

## **Jurist par excellence**

### **Justice Satyaranjan Dharmadhikari (Retd)**

The death of Mr. Ashok Desai, Senior Advocate is an extremely painful and sad event not only for everyone in the field of law and judiciary but also for followers of democracy and our Constitution. A person like him is not merely an advocate or a legal and constitutional expert, but, is also an authority in such field. One may claim himself to be a senior advocate after spending many years in the legal profession. However, not everyone can scale the heights of Ashok Desai. It is very rare to find a senior jurist, legal luminary and a mature lawyer like him. His range of work and grip on various laws was spectacular. His contribution in the fields of Constitution and law enhanced and strengthened peoples' respect for democracy and the institution of judiciary. His presence in the High Courts and Supreme Court was reassuring. Any top ranking and multi faceted professional enjoys a distinct aura and commands huge respect in his own profession and society. Mr. Desai always commanded such position, but, his professionalism was supplemented by high moral values and commitment towards society. He always believed that the discharge of one's own professional duties should ensure protection of fundamental rights guaranteed by our Constitution to the citizens and it was his firm conviction that this will enable the judiciary to keep a proper check on the Government. Hence, it is the duty of every professional to contribute for an efficient judicial system and for preservation thereof. He, therefore, always maintained that advocacy was not only about earning money and fame, but, also about raising the quality of one's own work and making a mark and impression thereof so that the effect of the concerned judgment and order would be deeply engraved on the constitution, the provisions of laws and interpretation thereof. He was of the firm view that judgments of the High Courts and Supreme Court should be guiding lights and torch bearers that can regulate our lives and day to day affairs for generations to come.

Our Constitution guarantees justice ..... and promises rule of law. Therefore, the judiciary is not merely a 'machine' delivering judgments and orders. Hence, he always believed that Courts should discharge their functions from this angle. He maintained the above zest till he breathed his last. He emphasised that justice should not only be done but it should be seem to be done.

I consider myself to be fortunate to work with Ashok Desai during my days of practice as an advocate. In fact, it was very difficult to get an opportunity to work with senior and accomplished lawyers of those days. The other professionals in the legal field used to engage the advocates for assisting senior advocates after considering their preferences, likes and dislikes. It was always understood that the likes of Ashok Desai were not to be displeased. I started my career as an assistant advocate with Kanga &

Company, a partnership firm of advocates. There was no stipend or salary, but lot of work and opportunities to learn. The said firm used to engage Ashok Desai, J. I. Mehta, Atul Setalvad, Mahendra Shah, Veerendra Tulzapurkar (who eventually became my senior), Virag Tulzapurkar etc. in several complicated matters. Of course, it would be possible to do so only if all the relevant issues such as clients' choice, the fees of all these counsel and the firm's own income were resolved. However, in a city like Mumbai the market prices of assets and properties were and are huge. Large industrial houses, Indian - foreign banks, land holders and wealthy families used to be clients of Kanga & Company. Therefore, they required lawyers of equal standing as that of their opponent. Therefore, the matters required an army of the above leading counsel and the likes of K. S. Kooper, G. A. Thakker, Iqbal Chagla etc. Each of them expected the respective firms to make all arrangements for them. We used to be therefore always at the beck and call of the firm's partners. Several conferences would be held to prepare for the matters. We used to visit the respective offices or houses of these senior advocates with a pile of papers, documents and law books. In one such matter I met Ashok Desai and my dream was fulfilled. However, even before that while I was a student of law in the Government Law College I used to visit the High Court out of curiosity. One had to push his way through into a court room where hearing would be going on in celebrated matters. Ashok Desai was arguing one such matter. The matter was regarding the alleged corruption by Mr. Antulay, the then Chief Minister of Maharashtra. It went on for days together before Justice B. Lentin. Mr. Desai's capabilities were on full display therein. I was highly impressed not only by his arguments but also by his conduct in court. The clients of Mr. Desai were no lesser mortals. Socialist Leader and ex-member of Parliament Mrinal Gore and her colleague Baburao Samant had filed this case against Antulay. It was not easy to gain faith and respect of such clients. Ashok Desai entirely believed the truthfulness of the said clients' statements, their earnestness and their respect for democratic principles. Therefore, his arguments had a distinct edge. I learnt from Ashok Desai that the practice on the original side of the Bombay High Court is extremely competitive, skillful and requires intelligence and shrewdness. On the original side I *inter alia* learnt how to prepare for a matter, how to obtain necessary documents while fighting against the Government (At that time the Right to Information Act was not enacted), how to pursue a prayer with perseverance and tenacity. Moreover, there is no question of any remuneration or fees in such public interest matters. If any injustice is seen then it is settled rule to make all out efforts for the client. Then one has to completely forget food, sleep etc. In such cases the relevant documents are important and necessary. It had to be demonstrated that unless such documents are brought on record, the submissions will not have the requisite backing and then truth cannot prevail before the Court. It is a well settled presumption that the affairs of the Government are carried out in accordance with law and that the

