CHAPTER 22
PUBLIC INTEREST LITIGATION IN REVENUE MATTERS

SYNOPSIS

"Great Innovations never come from above; they invariably come from below…[from] the much-derided silent folk of the land-those who are less infected with academic prejudices than great celebrities are wont to be."

—C. G. Jung in Modern Man in Search of a Soul, p. 243

Oh perpetual revolution of configured stars,
Oh perpetual recurrence of determined reasons,
Oh world of spring and autumn, birth and dying!
The endless cycle of idea and action,
Endless invention, endless experiment.

—T.S. Eliot in the First Chorus in The Rock:

"I repeat… that all power is a trust-that we are accountable for its exercise – that, from the people, and for the people, all springs, and all must exist.[1]*"*

—Benjamin Disraeli

1. The concept of *locus standi* widened

Public interest litigation in revenue matters is an assertion of public law view of *locus standi,* which means "the right to be heard in a court of law"[2]. Lord Denning

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1. In *Vivian Grey*, BK VI. Ch. 7.
2. SOD. The Latin expression *locus standi* means "place of standing".

in *R v Inland Revenue Comrs*[3] refers to an article published "a week ago" in the New Law Journal ([1980] NLJ 181) as *'Locus standi.* The major Problem in Revenue Law ……who can challenge the legality of a tax concession?' The Court of Appeal solved this problem by widening the concept of *locus standi.* The House of Lords in *National Federation of Self-Employed and Small Businesses Ltd*[4] upheld the view of the Court of Appeal widening the concept of *locus standi* through a remarkable judicial creativity. Our Supreme Court relied on this decision while determining the frontiers of Public Interest Litigation (PIL for short) in *S.P. Gupta & Ors v President of India & Ors* (AIR 1982 SC 149). Justice Bhagwati quoted with approval Lord Diplock's observations in his speech in the House of Lords:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by out-dated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped…It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge."[5]

Justice Bhagwati examined the problem of *locus standi* in Public Law in the light of various decisions of the Supreme Court of India, and the English and American authorities, and articulated his views with clarity and comprehen-siveness in these words:

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective."[6]

Lord Denning, on a comprehensive review of authorities, endorsed the general principle stated by Professor H W R Wade QC in his Administrative Law (4th ed. 1977, p. 608). Prof. Wade says:

> "It [the law] should recognise that public authorities should be compellable to perform their duties, as a matter of public interest, at the instance of any person genuinely concerned; and in suitable cases, subject always to the discretion, the

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3. [1982] 2 All ER 378 at 388.
4. [1981] 2 All ER 93 HL.
5. [1981] 2 All ER 93 at 107.
6. AIR 1982 S.C. at p.194.

court should be able to award the remedy on the application of a public-spirited citizen who has no other interest than a regard for the due observance of the law."[7]

2. *I.R.C. v. National Federation of Self-Employed and Businesses Ltd.* analysed

A closer look at *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd.*[8] is called for the following reasons:

(a) The judgments of Lord Denning MR in the Court of Appeal,[9] and of Lord Wilberforce, Lord Diplock, Lord Scarman, Lord Fraser and Lord Roskill of the House of Lords have discussed *locus standi* on broad juristic parameters in the context of statutory powers and duties of the Board of Inland Revenue under the British income-tax law which, on material points, are almost analogous the income-tax law in India.

(b) The judgments recognize a paradigm shift in income-tax jurisprudence.

Lord Denning MR brings out the facts, which led to the filing of the petition in *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd.* concisely in the decision of the Court of Appeal. Thus the story goes:

