

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
Office: Servants of India Society, Poona

Editorial Committee:

Prof. P. M. LIMAYE,
S. G. VAZE,

Member and Joint
Secretary respectively of
the All-India Civil
Liberties Council

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U. S. A.'S CIVIL RIGHTS ACT FOR THE PROTECTION OF NEGROES' VOTING RIGHTS

At last the Civil Rights Bill has passed, in spite of the filibuster staged by Southern Democrats in the Senate. The Bill includes some other provisions (as for instance one requiring local election officials to keep election records for two years and make them available to the Federal Government); but at the heart of the measure is a provision calling for the appointment by federal courts of "referees" to supervise the registration of Negro voters and to see that they can cast their ballots in areas where local officials attempt to impede Negro voting. The full scope of this "referee plan" provision will become apparent from the following passage in the legislation:

1. When a voter complains to the U. S. Attorney General that he has been denied the right to vote, the Attorney General may request a federal court to determine whether a "pattern" of discrimination exists in the locality. If the court so finds, the federal judge appoints a master in chancery, to be called a voting referee. The referee (or referees) would interview the complainant to determine his qualification to vote.

2. Once the pattern of discrimination has been determined, any other petitioner of the same race or group may, for a period of a year, seek through the referee a certificate qualifying him to vote and assuring him the right to vote and to be counted. He is required to swear that he has been denied the opportunity to register. Applying valid state laws—including "usages and customs" as they apply to whites—the referees would handle interviews out of the presence of state officials, would monitor the applications, keep stenographic records of any oral qualification tests. Along with documentary evidence, the referee would submit his list of qualified or unqualified voters to the court.

3. The Justice Department would then transmit a copy of the referee's report to the state attorney general or local voting officials with an order to show cause (within ten days) why the federal court should

not formally order the proper registration of qualified voters. The state would have an opportunity to prove the ineligibility of any individual; e. g., it might be proved that the petitioner is a non-resident of the state, but it could not arbitrarily hale the petitioner into court to dispute the referee's findings.

4. Armed with a federal court certificate, the qualified voter would then register and vote in both state and federal elections—if need be, in the presence of the referee, who would also attend the vote count. In cases where state officials refuse to comply (in the past, for example, registration boards have frustrated Negro attempts to vote merely by shutting their offices), they would be open to punishment for contempt of the federal court.

In some quarters a doubt has been expressed as to whether the law will not be declared unconstitutional because it requires a federal court to find that "a pattern or practice of discrimination exists." It is thought that this would be contrary to Art. III of the Constitution (relating to judicial process), which, it is said, prohibits a court from making any judgment beyond that involved in the individual case before it. Some would therefore have liked the law to empower the President to appoint enrolment officers as soon as a single case of discrimination is proved, thus obviating the necessity of finding a "pattern." But such a provision could hardly have been passed. However, the Attorney General, who is the author of the referee plan, is convinced not only that the law as it is does not suffer from any constitutional infirmity, but also that it will be effective, contrary to the general belief that relatively few Negroes will assert their rights in the face of white intimidation. Anyhow, it places within the reach of Negroes an instrument which, if used, will assure them the right of which they have been arbitrarily deprived for so long. And the fight which Negroes themselves have recently started against discrimination in other fields encourages the hope that they will avail themselves of this instrument to the full.

BAN ON NUCLEAR WEAPONS TESTS MAY GIVE AN IMPETUS TO GENERAL DISARMAMENT

The atmosphere in the East-West Disarmament Conference now being held in Geneva is happily far better and more conducive to a real start being made towards putting an end to arms race than in the previous gatherings. Formerly disarmament talks were often marked by doubt, cynicism and even hypocrisy; while all nations professed utmost devotion to an all-round liquidation of the warlike machinery of States, they only too frequently manoeuvred for diplomatic positions for themselves. Now a different spirit seems to prevail and there is a marked absence of polemics. The participating nations no longer confine themselves to vague generalities but are inclined to put forward concrete proposals for removing the numerous difficulties that stand in the way of the universally cherished goal of disarmament so that some positive and practical advance could be made towards reaching it. The goal was once again described by the British delegate as "the abolition of all nuclear weapons and all weapons of mass destruction" and "reduction of other weapons and armed forces to levels which will rule out the possibility of aggressive war." And Western nations certify that Soviet Russia genuinely accepts it and is sincere in finding practicable ways of achieving it. One indication of it is that Russians now agree to the setting up of an international control organization to supervise any stage in disarmament about which agreement might be reached. Obviously, no one will be confident without such an organization that disarmament agreements were being faithfully carried out. Russia was all the while balking at the establishment of such a controlling body but now it agrees to the stationing of an international inspection and control system inside its territory. This significant concession on the part of Soviet Russia in its turn leads to similar concessions being made by Western nations. For instance, Mr. Macmillan agrees to Mr. Khrushchev's suggestion about the "limitation of forces and weapons, both conventional and nuclear, in an agreed part of Europe, coupled with an appropriate system of inspection." A zone of arms limitation and control in Central Europe might well serve, as the "Guardian" says, "as the pilot model for a world-wide system later" and be a starting-point in world-wide disarmament.

