Section 630 should thus be viewed as a socio-economic offence as it is against the interests of the company and its shareholders. Checking white collar crimes is very complicated. It is much wider than the form and content of the penal law. White collar crimes should be properly understood and an overall attitudinal change in this regard is the only method by which the gravity of the offence can be appreciated in its true sense.

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Hazardous Industries and Liberalisation Whether *Mehta* Remains to be Potent?

Diwakar Agarwal*

Now, with the policy of liberalization being well into the irreversible stage, a question that still remains irksome is that of the liability of a company to the public for damage caused by an accident arising out of a hazardous activity.

The Indian law took a momentous turn due to P. N. Bhagwati, C. J's judgment in *M. C. Mehta v. Union of India,*[1] in which he laid down the general principle of absolute liability. By virtue of this principle, an enterprise engaged in "a hazardous or inherently dangerous industry" would be "absolutely liable" to compensate for any harm caused to the public on account of that dangerous industry. It must absorb such costs as part of its overheads. The Supreme Court thus removed the protective umbrella provided by the exceptions to the general principle of tort law as laid down in *Rylands v. Fletcher.* [2]

Another startling rule was the 'deep pocket theory' by which the amount of compensation payable would be dependent on the "magnitude and capacity" of the enterprise and hence the damages awarded would be variable from one accident to another — but presumably all similarly situated victims of a given accident would be treated the same and not be determined on the basis of actual consequences suffered by the victims. This principle was justified on the ground of deterrence.[3]

These two principles of law, particularly the 'deep pocket' theory, though indicative of judicial dynamism, would however make a potential investor in India recoil with horror and upset the liberalisation bandwagon. This proposition is examined in the light of various judicial and legal developments.

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1. AIR 1987 SC 1086 para 31 at 1099; hereinafter *Mehta.*

2. (1868) L. R. 3 H. L. 330. This case promulgated the rule of strict liability; however certain exceptions eg. Plaintiff's own default, Act of God, Statutory Athencity, Act of third party and consent of the plaintiff are provided.

3. See Supra, n.1, Para 32 at p. 1099.

The petitioner in *Mehta* sought to invoke the Supreme Court's jurisdiction under Article 32 of the Constitution. For this, it is mandatory that Shriram Foods and Fertilizer Industries be defined as 'State' within the meaning of Article 12 of the Constitution. The Supreme Court could not come to a definite conclusion in this regard and therefore failed to ignite its jurisdiction. Hence, it directed the petitioner to the appropriate court, the High Court, to nominate judges to expeditiously dispose of the proceedings.[5]

However, before disposing of the matter thus, the Supreme Court addressed itself to the point in question viz., the measure of liability of an enterprise to the public for damages caused by an accident arising out of a hazardous activity and laid down the aforementioned principles. Thus, it is clear that the Supreme Court was not required to decide upon the liability of an enterprise. In fact, due to the non-activation of the Supreme Court's jurisdiction, the matter ends in it being sent to the appropriate courts below and the second question, that of liability, does not survive.

The Supreme Court's views on this question are thus in the nature of *obiter dicta* as it did not 'require decision'.[6] This view has been subscribed to by the Supreme Court in *Union Carbide Corporation v. Union of India,*[7] wherein it is stated that "what was stated (in *Mehta*) was essentially *obiter.*"

The question that remains is whether the principles laid down in *Mehta,* though *obiter,* will be binding at least on the Courts below. The law in this regard seems to have been settled by Krishna Iyer, J.'s words[8] "Declaration of law by Courts, if it be only by the way has to be respected." Thus this *obiter dictum* of the Supreme Court should be accepted as binding.

This being so, *Mehta's* principles would continue to remain binding upon the Court's below, although they are in the form of an *obiter* and have been declared so.

Comparison with Western Law — Examination of these principles on merits will be fruitful keeping the legal developments and provisions of the developed countries in mind. This is particularly so, as India is trying to enter the global economy. Though *Mehta* seems to be upsetting the liberalization bandwagon, a comparision with Western law shall throw light upon the question whether *Mehta's* principles are indeed far-fetched and without a sound base.

Regrading the first principle of absolute liability, the many seceptions which act as riders to the *Rylands v. Fletcher* principle of this liability seem to make it inadequate to meet the requirements of modern times. So much so, that in the United Kingdom, several specific legislations have practically done away with the seceptions.[9]

The second principle, propounding the 'deep pocket' theory has been criticized by the Supreme Court of India itself in *Charan Lal Sahu v. Union of India* [10] which held this principle to be an "uncertain premise of the law", with difficulties in having it accepted in India on the basis of available evidence and established principles and internationally as a just basis

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5. See paras 30 & 33.

6. See **Madhav Rao v. Union of India,** A.I.R 1971 S.C 63.

7. AIR 1992 S.C 248 at p. 261.

8. **Municipal Committee v. Hazara Singh,** AIR 1975 S.C 1087.

9. **See eg.** S. 76 Civil Aviation Act, 1982; Nuclear Installation Act, 1965; Merchant Shipping (Oil Pollution) Act, 1971 and Central of Pollution Act, 1974. **See further** , Winfield and Tolomicz on Tort, 11th ed. (1979) pp. 421, 422, 227 and Clerk and Lindsell on Torts, p. 15th edition (1982) p. 1201

10. AIR 1990 SC 1480 at 1545, Per Sabyasachi Mukerji, C.J.

in accordance with law. Although Mukherjee, C. J., does not expressly overrule the principle, he casts doubt on it by opining its acceptance to be only "within the realm of possibility".

