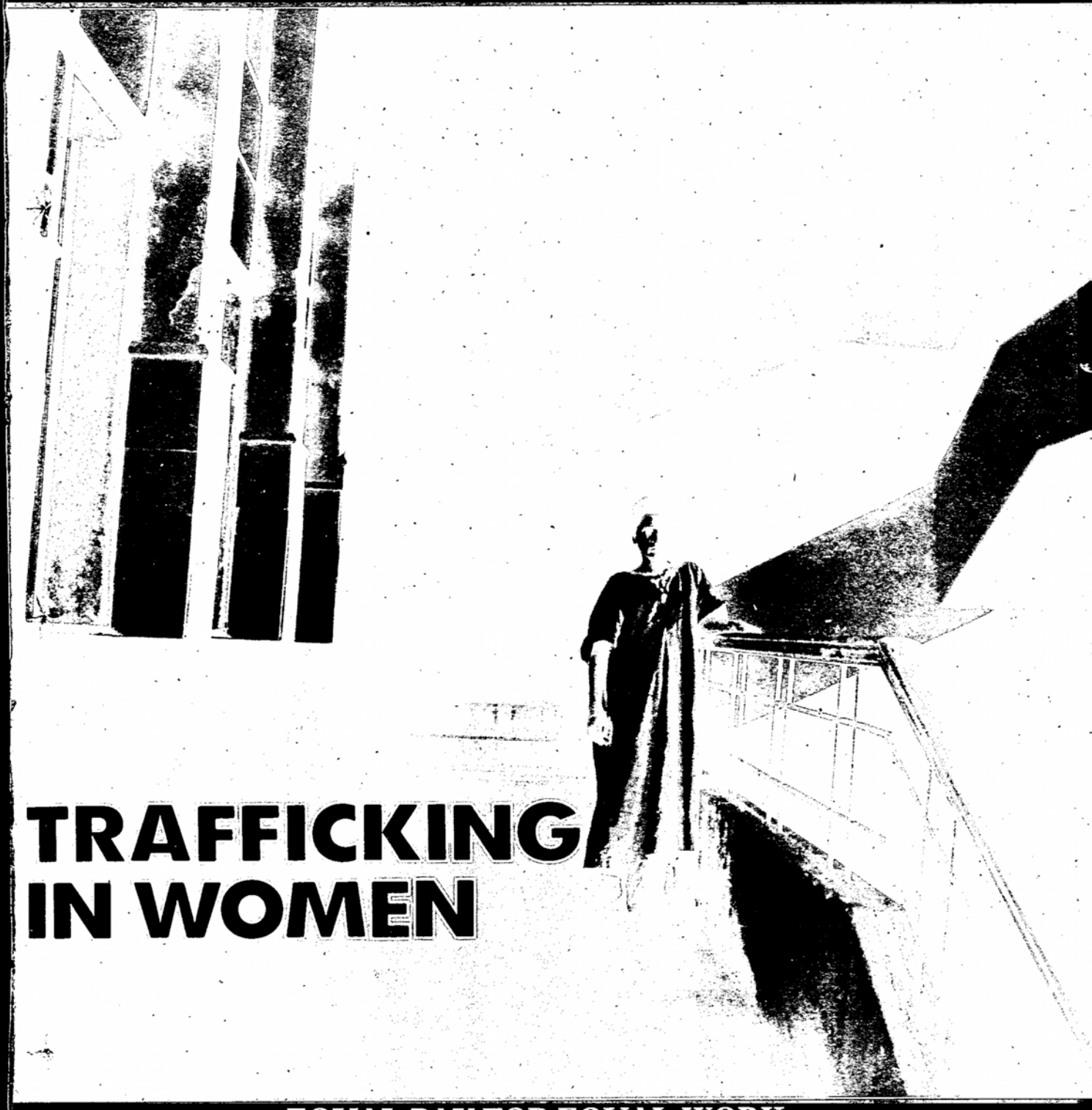
SEPTEMBER, 1986 Rs.5

FROM
THE LAWYERS
COLLECTIVE



TRAFFICKING IN WOMEN

EQUAL PAY FOR EQUAL WORK

DIVORCE BY MUTUAL CONSENT

EDITORIAL

The T.P.S. Chawla Affair.

With the appointment of T.P.S.Chawla as the Acting Chief Justice of the Delhi High Court, political interference with the appointment of Judges has reached its height. It is common knowledge that Chief Justice P.N.Bhagwati recommended his appointment as Chief Justice of the Delhi High Court. Consistent with the policy of the Government, T.P.S. Chawla could not have been transferred out of Delhi as he had less than a year to go in office. There was, therefore, no warrant for appointing him the Acting Chief Justice.

Lawyers of the Delhi High Court, currently on strike protesting the appointment of the judge as the Acting Chief Justice, believe that suspended Registrar, P.P. Sharma, has a hand in it. If this is true, P.P. Sharma must be a powerful man or must have powerful friends indeed.

Readers will remember that P.P. Sharma is facing serious charges of misusing his office and attempting to influence judges. He is under suspension. Some lawyers believe that at a meeting of three judges of the Delhi High Court, D.K.Kapoor, T.P.S.Chawla and S. B. Wad, a proposal was made that P.P.Sharma should be allowed to resign and the enquiry against him dropped. This proposal was strongly resisted by T.P.S.Chawla. If the enquiry goes on, it is likely to expose the nexus between P.P.Sharma and certain former judges of the High Court and politicians, past and present.

According to one report,Central Minister Shiv Shankar's murky deals are likely to form the subject matter of the enquiry. If this be true, he would have an obvious vested interest in stopping the enquiry. He could also be the man responsible for stopping T.P.S. Chawla's appointment as Chief Justice. If there is even a grain of truth in these reports the Prime Minister's office has a lot of explaining to do. As of date, no explanation is forthcoming.

The excuse that the decision to confirm T.P.S.Chawla could not be taken because the Prime Minister was away in Harare is not convincing as the appointment was made on the 20th of August while the Prime Minister left for Harare only on the 28th of August.

Whatever be the outcome of the controversy and even if T.P.S. Chawla is confirmed, the damage has already been done and the system has already been exposed for what it is.

Indira Jaising

CONTENTS VOL 1 NO.9

Editorial 2

Letters 3

Cover Story
SITA and Prostitution
Nilima Dutta 4

Notice Board
Urban Land Ceiling Guidelines 10

Special Report
In Bondage - Kolse Bhatti Kamgars
Deepti Gopinath 14

Comment
Divorce by Mutual Consent
Farida Pardawala 16

Proposed changes in Tax Laws
R.L.Kabra 17

Warrants Attention
Heads or Tails, Naxalite ? 19

Haazir Hai
Freny Ponda and Madhukar Pathare 22

Adaalat Antics
Devil's Advocate 24

LAW AND PRACTICE

Comparable Worth -
Equal Pay for Comparable Work
Jessica Hagen 66

Restoration of Land to Tribals
Nirmal Suryavanshi 68

Guarantees,
Indemnities and Letters of Credit
Anil Mehta 70

Editor
Indira Jaising

Cover photo
Santosh Varma
Courtesy: Illustrated Weekly

LETTERS

Beyond Compare

I refer to your article "Death in Prison" (July). I have one criticism. You have used the word "Verdict" very freely, like the common Presswalas. I think that judges can only pronounce or deliver judgements, instead of verdicts. A verdict is the answer of the Jury on a question of fact in a civil or criminal proceedings, according to Osborn's Concise Law Dictionary. Moreover sometime in 1968, after the Nanavati case, we have discontinued the Jury system as well. The article was otherwise excellent like the rest of the magazine. It has "Class" which is more important than "Colour".

Satish Nedinhall
Advocate, Bombay High Court.

To Sing or Not to Sing

Regarding the anthem singing case. Jehovah's Witnesses, all over the world draw a sharp distinction between the sacred (religion) and the worldly (state). Thus they have been murdered in Africa for refusing to join political parties. children belonging to Jehovah's Witnesses sect in American schools were punished for refusing to salute the flag, until the U.S. Supreme Court recognized their right to conscience. Young Jehovah's Witnesses are jailed in many countries for refusing military conscription.

These harmless dissidents suffer because they are too religious for a State-worshipping world. Yet they help the rest of us, by forcing Courts to consider civil liberties. For if one State can force you to open your mouth and singing aloud, then another can force the atheist to pray. And yet another can force you to renounce one's religion and embrace a different faith. The Supreme Court of India has seen these dangers and has ruled wisely. The Government of India should support the Supreme Court.

J. P.
GPO Box 1197
Sydney 2001
Australia.

Illegal Advertisements

Action must be taken against advertisements which infringe not only civic sense but existing laws as well. Manufacturers of two-wheelers invariably portray riders without helmets to high light the sporty image of their vehicles. It is unfortunate that manufacturers and ad-agencies exhibit and adulate such dangerous driving which is in contravention of the law as Section 85A of the Motor Vehicles Act, 1953 makes wearing a helmet a statutory requirement for both drivers and pillion riders of all two wheeled vehicles.

In another instance, a Government Department blatantly encourages ionmedicos to prescribe drugs, which is illegal.

The Post and Telegraph Department prints post cards with the message

"Fever? Might be Malaria. Take chloroquinine".

This gratuitous prescription aimed at the masses is made in the commercial interest of a public sector pharmaceutical undertaking. This is misleading and encourages drug abuse as high fever is not synonymous with Malaria. Besides all types of malaria cannot be cured by chloroquinine. At best the P&T abets self medication which is dangerous, and at worst, infringes section 15 of the Indian Medical Council Act, 1956.

Sujit K. Bhattacharya
Department of Relief and Welfare
Welfare Branch
Writers Building
Calcutta 700 001.

Expose the Legal System

I am happy that "THE LAWYERS" has the guts to criticize judges and judgements in a magazine that is accessible to the public. Most lawyers only grumble about incompetent or biased judges in private. They are too worried about their practice to take a stand against them in public. Popular magazines and newspapers are cowed down by the threat of contempt of court to really criticize judges. So far the only criticism of judicial behaviour has been in case law reviews which is too technical for the common man. Now for the first time we see a magazine brought out by lawyers which actually exposes the legal system and how it functions. I particularly appreciated your condemnation of the way Justice Masodkar negotiated for a Congress I ticket while still being a Bombay High Court judge (July issue). Some newspapers in Nagpur have reported that he is likely to become the Union Law Minister. It is shocking that such a person who has been associated with Antulays infamous IGPP is being considered for being Law Minister. Such an appointment will bring the entire legal system into discredit.

Kalpana Kalpurkar
Satara

SITA and Prostitution

The Government has recently introduced the SITA (Amendment) Bill. It aims at increasing penalties against those who encourage prostitution. Experience in other countries shows that legislation has not succeeded in eradicating prostitution. ***Nilima Dutta*** *discusses the proposed changes in the law relating to prostitution.*

Contrary to the widely accepted notion, prostitution has not been universally prevalent. In sexually permissive societies, it has often been rare whereas in others it has largely been repressed.

Prostitution is commonly referred to as the "oldest" profession in the world. However, the nature and character of prostitution has changed over the years from respectability to its currently demeaning position. In ancient Greece, China, Japan and India, prostitutes had a distinct social status which arose from the multifarious roles they played.

According to B.R.Agarwala, Senior Advocate, Supreme Court prostitution per se has not always been condemned. It was tolerated when :

i the prostitute chose her client discriminately - In Greece, the 'hetairae' were respected women because they were educated in various arts, provided intellectual companionship, entertainment and sexual gratification. Moreover the 'hetairae' were accessible only to the wealthy and the powerful.

ii. the earnings of prostitution were used to attain a socially desirable goal - Young girls practised prostitution for a limited period of time to earn their dowry and then retired without any blemish on their characters.

iii. prostitutes combined other roles with sexual gratification - in ancient Greece, Rome and other countries, prostitutes were attached to famous temples. In India, the institution of Devadasis arose when girls were dedicated to temples to fulfil certain religious and ceremonial functions.

Devadasis received a fixed salary for the religious duties which they used to perform and since the monetary remuneration was small, they were permitted to supplement it by selling their sexual favours.

In contemporary society, the 'geisha' girls in Japan still maintain these characteristics. Geisha women are trained in dancing, playing musical instruments and in social etiquette for a select male clientele in Japanese teahouses. Geishas are very discriminate about their sexual contacts. Their singular function in Japanese society elevates them above the 'common' prostitute.

TRAPPED NO RETURN

The position of the prostitute as entertainer for the rich and powerful changed with political fortunes. No longer did she remain a privileged hostess of the wealthy but became a seller of sexual services to the passing bidder. Changing socio-economic conditions forced prostitutes to operate singly or to band together in groups in the market place, to find common housing and to resort to being sexually indiscriminate. This consequently led to proliferation of territorial areas where prostitutes carried on their profession and thus became distinct in the community as 'immoral' or disreputable places.

He opines that prostitution is today condemned because it involves a high degree of sexual promiscuity which fulfils no publicly recognised social goal. The norms of every society are aimed at regulating sexual appetites and one of the ways is to channelise it into a stable sexual relationship such as marriage.

The advent of capitalism and particularly the Industrial Revolution in the

COVER STORY

West brought with it urbanization and economic exploitation of large numbers of persons both factors conducive to prostitution. No longer did the prostitute remain a privileged hostess of the wealthy, but became a seller of sexual services in exchange of money or valuable consideration. Sexual service of the prostitute attained the character of a commodity in capitalism. In the process prostitution lost the respectable character it had in antiquity and the ancient periods.

Prostitution today

Today prostitution has two essential elements viz.,

(i) the exchange of money in return for sexual activity.

(ii) the indiscriminate availability of such sexual activity to persons other than spouses, relatives or friends.

Social control of prostitution has varied according to the perception about prostitution. There is considerable controversy over this. This varies from biological (naturally agressive male behaviour, uncontrolled male libido) to social and economic (women attaining the character of private property in capitalism).

In the West, prior to the 19th century, the emphasis was on control and localization and identification of the prostitute. The motivation was two-fold-fiscal (taxes, licences, fees etc.) and moral (isolating the sinful). This was done through Municipal statutes and allowed rigid compartmentalization perpetuating the double standard of sexual morality in that period.

With emancipation of women and the notion that prostitution could be controlled through laws, the emphasis in the 19th century shifted from control to eradication. This led to a series of Contagious Diseases Acts of 1864, 1866 and 1869. However, on account of a campaign to accept prostitution, these Acts were suspended in 1883 and repealed in 1886. From that time onwards in the U.K., and later in the Commonwealth countries, though prostitution itself is not treated as a penal offence, legislation is directed against brothel keepers, procurers, pimps, landlords who rent buildings for such purposes.

However, recently in England, the Street Offences Act, 1959 for the first time prohibited all street solicitation and loitering by prostitutes, with increasing fines for repeated offences.

The status of prostitutes was not defined legally until India became a signatory, in 1950, to the International Convention at New York for the 'Suppression of Traffic in Persons'. There had been an alarming increase in the international trafficking of women and members of the United Nations belatedly realised the need of legislation to check and control trafficking in women.

In India the Suppression of Immoral Traffic in Women and Girls Act,(SITA),1956 was enacted by Parliament to prohibit or abolish traffic in women and girls for purposes of prostitution. SITA however does not aim at the abolition of prostitutes and prostitution.

Prostitution defined

Prostitution is defined under section 2(f) of the Act (1978) as "the act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise, and the expression prostitute shall be construed accordingly." To be called a prostitute under the Act, two ingredients have to be satisfied. (i) a female has to offer her body for indiscriminate sexual intercourse and (ii) she should do so for some payment.

Actual intercourse is not necessary. It is the continuous act of offering her body for hire, which satisfies the definition. A male prostitute is clearly excluded from the purview of Section 2(f).

Since prostitution is not illegal under the Act, the prostitute can carry on her trade wherever she desires with certain restrictions. Under section 7(1) any woman or girl (21 years being the cut-off age to be a woman) who carries on prostitution, and the person with whom such prostitution is carried on, in premises which are within two hundred metres of a public place is liable for punishment with imprisonment upto three months. However, the client is not punishable under this provision.

A consequence of this section is that a prostitute is banned from public places and forced to work only in cer-

Proceedings against Prostitutes under different provisions of SITA and other Acts.

	1980	1981	1982	1983	1984	1985 (1.1.85 to 30.9.85)
SITA						
No. of raids on brothels u/s 3,4,5 of SITA, 1956	61	73	43	72	80	90
No. of persons arrested	358	395	255	593	545	512
No. of cases sent to Court	61	42	5	65	68	10
No. of cases ended in conviction	—	—	—	—	—	—
No. of cases ended in acquittal	—	7	—	1	2	—
No. of cases pending trial in court	61	35	5	64	60	10
Total no. of cases detected under SIT Act	61	71	43	70	72	90
No. of girls rescued from brothels	186	68	79	104	123	61
No. of pros. arrested u/s 8(B)	784	809	585	830	915	650
No. of cases sent to Court	784	809	487	829	915	457
No. of cases ended in convictions	784	809	487	829	913	457
No. of cases ended in acquittal	—	—	—	—	2	—
No. of cases pending trial in court	—	—	98	1	—	—
Bombay Police Act Prostitutes arrested for soliciting	23643	33011	33155	33460	27303	18220
S.292 of IPC (Obscenity)	55	123	69	98	65	54
Women rescued under **Bombay Children Act**	125	115	136	146	97	95

Source: Vigilance Branch, C.I.D., Bombay)

tain areas. Of course, protecting impressionable persons like young adolescents from prostitutes is a lofty idea but this has caused the prostitute to be confined to 'ghetto' like areas her children are born and bred there and a host of support structures like hotels, temples, shops mushroom around constraining the prostitute to live, work and sometimes die in the same place. The provisions of Section 7(1) therefore act against the interest of the prostitute. Moreover, her sexual partner who buys her services gets away scot-free because of the lacuna in the Act.