That both East and West sincerely want disarmament can hardly be doubted; for both realize the doom that would await them if an uncontrolled arms race was to continue. The expense of world armaments is so fantastic and the benefits that would accrue if this expense could be stopped are so great that no statesman with any sense of realism can but desire that the present mad race must somehow come to an end. As Mr. Ormsby-Gore, Britain's Minister of State for Foreign Affairs, said at the conference, at present the world spent "a deeply shocking

proportion of its resources, in minds as well as in materials, in order to equip its forces with ever more sophisticated weapons of war. . . . Every one of us can think of a thousand things that cry out to be done if only the resources were available to us." The "Times" put it very forcibly when writing on the prospects of the Geneva conference: "Every year the latest refinements in arms provide smaller security at greater cost." It is because of this that President Eisenhower gave expression to the sentiment some time ago that there is more risk in building up armaments than in any probable programme of disarmament, whatever its shortcomings. A writer has said: "Never has this been truer, and felt more sharply, than on the eve of new Geneva talks. Each side walks into the room with the realization that it could wipe the other off the face of the earth and would probably die, itself, in doing so. On each side there is an acute fear that total disaster may come without its having been planned or willed." This fear will certainly give a momentum to the talks, encouraging the hope that at last a beginning will be made in bringing about some practical disarmament.

The hope is strengthened by the agreement which seems to be on the point of being reached about the ban on the nuclear weapons tests at the other conference, also being held in Geneva, of experts of the Big Three to study methods of detecting violations of any such possible agreement. Talks at this conference, which is in almost continuous session since it first met on 31st October 1958, have always been business-like. The experts found that, in the present state of scientific knowledge, it was difficult to detect small underground explosions. In view of this conclusion, the United States delegation at the Geneva conference put forward a proposal for a treaty outlawing all testing within the earth's atmosphere, in outer space (as far as the existing means of control are effective), and under water; the proposal also called for a ban on all such underground tests as were known to be clearly detectable. Thus it was a proposal for a total ban on tests, excepting from the scope of prohibition only low-yield subterranean tests, in which it was the opinion of atomic scientists that natural explosions could not be distinguished from man-made explosions. The proposal set the "threshold" of detection at a magnitude reading of 4.75 on the seismograph. Such a reading is equivalent to 19-kiloton explosions. The proposal also called for seismic research jointly by all the three nuclear powers so that with improved technique, underground detonations below the threshold could also be detected and controlled, thus making the ban complete.

But Russia at that time rejected this reasonable plan as "a step backward." It stood for "all or nothing;" either a total ban or no ban. Now, however, it has

reversed its position. It is now willing to accept a phased approach and recognizes that there is a real "threshold" problem which cannot be ignored except by blinking facts. It called a special meeting of the nuclear conference and announced that it would agree to the U. S. plan, only stipulating that while joint studies of underground explosions below the threshold are being carried on there should be in force a moratorium on such low-level tests (i. e. no such test should be conducted without previous warning). This stipulation placed the United States in no small difficulty. When it put forward the plan, it had intended that all nuclear nations should be free to hold tests below the threshold, and the Administration was under great pressure to hold them. Moreover, it feared that Russia, while undertaking voluntarily to desist from these tests, might secretly conduct them and obtain an undue advantage for itself. For, under its plan, there were to be no controls to assure compliance with the moratorium, and, in the opinion of scientists, through the use of muffling techniques, a nation could succeed in testing weapons in the range of 100

kilotons without violating the threshold on the seismic scale.

Yet, in spite of the risks involved, President Eisenhower, largely because of the insistence of Mr. Macmillan, has expressed his willingness to accept the Russian proposal, provided the moratorium is of a brief duration and provided the research into nuclear explosions below the agreed threshold start immediately. The U. S. A. and U. K. have acquiesced because anyway the plan would open Russian territory to inspection for the first time and because of the bearing of the test-ban agreement on the parallel negotiations in the field of general disarmament. It was also realized that, without such an agreement, imperfect as it might be, the nuclear arms race would intensify and within a relatively short time other nations would test nuclear weapons of their own design and the number of nuclear powers would multiply. And that would put an end to all possibility of any kind of control being instituted.

If this test ban agreement comes about, it may well give an impetus to the solution of the over-all problem of disarmament.

SUSPENSION OF SENTENCE BY AN EXECUTIVE ORDER.

Commander Nanavati of the Indian Navy was sentenced to life imprisonment by a Division Bench of the Bombay High Court on 11th March on a charge of murder of Prem Bhagwandas Ahuja, a city business man, in April last year. The High Court issued a writ and directed a warrant for the arrest of the Commander who was in naval custody. The warrant was returned unexecuted as in the meantime the Governor had issued an order under Art. 161 of the Constitution suspending the sentence and directing that he be kept in naval custody pending the disposal of his intended appeal to the Supreme Court.

On the warrant having been returned unexecuted the Division Bench referred the matter to the Chief Justice who constituted a Full Bench for hearing the matter. It consisted of the Chief Justice Mr. H. K. Chainani and Mr. Justice J. R. Mudholkar, Mr. Justice K. T. Desai, Mr. Justice S. T. Desai and Mr. Justice B. N. Gokhale. The judgment was delivered on 30th March.

The two questions for the determination of the Full Bench were : whether (1) the Governor's order was valid and (2) what steps should be taken to make the warrant effective.

In the course of the judgment, the Chief Justice said the principal question was whether there was a proper return of the writ issued by this Court, i. e., whether the warrant for the arrest of the accused had not been executed for good and valid reasons. It was necessary,

therefore, to decide whether the action taken by the Governor was within law.

JURISDICTION

The Advocate-General had raised a preliminary objection that the Court had no jurisdiction to examine the validity of the action taken by the Governor because there was no judicial proceeding pending in which the validity of the order could be decided. He also urged that the Court became "functus officio" as soon as it had pronounced judgment in the criminal reference.

