

# Communique

NEWS LETTER FOR PRIVATE CIRCULATION AMONG THE LEGAL FRATERNITY

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Part 8

## S C declines to answer the Reference

By its Judgment and Order dated 24-10-94 a five Judge Constitution Bench of the Supreme Court headed by Chief Justice M. N. Venkatachalaiah declined to answer the Presidential Reference made to it under Article 143 (1) of the Constitution concerning the Ayodhya dispute. The Judgment was unanimous. While Chief Justice M. N. Venkatachalaiah, Justice J. S. Verma and Justice J. N. Ray held that the reference is superfluous and unnecessary, Justice A. M. Ahmadi and Justice S. P. Barucha ruled that the Act & the reference favours one religious community and disfavour another; the purpose of the reference is therefore opposed to secularism and is unconstitutional. The Judges also held that Ayodhya is a storm that will pass; the dignity and honour of Supreme Court cannot be compromised because of it.

## Ayodhya Act upheld

By a majority of 3:2 the same Bench upheld the validity of the Ayodhya Acquisition Act, 1993 and also acquisition of the land surrounding the disputed structure to an extent of 67,703 acres and ruled that the Central Government will manage and administer the acquired land as a statutory receiver, exercising its power of vesting that property in another body or trust till the final adjudication, and thereafter it will handover the disputed area to the party found entitled to the same on the final adjudication. However the Court struck down Section 4 (3) providing for abatement of all pending litigation and held that this provision is unconstitutional

and invalid. As a result all the suits and proceedings pending prior to 7-1-93 (when the Central Government promulgated an ordinance) stand revived.

## Kalyan Singh Convicted

By a Judgment of 24-10-94 the Supreme Court convicted the former Chief Minister of Uttar Pradesh Mr. Kalyan Singh for committing contempt of Court in flagrant breach of an undertaking to the court that no construction would be allowed at the disputed area in Ayodhya. The Division Bench consisting of Chief Justice M. N. Venkatachalaiah & Justice G. N. Ray sentenced Mr. Kalyan Singh to a 'symbolic' one day imprisonment and a fine of Rupees two thousand.

## Judgment Reserved

A Division Bench of the Supreme Court comprising Chief Justice A. M. Ahmadi, Justice S. Mohan and Justice K. S. Paripoornan reserved the judgment of the case challenging the validity of prescribing 45 years age limit for enrolment of persons as Advocates by the Bar Council of India. The final arguments by the senior counsel B. L. Wadhwa was heard on 25-10-94. The main contention of the petitioner is that the restriction was unreasonable and beyond the powers of the Bar Council to impose such restriction. It was also contended that persons who have crossed 45 years of age would possess rich experience and they will be in a position to contribute very much for the cause of justice.

## 73 PC Reservation Stayed

On 11-11-94 the Division Bench of the Supreme Court comprising Justice Kuldip Singh and Justice B. L. Hansaria stayed the operation of the Karnataka Schedule Castes, Schedule Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and Appointments or Posts in the Services under the State) Act, 1994 insofar as it increases the total reservation to 73 percent in Educational institutions and government jobs. Making it clear that the court would not be silent spectator to the circumventing of the Apex Court's order enunciated in the Mandal Commission case the Division Bench held that it has become imperative to stay the operation of the impugned Act until further orders.

K.P. Surendranath and others have challenged the validity of the Act before the Supreme Court. The Counsel for the State Government pointed out that a similar Act passed by the Tamil Nadu Legislature and ratified by Parliament which is in challenge before the court has been referred to the constitution Bench and no stay order has been granted in that case. An agitated retort came from Justice Kuldip Singh "How many times will we refer the matter to the Constitution Bench? Already 8 out of the 9 Judges of the Constitution Bench have held the reservation cannot be more than 50 percent. Now you want us to repeat the same process again and again. You are throwing everything to winds. Besides, it means you are passing a law which is against the Constitution as interpreted by us. Any way,

we want to hear the State Government's Views first and then only we will decide whether to refer it to a larger bench."