Punishment of the Prostitute

Under Section 8(a) of the Act a prostitute can be punished with imprisonment upto six months or fine or both for soliciting. A prostitute can be convicted if she makes any gestures, says words or wilfully exposes herself, even from her own house for the purpose of prostitution provided the solicitation was done to cause public annoyance or was offensive of public decency. This provision is the most common cause of police harassment of the prostitute. In addition under the Bombay Police Act, the prostitute can be arrested for indecent behaviour. Judging by the number of arrests, there seems to be large scale rounding up of prostitutes for solicitation under the Bombay Police Act. (See Table)

As long as the prostitute solicits peacefully and does not contravene the provisions of Section 7, there should be no reason why Section 8 (a) should not be deleted from the Act. In a judgement supporting this contention the Madras High Court observed that :-

Merely to indulge in some flirtation with a stranger, or to behave in such a way as to attract the attention of persons of the opposite sex may be regrettable or immodest, but per se , it does not amount to any offence under Section 8 of the Act (AIR 1966 312).

Section 8(b) includes soliciting not only by the prostitute but also by any other person who solicits for the purpose of prostitution. So pimps and procurers can be penalized under Section 8(b). Again, these provisions have been targeted at the prostitute, not only for arrests but also used to convict

SITA is a penal statute. The penal provisions directed at persons other than the prostitute are laid down in Sections 3 to 6, 9, 10 and 18. Section 3 provides punishment for brothel-keeping.

Penal provisions against brothel keepers

A brothel u/s. 2(a) is "any house, room, conveyance or place or any portion of any house, room or place,

ATTITUDES TOWARDS PROSTITUTES

Rukmni Bansode

Attitudes towards prostitutes differ radically. **Rukmanibai Bansode,** the President of the newly formed Asahaya Tiraskrat Nari Sangh (ATNS) a newly formed organisation of brothel keepers and prostitutes, has three to four hundred members. The interest of brothel keepers and prostitutes, one might imagine, would be adverse to each other. But Rukmani Bansode did not seem to think so. "You have to begin somewhere. We can protect the interests of prostitutes. We have ourself gone through the situation".As examples of their concern, she says, that her organization would never permit children to be inducted into prostitution. She said the organization would also ensure that no woman is forced into prostitution. When asked what drove women to prostitution, she was of the opinion that it was, in all cases, poverty. Many prostitutes send money back home to support the family and most keep their links with the family alive.

The ATNS demands that harassment by the police for haftas be stopped, as also harassment by goondas who abduct girls from one brothel to another. Last year a petition was made by the ATNS to Prime Minister Rajiv Gandhi demanding that police harassment be stopped. Rukmanibai claims that after the ATNS has been formed, police harassment has considerably reduced. The organization has made several pledges, notable among them are restoring minor girls to their families, reporting of forced prostitution to the police and reporting of rape of prostitutes. The ATNS would like to be assured of medical care, education facilities, alternative employment and rehabilitation for those who want to quit.

Dr. I.S.Gilada, General Secretary of the Indian Health Organization, has been crusading for licencing and health care for prostitutes and has helped in the formation of ATNS. He has organised several medical camps for prostitutes.'I started with the impression like many others, that prostitutes are promiscuous women. But I found that most prostitutes had not chosen their profession, but were forced into it. Many women are inducted into under the pretext of marriage, others under sanction of religion, and others are inducted as children'. He believed that prostitutes were in a no-return situation as society will not accept them. Protective homes, he says, are so badly maintained that prostitutes would prefer to be in a brothel. He believes that prostitutes should be given licences so that they will not be harrassed, and given proper housing and medical facilities.

Jean D'Cunha who has recently done a research project for S.N.D.T. University, Bombay examined the SITA in terms of its formulation, scope and implementation.

She found that SITA was weighted against the prostitute and in favour of racketeers, pimps and persons profiteering from prostitution. However she felt that with necessary amendments the Act can be a powerful tool in dealing with the socio-economic problem of prostitution.

She opposes the demand for licencing. If individual prostitutes are given licences, she feels that the brothels they live in would also have to be licensed. These licensed brothels will give traffickers further leeway in procuring and selling girls. Decriminalisation and strict implementation of penal provisions of SITA is the only way, she says.

Satish Sakvi

Women in Kamathipura, Bombay

COVER STORY

which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes".

Owners of premises or persons in charge of premises used as brothels are liable if they 'knowingly' allowed the premises to be used as such. The scope of this section is limited because brothel keepers are not punishable if they plead ignorance of the use of the premises as brothels.

The dismal facts are that SITA is a penal statute and welfare provisions are alien to it. Section 19 is the only one which considers that a woman or girl may want to get out of prostitution. It is ironical that although an application can be made by a woman or a girl to be placed in a protective home or in the care of a court, a prostitute who is intimidated by society, is illiterate and totally ignorant of her rights, rarely does so. Most prostitutes are not aware of SITA. All they are cognizant of is that they are picked up by the police regularly for soliciting in public places or otherwise. Even when brothels are raided by police, the women are hustled around, sent to remand or protective homes and then released into the hands of the very brothel keepers who pose as their guardians.

The trauma of being inducted into prostitution with its attendant sexual atrocities not being enough, the women have to cope with sexually transmitted diseases (STD). According to Dr. I.S. Gilada, 90% of the prostitutes have at least one kind of STD and 50% have two kinds. Most prostitutes are aware of the physical discomforts of STD but not of its consequences or of the medical treatment available. Until the diseases are detected and treated, the prostitute remains a source of infection and ostracization.

Alternate employment opportunities

Whenever a prostitute chooses to opt out of her profession, she must have the free choice to choose another one and job skills to support her choice. The kind of vocational training imparted in remand and protective homes are hopelessly outdated and incapable of commanding a fair wage in the job market. In fact the alternatives available to a woman who wants to return to the mainstream of life may cause a reversion because the wages may not be adequate to sustain her.

The difficulty in attempts to control prostitution is illustrated by attempts in France. In 1946, State registration was ended and the maison de tolerance closed down. This resulted in the closure of brothels, but little was done for rehabilitation. Prostitution appeared thereafter in worse condition then before. By another law, in 1946 itself, a card index system for all prostitutes was introduced and regulated for the purposes of hygiene. By another enactment of 1948 the effect was to return to the scheme of state registration though not fully. Ultimately a compromise was arrived to allow brothels near army camps.

In the United States prohibition of prostitution has meant driving it underground and is now controlled by criminal organisations.

In Thailand brothel prostitution was regulated and all brothels and prostitutes are registered.

Prostitutes have been hapless for solutions because they are unable to organize. However recently efforts have been made to organize them.

Organisations of prostitutes

In Bombay there are two organisations both run by brothel owners. One is for Nepali women and the other for the Indian women.

What both organisations aim at is : (i) to ensure that no minors are involved in prostitution (ii) that nobody is physically forced into prostitution (iii) that police harassment is minimized (iv) the women are given alternative facilities so that they don't further fall in debt (v) health facilites are available to women and (vi) the children of prostitutes are brought up without the handicaps they suffer from now (especially in regard to education).

Both organisations attempt at implementing their aims through solemn pledges. Rukminibai Bansode (President of Indian prostitutes) and Dr.Trivedi (Advisor to the Nepali organisation of prostitutes) cite examples of minor women being returned to their families. Moreover, Bansode claims that in 14th Lane Kamathipura police harassment has virtually stopped. Though a number of observers have grave doubts about the capacity of these organisations to help prostitutes themselves, as they are controlled by brothel keepers, it is apparent that to an extent the interest of brothel keepers and prostitutes do coincide.

The proposed SITA (Amendment-)Bill 1986 does not however tackle any of these problems. The emphasis is on punishing traffickers.

The question, however, still remains whether and if prostitution can at all be eradicated. Eradication of poverty will certainly bring down the incidence of prostitution (as is evident from the experience of socialist countries). Decreasing sexual repression will also have lower the incidence of prostitution. This is clear from the experience of Western Europe and USA where the proportion of young males visting prostitutes has decreased in the post 60's period.

A number of academics have stated that until the 'root causes' are eliminated prostitution won't end. But nobody has cared to define these root causes. Surely it is the distortion of sexuality, men treating women as sex objects, taking different forms in different societies. Whatever may be these root causes, the elimination of them is a long term project.

In the meantime the following steps ought to be taken :

1. Enforce SITA with necessasry amendments which are protective of the interest of minors and prostitutes and make all offences of procuring and detention of persons for purposes of prostitution subject to stringent punishment.

2. Make it mandatory for the State Government to provide health care to prostitutes.

3. Set up vigilance cells of women and social workers in every locality to investigate offences under the Act and compel the police to take cognisance of the offences.

COVER STORY

SITA (Amendment) Bill, 1986

Nilima Dutta explain's the proposed changes

The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) was enacted to abolish or at least restrain trafficking in women and girls for purposes of prostitution. The applicability of the Act did not specifically extend to children and males.

The SITA (Amendment) Bill 1986 belatedly recognizes that **children and even men** can be sexually abused and exploited for commercial purposes and should be protected the way women and girls are. To that extent, the Bill is laudatory. However, in their zeal, the drafters of the Bill seem to have lost some important perspectives viz. the impact of the Act on the prostitute. The retention of Section 8 (a) hurts the interests of the prostitute. On one hand, the Act does not prohibit prostitution or declare it illegal per se but on the other hand treats the prostitute as a criminal under Section 8.

Is prostitution per se immoral and therefore is prosecution of the prostitute justified or should considerations of morality be set aside and the prostitute be allowed to carry on her trade peacefully just as any other person is lawfully allowed to carry on his or her trade or profession? These questions are unresolved in the Bill.

Section 2 widens the definition of a brothel to include any place used for the purpose of sexual exploitation or abuse. This broader definition of a brothel would make it easier to prosecute brothel keepers under Section 3 of the Act for all kinds of sexual exploitation and abuse falling outside prostitution. New clauses defining a child as a person who is below sixteen years of age, a minor as a person who has completed sixteen years of age but has not completed the age of eighteen years, and major as a person over eighteen years have been introduced.

The necessity of these definitions are explained in the context of punishment to be meted out to offenders under the Act . The younger the age of the person who is sexually exploited the greater the magnitude of punishment. The presumption of innocence in children also lies behind these new clauses.

Under the existing Act, **protective homes** refer to institutions where women and girls rescued from prostitution may be kept but the quality of rehabilitative care and training are not stipulated. By incorporation of a new clause stating that protective homes should have appropriate technically **qualified persons,** equipment and other facilities, Section 2(g) of the Bill mandates that protective homes should not only allow women to live in dignity but also to find means of gainful employment.

Section 3 is amended by a new clause which seeks to**plug the loopholes** provided to landlords, tenants or other occupiers of premises to escape punishment for brothel-keeping, under the defence of'**lack of knowledge**'. The defence under section 3(2) is still available under the Bill with the following exceptions viz:

(i) a local newspaper reports that the premises in question have been used for prostitution as a result of a search made under the Act, or (ii) a copy of the list of all things found during the above search are given to such person.

Sub-Section (1) of **Section 4 increases punishment for living on the earnings of prostitution of a child or minor.** The new clause imposes a mandatory imprisonment term of not less than seven years and not more than ten years. The conviction for living on the earnings of prostitution of majors is imprisonment upto two years and fine upto Rs.1000 or both. The stiffer penalty imposed in the case of minors or children is self-explanatory. The amendments sought under **Section 5** are the most commendable. The punishment given to procurers and traffickers was not harsh or deterrent enough and since a child is not defined under the Act, the reprehensible act of procuring children and minors went relatively unpunished. The Bill provides an increase in the prison term for offenders convicted for procuring majors and also makes provisions for **life imprisonment for offences against children.**

Section 6 of the Act is amended to increase punishment for detention of any person in premises where prostitution is carried on. These provisions are (1) imprisonment may be extended to life on conviction (2) the presence of a child in a brothel presumes the offence of detention of the child. (3) sexual abuse of a child or minor sexual in a brothel presumes that he or she has been detained for prostitution or sexual exploitation.

Section 8 provides **punishment for seducing or soliciting** for the purpose of prostitution. Under the Act, the imprisonment may extend to six months or a year as the case may be with or without a fine. The Bill mitigates the offence committed by male pimps and touts by providing them imprisonment between seven days and three months. Pimps and touts have nothing to fear under this section of the Bill.

Section 9 of the Bill offers **greater punishment to persons** who cause, aid or abet the **seduction for prostitution, of women** or girls over whom they have authority or who are **in their care and custody.** The punishment is more rigorous in the Bill as it seeks to deter trafficking of women and girls by parents, guardians, superintendents of homes and other persons who have custody.

Sections 10 and 12 are sought to be omitted under the Bill. Section 10 of the Act allows release on probation of good conduct or after due admonition. The deletion of this Section has two contra effects. Firstly, it is detrimental to the interests of the prostitute because she is denied probation. Secondly, pimps, touts and other traffickers cannot be released under Section 10. Section 10 could have been amended in the Bill so as to provide probation to prostitutes and to specifically exclude traffickers from its purview.

Section 12 of the Act empowers the Court when passing a sentence for an offence under this Act, to obtain a security for good behaviour from habitual offenders. This section has been deleted under the Bill as penal provisions for offences under the Act have been enhanced.

Section 13(4) is a new clause added by the Bill empowering the Central **Government to appoint trafficking police officers**whose powers and functions extend to the whole of

India. This clause broadens the authority of trafficking police officers over special police officers who have territorial restrictions imposed on them. This clause if incorporated in the Act would facilitate a crack down on inter-State trafficking and sexual exploitation. It is hoped that this clause will enable the authorities to make consistent efforts to prevent organised trafficking in human beings.

Section 15 of the Act confers power on the **special police officer** to **search without a warrant any premises** where any offence(s) are being committed against women or girls. There are three amendments to this section.

Section 15(4) is a replacement clause enabling **special and trafficking police officers** to enter such premises and **remove all persons** found therein. New clause 5A mandates a medical examination of such persons to determine age or detection of injuries caused by sexual abuse.

The insertion of **clause 6A** is a saving clause of amendments to this section. It prohibits **male police officers** empowered under the Act from making a search without a warrant unless **accompanied by at least two women police officers.** Interrogation of women or girls who are to be removed under Section 15(4) have to be carried by women police officer failing which the questioning of such woman or girl can be done only in the presence of a lady member of a recognised welfare institution or organisation. This is indeed a welcome measure proposed under the Bill. Women and girls rescued from brothels or other premises have been known to be harassed for money or sexual payment by male police officers. This clause curtails police power at least to the extent of maintaining 'the prostitutes' dignity as a woman.

Section 16 of the Act enables a Magistrate to direct a special police officer **to rescue any person** who is living, carrying or being made to carry on prostitution **in a brothel.**

Section 17(3) has been amended to confer discretionary power on the Magistrtate for **interim placement of children and minors rescued** under Section 16, in an institute recognised under any Children Act. To prevent persons from falling back into the hands of brothel keepers who pose as lawful guardians, under new clause 17A of the Bill, the Magistrate must verify the credentials of such guardians by causing an investigation to be made by a recognised welfare instituion or organisation.

Section 18 which **permits closure of brothels and eviction of offenders** has not been substantially amended by the Bill other than changing time periods mentioned therein to three years if minors or children have been found in such premises.

The next change affects **Section 21** where clause 21A has been introduced requiring **persons who maintain protective homes or corrective institutions to produce relevant records and documents.** This is a much needed amendment as protective homes and institutions have been notorious for not maintaining records of persons given in their custody. This will also prevent any trafficking caused by negligence or indifference of such authorities when discharging persons. Section 22A of the Bill empowers the Central Government to establish special courts for the speedy trial of offences under this Act and also those committed in more than one state. This is a self-explanatory clause.