> "The men are called the 'Fleet Street casuals'. There are about six thousand of them. They do casual work for newspapers. They love a bit of humour. When signing their pay dockets, they do not sign their true names. They use fictitious names and addresses. One favourite is 'Mickey Mouse of Sunset Boulevard'. Another is 'Sir Gordon Richards of Tottenham Corner'. But they do not sign in these names merely for fun. They use them for a serious purpose. It is to hide their true identities: so that they should not be discovered by the taxmen. By this means the Fleet Street casuals have defrauded the Revenue of about 1m a year.
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> The employers did not know their true names. But the trade unions did. There are three trade unions controlling this newspaper trade: NGA, NATSOPA and SOGAT. Every casual worker has to be a member of these trade unions: because they operate a closed shop. Each union has the names and addresses of all its casuals. When a man seeks work, he has to go to the 'call office' of the union. He is then given a 'call slip' authorising him to go to a particular newspaper for work. He does his work; receives his pay; signs his pay docket as 'Mickey Mouse' or other fictitious name and address; and goes home. This device defeats the Revenue authorities completely. They do not know the true names of these men. The trade unions do. They have a complete list of the men, their names and addresses, and the shifts worked by them. In many ways the trade unions fill the role of the men's employers. But the Revenue authorities have no access to these lists. They have no power to compel the unions to disclose the true names and addresses. So they cannot assess them to tax on their earnings.

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7. *R. v. Inland Revenue Comrs* [1980] 2 All ER 391 C.A. *overruled on different point in I.R.C.v. National Federation of Self-Employed and Small Businesses Ltd*, [1981] 2 All ER 93 HL.
8. [1981] 2 All ER 93 HL.
9. [1980] 2 All ER 387 C.A.

> A year or two ago the Revenue authorities found out about these false signatures. So did the BBC. They had a programme on Panorama exposing these frauds. The Revenue authorities were perplexed. They wondered what was the best way to deal with the problem. They would have liked to have legislation to deal with it. But in the absence of new legislation, they felt that they had to make a special arrangement with those concerned. It looks as if these casuals threatened to take industrial action if their names were disclosed and they were made to pay up their past taxes. So the Revenue authorities had discussions with the employers and the trade unions. They came to a special arrangement. It was this: the men were to give their true names for the future and pay their future taxes: but they were given an amnesty for much of the past. They were to be let off most of the past tax of which they had defrauded the Revenue."

The Federation brought proceedings by judicial review. The Revenue objected to the proceedings by judicial review. The Court of Appeal states:

> "The Board object to these proceedings being taken against them. They say that no one has any standing to come to the courts to complain of their actions. No one at all. Not an ordinary citizen. Not even a taxpayer who is aggrieved by them. Not even the 50,000 of them in this association."

The Court of Appeal allowed the appeal of the Federation. The House of Lords upheld the view of the Court of Appeal on the point of *locus standi* but sustained the amnesty granted by the Board of Inland Revenue as that was held to be a due discharge of functions of care and management of taxes entrusted by law to the Board. The House of Lords considered the provisions of the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970. Lord Scarman thus analyzed the statutory scheme:

> "Commissioners are appointed 'for the collection and management of inland revenue': see s I (1) of the Inland Revenue Regulation Act 1890. They 'shall collect and cause to be collected every part of Inland Revenue': see s 13(I). 'Inland revenue' means the revenue and taxes 'placed under the care and management of the Commissioners': see s 39. The Taxes Management Act 1970 places income tax under their care and management and for that purpose confers on them and inspectors of tax very considerable discretion in the exercise of their powers. It also imposes on them the very significant duty of confidence in investigating and dealing with, the affairs of the individual taxpayers. ……"

The statutory provisions "established a complex of duties and discretionary powers imposed and conferred in the interest of good management on those whose duty it is to collect the income-tax." The House of Lords sustained the decision of the Revenue treating it a good exercise of management power. The last paragraph of Lord Scarman's judgment brings this out clearly:

> "The federation, having failed to show any grounds for believing that the Revenue have failed to do their statutory duty, has not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application. Had it shown reasonable grounds for believing that the failure to collect tax from the Fleet Street casuals was an abuse of the Revenue's managerial discretion or that

there was a case to that effect which merited investigation and examinations by the court, I would have agreed with the Court of Appeal that it had shown a sufficient interest for the grant of leave to proceed further with its application. I would, therefore, allow the appeal."

