



Mishra (left) and Sinha: coming out on top

JAGANNATH MISHRA

Cleared By The Court

THE INDIA-RUBBER man, Jagannath Mishra, had done it again. For months, the Bihar chief minister's political fate had hung in the balance while the Supreme Court heard the Patna Urban Cooperative Bank case. Then, last fortnight, Mishra's fortunes took a sudden upward swing. On December 16, the Supreme Court held, by a two-one majority, that the withdrawal by Mishra's own government of Vigilance Case No. 9(2)78 against the chief minister and Nawal Kishore Sinha, ex-chairman of the urban bank, was valid and lawful. Also, the day before the judgment came, it was announced in Delhi that Mishra would lead the Indian delegation to the October Revolution celebrations in Moscow on December 20.

The urban bank case had acquired tremendous political significance in the light of Mishra's less than exemplary record in government since 1980. Nine days before the Supreme Court judgment, however, Union Minister of State for Information and Broadcasting N.K.P. Salve concluded discussions with journalists' bodies on the Bihar Press Bill—which had brought



B. Islam



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Mishra nation-wide notoriety—and had it sent back to Patna for 'reconsideration'. As the Bihar Legislative Assembly opened for its winter session on the very day of the judgment, Mishra's principal political foe, Karpoori Thakur, suffered another blow when the Patna High Court ruled that Speaker Radhanandan Jha was cor-

rect in stripping him of his status as leader of Opposition.

It was during Thakur's Janata regime that the criminal case had been filed against Mishra. The majority of Justices Baharul Islam and R.B. Mishra agreed with Solicitor-General K. Parasaran, who was the Bihar Government's counsel, that

Thakur nursed a grudge against Jagannath Mishra, and that D.P. Ojha, who as superintendent of police in charge of the Vigilance Department had instituted the urban bank case against Mishra, had been appointed to that post despite being indicted for dereliction of duty in the L.N. Mishra murder case by the K.K. Mathew Commission. "Remand for trial", said Justices Islam and Mishra, "will be a mere exercise in futility, and it will be nothing but an abuse of the process of the court to remand the case to the

trial court."

Vested Powers: The petition before the Supreme Court, filed by Bihar Lok Dal (K) MLA Sheo Nandan Paswan, revolved around Section 321 of the Code of Criminal Procedure, 1973 (CrPC), which reads: "The Public Prosecutor or Assistant Public Prosecutor in charge of a case may,

with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried."

The point at issue was whether or not the Government could use the powers vested in it by Section 321 of the CrPC to withdraw a case against anybody. On June 20, 1981, the special judge hearing the case allowed its withdrawal after Special Public Prosecutor Lalan Prasad Sinha argued that the withdrawal was necessary on four grounds—lack of prospect of successful prosecution in the light of the evidence, implication of the accused as a result of political and personal vendetta, inexpediency of the prosecution for the reasons of state and public policy, and adverse effects that the continuance of the prosecution would bring on public interest in the light of the changed situation.

Technically, the special judge interpreted Section 321 in its acutely legal sense. The precedent he quoted was in the *R.K. Jain vs The State* case, where the petitioner had challenged, in the Supreme Court, the withdrawal of the Baroda Dynamite case against George Fernandes and others by the Janata government, and of four cases against former defence minister Bansi Lal by the Congress(I) Government after it returned to power in 1980.

Legal Precedent: The Supreme Court had then upheld the withdrawal of the cases on the ground that the offences allegedly committed by Fernandes and others were of a political character—the motive of the accused being that they wanted to change the Emergency government of Indira Gandhi—and, in Bansi Lal's case, that the argument of paucity of evidence was justified and in one of the four cases, the complainant had been suitably and profitably compensated.

Justices Islam and Mishra accepted the R.K. Jain precedent as a principle earlier enunciated by their court, but Justice V.D. Tulzapurkar, who presided over the bench, delivered a judgment in sharp contrast to those of his fellow judges, not merely in its length but also in its attention to the convoluted course the case had taken since 1975. Tulzapurkar held that though withdrawal of prosecution under Section 321 is an executive function of the public prosecutor for which statutory discretion is vested in him, "the discretion is neither absolute nor unre-

viewable but it is subject to the Court's supervisory function".

Quoting from the Supreme Court's judgment in *State of Bihar vs Ram Naresh Pandey*, Justice Tulzapurkar observed that in cases of withdrawal of prosecution, "the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes". In *State of Orissa vs Chandrika Mohapatra*, the Supreme Court had ruled that where prosecution was sought to be withdrawn, "the ultimate guiding consideration must always be the interest of administration of justice".

