noble. However, the prices have risen more than 10 times from the date of application of this Act.

## Amendment to The Income Tax Act

Section 269 AB was introduced in Chapter XXA of the Income Tax Act, 1961 to control prices. The object of this amendment was to eradicate black money transactions. According to the new amendment, for every transaction involving transfer of possession of any immoveable property in part performance of an agreement for sale, a declaration in Form 37EE is necessary. If the declaration is not made the parties are liable for punishment and the property can be confiscated.

Yet another step to eradicate black money transactions is the addition of a new Chapter XXC. The object of the new Chapter is to empower the Income Tax Authorities to acquire the flat without making any additional compensation of 15% over the price shown in the agreement. There is no right to file an appeal. Extraordinary powers have been given to the Inspectors of the Income Tax Department to search the premises even in the absence of their owners. It is not necessary to give a notice before a search is carried out.

## Bombay Stamp Act Amendment

The recent amendment to the Bombay Stamp Act, which came into force on 10th of December 1985, has resulted in denying the privileges which were available to the members of the Co-operative Housing Society.

Some of the important changes in the new amendment are:

(a) The definition of "Conveyance" includes
i) a conveyance on sale
ii) every instrument and
iii) every decree or final order of any Civil Court by which property, which moveable or immoveable or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos and which is not otherwise specifically provided for by Schedule I;

(b) Under section 33A of the Act, a new provision has been made for calling for and impounding of documents after registration where they are found to be not duly stamped.

(c) A new Section 53-A enables the Chief Controlling Revenue Authority to call for such of the documents certified by the Collector under sections 32, 39 or 41 of the Act, as are found to have been incorrectly certified for the purpose of revising the Collector's decision and recovering the deficit of stamp duty, if any.

(d) Section 68 of the Act has been amended and enhanced powers to enter upon premises and inspect documents for seizing and impounding them have been conferred on the authorities.

It must be noted that in exercise of the powers conferred by clauses (a) (b) and (c) of Sub-section (1) of Section 42 of the Maharashtra Co-operative Societies Act, 1960, remission was granted from stamp duty and registration fees payable under the Bombay Stamp Act and Indian Registration Act, 1908 on conveyance of property. Certain modifications were made in this remission by a notification dated 24th March 1980.

In view of the recent amendment, the purchaser of a flat in a Co-operative Housing Society will not be entitled to the remission of stamp duty if the agreement of purchase is not registered and if the conveyance is not executed.

Consequently, from now on new purchasers of flats will be deprived of the privileges and benefits which they were entitled to have after registration of the society and they will be required to pay 10% stamp duty.

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# Scheme for Disclosure of Income & Wealth

*R.L. Kabra*

The Central Board of Direct Taxes (CBDT) vide its Circular Nos. 423 dated 26.6.85, 432, dated 15.11.85, 439, dated 15.11.85, 440, dated 15.11.85, 441, dated 15.11.85 and 451 dated 17.2.1986, offered amnesty to tax payers to come forward voluntarily and in good faith, make a full and true disclosure of their concealed income and wealth, prior to its detection by the Income Tax Authorities. The scheme was initially open upto 31st March, 1986. However, CBDT, vide its another circular No. 453, dated 4th April, 1986, extended this to 30th September, 1986.

The brief outline of the Scheme is as follows:-

1) The Scheme is applicable to the financial year 1985-86 corresponding to the assessment year 1986-87 and its past years.

2) If the assessee has filed the returns already and assessments are not completed, he can file a revised return making a full and true disclosure of his income or wealth as the case may be along with the proof of payment of tax. If the assessments are already completed, the assessee can file fresh returns with proof of payment of tax. Assessees who have not until now filed any returns of income and wealth, could take the benefit under this scheme by filing returns for the first time.

3) The tax authorities would be liberal in waiver of interest and no penalties and prosecution proceedings under sections 271 (1)(a), 271(1)(c) and 273 of I.T. Act, 1961 would be initiated.

4) Search and seizure cases will not be covered under this Scheme.

5) Assessees against whom acquisition proceedings are pending for under Statement of Purchase Value of property can now take the benefit of this Scheme by declaring the extra consideration not mentioned in the sale deed and get the acquisiiton proceedings closed.

6) Assessees need not disclose the source of Income and such amounts can be declared under the head "Other Sources". They could credit the declared income in their account books or bank account.

7) Women and minors can also make a declaration in respect of their own income or wealth. Benami capitalisations would be at the assessees own risk.

8) Assessees declaring jewellery or other assets without paying Income Tax will have to satisfactorily explain the source of acquisition. It would be wrong on the part of the tax payer to presume that he will be able to pay wealth tax only and introduce the amount in his books without having to pay Income Tax on concealed income.

9) It may be noted that where the return for the assessment year 1986-87 is not field on the date on which it is due under section 139(1) of the Income Tax Act, or section 14(1) of the Wealth Tax Act, the immunity will not extend to the penal consequences of the late filing of such return. In other words, an assessee who has field a return can certainly revise his return by declaring extra income or wealth before 30.9.1986 and can avoid penal consequences.

Tax payers may note that with the forthcoming amendments coming shortly, which will bring structural changes in the direct taxes, most of the penalty provisions will be turned into provisions for mandatory interest and/or additional tax with no right of appeal or reduction or waiver. Mens rea (requiring the showing of an intention to evade tax) generally will not apply to most offences or defaults under the Income Tax Act.

It is thus clear that an assessee can himself make a declaration of Income and/or Wealth and take the benefit of this scheme which is**extended till 30th September, 1986.** The Government does not intend putting the repentant tax payer in a better position than the honest tax payer and, therefore, the scheme should be adopted in its true perspective.

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## COMMENT

# Punishing attempted suicide - challenged

*A person who unsuccessfully attempts suicide requires sympathy and psychiatric care. India, however, is one of the few civilized countries to punish these unfortunates under Section 309 of the Indian Penal Code.* ***Rabindra Hazari*** *provides a historical perspective of suicide in society while focusing on the efforts of Indian judges to declare Section 309 as* ***ultra vires*** *of the Constitution.*

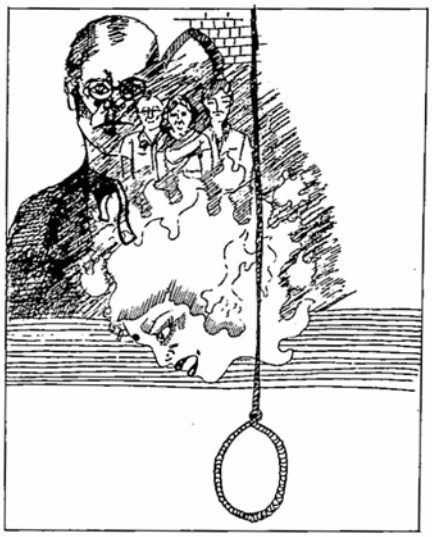
To fail in life and to fail in death ought to be sufficient punishment for those unfortunates who attempt suicide and fail-but not in India. Under Section 309 of the Indian Penal Code, an attempt to commit suicide or any act towards the commission of such an offence, is made punishable with simple imprisonment for a term which may extend to one year or with fine or both.