The central principle in the decision *IRC v Federation of Self-Employed* is what Lord Denning has said in his Closing Chapter:

> "The reasoning of each of their Lordships is worthy of study in depth. The principal reason was because there was no evidence whatever that the Board of Inland Revenue had done anything unlawful or *ultra vires*. Lord Diplock made it clear that, if there had been any substance in the charge of conduct, which was unlawful or *ultra vires*, then thee, federation would have had a *locus standi*."[10]

Even though on merits the Inland Revenue succeeded before the House of Lords, which held that the impugned action was a proper exercise of managerial discretion of the Board of inland Revenue, the various judgments delivered by the House of Lords are rich in reservations delineating circumstances when judicial intervention would be justified in the proceedings initiated by public spirited persons to enforce the rule of law, and to set right administrative lawlessness. At core, all the observations on the reach of the powers of the Board of Revenue illustrate the doctrine of *ultra vires*. Some of these observations are quoted hereunder:

- It must follow from these cases and from principle that a taxpayer would not be excluded from seeking judicial review if he could show that the Revenue had either failed in their statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their powers altogether. Such a collateral attack, as contrasted with a direct appeal on law to the courts, would no doubt be rare, but the possibility certainly exists.[11] (Per Lord Wilberforce).

- It would, I think, be extravagant to suggest that every taxpayer who believes that the Inland Revenue or the Commissioners of Customs and Excise are giving an unlawful preference to another taxpayer, and who feels aggrieved thereby, has a sufficient interest to obtain judicial review under Ord 53. It may be that, if he was relying on some exceptionally grave or widespread illegality, he could succeed in establishing a sufficient interest, but such cases would be very rare indeed and this is not one of them.[12] (Per Lord Fraser of Tullybelton).

- The federation, having failed to show any grounds for believing that the Revenue have failed to do their statutory duty, has not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application. Had it shown reasonable grounds for believing that the failure to collect tax from the Fleet Street casuals was an abuse of the

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10. AIR 1982 SC 149 at Pg.293.
11. [1981] 2 All ER HL 93 at 98.
12. [1981] 2 All ER HL 93 at 108.

> Revenue's managerial discretion or that there was a case to that effect which merited investigation and examination by the court, I would have agreed with the Court of Appeal that it had shown a sufficient interest for the grant of leave to proceed further with its application.[13] (per Lord Scarman.)

- I have already said that the court must not cross that boundary between administrations whether good or bad which is lawful, and what is unlawful performance of a statutory duty. [14] (per Lord Roskill.)

It was quite understandable why the Board of Inland Revenue was so sore about the grievance of the petitioners in IRC *v National Federation of Self Employed*. The Board asserted that none had any standing to come to the courts to complain against their actions. When they had taken this stand they were excusably wrong. Perhaps they acted on the ideas (much delicious to the Executive for obvious reasons), which had found favour in *R v Lords Comrs of the Treasury(1872)*[15]. In *McDowell & Co v CTO*[16] our Supreme Court had acknowledged the paradigm shift in tax jurisprudence. The income-tax law is a branch of Public Law under which, as observed by Lord Hewart CJ in *Rex v. Special Commissioners* (20 TC 381 at 384), the duties imposed upon the Commissioners of Income-tax are "in the interests of the general body of taxpayers, to see what the true assessment ought to be, and that process, a public process directed to public ends …".(quoted by Kanga and Palkhivala in *The Law and Practice of Income-tax* 8th ed. at p 1509). Walton J observed in *Vestey v Inland Revenue Comrs*[17]:

> "I conceive it to be in the national interest, in the interest not only of all individual taxpayers which includes most of the nation, but also in the interests of the Revenue authorities themselves, that the tax system should be fair.... One should be taxed by law, and not be untaxed by concession ... A tax system which enshrines obvious injustices is brought into disrepute with all taxpayers accordingly, whereas one in which injustices, when discovered, are put right (and with retrospective effect when necessary) will command respect and support"

3. A PIL in Revenue matters in India

Assessment Orders in 24 Cases of FIIs and MNCs were passed by the Assessing Officers, posted in Mumbai, under the Income-tax Act, 1961 in March 2000. Their taxable events had taken place in the territory of India. Their lobbyists and persuaders pleaded that the Assessing Officers had done wrong. There were good materials to show that the Indo-Mauritius Double Taxation Avoidance Convention entered into by the Central Government in 1983 had been misused