On the other hand, it was contended by Mr. R. B. Kotwal, who appeared for the Western India Advocates' Association, that the Governor's order had come in the way of the execution of the warrant issued in pursuance of a decision of this Court and therefore the main question which the Court had to decide was whether the obstruction caused in the execution of the warrant was lawful or not.

The Chief Justice said the Court was inclined to accept the arguments of Mr. Kotwal. If a writ issued by the Court was returned unexecuted, the Court was entitled to inquire as to why it was not executed. The execution of an order made by a Court might be an executive function. But if an obstruction was caused in its execution, the question whether it was lawful or not could only be determined judicially.

"In this proceeding we have to consider and decide whether the reasons given for not carrying out the order of this Court, are good and valid. For this purpose, it is

necessary to examine the validity of the action taken. We hold that we have jurisdiction to determine this question."

The Advocate-General's contention was that the Governor's action could not be challenged in the present proceedings because the Governor was not represented before the Court and also because under Art. 161 the Governor was not answerable to any Court for the exercise of his powers.

The Chief Justice said that Art. 161 gave "personal protection" to the Governor. No proceeding was, however, being held against the Governor. He was not being asked to answer for anything done by him. It was also not proposed to quash or set aside his order. The legality of his order had to be examined only in order to determine whether there was a valid return to the writ issued by the Court. If the Court had come to the conclusion that the Governor's order was invalid, the Court would have issued a writ to the officer now holding the accused in custody to hand him over. No writ or order would have been issued to the Governor.

Consequently, it was not necessary that the Governor should be a party to the proceeding in order to enable the Court to decide whether there were good and sufficient reasons for not complying with the orders of this Court.

POWER OF PARDON

The Chief Justice said that Art. 161 conferred discretionary powers on the Governor. The order in the present case was made when the application by the accused for leave to appeal to the Supreme Court was pending before this Court. No application had been made to this Court for releasing the accused on bail or for his being detained in naval custody pending appeal to the Supreme Court.

The order suspended the sentence not for a few days but until the appeal, if any, filed in the Supreme Court was disposed of. This, in the nature of things, must take a considerable time.

His Lordship said that the necessity of vesting the power of mercy, pardon and reprieve in some authority other than the judiciary had always been recognized. A judge could not take cognizance of facts and circumstances not brought to his notice judicially. Experience had shown that the minimum sentences prescribed under law for certain offences were sometimes unduly severe and the judge could not reduce or remit them. Power must also exist to avoid grave miscarriage of justice or possible errors in judicial determination. The wisdom of investing the head of the State with the power of pardon and mercy could not, therefore, be doubted. It was a power essentially in aid of justice to be exercised as an act of grace and humanity in order to do justice.

The Chief Justice dealt at length with the English and American systems of law and also the provisions of the Indian Constitution in this respect. He said having

regard to the language used in Arts. 72 and 161 of the Indian Constitution, it seemed to the Court that the framers of the Constitution intended to confer on the President and the Governors in their respective spheres the same power of pardon, reprieve and clemency, both in its nature and effect, as was possessed by the Sovereign in Great Britain and by the President in the U. S. In India also, the power of pardon could, therefore, be exercised before, during or after trial.

The validity of the order of the Governor was challenged by Mr. Kotwal and Mr. A. A. Peerbhoy, who appeared for the Bombay Bar Association, on the ground that it was made when the application for leave to appeal to the Supreme Court was pending before the Court and when the processes of law were not complete. The Chief Justice said :

If pardon can be granted during the pendency of a judicial proceeding, it is not possible to hold that the other allied but lesser powers of reprieve, suspension of sentence, etc., cannot be so exercised. The powers conferred by Art. 161 are also such that any order made in exercise of those powers must necessarily affect or alter the effect of the judgment of a court. If a person is pardoned after he had been found guilty and convicted by a court, its effect will be to clear the person from all the consequences of the offence for which it is granted.

Notwithstanding the decision of a court finding him (the accused) guilty of the offence, he will be deemed not to have committed the offence if it is pardoned. Similarly, the effect of remission of a sentence is that, in spite of the decision of the court imposing a sentence, the accused will not be required to undergo any sentence. Any order issued under Art. 161 must, therefore, to some extent conflict with the decision of a court.

Consequently, an order made under Art. 161 cannot be held to be illegal, merely because there is a conflict between it and the order made by a court. The Article, covering as it does the field of mercy and pardon, should be liberally construed.

Much as though we may not like the Governor acting in this case immediately after this Court had delivered its judgment and when the application for leave to appeal to the Supreme Court was pending in this Court, we cannot hold the order of the Governor to be illegal on that ground.

Another contention raised was that the Governor could not impose any condition (e. g. that the accused should be detained in naval custody), if he suspended a sentence. Sec. 401 specifically empowers the Government to suspend a sentence without conditions or upon any conditions. The absence of similar words from Art. 161 was emphasised in support of the argument that a conditional order of suspension could not be made under Art. 161. "In our opinion, there is no force in this

argument." The power to suspend a sentence would include the power to attach lawful conditions to it.

If a pardon could be made conditional, a sentence could also be suspended on conditions. The condition should, however, not be illegal, immoral or impossible of performance.

NAVAL CUSTODY

The Governor's order was challenged on the ground that the detention of the accused in naval jail custody after conviction was illegal. The Advocate-General in reply to the contention urged that naval custody included custody in accordance with the usages of the naval services. The Chief Justice said that the usages referred to in the Navy Act were usages in regard to the mode and manner of arrest and confinement and not usages under which arrest or confinement took place.

