

# CRIMINAL ABUSE OF CONSTITUTIONAL PRIVILEGES

*K. D. Gaur*

## 1. INTRODUCTION

In a democracy governed by *Rule of Law* the State functionaries, particularly those holding high offices, are required to exercise their constitutional authority judiciously and for *bona fide* purpose in a transparent manner. In the words of Mahatma Gandhi, the Father of the Nation, they hold the office as a trustee under an oath of and secrecy to discharge their constitutional obligations honestly without fear and favour and to uphold the dignity, status and preserve its honor. Strict adherence to a high standard of ethical behaviour is necessary for honest functioning of the new social political and economic order. But to one's utter dismay and frustration, some of the persons in authority have flouted the ethical and legal norms with impunity. Some of the instances are highlighted in the instant paper.

## 2. CRIMINAL ABUSE OF CONSTITUTIONAL PRIVILEGES: SOME NOTORIOUS INSTANCES

### *2.1 Abuse of privileges*

In 1993 in a historic case<sup>1</sup> a person no less than the Prime Minister of India, P. V. Narasimha Rao with the help of his comrade

\* Vishard UGC Emeritus Fellow, Law Faculty Lucknow University, Lucknow Former Professor, and Head, Post-Graduate Department of Law, and Ex-Vice Chancellor, Utkal University, Bhubaneswar (Orissa).

<sup>1</sup> *P.V. Narasimha Rao v. State (CBI/SPE)*, AIR 1998 SC 2001. Major judgement was delivered by Justices S.P. Bharucha, S. Rajendra Babu and G. Ray and minority judgment by justice S. Aggarwal and Dr. A. S. Anand.

'successfully maneuvered to purchase the right to remain in power and rule the country by bribing the Members of the Parliament. In die General Election for the tenth *Lok Sabha*, held in 1991, the Congress (I) party emerged as the single largest party and it formed the government with P. V. Narasimha Rao as the Prime Minister. In the monsoon session of the *Lok Sabha* in July 1993 a 'No Confidence' motion was moved against the Government by a CPI (M) MP. At that time the effective strength of the House (*Lok Sabha*) was 528 and Congress (I) party had 251 members. It was short by 14 members for a simple majority. The motion of 'No Confidence' was taken up for discussion and thereafter was put to vote. The motion was defeated with 251 members voting in favour of the motion, while 265 voting against it.

On February 28, 1996, one Sri R.V. Kapoor of *Rashtriya Mukti Morcha* filed a complaint with the Central Bureau of Investigation (CBI), wherein it was alleged that in July 1993 a criminal conspiracy was hatched by P. V. Narasimha Rao, Satish Sharma, Ajit Singh, Bhajan Lai, V. C. Shukla, R. K. Dhavan, D. K. Adhikeshavalu, M. Veerappa Molly, M.L. A. and Chief Minister of Karnataka, Mr. Ravonna, Lalit Suri to prove a majority of the government on the floor of the House on July 28, 1993 by bribing members of Parliament of different political parties, individuals **and** groups of an amount of over Rs. 3 crores (thirty million) and **that** in furtherance of the said criminal conspiracy a sum of Rs. 1.10 crores (11 million) was handed over by the aforementioned persons to Suraj Mandal and others.

On the basis of the said complaint, the CBI registered four cases under sec. 13(2) read with sec. 13 (1)(d)(iii) of the Prevention of Corruption Act, 1988, (PCA) against Suraj Mandal, Shibu Soren, Simon Marandi and Shalender Mahto, Members of the *Lok Sabha* owing allegiance to the Jharkand Mukti Morcha (JMM), and Ram Lakhan Singh Yadav, Anandi Charan Das, Abhay Pratap Singh **and** Haji Gulam Mohammed, Memebbers of the *Lok Sabha* owing allegiance to the *Janata Dal*, Ajit Singh group (J.D.A.S), voted against the 'No Confidence' motion. Ajit Singh abstained from voting.

The Special Judge designate Delhi on the basis of records came to the conclusion that there was sufficient evidence to justify framing of charges, to initiate prosecution of all the above named persons for criminal conspiracy under sec. 120B IPC read with sec. 7 (public servant taking gratification), sec. 12 (punishment for abatement of offences defined under sec. 7 or s. 11) and sec. 13(2) read with sec. 13(1)(d)(iii) of the PCA.