At a glance: THE CHANGES

Comparison of offences under SITA and SIT Amendment Bill, 1986

Section and offence	Punishment under SITA	Under the Bill
S.3 (1) Brothel keeping	First Conviction Rigorous Imprisonment (RI) between 1-3 years and fine upto Rs. 2,000/-	Unchanged
	Second Conviction Rigorous Imprisonment between 2-5 years and fine upto Rs. 2,000/-	Unchanged
S.3 (2) Abetment of brothel keeping	First Conviction Imprisonment upto 2 years and fine upto Rs. 2,000/-	Unchanged
	Second Conviction R.I. upto 5 years and fine	Unchanged
S.4 living on the earnings of prostitution	Imprisonment upto 2 years or fine upto Rs. 1,000/- or both	Imprisonment not less than seven years and not more than ten years where offence is committed against a child or minor
S.5 Procuring, or inducing or taking a woman or a girl for the purpose	First Conviction R.I. between 1-2 yrs. and fine upto Rs. 2,000/-	On Conviction R.I. between three years and seven years and fine upto Rs. 2,000/-
	Second Conviction R.I. of 2-5 years and fine upto Rs. 2,000/-	Imprisonment between seven and fourteen years when committed against will of any person
S.6 Detention	First Conviction R.I. 1-2 years and fine upto Rs. 2,000/-	On Conviction with simple or R.I. between seven years and life or upto ten years with or without fine
	Second Conviction R.I. 2-5 years and fine upto Rs. 2,000/-	Discretionary powers of court to provide imprisonment less than seven years
S.7 (1) Prostitution in public place	Conviction upto three months	Simple or R.I. not less seven years upto life or ten years in case where offences are committed against children
S.7 (2) Abetment of prostitution in public places	First Conviction Imprisonment upto three months or fine upto Rs. 200/- or both	Lesser punishment at the discretion of judge
	Second Conviction Imprisonment upto six months and fine upto Rs. 200/-	Under Section 7(2) of Bill suspension of hotel licences between three months and one year where such hotels are used brothel and if minors or children are found, cancellation of licences
S.8 (a) Soliciting or seduction	First Conviction Imprisonment upto six months or fine upto Rs. 500/- or both	Same as under the Act
	Second Conviction Imprisonment upto one year or fine upto Rs. 500/- or both.	If offence committed by a man, imprisonment between seven days and three months
S.8 (b) Soliciting by nuisance	-do-	
S.9 Seduction	First Conviction R.I. 2-5 years and fine upto Rs. 1,000/-	On Conviction with simple imprisonment or R.I. between 7 years and life or upto ten years without fine
	Second Conviction Imprisonment upto 5 years and fine upto Rs. 1,000/-	

NOTICE BOARD

Guidelines to provide sites and services for smaller sizes of tenements and construction of tenements on the surplus land to be exempted u/s 20 of the Urban Land (Ceiling and Regulation) Act, 1976. *(As published by the Government)*

GOVERNMENT OF MAHARASHTRA

Dated the 22nd August, 1986

Housing and Special Assistance Department,
Resolution No.SSS-1086/(2340)/XIII
Mantralaya, Bombay 400 032

GUIDELINES

1. The State Government had announced a scheme u/s 20 of the Urban Land (Ceiling & Regulation) Act, 1976 for construction of tenements for weaker sections of society on 29-6-1983 under Government Circular No.HWS-1083/CSC-54/XIV. The scheme has been challenged in High Court twice and, therefore, it could not be brought into effective operation. This Government had been seriously considering as to how best the objective of creating appropriate housing stock which will be within the affordable means of poor can be achieved. The Government is convinced that with a view to making the dwelling units affordable, the price to be ultimately charged is the most relevant and crucial factor. Further, this housing stock has to be made available within a reasonable span of time, in larger numbers and of appropriate quality. The experience of creating low cost dwelling units in the World Bank Project was available to Government. Government feels that this pattern needs to be replicated if low cost housing on large scale is to be achieved. The objective of the Urban Land (Ceiling and Regulation) Act to subserve common good can be met. With a view to making housing of appropriate category available, certain concessions in the existing rules and bye-laws will have to be given so that each dwelling unit has the basic essential infrastructure, but the cost is not prohibitive. Government has decided to make suitable concessions available in the Development Control Rules and Building Bye-Laws than what is normally applicable to other income groups. Further, efforts will have to be made by every one including the Government so that a proper orientation is given to the creation of housing stock in the market.
2. The broad objectives of the Government, in announcing the guidelines as mentioned above are to make available low cost dwelling units of appropriate category to persons whose annual income is Rs.15,000/- and also to increase, in the open market, the stock of small size tenements which will be affordable by the persons from middle income group. To achieve these objectives, Government has decided that at least 70% of the surplus land should be utilised for construction of dwelling units having plot area of 25 sq.mtrs. Each plot will have a fully developed infrastructure with an independent water and toilet point. The dwelling units on plots of this size will be either serviced sites (Sites & Services) or core houses (plinth built up) or single room fully built tenements as per the situation. The remaining 30% of the land should be utilised for constructing tenements, 50% of which will be having plinth area upto 40 sq.mtrs. and remaining 50% having plinth area upto 80 sq.mtrs. While apportioning the area of the total plots into 70% and 30%, the areas reserved for different public purposes under the Development Plan will be taken into consideration and apportionment of net buildable land between 70% and 30% will be so made that the burden of the land under reservation is also proportionately divided between 70% and 30%. As regards the holdings having surplus land upto 4000 sq.mtrs. the total net buildable area be utilised for construction of tenements having plinth area upto 40 sq.mtrs.
3. The land/area covered or under D.P. reservations on the piece of land will be apportioned between the two types of housing schemes in the proportion of 70% and 30%. The land used for weaker and lower income group housing will have 70% of the area under D.P. reservations and the other housing scheme will have 30% of area under D.P. reservations respectively. Though the apportionment will be done in the proportion of 70% and 30%, yet all the land under D.P. Reservations will have to be surrendered by the landholder free to Government, which in turn will allot it to appropriate authorities.
4. The Urban Development Department will issue suitable general directives giving relaxations in the Development Control Rules and Building Byelaws wherever necessary in respect of Economically Weaker Section and Low Income Group Housing schemes on 70% portion. The layouts to be prepared for utilisation of the balance 30% land by the surplus holders (above 4000 sq. mtrs.) should adhere to the normal prevailing municipal regulations, town planning requirements and other statutory requirements for the development of the 30% land. The density relaxation and other relaxations granted in favour of the 70% will not affect the density regulation on the 30% portion.
5. All those landholders who want to utilise their surplus vacant land as per these guidelines will have to provide all infrastructure facilities to the land for which exemption is sought under these guidelines. As stated above 70% area out of net buildable land calculated on the basis of what is stated in para 2 above, will have to be utilised for providing dwelling units of the patterns stated in the foregoing paragraph. The percentage of the three types of dwelling units (serviced sites, core houses or single room tenents with water and toilet points) to be constructed on approximately 25 sq.mts. plots in a given land/scheme will be decided or fixed by Government. All these dwelling units will have different price ranges, the maximum ceiling being Rs. 25,000/-. The minimum specifications for these dwelling units will be as follows:-

i) The landholders will have to provide proper access road, sewerage, storm water drains, water supply lines and electric poles.

ii) A serviced site of 25 sq. mtrs. should have plinth of adequate height for W.C. and bathroom. The size of the plinth for W.C. should be about 4' x 3' and that for bath room should be 4' x 4'.

iii) In respect of the dwelling units as core houses, in addition to the services as mentioned in item No. (ii) above, should have plinth with adequate height for a core house, the total area of which should not exceed 21 sq. mtrs. in a plot of 25 sq. mts.

NOTICE BOARD

(iv) Minimum specifications will be fixed as regards the standard of infrastructure to be provided, construction to be made and material to be used for such construction. With a view to verifying whether construction has been done according to the specifications, a panel will be appointed by the State Government.

(v) On the 70% land, which will be utilised for providing serviced sites, core houses or single tenements, no other construction will be permitted. The relative percentages for three types or one or more on the given plot will be fixed by Government as per the need in the Urban Agglomeration or the area. Once the core houses or tenements are constructed upon the plots, further development of any different pattern will be frozen and the local authorities will not permit any other construction either by amalgamation of plots, or by redevelopment of construction done. The residual FSI on 70% portion will not be allowed to be transferred to the 30% portion.

6. The objective of the entire scheme is to make available dwelling units within the affordable price range. The ceiling price on the dwelling units on 70% land should under no circumstances exceed Rs.25,000/- per dwelling unit inclusive of the cost of land, development and on-site infrastructure and the actual construction of the dwelling unit. These dwelling units will either be in the form of serviced sites (site and services), core houses (plinth built up) and wherever situations permit, single room tenements with either private or semi-private toilet and bath facilities in the form of row houses. These 3 options will be available since the situation will vary from site to site depending upon the level of development, the reclamation and filling that is required to be done. The maximum price limit of any dwelling unit, serviced site, or core house or tenement will be Rs.25,000/-. The prices for the various range of dwelling units will be fixed by Government after considering the local situation. Families whose annual income is upto Rs.15,000/- or below will be eligible for these dwelling units. Government will fix the price of tenements according to the local situation and it will be binding on the landholder or the developer.

7. The Government will have the right of pre-emption, that is of purchasing these serviced plots with or without core houses or single room tenements at the rates which will be fixed by the Government as mentioned in the foregoing. If the dwelling units are purchased/ taken over by Government they will be allotted to eligible persons, who are resident of Maharashtra for the last 15 years and having income less thant Rs.15,000/- per annum and as per the rules which will be framed by Government in this respect.

8. Wherever Government chooses not to exercise the option of all allotment through Government channels the allotment will be entrusted to the landholder. A procedure will be laid down. The allotment will be made by the landholder only according to that procedure. It will generally be on the lines of the procedure presently followed by Maharashtra Housing and Area Development Authority. In short, applications will be invited by giving advertisement in suitable local newspapers in different languages and if after scrutiny of the applications received, number of eligible applicants is more than the dwelling units, lots will be drawn.

9. With a view to making tenements available to middle income and higher income groups of the society along with economically weaker sections and lower income group, the State Government will permit the landholders to construct tenements upto 80 sq. mts. on 30% land. Half of the land (out of this 30% portion) will be used for constructing tenements having plinth upto 40 sq. mts. and remaining half of the land (out of the 30% portion) for tenements having plinth between 40 and 80 sq. mts. area.

10. The price of these tenements (referred to in para 9) will be fixed according to the principles laid down by the Government of India under section 21 of the Act and the rules framed thereunder. These principles are that the price of such tenements will be equal to 5 times the land cost under Urban Land (Ceiling and Regulation) Act, plus actual cost of construction plus 15% profit on the total expenditure. However, the actual selling price of these tenements in this frame-work and the formula will be fixed by the State Government after duly considering the local situation. Out of the tenements so constructed, 10% will have to be sold to Government and remaining 90% can be sold by the landholder in the market at a price fixed by Government on the basis of the above referred formula.

11. Government has carefully considered the question of surplus lands below 1 acre and feels that it needs to be treated on a separate footing. As these pieces are likely to be closer to city centre, higher densities of houses may not be desirable and the type of development envisaged herein may not be possible. The landholders (surplus being below 4000 sq. mts.) will be permitted to construct tenements of plinth area not exceeding 40 sq. mts. on the entire land. Out of the tenements constructed on such land in accordance with the prevailing Building Regulations and Development Control Rules, 30% of tenements, will have to be sold to Government Nominees at predetermined rate to be fixed by State Government. The remaining tenements can be sold in open market, at a price to be fixed by Government in accordance with the formula prescribed u/s 21 and rules thereunder or Urban Land (Ceiling and Regulation) Act. However, if the landholders can undertake the development envisaged in the foregoing paras, Government will have no objection.

12. The minimum specifications of the materials to be used in the construction of all tenements having plinth area upto 40 sq. mts. or upto 80 sq. mts. will be as under:=

i) Marble mosaic tiles flooring in all rooms.

ii) White glazed tiles dados of 4 ft. height in bath room and minimum 1 ft. 6 inch height in W.C.

iii) Cooking platform in the kitchen with built-in sink.

iv) One wash basin with towel rod.

v) Fan points in addition to minimum number of light points and plus points in living room and bed room/rooms.

13. The building work should comply all the standards specified by I.S.I. National Building Code/Municipal Regulations in this behalf.

14. 30% tenements to be taken over by Government (para 11) will be allotted by the Government as per the rules to be framed in this regard, subject to amendment from time to time.

NOTICE BOARD

15. Only the landholder, as defined in Section 2(L) of the Urban Land (Ceiling and Regulation) Act, 1976, or his legally Constituted Attorney/representative shall be entitled to apply for such exemption.
16. The excess landholder, if his proposal according to the above guidelines is accepted and exemption is granted u/s 20(1) (a) of the Act, will have to give advertisement in at least 2 local news papers of local language indicating the area exempted, the total number of tenements to be constructed and may be made available to the needy persons, within 3 months from the date of issue of exemption order u/s 20 of the Act. If the proposal is to be implemented in phases the first advertisement to be issued within three months after the sanction of the scheme should indicate the total number of dwelling units/tenements that will be constructed in the scheme and the phases in which it is proposed to be completed. The construction could be in phases but booking to commence immediately. No booking of tenements is permissible before issue of such advertisement.
17. The layout plan approvable by the concerned local authority/planning authority, showing the reservations under the concerned development plan, and notified slums, if any, with a certificate of the appropriate authority indicating notification of such slum, a certificate of the Architect indicating the maximum extent of net buildable land to be included in such proposal will have to be submitted with the application. Similarly, a block plan showing the sizes of different plots for dwelling units costing below Rs.25,000/- as well as the size of the tenements proposed to be built and location of such buildings will have also to be enclosed with the application. The landholder will also submit building plan of the individual buildings/type design and will also indicate 10% or 30% tenements as the case may be, to be sold to Government nominees of such building plans.
18. Permission to undertake such proposal will be given only where the residential buildings are permissible under the relevant Development Plan/Development Control rules and if such tenements are intended to be sold on outright basis or hire purchase.
19. No exemption to the surplus vacant land, under section 20(i) (a) will be given for lands which are likely to be required by Government or by any semi-Government organisation or for any other public purpose.
20. No exemption under section 20(1) (a) of the Act will be granted for any part of the land occupied by a notified slum, unless a scheme for redevelopment of slum area, as approved by Government is also submitted for sanction and approval obtained. For the purpose of carrying out the scheme of slum re-development the landholder shall be bound to transfer the land under notified slum to Government wherever Government consider it necessary.
21. All the proposals submitted under these guidelines should be for utilisation of maximum permissible F.S.I. If the proposal is for utilisation of less than the maximum permissible FSI, the built-up area in the form of tenements to be sold to Government will be calculated on the basis of maximum permissible FSI.
22. One family should be allotted only one plot with core house or one tenement. Family would mean husband, wife and minor children. To ensure implementation of this condition, the landholder should supply copies of all agreements/sale deeds made with the purchaser to the Competent Authority of the concerned Urban Agglomeration.
23. The dwelling unit or the plot shall not be sold or otherwise transferred to a person if he or a member of his family already owns a dwelling unit in the same urban agglomeration. An affidavit to this effect must be obtained from the intending purchasers of the plot or the tenement.
24. Where the proposal envisages advance collection of funds from prospective occupants/buyers the entire construction programme will be regulated by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, or by the Maharashtra State Cooperative Societies Act, 1960, if the construction is by a Cooperative Housing Society.
25. The landholder who will be given exemption under these guidelines will be required to submit from time to time return to the respective Competent Authority which will be prescribed by the State Government in order to indicate the progress of work done by him.
26. It will be binding on the landholders to commence the development of serviced sites, core houses, single room tenements on the 70% of the land first and then take up development of the remaining 30% of the land. The development 70% of the land should commence within one year from the date of sanction of the scheme and be completed within 2 years thereafter. Development on 30% to commence within 1/2 years and be completed with 2 1/2 years thereafter. Handing over of the serviced plots or core houses (70% of land) should be completed first and then only the completion certificate in respect of 30% will be issued in respect of that landholder.
27. In respect of lands 4000 sq. mts. and below the commencement will be within one year after sanction and completion within 2 years thereafter.
28. For lands which are not utilised by the landholder at the end of the time limits prescribed or the land with incomplete structure, the exemption is liable to be withdrawn and where the buildings are incomplete, the land under such incomplete buildings and the land appurtenant is liable to be treated as vacant land and acquired as per Chapter III of the Urban Land (Ceiling and Regulation) Act, 1976.
29. Government reserves the right to relax any of the conditions or impose fresh conditions either in respect of a particular land or in general.
30. These guidelines supersede the New Scheme declared u/s 20 of the Act on 29.6.1983 referred in para-1 above. The landholders who had already applied for grant of exemption u/s 20 of the Act under the New Schemes mentioned in para-1 above can now apply for exemptions under the guidelines specified above.
31. These guidelines will not be applicable in the island city of Bombay i.e. from Colaba to Mahim and Sion.

By order and in the name of the Governor of Maharashtra. **(D. K. AFZULPURKAR)** Secretary to Government

Comparable Worth - Equal pay for comparable work

Equal pay for equal or similar work was the principle of the Equal Pay Acts brought in to overcome the discrimination in employment between the sexes. However, this ignored the fact that victims of discrimination occupied traditionally low paid jobs and therefore out of equal pay for equal work principles. The attention has therefore turned to Comparable Worth - equal pay for comparable work. ***Jessica Hagen*** *assesses the development of the law on the subject in the U.S.*

The latest battle to overcome employment discrimination on the basis of sex has centered on the theory of "comparable worth" — paying equivalent wages for jobs which, though different, have been judged to be of equal value. The underlying basis of comparable worth is that traditional job segregation between men and women has led to an ingrained discrimination that cannot be eradicated by only requiring that equal pay for equal work be paid.

The basis for the campaign for comparable worth in the U.S. is that without it, the connection between job segregation and wage discrimination cannot be cracked. A crucial reason for the continuing wage disparity between men and women is that historically, women have been confined to a limited number of jobs whose wages are well below those of predominantly male jobs. Unless some form of comparable worth analysis is accepted and employed as a basis for a discrimination claim, this systematic discrimination cannot be adequately attacked.

In 1980, a study done by the Women's Bureau reported to the OECD in Europe showed that 68.5% of women employees held traditionally female jobs. The U.S. Commission on Civil Rights estimated that two-thirds of all working women's occupations would have to be changed to match the occupational patterns of white American males. Thus, equal pay for equal work addresses the problems of only a minority of the working women in the U.S. Due to the scope of this segregation, merely opening access to traditional male jobs will not suffice to aid women who have invested years of training in the jobs they now hold and with which they are satisfied.