However, the idea of 'deep pocket' itself is not *sui generis*. In medical malpractice cases in the U.S.A., doctors have posted that subjective influence such as the *deep pocket* of the defendant, affects the awards. Though legal theory holds such motivations as illegitimate,[11] the fact that such an idea and feeling has been articulated, nevertheless, holds mush water, and is indicative of what the judges are moved by. In this regard, laying down of the theory in the form of a judgement in *Mehta* merely expresses the incerticulate motivations in the mind of a judge.

It is further submitted that this theory only prescribes the form of the liability and in substance, the liability is valid. Surely, the Indian judiciary is competent and independent enough to prescribe the form and does not require international ratification in this regard. Moreover, its justification on the ground of deterrence is quite valid and indicative of judicial cognizance of the need to protect Indians from an onslaught of inherently dangerous and possibly faulty industries from abroad, which the Western countries are not permitted or are in fear to put up in their own territories.

The legal trend in the United States of America is clearly pro-environment and very dynamically so. A striking parallel is evident in the law relating to clean-up costs for threatened or actual releases of hazardous wastes under the Comprehensive Environmental Response, Compensation and Liability Act, 1980.[12]

Clean-up costs is the essential remedy for release of hazardous wastes and the pollution caused by it, just as compensation to the victims of an accident in a hazardous and dangerous enterprise is the essential remedy.

Under Section 107(a) of CERCLA, current owners and operators of hazardous waste sites are potentially liable for the clean up costs, associated with actual or threatened releases of hazardous wastes.[13] Courts have construed the "owner" or operator liability provision to mean that the current owner or operator of a contaminated site or facility can be held liable, and strictly so for clean-up costs *even if the damage occurred during a previous ownership*.[14] Although it is open to an innocent land owner who "did not know and had no reason to know that it acquired property containing hazardous waste" to prove his innocence and absolve himself of liability, this provision and its interpretations are clearly indicative of the strictness of the law and the absoluteness of the liability.

In a recent case, *United States, v. Fleet Factory Corp.*[15] the Eleventh Circuit held that a lender that had not foreclosed on its secured property would be considered an owner if it had "participated in the financial management of a facility to a degree indicating a *capacity to influence* the Corporation's treatment of hazardous wastes".[16]

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11. See Boujberg, *et al.*, "Juries and Justice: Are Malpractice and other personal injuries created equal?" **Law and Contemporary Problems.** Vol. 54, No. 1, page 5, Winter 1991.

12. Hereinafter CERCLA.

13. See CERCLA (107(a)(1), 42 U.S.C.A) 9607(a)(1) (West 1983 and Supp. 1990) Note: "Clearing up the Debris after **Fleet Factory**: lender's liability and CERCLA's security interest exemption", 104 *Harvard Law Review*, 1249 (1991) hereinafter Debris.

14. See, **New York v. Share Reality Corp,** 759 F.2d 1032, 1044 (2nd Cir. 1985); (emphasis supplied)

15. 901 F.2d 1550 (11th Cir. 1990), *Cert. Denied*, 177 S.Ct. 752 (1991) Debris, 1250.

16. **Ibid.**, at 1557 Debris. (Emphasis added).

With regard to the question whether foreign investment in India will be affected, it is difficult to analyse whether the scam will work against the New Economic Policy. True, the scam may act as a discouraging factor as far as foreign investment is concerned. However, there are many other factors too which have resulted in foreign investors shying away from India. First of all, the registration process itself is too tedious and it takes at least three to four months for clearance through all the relevant channels. Moreover, foreign brokers are not allowed to operate in India and foreign investors may be reluctant to hire the services of an Indian broker. To top it all, the capital gains tax is still a very high 30 per cent. The above mentioned factors as well as the political situation in the country have, to a larger extent been responsible for discouraging foreign investment in India.

White Collar Crimes with specific reference to Section 630, Indian Companies Act, 1956[1]

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The emergence of the corporate culture and the consequent rise of a small controlling elite — the managerial class, has led to an intricate institutional machinery. Adherence to ethics is necessary for the honest functioning of the corporation. The inability of society to appreciate this dimension has resulted in the emergence and growth of white collar crimes. These crimes are more dangerous not only because the financial stakes are higher, but also because they cause irreparable damage to public morals.

Sutherland[2] defines a white collar criminal as a person of the upper socio-economic class who violates the criminal laws in the course of his occupational or professional activities.

The development of new dimensions in the crimes of the corporate world has rendered this definition obsolete. Block and Geis[3] categorise white collar crimes as:

1. Crimes committed by individuals as individuals,
2. crimes committed by employees against the Corporation, and,
3. crimes committed by policy making officials of the Corporation.

Section 630, Indian Companies Act[4], falls within the second part of this classification. The section encompasses the penalty for wrongfully withholding the property of the Company by an employee or officer thereof.

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1. Section 282A of the erstwhile Companies Act of 1913.
2. **Ibid..**
3. Ssection 630 concerns itself with the penalty for wrongful withholding of property..
4. Cited in Ahmed Siddique , **'Criminology': Problem and Perspectives**, (Lucknow: Eastern Book Co., 1983) 34