The accused persons raised an objection before the Special Judge that the jurisdiction of the Court to try the case is barred under art. 105(2) of the Constitution of India because the trial is in respect of matters which relate to the privileges and immunities of the House of Parliament and its members inasmuch as the foundation of the charge sheets is the allegation of acceptance of bribe by some Members of the Parliament for voting against the 'No Confidence' motion and that the controversy to be decided in this case would be in respect of the motive and the action of the members of the Parliament pertaining to the vote given by them in relation to the 'No Confidence' motion.

Special Judge rejected the said contention and held that in the impugned case the voting pattern of the accused persons was not under adjudication and they were sought to be tried for their illegal acts committed outside Parliament, i.e., demanding and accepting bribe for exercising their franchise in a particular manner, and that the accused persons are not being prosecuted for exercising their right to vote, but they are being prosecuted on the allegation that they while holding a public office demanded and accepted illegal gratification for exercising their franchise in a particular manner which is an offence punishable under the 1988 Act<sup>3</sup> and that art. 105 of the Constitution<sup>4</sup> does not provide any protection to the

<sup>2</sup> Sec. 13(2), PCA states: 'Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine.'

<sup>3</sup> *Id.*, s. 13(1)(d)(iii) 'If he, while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.'

<sup>4</sup> Article 105 reads: '*Powers, Privileges, etc. of the House of Parliament and of the members of the committees thereof.* (1) Subject to the provisions of this

accused persons. The Court further held that members of Parliament are public servants and are therefore subject to prosecution under the PC A.

In the revision petition filed by the appellants against the said order of the Special Court, Constitution bench of five judges formulated two questions for consideration, viz., (i) Does art. 105 of the Constitution confer any immunity to a Member of Parliament from being prosecuted in a criminal court for an offence-involving offer or acceptance of bribe? and (ii) Is a Member of Parliament excluded from the ambit of the Prevention of Corruption Act, 1988 for the reason that (a) he is not a person who can be regarded as a 'public servant' as defined under sec. 2(c) of the 1988 Act, and (b) he is not a person comprehended in clauses (a), (b) and (c) of sub-sec. (1) or sec. 19 for sanction and there is no authority competent to grant sanction for his prosecution under the 1988 Act?

As regards the second proposition, there is unanimity amongst the judges. All of them have upheld that M.Ps are 'public servant' within the purview of the Act of 1988 and in the absence of an authority competent to grant sanction for the prosecution of any Member of Parliament, the prosecuting agency shall obtain the permission of the Chairman of the *Raj'ya Sabha* or the Speaker of the *Lok Sabha* as the case may be.

Constitution and the rules and standing orders regulating of the procedure of Parliament there shall be freedom of speech in Parliament.

(2) No Member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, papers, votes or proceedings.

(3) In other respect, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House and shall be such as may from time to time be defined by Parliament by law, and until so defined (shall be those of that House and of its members and committees immediately before the coming into force of s. 15 of the Constitution (Forty-fourth Amendment)) Act, 1978.'

However, in respect of the first proposition, there is a difference of opinion amongst the judges. The majority judgment was delivered by Justices G.N. Ray, S.P. Bharucha and S. Rajendra Babu and minority judgment by Justices S.C. Agarwal and Dr. A.S. Anand. The majority made a distinction between a bribe-giver and a bribe-taker M.P. In case of alleged bribe-taker M.Ps., other than Ajit Singh, the judges allowed protection against criminal, prosecution under art. 105(2) of the Constitution conferring privileges to the Members of Parliament and held that they are not answerable in a Court of Law for the alleged conspiracy and agreement. Accordingly, Suraj Mandal, Shibu Soren, Simon Marandi, Shailendra Mahto, Ram Lalakhan Yadav and their friends were set free. Ajit Singh, not having casted a vote on the 'No Confidence' motion, derives no immunity from art. 105 (2) of the Constitution.

On the other hand, in case of a bribe-giver M.P. no such privilege was permissible. The Court said that what is otherwise an offence is not an offence when it is committed by a Member of Parliament and has a connection with his speech or vote therein. In other words, if an MP by his speech or vote in Parliament committed an offence, he enjoys by reason of art. 105 (2) immunity from prosecution therefore. But those who have conspired with the M.P. in the commission of that offence have no such immunity and are subject to prosecution.