Appearing on behalf of the petitioners Senior Counsel Mr. M. Rama Jois contended that even if the impugned Act was brought within the purview of the Ninth Schedule to the Constitution it cannot be saved as it was against the basic structure of the Constitution and the law enunciated by the Supreme Court. The court has directed issue of notice to the State Government returnable by 21st November 1994.

## SC Gets New Judge

The President has appointed Ms. Sujatha V. Manohar, Chief Justice of Kerala High Court, as a Judge of the Supreme Court of India.

## Paper Presented

Mr. M. G. Srinivas, Advocate and faculty member of BMS Law College & University Law College, Bangalore, presented a paper on the topic "Control on money power in the electoral Process-Legal provisions, limits on expenses & public funding systems" in the recently concluded National Seminar on electoral reforms at Mysore. The paper has been published by the Department of Studies in Law, Manasa Gangothri, Mysore University.

## Bar Council Election

Election of members to State Bar Council is scheduled to be held on 22-12-94. 25 members are to be elected in this election.



More Lawyers have been ruined by politics than by liquor, women or the stock market.

-Arthur Garfield Hays

## Back to the Square

Declining of the Supreme Court to answer the one point Presidential Reference made to it under Article 143 (1) of the Constitution is quiet on expected line. The unanimous observation of the five Judge Constitution Bench that the reference "is superfluous and unnecessary" makes it clear that the Court has refused to be drawn in to the issue which is essentially a political one. Thus the ball is returned to the Executive to find a solution to the vexed issue without resorting to drag the Court into the muddle.

In the process the Court had to earmark several precious hours of its time in hearing the arguments for and against the need to answer the reference, apply its mind and pass the Judgment. It is also clear that the court had to give priority to disposal of the Presidential Reference in preference to the long pending cases awaiting adjudication. By not seeking the opinion of the Court in a matter of this nature the government could have helped the Court in attending to other pending cases.

It is in this context one has to see whether the Presidential Reference was called for and if the answer go to ascertain the motive behind the decision to make the reference. After the unprecedented incident in Ayodhya on 6th December 1992 it is clear that the Union Government wanted to bring peace & restore semblance of normalcy in the Country. For this reason the government might have thought it fit to refer the matter to the Supreme Court by invoking the Presidential power of making reference. In the process it is possible that the government might have thought that it can abdicate its

primary responsibility of finding a solution to the issue and pass on the buck to the Court. A large section of public opinion including that of the parties involved in the dispute had expressed reservations about the bonafides and efficacy of the reference by alluding to the fact that the government had chosen to make the reference under Article 143 (1) instead of seeking opinion of the Court under Article 138 of the Constitution which would have had the binding effect. However the government persisted with its view. The refusal of the Court to answer the reference show that the government had all along indulged in this futile exercise with the sole intention of transferring its responsibility of finding solution to this politico-religious issue on the Court.

The most unfortunate thing is that many citizens of this country can not understand that the government acted in an unpurposeful manner apart from abusing its prerogative of making the reference. It is sheer negligence on the part of the government that it failed to find solution to the issue rather than resorting to use the constitutional functionary like the Supreme Court to answer the reference. While the Supreme Court might have done a good thing in refusing to get itself involved in the matter can we say the same of the Executive? At least after this imbroglio of its own making can we reasonably hope that the government will not hesitate to find solution to this long pending issue instead of adopting dilatory methods knowing fully well that it cannot bring in the cherished peace and tranquility in the Indian Society?

## Article 356 - Scope of Judicial Review

Justice (Retd.) M. Rama Jois

(continued from last issue)

The power under that Article was meant to be used when the Nation was threatened with war or internal disturbance. It was misused for continuing in power. The said declaration and the repression which followed, awakened the 'Political Sovereign' the people, from slumber. In the election held in March 1977 for the first time, the party which was in power at the Centre, for three decades suffered defeat. Another party came to power, securing absolute majority of votes as well as seats in Parliament. The Parliament in conformity with the will of the people took steps to amend the Constitution to insulate against the abuse of power under Article 352. The important amendments were:

(1) Proclamation of internal emergency could be declared only when the Country is threatened by war or armed rebellion and not when there is internal disturbance.