TULZAPURKAR also brought out two important principles enunciated in the R.K. Jain case. In the first place, he said, the court had to consider "whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations". Secondly, in the R.K. Jain judgment the court had observed: "The court has a responsibility and a stake in the administration of criminal justice and so has the



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—Justice V.D. Tulzapurkar

Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible misuse or abuse by the executive by resort to the provisions of Section 321 CrPC."

Justice Tulzapurkar, disagreeing with Justices Islam and Mishra, held that the offences Jagannath Mishra and his co-ac-

cused were charged with were not political in nature. On the contrary, he said, no "public interest" had been endangered by the prosecution, and the "ordinary common law crimes" the accused were alleged to have committed were not followed by "any mass agitation or communal frenzy or regional dispute or industrial conflict or student unrest".

The crucial loophole lay in the fact that Section 321 of the CrPC does not distinguish between political and criminal offences. "Yet," said Supreme Court lawyer and Bharatiya Janata Party Vice-President Ram Jethmalani, "the distinction does exist, and political offences are a well-recognised category both in international and domestic law. In a society governed by the rule of law you cannot condone moral turpitude. If we accept the judgment it will mean that we can never punish corruption in high places."

Wrong Legitimation: Justice Tulzapurkar expanded on this when he said: "No results of any election, howsoever sweeping, can be construed as the people's mandate to condone or compound the common law crimes allegedly committed by those who have been returned to power... success at the hustings is no licence to sweep all dirt under the carpet and enjoy its fruits nonchalantly."

Lalit Bhasin, vice-chairman of the All India Congress Committee(I)'s legal cell, agreed with the majority judgment. "The Supreme Court," he said, "has merely used the correct legal position in the R.K. Jain case. There is no such thing as a political offence. All offences come under the Indian

Penal Code. The decision to withdraw prosecution is political."

Bhasin had a point when he stated that there was no legal issue of great importance involved in the urban bank case. "The petitioner Sheo Nandan Paswan," he said, "never made it a plea that the court should reconsider its own judgment in the R.K. Jain case. Section 321 of the CrPC presupposes a double safeguard, whereby both the public prosecutor and the court independently apply their minds."

Unusual Circumstances: However V.M. Tarkunde, who had argued in the R.K. Jain case, felt that the court's decision last fortnight was wrong. "In George Fernandes's case," he pointed out, "the argument was that during the Emergency, democratic rights were unavailable, and so

opponents of the regime resorted to unconstitutional methods. Surely in that case prosecution could not continue after the Government changed. Moreover, the Bansi Lal case was tagged on to the Fernandes case withdrawal because of some deft manoeuvring."

The urban bank case in the Supreme Court had been dogged from the beginning by controversy. Justice D.A. Desai and Justice Mishra originally admitted Paswan's appeal on April 20 last year and fixed July 19 for the next hearing. Two days before that, however, Justice Desai and his wife, along with Justice P.N. Bhagwati, visited Patna to attend a symposium organised by the Bihar State Legal Aid Board. Jagannath Mishra's Government offered to put its airplane at their disposal so that they could visit Bodh Gaya and Nalanda, but the judges, aware by then that Mishra was trying to embarrass them, refused. They however shared a breakfast with Mishra, and at a lunch hosted by the board, Mishra made it a point to pay obsequious attention to justice Desai.

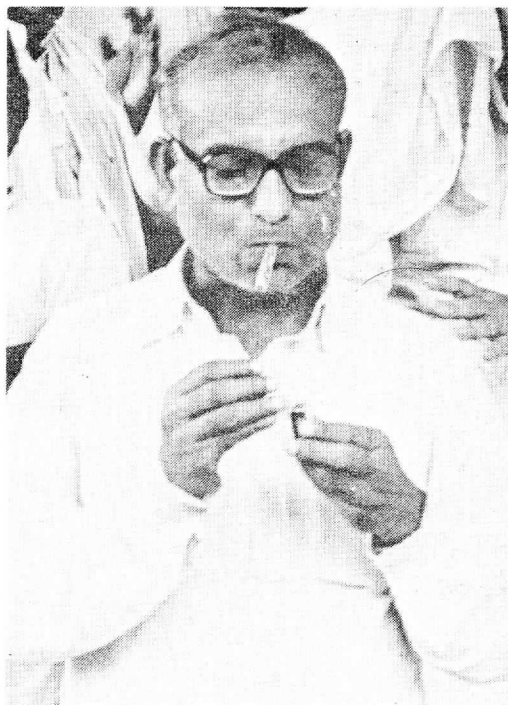
The event was noticed, and photographs of Justice Desai with Jagannath Mishra were printed in the newspapers. This led to unseemly speculation about the course the imminent urban bank hearings would take. Eventually, the Supreme Court postponed hearings to October 5, and Justice Desai was replaced on the bench by Justices Tulzapurkar and Islam.