However, Justice Aggarwal and Justice Dr. Anand while delivering a dissenting judgment have rightly upheld the High Court's finding that there was no justification for interfering with the order passed by the Special Judge initiating prosecution of all the accused including 'taker' and 'giver' of bribe. The Court observed that special privileges based on clauses (2) and (3) of art. 105 to the Members of Parliament extends to secure full freedom to a Member while participating in the proceedings in the House or its Committees by way of speech or by casting vote, but it does not extend to a case of bribery and corruption by a Member of Parliament.

With due respect, it is submitted that the majority judgment has made a distinction between a common man and a Member of

Parliament, the former subject to the rigors of corruption laws, while an M.P is beyond it. Such an artificial distinction between a common man and a lawmaker in a democracy is untenable and is against the very concept of *Rule of Law*. Granting immunity from prosecution to the alleged bribe-taker MPs under art. 105(2) of the Constitution for helping P.V. Narasimha Rao's minority Government survive a 'no confidence' motion has given a wrong signal and demoralized those citizens who were expecting stern action against corrupt lawmakers. Needless to say, the object underlying protection under art. 105(2) of the Constitution accorded by the framers of the Constitution is in respect of the bona fide acts like free speech and fearless voting in the House to genuine law makers against malicious prosecution and not for protecting bribe-taker for acting in a particular way or making a speech on some consideration and casting vote on receiving gratification.

A claim to the immunity from prosecution under art. 105(2) by the MPs who had allegedly taken bribe for an act in the House would place such members above the law. Such a grant would not only be repugnant to healthy functioning of Parliamentary democracy, but would also be subversive to the rule of law, another basic feature of the Constitution, which signifies that howsoever high one may be, he or she is not above the law. This has been asserted by the apex court itself by holding so in a number of cases. In a recent case in the State of *Jammu and Kashmir v. Vinaya Nanda*,<sup>5</sup> the apex Court said:

Corruption at any level, by any person of any magnitude is condemnable which cannot be ignored by the judicial courts, when proved. No leniency is required to be shown in proved cases under the Prevention of Corruption Act, which itself treats the offence under it of a special nature to be treated differently than the general penal offences. No

<sup>5</sup>(2000) 1 SCC187.

populous or sympathetic approach is needed in such cases.<sup>6</sup>

The majority judgment nullifies the very basis of anti-corruption laws, which have been enacted to root out rampant corruption in the country. When lawmakers themselves are not accountable for their criminal acts, there is no justification whatsoever-moral, ethical or legal- to hold others accountable for such acts. By common sense and conviction, both bribe-givers and bribe-takers must face charge equally. In fact, the message, which may not be correct, went across the country that the Supreme Court has put its seal on MPs' right to take bribe for acting in a particular way, making a speech on some consideration and casting their vote on receiving gratification.

It is high time that the lawmakers, taking note of the strong public opinion against the majority judgment in *P. V. Narasimha Rao* (JMM Bribery case), amongst jurists, scholars and legal scientists, overrule the said judgment by making an appropriate amendment in the Constitution. The scope and extent of Parliamentary Privileges under arts. 105 and 194 of the Constitution accorded to the Members of Parliament and the State Legislators respectively should be streamlined, to set an example that in a democracy a common man is as much important as a lawmaker and the *Rule of Law* is applicable to both equally. And a lawmaker should be held accountable as a common man for giving or accepting a bribe under the law of the land.

## 2.2 Abuse of discretionary power

In 1996 in the *Common Cause, A Registered Society* and the *Shiva Sagar Tiwari*<sup>8</sup> cases the Supreme Court held that a Minister is in a

<sup>6</sup> *Id.*, p. 188 para 2. See *Times of India*, March 16, 2000. Finally Delhi High Court on March 15, 2002 acquitted P. V. Narasimha Rao in *JMM*. MP's bribery case against him and Buta Singh's conviction and sentence of three years imprisonment by Special Judge, Delhi on the ground of lack of evidence as usual and expected.