Difficulties in comparison

Powerful arguments against comparable worth do exist, however. Initially, enormous difficulties exist in determining whether certain jobs are of comparable worth. Commentators cannot even agree what constitutes "worth". Some define it in terms of the skill, effort, and responsibility of a job, others define it in terms of the value of the work to an employer or to society at large. Any such evaluation, therefore, necessarily incorporates elements of subjectivity. Cases have even involved conflicts between a job evaluation done by the employer and one done by the employees. In addition, statistics on which discrimination claims often rest, can be attached on the ground that all relevant factors have not been taken into account, or that all the factors operating simultaneously to influence compensation received have not been accounted for, or that the assumptions that the statistician makes in selecting data are faulty.

Choosing the frame of reference for comparing various jobs is also controversial. Most authorities believe that comparison should only take place between different jobs in the same organization. Some litigants, however, have sought to compare their work with that performed for employers in the general community.*[Lemons V. City of Denver,* 620 F.2d 228 (10th Cir.1980).] In addition, determining which jobs should be compared can be difficult For example can a secretary be compared to a computer programmer or to a steelworker?

Acceptance of scheme of comparable worth could also affect the rate of unemployment in female-intensive industries. If the costs to the employer increase significantly, jobs may be discontinued or lost to foreign competition. These risks are inherent in any cost-enhancing regulation, though. In fact, in *Los Angeles Dept. of Water and Power V. Manhart,* [435 U.S. 702 (1978)] the Supreme Court ruled that cost alone is not a valid excuse for continuing discriminatory practices. The question really is not whether to bear these costs, but how to distribute them. Inaction would simply mean that the costs would be borne as they are now - by victims of the discriminatory treatment. Ligitimate concerns exist, though, as to how far the government or judiciary are capable of determining wages.

Free Market

Another argument against comparable worth is that the free market should not be interferred with in the efficient setting of wages. Although this might be a strong contention if a 'perfect' free market system existed, in a system warped by past prejudices where wages are deliberately set lower for female-dominated jobs and where women are confined to a limited number of occupations, overcrowding them and thereby further forcing down the wages, this argument rings hollow.

Alternatives to comparable worth do exist but they have not been very effective. Collective bargaining for union members is a possible way to negotiate for pay equality, but the overall under-representation of women and their interests in union power structures has worked against them. Integration of sex-Segregated jobs is another possibility, but due to the low pay and low status of many female-dominated jobs, little incentive exists for men to enter these fields. Comparable worth is therefore, the most viable method to overcome past discrimination. However, its consequences remain unclear since only recently has it begun to be implemented on any wide scale.

Equal Pay Act, 1963.

The development toward remedying wage discrimination in the U.S. began with the Equal Pay Act (EPA) of 1963 which called

for equal pay for equal or substantially similar work. It also incorporated four affirmative defenses for a defendant on which a wage differential may be properly premised viz.:-

1) a seniority system,
2) a merit system,
3) a system which measures earnings by quantity or quality of production or
4) any factor other than sex.

Although this Act helped attack the most blatant discrimination, it could not affect the most subtle forms such as where a job primarily filled by women was paid substantially less than a job filled primarily by men, although the jobs might be judged to be of equal value.

Title VII, Civil Rights Act, 1964.

The EPA was followed by Title VII of the Civil Rights Act of 1964 which prescribed general equal employment opportunities for women and minorities. For many years, it was unclear whether Title VII, though the Bennett Amendment stipulating that in the event of conflicts the provisions of the EPA would not be nullified, was also limited to providing only a remedy on the basis of identical or substantially similar work.

In 1981, however, the Supreme Court ended much of the controversy with its decision in *County of Washington V. Gunther* [452 U.S. 1961 (1981)] when it ruled that the Bennett Amendment did not restrict Title VII's prohibition against sex-based discrimination to claims of equal pay for equal work. In *Gunther*, the County of Washington had conducted an evaluation of its compensation system for prison employees and then paid prison matrons only 70% of their valued worth, whereas male prison guards were paid their full evaluated worth. Although this case opened the door to comparable worth claims, the Court deliberately stated it was not ruling on the controversial theory. The debate today focuses on how far *Gunther* can be extended or limited since the Supreme Court has thus far declined to clarify its position.

Disparate Treatment

Two main branches of suits on the basis of sex discrimination exist under Title VII - disparate treatment and disparate impact. A disparate treatment case prohibits intentional discrimination based upon impermissible criteria and must present evidence of the employer's discriminatory motive, showing that the employer did not act accidentally. This can be done through circumstantial evidence such as gross wage disparities between male and female predominated jobs under the same employer, as well as direct evidence, such as an employer's statement that women need not be paid as much since they are not the primary wage earner in the family. Once the plaintiff has established a *prima facie* case, the employer need only give a legitimate non-discriminatory reason for the wage disparity, and then the plaintiff must show this is not the true reason. *[Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248 (1981)].

Plaiantiffs in cases along this line have had limited success. *Gunther* was a disparate treatment case and so was *UE V. Westinghouse* [631 F. 2d 1094 (3rd Cir. 1980)] where again the actual wage rates of the women were less than their job evaluations would indicate. Both cases involved direct evidence of intentional discrimination since the employers, despite adopting the evaluations, refused to abide by them.

More problematic are the cases where the intent must be shown partially or completely on the basis of comparable worth evidence. Before *Gunther* courts refused to accept any comparable worth evidence to prove a discrimination claim *[Lemons, Gerlach v. Michigan Bell Telephone*, 501 F. Sup. 1300 (Ee.KD. Mich. 1980)]. After Gunther the courts have split. In *Briggs v. City of Madison*, [536 F. Supp. 435, (W.D. wIS. 1982)] the district court allowed evidence of comparable worth between nurses and sanitation workers, consisting of testimony by expert witnesses and statistical comparisons of wage rates without relying on an employer evaluation to establish the *prima facie* case of intentional discrimination. The court made it clear, however, that it only accepted the comparable worth evidence in this case because the two jobs had substantially similar work requirements and conditions and therefore levels of skill, effort, responsibility and working conditions could be compared. Other cases which have also allowed gross statistical disparities to constitute *prima facie* proof of an intentional pattern and practice of discrimination are *Melani v. Board of Higher Education of the City of New York*, [561 F. Supp. 760 (S.D.N.Y. 1983)] and Heagney v. Univ. of Washington [642 F. 2d 1157 (9th Cir.. 1981)].

In direct contrast to *Briggs*, is *Power v. Barry County*, [539 F. Supp. 721 (kw.D. Mich. 1982)] where the district court refused to allow comparable worth evidence to form the basis of an independent claim. Matrons for county female prisoners had claimed that their jobs were of equal value to those of male correction officers who supervised jail inmates. Here, however, no evidence was introduced to show that the positions were of similar value, only that the women were paid less. Perhaps if the court had not had to make its own evaluation of the worth of the jobs, the claim would have had more success.

In one of the most recent decisions, *Spaulding v. Univ. of Washington*, [740 F. 2d 686 (9th Cir. 1984) cert. denied 105 U.S. 511 (1984)], the court ultimately refused to find intentional discrimination from pay differentials and comparable worth evidence. Instead, the court decided that the plaintiff's evidence did not control for differences between individuals that can legitimately lead to their being treated differently - e.g. seniority and education. In this decision, though, the comparable worth evidence was allowed to establish the *prima facie* case and only after a careful consideration of the evidence did it find it inadequate.

The most recent case in this area is *AFSCME v. Washington*, [578 F. Supp. 846 (W.kD. Wash. 1983) rev'd, 770 F. 2d 1401 (9th Cir. 1985)]. In the district court, the plaintiff won on a combination of direct and circumstantial evidence. For example, an overall wage disparity of 20% existed and state officials had even admitted discrimination. Later, however, the 9th Circuit reversed, deciding that the evidence of comparable worth was not sufficient. Very recently, however, the case was settled, giving the plaintiffs substantially what they asked for, in large part to avoid further protracted litigation.

Market Place Defence

The biggest stumbling block existing for a disparate treatment claim is the employer's reliance on the marketplace defense. Under the fourth affirmative defense of the EPA, the employer can claim that the discrimination results from a factor other than sex, such as the wages the market place forces him to pay for certain jobs in order to attract enough workers. For example, in *Briggs*, although the court accepted the comparable worth evidence to establish the *prima facie* case, it eventually decided that the employer was not responsible for the discri-

mination because the market forced him to pay sanitation workers more in order to keep the position filled. If the courts continue to allow this defense for discrimination claims, it will vitiate much of the value of a comparable worth claim because it is this very ingrained market prejudice which comparable worth is supposed to combat.

Disparate Impact

Disparate impact analysis, on the other hand, is intended to remedy practices that are fair in form but discriminatory in operation. The plaintiff here need not prove discriminatory intent on the employer's part, but instead must show that facially neutral employment standards distinguish between employees on a discriminatory basis. The burden then shifts to the employer to show that either the plaintiff's statistics are flawed or that the employers policies are job-related, justified by business necessity. Even if the employer satisfies this burden, the plaintiff can prevail by proving that a less discriminatory alternative would serve the employer's legitimate interest. *[Griggs v. Duke Power Co.*, 401 U.S. 424 (1970)]. *Gunther,* however, raised the implication that disparate impact under Title VII did not apply to gender-based discrimination by implying that intent is necessary. However, little discussion of this point exists.

Relatively few cases exist in this area. One example, though, is *Kouba v. Allstate Ins. Co.*, [691 F.2d. 873 (9th Cir. 1982)] where an employer based the initial salary of a new employee on his/her prior salary. Employees alleged this practice perpetuated the effects of societal discrimination against women who have traditionally received salaries below those paid to men. The district court ruled the practice could not continue unless the employer could prove the prior salaries were based on factors other than sex, relying on statistics showing that new female employees as a class received lower starting salaries than those paid to men. The appeal court, however, reduced the burden on the employer, only requiring to show that use of prior salaries was based on legitimate business reasons. Eventually the suit was settled, with the employer agreeing to change its methods of setting initial salaries and to set up a significant trust fund for the 2,500 women in the class.

Pouncy v. Prudential Ins. Co. of America, [668 F. 2d 795 (5th Cir. 1982)] continued this trend by deciding that reliance on market wages was not a facially neutral practice within the meaning of Title VII, but instead reasoned that every prudent employer must look to the job market for guidance in wage setting, and that it cannot be held respoisible for these extrinsic conditions. In this area, as with disparate treatment, the marketplace's set of wages remains a powerful defense.

Other policies attacked under disparate impact analysis have been the "head of household" status used to limit the wife's coverage under an employee's medical policy. In *Wambheim v. J.C. Penny Co.*, [705 F. 2d 1492 (9th Cir. 1983)] and *Dothard v. Rawinson,* [433 U.S. 321 (1977)] where females as a group were adversely affected by height and weight requirements, the trend appears to be that the policy attacked must be sufficiently discrete so that its effects can be isolated. Unlike with disparate treatment claims, comparable worth evidence will not be as helpful in isolating the discrimination because so many subjective factors go into setting wages that are not readily reduced to statistical studies.

Evaluation

The latest status of comparable worth as a basis for sex discrimination claims remains unclear. The trend of the federal courts has been mixed. In cases such as *Briggs* the courts have at least been willing to accept, albeit in narrow formulations, some types of comparable worth claims. Other courts, however, have rejected comparable worth as a legitimate basis for such a claim-power. Despite the inter-circuit disagreement on the issue, the Supreme Court has refrained from clarifying its initial decision in *Gunther.* In several cases, the Court refused to grant certiorari to cases which would have forced it to directly decide the comparable worth issue. In part this might be because it is waiting for more clarification of the issue through the circuit court decisions and through observing the effects of these decisions. In addition, some plaintiffs appear reluctant to appeal their cases to the Supreme Court due to its perceived conservatism and their fear of an adverse precedent resulting which could kill the whole issue.

The overall precedent laid down in *Gunther,* however, can be construed in favour of a broader reading of Title VII. The court there noted that Congress itself had indicated that a broad approach to the definition of equal employment opportunity which is essential to overcome and undo the effects of past discrimination and that it "must avoid interpretations of Title VII that deprive victims of discrimination of a remedy without a clear congressional mandate"

The Reagan Administration

At the moment, the federal government appears opposed to the idea of comparable worth. Although officially the Reagan administration has not taken a position on it, the actions taken by most of his officials with EEO responsibility indicate that it is strongly opposed to the concept. In fact, shortly after the initial *AFSCME* decision was handed down, the Justice Department hinted it might join the appeal on the side of the State of Washington. It later backed down both because of the criticism it received and in light of the *Spaulding* case indicating the 9th Circuit would probably reverse. In addition, although comparable worth legislation is pending before Congress it appears to have little chance of success.

State Response

Many state and local governments, however, appear much more receptive to the comparable worth theory. A number of states have enacted some form of equal pay legislation and many others are considering it. At the moment, though, this legislation is restricted primarily to state employees. For example, in 1982 Minnesota became the first state to enact legislation requiring its mucicipalities to provide employees with equal pay for comparable worth. By acting in good faith to rectify the acknowledged wage disparity, Minnesota avoided the issue of back pay which formed a substantial part of the final *AFSCME* settlement. Since Minnesota has not encountered many problems in the implementation of its programme, other states are considering its example.

Since the root cause of the pay inequities between men and women lies with the job segregation that has taken place within the labor market, comparable worth offers one of the few viable ways of attacking this ingrained discrimination. Without it, women will be forced to forsake traditionally female-dominated occupations to pursue higher-paid, male-dominated positions. Although this offers an imperfect solution to women just now entering the work force, it leaves the majority of women who are already entrenched in those careers with no redress.

Jessica Hagen is a student of law at the Columbia Law School.

Restoration of Lands to Tribals

Tribals were ostensibly protected under tenancy laws. However, experience showed that tribals could easily be divested of their land by non-tribals. In order to remedy this situation, the Maharashtra Government enacted the Maharashtra Restoration of Land to Scheduled Tribes Act, 1974. **Nirmal D. Suryawanshi** *explains the main provisions of this radical piece of legislation.*

The Government of Maharashtra by its resolution dated 16th March, 1971 appointed a Committee under the Chairmanship of Mr. Vartak, the then Revenue Minister, to inquire into and report to the Government as to how far the Maharashtra Land Revenue Code, 1966 and relevant tenancy laws had been effective in giving protection to Scheduled Tribes and to suggest suitable amendments. The Committee gave its report on 7th April 1972.

In the opinion of the Committee the provisions of the Maharashtra Land Revenue Code and relevant tenancy laws were not sufficient to protect the lands belonging to tribals. The Committee found several cases where transfer or exchange of tribal land had been done in the favour of the non-tribals. Under the guise of duly effected transfers, such as sale or lease for fixed period, the rich farmers easily divested the tribals of their lands for a nominal price. Moreover, the Collector allowed the transfer of lands to non-tribals rather freely.

The Committee made two recommendations. One, to prevent alienation of land of tribals to non-tribals. The other, to restore lands, which had been taken away from the tribals by the non-tribals, to the tribals.

Maharashtra Restoration of Land to Scheduled Tribes Act, 1974

The Government considered the recommendations of the Committee. The first suggestion found realization in the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974. (This has been dealt with in the June issue of The Lawyers). As for the second suggestion, the Government introduced a Bill, The Maharashtra Restoration of Land to Scheduled Tribes, Bill 1974. The Bill was passed and came into force on 1st November 1975 (published in the Maharashtra Gazette dated 28 May 1975, Part IV).

As the Preamble of the Act states, it is intended to take steps for restoring land to persons belonging to Scheduled Tribes.

The Act applies to the whole of the State of Maharashtra.

It defines **tribal** to mean a person belonging to Schedule Tribes within the meaning of the explanation to Section 36 of the Land Revenue Code and includes his successor in interest [Section 2(j)]

Non-tribal means a person who is not a tribal and includes his successor in interest [Section 2(e)].

Transfer has been defined as a transfer in relation to land belonging to a tribal made in favour of a non-tribal during the period commencing on 1st April 1957 and ending on 6th July 1974, either:

a) by act of parties, whether by way of sale, gift exchange, mortgage or lease or any other deposition made *inter vivos* (during their lifetime), or
b) under a decree or order of court, or
c) for recovering any amount of land revenue due from such tribal or for recovering any other amount due from him as arrears of land revenue or otherwise under the Maharashtra Co-Operative Societies Act, 1960, or any other law but does not include a transfer of land falling under the Land Revenue Code.

Restoration of Land

The lands transferred by the tribals to the non-tribals are now restored to tribals under Section 3 of the Act. Action for restoration of such lands can either be taken by Collector of District *suo moto* (on his own) at any time or by a tribal who can apply to the Collector for restoration of his land. The time limit for such an application is three years commencing from the date of transfer. The land however should not have been put to non-agricultural use on or before the 6th July 1974.

If the transfer of lands between tribals and non-tribals has taken place due to exchange of land, the lands exchanged have to be restored to the other person.

In any other case of transfer which took place during the period commencing on the 1st April 1957 and ending on the 6th July 1974, lands will be restored to tribals free from any encumbrances (Section 3).

The lands, however, have to be restored to the tribals only if the tribal gives an undertaking to cultivate the land personally and to pay such amount to the non-tribal transferee as the Collector may determine under the provisions of sub-section 4 of section 3 of the Act.

Under sub-section 4 of section 3 of the Act, the Collector, can determine the value of improvements, if any, made on the land by the non-tribal transferee.