(2) The President shall not issue a proclamation unless the Prime Minister and Council of ministers of Cabinet rank gave advice to him in writing (This was incorporated vide clause (3) since on 25-6-1975 the President had signed the Proclamation without such advice and brought into force & the advice came thereafter on 26-6-1975 after the proclamation had already been issued after the meeting of the Cabinet at 6 A. M. on 26-6-1975.)

(3) The proclamation could be approved only by a majority of total membership of the House and by a majority of not less than two thirds of the members of the House present and voting which is the same requirement for amending the Constitution, as declaration of emergency has the effect of taking the powers of a State, under the Constitution.

Sarkaria Commission, which inquired into the topic of Central State relations considered problems arising out of the exercise of power under Article 356 and made certain recommendations in its report submitted in 1988. Some of them are:

1. "6-8-01. Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a break down of Constitutional machinery in the State".

2. "These alternatives may be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action under Article 356 will lead to disastrous consequences".

3. 6-8-02 "A warning should be issued to the erring State, in specific terms, that it is not carrying on the Govt. of the State in accordance with the Constitution. Before taking action under Article 356, any explanation received from the State should be taken into account. However this may not be possible in a situation when not taking immediate action would lead to disastrous consequences".

6-8-03 "When an 'external aggression or internal disturbance' paralyses the State Administration creating a situation drifting towards a potential break down of the Constitutional machinery of the State all alternative courses available to the Union for discharging its Paramount responsibility under Article 355 should be exhausted to contain the situation".

4. 6-8-06 "The State Legislative Assembly should not be dissolved either by the Governor or by the President before the proclamation issued under Article 356(1) has been laid before Parliament & it has an opportunity to consider it. Article 356 should be suitably amended to ensure this".

(to be continued)



## Around the Courts

□ Section 37(1) of the Income Tax Act, payment of bribe and claiming deduction as a business expense.

Mahindra and Mahindra pleaded that with a view to run their business smoothly they paid bribe. Classified it as business expenses & claimed the amount involved as deduction under Section 37(1) of the I.T. Act. This was promptly disallowed by the I.T. Department. The matter having been come up before the Court (Mahindra and Mahindra Vs I.T.O.) the plea of the assessee was rejected. The assessee had even cited the report of Sarkaria Commission of Inquiry which had inquired into the matter had opined that the company had to make these payments under duress. Though the Court conceded that the assessee was helpless in the matter, as without the payment of ransom, it would not have been possible to the company to recover its dues from the state government though the Court did not admit such expenditure for the purpose of deduction. It held that whatever the circumstances illegal payment will continue to be illegal as there is no obligation to carry on the business illegally irrespective of the purpose.

However in another case (Commissioner of I.T., Madras Vs. Coimbatore Salem Transport (pvt.) Ltd.) the Court allowed such deductions claimed as 'way side expenses' incurred for running the business notwithstanding that the assessee had failed to furnish any proof for such payments. The Court rationalised the justification for such deductions on the ground that the nature of payments are such that no proof is possible. According to the Court the amounts (Rs. 6000/-) claimed as having been paid as Ma-mools (or wayside expenses) were reasonable.

## Justice Hegde Retires

Justice B. Jagannatha Hegde retired as a Judge of the Karnataka High Court on 30-10-94 after Completion of about 31 years of service in judiciary. On 28-10-94 Sri S.T. Patil, Chairman of the State Bar Council read the farewell address in Court Hall No.1 in a solemn function. Justice Hegde in his reply thanked all those who had helped him in the discharge of his responsibilities. On the same day a farewell function was organised by the AAB in the High Court Unit.

## Campus Watch

□ Inaugural function of the Bangalore University Law College Students' Council 1994-95 was held at the College Auditorium on 22-10-94. Mr. F.T.R. Colaso, I.P.S., Director General of Police (CID & Training) Government of Karnataka was the Chief Guest. Sri S. Chen-narayana Reddy, Advocate addressed the students. Prof. N.R. Shetty, Vice Chancellor, Bangalore University presided over the function.

## Humour in Courts

□ In a Suit for recovery of money the Defendant admitted the claim and pleaded for instalments. His Lawyer argued that instalments be granted to his client since the latter is a God fearing christian and he had seven children.

