

RIGHTS OF CITIZENS

RIGHTS OF CITIZENS

BY

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FOREWORD BY

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GANESH & CO. MADRAS

THE CAMBRIDGE PRESS. MADRAS

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APPENDIX A

SPECIAL BENCH

Extract from the judgment of the Special Bench composed of Sir Lawrence Jenkins, Chief Justice and Judges Mr. Stephen and Mr. Woodroffe. *In re-Mahomed Ali.*

Mr. Jenkins observes:—

The Advocate-General has admitted, and I think very properly, that the pamphlet is not seditious, and does not offend against any provision of the Criminal Law of India. . . . But he has contended, and rightly in my opinion, that the provisions of the Press Act extend far beyond Criminal Law; and he has argued that the burden of proof is cast on the applicant, so that however meritorious the pamphlet may be still if the applicant cannot establish the negative the Act requires, his application must fail.

And what is this negative? It is not enough for the applicant to show that the words of the pamphlet are not likely to bring into hatred or contempt any class or section of His Majesty's subjects in British India, or that they have not a tendency in fact to bring about that result. But he must go further, and show that it is impossible for them to have that tendency either directly or indirectly, and

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whether by any way of inference, suggestion, allusion, metaphor, or implication. Nor is that all, for we find that the Legislature has added to this the all-embracing phrase "or otherwise." And here I may, not inappropriately, invite attention to section 153A of the Penal Code which has such affinity to the statutory provision governing this case, that it may be regarded as its basis. That section was added to the Penal Code in 1893, and was directed against the promotion and attempts to promote feelings of enmity or hatred between different classes.

It will be noticed that the feeling here described is one of enmity or hatred; no provision is made for contempt. But the more important divergence is that while the Penal Code requires that the enmity or hatred should be not only towards a class but by a class, there is no such limitation in the Press Act as to the source from which these hostile feelings should proceed; it aims against all hatred or contempt regardless of those by whom it is entertained. Nor is this the only direction in which there is a greater stringency in the Press Act. To section 153A there is appended an explanation which declares it not to be an offence to point out without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce the feelings of enmity or hatred, indicated in the section. And yet no such qualifying words are to be found in section 4 of the Press Act and this is the more remarkable because the qualifying explanations of section 124A are introduced, though they relate to an even graver offence.

It may be that this omission is by oversight; whether

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that be so or not the Government insists on the absence of the explanation though it leads to a curious result.

I think the Government is entitled to stand on the letter of the Law, though it deprives Mr. Mahomed Ali of an opportunity of relying on explanation conceived in the spirit of which of that which forms part of section 153A of the Penal Code.

Had the Press incorporated the explanation to section 153A as it has that section 124A Mr. Mahomed Ali might perhaps have made a very strong case in view of the Advocate-General's admission as to the character of the Pamphlet and the applicant's purpose and intentions.

The applicant, however, contents strenuously that the Pamphlet does not come even within these all embracing terms of the Act and that the Legislature aimed at something wholly different. The incalculable power of forfeiture vested in the Executive are a sure sign that the Act was called into being by urgent Political necessity. And it is of sufficiently of recent date to enable us all to remember that the mischief aimed at was the prevalence of Political assassinations and anarchical outrage. Comprehensive words were designedly used to catch crime and the incitement to crime posing in the guise of innocence.

The Act was directed against crime and aims at its prevention. I doubt whether publication with an authorship, a source, a purpose like those of the present Pamphlet we thought of; and I recognise the force of the argument that the Act is now being applied to a purpose never intended. But be that so or not, if the Legislature has employed language wide enough to cover the Pamphlet this

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lac of reserve affords no answer to the forfeiture now attacked.

I have already dealt with one case of the absence of ground in the notification. This defect and the Government's failure to place before us any materials beyond those furnished by the applicant have sensibly added to our difficulties in discharging the peculiar duties cast on us by the Act. The notification does not even specify the classes that might be brought into hatred or contempt or which of these two diverse sentiment is apprehended. And so when Mr. Norton rose to address the court he had to seek this information from the Advocate-General.