The rationale for penalizing a person who unsuccessfully tries to end his own life is a legacy of Anglo Saxon jurisprudence. Life *per se* is held to be precious to the community. Accordingly the taking of life injures, and is penalized by, the community. Thus if the attempt to take one's own life goes unpunished, then the principle for punishing the taking of other's lives is weakened.

This legal philosophy draws sustenance from Christian theology which condemns suicide as sinful. The abhorrence of suicide, the religious injunctions preventing the corpse of a suicide from being buried in consecrated ground, is common not only to Christianity but also to Judaism, Islam and Zoroastrianism. Whereas the first three religions were Semitic, all four were products of the Fertile Crescent and being monotheistic had a reputation for intolerance.

### The Honourable Suicide

In contrast, suicide occupies a venerable position in Jain, Buddhist and Hindu lore. The Jain Tirthankaras including Mahavir, as well as the Buddha, achieved death by seeking it, i.e. by starvation. In his last years Chandra Gupta Maurya became a Jain monk and died in the prescribed Jain fashion of slowly starving to death, a practice prevalent amongst Jain munis even today. On another level, the self immolation of high caste Hindu widows, called Sati when done in retail and Jauhar when wholesale, was a re-affirmation of piety and fidelity. Interestingly, when lower Hindu castes sought "Kshatriya" status they buttressed their claim by adopting the practice of Sati.



*Asif Khan*

In Japan, the Samurai ruling class governed itself by an intricate system of rights and duties, the infringement of which was Seppuku or Hara-kiri. In World War II this inspired entire Japanese armies to fight to the last man-a feat unparalleled in world history. Even in Catholic medieval Europe, as revealed by the French historian Emmanuel Le Roy Ladurie in his book "Montaillou", heretical cults glorified the 'endura', the fast unto death undertaken by the leaders of the Cathar heresy. Thus in many societies dispersed in both time and space, suicide provided an honourable exit from life's stage. It was however largely an élitist phenomena, undertaken by an élite to justify their position as leaders by actions that would both awe and inspire the masses.

The classic study on suicide was undertaken by Emile Durkhem,the 19th century sociologist. Durkheim divided suicides into three broad categories. Egoistic suicide covered those cases where the individual was alienated from his community and its mores. The second was Altruistic suicide whereby socially integraged individuals acted out of a heightened sense of honour. There was also a third class of suicides resulting from the community's failure to control the behaviour of individuals.

### Causes

Whatever its classification suicide is the ultimate act of desperation and despair. Psychiatrist Dr. (Mrs.) Dastoor of "Suicide Prevent" said, "Suicide is on the increase especially among the younger generation. A person who attempts suicide, normally has a very low self image of himself". Separation of families who immigrate in search of employment is a common cause of suicide. Broken homes, the problems of living in a joint family, job stress, the housing problem, the frustration of having no privacy in a married life, the contradictions of a modern education with a traditional upbringing, motivate large numbers of suicides in India today.

### The Judges Revolt

Society has sympathy for the successful suicide but none for the unsuccessful attempt. Section 309 punishes those unfortunates for whom survival is already the worst punishment. That section 309 is an abomination in a civilized society is only lately being recognised by the Indian judiciary. In a recent judgement, Justice Rajinder Sachar of the Delhi High Court while quashing prosecutions in 119 cases of attempted suicide, remarked:

" The need is for a humane civil-

ized and socially oriented and conscious penology. Many penal offences are the off shoots of an unjust society and socially decadent outlook of love between young people being frustrated by false consideration of caste, community or social pretensions. No wonder so long as society refuses to face this reality, its coercive machinery will invoke the provision like section 309 IPC which has no right to remain on the statute."

The most powerful critique of Section 309 is contained in an article published in *The Illustrated Weekly of India* (September 29, 1985) by Justice R. A. Jahagirdar of the Bombay High Court. Combining both erudition and clarity, a rare combination conspicuously absent in the higher judiciary, Justice Jahagirdar marshalls evidence not only from law but from sociology, psychology, penology and history to show that Section 309 is both uncivilized and unconstitutional. Justice Jahagirdar holds Section 309 to be unconstitutional on four main grounds:

Firstly, neither academicians nor jurists are agreed on what constitutes suicide, much less attempted suicide. "Suicide" is not defined in the Indian Penal Code. Jahagirdar notes that "the authors of the IPC have defined the word "murder" so meticulously as to exclude certain acts, though they result in death. If killing by itself cannot be regarded as an offence of murder, how can it be legitimately said that self-killing, irrespective of various factors, must amount to an offence? " Thus an offence which cannot be defined cannot be punished.

Secondly, the *mens rea*, the intention without which no offence can be sustained, is not clearly discernible. Says Jahagirdar," it is impossible to say with any amount of accuracy that a particular act is suicide. Very often a man merely attempts to invite the attention of others to himself by indulging in an act which causes him injury that may lead to death, much against his own wish. There is no definite test from which it could be unerringly inferred that he did commit suicide. Courts have often tried to employ the test of intention, but this is not always an infallible guide". The intention may be to hurt oneself, but with unintended fatal consequences.

Thirdly, suicide is attempted under cases of such extreme desperation, that the individual is not fully responsible for his actions. One can go further and argue that temporary insanity and diminished responsibility which are valid defences to homicide must apply equally to suicide.

Fourthly, individuals who are driven to attempt suicide require psychiatric care. This is denied by penalizing the attempt thereby preventing the individual from leading a normal life. Here Justice Rajinder Sachar of the Delhi High Court has scathingly held:

"Instead of society hanging its head in shame that there should be such social strains that a young man (the hope of tomorrow) should be

## Suicide Prevent

"Suicide is a call for help" says Dr.(Mrs.) Dastoor who heads an organisation called **Suicide Prevent.** which is a part of the "Samaritans" belonging to the fellowship of "Befrienders International". Dr. Dastoor is a psychiatrist. The staff consists of 2 full time trained social workers, 2 part time social workers, one rehabilitation officer, one Public Relation Officer, one Occupational Therapist and a band of volunteers who give their free time.

Mrs. Dastoor was also of the impression that the absence of the actual physical proximity of the mother in the formative years of the child (because of working mothers) caused for the child to grow up in comparative loneliness and confusion. To illustrate this, she says that there is a substantially lower suicide rate amongst the children of the poorer classes. She attributed this to the presence of the mother in the formative early years.