The Collector shall also determine the amount payable by the tribal to the non-tribal for the land restored to him. This has to be equal to 48 times to the assessment of the land of the amount of the consideration paid by the non-tribal transferee for acquisition of the land, whichever is less.

The Collector, while determining the value of improvement made by non-tribal, should consider the labour and capital provided or spent on improvement, the current condition of improvement and benefits accrued to the land due to such improvement. The amounts determined by Collector are recoverable as arrears of land revenue. This implies that a particular procedure has to be followed.

LAW AND PRACTICE

The Act makes a special provision in respect of restoration of lands, belonging to tribals, which have been transferred by a lease created by them in favour of non-tribals and which vest in non-tribals due to the provisions of tenency laws.

Where any land of a tribal is, at any time on or after the 1st April 1957 and before the 6th of July 1974, purchased or deemed to have been purchased or acquired under or in accordance with the provisions of the relevant tenancy laws by a non-tribal and which has not been put to any non-agricultural use on or before the 6th of July 1974, will, now be restored to the tribals free from all encumbrances. The tribal, however, will have to refund the purchase price paid by non-tribal either in a lump-sum or in annual instalments, not exceeding twelve, with simple interest at the rate of 4.5 percent per annum. (Section 4)

Enquiry

The Collector, before directing the restoration of land to the tribals, may hold an enquiry as he deems fit. Rules, being Maharashtra Restoration of Lands of Scheduled Tribes Rules 1975, have been framed for the procedure to be followed for such an enquiry. For restoration of the land, the tribal has to submit his application to the Collector stating his name, survey number, area and assessment of land. He should also state the address of non-tribal, the date of transfer and mode of transfer, and consideration, if any, paid by the non-tribal transferee to the tribal for the land.

Where the land is acquired in exchange by a non-tribal transferee, the survey number, sub-division, area and assessment of the land received in exchange by the applicant, the village taluka and district in which it is situated, the valuation of the land acquired in exchange by the non-tribal transferee, both valuations being estimated at of the time of exchange have also to be stated. [Rule 3 (2)]

On the basis of the records, if any, available with him and where an application has been received under sub-rule (1), on the basis of particulars given in such application, the Collector should give notice to the non-tribal transferee and all other persons interested in the land calling upon them to show cause why the land should not be restored to the tribal transferee as the case may be, why the lands exchanged should not be restored to the tribal. The notice shall specify the date, the time, and place of hearing, intimation of which shall also be given to the tribal transferor. [Rule 3 (3)].

The Collector, in his inquiry, has to record the statements of tribals and non-tribals and their witnesses. He has also to examine the parties and their witnesses and after recording the evidence he should decide the issue of restoration of land to the tribal [Rule 3(5)].

The Collector, after recording evidence shall call upon the tribal to give an undertaking in Form III as required under the Act to personally cultivate the land. After such an undertaking is given, he has to pass an order of restoration. [Rule 3 (6)]

The decision of the Collector must be in writing and in the form of an order and he has to state reasons for such a decision which shall contain a full statement of the grounds on which it is passed.

The lands which are liable for restoration but cannot be restored shall vest in State Government and will be granted to other tribals subject to certain restrictions. (Section 5A)

Appeal

An appeal is provided against the decision of Collector to the Maharashtra Revenue Tribunal. The appeal should be made within a period of sixty days from the date of receipt of the decision or order of the Collector (Section 6)

Revision is also provided against the order of the Collector to the Revenue Commissioner of the Division. Where no appeal is filed, the Commissioner can, either *suo moto* or on the direction of the State Government, at any time, revise the order of the Collector. This can only be done after examining the records and proceedings of enquiry before the Collector. (Section 7)

The decision of the Collector, subject to appeal and revision is final and conclusive. The decision of the Maharashtra Revenue Tribunal in appeal is also final and conclusive and cannot be questioned in Civil Court or any Court (Section 9).

The appearance of pleaders and advocates is barred.(Section 9A).

The jurisdiction of Civil Court is barred in respect of questions to be decided or settled or dealt with by the Collector, Commissioner and the Revenue Tribunal and the Government under the provisions of the Act (Section 10).

The Act has been included in the 9th Schedule of the Constitution of India. It, therefore, cannot be questioned on the ground that it takes away the fundamental rights of any person.

The inclusion of the Act in 9th Schedule of Constitution and its validity was challenged in *Kaniram Jagannath Lokhande Vls State* (AIR 1977 BOM.240) and also in *Lingappa Panchanna Appelwar Vls State of Maharashtra* [1985 1 SCC 430] but the challenge was rejected.

Though the Act was passed in 1974, it was effectively stayed till the decision of the Supreme Court in 1985. Thus ten years have elapsed in the meanwhile. Under the Act the applications have to be made in three years. It will remain to be seen whether three years would include a period after the stay was lifted.

The Act is intended for the welfare of the tribals. However, the illiterate tribals are still unaware about their rights, and the protection of the Act is not yet in any real sense extended to the tribal community dwelling in the interior of the jungles.

Nirmal Suryawanshi is an Advocate practicing in the Dhule District Court, Dhule, Maharashtra.

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

LAW AND PRACTICE

Guarantees, Indemnities & Letters of Credit

Once a Bank Guarantee has been given should courts grant injuctions restraining the bank from making payment under the guarantee to the benificiary? Under what circumstances can this be done ? What is the difference between a guarantee, indemnity and letters of credit ? These are some of the questions ***Anil Mehta*** *discusses.*

A **Guarantee** is the simplest and the commonest form of **security** a Bank takes, when a Bank disburses a loan. A **Guarantee** is an **accessory contract** by which the **Guarantor** undertakes to answer the debt, default or miscarriage of another person, known as the **principal debtor.**Being an accessory contract, it necessarily involves some other person being primarily liable. The Guarantor is liable only if that principal debtor does not discharge his liability or if he commits a default of the principal contract.

In India (unlike England) a contract of guarantee is governed by statute i.e. Section 126 of the Contract Act. A **Contract of Guarantee** is a contract to perform the promise or discharge the liability of a **third person** in case of **his default.** The person who gives a guarantee is called the **surety;** the person in respect of whose default the guarantee is given, is called the **principal debtor** and the person to whom the guarantee is given is called the **creditor, occasionally referred to as the beneficiary. A guarantee may be either oral or written.**

A Contract of Indemnity as defined under Section 124 of the Contract Act is a contract by which one party promises to save the other party from the loss caused to him by the conduct of the promisor himself or by conduct of the other person.

An **Irrevocable Letter of Credit** is a definite undertaking on the part of an issuing Bank and constitutes the engagement of the Bank to the beneficiary or, as the case may be, to the beneficiary and bonafide holders of drafts drawn and/or documents presented under it, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

There is therefore a great amount of difference between a Contract of Guarantee, a Contract of Indemnity and an Irrevocable Letter of Credit. In a **Contract of Guarantee** there have to be **three parties**;(i) a principal debtor whose liability may be actual or prospective, (ii) a creditor and (iii) a third party (generally the Bank) who in consideration of some act or promise on the part of the creditor promises to discharge the debtor's liability if the debtor should fail to do so. His liability is collateral. In the case of an Indemnity, however, the promisor makes himself primarily liable and undertakes to discharge the liability in any event, provided, no doubt, that the indemnified suffers a loss and such loss is proved to have been suffered.

The Tarapore Case

In India the law on guarantees is believed to have developed since 1970 in the case of *Tarapore & Co. vs. Tractor Exports Moscow* (AIR 1970 SC 891). The Supreme Court in that case was considering the interpretation of a confirmed Irrevocable Letter of Credit and not a Bank Guarantee nor a Performance Guarantee.

Tarapore & Co. Madras (Indian firm) had been awarded a contract for excavation of a canal as a part of the Farakka Barrage Project. The Indian firm placed an order for the machinery, from Tractor Export Moscow (Russian firm). In respect of this contract for supply of machinery, the Indian firm opened a confirmed, irrevocable and divisible Letter of Credit (L/C) of Bank of India in favour of the Russian firm, for Rs.66,09,372.

The Russian firm supplied the machinery to the Indian firm. After using the machinery for some time, it was found to be defective. The Indian firm instituted a suit seeking an injunction restraining the Russian firm from realising the amount payable under the L/C. The trial court granted the injunction. The Appeal court reversed it. The Indian firm went to the Supreme Court.

While discussing the scope of an Irrevocable Letter of Credit and Bills of Exchange, the Supreme Court held that:

a) A Letter of Credit gives rise to a separate contract between the Bank and the Seller, separate and distinct from the contract for the sale of goods between the seller and the buyer. The autonomy of a L/C is entitled to protection.

b) In documentary credit operations all parties concerned dealt in documents and not in goods.

c) A Letter of Credit was a mechanism of great importance in International trade and any interference by Courts with that mechanism would have serious repercussion on International trade, except under very special circumstances.

d) Once the seller complied with the requirements of the Letter of Credit the Court will not be justified in granting injunction restraining the Bank from paying the seller.

e) There was an absolute obligation upon the Bank to pay irrespective of the dispute between the buyer and the seller as to whether the goods supplied by the seller were in accordance with the contract.

It is obvious that this was a case dealing with the interpretation of an Irrevocable Letter of Credit and not a Bank Guarantee.

The Case of Godrej Soaps Limited

The next relevant decision of the Supreme Court is *United Commercial Bank V/s Bank of India and Others* reported in (AIR 1981 SC 1427.)

Godrej Soaps Limited (GSL) agreed to supply to the Bihar State Food and Civil Supplies Corporation (Bihar Corporation) 1000 MT of Sizola Brand, Pure Mustard Oil, the total value of which was approximately Rs.86 lakhs. Bihar Corporation opened a Letter of Credit with United Commercial Bank (UCO Bank) for the sale price in favour of GSL. The Letter of Credit required compliance of certain conditions and after making despatches from time to time. GSL presented the documents for

payment to UCO Bank in two lots. In the first lot, the total value of the documents was Rs.36,52,960 and in the second lot, the value of the documents was Rs.49,31,496. When these documents were presented, UCO Bank refused to pay **"Except under Reserve"** on the ground that the goods were described in the R/Rs as "Sizola Brand Pure Mustard Oil Un-refined". GSL instructed its own Bankers, Bank of India to accept payment of Rs.36,52,960, against the first lot of documents "under reserve". UCO Bank then paid Bank of India who credited the account of GSL "under reserve".

The second lot of documents was also presented. UCO Bank refused to pay on the ground (i) that there were discrepancies and (ii) that some of the R/Rs were "stale". UCO Bank refused to negotiate the documents. UCO Bank thereafter called upon Bank of India to refund to it the amount of Rs.36,52,960 paid "under reserve" under the first lot of documents on the ground that the Bills were not accepted by Bihar Corporation, due to discrepancies. GSL demanded payment of Rs.49,31,496 from UCO Bank under the L/C against the second lot of documents enclosing a letter of guarantee or indemnity executed by Bank of India. The relevant portion of the Letter of Indemnity or Guarantee states:

"In consideration of your having negotiated Documentary Bills of Exchange drawn by GSL drawn on Bihar Corporation under the Commercial L/C issued by UCO Bank, Bihar..... We hereby "unconditionally" agree to hold you harmless and indemnified for all consequences of non-acceptance and/or non-payment of these Bills of Exchange by reason of the following discrepancies..... .....

We have made arrangements for due payment of these bills.

We further unconditionally agree that in the event of the bills being dishonoured on due presentation on account of the above discrepancies..... **to reimburse on demand** the equivalent of the abovementioned Bills..... Notwithstanding anything contained our liability under this bond is restricted to Rs.86 lakhs.

Unless a claim under the **Guarantee** is made against us in writing and received by us before that date, all your rights under **the said guarantee** shall be **discharged** and we shall be relieved and discharged from all liability thereunder"

The document clearly indicates that it was an indemnity; though the latter portion suggests that it is a guarantee. UCO Bank made the payment of the second lot of Rs.49,31,496 "under reserve" and against the letter of indemnity or guarantee.

Thus the payment against the first lot of documents of Rs.36,52,960 was made by UCO Bank to Bank of India "under reserve" and that of Rs.49,31,496 was also made under reserve as well as against the Letter of Indemnity wrongly referred to as Guarantee. UCO Bank demanded refund of Rs.85,84,456/- from the Bank of India with interest at 15% This demand was made on the basis of the Letter of Indemnity. The Bank of India informed GSL about the demand.

GSL filed a suit in the High Court praying for injunction restraining Bank of India from paying the amount of Rs.86 lakhs to UCO Bank and restraining UCO Bank from making the recall. The judge appointed the Court Receiver for the goods with power to sell the goods. GSL purchased the same goods from the Court Receiver's sale for Rs.18,53,000. He also granted an injunction restraining Bank of India from making the payment to UCO Bank. UCO Bank appealed, but the appeal was dismissed. The result was that GSL received Rs.85,84,456 towards the price of the goods and also became the owner of those very goods for Rs.18,53,000.

UCO Bank appealed to the Supreme Court. The main point in controversy was whether the Court should, in a transaction between a banker and a banker grant an injunction at the instance of the beneficiary of an Irrevocable Letter of Credit restraining the issuing Bank from re-calling the amount paid "under reserve" from the negotiating Bank.

Letter of Credit - Sole Contract

The Supreme Court observed that a Letter of Credit constituted the sole contract with the Bankers. The L/C had no relation with any question that may arise between the seller and the purchaser of the goods. The Supreme Court held that a Bank issuing or confirming a Letter of Credit was not concerned with the underlying contract between the buyer and the seller, and that if such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a Bank from recalling the amount due..... the whole banking system in this country would fail.

On a closer examination, it will be apparent that this decision relates only to Letters of Credit and not Bank Guarantees. However, some unfortunate reference to the expression "Letter of Guarantee" has been made.

The observations of Justice Kerr, have been cited with approval by Lord Denning, M. R. in *Edward Owen Engineering Ltd. v/s Barclays Bank International Ltd.* (1977) 3 WLR 764 = (1978) 1 All E. R. 976). Lord Denning held that a performance guarantee was similar to a confirmed L/C. He held that where a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the contract was proved.

In *Barclays Bank* as the defendants' guarantee provided for payment on demand without proof or conditions and was in the nature of a promissory note payable on demand, and the Plaintiffs had not established fraud on the part of the buyer, the defendants were required to honour their guarantee on the demand being made.

Barclays Bank was based on the language of the guarantee and not a general proposition that every Bank Guarantee was a promise to pay.

Ultimately, the Supreme Court observed that injunction could not have been granted as GSL had not established a (prima facie) case viz. that there was a bonafide contention between the parties or a serious question to be tried. Hence UCO Bank could not be prevented from re-calling Rs.86 lakhs. It may be noted that this decision does not relate to Bank Guarantees but relates only to L/Cs.

The MSEB Case

Then came one more decision of the Supreme Court in the case of *MSEB V/s O.L.H.C. Ernakulam* (AIR 1982 SC 1497)

In this case, Cochin Malleables (P) Ltd. (in liquidation) had furnished a Bank Guarantee (in lieu of a permanent deposit) in the sum of Rs.50,000 in favour of Maharashtra State Electricity Board for goods supplied by CMP Ltd. to MSEB pursuant to tenders from time to time invited by the latter. The relevant part of the guarantee was as follows :-

"The Canara Bank Ltd. hereby agrees unequivocally and unconditionally to pay within 48 hours on demand in writing from MSEB ..... of any amount upto and not exceeding Rs.50,000....."

The Supreme Court, whilst construing the document held that "it cannot be disputed that the terms on the basis of which the Electricity Board has claimed the amount from the Bank constitute a contract of guarantee and not a contract of indemnity. Under the document the Bank had undertaken to pay

any amount not exceeding Rs.50,000 to the Electricity Board within 48 hours of the demand. The payment of the amount guaranteed by the Bank is not made dependent upon proof of any default on the part of the company in liquidation."

The Supreme Court held that since the liability of the Bank was absolute and unconditional, the Bank could not be restrained from paying the liability. It may be noted that this decision does not lay down the law on interpretation of Bank Guarantees. The Supreme Court also did not make any reference to its earlier decision in *UCO Bank Vls Bank of India* (AIR 1981 SC 1426.)

Let us now examine some of the decisions of several High Courts of our country which have interpreted Bank Guarantees.

ETC Case

In *State Bank of India Vls Economic Trading Co. & Ors.* (AIR 1975 Cal.145) Lohia Jute Press Pvt. Ltd. (Sellers) (LJP) agreed to sell to the Economic Trading Co. (Buyers) (ETC) 27,12,900 pieces of polythene bags at Rs.270/- per 100 bags FOB Calcutta of the total value of Rs.73,24,830. In the contract, there was a guarantee clause requiring the sellers to obtain a Letter of Guarantee for 20% of the face value of the goods sold in favour of the consignees within three months of the expiry date of the L/C and the Letter of Guarantee was required to be valid for claims to be filed by the buyers or consignees within three months of the expiry date of the Letter of Credit. This Letter of Guarantee was also required to be **"unconditionally payable on demand".**

LJP requested State Bank of India on 25th August 1967 for a packing credit loan and performance guarantee for Rs.14,65,000 and stipulated that such a guarantee should be given in favour of Alexandria Bank of Cairo (ABC Bank) who were the Bankers of the purchasers. The State Bank of India requested ABC Bank to execute an unconditional guarantee for Rs.14,65,000 in favour of Defendant No.2 representing 20% FOB value of the goods.