The plaintiff's Counsel opposed the relief. He argued that if the Defendant is really a God fearing christian God should actuate the Defendant to immediately pay the whole amount. As regards the plea of the Defendant that he has seven children, though a pitiable condition, his client is in no way responsible for this state of affairs and that there is no guarantee that few more children would not be born subsequently.

Courtesy : Smt. S. Rathnamala, Advocate.

## Meet on Simplification of Tax Laws

Karnataka Tax Consultant Association had organised a meet on simplification of Income Tax and Sales Tax Laws on 29-10-94 at Hotel Woodlands, Bangalore. Smt. Vijaya Mohanram, IRS, the Commissioner of Income Tax Bangalore, who inaugurated the function called for the simplification of IT laws is view of complexity of the tax structure. She also welcomed the idea to simplify the IT forms and filtering the survey wing of the IT department so as to make more humane.

Sri Nagaraj, Addl. Commissioner of Commercial Taxes, Bangalore, who was the Chief Guest at the Seminar informed that the recently introduced fast track system in the Commercial tax Department will be extended to all circles to avoid inordinate delay in disposal of the cases.

Other speakers included Sri K.L. Ramesh, President FKCCI; Sri D.R. Balaji Singht Joint Commissioner of Commercial Taxes, Advocates Sri S. Narayana and E.R. Indra Kumar. In the beginning President of KTCA Sri S.K. Nahar welcomed the participants. At the end Sri T.P. Gandhi, Secretery KTCA, roposed vote of thanks.

## Pending Cases in S C

According to a recent survey conducted by the IIM, Ahmedabad, there are 33,160 cases awaiting admission in the Supreme Court as on 1-6-94. Out of these 90 cases were registered prior to 1980 and 15,362 cases were registered between 1980 and 90.

84 page interim report prepared by the Institute reveals that 21,948 cases were pending hearing by the Court as on 1-6-94. The report was recently submitted to the Registrar of the Supreme Court by the team which undertook the survey.

## Call for Dowry Cells

Justice S. Mohan, Judge of the Supreme Court, called for constituting special cells in the police force of all states to bring down instances of dowry deaths and harassment of women on the lines of existing practice in Karnataka. Justice Mohan was addressing a seminar on 5-11-94 at Madras on the topic 'Human Rights and Criminal Justice' organised by the Indian Society of Criminology.

Justice Mohan recalled that as the Chief Justice of Karnataka High Court he had suggested this idea and the same was promptly implemented by the State Government as a result of which there was reduction of dowry harassment cases from 42 to 4. He also suggested amendments to be effected to the IPC so as to effectively tackle the dowry death cases. He further suggested that death sentence should be awarded to the offenders; besides providing for compensation to the victims or their kins in all such cases.

## Point Blank

□ There is nothing wrong in a politician's son becoming a politician. Nobody says anything when a doctor's son becomes a doctor and a lawyer's son a lawyer.

—Mr. C.K. Jaffer Sharief, the Union Minister for Railways, in a recent letter to the President of AICC Sri P.V. Narasimha Rao while canvassing nomination for two of his sons and a son-in-law from Congress

## Upadhyaya made the Chairman

Mr. Lalit Bhasin, Chairman of the AICC (I) legal cell, has appointed Sri V.V. Upadhyaya, Advocate, as the Chairman of KPCC (I) legal Cell. Sri Upadhyaya replaces Sri K. M. Manamohan. Sri M. Lokesh continues to be the convenor of the Cell.



## Bouquets All over



Three members of the all women River Rafting team which successfully completed 2,500 Km. Ganges rafting expedition receiving bouquets at Jamshedpur before under taking the expedition. (L-R) Kokila Sudha, Advocate from Bangalore, Yumnam Nolini Devi and Jamuna Devi Thakur.