Government officials take decisions in public interest. The Petitioner had to undertake huge trouble and efforts to disprove the same. For this purpose, strong documentary and circumstantial evidence is required to be brought on record. In those days it was a gigantic effort and one had to burn lot of midnight oil. Prolonged hours are required to be spent in the reference room and library. The opponent has to be vanquished. The Government officials play lot of tricks to prevent truth from coming on record of the Court. One has to prevail over such tactics. Petitioner has a huge responsibility to rebut these and many such presumptions. It had to be proved by circumstantial evidence in the civil matter that upon giving donations to the public charitable trust formed by Antulay's blessings that such donor, by a backdoor method, was either allotted cement below the agreed and stipulated price or was allotted higher quota of cement at the fixed price. Mr. Desai's clients proved these allegations with his help and succeeded. The injustice was brought before the public and democratic principles triumphed. It is underlined by this judgment that the Chief Minister is a public servant and his conduct is required to be in accordance with law and rules. Antulay had to resign due to Arun Shourie's investigative journalism and Mrinaltai and Baburao Samant's perseverance and struggle.

Many such cases and various celebrated judgments before I joined the legal profession bear testimony the success of Ashok Desai. The evidence of his all round performance is found in innumerable cases. Ashok Desai's father Haribhai was a renowned criminal lawyer. Ashok Desai got an opportunity to handle extremely complicated matters arising under the criminal law and Evidence Act due to his lineage. Shekhar Naphade is a renowned senior counsel in India today. He has mentioned while paying tribute to Ashok Desai that he would very effectively conduct examination in chief and cross examination in civil and criminal matters. Such matters arising in lower courts test your ability as a lawyer. Ashok Desai was a man groomed in such type of advocacy, thereafter at the higher level and finally at the highest level and who reached unimaginable heights. There is simply no comparison between today's lawyers, directly commencing practice in the High Court, shallow at times, not possessing enough knowledge of law, inexperienced, falling short in reading and arguments and lawyers like Ashok Desai. These days many persons, longing for instant success, money, revelry, car, bungalow, properties and not at all being professionals, enter legal practice. They parade themselves as renowned. The social media and newspapers make them famous. However, a true lawyer possesses high moral values, is intelligent and shuns publicity. He doesn't have to display his knowledge. Initially, Ashok Desai did not get much fame. However, I knew about him due to my family background in law. When the drama "Sakharam Binder" was banned, Ashok Desai realised that this impinges upon freedom of speech and expression and that such action was clearly unconstitutional.

He challenged the provisions of the Bombay Police Act, 1951 and the rules thereunder in this matter. These rules were held to be partly unconstitutional. The ban on the drama was lifted. The Sarang couple has thanked and praised Ashok Desai in the book "Binderche Divas" and elsewhere.