The first answer implied that it included Christians, Greeks and Englishmen, but as under the Act the classes are limited to those composed of His Majesty's subjects in India, the Greeks were withdrawn and the first and the last retained. Still the answer in its original form is not without its significance though it was afterwards modified.

The Pamphlet would doubtless bring into hatred the unchristian Christians whose deeds of atrocities are described.

The theory presented is that the reflection of this hatred might fall, not in deed on the Government but on His Majesty's Christian and English subjects in British India. If this be the Government's view without all the information at its disposal, the court no more informed than the man in the streets cannot (in my opinion) affirm this could not be so, and affirm it with a degree of assurance that would entitle it to set aside a measure of safety on which the Government had solemnly resolved. The

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Advocate-General has convinced me that the Government view of this piece of legislation is correct and that the High Court's power of intervention is the narrowest; its power to pronounce on the legality of the forfeiture by reason of failure to observe the mandatory conditions of the act is barred; the ability to pronounce on the wisdom of the Executive order is withheld; and its functions are limited to considering whether the applicant to it has discharged the almost hopeless task of establishing that his Pamphlet does not contain words which fall within the all comprehensive provision of the Act. I describe it as an almost hopeless task because the terms of section 4 are so wide that it is scarcely conceivable that any publication would attract the notice of the Government in this connection to which some provision of that section might not directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise apply. I have said that the ability to pronounce on the wisdom or un wisdom of Executive action has been withheld. There was good reason for this. Courts of Law can only move on defined lines and act on information brought before them under limited conditions.

It is not so with the Executive authority. It would be paralyzed if it had to observe the restrictions placed on the courts. Its action can be prompted by information derived from sources not opened to the courts, and based on considerations forbidden to them; it can be moved by impressions and personal experiences to which no expression can be given in a court, but which may be a very potent incentive to Executive action. The Government

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may be in possession of information which it would be impossible to disclose in a Court of Law and yet obviously requiring immediate action.

Therefore a jurisdiction to pronounce on the wisdom or unwisdom of Executive action has been withheld and rightly withheld. It may be a question whether even the semblance which this act provides should not have been withheld as it was by Act IX of 1878.

Political considerations and reasons of state are the life blood of Executive actions but they have no place in a Court of Law. "The constitution" said Lord Mansfield 'does not allow reasons of state to influence our judgments: God forbid it should! we must not regard political consequences, how formidable so ever they might be: if rebellion was to certain consequence, we are bound to say *fiat, justitia ruat: cælum: John Wilke's case.*

The fact is that the Executive and Judicial authorities stand on a wholly different plane for the purposes of arriving at a decision as to the propriety of Executive action. And the one cannot sit in judgment on the determinations of the other " *si judicas, cognosce; si rugnas, jude.* And what then is the conclusion of the whole matter; of the two alleged checks on Executive action, supposed to be furnished by the acts, one, the intervention of the courts, is ineffectual, while the other, for this very reason can be, and in this case has been disregarded without impairing the practical effect of forfeiture purporting to be under the Act.

One word more and that is as to the motive of the present application. The applicant Mr. Mahomed Ali

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is by no means unknown in India ; he is a journalist of position and repute, Though he is not an accused, he tells us that he regards himself as under the stigma which (he declares) must attach to any journalist who has come under the operation of an act directed, primarily at any rate, against a criminal inducement marked by outrageous which so shocked the public sentiment as to call for this drastic legislation. But even if he has not succeeded in proving the negative that fate and the Law have thrown in his way, at least his application has not been wholly in vain.

The Advocate-General representing the Government has publicly announced, that Mr. Mahomed Ali's forfeited pamphlet is not in his opinion a seditious libel and indeed that he attributes no criminal offence to Mr. Mahomed Ali ; he was even willing to concede, and, believe he was acting in the highest interest of humanity and civilization. In this, I think the Advocate-General made no admission which it was not proper for him to make.

Mr. Mahomed Ali then has lost his book, but he retains his character : and he is free from the stigma that he apprehended. And this doubtless will be some consolation to him when we dismiss, as we must, his present application. I think there should be no order as to cost.