The contention of the Advocate-General was that a trial did not end until the matter was finally disposed of by the highest court. The Chief Justice said that the word "trial" was well understood in criminal law and it ended when the proceedings in the trial court came to an end. Examining the use of the word "trial" in the Navy Act, the Chief Justice said that the word had been used in that Act also in the same sense in which it was ordinarily understood in criminal law. The trial in the present case ended when the Sessions Judge made a reference to this Court or at least when the High Court delivered its judgment on the reference made to it. The accused could not, therefore, be detained in a naval jail under sec. 89 (3) of the Navy Act. There was also no other provision in the Navy Act, which authorised his detention in a naval jail after he had been convicted. The question therefore arose whether the detention of the accused in the naval jail was illegal.

The Chief Justice said that the order of the Governor did not contain any directive or mandate to the naval authorities but attached a condition to the order of suspension passed in favour of the accused and imposed a condition on the accused. The condition was that the order of suspension notwithstanding, the accused was not to be at large, but should remain in custody till the disposal of the appeal by the Supreme Court.

DIFFERENCE OF OPINION

The Chief Justice said :

In the opinion of my three brothers (Mr. Justice Mudholkar, Mr. Justice S. T. Desai and Mr. Justice Gokhale), the pith and substance of the condition is that the accused should remain in custody and not the mode or manner of that custody. In their opinion priority of consideration should not be given to the actual mode or manner in which the condition is to be fulfilled and worked out. That is a matter apart and must not be treated as of the very essence of the condition of the whole order. Having regard to these considerations, it seems to them that it will be incor-

rect to say that the Governor's order is unconstitutional and that it is invalid because it contemplates the detention of the accused in a naval jail.

They are also of the opinion that an order, made by authority which is intrusted with wide powers under the Constitution and which on its face is ascribable to those powers, cannot be struck down as invalid, because it contains a condition, the fulfilment of which may make someone do an act which is not expressly authorized by law.

The Chief Justice and Mr. Justice K. T. Desai were, however, inclined to hold that an essential part of the condition in the Governor's order was that the accused "shall remain in naval jail pending the decision of the Supreme Court." As this could only be complied with by keeping the accused in naval jail without any authority of law, the condition and, consequently, the order of the Governor, were both invalid.

"In view, however, . . . of the well settled rule that where two views are possible, the presumption in favour of the validity of the order must prevail, we have decided not to dissent from the view taken by the majority of us. Accordingly, we hold that the condition contained in the order of the Governor has not been shown to be invalid," the Chief Justice said. Similarly the Full Bench held that "the order made by the Governor has not been shown to be unconstitutional or contrary to law." In the result, the decision of the Full Bench was unanimous.

EXTRAORDINARY POWERS

While upholding the validity of the order, the Chief Justice expressed profound regret at the use of the extraordinary powers in the present case. His Lordship said :

We consider it necessary to add that wide and unfettered as the powers referred to in Art. 161 are, they cannot be exercised arbitrarily and except for good and sufficient reasons. The very amplitude of these powers makes it necessary that they should be used sparingly and with considerable restraint.

They must be used only for the purpose for which they have been conferred and that is to promote justice and not to circumvent the due processes of law. Ordinarily, they should not be exercised when judicial proceedings are pending. They should also not be used so as to short-circuit legal processes and give relief which could be granted by a court. We hope that those, on whom the Constitution has conferred these extraordinary powers, will exercise them with wisdom and so as not to interfere with the due administration of justice.

(In this case) the reasons for the order have not been disclosed to us. We can only look at the matter with judicial eyes and we are not entitled to take notice of what has appeared in the newspapers in regard to it. It is, however, clear that the order was issued when this Court was seized of the matter.

The Advocate-General stated in the course of his arguments that this Court could not have granted bail to the accused, after it had found him (Nanavati) guilty of the offence of murder and that consequently, the accused had to seek the intervention of the executive for the suspension of his sentence, pending the decision of the Supreme Court.

Assuming, however, that this Court could not have granted bail, it might have been in a position to direct, on sufficient cause being shown, that the warrant for the arrest of the accused should be issued or executed after an interval of some days, during which the accused could apply for leave to appeal to the Supreme Court. No application for such relief was, however, made to this Court. No application for bail was also made to the Supreme Court. The order also suspends the sentence not only until the application for leave to appeal to the Supreme Court has been decided, but until the appeal to the Supreme Court has been disposed of.

Several cases have come before this Court, in which persons, who had been tried on the charge of murder and had been acquitted by the trial court, have been convicted by this Court and sentenced to imprisonment for life. In none of these cases was the sentence suspended pending the decision of the Supreme Court.

The order in this case is, as observed by Mr. Justice Shelat and Mr. Justice Naik, "unusual and unprecedented." Such an order is likely to create an impression that it has been made in order to accord special treatment to a particular person and as such is likely to impair the confidence of the public in the impartial administration of justice. We must, therefore, express our profound regret at the use of the extraordinary powers in this case, the result of which has been that the writ issued by this Court in the exercise of its normal jurisdiction has become infructuous, not on account of an order of a superior court but on account of a directive issued by the executive.

The Court directed that unless the Governor's order was cancelled or withdrawn the warrant for Nanavati's arrest issued by the High Court should not be reissued until the appeal to be filed by the accused in the Supreme Court had been disposed of.