## Around the Courts

□ Sections 42, 95 (I) (V) (iii) and proviso (ii), of the Motor Vehicles Act, 1939:

Recently a Full Bench of the Gujarat High Court comprising Justices M. B. Shah, C. V. Jani and A.N. Divecha, has laid down that Insurance Companies are liable to pay compensation under the Motor Vehicles Act for death or injury caused to a passenger travelling on payment in a goods Motor Vehicle not registered with the transport authorities for carrying passengers. The Judges have held the Insurance Company cannot escape liability by saying that carrying of such passengers by the goods vehicle is in breach of condition mentioned in the insurance policy or Certificate. Further it has been held that the Insurance Company should establish that there was a breach of specific condition specified in the insurance policy Certificate apart from establishing that such a breach was done by the insurer himself or at his instance. It is only when such burden of proof is discharged by the Insurance Company it can escape liability and not otherwise.

The Judges took judicial notice of the travails of the claimants in recovering the compensation in road accidents. They pointed out that a motor vehicle is a powerful engine of death and destruction and unless driven with due care and attention it is capable of doing much damage to persons and property. The danger grows as the number of cars plying on the roads increase and their speed get faster. As a consequence more and more people get killed. M.V. Act being a social welfare legislation under no circumstances the claimants should be denied compensation. The Judges also took judicial notice of the fact that the Victims mainly belong to poorer section of the society and in many cases they are forced to travel in goods vehicles because of their economic condition.

New India Insurance Company Ltd. Vs. Sultan Singh Harum Jadav and others.

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## Miscellany

□ With effect from 17-10-94 Basavaraj Kareddy, Advocate, has shifted his office to No. 17, "Om Nivas", 3rd Floor, 5th Main Road, Opp. Moti Mahal Hotel, Gandhinagar, Bangalore-560 009. Ph: 2261531

□ With effect from 29-10-94 Mr. Jagadeesh Mundaragi, Advocate is functioning in his new office at 3rd Floor, Amar Tower, 1st Cross, Gandhinagar, Bangalore-560 009.

□ On 15-11-94 Lahari foundation provided medical assistance of Rs 1,500/- to Mr. B.K. Anand, Advocate, who recently met with an accident.

## News Focus

□ On 6-10-94 Justice Kamalleshwarnath, Karnataka Upa Lokayuktha, addressed the members of AAB, High Court Unit, on the topic Lokayuktha and its functioning in Karnataka.

□ On 30-10-94 Seminar on "Judicial Administration and speedy Justice" organised by the Karnataka Commission of Jurists was held at Mangalore.

□ On 10-11-94 H. H. Swami Bodhananda Saraswathi of Sambodh, Centre for Vedanta and Meditation, New Delhi addressed the members of AAB, High Court Unit on the epic Bhagavadgita. Sri Gopalakrishnan, General Manager (Development) Bangalore Telecom District was the chief guest. Sri K.N. Subba Reddy, President, AAB, presided.

## Campus Watch

E. Ashwini of University Law College has been adjudged best lady advocate at the First Karnataka Moot Court competition held by National Law School of India University. She was also adjudged third best speaker of the competition.

## Obituary

On 10-11-94 John D'souza (65), Advocate and Notary, passed away at Bangalore.

## ಲಿಟರರಿ ಯೂನಿಯನ್

□ ತಾ|| 22-10-94 ರಂದು ಮಹಿಳಾ-ರಿಗಾಗಿ ಜಾನಪದ ಗೀತೆಗಳ ಗಾಯನ ಸ್ಪರ್ಧೆ ಏರ್ಪಡಿಸಲಾಗಿತ್ತು. ಈ ಸ್ಪರ್ಧೆಯಲ್ಲಿ ಶ್ರೀ ಸುಬ್ರಮಣ್ಯ ಭಟ್ ಪ್ರಥಮ, ಶ್ರೀ ದಿವಾಕರ್ ಮದ್ದೂರ್ ದ್ವಿತೀಯ ಮತ್ತು ಶ್ರೀ ಕೆ.ವಿ. ರವಿಕಂಠ ರವರು ತೃತೀಯ ಬಹುಮಾನವನ್ನು ಪಡೆದರು.