At **Suicide Prevent** not only is the patient helped but they consider the participation and rehabilitation of the family imperative too in the recovery process. Intensive phycho-therapy and support therapy are imparted to the patient and his family. This requires detailed study of his relationships and personality previous to the breakdown. The medical history is also studied and attended to. Often through studying the patient, the sickness of the whole family comes to light. In fact, the concept of punishing someone who has attempted suicide becomes really ridiculous, when we see that in fact the person was often driven to it by criminal acts like cruelty both mental and physical inflicted on her. The need is for compassion and understanding, and actual mental and physical treatment.

At the Rehabilitation Centre, the patient has a sense of being cared for. In the initial stages, hours are spent just talking to him and his family (together and separately). The psychiatrist guages the kind of help he requires and the treatment begins. His physical condition is also attended to. The Rehabilitation Centre is a kind of day care centre. Patients can come and spend their day there. The day begins with exercise and Yoga (in some cases to work out agression, in others to activate them). The rest of the day is spent learning some useful craft Carpentry, needlework, toy making are some of the things they do. On Wednesdays and Saturdays its recreation time- there is music and games. Sometimes, they go out in groups for a walk or to play outdoor games and once a year for a picnic. In the day care centre, the patients and therapists relate together as friends and colleagues in an easy and cared-for atmosphere. They learn by working together and helping each other that life is worth living.

There are also group therapy sessions in which they are given an everyday situation and asked to enact it. Many inner conflicts come to surface in these sessions.

Rehabilitation includes an effort to re-establish him not only with his family and social environment, but also the social worker mediates with his employers to break him back into his work life.

Says Mrs. Dastoor :"Society have responsibility to become aware of the mental problems (as opposed to mental illness) that people face. And also to come out in support of organisations who work for it."

**Suicide Prevent** charges no dues or fees. Treatment is completely free. However, surviving on donations, limits its activities.

What is most striking about Suicide Prevent is that the staff do not deal with their patients as wretched or pitiful creatures, but as sick people in need of compassion and care.

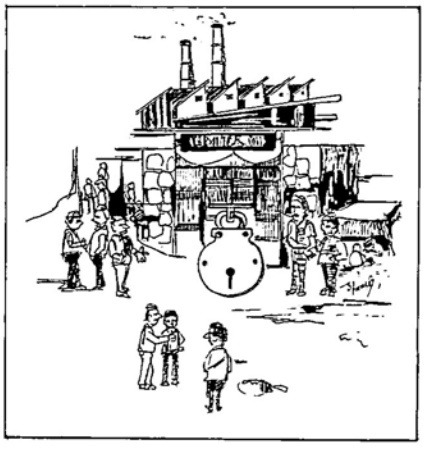
They can be contacted at Sewa Niketan, Byculla, Bombay.

***Deepti Gopinath***

## WARRANTS ATTENTION

# Empress Mills Wound Up

*Recently the Bombay High Court allowed the winding up petition to wind up Central India Spinning and Weaving Mills and close down the Empress Mills at Nagpur thereby setting at naught provisions under Section 25-O of the Industrial Disputes Act. In this article* **Mihir Desai** examines the implications of this decision.



The right to close down a business has traditionally been held by the courts to be incorporated in the fundamental right "to carry on business". Sounds reasonable? Not so if one looks deeper into the matter from the point view of the workers, the consumers and social cost it involves. Not even if one looks at the underlying legal and Constitutional issues involved.

A case in point is the recent close of the Empress Mills.

### What led to the closure?

The Central India Spinning Weaving and Manufacturing Company Limited is the oldest Tata concern dating back to the 19th century. As its main activity, it runs three units of Empress Mills - a textile concern, at Nagpur. The mills made profits of crores of rupees for decades. The profits allowed rationalisation and modernisation to such an extent that out of the work force of 22,000, nearly 15,000 workers became redundant and in the seventies the Mills needed only 7,000 workers to reap profits worth crores.

However, other industries like engineering, being more remunerative, the Tatas decided that paying attention to Textiles was a waste of time. But Empress could still be made to bleed for the other Tata concerns. For instance, NELCO made a computer which did not find a market. So it was "sold" to Empress for Rs.8 lakhs with a recurring cost of Rs.2 lakhs per annum. Large amounts of funds were borrowed from financial institutions. A deliberate policy of mismanaging or neglecting the Mill was adopted. The Company bought new machinery worth Rs.6.97 lakhs between 1977-83 and let it lie idle. The total indifference finally achieved the results the Management wanted. The Company, at least on paper, started making losses from 1983. This gave an excuse to the Management to stop discharging their statutory liabilities. Ultimately in the beginning of 1986, the Management stopped manufacturing activities, and along with it stopped paying wages to 7,000 workers.

Under Section 25(O) of the Industrial Disputes (ID) Act, 1947, an industrial undertaking employing more than 100 workers is required to take prior permission of the State Government before closing down. In February, 1986, the Management applied to the Government for permission to close, on grounds of financial difficulties. The Government was of the opinion that the Mills could take the Rs.3 crore rehabilitation loan which the Industrial Development Bank of India (IDBI) was offering and start its operations. The Company was not willing. The Government, therefore, refused the permission to close down.

### Winding Up Petition

In this battle of wits, the Tatas outsmarted the Government by filing a petition for voluntary winding up under the Companies Act, 1956 in the Bombay High Court.

The Union opposed this move, by placing before the Court, the facts exposing the manoevures and manipulations of the Management. The Government mentioned that it had taken a decision in principle to take over the company. N.A.Palkiwala, appearing for the Company, virtually told the Court that regardless of the final outcome of the Court case, the Management was determined to close down.

### Winding up allowed

The Court, in its order, eulogised about the welfare of the workers and the primary duty to protect their interests. But surprisingly, it held that appointing a provisional liquidator, as prayed for by the Company, was the only way out. The manipulations of the Company and its potentially sound financial conditions were shirked off by the Court by philosophising on "let bygones be bygones". The Company was allowed to achieve its object, the workers were left to starve and the Court had performed its sacrosant duty of upholding the fundamental right to close down business. Section 25(O) was given a decent burial. Perhaps the only saving grace was the existence of an amendment to the Companies Act, Section 530(b), which gives, upon winding up, priority of payment to the workers wages over all other claims ,except revenue claims of the Government.

### Amendments required

In such cases, the drastic consequences for the workers and for the consumers could have been avoided if a provision existed in the Companies Act, 1956 disallowing winding up if the Government refuses the permission to close.

Often the management may not restart its activities even if the Government refuses to permit closure. In such a case, under the Industrial Disputes Act, the Management would be required to pay wages to the workers. This, however, is an extremely feeble remedy at the end of which the work-

ers are not likely to get anything. This is exactly what has happened in the *Mukesh Mills* case.