"Judicial Process Obstructed"

At a meeting of the Supreme Court Bar Association held on 4th April under the presidency of the Attorney-General, Mr. M. C. Setalvad, a resolution was adopted expressing "grave concern" at the action of the Executive in "suspending conditionally the sentence passed by the High Court of Bombay on Commander Nanavati." The resolution characterized the action as "improper inasmuch as it obstructed the due execution

of the judicial process in an unprecedented manner," and added: "In the view of the Association, such action on the part of the Executive tends to shake the confidence of the public in the due administration of law and justice."

COMMENTS

Supreme Court's Opinion on Berubari

A special bench of the Supreme Court on 14th March handed in its advisory opinion on the constitutional way of implementing the agreement of 1958 between the Prime Ministers of India and Pakistan regarding the transfer of a part of the Berubari union to Pakistan and the exchange of Cooch Behar enclaves. The Attorney-General was of the opinion that since the agreement constituted only the true ascertainment and recognition of the boundary between the two countries in the light of the Radcliffe award, it could be implemented by mere executive action. The Supreme Court says that neither executive action nor a simple law on the subject would give the Government the necessary authority to give effect to the proposed change. For, in the opinion of the Court, the agreement amounted to a cession or alienation of a part of Indian territory and was not a mere ascertainment or determination of the boundaries in the light of, and by reference to, the award. And the Constitution as it stands at present gives no power to the Government to make such a cession.

As a sovereign power India could of course cede a part of its territory if it so chose to another power, but an amendment of the Constitution would be required to enable it to do so. Ordinary legislation under Art. 3 would not be enough, for that Article deals merely with the alteration of boundaries of States and does not confer the power to cede national territory in favour of a foreign State. And as the agreement involves cession of national territory, power must first be obtained by amending the Constitution according to the procedure laid down in Art. 368 to cede Indian territory to a foreign State, as is involved in the implementation of the agreement.

Revolt Against Apartheid

South Africa has erupted into an explosion. It was sparked off by demonstrations in protest against the humiliating pass laws which prevent Africans from moving freely about the country and force them to live in special native areas. The demonstrations were organized by the Pan-Africanist Congress, a militant organization of Africans, which asked all Africans to leave their passes at home and to go to police stations to surrender to the police for not carrying them. The objective was to fill the prisons to overflowing and paralyze the economic life of South African cities. To put down the movement which at any rate was intended to be peaceful repression was used which has shocked the whole world.

The revolt is against the whole policy of apartheid, and this apartheid is not, as Mr. Gaitskell said, "just keeping people apart, not just social segregation, not just having different schools, dwellings, and beer halls. Apartheid as is being practised in South Africa is keeping black men in subjection for the benefit of white men. It is based on the repellant doctrine, so alien to our Christian tradition, that, because of the colour of their skins, black men are inferior beings whose function in life is to minister to the wants of their white superiors." It is a plain attempt on the part of the whites, who form only a quarter of the population, to rule the rest by the use of naked force so that they themselves may hold on perpetually to their highly privileged position, politically and economically.

But it is a bankrupt policy which can never succeed and does not deserve to succeed. It is bound to be overturned. If mild measures used in that direction are not effective, strong measures will inevitably come to be used. This is what appears to be happening in South Africa. The efforts of the moderate African organization, the African National Congress which has the support of liberal elements of all races, to persuade the Nationalist Government to give up its policy of apartheid and accept the non-whites as equal citizens, were rewarded by instituting a Treason Trial so as to suppress all such efforts. The initiative has consequently passed into the hands of another body which is inspired, it is said, by "a virulent black fascism." Such a development everybody will deplore, but it is the logical outcome of the senseless and cruel policy which the Nationalist Government is relentlessly pursuing. Now both the Congresses have been proscribed.

Elected Africans Join Kenya Government

It is an encouraging sign that, in response to the invitation given to African nationalists at the Kenya round table conference in London, three directly elected African members of the Legislative Council have taken ministerial posts in the Government even before the Constitution hammered out at the conference comes into force in the legislative field. African nationalists had declared that they would accept no ministerships under the Lennox-Boyd Constitution, and a fiction had therefore to be created, to overcome their opposition, that if they joined the Government they would join not the old Government but a new care-taker Government. Anyhow, it is a very significant fact that nationalist leaders have agreed to participate in the responsibilities of government.

This is the first time that directly elected (or, in the language in use in Kenya the "constituency elected") members of the Legislative Council have joined the Kenya Government. Till now only the "specially elected" members, i. e., members elected by the Legislative Council sitting as an electoral college, could

be persuaded to share the responsibility of administration and these members were unacceptable to all the nationalist groups and were therefore exceedingly unpopular. Of the African members who have now joined the Cabinet one is Mr. Ronald Ngala, who was the leader of the African delegation at the London conference, and another is Mr. Julius Kiano, who also played a prominent part in the conference. (Mr. Tom Mboya has chosen to keep himself out of office, though he agrees that, under the formula, there should be no bar to acceptance of office). The new members may therefore be said to be fully representative of African nationalist opinion.

Their participation is a guarantee that the new Constitution will be worked by Africans in the spirit in which in London it was accepted by them. There was not a little risk that the nationalist leaders after returning to Kenya from the conference would themselves go back on it or that they would be repudiated, for it must not be ignored that radical as these leaders are, there are in Kenya certain influential elements even to their left. It is therefore extremely satisfactory to have, in the acceptance of ministerial portfolios by them, a pledge that co-operation will continue to be given by Africans in the working of a Constitution which, if it receives a fair trial, is calculated to bring the colony a great deal nearer to the ultimate objective of independence.