<sup>7</sup> *Common Cause, A Registered Society v. Union of India*, (1996) 6 SCC 530.

position of a trustee in respect of public property under his charge and discretion, and he must therefore deal with people's property in just and fair manner, failing which he would be personally liable for criminal breach of trust. In *Common Cause, A Registered Society*,<sup>9</sup> the apex Court in November 1995 imposed exemplary fine of Rs. 50 lakh on Captain Satish Sharma, former Petroleum Minister in the P. V. Narasimha Rao's Government for arbitrary exercise of discretionary power of Minister in allotment and distribution of petrol pumps and cooking gas agencies; and ordered the CBI to probe into the allotment scam and institute criminal proceedings for committing breach of trust against Satish Sharma for abuse of office during his tenure as a Minister. The bench consisting of Justices Kuldeep Singh and Faizanuddin, setting aside the order of allotment of petrol pumps said:

—No criteria were fixed, no guidelines were kept in view, none knew how many petrol pumps were available for allotment, application were not invited. The allotments have been made in a cloistered manner. The petrol pumps- a public property have been doled out in a wholly arbitrary and discretionary manner.<sup>10</sup>

The Court explained that in a welfare state the Government provides a large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas

\* *Shiva Sagar Tiwari v. Union of India*, (1996) 6 SCC 558 and *Shiva Sagar Trwari v. Union of Indies* (1996) 6 SCC 599.

*Supra* n. 7. Pursuant to a news item in *Indian Express* dated 11.8.1995 under \*e caption 'In Satish Sharma Reign, Petrol and Patronage Flow Together', H.D. Shourie-Director Common Cause filed, a PIL wrk petition challenging the **allotment** of 15 retail outlets for petroleum products (petrol pumps) by the then **Minister** of State for Petroleum and Natural Gas, exercising the powers of **Central** Government. It appeared that allottees were related to either politicians **m** relatives of officials including his own driver and-the driver of his Additional **ftivate** Secretary out of the Minister's discretionary quota on compassionate **sounds** in a stereotyped manner without following any procedure or guidelines.

*Id.*, pp. 542-54 (para 20). See *Ramana Dayaram Shetty v. International Smport Authority of India*, (1979) 3 SCC 489.

agencies, mineral leases, contracts, quotas and licenses etc. The apex court with this concern further observed:

A Minister who is the executive head of the department concerned distributes these benefits and largesse. He—holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people. —Capt. Satish Sharma in his capacity as a Minister—deliberately acted in a wholly arbitrary and unjust manner. — The allotments made by him were wholly *mala fide*"

In *Shiva Sagar Tiwari*, the apex court levied a fine of Rs. 61 lakhs on Mrs. Sheila Kaul former Union Minister for Housing and Urban Development and former Governor of Himachal Pradesh and cancelled the allotments of 52 shops and kiosks (stalls) for arbitrarily, oppressively and unconstitutionally allotting the shops to her relatives, friends and staff members during her tenure as Minister. The Court directed the Government to formulate an allotment policy within two months and complete the process of allotment within four months. Justice Kuldeep Singh and Justice Hansaria while imposing the fine said:

Since the properties she was dealing with were Government properties, the Government by the people has to be compensated for breach of public trust. Mrs. Kaul should pay for causing pecuniary loss to the exchequer for acting in an "oppressive

<sup>1</sup> *Id.*, pp. 553-54, (Paras 22,23).

<sup>12</sup> *Shiva Sagar Tiwari v. Union of India*, (1996) 6 SCC 558. The Petitioner, advocate of the Supreme Court brought to the notice of the apex court that respondent while serving as Union Minister for Housing and Urban Development in 1992 and 1994 allotted two shops to her grandsons, one shop to the maidservant of her son, one shop to the handloom manager of the firm owned by her son-in-law, another to a close friend and one to the nephew of Minister of State P.K. Thangon; and stalls to the relatives and friends of personal staff and officials of the directorate of Estate.

and malafide manner", while making shop<sup>13</sup> allotments.<sup>13</sup>

Comparing Capt. Satish Sharma's case, the Court said:

Mrs. Kaul had not only acted in an 'oppressive and malafide' manner, but had been more callous than Capt. Sharma while making the shop allotment. In Captain Sharma's case there was no pecuniary loss caused to the Government, but in her case it is very clear. Mrs. Kaul's action amounted to injury to high principles of public law.<sup>14</sup>

However, the apex court in a review petition filed by Mrs. Kaul, quashed the damages on compassionate ground 'having regard to the peculiar facts and circumstances of Kaul, who is stated to be old and ailing and the gross hardship of the case'.<sup>15</sup>

It was thought that the above judgments have set at rest the controversy in respect of exercise of discretionary power by the Ministers etc., and have established jurisprudence of public accountability and transparency in the Governments' working and would be an eye opener to persons in high positions to exercise powers with restraint so as not to make it a farce and mockery of rule of law and democratic process. But to the dismay of the common man and disappointment of the legal fraternity in a review petition, a three member bench of the Supreme Court consisting of Justices Saghir Ahmad, Venkatswami and Rajendra Babu on August 3 1999<sup>16</sup> turned down its earlier decision of November 4, 1996,<sup>17</sup> and ordered for the refund of the sum of Rs.50 lakh to the petitioner and quashed the order of the court for launching prosecution against Capt. Sharma for Criminal Breach of Trust under section 406 IPC.