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[13]. [1981] 2 All ER HL 93 at 114.
[14]. [1981] 2 All ER HL 93 at 120.
[15]. LR 7 QB 387, 41 LJQB 178, 26 LT 64, 36 JP 661, 12 Cox CC 277, DC, 16 Digest (Reissue) 346, 3635.
[16]. (1985) 154 ITR 148 SC.
[17]. (1977) 3 AII ER 1073 at 1079, (1998) Ch 177 at 197-198.

by the treaty shoppers. Pressure was mounted for vacating such orders. The statutory appellate authorities were not trusted. They wanted things on their terms. The Central Board possesses power to issue administrative instructions to their subordinates for proper administration of the Income-tax Act in terms to Section 119 of the Income-tax Act, 1961. The Board issued Circular No. 789 dated April 13, 2000 going back on its view announced in the Press Note that a grievance could be addressed through the prescribed appellate process. It required the Assessing Officers that wherever the non-residents produced Certificate of Residence, no more inquiry be made: on the basis of the Certificate alone the issues as to beneficial ownership and residence be decided. This Circular was designed to permit the Treaty Stoppers to avail of the benefits of the Indo-Mauritius Double Taxation Avoidance Convention by masquerading as the Mauritian citizens. It mandated that the operators reaping profits on the Indian Stock Exchange were not chargeable to capital gains in India. And there was no capital gains tax in Mauritius. Against this Circular a Writ Petition (PIL)[Civil Writ Petition No. 2802/2000] was filed before the Delhi High Court by *Azadi Bachao Andolan.* A more comprehensive PIL in the matter was filed before the Delhi High Court by *Shiva Kant Jha* in Civil Writ Petition (PIL) 5646/2000. The High Court quashed the impugned Circular[18] The Union of India and the Central Board of Direct Taxes preferred SLP before the Supreme Court. [SLP (C) Nos 22521-22522 of 2002]. The Division Bench of the Supreme Court (Coram: Hon'ble Justice Ruma Pal and Hon'ble Justice B. N. Srikrishna) delivered Judgment in Civil Appeal Nos 8163-8164 of 2003 held that the Delhi High Court Judgment was wrong on all counts. The appeal was allowed.[19] The Supreme Court was lukewarm in appreciating the PIL character of the case. Describing its nature the Court observed the case was just "said to be" a PIL. [The expression "said to be" with infinitive means "be alleged or reported"[20]; "alleged" means "state (something) as a fact but without proof; give as an argument or excuse"[21]]. Perhaps for this reason a "short shrift"["discourteously brief or disdainful consideration": *Chambers 21st Century Dictionary*] was given to it.

From the arguments advanced before the Delhi High Court and the Supreme Court it was clear that our government believed that once the right to raise revenue was granted by Parliament, what it did with it was its own affair. It could use it, misuse it, waste it, donate it, throw it to go down the gutters, or allow it to be looted. Our Government questioned the *locus standi* of the petitioners. Irony reached its climax when a tax haven company, which became a co-appellant with our Government for the first time before the Supreme Court, too had the temerity to question the *locus standi* of a citizen of this Republic who was a taxpayer, and had contributed to India's struggle for Freedom in a substantial way. It was difficult to understand how our government "agreed to provide Mauritius with a $ 100 million line of credit for development of a cyber city technology development

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18. [(2002) 256 ITR 563].
19. [(2003) 263 ITR 706].
20. The New Shorter Oxford Dictionary.
21. Oxford Advanced Learners Dictionary Encyclopaedic Ed.

centre. It is difficult to under stand how India where per capita income is US $ 440 is so charitable to a country with per capita income of US $ 3,540. When persons in power, with the resources of this country, are out to promote their ends in tax havens and many other enclaves in mini or micro-states, then who would have time to think of the plight of the millions in our country, without food, without education, without health care facilities, and without effective system for redressing grievances. It is only by changing our attitudes towards resources of the state we can hope to escape a situation which brings to mind these lines from William Blake:

Some are Born to Sweet Delight,
Some are Born to Endless Night.