Dr. Banda's Release

The Colonial Secretary, Mr. Macleod, demonstrated, in dealing with the problem of Kenya, that he had the courage to face the opposition of the dominant white community and force on them a constitutional advance which would in time bring the Africans into their own. And it appears that he will be equally courageous and determined to break the stranglehold of the whites in Central Africa. The release of Dr. Hastings Banda, the Nyasaland African leader, from detention is a harbinger of the new policy towards the Central African Federation. The release was no easy matter; the Governor of Nyasaland had opposed it and even threatened resignation because of the fear he entertained that it would be followed by a widespread outbreak of violence. The Premier of the Federation and the Premier of Southern Rhodesia had also resisted the step because they knew that it was going to be the starting-point for a constitutional change in Nyasaland which would in course of time bring their dreams of white dominance in the whole of Central Africa to naught.

Mr. Macleod, however, bravely disregarded these threats and restored Mr. Banda to liberty. This was necessary if Nyasaland, which has lagged behind in the matter of constitutional advance, is to be put at least on a footing of equality with Northern Rhodesia. At present, in Nyasaland, there is a Legislative Council consisting of

27 members, made up of 14 official and 13 unofficial members. Seven of the unofficial members are Africans. There is also an Executive Council consisting of nine members, five official and four unofficial, including two Africans. In both councils, therefore, there are still official majorities. In Northern Rhodesia both councils have unofficial majorities. The least that is required in Nyasaland is to convert the slender majority of Africans on the unofficial benches into an overall African majority in that country's Legislative Council when elections are introduced.

There is no doubt that African feeling bitterly resents Nyasaland being included in a white-dominated Federation, and the British Government is committed not to keep Nyasaland in the Federation unless the majority of the people desire it. Economically it is, of course, a great advantage to this extremely poor and overpopulated country to remain in the Federation, for about three-fifths of Nyasaland revenue is now derived from federal sources, and to this all its social services such as they are due. Mr. Macleod's aim evidently is to persuade the African leaders, as the "Times" puts it, that "they can remain in federal relationship with other territories without sacrificing their essential independence." But this cannot be achieved unless the Nyasas' political status is first improved. To take Nyasaland out of the Federation is to Dr. Banda equivalent to, as he himself once said, "keeping Nyasaland out of the clutches of Sir Roy Welensky," and if he sees evidence now that the power of the whites in the Federation will not be increased at the expense of the territorial Government and that on the other hand Nyasaland will be placed in a position to resist federal encroachments, he will perhaps be satisfied that there will be real inter-racial partnership in the Federation, and his opposition to such a Federation will then disappear. Mr. Macleod, it appears to us, is engaged in this difficult task.

Dr. Banda on his release appealed to his followers to keep calm and not to give an excuse to the protectorate's government to adopt repressive measures for security reasons. Evidently he has great regard for Mr. Macleod's far-sighted statesmanship. For he said Mr. Macleod "is a great man and could do here what he has done in Kenya." He said: "It took great courage for Mr. Macleod to bring me back to Nyasaland, because Welensky wanted to keep me in Gwelo (prison) until 1961. Let us put the people in Salisbury to shame who said that if I came back here there would be trouble. Leave all the trouble to me, because I am going to make plenty of trouble in Government House, but not the kind of trouble that is made by throwing stones and spears. The kind of trouble I will make will be made by my brain and tongue. While I am away in London and America I want everyone to be quiet and peaceful." After talks with Mr. Macleod, Dr. Banda went to London for further talks preparatory for a Nyasaland Conference in June.

Rule of Governmental Immunity

In allowing the Government's appeal from the trial court's decree (reported on a later page under the heading "Government's Liability in Torts"), Mr. Justice Dwivedi of the Allahabad High Court made remarks on the governmental freedom from suability for tort. His Lordship pointed to the variance of judicial opinion on the subject and said:

Whatever might have been in the past the justification for the view that the government was not suable for the tortious acts of its employees, that view no longer seems to accord with the current constitutional reality in the country, when people are now the real sovereign and the government is only their delegate. The rule of governmental immunity runs counter to modern democratic notions of the moral responsibility of the State, and the matter in our view now merits early attention of the legislative organ of the Government.

The English law also suffers from the defect to which the Allahabad High Court has drawn attention; in England the Crown is still not liable to be sued in tort. The Committee on Ministers' Powers pointedly referred to this "lacuna in the rule of law." A committee recommended in 1927, in the form of a Bill, a provision to the effect that the Crown should be liable in tort, but it has not yet become law. By the Administration of Justice (Miscellaneous Provisions) Act of 1933 several of the Crown's immunities in litigation have been lopped off, but this lacuna persists and therefore it cannot be said that in England the remedy of the subject against the Administration is yet as complete as the remedy of subject against subject, as is required by the Rule of Law.

GOVERNMENT'S LIABILITY IN TORTS

Failure to Return Seized Gold

DECREE AGAINST U. P. STATE QUASHED

The question whether the Government should not be liable to be sued for the tortious acts of its employees came up for consideration before the Allahabad High Court in a suit filed against the State of Uttar Pradesh by a bullion dealer of Amritsar.

On 20th September 1947, Mr. Ralia Ram, a partner of the firm of Kastoori Lal which dealt in bullion at Amritsar, came to Meerut for selling gold and silver in the Meerut market. He was taken into custody by three police constables and the gold and silver were seized on the suspicion that they were stolen property. He was released on bail the following day and some time thereafter the entire silver was returned to him, but the gold weighing about 103 tolas was not returned in spite

of repeated requests. And the firm which was the owner of the gold instituted a suit against the U. P. Government. The Civil Judge of Meerut decreed the suit, holding that there was the relationship of bailor and bailee between the Government and the plaintiff firm, and that the police constables and the sub-inspector in charge of the Kotwali, where Mr. Ralia Ram was detained, had not taken reasonable care and the gold was lost on account of the negligence of Government's employees.