THE URBAN bank hearings extended over eight days between October 5 and 19. A week before the judgment was delivered, Justices Tulzapurkar and Islam had finalised their respective verdicts, and copies were sent to Justice Mishra. Yet, INDIA TODAY learnt, until 8.30 a.m. on the morning of the judgment, neither of the two other judges had had any inkling of which side in the tie Justice Mishra had cast his deciding verdict on.

The hearings in the Supreme Court also threw up all the evidence gathered during the lengthy investigation of the urban bank case. Here, too, after examining the facts, Tulzapurkar ruled: "The documentary evidence, the genuineness of which cannot be doubted, clearly makes out a prima facie case against (Jagannath Mishra) sufficient to put him on trial for the offence of criminal misconduct under Section 5(1) (d) read with Section 5(2) of the Prevention of Corruption Act, 1947. Similar is the position with regard to the incidental offence of forgery under Section 466, Indian Penal Code."

December 16 was a gloomy day for Jagannath Mishra's opponents, both within the Congress(I) and outside. The heat generated by the urban bank case and the Bihar Press Bill controversy had encouraged dissidents in the state ruling party. The judgment was followed by the suspension of Bihar dissident leader Ashwani Kumar Sharma from the Congress(I).

Swift Revenge: Two days later, minutes before a jubilant Mishra flew to Delhi en route to Moscow, Sudhish Narain Singh, an inspector-general rank police officer who was the chairman and managing director of the Bihar State Police Construction Corporation (BSPCC) was



Paswan: "The judiciary has lost, not me"

unceremoniously stripped of his duties. In 1980, when Singh was inspector-general of the Vigilance Department, he had refused to withdraw the urban bank case after Jagannath Mishra returned to power. In February last year, after he was superseded as inspector-general of Bihar, Singh had to obtain a high court injunction in order to get his BSPCC posting.

Sheo Nandan Paswan, the man who had filed the abortive appeal, was not surprised by the judgment. "If anyone has lost because of this judgment," he said, "it is the judiciary. Let the people judge the judgment."

Happiest of all, of course, was Nawal Kishore Sinha, the ex-chairman of the Patna Urban Cooperative Bank. At the height of the uproar over the bank's

affairs in 1975, he had been pointedly rewarded with the additional posts of chairmanship of the state Tubewells Corporation and chairmanship of the Patna Regional Development Authority. At one point, it transpired, his bank had given a loan to a certain Krishna Gopal Singh, who furnished as security Patna's huge Gandhi Maidan and platform 4 of the Patna Railway Station.

"We had an idea from the very beginning," said Sinha, "that the verdict would be in our favour. The Supreme Court judgment has proved that truth finally triumphs." The urban bank was liquidated in 1976, but Sinha's star has not plunged. Under his friend Jagannath Mishra's generous dispensation, Sinha currently held the chairmanship of the Patna District Board and was the president of the Pradesh Congress(I)'s Agriculture Cell.

Sharp Criticism: The larger implications of Jagannath Mishra's reprieve, however, drew sharp comment from editorialists and legal experts. Said former additional solicitor-general Soli Sorabjee: "The judgment is unfortunate. It will result in the common man becoming cynical about law, and about the administration of criminal justice. Moreover, the reasoning of the majority judgments that evidence against Mishra would not be forthcoming if the case were sent back to trial court is very strange. It means that no chief minister or minister can ever be arraigned on criminal charges."

Added Jethmalani: "The Supreme Court has laid down a very evil precedent. Since persons in high places cannot be prosecuted, it means that they can be prosecuted only when they are out of power. So every time the argument will be made that the case arises out of political vendetta." Upendra Baxi, legal scholar and currently vice-chancellor of the South Gujarat University, feared that "Adjudication on high political matters will be tainted with the suspicion of being 'indirect adjudication', that is the shaping of judicial outcomes by promises and pressures outside the courtroom and the Constitution."

The *Indian Express* summed up the case in a telling editorial: "It is not that Jagannath Mishra was being pronounced guilty. He was being offered the opportunity of a fair trial and used his authority as chief minister to scuttle the case. The Supreme Court's judgment ends the matter. But for many, Jagannath Mishra will remain an undertrial at large."

—CHAITANYA KALBAG