Young, promising and trainee advocates as also the students of law must read the entire judgments in the matters of Antulay and Binder. These judgments have been reported in 1981 BLR 427 and 1975 BLR 13. However, more fascinating aspect is Ashok Desai's performance in criminal matters. It is common knowledge that he has ably assisted the Bombay High Court in interpretation of several provisions of the Criminal Procedure Code (Cr.P.C.) and the Indian Penal Code (IPC). For example, in *Shreyansprasad Jain v. Shantiprasad Jain* (1976 BLR 394) the issues whether the provisions of the old Criminal Procedure Code and the new Criminal Procedure Code, 1973 could be reconciled or whether evidence would be required to be recorded again as per the new Criminal Procedure Code, were decided by the Division Bench on the basis of his arguments. The discussion on the issue as to whether it would be appropriate to transfer cases from one Magistrate to another can be found in this judgment. Even when the said judgment was sought to be reviewed (1977 BLR 184) Ashok Desai made detailed submissions while raising objections to maintainability of the review petition. He tried to convince the Court that it was not permissible to do so in criminal cases.

The unparalleled performance of Ashok Desai was evident in several matters challenging the State's power of preventive detention. Whether such detention puts unreasonable restriction on a person's fundamental right to life? (Article 21 of the Constitution of India) and How and when such detention can be challenged? Whether such detention order can be challenged prior to implementation thereof? All these questions were raised by him in *Jayantilal Shah v. State of Maharashtra* (1981 BLR 190) and he established that if such order itself was illegal and unconstitutional then the detenu could challenge it before being imprisoned.

Apart from this, he also ably handled matters relating to various civil suits, civil and criminal appeals, Urban Land Ceiling Act, 1976, Land Acquisition Act. There were several acclaimed advocates practicing on the appellate side of the Bombay High Court. Despite this, the member advocates of AAWI (Advocates' Association of Western India) would engage Ashok Desai and Atul Setalvad for arguments. It is always a difficult task to challenge the enactments and the provisions and sections thereof relating to land revenue, agricultural produce, co-operative societies etc. on the touchstone of Constitution of India. They must pass the test of not only being constitutionally valid but they should also fit within the legal framework. A true lawyer is the one, who on a bare

reading of the provisions of an enactment and considering the scheme of such Act assists the Court in arriving at a holistic interpretation of all such provisions. Moreover, all this would be required to be done on the basis of facts of each of the matter. Desai was quite renowned for this. He successfully defended a magazine in a suit relating to a defamation matter. Due to this, the suit filed by a well known actress (Simi Garewal) was dismissed. I am therefore tempted to say that you may practice anywhere, any type of matter, be it original suit or appeal, you must have your own thought process, preparation and imprint thereon. Though you may be intelligent and clever, you must also be creative and proactive. The arguments of Ashok Desai always revealed his inborn talent and creativity. He would unravel matters in his own inimitable, distinctive and crisp style. At times, he would deliberately leave a sentence incomplete. The weak side of his client's case would be skillfully and systematically concealed thereby. At the same time, he would be quick to bring forth the errors committed by the other side and their falsehood. He would at times bypass the issues and very deftly point out various shades of the respective clients' nature. To this end, he would also *inter alia* quote incidents in everyday life, apt examples, literature and poems of celebrated writers. As a result, his arguments would never be boring and tedious. He very well knew that the client stands to lose if the judges get bored and disinterested due to a lengthy argument. He would therefore quickly make his point or, before touching the main issue, he would narrate in his peculiar style humorous anecdotes. As a result, the judge would remain engaged in the concerned matter. Even if he was required to repeatedly explain very simple and preliminary things he would effortlessly do so. He would salvage his client's case by contending that "you can't unscramble a scrambled egg." and also while explaining about a past event by stating as to how at times one is helpless and that it was certainly not a huge mistake. By his lucid arguments, intricate issues about many complicated provisions of taxing statutes and other statutes including about Mumbai Port Trust, Mumbai Municipal Corporation would be easily resolved. Many a time his mere entry would reduce the tense atmosphere in a court room. He would calm down the tempers in court by placing his hand on the shoulder of the opposite counsel and calming him or, occasionally, by mildly scolding the junior counsel appearing with him. That apart, Desai was firm on certain issues. This aspect of his nature as also his fearlessness was evident to all during the emergency. During the emergency personal liberty was endangered and the freedom of speech had come to an end. However, the Bombay High Court stood like a rock and while giving credit for the same to judges like Justice Tulzapurkar, Justice Ramakant Bhat and Justice J. M. Gandhi, credit must also be given to the likes of Ashok Desai and others who were not sufficiently prominent till that time. When people like Seervai, Palkhiwala, Sorabjee, Nariman are leading a war from the front, they require equally strong and brilliant soldiers to assist them. Ashok