<sup>13</sup> *Id.*, p. 560 (para 4).

<sup>14</sup> *Times of India*, November 8, 1996, p. 11.

<sup>15</sup> See, *Times of India*, February 20, 2002, p. 1. (Lucknow edn.). The Bench consisted of Justices G.B. Pattnaik, R.P. Sethi and Bishewar Prasad Singh.

\* *Common Cause, A Registered Society v. Union of India*, AIR 1999 SC 2979. <sup>17</sup> *Supra* n. 7.

While endorsing the finding of the Court, in its earlier decision 1996, that the allotment of petrol pumps made by Capt. Shan was atrocious, specially to those made in favour of the members Oil Selection Board or their sons etc., and reflected a want exercise of power and that the conduct of the Minister was who unjustified, the Court said, nevertheless it falls short 'misfeasance' and the petitioner 'Common Cause', not being applicant for allotment, it could not claim to have suffered a 'damage or loss' on account of the conduct of the Minister. This has to be an identifiable plaintiff or claimant whose interest was damaged by the public officer (tortfeasor) maliciously or with knowledge that the impugned action was likely to injure the interest of that person. As regards the imposition of pecuniary damages, the Court said,

State cannot derive itself the right of being compensated by its officers on the ground that they had contravened or violated the fundamental rights of a citizen. Directing the Minister to pay, a sum of Rs. 50 lakh to the Government would amount to asking the Government to pay exemplary damages to itself, which the Court said, "is not tenable under the law.

Lastly, the Court said that principle of 'doctrine of trust' is applicable in case of ministers in discharging their duties advanced a somewhat conspicuous justification, when it said:

The person does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a trustee in real sense nor does a 'trust' come into existence in respect of Government properties. —The 'doctrine of Trust' cannot be invoked in fixing the criminal liability.—Mere existence of 'power to allot' petrol outlets by Minister of State for Petroleum cannot, be treated as 'property'

within the meaning of sec. 405, IPC, capable of being un-utilized or misappropriated.<sup>18</sup>

One fails to understand the logic of such a farfetched argument that though the act of the Minister is wrong it is not actionable. '*Ubius ibi remedium*' 'when there is wrong, there is a remedy', is well known maxim of common law.

With due respect to the Hon'ble Court, it is submitted that in a democracy the Court cannot shirk from its constitutional obligation by pleading its inability to provide remedy applying the colonial theory of 'king can do no wrong.'

Another assumption of the Court, that 'the Minister does not assume the role of a trustee' in the real sense, nor does a 'trust' comes into existence, is misleading. It would perhaps be appropriate to refer the statement of the Hon'ble court in its earlier decision of 1996, wherein the Court after discussing at length a number of cases and referring to various authorities, said:

The Executive power of the Government is distributed department-wise and one Minister made the head of the Department. He becomes principally accountable and answerable to the people. The law of the land regulates his powers and duties. The legal and moral responsibility or liability for the acts or omissions rests solely on the minister. He cannot be absolved of his responsibility by taking the plea of State action.<sup>19</sup>

The Court further held that 'misfeasance in public office includes malicious abuse of **power**' by public official, which is actionable in **law** of tort. The fact **that** there is no injury to a third person in the present case is not enough to make the principle of public accountability inapplicable in as much as there was injury to the high principles of public law, that a public functionary has to use

<sup>a</sup> Paras 154, 155, 157 and 162.

*Common Cause, A Registered Society v. Union of India*, (1996) 6 SCC 43, at **560 (para 4)**.

its power for the *bonafide* purpose and in a transparent manner. Moreover, there was loss to the exchequer as allotments were made without calling tender, which must have yielded revenue to the Government.