APPENDIX A1

Extract from the judgment of the Special Bench composed of Mr. Abdul Rahim officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

In the matter of Indian Press Act (1 of 1910), sec. 4 (1) and in the matter of the "New India Printing Works."

Justice Abdul Rahim observes

* * *

The scope of section 4 was considered by the Calcutta High Court in the matter of a petition of *In re-Mohamed Ali* (1) and the learned Advocate-General has supported the interpretation put upon it by Chief Justice Jenkins and the other learned judges of that court. That, generally speaking, the terms of the section are extremely wide and comprehensive cannot be doubted. They vest the Local Government with a discretion so large and unfettered that the keeping, of printing presses and the publication of newspapers become extremely hazardous undertakings in the country. A press may be devoted to the printing of most useful and meritorious literature or other publications of an entirely innocent and non-controversial nature, yet it will be liable to forfeiture if any matters printed in such press are considered by the government to be objectionable within the meaning of the Act. It may be doubted if it is possible for the keeper of any printing press in the country to maintain such an efficient expert supervision over matters that are printed as to detect everything that might

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be regarded to fall within the "wide spread net" of section 4.

Similarly a newspaper may be consistently staunch in its loyalty to the Government, its general policy may be above all reproach, the sincerity and *bona fides* of the intentions of the editor may not be liable to question but if any letters or other writings were let in, may be through carelessness, which come within the scope of any of the clauses to section 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself. That the influence of a periodical on public life of the country is on the whole decidedly beneficial need be no bar to the Governments' action. The Local Government, it may be assumed, will not indiscriminately exercise the power which it possesses under this enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious encroachment on the freedom which the press in India enjoyed before the passing of the Act.

The Act as is well known was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. How far it has been instrumental in accomplishing that object is not a question with which we are concerned; nor are we concerned with the question whether the legislature was justified in applying such diastic press laws to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionaries in one part of the country.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Presided by—Viscount Haldane, Viscount Cave, Lord
Phillimore, Sir John Edge and Mr. Ameer Ali) 1919.

* * *

The statute contemplate that in ordinary cases security shall be deposited, and the only duty of the magistrate is to fix the amount, having regard to the two limits, and to receive it. Then follows the proviso :—

Provided that the magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section.

It was contended before their Lordships that to read this proviso as enabling the magistrate to cancel or vary an order of dispensation would be to make a proviso upon a proviso, and to collect a positive enactment out of that which was only a qualifying provision. But it is well settled that there is no magic in words of proviso, and that the plain meaning must be given to the words of the Legislature, and those words enable the magistrate to cancel or vary any order made under the subsection, which should mean, among other orders, orders of dispensation. If the magistrate having fixed the minimum security may vary his order by imposing the maximum,

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there is no reason why he should not, as time goes on, think fit to require security when at first he thought fit to require none.

Their Lordships are therefore of opinion that the Magistrate has power under the section to cancel an order of dispensation, the necessary consequence of which will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed, as would be done in normal course on the first making of a declaration.

Their Lordships are in agreement in this respect with the opinion of Mr. Justice Ayling, and in disagreement with the view of Mr. Justice Seshagiri Aiyar. The Officiating Chief Justice (Mr. Justice Abdur Rahim) agreed in principle with Mr. Justice Seshagiri Aiyar, and so expressed himself in a judgment upon the other application.

THE FUNCTIONS OF THE MAGISTRATES

It is next contended on behalf of the appellant that the act of the magistrate in cancelling the dispensation was a judicial order, and was bad because she was given no opportunity of being heard before an adverse order was made against her. To this argument several answers have been given: that the order might be treated as an *ex parte* order which it would have been open to her to move to discharge instead of complying with it as she did under protest; that as a judicial order it was still one made by the magistrate within the exercise of his jurisdiction, and that the omission to hear her was only an irregularity which could not be reviewed, or at any rate could not be

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reviewed by process of certiorari; and, lastly, that the act was not a judicial act, but one done in the exercise of administrative functions. It was on this last ground that all three Judges in the High Court decided the point against the appellant; and without pronouncing any opinion on the other ground their Lordships agree that this one furnishes a sufficient answer.