If despite the order refusing permission, the Management decides to close down its business, one solution would be to allow the workers to take over the Management and run the enterprise without any compensation to the Management for the take over. If the workers are unable to do this, either due to personal financial crisis or due to dire straits of the Company, it should be made incumbent upon the Government to take over the Company and no compensation should be paid for the take over. This flows logically from the fact that running and closing down of business involves decisions about large public funds of the financial institutions of the shareholders and involves the very existence of workers.

The root of the problem is, however, the widely held view that the right to close down a business is part of a fundamental right in the Constitution. The Constitution, by Article 19(1)(f) only guarantees a right to carry on business. If you have a right to start a business, goes the argument, you have a right to close down a business. This argument was accepted by the Supreme Court in the Excel Wear case (AIR 1979 SC 24)

The fallacy in the argument accepted by the Supreme Court is that it equates decision to start a business, which is an individual decision, with a decision to carry on and close down a business which cannot be termed an individual decision. Today, no person carries on business with his own money and in an isolated manner. All businesses primarily depend on credit from banks and financial institutions. This money is public money. Many of the large companies have shareholders numbering lakhs, majority of whom have no say in management. The money of the shareholders is also public money. The decision to start a business may be a private individual choice, running a business or closing it down is a decision which affects the public lending institutions, workers and consumers, which cannot be allowed to be taken without considering the social obligations and consequences. The time has come to reconsider the decision in the Excel Wear case. The sooner it is done the better.

# NOTICE BOARD

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**Bombay** Deepti Gopinath 818 Stock Exchange Towers, Dalal Street, Bombay 400 023. Tel. 272794.

**Suicide - challenge** *(continued)*

driven to commit suicide, it comporids its inadequacy by treating the boy as a criminal. Instead of sending the young boy to a psychiatric clinic it gleefully sends him to mingle with criminals, as if trying its best to see that in future he does fall foul of the punitive sections of the Penal Code".

Accordingly, Justice Jahagirdar doubts whether section 309 can be regarded as a law within the meaning of Article 14 and looks forward to the day when the Supreme Court strikes down Section 309 as ultra vires of the Constitution.

### Unanswered Questions

Certain queries regarding Section 309 remain. For example Justice Jahagirdar in his scholarly exposition has confined himself to cases where the individual is driven to suicide and is not fully responsibnle for his actions. But what about those who in full possesion of their faculties intend suicide and fail? Further, is there a right to die? Can such a right be read into the right to life itself? Is society entitled to stop a fully conscious and rational person from ending his own life? The answer to these questions have far reaching implications for the debate on Euthanasia and the right to abortion.

### Writ Challenging S.309 Admitted

Some of these issues will hopefully be settled by the Bombay High Court which recently admitted a writ petition challenging the constitutional validity of Section 309. The Petitioner is a policeman who tried to shoot himself and failed. Justices Sawant and Kantharia admitted the writ and passed orders staying all pending prosecutions under Section 309. At last there is some hope for those hapless failures who would be dead if they succeeded and damned if they failed.

**NEWSHOUND** **BY RAP**

## SPECIAL REPORT

# Antulay trial - letting off the big fish

*The Antulay case has now taken a peculiar turn. In a strange reversal of roles, the prosecution vehemently argued that known co-conspirators, Ajit Kerkar and J.J.Bhaba, should not be made co-accused in a charge of conspiracy along with the main accused, Antulay. Antulay urged that they too be forced to face the music with him as co-accused. In this article Raju Z. Moray examines the recent judgement of Justice F.S. Shah.*

Courtesy: Daily

*J.J. Bhabha*

On April 30, 1985 Justice Dinshaw Mehta of the Bombay High Court passed an order by which he refused to frame charges against Antulay on 22 heads out of a total of 43. He proceeded to frame charges under the remaining 21 heads. The charge of conspiracy under section 120-B of the Indian Penal Code (I.P.C.) was one of the charges which was not framed by Justice Mehta.

The order of Justice Mehta was challenged by the Complainant, Mr. Ramdas Nayak,in the Supreme Court. The Supreme Court decided on April 17, 1986 that 'a prima-facie case has been established by the prosecution in respect of the allegations for charges under sections 120-B, 161, 165 and 420 I.P.C. and under Section 5(1) read with section 5(2) of the Prevention of Corruption Act.[(1986)2 SCC 716]

### Scot-free

When the trial recommenced after the Supreme Court decision before Justice Shah (Justice Mehta was directed to be replaced by the Supreme Court), the first question which came up for argument was whether Kerkar and Bhabha should be added as co-accused or whether they should be allowed to go scot-free. Since Kerkar and Bhabha are two senior directors of the Tata Empire, there was much speculation about the outcome of this aspect of the trial.

When the prosecution counsel, Ram Jethmalani, announced that he was not keen on proceeding against Kerkar and Bhabha as co-conspirators, most people jumped to the obvious conclusion that despite the fact that the Supreme Court had found *prima facie* evidence of their involvement, Jethmalani was willing to spare them for undisclosed reasons.

R.D. Ovalekar, appearing for Antulay, contended that the term co-conspirators "known and unknown" was very vague and only known conspirators could be considered by the Court. This contention was upheld by Justice Shah who ordered that the portion stating "known and unknown including the officers of the Sugar Directorate" should be deleted and substituted by "and/or officers of the Sugar Directorate not known". He also observed that as far as the named conspirators was concerned, their names will have to be retained in the charge. This meant that the names of M/s Kerkar, Bhabha, Tidke, Pesi Tata and Ram Batra (the last two are dead) would have to be retained as co-conspirators as they were amongst those whose names were furnished by the prosecution during the course of the trial before Justice Mehta as "known conspirators" he relied upon section 319 of the Criminal Procedure Code (Cr.P.C.) which states that any person not being an accused could be tried together with the accused, if it appears from the evidence that he has committed any offence for which he could be tried with the accused. One of the provisions of this section also states that "the proceedings in respect of such person shall be commenced afresh and the witnesses reheard" Ovalekar's argument was that the very fact that some people were named as co-conspirators in the charge would

Courtesy: Daily

*Ajit Kerkar*

show that there was a prima facie case against them in respect of the offences of conspiracy with which Antulay is charged and, therefore, there could be no compelling reason why these co-conspirators should not be joined as co-accused in the trial, especially in view of the Supreme Court findings.

Relying on the Supreme Court decision in *Raghubans Dubey v/s. State* of Bihar (AIR 1967 SC 1167), Ovalekar argued that once cognisance has been taken by the Magistrate, he takes cognizance of an offence and not the offender and then it is his duty to find out who the offenders really are and to proceed against those persons. Since in this case the Supreme Court had indicated a *prima facie* case against the named co-conspirators, Ovalekar submitted that they should be proceeded against.