It may be pointed out that in similar situations in a number of countries, state functionaries have been found guilty of 'misfeasance' and 'wrongful exercise of power' and they have been made personally liable. For instance, the Supreme Court of Canada in *Carelli*,<sup>20</sup> awarded damages against the Prime Minister of the Province of Quebec for wrongful cancellation of license of liquor shop and was asked to pay damages personally. The Supreme Court of Bahamas in *Tynes*,<sup>21</sup> awarded exemplary damages for arbitrary, oppressive or unconstitutional action by State officials. Similarly, the Supreme Court of Jamaica in *Samulla*,<sup>22</sup> awarded exemplary damages. It is therefore high time that in democratic government by Rule of Law State functionaries should be made personally accountable for the wrongful exercise of their public duties.

Another fallacious finding by the Hon'ble Court is that 'asking the minister to pay exemplary damages of Rs. 50 lakh was nothing more than, asking the Government to pay exemplary damages to itself,' which the Court said, 'it cannot be permitted under art. 32 of the Constitution'. Such a proposition is perhaps based on wrong assumptions. This is evident from the decision of nine-member Constitution bench of the apex court in *Superintendent and Legal Remembrance of Legal Affairs*,<sup>23</sup> by a majority of 8 : in 1967.

<sup>10</sup> *Pon Carelli v. Duplejis* (1959) VR 280.

<sup>21</sup> *Tynes v Barr.* (1996) 1, Commonwealth Human Rights Law Digest (CHRD); pp. 117 to 120.

<sup>22</sup> *Samulla v. A. G. of Jamaica* (1996) 1 CHRD, pp. 120-122. Also see *Deshpriya v. Municipal Council, Nuywara Eliva*, (1996) 1 CHRD, 115 (Sri Lanka S. C.) where political discrimination was the motive for restricting freedom of expression, aggravated award was ordered.

<sup>23</sup> *Superintendent and Remembrance of Legal Affairs, West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997. The earlier decision of the Court in *Director of Rationing and Distribution v. Corporation of Calcutta*, AIR 196 SC 1355 was turned down. The State of West Bengal was carrying on the trade without obtaining a licence as required under sec. 218 of the Calcutta Municipality

It is therefore, respectfully submitted that the Court is well within its powers to direct the Government to pay exemplary damages. Perhaps it would be in the interests of justice that the 1999 verdict in *Common Cause*,<sup>24</sup> be overruled and the 1996 judgment be restored by a larger bench to get the law settled on this important issue and restore the confidence of the people in the administration of justice.<sup>25</sup>

### 2.3 Abuse of constitutional authority

Installation of Miss J. Jayalalitha as the Chief Minister of the State of Tamil Nadu on May 14, 2001 by the Governor Mrs. Fathima Beevi is yet another example of gross constitutional improprieties. Miss. Jayalalitha was convicted and sentenced to three years of rigorous imprisonment by the Special Judge, CBI, Chennai in *Tansi land* scam case under Prevention of Corruption Act, 1988. This led the Election Commission to reject her nomination papers for all the four constituencies she sought to contest in May 10, 2001 Assembly election and she was declared disqualified to contest. However, she was elected leader of her party AIADMK **that** registered an impressive victory in the Assembly election.<sup>26</sup>

The unseemly haste in which the Governor administered the oath of office and secrecy the very next day of her election as the leader

Act, 1951. The Corporation of Calcutta filed a complaint under the provisions of **sec.** 541 of the Act in the Court of Presidency against the West Bengal Government for contravening the provisions of sec. 218. The court dismissed **the** claim. However, Calcutta High Court held the State liable to take licence **Kke** a private individual. State went in appeal to Supreme Court. Dismissing the **appeal**, the apex court agreed with the High Court's finding th#t the State is as much bound by the law as is a private citizen and the State of West Bengal was **asked** to pay a fine of Rs. 250/- to the Corporation of Calcutta.<sup>54</sup> *Supra* n. 16. <sup>s</sup> *Supra* n. 19.

Article 173 of the Constitution provides qualification for the membership of fe State legislature and Article 191 deals with disqualification for membership **and** further Representation of Peoples Act provides that a person convicted of an **offence** and sentenced to imprisonment for not less than two years shall be disqualified from contesting an election for six years from the date of release. Miss J. Jayalalitha has been convicted under PCA, 1988 thrice.

of the party, when she was. to appear before a court in a criminal case relating to economic offences has set a bad precedent. The following questions put to Ms. Fathima Beevi by a reporter in Thiruvananthapuram on her return from Chennai after-relinquishing the office of the Governor and her responses thereto are interesting to note.<sup>28</sup>

Q. Why did she (the Governor) hurry to swear J. Jayalalitha in? A. I had to do it with their belief of auspicious time. I did not want to hurt their feelings.