Without crash apathy to the common people of the country, India's Solicitor General could not have argued that the treaty shoppers could legitimately poach into our resources on the analogy of the Indian citizens opening industries in backward areas in our country to take advantage of tax concession. The argument of the law officer was deservedly courted the following comment from the High Court:

> "So far as submission of the learned Solicitor General to the effect that Mauritius route may be taken recourse to for gaining benefit as is done by the industrialist setting up industries in M.P or some other place in the country where tax benefit are given, the same is stated to be rejected."

But the point to be considered is: was it proper for our government to make this sort of atrocious argument. If the government is allowed to hold this sort of view, our country is surely to be swindled and 'short shrifted' in this smoggy "global world." It is strange that the Solicitor General of our Republic could see no difference between the citizens who swim and sink by the nation's fortune, and those outsiders who are at best only fair-weather friends.

It is time to recognize that any citizen can bring to the notice of the Court acts of administrative lawlessness. A distortion of law is itself a matter of gravest concern. In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mog*[22] the Queen's Bench Division granted *locus standi* to Lord Rees-Mogg on the sole ground that he brought " the proceedings because of his sincere concern for constitutional issues." The material facts of the Case were thus summarised in the first paragraph of the judgment by Lloyed LJ.:

> "The applicant in these proceedings, the Rt Hon Lord Rees-Mogg, seeks, *inter alia*, a declaration that the United Kingdom may not lawfully ratify the Treaty on European Union including the Protocols and Final Act with Declarations (Maastricht, 7 February 1992; EC 3 (1992); Cm 1934). Mr Pannick QC advances three main arguments on his behalf. First, by ratifying the Protocol on Social Policy the government of the United Kingdom would be in breach of s. 6 of the European

[22]. [1994] 1 All ER 457.

> Parliamentary Elections Act 1978. Secondly, by ratifying the protocol, the government would be altering the content of Community law, without parliamentary approval. Thirdly, by ratifying Title V of the Union Treaty, the government would be transferring part of the royal prerogative to community institutions without statutory authority, namely the power to conduct foreign and security policy."

Locus standi of Lord Rees-Mogg was recognised for the following reasons (at p. 461 of the Report):

> "There is no dispute as to the applicant's *locus standi*, and in the circumstances it is not appropriate to say anymore about it, save refer to the observations of Slade LJ in *Ex p Smedley* [1985] 1 All ER 589 at 595, [1985] QB 657 at 669. It is suggested by Mr Kentridge that these proceedings are no more than a continuation by other means of arguments ventilated in Parliament. *Be that as it may, we accept without question that Lord Rees-Mogg brings the proceedings because of his sincere concern for constitutional issues.*" [Italics supplied]

Our courts too have not lagged behind. In Municipal Council, *Ratlam v. Shri Vardichan* our Supreme Court held that the center of gravity of justice has shifted, as the preamble to the Constitution mandates, from the traditional individualism of *locus standi* to the community orientation of public interest litigation. Public-spirited persons sought redress against the Municipality, which had failed in discharging its public duties. In *Pillo Mody v. Maharashtra*[23], the Bombay High Court granted *locus standi* to Piloo Mody who had complained that the Government, through three Ministers, had leased out valuable plots of land at a gross undervalue. In a number of Cases our courts have enforced the principle of Public Accountability. Public power is to be exercised under the discipline of law, and only for public benefit.

In income-tax law policy quotient is minimal. Policy content of the income-tax law does not concern those who actually administer the Income-tax Act, 1961. Under this Act policies are only legislatively enacted in the form of statutory provisions. Hence, the issues to which the income-tax law gives rise, are to be decided on the count of *legality* alone, rather than in the light of policy considerations.

