

PRESSURES ON JUDGES

Justice Kurian Joseph's disclosures immediately after retirement touch upon the integrity and independence of judges of the Supreme Court.

BY A.G. NOORANI

THE Bar, the media and the public have been remiss in neglecting to notice the very grave implications of the remarks, made in successive press interviews, by Justice Kurian Joseph immediately after retiring as judge of the Supreme Court. He rendered high service by speaking as he did. It is unfortunate that the response has been a poor one. His statements touch upon the integrity and independence of judges of the Supreme Court.

On December 2, 2018, he referred to "starkly perceptible signs of influence with regard to allocation of cases to

different benches selectively, *to select judges who were perceived to be politically biased*" (*The Times of India*, December 3, 2018; emphasis added, throughout). Two points deserve note: one concerns the retired Chief Justice of India (CJI) Dipak Misra; the other is his assignment of cases "selectively to select judges who were perceived to be politically biased".

The next day, he repeated both points. "We made it clear to Justice Misra that the decisions that he was taking don't seem to be independent. There was no positive response at all to what we told him or asked him. *He kept allotting cases selectively to selective judges with political bias*" (*Hindustan Times*, December 4, 2018). Who were they? We need to know.

Mark his precision of language—"allocation of cases... selectively to select judges who were perceived to be *politically* biased". This was repeated the next day. "He kept allotting cases selectively to selective judges with political bias." It is unfair to pick on anyone at random. But it is right and proper to ask why Justices Dhananjaya Y. Chandrachud and A.M. Khanwilkar who sat with CJI Dipak Misra for long did not recuse themselves. They knew that the CJI was under a cloud, knew

also that he favoured them, and knew of the resentment of their brother judges. Yet, they sat still. This will never be forgotten. They will never be able to live it down.

SETALVAD PRECEDENT

Consider this precedent set by M.C. Setalvad when he was still a struggling junior. "There was an interesting incident in my early days at the Bar in which Bhulabhai Desai was involved. In a matter in which I was the junior of Dinshaw Mulla, and Kanga and Bhulabhai were against us. There was a reference of the dispute in suit to the joint arbitration of Bhulabhai and myself. At the very first arbitration meeting held in Bhulabhai's chamber, Bhulabhai appeared to show an extremely strong bias in favour of his former client and appeared to treat the arguments on the other side very curtly. I felt greatly distressed at being an arbitrator in an arbitration which was being conducted in such a manner. I had not then attained a standing at the Bar which could enable me to assert myself or correct my co-arbitrator who was the senior in whose chamber I was reading. In the circumstances, I thought it best to withdraw from the arbitration and the arbitration fell through" (Setalvad; page 16). These two judges had it in their power to end the abuse and teach CJI Misra a lesson. They went along with him merrily.

The charges against CJI Misra are grave enough, especially when viewed in the light of the allegations made against him publicly by members of the Supreme Court Bar and in the media. *The Caravan* issue of July 2018 had a carefully documented article entitled "The Darkest Hour: Dipak Misra's shadow over the Supreme Court". He was alleged to have been "indicted for fraud in a judicial order" (page 33).

The article was printed in closely printed pages from pages 30 to 53. It was meticulously documented. The case concerning Judge B.H. Loya was also discussed. It establishes a prima facie case for an independent inquiry. Anyone is free to form his own opinion on the merits. What is shocking is the absence of any reply from CJI Misra. In Britain, no self-respecting judge would have continued to sit on the bench without suing the writer for libel and thus inviting a judicial opinion on the charges.

JUDICIAL LAPSES

Judicial lapses go a long way back. One of the most distinguished judges in India, M.C. Chagla, Chief Justice of the Bombay High Court, readily agreed to be a member of India's delegation to the United Nations General Assembly in 1946; a job in the bounty of the Government of India. He was censured for this by the then leader of the Bar, Sir Chimanlal Setalvad, in a letter to *The Times of India*. B.R. Ambedkar referred to it pointedly in the Constituent Assembly on May 24, 1949, while Chagla was still Chief Justice. Ambedkar said: "Personally I share those sentiments" of Setalvad (*Constituent Assembly of India*, Volume 8, page 266). He was the first judge to make political speeches on public platforms while holding the office of Chief Justice. He was criticised

by both Prime Minister Jawaharlal Nehru and the first Chief Justice of India, Justice Harilal J. Kania. His letters to Nehru reveal his traits. A letter to Nehru, in reply to Nehru's criticism, dated July 3, 1953, ended by lauding him for giving "to our country an international status, which even countries more seasoned in diplomacy may well envy" (Chagla, *Roses in December*, page 496).