LJP requested State Bank of India on 25th August 1967 for a packing credit loan and performance guarantee for Rs.14,65,000 and stipulated that such a guarantee should be given in favour of Alexandria Bank of Cairo (ABC Bank) who were the Bankers of the purchasers. The State Bank of India requested ABC Bank to execute an unconditional guarantee for Rs.14,65,000 in favour of Defendant No.2 representing 20% FOB value of the goods.

On 3rd September 1967, a Letter of Credit for Rs.73,25,000 was opened in favour of the LJP. by ABC Bank at the instance of SBI. On 4th September 1967 there was a letter of undertaking by ABC Bank for Rs.14,64,966 in favour of the buyer viz. Egyptian Chemical Industries. It appears that there was an alleged breach by LJP in supplying the goods. It was the case of the foreign buyer that the quality of the goods meant to be supplied and inspected by the surveyor was not according to the specifications. The foreign buyer therefore purported to cancel the contract. LJP alleged that the jute bags were manufactured according to specification and that therefore the cancellation or the repudiation of the contract by the foreign buyers was wrongful. SBI received a telegram from the ABC Bank on 28th November 1967 calling upon payment in terms of the Letter of Guarantee. LJP on the same day filed a suit against Defendants Nos.1, 2 and 3. SBI was not made a party. In the suit, LJP alleged that the purported cancellation or the repudiation of the contract by the foreign buyer was wrongful and asked for injunction against Defendants Nos.1 and 2 restraining them from claiming or receiving any money under the letter of guarantee and restraining Bank of Alexandria from making any payment on account of Defendants Nos.1 and 2.

The Trial Court granted the injunction sought by LJP and, in appeal, the Division Bench of the Calcutta High Court whilst referring to the decision of *Tarapore & Co:* (AIR 1970 SC 891) held that the principle governing payments under a Letter of Credit will not apply to a contract or a Letter of Guarantee given by a Banker to a Bank.

L/C and Bank Guarantee-Distinction

The Calcutta High Court, relying upon its earlier decision in the case of *MMTC Vls Suraj Balaram Shetty* [(1970) 74 Cal. Weekly Note 991] held that the distinction between an irrevocable Letter of Credit and a Bank Guarantee was not merely one of function. The more important point of this distinction was the autonomy of an Irrevocable Letter of Credit and the dependence of a Bank Guarantee on a contract between the beneficiary of the guarantee and a third party. Payment under an irrevocable Letter of Credit did not depend on performance of obligations on the part of the seller except those which the letter of credit expressly imposed. There the obligation was of the Bank to the beneficiary. No third party came into the picture. In the case of a Bank Guarantee, however, by definition the third party was always on the scene. **Unless there was some act of omission or commission on the part of the third party, payment under a Bank Guarantee did not become due. In other words a Bank Guarantee did not enjoy the autonomy of an irrevocable Letter of Credit.** In the case of a guarantee there was always the question of a contingency on the occurence of which the guarantee became enforceable. A Bank Guarantee like any other contract was no more or no less than the party had made it. Payment under a Bank Guarantee like payment under a Letter of Credit became due only on the compliance with the terms on which the Bank was to pay under the respective documents. The Calcutta High Court hence held that the injunction granted by the trial court was justified. This was the first decision which makes a distinction between a Letter of Credit and a Bank Guarantee.

The Texmaco Case

This case was followed by the case of *Texmaco Limited Vls State Bank of India* (AIR 1979 Cal.44)

Texmaco asked for injunction against State Bank of India, State Trading Corporation of India and Projects & Equipment Corporation of India (PEC) restraining State Bank of India from releasing or making any payment to STC or PEC under or in respect of a performance guarantee issued by State Bank of India. The relevant portion of the guarantee by State Bank of India in favour of the STC was as under :-

Relevant portion:-

"Now this guarantee witnesseth that:

1. In consideration of the aforesaid premises and at the request of Texmaco we, the Bank, hereby **irrevocably and unconditionally guarantee** that Texmaco shall perform in an orderly manner, their contractual obligations under the Back to Back Contract and in the event of Texmaco's failure to do so, the Bank **shall pay to STC on its first demand,** any amount upto Rs.49,50,570/- **without any contestation, demur or protest** and/or **without any reference to Texmaco** and/or without questioning the legal relationship subsisting between STC and Texmaco."

The Court, after considering the decisions reported in *Tarapore S.B. Shetty and Economic Trading Co.*, and the decisions of the English Court in *Harbottle* held that whether the Bank was obliged to pay and pay on what terms must depend upon both, in the case of Bank Guarantee and in the case of Letter of Credit, **on the terms of the document.** *To be continued*

Anil Mehta is an advocate practicing in the Bombay High Court

SPECIAL REPORT

In Bondage — Kolse Bhatti Kamgars

There is growing realisation that the Bonded Labour System is all pervasive in India. Maharashtra has escaped notice in this respect, till recently, when social activists started organizing the Adivasi coal-kiln workers in the Sindhdurg, Raigad and Ratnagiri districts of Maharashtra. ***Deepti Gopinath*** *describes their condition and the efforts to organize them.*

The Konkan region of Maharashtra comprising the districts of Sindhdurg, Ratnagiri and Raigad are famous for their mountainous terrain and green forests. From these districts about 2.5 million tonnes of timber is converted into coal every year. Much of this business is carried on illegally, without any permission required by law. The story of the coal making itself is a black one. This industry though not recognised by the Labour or Industries Department has not only denuded the forests but has sent about 40,000 Adivasi men women and children to labour in kilns and turned them into slaves in bondage.

Uchal and Bondage

In the districts of Thane and Raigad are many landless tribals mainly Katkaris and Thakkars. Once the agricultural period of ploughing and sowing in the months of June to July are over, these labourers find themselves without any work. Usually, on festival days in the months of August to September, the agents, who are the local hench men of the coal kiln owners begin to trickle in on the settlements of the Adivasis. They pay to the labourers advances of money (this is known as *Uchal)* on the condition that they will agree to work on the coal kilns in the following kiln season which begins in the middle of November. *Uchal* may range anywhere from 100 to 400 rupees depending on the needs of the contractor. In taking this money, the Adivasi commits those 7 months of his life and that of his family between mid November and June into the hands of the coal kiln owners to be taken wherever the owners and land contractors decide.

After Diwali, by the second or third week of November, the contractor or owner comes to the Adivasi settlements with trucks. The Adivasis, young and old, women and children (each labourer also takes his family along to work in the kiln though wages are calculated only for one person) are herded into these trucks with their meagre belongings and taken to the site. The coal kilns are situated deep in the forests near the site chosen for tree felling. Each family is deposited on a kiln site separately from the next kiln and family, separated by miles.

Contractors and Owners tie-up

Since this land is non-cultivable the farmers let out these forests for a period of 7 months to the contractors on an oral agreement. The contractors take these forests for felling of trees and the processing of coal in the kilns at rates varying from Rs.50-500 per acre. Of this, about a third is paid as an advance and then may be later a small amount to keep him pacified.

The land on which the kilns are physically located has to be non-agricultural. If it is not it has to be converted for non-agricultural use by getting the permission. This can be done only by the owner of the land. The contractor, taking advantage of this rule, instead of buying the trees for coal making, enters into an oral agreement with the land owner to purchase the coal produced by him. Therefore, it is the land owner apparently who applies for permission to convert the land for temporary non-agricultural use. In fact, the contractor arranges for everything. Similarly, other permissions such as that to cut trees (other than those species banned from cutting) are applied for in the name of the land owner.

Conditions

The Adivasi labourer and his family are dumped on the site of the kiln and left with the sky as their roof. Naturally there is no question of providing clean drinking water. Water is often located as far as 2 km away from the kiln, from where it must be fetched and carried for both to use on the kiln and the needs of the household. On arriving at the site, the Adivasi labourer with his family builds a shelter and settles down to live at the kiln. Every week on the bazaar day, the labourers of the various kilns meet in the market with the contractor where the labourer is supplied with about 8 kilos of Jawar and 2 kilos of rice (depending on the size of the family) and the insignificant amount of Rs.4 to Rs.10 as kharchi (loan) for his survival through the week. These workers are paid no wages at all. Cost of the grain for about 30 weeks amounts to about Rs.800 to Rs.900 and the kharchi to Rs.200 to Rs.300. All this is given as further loans.

Coal Making

Preparing coal from timber is strenuous work. Forests are demarcated by the contractors. The first step is the felling of trees which the men do by themselves. If the tree felling in a particular area is especially a big job, some extra workers are employed (only for that job) and these labourers wages are deducted from the wages of the Adivasi who belongs to that kiln.

SPECIAL REPORT

The making of coal is a highly skilled job. The tribal must exclude the banned varieties and cut the remaining trees, chop it to the appropriate size, carry it to the site. The wood pieces are arranged, then covered with dried grass and lastly with fine damp soil. At the bottom small gaps are left as outlets for air to keep the wood burning at a steady rate. The kiln is lit from the bottom and a 24 hours watch has to be kept for a full week. From the quality of smoke, the adivasi identifies at what stage the coal is. At the final stage, the kiln is extinguished, by throwing water over it. The coal is then sorted out and heaped. In a season, each family sets up three to four kilns at least, producing approximately 500 gunny bags of coal.

Low Wages

The felling and cutting of trees and the preparing and firing of the kiln are done by the men. All other jobs are taken care of by the women and the children. Each labourer on average produces 600 bags, which means that he is entitled to Rs.3600-6000 as wages. But this is never paid to him. No owner keeps any account of the production of the labourer. Besides, initially, uchal is advanced. Later the grain and kharchi are indebted to the labourer. Then a string of other expenses (like the cost of extra labour and supply of grass) are added. The labourer is charged for the cane baskets for carrying coal, the tins for carrying water, the cost of his transport from his village, clothes, chapals, the cost of bhatti puja performed by the owner where mutton and liquor are served, the baksheesh or gift given to him at festival times, the cost of jaggery which is used in tea during the night watch. Even the cost of a tin can used by the labourer to wash himself is deducted from his advance. Often at the end of the season the labourer is shown to be in debt to the owner. Rarely does he ever manage to carry back with him more than Rs.100-200. Questioning the calculations of the contractor does not arise. Many times, after the coal has been transported away, the labourers are deserted without settling the dues, and are left to walk back home together with their wives, children and belongings for a distance of 300-400 kms.

Transporting Coal

Once the coal is ready, it is packed into bags and has to be carried to the depot. Carrying coal to the depot is done by the *Lamans* (a Banjara tribe) from the district of Ahmednagar who walk up to the kilns with their bullocks. Ahmednagar is a drought prone district. Taking advantage of this, the kiln contractors engage the Banjaras in the same way as the Adivasis by giving them loans for fodder, which is not available except in the monsoons. The *banjaras* walk up the hills to the kilns and after three weeks they reach the site.

If there are rains and the bulls cannot climb up the hills, the women folk carry the coal down to the roads on their heads. Only the transporting of the coal is done in the name of the owner. The contractors earn a profit of upto 200% on their investments.

Organising

The *Kolse Bhatti Kamgar Sangathana* is a federation of 12 organisations, all working amongst the tribals. Since 1984 they have been conducting sample surveys of the tribals and their work patterns and circumstances. On studying the collected facts and figures, their state of bondage became glaringly evident. Violations of the Bonded Labour System (Abolition) Act 1976 were apparent. Throughout the season, these labourers forfeit their right to work for any one else of their choice. They also forfeit the right to move freely throughout the territory. They are forced to work on the kiln, by kiln owners who beat them up if they attempt to escape. They are given no medical benefits.

The Sangathana argues that by definition under the Act Uchal is a bonded debt, the workers are bonded labourers working in a Bonded Labour System. Under the Act **bonded debt** means an advance obtained or presumed to have been obtained by a bonded labourer under or in pursuance of the bonded labour scheme. **Bonded labourer** means a labourer who incurs or has or is presumed to have incurred a bonded debt. **Bonded Labour System** means the system of forced or partly forced labour under which a debtor enters or has, or is presumed to have entered, into an agreement with the creditor, in consideration of an advance obtained by him and that he would render by himself, any member of his family, or any person, dependent on him, labour or service to the creditor for a specified period or for an unspecified period, without wages or for nominal wages.

By any account the workers are entitled to be declared as bonded labourers and rehabilitated under the Bonded Labour System (Abolition) Act.

The Sanghatana has in accordance with the Act, asked for declaration that workers be declared as bonded labourers, for all unsatisfied debts of the tribals to be extinguished, for a minimum wages committee to ensure minimum wages and vigilance committees to be set up to provide for the economic and social rehabilitation of the freed bonded labourers. They also demand that the District Magistrate be asked to inquire into the system of bondage and ensure payment of minimum wages.

The High Court on a letter petition has directed the State Government to enquire into the allegations of bondage and submit schemes for rehabilitation. It remains to be seen whether the State Government is really serious about ending the system of bondage in Maharashtra.

COMMENT

Divorce by Mutual Consent

The provision relating to divorce by mutual consent was introduced in Hindu Law by the Marriage Law (Amendment) Act, 1976. In the Special Marriage Act, this provision has existed from inception. Just as the parties can obtain a consent decree from the courts under Order 23 Rule 3 of the Civil Procedure Code (CPC), so they can file a petition for divorce under Section 13B of the Hindu Marriage Act 1955 to obtain divorce by mutual consent. **Farida Pardawala** *traces the radical turn the law is taking in this sphere.*

Conditions

The requirements for the presentation of the petition by mutual consent are the following:

1. The spouses have been living separately for a period of one year.
2. They have not been able to live together.
3. They have mutually agreed that their marriage should be dissolved.

After the presentation of the petition, the parties have to wait for six months, after which they can apply to the court for a decree of divorce dissolving their marriage. The parties are also free to withdraw their petition within that period.

Changes

Recent judgements under Section 13B of Hindu Marriage Act 1955 are good examples of judicial social engineering making divorce easier.

In fact, even as far back as in 1981, in *Indrawal Vls Radheraman* (AIR 1981 ALL.151) Justice Deoki Nanda observed : "The policy of law having undergone a change after the Marriage Laws (Amendment) Act, it is possible now to dissolve a marriage by agreement between the parties although none of the grounds on which marriage be dissolved by court, be found to exist". In this case the husband and wife entered into a compromise decree at the appellate stage, and the marriage was dissolved even though the technical requirements of Section 13B were not fulfilled.

Withdrawal of Consent

A step forward is the judgement of the Bombay High Court delivered by Justice Sharad Manohar in *Sudhakar Vinayak Joshi Vls Sulabha Sudhakar Joshi* [I (1986) DMC 336] where it was held that the continuance of Section 23 (1)(c) in the Hindu Marriage Act, 1955 purporting to put an embargo upon divorce by collusion cannot be a bar to the court's jurisdiction under Section 13B of the Act or under Order 23 Rule 3 of the Civil Procedure Code(CPC). If the two spouses agree to take divorce under Section 13B of the Hindu Marriage Act by consent they can likewise agree to take divorce in accordance with the provisions of Order 23 Rule 3 of the Civil Procedure Code(CPC), because now after the statutory acceptance of the concept of divorce by consent, it has got to be held that agreement to divorce is a lawful agreement. This judgement is the legal declaration of the fact that the continuation of Section 23 (1)(c) in the Hindu Marriage Act is an anachronism after the statutory acceptance of the concept of divorce by consent under Section 13B and is to be regarded as dead letter. However, the agreement to take divorce under Order 23 Rule 3 can be perfectly reconciled with the provisions of Section 23 (2) of the Hindu Marriage Act. All that the court is required to do initially is to try to bring about a reconciliation and if that was not possible, to give sufficient time to both the spouses to retrace their steps.

Another important point stressed in *Joshi* is that even if one of the spouses remains absent, the court has jurisdiction to pass a decree for divorce in favour of the spouse who attends the court.

An interesting question arose in *Smt. Jayshree Ramesh Londhe Vls Ramesh Bhikaji Londhe* (AIR 1984 Bom.302) - Can one of the parties withdraw a joint petition and can consent once accorded be later withdrawn? It was held by Justice Gadgil that there cannot be any abandonment of a petition filed under Section 13B without the consent of both parties. Such permission would nullify the very purpose of a joint application. What is material is whether the requirement of Section 13B were existing when the petition was filed. The fact that at a later stage either party does not want a divorce would be irrelevant.

The same trend is also reflected in the decision given by Justice Pritpal Singh in *Nachhattar Singh Vs Harcharan Kaur* (AIR 1986 Punjab &Haryana 201) where it was held that if both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in sub section (1) of Section 13B of the Act are fulfilled, it would not be open to either party to withdraw the consent.

Section 13 (2) directory

An even more liberal construction to Section 13B (2) of the Hindu Marriage Act 1955 was given by the Andhra Pradesh High Court in *K. Omprakash Vls K. Nalini* (AIR 1986 Andhra Pradesh 167) which stresses the importance of construing Section 13B (2) as a directory and not a mandatory provision. This is a welcome deviation from the normally strict interpretations and gives effect to the fact that the statutory provision, though mandatory in form, can yet be treated as directory in substance. Section 13B (2), no doubt, cautions the court of its duty to fight the last ditch battle to save the marriage, but that in the interests of justice and of the individuals, marriage tie should be put asunder immediately, Section 13B (2) does not impose any fetter on the powers of the court to grant decree of divorce. At any rate, the time table fixed by Section 13B(2) does not apply to an appellate court..