Q. Does a whiff of morality springs from swearing in one who was convicted?

A. If the question of morality was to be inquired into, democracy will scarcely survive.

Q. Why did she swear in Miss Jayalalitha as chief minister despite her nomination being rejected?

A. Governor had to take decision and the only candle to the Governor on the appointment of a chief minister is art. 164(4) of the Constitution, which enjoins on the incumbent to get elected within six months.<sup>27</sup>

After Jayalalitha, having being declared disqualified by the Election Commission to contest assembly election, perhaps it was obligatory on the part of the Governor to seek legal opinion before installation of Jayalalitha as chief Minister. Article 192 of the Constitution empowers the Governor to decide on disqualification of a legislator 'after obtaining the opinion of the Election Commission and shall act according to such opinion'.<sup>28</sup> But the

P.K. Sundaram, *Times of India News Service*, July 6, 2001, Thiruvananthapuram (Kerala). Extracts from an interview with Fathima Beevi after she relinquished the office of the Governor in the wake of the Union cabinet decision to recall the Governor as a result of her controversial report regarding arrest of two Central Ministers, Mr. Murli Saran Maran and Mr. T. R. Balu by the police in Chennai on June 30, 2001.

<sup>28</sup> Art. 192 says: '(1) If any question arises as to whether a member of a House of Legislature of a State has become — disqualified—the decisions of the Governor—shall be final.

Governor has not even complied with the constitutional mandate. No doubt, art. 164(4) of the Constitution<sup>29</sup> provides that a non-member (of the assembly) could become a Minister/Chief Minister, but such a person must be elected to the legislature within a period of six months from the date of assuming the office. It was, therefore, implied that such a person was eligible to contest the election and he/she did not suffer from any disqualification.<sup>30</sup> It was never intended for a person who is disqualified from contesting election or for a person duly convicted of an offence.

A decision taken on the consideration of one's feelings, belief and auspicious time to appease an incumbent ignoring all norms of propriety can not be justified by any standard. The principle of natural justice demands that an action to be valid must be fair just and reasonable. Justice hurried is justice buried.

What the constitution and laws do not specify are governed in a democracy by healthy parliamentary conventions and traditions. According to the conventions followed in India, if a person is charged in a case of corruption with a *prima facie* evidence, that person quits his or her office as minister or Chief Minister. The persons belonging to all political parties have adhered to the convention. Miss Jayalalitha's own party nominee Mr. Sadapatti R. Muthiah resigned from the Vajpayee Government of being charge sheeted in the disproportionate wealth case against him. Laloo Prasad Yadav and Madanlal Khurana had to quit their chief ministership of Bihar and Delhi respectively on being charge sheeted in fodder and Hawala scams. Mr. Suraj Bhan, the then Governor of Bihar, dismissed one Mr. Samrat Choudhary (a non-member of the Bihar Legislative Assembly), a minister in the Rabri Devi Government, who was under age (i.e. below 25 years

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

Article 164(4) reads: 'A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.'

Rakesh Bahatnagar, *Times of India*, July 2, 2001, p. 6.

of age) after ascertaining the actual facts from the State chief electoral officer.

No doubt, in a democracy the people decide who should rule them, but of course, it is, subject to *rule of law*. So long the constitution stands no mandate can be construed as the peoples' mandate to condone or compound crimes committed by an individual howsoever powerful he or she might be.

It is gratifying to note that in *B.R. Kapur v. State of Tamil Nadu*<sup>31</sup> a Constitution Bench comprising of five Judges, S. P. Bharucha, G.B. Pattanik, Y.K. Saharwal, Ruma Pal, and Brajesh Kumar, JJ. ruled that it was beyond the discretion of the Governor to appoint as Chief Minister a disqualified person to contest an election. While upholding the sanctity of the Constitution over the will of the people, the Court in its unanimous verdict said:

A person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State under Article 164(1) read with 164(4) of the Constitution of India and cannot continue to function as such.