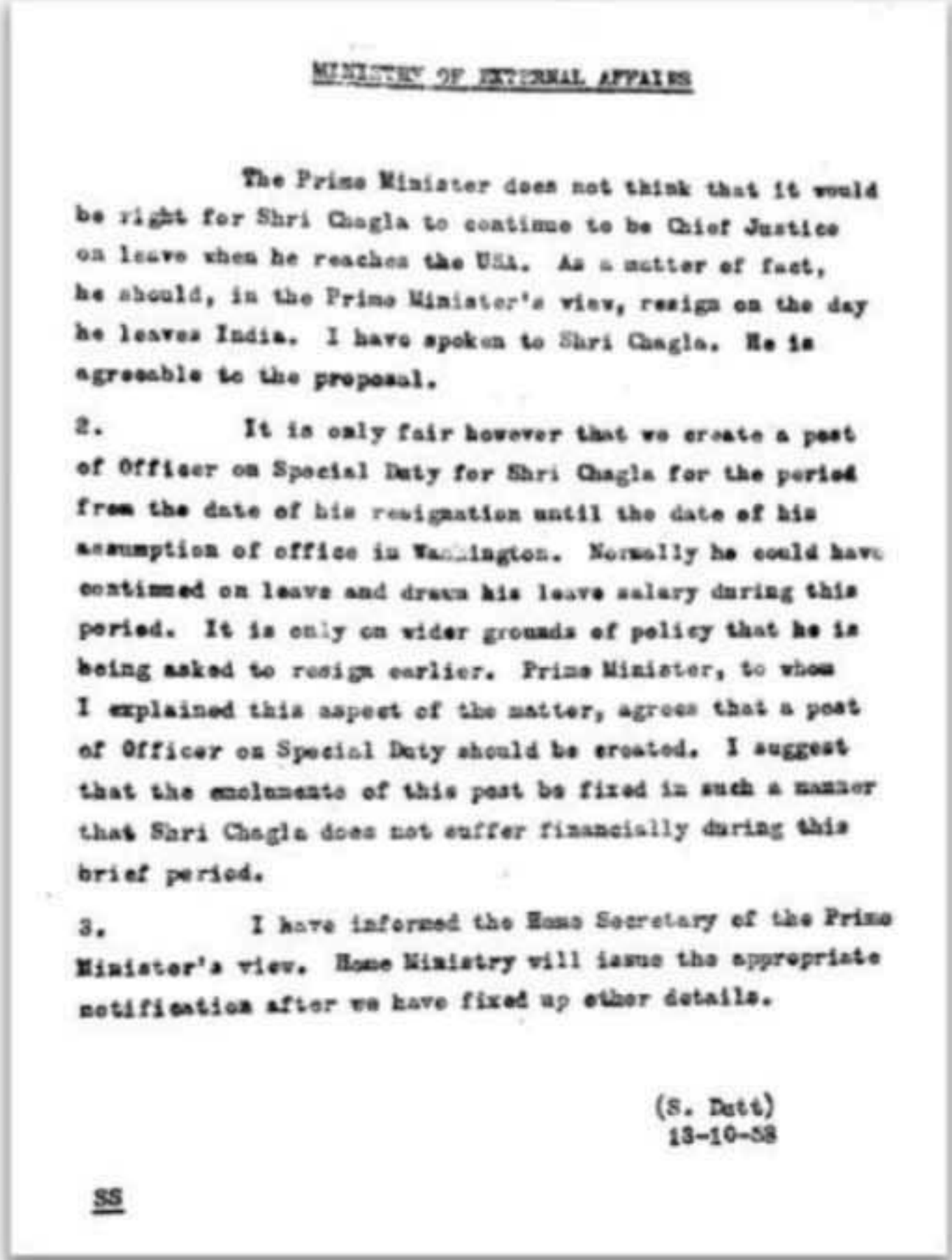
More significant were the concluding lines of his letter of January 29, 1953, to "My dear Panditji". Chagla wrote: "I mean every word when I say that my services are always at your disposal and I am prepared to serve my country in any capacity in which you think my work will be most useful to the cause for which you stand for which in my own humble way I also stand." The ardour of the allegiance is coupled with an offer of services.