S.B. Jaisinghani, appearing with Jethmalani for the Complainant, pointed out that Jethmalani had offered to make a concession as far as Kerkar and Bhabha were concerned not out of any ulterior motive but keeping in mind the spirit of section 8(2) of the Prevention of Corruption Act, 1947 (which enables a Court to pardon any person in order to obtain his evidence). Jaisinghani said that since both, Kerkar and Bhabha, had already been examined as witnesses for the prosecution, it did not seem fair to

join them as co-accused at this late stage merely because the main accused found it expedient to demand that they be prosecuted. He said that the trial had dragged on for a long time without much progress. The Supreme Court had observed earlier that an expeditious disposal of a criminal case was in the interest of both, the prosecution and the accused.

## Kerkar and Bhabha - Small fish ?

Jaisinghani then made an astounding proposition that in order to get the big shark one has to let go of the small fish. His main worry seemed to be that if Kerkar and Bhabha were made co-accused, the evidence obtained from them as witnesses in the trial would be lost to the prosecution. He relied on the Supreme Court decision in *Laxmipat Choraria v. State of Maharashtra* (AIR 1968 SC 938) where it was held that the prosecution was not bound to prosecute an accomplice if they thought that the accomplice's evidence was necessary to break a smugglers' ring. He was thus clearly putting Kerkar and Bhabha in the bracket of accomplices to the crime of conspiracy.

Jaisinghani questioned the right of the accused to demand the arraignment of co-conspirators as co-accused and pointed out that this matter was solely between the prosecution and the Court. He relied on a Division Bench ruling of the Bombay High Court which stated that "the provisions regarding joinder of accused contained in the Cr. P.C. are merely enabling and they do not give an accused a right to insist that some one else, though he may be an accomplice in the crime alleged, be joined with him at the trial." *(Laxmandas Chhaganlal Bhatia vs State AIR 1968 Bom.400 ).*

**Surprisingly, Kerkar himself was asked to show cause why he should not be prosecuted. Kerkar argued that if he was arraigned as co-accused, "his reputation in the business community would suffer and that while politicians could take such matters in their stride, businessmen could not."**

## Kerkar and Bhabha - let off.

Mr. Justice P.S. Shah decided on 24th July, 1986 that the co-conspirators should not be joined as co-accused. His reasons were:

(1) Out of the five named conspirators, two have been examined as witnesses for the prosecution and two are dead. Only Tidke is not examined.

(2) The trial has already taken a lot of time.

(3) As many as 57 witnesses have so far been examined and 90% of the prosecution's evidence is over. Most witnesses have been cross-examined at length by the defence.

(4) The inevitable consequence of joining the other named co-conspirators as co-accused at this stage would be that the trial would have to be commenced afresh.

(5) In this case the interest of justice is in the speedy end of the marathon trial.

(6) To ask the complainant to go through all the process again in a fresh trial would be highly inequitable.

(7) The wording of section 319 of the Cr. P.C. shows that it is not mandatory that in each and every case the other accomplices or co-offenders must be tried as co-accused. The court has to use its discretion bearing in mind all the relevant aspects of the case.

(8) The result of making them co-accused would mean that their evidence, though probably in the nature of accomplice evidence, would be lost to the prosecution.

Justice Shah concluded by stating that, "it would, in my opinion, neither be desirable nor proper to proceed against the other named co-conspirators in the draft charge as co-accused. Such a course being adopted, as pointed out by me, would entail a complete de-novo trial".

Ovalekar immediately applied for leave to appeal to Supreme Court. Justice Shah refused the leave, recorded Antulay's plea to the charges framed but stayed the trial to enable Antulay to approach the Supreme Court.

## Mis-directed Urgency

The judgement exhibits a well intentioned but mis-directed urgency. Justice Shah's decision to allow expeditiousness to prevail over legal niceties cannot be faulted. But whilst one can appreciate that "the interest of justice is in the speedy end of the marathon trial", one cannot sacrifice the purpose of the trial, viz. to punish the guilty of the crime.

Justice Shah observed that "the earlier the trial ends, the better for the accused himself". But expeditious dispensing of justice is always in danger of slipping into expeditious dispensing with justice itself.

## Separate trial for Kerkar, Bhabha!

Another aspect which appears to have been overlooked whilst dealing with the named co-conspirators like Kerkar and Bhabha is that there are provisions under the Cr. P.C. for an accomplice used as a witness to be made to face trial separately if need be. In *Bhatia's* case (AIR 1968 Bom.400) the Division Bench had observed that,"If an accomplice is desired to be used as a witness without the procedure of pardon, his trial can be separated and he may either be tried first and then be examined as a witness or he may be examined as a witness first and then tried". One wonders why the Court did not direct this method to be adopted in the cases of Kerkar, Bhabha and Tidke who by no stretch of imagination can be accepted as "small fish" as contended by the prosecution, but who in fact are equally big (if not bigger) sharks in the whole murky business. In fact, one wonders whether there is anything to choose between corruptors from the Tata empire and the corrupted. Or is there a separate and special immunity for corruptors from the corporate empires which is not available to their political counterparts?

Moreover, is the trial being conducted in *bona fide* public interest or as a political vendetta and if so what attitude should the Court take on it? Can courts refuse to prosecute persons against whom a prima facie case exists? These are some of the questions thrown up by Justice Shah's order letting off Kerkar and Bhaba. Everybody is asking whether they have been let off only because they are part of the Tata Empire. Apparently, the misdeeds of corporate executives are not to be confused with those of the politicians. After all, politicians come and go but companies stay on forever.

Meanwhile, the trial dispite having been expedited, shows no sign of an early end. Antulay plans to appeal to the Supreme Court against Justice Shah's order. And now, Antulay's counsel have again started arguing the question of sanction.

# Reagan's attack on Affirmative Action

*Among the many things that Reaganism has attempted is an attack on affirmative action, spearheaded by the U. S. Department of Justice. In this article* **Jack Greenberg** *and* **Jane Sovern** *evaluate the response of the Supreme Court to the Reagan onslaught.*

Affirmative action, compensatory discrimination, preferential treatment: these are some of the names for what the United Nations International Convention on the Elimination of All Forms of Racial Discrimination called "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". Despite recent controversy about many affirmative action measures, a general American consensus exists that victims of discrimination deserve compensation, and efforts should be made to provide redress for past wrongs, especially the racial discrimination which plagued and still plagues American society. The controversy is over the specific means used and the specific sacrifices demanded to achieve these goals.