□ ತಾ|| 27-10-94 ರಂದು ಯೂನಿಯನ್ನಿನ ಆಶ್ರಯದಲ್ಲಿ "ಡಾ|| ದ. ರಾ. ಬೇಂದ್ರೆ, ಕಾವ್ಯದೊಂದಿಗೆ ಒಂದು ಸಂಜೆ-ಬೇಂದ್ರೆಯವರ ಗೀತೆಗಳ ಗಾಯನ" ಕಾರ್ಯಕ್ರಮ ಏರ್ಪಡಿಸಲಾಗಿತ್ತು. ಶೇಷಾದ್ರಿಪುರಂ ಕಾಲೇಜಿನ ಮನಃ ಶಾಸ್ತ್ರ ವಿಭಾಗದ ಬೋಧಕರಾದ ಶ್ರೀಮತಿ ಶುಭ ಮಧುಸೂದನ್ ಹಾಗೂ ಆಕಾಶವಾಣಿ ಕಲಾವಿದೆ ಶ್ರೀಮತಿ ಮಂಜುಳ ದಿವಾಕರ್ ರವರು ಬೇಂದ್ರೆಯವರ ಗೀತೆಗಳ ಗಾಯನ ಮಾಡಿದರು. ಎನ್.ಎ.ಎಲ್. ನ ವಿಜ್ಞಾನಿ ಶ್ರೀ ಮಧುಸೂದನ್ ರವರು ತಬಲ ಸುಡಿಸಿದರು.

□ ತಾ|| 29-10-94 ರಂದು ನಡೆದ (ಶಾಸ್ತ್ರೀಯ ಗಾಯನ) ಸಂಗೀತ ಸ್ಪರ್ಧೆಗಳಲ್ಲಿ ಕು|| ನಾಗರತ್ನ ಮೇದಲನೆ ಬಹುಮಾನ; ಆರ್. ಯತೀಶ್ ಕುಮಾರ್ 2ನೇ ಬಹುಮಾನ ಮತ್ತು ಕುಮಾರಿ ಶೇಷಪ್ಪಿನಿ ಮೂರನೇ ಬಹುಮಾನ ಹಾಗೂ (ಭಾವ-ಗೀತೆ) ಆರ್. ಯತೀಶ್ ಕುಮಾರ್ ಮೇದಲನೆ ಬಹುಮಾನ; ರವಿಕಂಠ ಎರಡನೇ ಬಹುಮಾನ ಮತ್ತು ದಿವಾಕರ್ ಮದ್ದೂರ್ ಮೂರನೇ ಬಹುಮಾನವನ್ನೂ ಪಡೆದರು.

□ ತಾ|| 10-11-94 ರಂದು ಕುವೆಂಪು ವಿರಚಿತ "ಮಹಾರಾತ್ರಿ" ಎಂಬ ನಾಟಕ ಪ್ರದರ್ಶನ ಏರ್ಪಡಿಸಲಾಗಿತ್ತು. ಶಿವ-ಮೂರ್ತಿ ನಂದನ ಹೊಸೂರು ರವರು ಟನಾಕ ನಿರ್ದೇಶನ ಮಾಡಿದರು. ಆ ದಿನವೇ ದಿವಂಗತರಾದ ರಾಷ್ಟ್ರಕವಿ ಕುವೆಂಪು ರವರ ನಿಧನದ ಬಗ್ಗೆ ಶೋಕ ಸಂತಾಪ ಗೊತ್ತುವಳಿಯನ್ನೂ ಸಹ ಕಾರ್ಯಕ್ರಮದ ಪ್ರಾರಂಭದಲ್ಲಿ ಅಂಗೀಕರಿಸಲಾಯಿತು.

□ ತಾ|| 16-11-94 ರಂದು ವಿಜಯ ಕಾಲೇಜಿನ ಕನ್ನಡ ವಿಭಾಗದ ಪ್ರೊ|| ಎನ್. ಎಚ್. ನಾಗರಾಜ್ ರವರು "ಎಸ್.ಎಲ್. ಬೈರಪ್ಪ-ವ್ಯಕ್ತಿ ಮತ್ತು ಕಾದಂಬರಿಕಾರ" ಎಂಬ ವಿಷಯದ ಬಗ್ಗೆ ಉಪನ್ಯಾಸ ಮಾಡಿದರು.

## Cash Looted

On 15-11-94 two youths entered the Court of First Class Judicial Magistrate of Dimapur (Nagaland) held the Judicial Officer hostage and looted cash of Rs. 5.20 lakhs from the Court.