The U. P. Government filed a first appeal. In its written statement Government admitted that the gold was not returned to the plaintiff firm, but denied its liability either to return the gold or to pay its price. It was stated that a head constable, Mahomed Amir, who had placed the gold in the police Malkhana had fled to Pakistan with the gold on 17th October 1947, without handing over charge to anyone. A criminal case for embezzlement was registered against him, but he could not be apprehended in spite of earnest attempts. The Government took the stand that the employer was not liable for the criminal acts of its servant if he did not act in the course of his employment and misconducted himself not for his master's benefit but for his own.

The appeal was heard by Mr. Justice Gurtu and Mr. Justice Dwivedi and was disposed of on 18th March. The Court did not agree with the trial court that the relationship between the plaintiff and the defendant was that of bailor and bailee. And it observed that the finding about negligence was rested solely upon non-observance by the police of Regulations 165 (vi) and 166 of Chapter XIV of the Police Regulations. But neither Chapter XIV nor the Manual of Government Orders contained any provision requiring the transfer of gold from the police station to the treasury. Their Lordships therefore came to the conclusion that the Kotwali police staff could not be held to be negligent on account of having retained the gold in the Kotwali police Malkhana from where it became untraceable.

The gold was seized by police officers and kept in custody in exercise of the statutory duty under secs. 54 and 51, Cr. P. C. The police officers were not acting as servants of the Government but were acting in discharge of their statutory duty and as such were not amenable to the control of the Government. Even though the Government was their employer, it would not be liable for their negligence. It was widely recognized that the master was not liable for the acts of his servants performed in the discharge of a duty imposed by law.

Their Lordships allowed the first appeal of the U. P. Government, set aside the judgment and decree of the trial court and dismissed the plaintiff's suit.

[Also see "The Rule of Governmental Immunity" under "Comments"]

HABEAS CORPUS

Detention Order Quashed BY THE PUNJAB HIGH COURT

One Ravinder Kumar alias Tittoo was detained in December 1959 by an order passed by the district magistrate, Delhi, under sec. 3 of the Preventive Detention Act. It was alleged against him that he was a desperate and reckless type operating in a lawless manner in the areas of Kashmere Gandhi Nagar police station and instances were mentioned of thieving, gambling, rowdyism, excessive drinking, assaulting people, etc. The Advisory Board constituted under the Act approved his detention. Ravinder filed a habeas corpus petition in the Punjab High Court challenging his detention.

Counsel for the petitioner contended that the detention order could be sustained as legal only if the grounds of detention were relevant to the maintenance or public order within the meaning of sec. 3 (1) (a) (ii) of the Preventive Detention Act. It was submitted that practically all the activities which were alleged against the petitioner, e. g., thieving, gambling, rowdyism, excessive drinking and assaulting people, could not possibly be regarded to be such activities as were in any manner prejudicial to the maintenance of public order. It was further contended by counsel that even if some of these activities were of such a nature as to justify the petitioner being regarded as a dangerous and desperate character or a goonda, the detention order could not be sustained as legal because the other activities, which had already been mentioned, were such as had nothing to do with the maintenance of public order. And if the subjective satisfaction of the detaining authority was based on those activities which were not relevant to the subject of detention, the entire order would be vitiated.

Counsel appearing for the State submitted that the petitioner was a desperate character of a dangerous nature and, therefore, his detention under the Preventive Detention Act was perfectly legal. Further, the detention having been ratified by the Advisory Board appointed under the Act, no petition under Art. 226 of the Constitution was competent.

Mr. Justice Grover on 8th February allowed the petition and quashed the order of detention. His Lordship examined the grounds of detention and found that some of them were irrelevant to the object of detention. He said :

I have very little hesitation in holding that such activities as committing thefts, indulging in gambling excessive drinking, etc., can possibly have no relevancy so far as the maintenance of public order is concerned.

Merely because a person is of a dangerous character or is breaking the law in one manner or the other does not mean that maintenance of public order is being threatened unless the activities are of such a

nature and the situation prevailing in the particular part of the country is such that if he is not detained public order cannot be maintained or would be endangered.

If the local police are helpless in securing conviction successfully with regard to a person who is committing theft and is indulging in gambling, drinking, assaulting people, etc., it does not mean that resort can be had to the provisions of the Preventive Detention Act in normal circumstances, unless some special circumstances exist which would show that the maintenance of tranquillity in the community would be prejudiced or endangered unless the person is detained.

It may be that some effective legislation is necessary for preventing goondas from indulging in anti-social activities, but that does not mean that resort can be had to the provisions of the Preventive Detention Act in circumstances similar to those pressed in this case. It is for the legislature to enact some statute to enable the authorities to deal with such characters effectively.

Commenting on the maintainability of a writ petition even when the detention is ratified by the Advisory Board, His Lordship said :

It is a view which must be described as altogether opposed to the ambit and scope of Art. 226 of the Constitution and the provisions of the Preventive Detention Act. There is no provision in the Preventive Detention Act which sets up any such bar and even if the statute had laid down such a bar that would have been wholly ultra vires as is well settled by now because the powers conferred by the Constitution under Art. 226 cannot be curtailed by any provision in a statute unless the Constitution itself is amended.