Continued on page 18

COMMENT

Proposed Changes In Tax Laws

The Government has decided to rationalize the tax structure through the comprehensive Taxation Laws (Amendment) Bill. ***R.L. Kabra*** *outlines the proposed changes.*

The long term fiscal policy of the Government envisages radical changes in the tax structure. These changes are intended to simplify the laws and procedures for encouraging voluntary compliance on the part of the assessee and preventing tax evasion. Certain amendments have already been introduced by the Finance Act, 1986. These include reforms in the areas of capital gains tax, gift tax and provisions relating to pre-emptive purchase of properties. Other changes were also introduced in the last session of Parliament through an Act relating to exports and depreciation. The Government now intends to introduce comprehensive Taxation Laws (Amendment) Bill in the budget session in 1987 and have a single Direct Taxes Code by the end of the financial year 1987-88.

Income Tax Act

Presently, the assessee can choose to have different accounting years for different sources of income. He can also have an accounting year of his choice to close the books. This allows assessees to manipulate figures. It is now proposed to have the financial year (1st April to 31st March) as the accounting year for all assessees and do away with the concept of 'Previous Year' and 'Assessment Year'.

The Government intends to take care of problems likely to arise on this account. The proposal is to extend the due date for submission of the return to avoid pressure of work in a particular period of the year as well introduce special provisions to avoid hardship in the transition year. At the same time this will facilitate the Government to verify transactions thereby reducing the scope for collusive manipulations, help investigations and collect reliable data necessary for compiling national economic and commercial statistics.

As this radical change may affect the sentiments of the assessees who close their books coinciding with auspicious days like Diwali, Ramnavmi, or the advent of the religious year as well affect those corporate and other assessees who close their books coinciding with accounts of the holding or subsidiary companies or collaborating companies or those persons carrying seasonal or traditional business where the financial year may not be practicable for taking inventories, ascertaining profits and so on, the Government has decided to exclude these categories of assessees from provisions in this behalf.

Change in assessment procedure

In future the acknowledgement slip of the return will serve the purpose of the present asessment order. Each return is not proposed to be scrutinized. Thorough scrutiny will be done only of those returns selected on a random basis. The Government expects the assessees to respond positively to the trust and confidence reposed in them by Government. However, stern action is proposed to be taken for tax-evaders.

The period of re-opening of assessment is proposed to be reduced from the present 16 years to 10 years and in some cases even to 6 years.

Taxable Entities

On the one hand, the payments made to partners by way of salary, interest and so on will be treated as allowable expenses in the computation of firm's income and will not be again included in the individual assessment of the partners and, on the other hand, all specified firms will be taxed as separate entities at the maximum marginal rate (i.e. 50%) and non-specified firms will be taxed like an individual (i.e. slab rate).

Association Of Persons (AOPs) with determined share of members are presently taxed under the slab system at individual rates. Today, one can create as many taxable entities in the form of AOPs as one likes. Each AOP thus gets the basic exemption of Rs.18,000. Not much formality, unlike in the case of a partnership firm or a company, is involved. The amendment proposes to tax all AOPs having income under the head 'business or profession' or where the share of the members are indeterminate, at the flat rate of 50%.

In the remaining cases, AOPs will continue to be taxed under the slab system, at the individual rates.

It is now proposed that specified HUFs will be taxed at the maximum marginal rate i.e. 50%. However, non-specified HUFs will continue to be taxed at the rates applicable to an individual.

Mandatory Interest/Additional tax

It is proposed to divest Income Tax Officers (ITOs) of their power to condone the delay and mandatory interest is proposed to be charged. This will neither be appealable nor subject to the existing discretionary power of waiver under Rules 40A and 117. The rate of interest for under-payment of advance tax and late filing of returns is proposed to be raised from 15% per annum to 2% per month or part thereof.

Simultaneously, the provisions for payment of interest by the Government are also being rationalised and interest will be payable to assessee @ 1.5% per month or part thereof from the first day of April or the date of the payment to the date of the refund without ignoring any period in between as under the existing provisions. It is also proposed to substitute the present penal provisions u/s. 271(1)(c) prescribing penalty for concealment of income by a simple system of charge of additional tax equal to 30% of the amount by which the returned income falls short of the assessed income.

Provisions similar to the FERA provisions are being enacted to shift the onus of proof to the assessee so that effective prosecution is ensured.

Concept of Real Income

The amendments proposed do away with the provisions which result in the computation of artificial or notional income.

The notional income arising from self-occupied property (limited to one

Continued on page 18

COMMENT

CONSENT DIVORCE

In fact, the six months time fixed by Section 13B (2) is not a rule relating to the jurisdiction of the court to entertain a petition filed for divorce by consent. The question of jurisdiction is dealt with by Section 13B(1) of the Act and must be strictly complied with. Section 13B(2) is a part of procedure. A procedural provision must be interpreted as a handmaid of justice in order to advance and further the interest of justice and not as a technical rule impeding it.

It may, however, be noted that Section 13B (2) as applicable to the exercise of matrimonial jurisdiction by the appellate courts becomes totally unworkable.

Appellate Courts

On a literal reading of Section 13B (2) the courts cannot pass a consent decree of divorce beyond eighteen months period from the date of its filing. In the event that such an application is filed by the parties and the courts for some reason of human error or failure did not or could not dispose it off within the period of eighteen months, the literal meaning of Section 13B (2) prevents the courts from granting the relief thereafter. Similarly, if a petition for divorce by mutual consent was dismissed by the lower court for some reason, the appellate court would be powerless to grant that relief on the basis of the application filed in the lower court because eighteen months must have elapsed by the time the matter reached the appellate forum although the parties are still fighting relentlessly in the appellate court.

To summarise, the following important points emerge from the above decisions:-

1. By virtue of Section 13B, agreement to take divorce is a lawful agreement, and two spouses can agree to take divorce in accordance with the provisions of Order 23 Rule 3 of the C.P.C.
2. Section 23 (1)(c) is dead letter in view of Section 13B.
3. Despite the absence of one spouse from the court, a decree for divorce can be passed in favour of the spouse who remains present in the court after the six months period.
4. A petition for divorce by mutual consent cannot be abandoned, revoked or withdrawn by one of the parties without the consent of the other.
5. Section 13B (2) is directory and not mandatory.
6. Appellate Courts are not bound by Section 13B (2).

It seems clear, therefore, that divorce laws are taking a liberal turn. No system of law can produce marital bliss, but human laws may at least alleviate suffering. And when marital life is wrecked, the home utterly broken up by misunderstanding, jealousy, cruelty, or infidelity, what greater boon can two persons have than the power to secure their liberty? Rigid and unjust laws call for the intervention of the law reformer. Hopefully, such liberal decisions relating to the concept of mutual consent will pave the way for a better future of the parties by relieving them without much heartache, of a companionship which has become odious. However, while it is imperative that these demands be satisfied, it is equally important for courts to consider the economic aspects relating to alimony and maintenance, providing security to the women, before granting such a decree.

Farida Pardawala is a research scholar in the Institutute of Islamic Studies, Bombay.

TAX PROPOSALS

such property) and the property which is not occupied will no longer be liable to tax. In respect of the self-occupied property (in excess of one such property) or the property occupied without payment of rent, the municipal annual valuation will constitute the annual income.

The ceiling on allowances of expenses on advertisements [(Sec. 37(3) and Rule 6B] and travelling (Rule 6D) are proposed to be removed. The entertainment expenses u/s. 37(2A) will be allowed @ 60% of the actual expenses. At present, the payment of bonus to employees is allowable to the maximum payable under the Bonus Act, 1965. It is now proposed to remove the ceiling on the amount of allowance of bonus. However, this will be restricted to the amount actually paid in a particular year otherwise subject to provisions of Sec. 43B.

The ceiling on remuneration of Directors u/s. 40(c) and for other employees u/s. 40A(5) are proposed to be withdrawn. The provisions for depreciation are also proposed to be liberalised.

Uniform applicability of law

To ensure early interpretation of law by an authority whose decisions have a binding force throughout the country, it is proposed to set up a high powered appellate body to be known as the National Court of Direct Taxes (NCDT) having jurisdiction all over India and benches at least at all the places where there are High Court benches. The present advisory and writ jurisdiction of the High Courts will be taken away. The interpretation given by NCDT will be uniformly applicable. No further appeal is proposed to be provided against the orders of NCDT. However, the jurisdiction of Supreme Court in the matter of writs under Article 32 and special leave petitions under Article 136 will, of course, remain.

To ensure quick disposal of cases in courts and at the various appellate stages, it is proposed to take the following steps:-

It is proposed to abolish the institution of AAC. Thereby Income Tax Appellate Tribunal (ITAT) and Commissioner of Income Tax (Appeals) CIT(A) will both become the first authority for appeals.

The existing reference jurisdiction of the High Court will be replaced by the appellate jurisdiction of the NCDT.

Barring of second appeal against orders involving a point relating to incentive provisions, no appeal to NCDT will lie against any order.

Infructuous appeals will be discouraged by raising filing fees.

It is proposed to take away the power of the appellate authorities to stay the recovery proceedings during the pendency of an appeal. The existing powers for grant of stay u/s. 220 will, however, continue.

R.L. Kabra is a practicing Chartered Accountant.

WARRANTS ATTENTION

Heads or tails, Naxalite?

The following letter was received by us from the Superintendent of Police, Chandrapur District, Maharashtra, Mr. Raj Khilnani. We reproduce it extensively, to enable the readers to realise the flimsy grounds on which the Police level serious charges of sedition, punishable with imprisonment for life. Following it, we have a rejoinder to the letter.

The special report captioned 'Heads - you are a terrorist, Tails - you are a Naxalite' publised in The Lawyers July '86 makes interesting reading -is factually incorrect in material respects.

As an officer of the Indian Police Service and Superintendent of Police Chandrapur district, I deem it fit to put across the other side of the story so that the readers can judge for themselves about the issues raised.

As regards the account of the arrest of Susan Abraham on lst May '86, there is not only omission of crucial relevant facts but also blatant falsehoods. To say that Susan Abraham was picked up while proceeding for a meeting is a white lie. The facts are that Susan Abraham and Advocate Krishna Reddi had organised and were conducting a meeting of the colliery workers on the lst May '86. The meeting was apparently for celebration of May day. They distributed objectionable leaflets, recited and played tape recordings of revolutionary songs, gave objectionable speeches etc. All of these being seditious and coming within the mischief of Sec. 124A IPC. All this propaganda was for arousing feelings of enmity, hatred, ill will and disaffection amongst the colliery workers against the Government. There were attempts at drawing inspirations from 'Naxalite martyrs' i.e. Pedi Shankar, Balanna, etc. I reproduce below selected verses as illustrations of seditious material propagated during the meeting:-

a) Let's go friends to the place where the dark night is ending.... where the Govt. which commits atrocities is being changed.... behold, lakhs of hands are rising causing few selected enemies to panic.... Victory to the red flag which will turn dreams into reality, victory to the red flag which is coloured with blood, and which is changing the Govt.....

b) Why should the labourers and poor peasant workers fill the coffers of the rich exploiters... we have now found a solution, let's pick up the weapons, we'll continue to walk on the path of revolution, for the victory is ours and defeat of the enemy ....

c) How long will this exploitation and authoritarian Govt. continue. Oh Adivasi brethren pick up weapons, the naxalites have shown us the way. Shrikakulam has spread the desire, it is your duty to snatch the victory, for you are the king of forests ....

d) During the tendu leaves collection season we have started the agitation ..... we have intensified our struggle ... with the bullets of the devils .... one brave soldier of the red flag Shri Pedi Shankar has become a martyr, to him our red salutes ..... this country is ours, this land is ours, we are the rightful claimants of its wealth, we are its protectors we have not got good opportunity, let's strike strongly when the iron is hot, to bring about the Govt. of workers, we shall have to take weapons in our hands, to achieve equality we shall have to take weapons in our hands .....

It is relevant to mention here that some of those who heard the propaganda have stated that feelings of enmity,hatred, ill will and dis-affection against the Government were momentarily aroused in them during the meeting as a result of the propaganda. There was crystal clear incitement at 'taking up weapons' and resorting to bloody revolution for achieving justice, equality, etc. It is not possible to discuss here all the evidence at length. This should suffice to show that the police had in fact only performed its duties. It would have been derelication of duties and betrayal of conscience if no cognition was taken by the police. It would have been like refusing registration of offence of murder when reported. It is pertinent to note here that the police was not present when the meeting started but was summoned by the Sarpanch of the Sasti village where the meeting was being held. There is nothing wrong or illegal in first questioning Susan Abraham and others before effecting their arrests which followed within reasonable time. It is wrong to say that they were not informed about the charges against them.

As regards the writer's say that she was later fixed in series of false cases of theft, dacoity, attempt to murder, etc. I can prove that a malicious false misrepresentation is made by stating or suggesting so. She has never been charged for these offences. The only other charge made against her was that she had abetted hard core naxalites, Chandranna and Jaya, in commission of offence of sedition. There is clear evidence to suggest that Advocate Reddi and Susan Abraham were meeting Naxalites, Chandranna and Jaya, in their hideout, in the dead of night under suspicious circumstances. Identical revolutionary songs as quoted above were recovered from the possession of the Naxalites Chandranna and Jaya on the one hand and Susan Abraham and Reddi on the other. In a letter written to Susan there was a clear suggestion to create law and order problems in the district during the tendu leaves collection season.

The writer has alleged that the prime intention of the police has been to ensure the continued detention of Susan Abraham. She has however not given any reasoning to show as to what could be the motive for the police to victimise her and a couple of her associates. The police has nothing to gain whatsoever in deliberately making false cases as alleged and detaining her in her private status as 'Susan Abraham'. Since police officers like anybody else should have some motivation, I ask for being shown even one sufficient motivation for resorting to illegalities whatsoever committed, as suggested by saying that the arrest warrants were not given, homes were searched, letters were read, panchnamas of searches were not supplied. They were produced at the residence of

WARRANTS ATTENTION

the Magistrate and that they were detained at Bhadravati P. Stn. which is 19 Kms. from Chandrapur. I ask for being shown the legal provisions under which irregularities such as the ones wrongly suggested in the report (and referred above) have been committed.

It is true that the police lock up is not a comfortable place to be in with no separate toilet etc. It is, however, incorrect to say that there was filth or urine or shit as alleged. Since the lock-ups are occupied by criminals, I cannot guarantee that some of the criminals might have not urinated in the lockup. However, the suggestion that the lock ups were deliberately kept filthy is far from the truth. To say that Susan was threatened that "she would be kept in custody for one year" and other such threats, like being reminded as to how women are treated or dealt with or that she would be sent to A.P. for being dealt with etc., are sheer lies. Nothing of that sort was told to her.

As regards the other comments in this special report regarding life in jail, lives of other jail inmates, action of the judiciary, etc., I do not wish to clarify because they do not directly pertain to Chandrapur district police. It is not correct to have included them in this report which is captioned "Heads, you are a terrorist and Tails, you are a Naxalite". However, I cannot resist pointing out the utter falsehood in Susan Abraham's report that the food supplied in the jail was insufficient, putrid and included lizards, rat-shit and worms. Let me make it clear that it is not my responsibility to account the sort of food provided to the prisoners as there is a separate independent jail department. However, during my visit to the jail I have personally visited the kitchen and dining hall and seen with my own eyes that the food given is not only reasonably clean and adequate, but also luxurious by the standard of the numerous citizens of this country who are unfortunately below the poverty line. There are many other facts on the subject which I am not including here as the scope of this note is confined to the specific points found in the special report.

(Raj Khilnani)
Supdt. of Police, Chandrapur.

Editor's rejoinder

Susan Abraham

Raj Khilnani, Superintendent of Police, Chandrapur, has not been able to deny any of the facts in our report. He says Susan Abraham and Krishna Reddy had organized and were conducting a meeting of colliery workers. Whether this is true or not, which law prevents the holding of a meeting, one might ask? He does not care words to define like "objectionable leaflets" and "revolutionary" songs. He claims they were seditious.

Sedition

What is sedition ? Section 124A of the Indian Penal Code (IPC) defines sedition as follows:-

124 A Sedition - Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which, fine may be added, or with imprisonment, which may extend to three years, to which fine may be added, or with fine.

Explanation 1 : The expression "disaffection" includes disloyalty and feelings of enmity.

Explanation 2 : Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3 : Comments expressing disapprobation of the administration or other action of the Government, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

One would expect a Superintendent of Police, whose job it is to register offences and investigate into them, to know what constitutes the offence of sedition. Fortunately, he has reproduced 'selected verses' of what he considers ' seditious material '. He states that this should 'suffice to show that the police had in fact only performed its duty'. Far from it.

It seems Superintendent Raj Khilnani is unaware of the fact that the constitutional validity of Section 124-A was challenged as far back as in 1962, in the case of *Kedar Nath Vls State of Bihar* (AIR 1962 SC 955).

Bal Gangadhar Tilak's case

The section itself was introduced in the Indian Penal Code in 1870 by a colonial regime. It was originally titled "Exciting Disaffection". The obvious intention of this colonial piece of legislation was to ensure unquestioning obedience to an imperialist Government. Leaders of the Independence Movement were charged and tried under this section. The most blatant example of colonial injustice is to be found in the case of *Queen empress V. Bal Gangadhar Tilak* (ILR 22 Bom 112). Judge Strachey, in his address to the jury, said:

"The offence as described in the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are 'feelings of disaffection?' I agree with Sir Romer

Petheram in the Bangobasi case that disaffection means simply the absence of affection. It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feelings to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite, he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of disaffection is absolutely immaterial except perhaps in dealing with the question of punishment. If a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under this section. In the next place, it is absolutely immaterial whether feelings of disaffection have been excited or not by the publication in question, whether any disturbance or outbreak was caused by these articles, is absolutely immaterial."