His record as judge was not an unblemished one. During the British Raj, Talpade's habeas corpus case was as important as the one in 1976 during the Emergency. M.C. Setalvad wrote: "It is, however, noteworthy that Weston, an Englishman and a member of the I.C.S., had the courage and independence to dissent from Beaumont CJ and recommend the release of Talpade in accordance with the judgment of the Federal Court even though that involved the release of an Indian nationalist while a World War was raging. That Chagla did not concur with Weston, but chose to join Beaumont in defying the Federal Court is strange; perhaps, he was too junior a judge to resist the Chief Justice"; a very charitable comment for a friend, indeed (*My Life*, page 79).

Far more apt is this: "The Law Commission had, after careful consideration, expressed the *unanimous* view that the practice of judges looking forward to or accepting employment under the government after retirement was undesirable as it could affect the independence of the judiciary. We therefore recommended that a constitutional bar should be imposed on judges accepting office under the Union or State governments similar to the bar in the case of the auditor and Comptroller General and members of Public Service Commissions. Chagla, who was Chief Justice of Bombay and a member of the *Law Commission*, had concurred in this recommendation. He had, however, always yearned to be in politics, and had while Chief Justice expressed political opinions which a judge ought not to. He was so keen to get into politics that soon after the Report was signed by him ('even before the ink of his signature on the Report was dry'—as observed in a letter to the press) he resigned his office to become India's Ambassador to the United States. His action was characteristic of the self-seeking attitude of many of our leading men" (ibid, page 261).

THE ARCHIVES

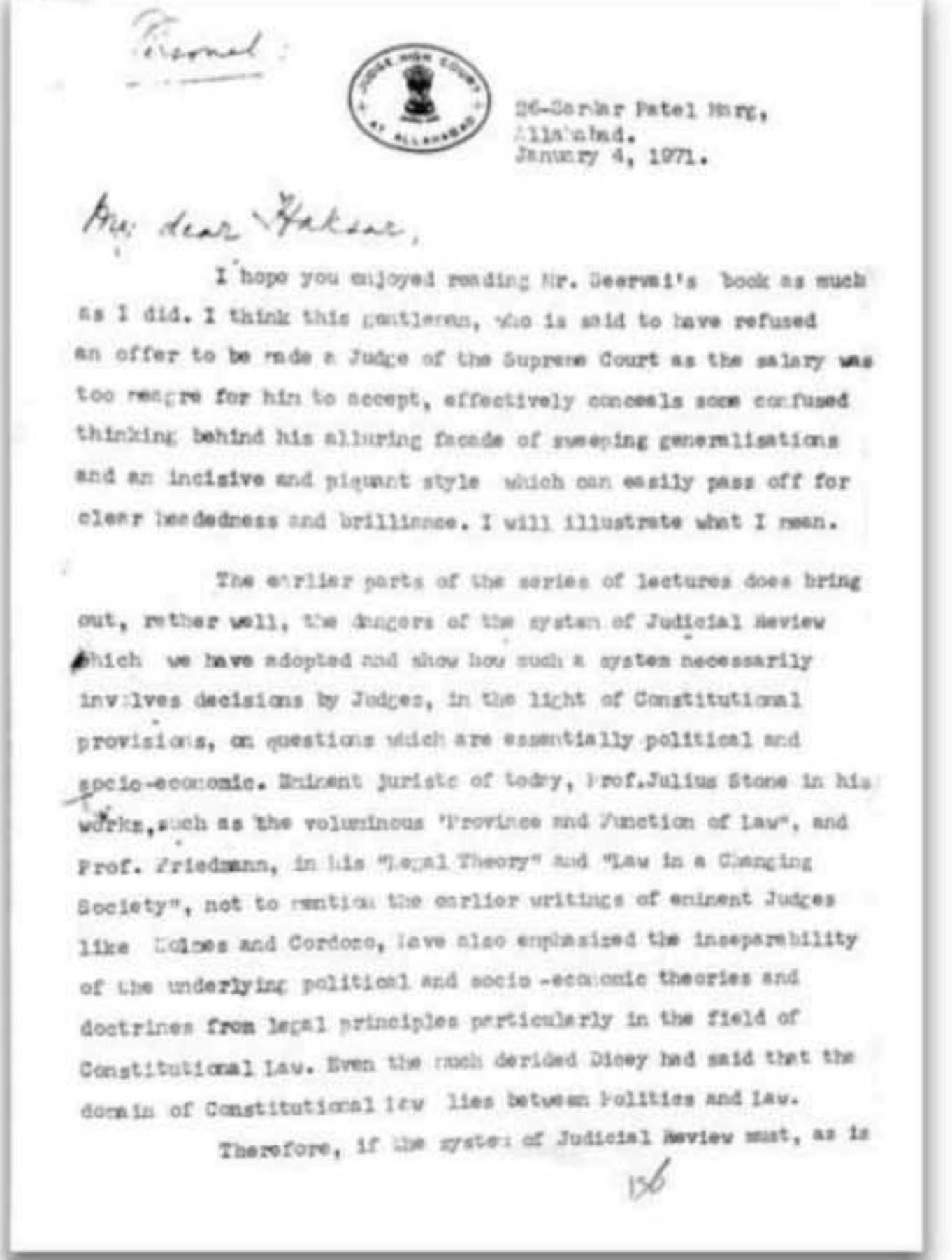
The archives are a merciless institution. Read this note (see Document 1, Dutt's Note) by Foreign Secretary S. Dutt dated October 18, 1958: *Chagla wanted to retain a lien on the office of Chief Justice after his return as Ambassador. Worse, for a few thousand of rupees he was apparently ready to be designated as Officer on Special Duty; a post Ministers create for their favourites.*