***The Reagan Administration is out of touch with the mood of the Court and the country***

## The Consensus Before 1980

The three main Constitutional and statutory sources of affirmative action to remedy discrimination against minorities and women are: the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution ("No state shall deny to any person within its jurisdiction the equal protection of the laws "), the 1964 Civil Rights Act, which prohibits organizations receiving Federal funds from discriminating on the basis of race or sex, and several Executive Orders, Presidential Directives having the force of law. President Lyndon Johnson's 1964 Executive Order 11246 prohibits any Federal contractor with contracts of $10,000 or more from discriminating against applicants and employees on account of race, creed, color, sex or national origin, and also requires the contractor to take affirmative steps to ensure non-discrimination.

The case law prior to 1980, the year of the election of Ronald Reagan as President, held consistently that, despite claims of so-called "reverse discrimination" by whites, the Constitution was not "color-blind" and did permit consideration of race in employment, university admissions and the like. The three leading cases demonstrate that the Supreme Court found Constitutional affirmative steps to remedy past discrimination. In *University of California Regents v Bakke*, a university medical school had set aside 16 of 100 places for minority students to be chosen in a separate admissions process (akin to reservations in India). Bakke, a white student who was twice turned down sought to have the Court disallow these special minority places. Bakke's medical college admission test scores and prior grades were significantly higher than the average test scores and grades of minority students admitted to those sixteen places. The Supreme Court found that reserving places for which white students might not complete - that is making minority status the determining factor rather than one important factor in admission- was impermissble. However, the Court said that the university may consider race as a factor in the application process "when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area."

A 1979 case, *United Steelworkers v. Weber*, considered a challenge to a collectively bargained-for plan between the union and the company to reserve half of the openings in an in-plant craft-training program for blacks until the number of black craft workers reached parity with the number of blacks in the local labour force. The challenge was brought by a white production worker who had been rejected for the training programme while blacks with less seniority than him were admitted. The Supreme Court upheld the plan, finding permissible these kinds of "race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories."

In *Fullilove v. Klutznick*, a 1980 case, a Congressional spending program required that 10% of federal funds granted for local public works projects be used to procure services or supplies from minority owned or controlled businesses. Several white-owned businesses sued, claiming economic injury because of lost contracts, and

alleging that the 10% requirement violated the Constitution. The Supreme Court upheld the constitutionality of the requirement, known as the Minority Business enterprise provision.

While the U. S. Supreme Court Justices, in multiple opinions, debated vigorously what constituted appropriate remedies for discrimination, a firm consensus existed that "affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories" were constitutional.

Not only was the case law settled that both statutorily mandated and voluntary private affirmative action was constitutional, but evidence demonstrated the effectiveness of such action in improving the employment and advancement of minorities and women. The U.S. Department of Labor initiated a study in 1981 to determine the impact of the Federal contract compliance program which found that women and minorities working for those employers who operated under the stimulus of Executive Order 11246 made significantly greater gains in employment and advancement as compared with working women and minorities generally.

## The Ideological Attack

President Ronald Reagan's Administration began an immediate ideological attack on affirmative action. Its vantage point was that of the "innocent" white male "disadvantaged" by these programmes, and its rallying cry was "reverse discrimination". The Justice Department, the Executive branch agency responsible for enforcement of Federal laws, including the 1964 Civil Rights Act, called goals and quotas for redress of discrimination "illegal and immoral" and its position on pending issues is traditionally accorded substantial weight by the courts. But this position, denying the reality of the Labor Department report and other evidence of the efficacy of affirmative action, goes well beyond any Supreme Court ruling.

The Justice Department's attitude is illustrated by its interpretation of a 1984 Supreme Court decision, *Firefighters Local Union No. 1784 v. Stotts*, which dealt with layoffs in the Fire Department of the city of Memphis, Tennessee. Because the layoffs followed a "last hired, first fired" policy, they threatened to affect disproportionately black employees, many of whom had been recently hired under the terms of a 1980 agreement to reverse past discriminatory practices. This agreement, a consent decree between black fire fighters and the Fire Department, was what Carl Stotts, a black captain in the Fire Department, attempted to use in court to prevent the layoff plan. The Supreme Court ruled that a court order (the consent decree) could not prevent the operation of a bona fide seniority system, even if the seniority system resulted in more minorities laid off than whites.

The Justice Department has aggressively put forward a controversial interpretation of the *Stotts* case to buttress its claim that affirmative action is dead. In briefs opposing affirmative action plans in several cases, the Department has declared that *Stotts* prohibits the use of prospective hiring or promotion goals that will benefit individuals who are not personally identifiable victims of discrimination.

Concern for the rights of so-called innocent employees, usually white men, is cited by the Justice Department as the basis for its broad reading of *Stotts*. The Department seeks to limit the holding in *United Steelworkers v. Weber* only to private employers, and to contend that public employers are constitutionally prohibited from adopting even voluntary affirmative action plans that have any racial elements to them.

## The Supreme Court Rejects the Attack

The Supreme Court, in its most recent affirmative action case, *Wygant v. Jackson Board of Education*, rejected the Justice Department's position that race-conscious relief may not be used to benefit minorities who are not personally the victims of discrimination, at the expense of so-called innocent whites. In *Wygant*, white teachers laid off from their jobs sued the town of Jackson, Michigan to be reinstated because black teachers with less seniority than the whites were not laid off. The layoff decisions were made pursuant to a collective bargaining agreement between the teachers' union and the school board that linked the number of minority teachers to be protected from layoffs to the proportion of the minority pupil enrolment. The Court found this plan unconstitutional as it impermissibly burdened white teachers. The Court specifically stated, however, and by implication at least eight of the nine justices agreed that, "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." The Court distinguished affirmative action in hiring, where the cost borne by society does not fall too heavily on any individual, and firing, where the burden of losing a job on an individual is great.

The Supreme Court has undoubtedly become much more conservative in its affirmative action decisions since 1979 when *Weber* was decided. The political domination of President Reagan may have helped fuel that growing conservatism. No American Court can remain completely immune from the political strains of its time. But the Supreme Court has gone significantly less far than the Administration would like it to in limiting affirmative action. A majority of the court in *Wygant*, at least four dissenting and one concurring, agree that an affirmative action plan "need not be limited to the remedying of specific instances of identified discrimination" to be upheld by the Court, specifically repudiating the Justice Department position.

Several more affirmative action cases will be decided in late 1986, but the trend seems clear: the Reagan Administration is out of touch with the mood of Court and country. The Supreme Court has specifically refused to adopt the Administration's extreme position on affirmative action. The question to be decided by the Supreme Court is not whether affirmative, race conscious relief is legal and moral. The Court had answered that in the affirmative. The question is whether details of different plans to remedy past discrimination will be acceptable: Who must sacrifice to help eradicate discrimination, and who may not? These are the difficult and divisive questions; for their answers we must wait and see. One battle for affirmative action has been won, but the war continues.