The jury found Bal Gangadhar Tilak guilty of sedition.

Kedar Nath's case

In a colonial set up, of course, there was no place for fundamental rights, much less the fundamental right to freedom of speech and expression. Bal Gangadhar Tilak, therefore, did not have the advantage of challenging section 124 A on the ground that it violated the right to free speech. Such a challenge was, however, made in *Kedar Nath v/s State of Bihar*. The Supreme Court in that case observed :

"If on the other hand we were to hold that even without any tendency to disorder or intention to create disturbance of law and order by the use of words written or spoken, which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with Clause (2) ... the section aims at rendering penal only such activities as would be intended or have a tendency to create disorder or disturbance of public peace by resort to violence".

Raj Khilnani seems to be unaware of this judgement. There is not even an allegation much less any evidence to show that the activities of Susan Abraham and Krishna Reddy created or were likely to create disorder or disturbance of public peace by resort to violence. It must have been easy enough for Raj Khilnani to put together a few police enthusiasts who say that 'feelings of enmity, hatred, ill-will and disaffection against the Government were momentarily aroused....'

Democracy with feet of clay ?

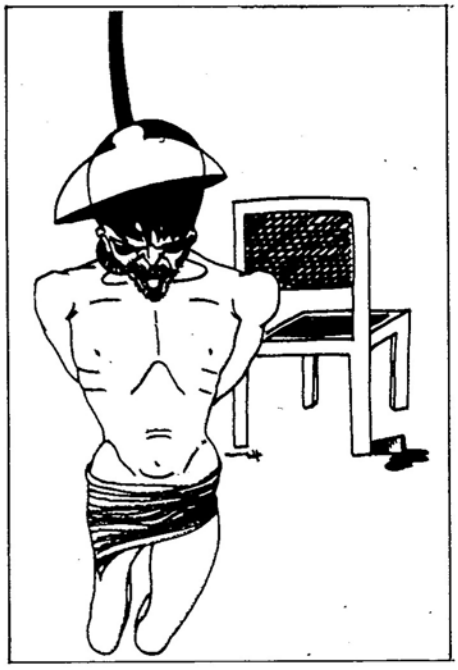
Raj Khilnani must think that our democracy has feet of clay, if it cannot survive criticism. Or does it require the armed might of the State to combat the power of revolutionary songs? If exposure of Government lawlessness is all that is required to sustain charges of sedition, then every newspaper and magazine in the country today which exposes Government lawlessness would have to fold up and face charges of sedition.

Police officers would do well to study the law before making arrests. That may be one way of preventing over crowding in police lock ups.

The repeated use of the word 'Naxalite' by Raj Khilnani does him no credit. He forgets that there is no such thing as a 'Naxalite' nor is the expression judicially defined, nor is it a crime to be a 'Naxalite', whatever that means. If by the use of the expression he means a person who holds a belief that the use of violence is necessary to overthrow an exploiting Government, it is no crime to hold such a belief. If by Naxalite he means a person who believes that society is divided into the exploiting and exploited classes, it is no crime to hold such a belief. Raj Khilnani, by using such expressions, has already tried and found Susan Abraham and Krishna Reddy guilty for the beliefs they hold. He is welcome to his own beliefs, but he cannot misuse his official position to impose them by force on those who disagree. He seems to operate under a concept of 'loyalty' and 'disloyalty' held by the British rulers in trying to perpetuate colonial rule over the Indian masses. His letter is a sad commentry indeed on the functioning of the Indian State.

Facts admitted

Raj Khilnani admits that Susan Abraham and Krishna Reddy were held in detention without being arrested for "questioning" for a "reasonable time".



How much is reasonable he does not care to explain. He also admits that their homes were searched without search warrants being shown to them, their letters read and document recovered without panchnamas being given to them. When the only allegation against them is that seditious writings were recovered from them, what is to prevent the police from planting material which was never recovered? Surely the only safeguard against such an eventuality would be to give a copy of the list of documents seized to the accused i.e. a panchnama. Is that asking for too much?

And why produce the accused at the residence of the Magistrate? Doesn't the Magistrate have a Court? And is justice not supposed to be done in a public and an open manner? The article did not suggest that lock ups are deliberately kept filthy, but that they are filthy. Even criminals are entitled to toilets. As regards life in jails, the Superintendent of Police should visit jails in cognito and not with a lot of fanfare and with plenty of prior notice. Or better still, if he is really concerned about the quality of the food in jails, he should spend a few days in prison and eat the 'luxurious' meals with or without worms and lizards. May be then his defence of the prison administration will carry more conviction.

HAAZIR HAI

Freny Ponda

Leading criminal lawyer, tells **The Lawyers** *of the trials and tribulations of a woman joining the criminal law stream.*

Q. *How did you decide to practice criminal law?*

A. Initially I joined civil chambers under H.D. Banerji. There was great prejudice against women advocates. Two senior counsel, one of whom became a Supreme Court judge, bluntly told me to pack off and retire to the kitchen. For two years I practised on the Original Side but made no headway. However, jury trials fascinated me. In those days Government lawyers were not made available in non-murder cases. So, M.B.Vohra, then Public Prosecutor, asked me to defend an accused in a kidnapping case. I got him released. That was the beginning.

Q. *How do your clients react to you as a woman?*

A. Clients in civil matters would not entrust their property in my hands but the poor gave me their lives. I was flooded with letters from jail. Some even compared me to Sita who could change Hanuman into a human being. They saw me as a maternal figure, saying "Uppar Allah Niche Aap".

Q. *How is a criminal law practice different from any other legal practice?*

A. One deals not with cotton seed and yarn but with human lives which somewhere in life's path have gone astray. There is no use in judging them. Instead, my experience as a teacher of criminal jurisprudence teaches me to offer the needed compassion and understanding.

Q. *How competent are your adversaries in the Public Prosecutor's office? Do Public Prosecutors identify totally with the police and become party to their illegal deeds?*

A. In law a man is innocent until proved guilty. The police, however, straight away presume guilt and arrange every bit of evidence to reconcile with the initial presumption of guilt. Most Public Prosecutors are police mouth-pieces. Only a fearless few go against police instructions. Tutoring of witnesses is prohibited. It is illegal to refresh the memory of a witness before trial by showing him his recorded police statement. Yet the police coach the witness inside and outside the court room to reconcile his evidence with the Public Prosecutor's arguments. A competent Public Prosecutor must make an effective presentation co-related with other evidence to close all possible defences. This takes the wind out of the defence's sails. In Bombay, only two to three Public Prosecutors are really good.

Q. *Our criminal law neither protects the victim nor punishes the guilty. With inordinate delays, sloppy investigation plus a conviction rate of 30% or less, our criminal justice system has collapsed. Do you agree?*

A. When an important accused is involved the police are bought over to loosen the strings of investigation. Such cases rarely come up for trial. When the accused is a noted goonda the witnesses are terrorized. In the Byculla jail, a known goonda, Hamid, was so enraged by a jailor who remained present during a re-union with his girl-friend, that he attacked the jailor with a chopper. If this is the fate of jailors imagine that of witnesses. It is only the Bilhu Pandus of the world who get life imprisonment for a first offence. This is the inequity of our system. The tigers escape and the minnows get caught.

Q. *Do offences involving women require a special approach?*

A. Yes. Social workers should carry out parallel investigations. In Sudha Goel's case, a dowry death matter, I appeared for the relatives of the deceased and the womens' organisations. Formerly, where there were two dying declarations, one favouring and the other against the accused, the declaration favouring the accused was relied upon. However, Sudha Goel's case set a new precedent whereby when a dying declaration exonerating the accused is suspicious, or where the police hand is seen and felt, no reliance can be placed on such a declaration.

Q. *Erle Stanley Gardner used Perry Mason to highlight the importance of forensic evidentiary analysis and the need for trial lawyers to study this subject carefully. What is the position in India?*

A. Here the chemical analyser rarely attends court in person. His report which is an admissible piece of evidence is presented. Very few defence lawyers challenge the expert witnesses. Allegations of the police tampering with the evidence are made out but defence lawyers are too ignorant of the technicalities to say how the tampering was done.

Q. *Criminal lawyers rely heavily on police contacts - often acting as brokers between the police and the detenue. Comment.*

A. I do not do this. However, in many customs and accident cases, this is very common. Lawyers pay policemen to inform them of road accidents, then rush to the hospital to take the victim's Vakalatnama on a contingency fee basis.

Q. *Do you experience any conflict in accepting or rejecting a brief - particularly when you know that the party is guilty?*

A. Ram (Jethmalani) says that it is unethical to reject a brief. I think it is unethical to accept a brief when you feel that the accused should be convicted. I have therefore, given up briefs in rape cases and dowry deaths.

Q. *The public sees criminal lawyers as charging exhorbitant fees from rich clients who get off scot free while the undefended poor languish in prison.*

A. Rich accused need not go to rich lawyers - they destroy the case right at the beginning.

HAAZIR HAI

Madhukar Pathare

Madhukar Pathare, Bombay's Chief Public Prosecutor from 1977 to 1983 talks to The Lawyers of the functioning of the Public Prosecutor's office.

Q. *What are the functions of the Public Prosecutor?*

A. As the Head of the Department the Public Prosecutor (PP) has to distribute the work amongst his juniors. The PP has to give his opinion to various government departments for which there is no separate fee e.g. The Registrar of Companies seeks advice whether in the case of a particular firm a criminal case exists or not. The PP is also expected to handle defamation cases against Ministers.

Q. *How are PPs paid?*

A. In my time Rs.150 was the attendance fee in the sessions courts plus the PP received Rs.40 for every brief. All this is changed. Now the PP can only receive a maximum of Rs.200 per day. Even if he handles 10 appeals a day, he still gets only Rs.200 . Thanks to the old system I got about Rs.400 per day.

Q. *Has the lower pay scale affected recruitment to the PP's office?*

A. Quantitatively there is no change, but qualitatively work has suffered. There is no incentive to clear disposals, so arrears have mounted.

Q. *In Bombay what is the break-up of cases handled by the PPs office?*

A. It is very difficult to say off-hand. Complete records exist in the PP's office. Robbery is the most common offence, which is handled by the Police Court but when it is combined with the use of a weapon, then it comes to the Sessions Court.

A very rough break up of cases handled by the PPs would be:

Kidnapping and rape	15% - 20%
Robbery	30%
Murder	30%
Rioting	15% - 20%

There is, of course, a lot of overlapping, cheating cases are rare and are usually handled in the police courts.

Q. *How are rape cases handled?*

A. 70% - 80% of rape cases result from love affairs which the girl's family disapproves of. So the father of the girl, who is usually under age, demands that a rape case be instituted to restore the family honour. Sometimes the girl after going around with her paramour marries somebody else. In these cases we try to persuade the girl's father to withdraw his complaint keeping his daughter's reputation in mind. Some rape cases result from contractors taking advantage of the women labourers they employ. Rarely are respectable women molested but when they are, we really go all out to catch and punish the culprit.

Q. *Since the rate of convictions is not considered important, by what yardstick does the PP evaluate the performance of his office?*

A. There is no yardstick to check the PP's efficiency. Even if there was evaluation, government does nothing. The work suffers because of the poor quality of PPs. Police Officers used to beg me not to assign important cases to incompetent prosecutors. The police say that it would have been better to take money and finish the case off at the police court itself, rather than pursue the matter to punish the guilty, only to see them let off by a useless prosecutor.

Q. *Is the appointment of Special PPs a healthy phenomena?*

A. Formerly there were only three Additional PPs, now there are seven. So a special PP is rarely required. Besides, of the 34 judges in the City and Sessions Court, only 9-10 are assigned for criminal work. So, unless more judges are appointed there is no work for a special PP.

Q. *Defence lawyers allege that most PPs are mere police mouthpieces who sanction police mal practices such as third degree methods, doctoring evidence and tutoring witnesses.*

A. This is not correct. Third degree methods are employed only at the stage of investigations. The PP is not involved. Once the charge sheet is filed, the accused is independent i.e. he is either on bail or in custody. The tutoring of witnesses is unfortunately true. Witnesses forget what they had told the police one to two years ago. They have the right to see their statement. PPs often refuse police instructions. In the Sessions Court the PP is in charge. The police officer cannot dictate but like any client he can advise.

Q. *In what way do sloppy investigations ruin a case?*

A. Bad investigations are of two kinds. Firstly, where the police officer deliberately does not go in a certain direction to help the accused. Secondly, where the sub-inspector as the investigating officer is not helped by more experienced superiors e.g. where a witness has given a good description of the offender but the indentification parade is delayed or not held at all. Here the evidentiary value suffers and the case is spoilt.

Q. *Our criminal law neither protects the victim nor punishes the guilty. With inordinate delays, sloppy investigations plus a low conviction rate, our criminal justice system has collapsed. Do you agree?*

A. Definitely so. The collapse is because of the delays in trial. If trials are held in fifteen days 90% of the cases will succeed. Otherwise even the victim loses interest. Often the widow of the victim is approached by the accused and bought off. So what do you do?

Postal R.No.:
MH-BY-SOUTH-382

ADAALAT ANTICS

Lawyers for Sale

Chief Justice Warren E. Burger, in his final address to the American Bar Association, referring to advertising by lawyers, is reported to have said that he was upset by one form of unprofessional and improper advertising, that the first visit to the lawyer was free. "Advertising that the first visit will be free is a bit like the fox telling chickens he will not bite them until they cross the threshold of the hen house."

Advertising by lawyers in India, as we all know, is against the rules of the Bar Council. But isn't that a bit hypocritical? The rule belongs to a bygone age when the difference between profession and business still existed. Would it not be more honest to permit lawyers to advertise now that the business of law has acquired the dimensions of being a lucrative industry? All that the rule achieves is to drive advertising underground. Some do it in obvious ways like putting on a black coat and hanging around the stairways of the court room beckoning clients. Others have more classy ways, like throwing parties at five star hotels and inviting the higher echelons of the judiciary to join them for a drink or two. Jet set lawyers currently doing the circuit of international intellectual melas are going from Seoul to California to New York. No doubt they will come back home with business packed wisdom.

Midnight Bail

Suddenly bail or jail has become a national dilemma. The occasion for raising this soul searching question was provided by the arrest of Industrialist Lalit Thapar. Editorials in national dailies screamed that industrialists are not criminals. They obviously screamed loud enough to be heard by Justice R.S. Pathak of the Supreme Court who directed Lalit Thapar's bail application be heard at 11 p.m. Justice E.S. Venkatramiah granted midnight bail. Lawyers of lesser mortals were so enraged that they demanded the 'littleman' waiting in jail be shown the same touching concern exhibited by Pathak and Venkatramiah for Lalit Thapar. Their applications are still pending while Thapar was freed. Seen pleading passionately in the Court of O. Chinnappa Reddy for bail for Lalit Thapar were K.K.Venugopal and Y.S.Chitle, among others. Incidentally, could they be the ones filing returns of Rs.1.2 crores and above?

Rubberised Judiciary

Krishna Iyer has a delightful way with words. Commenting on the political interference with the appointment of judges, he said the Government wanted a rubberised judiciary. What a welcome change from the hack expression 'independence of the judiciary'. He was commenting on the addition of the word 'Acting' to the appointment of Chief Justice Chawla of the Delhi High Court. Perhaps the Government literally expects judges to 'act' to their tune. But Krishna Iyer hit the nail on the head when he coined the expression 'rubberised judiciary'.

What a funny image, little rubber judges sitting on the bench, swaying whichever way the political wind blows. No wonder H. M. Seerwai gets irritated with Krishna Iyer, for he simply cannot find these words in the Oxford English Dictionery (OED).The High Priests of the Bar would do well to throw the OED out of the window into the bin and start keeping pace with changing times. After all it is never too late to learn.

Male Chauvinist Dictionary

There is yet another good reason for throwing Oxford English Dictionary (OED) out into the bin. Whoever wrote it, must have been a male chauvinist pig. Since the cover story of the month is on prostitution, I looked up the word in OED and found 'woman who offers her body to indiscriminate sexual intercourse' Prostitution is not confined to women, and the definition should have read 'any person.....' Incidentally, isn't it time feminists complained against the male chauvinist definitions in the General Clauses Acts, "He includes she"...?

The Bond Seekers

A litigant complains that lawyers are getting smart in their demands for fees. It is now the done thing for lawyers to ask for Bearer Bonds(BBs) instead of cash. Remember the old days when Counsel used to mark their briefs in gms? (Gms = Guineas) Now it is in Bearer Bonds. So don't be surprised the next time you find a brief marked 100 B.B. You know how to decode the message.

Lawyers have always measured their success in terms of the tax return they file. The latest success story comes from New Delhi. According to some reports, a lawyer practicing at the Supreme Court has filed a tax return of Rs.1.2 crores. A neat income without any investment. Lawyers now compete with film sharks in playing the hard to get game. You have to book them for performance days in advance and even then you cannot be sure that they will put in their appearance in the scheduled dates. They will ditch, if offered more in other courts.

Devil's Advocate

Edited by Indira Jaising. Printed and published by Rabindra Hazari for the Lawyers Collective. Layout by Satish Kulkarni. Printed by West Coast Litho