DOCUMENT 1 (left) by Foreign Secretary S. Dutt dated October 18, 1958, saying how Prime Minister Nehru did not think it was right for M.C. Chagla to continue to be Chief Justice on leave when he reached the U.S. as India's Ambassador. Document 2 (right) is Justice M.H. Beg's letter when he was judge of the Allahabad High Court to P.N. Haksar, Prime Minister Indira Gandhi's Principal Secretary.

What is one to say of Justice M.H. Beg's letter when he was judge of the Allahabad High Court to P.N. Haksar, the Prime Minister's Principal Secretary (Document 2). Beg attacked Seervai and Palkhivala and became a Supreme Court judge where he fully fulfilled his promise as a stooge of the government. Haksar's admission that he contacted all the judges who were to hear Indira Gandhi's appeal, except Justice H. R. Khanna, is well known. We do not need to consult the archives on another CJI, P.N. Gajendragadkar. His memoirs, *To The Best of My Memory*, give him away completely. It has some revealing gems about his close friendship with Prime Minister Lal Bahadur Shastri (pages 184-187) as well as with T.T. Krishnamachari, another "personal friend of mine". He advised Shastri on how to conduct himself at Tashkent.

"The third occasion, which I recall, was on the night previous to Shastri's departure for Tashkent. We talked about several matters pertaining to the visit and the problems which he would have to face. 'The Russians are determined negotiators,' I told him, and 'you will find that they know more about your quarrel with Pakistan than some of our Ministers do. You will have to watch your steps carefully and not succumb to coercion or inducement or persuasion or smiles or frowns.' He said: 'I look a small man but I have an iron will and you can trust me to stand up to any measure which the Russians may have up their sleeve.'" (page 187). What did Gajendragadkar know of foreign affairs? The External Affairs Min-



istry was staffed with diplomats of high calibre and the Shastri Cabinet had able Ministers. Gajendragadkar served in many posts after retirement.

One of the most uprightful judges who served on the Supreme Court, Justice P. Jaganmohan Reddy, recorded: "One of the most significant pieces of information about how one of the Ministers of Indira Gandhi's Cabinet tried to influence one of the colleagues in the 13-judge bench (Fundamental Rights Case 1973) has been narrated by his wife. It appears that the Cabinet Minister and his wife who were well known to my colleague and his wife invited themselves on one or two Saturdays for lunch to persuade him to take the view which the government wanted the court to take so that the judgment would be that of a majority which without him would be a minority. In fact, the colleague was told that if he didn't agree he would be losing a great opportunity for a higher post. I was proud to know of his forthright refusal and also when he told them that such a job may be offered to another colleague who will really welcome it" (*The Judiciary I Served*, Orient Longman, 1999, page 248).

Evidence of pressures is hard to come by. Evidence of proximity with Ministers is easily available. It is forbidden to judges to hobnob with them. When those red lines are crossed, proximity glides into familiarity, rendering pressure unnecessary. Such judges become like the famous shepherdess of old—utterly immune to rape; because she is never unwilling. □



FORMER CHIEF JUSTICE OF INDIA Dipak Misra (right) with Justice Kurian Joseph at a function in New Delhi on December 3.