The decision of the Division Bench of our Supreme Court in of *Azadi Bachao* is, it is submitted, open to serious criticism, as the matter did not proceed the way a PIL in revenue matter should have preceded. Mr. Salve, who argued the Case before the Delhi High Court, and Mr. Sorabjee, who argued the Case before the Supreme Court, were the distinguished Law Officers of our Government. But throughout the judicial proceedings the Law Officers sailed in the same boat with a tax haven company. Its awkwardness reached a high point when they vehemently argued against the Constitution Bench decision of our Supreme Court in *McDowell* that our Government had won despite the pleadings by the same gentlemen

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[23]. *H.M.Servai,* Constitutional Law of India *4th ed. Vol I , 1381-2.*

before the Constitution Bench which decided the Case of *McDowell & Co*!.

In fact, in a PIL, there is no lis. The Petitioner merely assists the Court. He is a party only in a very formal sense. But in *Azadi Bachao* the judicial procedure was clearly adversarial. Factual substratum, supplied by filing the Assessment Order of M/S Cox & King was wrongly circled out. The way the litigation was conducted by the Government of India left not even an *iota* of doubt that it was a willing instrument of certain pressure group. Everybody saw how in quick succession the CBDT issued (perhaps made to issue) the Instruction No. 12 of 2002 dated Nov. 1, 2002, how I.T. Rules were amending by inserting Part IX-C with effect from 6.2.2003 (immediately corrected by Notification No 39/ 2003 dated 26. 2. 2003) and how the Section90 (1) was amended as if some Furies in the Aeschylean tragedy were on wings. For the fist time, the circular making power of the Central Board of Direct Taxes had been questioned in a PIL. The entire discussion as to the CBDT's power of Circular making was done under *inter parties* situation. Whenever circulars beneficial to the taxpayers are issued such taxpayers enjoy the fruits of administrative clemency, and they are obviously happy with the benefits they get. The CBDT, which grants such benefit can surely not grumble against its own acts. So both the sides are happy. There would be none to raise the question of *ultra vires*. Only a PIL petitioner can question before the Court of law the legality of such circulars. The Court failed to examine in a PIL perceptive the *vires* of the CBDT Circular. A circular may be binding on the officers in the Department to ensure uniformity in the assessments made by different officers. But when the issue of *vires* is raised in a PIL, the Hon'ble Court should have examined it from a new observation post; on the count of legality alone. The PIL perspective was lost once the Court relied on *Roy Rohatgi*[24], and accepted the Attorney General's submissions which can be paraphrased thus: 'Let the tax law be followed in its breach. All is fair in amassing FDI and gathering foreign exchange.' It is never to be forgotten that our Court is, as Lord Mansfield said, "the general censor and guardian of the public manners"[25].

4. Changing judicial attitude to PIL

It is too early to judge the judicial attitudes towards PIL in revenue matters. But there are grounds for concern. The role of the State is shrinking. Taxation is gradually becoming less and less important. Capitalism has sprung to rule and reign. There is more and more emphasis on obtaining resources from non-tax sources. Judicial trends in the recent years also cause concern. Shri Prashant Bhushan, who had represented *Azadi Bachao* both before Delhi High Court and the Supreme Court, has very perceptively observed in an article:

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[24]. *See the Chapter on* "*Reading with Discrimination*".
[25]. *Jones v. Randall*, (1774), Lofft 383, 98 E.R. 706.

> "There is now a large body of cases decided in the last decade where the court has not only betrayed a lack of sensitivity towards the rights of the poor and disadvantaged sections of the society, but has also made gratuitous and unmerited remarks regarding abuse of public interest litigation. This decade has also been the decade of "economic reforms' as they are called. Several public interest cases were filed during this period challenging alleged perversions, corruption and other illegalities involved in the new economic policies. Almost all these cases were dismissed. In several of them, the court hinted at and made remarks suggesting an abuse of public interest litigation."

The author wishes that his apprehensions should go wrong. For the present the author would end this Chapter with a quotation from Edward Lear's *Book of Nonsense*:

There was an Old Man who said, 'Hush!
I perceive a young bird in this bush!'
When they said, 'Is it small?'
He replied, 'Not at all!
It is four times as big as t