*Jack Greenberg is the Vice Dean of Columbia Law School. Jane Sovern is a law student at that School.*

litation, they are concentrating on individual rehabilitation. Moreover, they give the money to the head of the family, when a family has say 4-6 workers. The wife is invariably a bonded labourer but they never take the female as an independent bonded labourer. This is a great lacuna because in a patriarchial system it is invariably the male who is the head of the family. Because of that the woman in the family never receives the money. They give only Rs.4,000/ (now raised to Rs.6,250/ ), which is totally inadequate.

**Q.** *How would you assess your experience in Court?*

**A.** The judges in terms of rebutting the argument of the respondents, were very good; their depth of human perception has been eloquently brought out in their judgement and even during the arguments they were very sympathetic to the cause of bonded labourers. The only problem, and the judges could not help it, was the very nature of the judicial system - there used to be long adjournments for months together.

The judgement was kept reserved for about a year which was very surprising and frustrating for us. The judgement was delivered on 16th December, 1983. So we cannot really understand the attitude of the judges. If they really meant business, they should have decided on the Patwardhan Commission's Report immediately after its submission - say by end of July or latest by the end of September, 1982. If I were a judge or the Chief Justice, I would have seen to it and tried my best to decide these cases at the earliest because there is this oft-repeated judicial cliche "justice delayed is justice denied", which is very true.

**Q.** *How do you assess the system of public interest litigation?*

**A.** The entire operational style of public interest litigation is, from the very beginning, non-confrontationist, non-adversarial and non-antagonistic. Even where they found that gross injustice was being perpetuated, violations after violations were taking place inspite of the Court's interim directions the blood of the judges never boiled to a point where they would have come down with a heavy hand.

Judges must understand that conflict is inherent in the situation. I thought that if I were a judge, sitting up there, my word would have been law and I would have pulled up these people for not complying with my orders, charged them with contempt or passed strictures against some of them so that they would have lost their jobs or experienced a loss of face. They could not even hold conclusively that stone quarry workers are bonded or not. They again appointed a Commission of Inquiry. The Commission was asked to go according to the guidelines given in the judgement. We had alleged that these 10,000 odd bonded labourers were languishing in the most inhuman conditions and they should have decided one way or the other - said yes - we accept the petition. They have upheld the petition - in the last para of the judgement, they have said we uphold the petition but in what sense? They have set them at liberty or released them but as what? Not as bonded labourers; they have not used the word bonded. This is important because only if they are released as"bonded" are they entitled to benefits as of right under the Act.

**Q.** *What were the directions given on the reports of the Commissioners?*

**A.** The Court gave 21 directions - very specific minute directions stating that Vigilance Committees should be set up and they must include voluntary organisations; these Committees must meet regularly; workers must be provided with clean drinking water; there must be pitchers containing water in shaded places; workers must be paid minimum wages; truck sizes should be found out; workers must be paid directly; dust pollution must be controlled and the education wing of the Labour Ministry must hold classes and educate the workers about their rights, and so on.

**Q.** *Were the directions implemented by the State? If not, what efforts have been made to get them implemented? What were the problems in implemeniation?*

**A.** I think the entire tragedy of our democratic system, which includes our judiciary, is the casualty at the level of implementation. If we want to go by words written on paper, words spoken on the floor of the Parliament, our legislators should be congratulated as being the best in the world. Our judiciary can also be complimented for the judgements they deliver - at least during the last 3-4 years - whenever they started this public interest litigation. The Commissioners should also be congratulated for giving these excellent reports. But all said and done everything has remained on paper.

We waited and waited and filed about a dozen miscellaneous petitions that these directions are not being implemented. Time and again we spent days and days in the court. Normally a person like me is not given to running in and out of courts; I believe more in working with the people but once I got into it- I, and other activists of Bandhua Mukti Morcha-had to keep shuttling between the courts and the quarries to feed information to the lawyers. Ultimately, after waiting for about a year, we thought that we should come out on the streets once again. We demonstrated before the District Magistrate and the employers demanding nothing else but the bare implementation of the Supreme Court's 21 directions. We did not say that you implement them right here and now, but at least start implementing, let there be some semblance of work going on. That was our point of confrontation. We started our agitation for implementation on 15 March, 85. On 16th March we were told to go to the quarries and that we would be called on 18th March for discussions. On 17th, we were attacked by employers, their musclemen and goons. One of our colleagues was beaten to death and 34 others were seriously injured. Police were watching, openly conniving with the employers. They brought the injured from the hospital to the police lockup and got their thumb impressions on false FIRs and arrested them.

From the jail at Rohtak I filed, through the Superintendent, a contempt petition. It was admitted but I was asked to file a regular petition after coming out of jail on bail.

It has been admitted and the notices have been served but after that not a single hearing has taken place till today.

## HAAZIR HAI

# Swami Agnivesh

*The jurisprudential foundations of proof in public interest cases were laid down in the* ***Bandhua Mukti Morcha*** *case(AIR 1984 SC 802). It was taken up for the release of bonded labourers in Haryana by the Bandhua Mukti Morcha. Swami Agnivesh has been closely associated with the Morcha and the case. We talked to him about his evaluation of approaching the Court.*

**Q.** *How do you evaluate your efforts at organising bonded labour and your attempt to gain freedom from bondage for them?*

**A.** Well, as a matter of fact, I do not think we have gained anything substantial in terms of releasing labourers from bondage, getting them freedom and so on. Looking at the overall problem, we feel that there are about 5 million bonded labourers living in a chronic stage of bondage. In terms of numbers, we have not been able to get more than 20,000 labourers released through Bandhua Mukti Morcha's direct intervention. A large number of these have been rehabilitated, though by our standards, the rehabilitation has not been satisfactory. So, if you take into account the total effort and total result in terms of release from bondage, it is not much - but if you take into account the awareness generated through the media, through the courts, through the Parliament, through other social action groups, it has been considerable. Today, the authorities accept the situation that there is something called bonded labour in the country although the required political will to do something about it is not there, but somewhere in the echelons of power there is acceptance of this stark reality.

**Q.** *What made you decide to go to the Court? What were your expectations?*

**A.** We had heard of the Asiad judgement. We were enthused at the innovation which had been brought out by the Supreme Court. We thought that perhaps by writing a letter pointing out our plight, we would be able to get justice. We were very hopeful that the Court would immediately take notice of the situation, and the workers in bondage would be treated like persons in wrongful confinement and the Court would proceed as in a writ of habeas corpus. The Supreme Court in the beginning proceeded in that manner, with a sense of urgency. It immediately appointed a Commission of Inquiry, sought for more details. It also set at liberty some workers produced before the Court. Lists were given to it; but thereafter the process started becoming sluggish.