In other latest case, *Tejpal Singh*,<sup>32</sup> delivered on August 18, 2001 by a Bench comprising of Dr. A. S. Anand, R. C. Lahoti, and K.G. Balkrishnan, JJ., the apex court had ruled that a non-elected member of the Legislature must get elected within six months of assuming the office and that such a person cannot be reappointed as minister during the same term of the office of the House unless he or she is duly elected.

<sup>31</sup> *B.R. Kapur v. State of Tamil Nadu*, 2000(7) SCC 1.

<sup>32</sup> *The Times of India*, (Lucknow edn.) August 19, 2001, p. 1. Setting aside Tejpal Singh's appointment again as a minister after six months because he had not been elected to the House within a period of six months, the Court said, 'such practice would be clearly derogatory to the Constitutional scheme, improper, undemocratic and invalid'.

The above judicial pronouncements are welcome and will certainly go a long way in putting a check on corrupt politicians from holding office and curbing rampant corruption in public life, which has been eroding the core of our democracy.

### 3. CONCLUSION

The study made in the foregoing pages reveals that the criminal judicial system is indifferent to, perhaps unconcerned with, and little hostile to, the poor and the weak. The Courts are not consistent in their approach. It is found that many a time courts have adopted a narrow and legalistic approach of literal interpretation practiced in colonial era, which is outdated in a democracy. The courts perhaps sitting in ivory tower forget that in a democracy the judiciary too like other two wings of the State- legislature and executive- have an important role to play to advance, protect and preserve socio-economic and political justice as enshrined in the Preamble to the Constitution.

As discussed at length, in JMM bribery case, the apex court by a majority of three to two upheld the right of the lawmakers to commit day light robbery and to get away with it, for helping the Rao's minority Government to survive a 'no confidence' motion under the guise of privileges provided under art. 105 (2) of the Constitution.

Perhaps framers of the Constitution and Chairman of the Drafting Committee Dr. Bhim Rao Ambedkar might not have even visualized in dream that lawmakers in free India could successfully barter a most solemn trust committed to them by those they represented and get its approval by the highest court of the land. Unfortunately, the apex court has once again reiterated the colonial doctrine 'king can do no wrong', though Britishers left India almost 57 years ago. In fact, the judgment is a set back and has shattered the faith of the common man in democracy and *rule of law*.

*Supra*, n. 1.

In another case of abuse of power in 1999<sup>34</sup> a three member Bench of the apex court turned down its earlier decision of 1996 and ordered for the refund of a sum of Rs. 50 lakh of exemplary fine imposed on Captain Satish Sharma. As stated earlier, Captain Satish Sharma, former Petroleum Minister, was charged and found guilty of arbitrary exercise of his discretionary powers in allotment and distribution of petrol pumps and cooking gas agencies. Applying the principle of accountability and transparency in the Governments' working, the court held Capt. Sharma personally liable for breach of public trust. The court said:

Captain Sharma had doled out the petrol pumps as if he was a king' and the pumps were his personal property, he showed scant respect for the office he was holding and also for the rule of law and that his act was unconstitutional.<sup>35</sup>

It was thought that with the 1996 judgment the doctrine of public trust has finally been incorporated in our legal system. It would have helped to clean and make the working of our administration transparent and efficient, besides being judicious. However, it had a very short life.

As earlier stated the appointment of Miss J. Jayalalita, a convict and disqualified person to contest election as a Chief Minister, the Governor of Tamil Nadu is a glaring example of abuse of constitutional authority in a democracy.

The persons in authority and responsible for the enforcement of law and setting legal machinery in motion to safeguard the interest and well-being of the people should not use, abuse and misuse the law for their personal and political gains and advantages depicted in a number of cases discussed earlier. Being custodian of law, they have special responsibility and solemn duty to protect and preserve the *rule of law* and the interest of the people, the weak, the deprived, the handicapped, and the neglected in

<sup>34</sup> *Supra*, n. 16.

<sup>35</sup> *Supra*, n. 8.

society so that they can avail of and enjoy social, economic and political justice guaranteed under the Constitution of India equally.

In a democracy, persons hold the office as a trustee and are supposed to exercise and discharge powers and duties honestly and sincerely with clean hands to set an example instead of being an object of ridicule and disgrace. Unless the normal and orderly functioning of the public offices are ensured through strong legislative, executive as well as judicial exercise, corrupt politicians and public servants could even paralyze the functioning of such institutions and thereby hinder the democratic policy.