Desai ably supported these legends. The world saw the distinct proactiveness, unbiased conduct and strength instead of judicial impotency.

After emergency may senior advocates settled in Delhi and Ashok Desai ably filled the void in the Bombay High Court. The scope and sphere of his practice became extensive. He appeared in various matters relating to Constitution and elections. At that time, the advice of Ashok Desai proved to be useful to leaders like Sharad Pawar. While occupying the post of Attorney General and the post of Solicitor General before the same, Ashok Desai settled in the country's capital. It was no wonder that Ashok Desai adorned these posts after his unparalleled achievements from 1977 to 1989 in Mumbai. Thereafter, Ashok Desai advised Sharad Pawar when allegations were made against him in an election petition between Balasaheb Vikhe Patil and Yashwantrao Gadakh on the basis of a speech. Sharad Pawar successfully challenged the adverse judgment of the Bombay High Court with the help of Ram Jethmalani and Ashok Desai. Sharad Pawar even today acknowledges with gratitude that we have lost a fearless, decent, gentle and cultured personality like Mr. Desai.

I personally became very close to him due to Barrister Raja Bhosale. Certain members of State Legislature such as Shivajirao Naik, Gurunath Sarang Patil etc. were trapped in the clutches of the provisions of the Anti Defection Act. They were trying to wriggle out of the same. However, Arun Gujarathi, the Speaker of State Legislature declared them disqualified. These persons challenged his said order in the Bombay High Court. Vinod Bobde (the elder brother of the present Chief Justice of India) was appearing for these persons and I assisted Ashok Desai for the other side. Several conferences would be held at Mr. Desai's residence in Mumbai while preparing for these matters. These meetings revealed his affable nature to me. He would not commence the conference till I joined. Then we would read books in his library for hours on end. We received the love and affection of his family members also. He would warmly enquire about my father. We would leave for the Court from his house after relishing the good old memories. He would hold the fort alone for all the Respondents in Court. Mr. Desai made it a point to come from Delhi in this matter and another matter of the State lottery. I appeared with him in the said matter also. An equation that anti defection law means Ram Jethmalani and Ashok Desai was the rule of the day in the whole country. Then be it the matter of Ravi Naik or that of Kashinath Jalmi in Goa; wherever matters under this enactment would arise the names of these two would come to the fore. In the state of Goa it was a foregone conclusion that if such a matter reached court, Ashok Desai was bound to be engaged therein. It was an unwritten rule that if an appeal was filed in Delhi from any election matter in Mumbai, be it on the issue of Hindutva or otherwise, Ashok Desai would definitely be briefed. In the matter of Subhash Desai v. Sharad Rao, Ashok Desai ably handled the case of Sharad Rao. [In this matter Vasant

Kotwal, Senior Counsel and Justice Hemant Gokhale (Retd.) had appeared for Rao.] I consider myself to be fortunate to get a chance to appear with him in two-three of such matters. These experiences have proved to be useful even today.

I have innumerable memories of him. However, there is a limit to how much one can write. The prayer that let his departed soul be bestowed with peace would be futile unless and until we all and the future generations of lawyers and worshippers of liberty do not take inspiration from Ashok Desai and make sincere efforts to augment and strengthen the Constitution of India and the institutions that have taken birth thereunder.

Original Marathi article "Prakand Vidhidnya" of Justice S. C. Dharmadhikari, former Judge, Bombay High Court published in Loksatta dated 19.4.2020 translated in English by Vaibhav V. Joglekar, Advocate, Bombay High Court.