**Q.** *What were your arguments before the Court? What were the responses of the Employers and the Government and the attitudes of the judges?*

**A.** Our arguments were plain and simple. We argued that as the workers were bonded, the Court should treat our letter as a habeas corpus petition. But the Court appointed Commissioners. We were very appreciative of that because the Commissioner corroborated all that we had to say in our petition. Each successive commission of inquiry substantiated the charges and went beyond that by describing the situation of the bonded labourers' working conditions as abominable and suggested the means for their release and rehabilitation. But,in the meantime, the rich contractors engaged some of the top-most lawyers in the country - present Law Minister, Mr. Ashok Sen, was the lawyer on behalf of the contractors at one time; then Dr. Y.B. Chitaley was also their lawyer; K.G.Bhagat, Additional Solicitor General was the lawyer for the state of Haryana. So, almost all the top most lawyers were pitted against us and the argument they put forward was that the reports of the Commissioners cannot be considered as establishing a *prima facie* case. The lawyers for the Respondents said: "Very well even if we accept all these things it does not prove that the workers are bonded labourers; they may be termed as forced labourers but they are certainly not bonded labourers." We were shocked as this was the plea taken by none else than the Additional Solicitor General. Ultimately, the Court came out with the judgement and observed that, "whenever it is shown that a labourer is made to provide forced labour, the Court would raise the presumption that he is required to do so in consideration received by him and he is therefore a bonded labourer. This presumption may be rebutted by an employer and also by the State Government if it chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the presumption that the labour is a bonded labour entitled to the benefit of the provisions of the Act".

**Q.** *Have the bonded labourers been released and rehabilitated? What are the problems in the way of rehabilitation?*

**A.** Those bonded labourers who were on the lists produced before the Court have been released. The rehabilitation was very tardy. It took months and months and sometimes years to get them meaningful rehabilitation. Rehabilitation is purely economic. Recently, the State Government has started coming forward for rehabilitation but here again it is highly unimaginative. Instead of collective rehabi-

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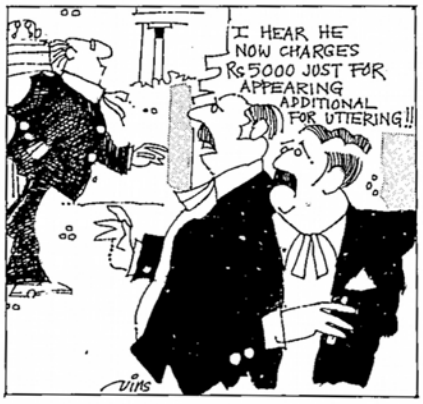
# ADAALAT ANTICS

## Fees and Feasts

*A friend at the Supreme Court told me that Senior Counsel fees now-a-days are like the cost of Godrej almirahs. When you book them, the going rate is quoted. At the time of delivery, the unwritten escalation clause operates and the clerk of the senior tells you that time and inflation have taken their own toll: the fees have gone up.*




*Incidentally, Godrej almirahs are popular items in dowry, which also, has a similar way of escalating upwards between the dates of engagement and marriage.*

*My old friend recalls the time when M.C. Setalvad started his practice by charging Rs. 1,040/- and also ended at that level. Today, it is Rs.5,500/- "reading fees" and another Rs.5,550/- "appearance fees" for admission. A case of rising, or falling, standards shall we say?*

## Juniors Resolve

*Found floating around the Supreme Court was the following resolution:*

*"Considering the increase in the prices of essential commodities such as controlled cloth, matches, beedies, sugar, candles etc. this society of Advocates on Record and Junior Counsel whole heartedly supports the decision of the hitherto underpaid Senior Counsel of this Court to increase their fees and those of their "overworked" clerks. This society, however, feels that the increase effected so far does not adequately neutralise the rise in the cost of living. As an incentive to Senior Counsel to fix a more realistic level of fees, this society announces the award of a cash prize (payable by cheque) and a citation to the first Senior whose fees for an admission touch five figures."*

## Rubbing shoulders with the Janata

*Pomilla Kalhan, writing in Mid-day about judges (15th July, 1986) had this to say about judges:*

*"If judges have to travel by bus rubbing shoulders with litigants, some of them of a criminal variety, and if they have to depend on lawyers for small favours, can they be expected to remain independent and honest?"*

*Good question that. But what makes us think that criminals and litigants are to be found only in buses? What about the Five Star variety? The Income Tax Practitioners Association threw a party at Hotel President to felicitate Mr. Suggla, Chairman, Income Tax Tribunal, on his appointment to the High Court and Justice Kania, on his appointment as Chief Justice of the Bombay High Court. Present at the distinguished gathering were several judges. And what could they possibly be doing in Five Star comfort if not "rubbing shoulders" with lawyers and potential litigants and who knows, may be the "criminal variety" After all, such people are found not only in buses but also in hotels, especially of the Five Star variety.*

## The Missing Minister

*Law Minister Ashok Sen is not to be found around town when needed. Having returned from a trip to London, for whatever reason, he then pushed off to Harare for a conference of Law Ministers. All this, when Parliament was in session. Since he seems to be such a popular man on the international scene, it might not be a bad idea for us to create a permanent position for him as Overseas Law Minister and post him overseas. But then, who would fill up the vacancy in India?*

## Minister-in-waiting

*Perhaps B.A. Masodkar, who has been spreading the word that he is going to be the chosen one? Incidentally, we might have to appoint him Minister of Five Star Hotels instead. Did you know that he is camping out in Delhi at the Taj Palace Hotel, Room No.606? Who is picking up the bills? He is not known to be lavish with his own money. And, is this a case of assets disproportionate to the known source of income? Or is it perhaps the Antulay connection via Ajit Kerkar the co-trustee on the IGPP with B.A. Masodkar. The Taj, after all, is known for its hospitality.*

## Kit-Kit kar

*Judge Kirtikar, Additional Principal Judge, Bombay, City Civil Court, takes his administrative duties far too seriously. The learned judge spends long hours in his chambers undoubtedly grappling with problems of the burdens of office. Consequently, he had little time to hear cases. His court room wears a deserted look. The learned judge's mannerisms have endeared him to advocates. When both sides ask for an adjournment, they are forced to argue. Conversely when both parties are ready to go on the learned judge adjourns the matter and returns to his much beloved chambers. No wonder that the advocates of his court lovingly call him "The Hon'ble Kit-Kit-kar".*

## Bhardwaj Dinner

*Our man Bhardwaj has a more organised way of going about dinner diplomacy. The President of the Delhi Judicial Services Association, who conveniently happens to be personal secretary*


*to Bhardwaj, invited judges for dinner at the Claridges. And they went - because they wanted to "go along with the powers of the day". Well, it has been a month of fees and feasting, from all of which, the Devil's Advocate feels very left out. Must be a very very unpopular Devil or Advocate or both.*

*Thats all till the next round of dinners.*

## Devil's Advocate

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