When it is once established that the normal course is to have a deposit, the action of the magistrate in increasing or diminishing, withdrawing or imposing, is a pure matter of administrative discretion. It is only in one case that he is to record his reasons, and that is when there is a departure from the normal, and the object of recording them is, as the Officiating Chief Justice rightly said, for the information of his superiors in the Government.

The act of the magistrate is after all only the withdrawal of a privilege which need never have been granted. It is not like a condemnation, in which case justice requires that the person to be condemned should first be heard. It would have been, in their Lordships' opinion, more discreet, and it would have removed an occasion for comment and complaint, if the magistrate had given the appellant some opportunity for making her observations before the privilege was withdrawn; it might have been a wiser discharge of his duty as officer. But having said this, their Lordships are unable to go any further. It results, therefore, that if the order of the magistrate was open to examination, either upon process of certiorari or by a way of revision the consequence of an examination would be to leave the order as it stands, and this consequence is not without its

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bearing upon the question, which is prior in order of reasoning, whether it was competent to the Court to enter upon any such examination. The appellant based her demand partly upon the Code of Criminal Procedure and partly upon the supposed common law power to grant a writ of certiorari. She did not rely upon the power of revision given by the Code of Civil Procedure. It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the appellant as charged with an offence. They are at the utmost proceedings which rendered the appellant, if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty. In any view, as their Lordships have intimated their opinion that the magistrate in withdrawing the order, of dispensation was not acting judicially, it follows that this is not a case for revision under the Code of Criminal Procedure.

THE WRIT OF CERTIORARI

It was contended on behalf of the respondent in the High Court that there is no power in the High Court to issue a writ of certiorari, or alternatively that the provisions of Section 22 forbid recourse to this writ in cases which come under the Press Act. As to the first point, it would seem that at any rate the three High Courts of Calcutta, Madras, and Bombay possessed the power of issuing this writ (see *Re the Justices of the Supreme Court of Judicature at Bombay* :1 Knapp, pp. 49, 51, 55 ; and *Nundo Lal Bose v. the Corporation for the Town of Calcutta*, I.L.R., 1 Cal., p. 275) Whether any of

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the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question. Supposing that this power once existed, has it been taken away by the two codes of procedure? No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of Section 435 of the Criminal Procedure Code and Section 115 of the Civil Procedure Code of 1908 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of these Sections. For such cases their Lordships do not think that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away.

But assuming that the power to issue the writ, remains, and that it might be exercised notwithstanding the existence of procedure by way of revision, Section 22 has still to be considered ; -

Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that forfeiture therein referred to, has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act shall be instituted against any person for anything done or in good faith intended to be done under this Act.

It was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away

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the right to it remained notwithstanding the very express but still general words of this Section. However that might be according to English law, where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act. "Certiorari," according to the English rule, is only to be granted where no other suitable remedy exists. If the order of the magistrates were a judicial order it would have been made in the exercise either of his civil or of his criminal jurisdiction and procedure by way of revision would have been open.

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APPENDIX B.

INDIA'S PETITION OF RIGHTS.

[The following is the resolution adopted by the Indian National Congress and the All-India Moslem League at the Special Sessions held at Bombay in August—September, 1918.]

The Government of India shall have administrative authority on matters directly concerning peace, tranquillity and defence of the country, subject to the following declaration of rights of the people of India.—That the Statute to be passed by the Parliament should include the declaration of the rights of the people of India as British citizens; that all Indian subjects of His Majesty and all the subjects naturalised or resident in India are equal before the law, and there shall be no penal nor administrative law in force in the country, whether substantive or provisional, of a discriminative nature; that no Indian subject of His Majesty shall be liable to suffer in liberty, life, property, or freedom of speech or in the right of association, or in respect of writing except under a sentence by an ordinary Court of justice and as a result of a lawful and open trial; that every Indian subject shall be entitled to bear arms subject to the purchase of a license as in Great Britain, and that the right shall not be taken away, save by a sentence of an ordinary court of justice; that the press shall be free and that no license nor security shall be demanded on the registration of a press or a newspaper; and that corporal punishment shall not be inflicted on any Indian save under conditions applying equally to all other British subjects.