INDUSTRIAL DISPUTES

Act's Applicability to a Corporation

Supreme Court's Decision

The Corporation of Nagpur had several disputes with its employees in various departments in respect of their conditions of service. These disputes were referred for adjudication to the State Industrial Court, Nagpur. The Industrial Court held by its award that the Fire Brigade Department and all others except five departments fell within the term "industry" and on this view granted relief to the employees. The five departments excluded by the Industrial Court related to the assessment and levy of house tax and octroi, removal and pulling down of encroachments and dilapidated houses, prevention and control of food adulteration, and maintenance of cattle pounds.

The Corporation preferred three appeals and raised the question whether and to what extent the activity of

the Corporation came under the definition of "industry" and the provisions of the Industrial Disputes Act.

It was argued by the appellant that no service rendered by the Corporation came within the definition of "industry" under sec. 2 (14) of the C. P. and Berar Industrial Disputes Act, 1947, and that in order to fall within that term the service must be analogous to a business or trade and must partake of the common characteristics of an industry.

The Supreme Court on 10th February dismissed the appeals, holding that the provisions of the Industrial Disputes Act were applicable to the employees of the Corporation in all the departments which were concerned in the appeals. It examined the contention of the applicants and, on the basis of its earlier decisions in *D. N. Banerjee v. D. R. Mukharjee* and the *Baroda Borough Municipality v. its workmen*, stated its conclusions in the following terms :

(1) The definition of "industry" in the Act is very comprehensive. It is in two parts ; one part defines it from the standpoint of the employer and the other from the standpoint of the employee. If an activity falls under either part of the definition, it will be an industry within the meaning of the Act.

(2) The history of industrial disputes and industrial legislation recognizes the basic concept that the activity shall be an organized one and not that which pertains to private or personal employment.

(3) The regal functions described as primary and inalienable functions of a State, though statutorily delegated to a Corporation are, necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power.

(4) If a service rendered by an individual or a private person would be an industry, it would equally be an industry in the hands of a Corporation.

(5) If a service rendered by a Corporation is an industry, the employees in the departments connected with that service, whether financial, administrative or executive, would be entitled to the benefits of the Act.

(6) If a department of a municipality discharges many functions, some pertaining to industry as defined in the Act and others non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of the Act.

The Supreme Court examined the main functions of the departments of the Corporation. The Court held that the 18 principal departments, including those concerned with tax, fire services, public conveyances, lighting and water engineering, sewage, markets, public works, education, building and general administration, were covered by the term "industry."

The Court did not express its opinion on the correctness of the decision of the Industrial Court in regard to the departments excluded by it as no appeal had been filed by the employees.

Mr. Justice Subba Rao, who delivered the judgment, thus explained the scheme of the City of Nagpur Corporation Act:

The Corporation is analogous to a big public company carrying out most of the duties which such a company can undertake to do with the difference that certain statutory powers have been conferred on the Corporation for carrying out its functions more satisfactorily.

A Corporation may, therefore, discharge a dual function: it may be statutorily entrusted with regal functions, strictly so-called, such as making laws and disposal of certain cases judicially and also with other welfare activities. The former, being delegated regal functions, must be excluded from the ambit of the definition of "industry."

The Supreme Court could not find any justification in the artificial division of the activities of the Corporation, as was sought to be drawn by the applicant, viz., into activities of the department which performs services, of the department which only imposes taxes and collects them and administers them, and the departments which are purely in administrative charge of other departments. It was held that whether these three functions are carried out by one department or divided between three departments, the entire organization and activities would be covered by the definition of "industry" given in the Act.

In the result the appeals were dismissed.

Compensation for Forced Unemployment

PRINCIPLE OF SOCIAL JUSTICE APPLIED

Owing to a failure of the monsoon and resulting short supply of electricity the textile mills in Bombay were compelled by an order under sec. 6-A (1) of the Bombay Electricity (Special Powers) Act, 1946, of the State Government to restrict their working. This short working during the period November 1, 1951, to July 13, 1952, led to a loss of working days up to a maximum of 38 in some mills. The workmen demanded the payment of wages for this period or, in the alternative, compensation for involuntary unemployment.

The Government of Bombay referred the matter to the Industrial Court on October 30, 1952. The Court gave its award on January 20, 1954, and directed the management of the cotton textile mills who were parties to the reference to pay the workmen 50 per cent of their wages and allowances for the period that they were kept out of work. The mills preferred an appeal to the Labour Appellate Tribunal, which set aside the order of the Industrial Court, holding that the workmen were not entitled to any compensation and that standing orders of the mills barred the grant of compensation.

Thereupon, the Rashtriya Mill Mazdoor Sangh, representing the employees of the cotton textile mills in the city of Greater Bombay, obtained special leave to appeal to the Supreme Court. The appellants urged that

the Labour Appellate Tribunal had no jurisdiction to entertain the appeal as it did not involve any substantial question of law, and supported the decision of the Industrial Court on merits. On the other hand, the respondents, the Millowners' Association, the Apollo Mills and other companies owning textile mills submitted that the proceedings before the Industrial Court were barred by the provisions of the Bombay Electricity Act.

The appeal was heard by Mr. Justice S. K. Das, Mr. Justice Sarkar and Mr. Justice Hidayatullah. The Court held (10th March) that the Industrial Court had jurisdiction to adjudicate on the dispute referred to it by the Government of Bombay and that the Appellate Tribunal had jurisdiction to interfere with the lower court because in the present case a substantial question of law was involved. The respondents had contended that the closure was a result of force majeure, and that under the standing orders applicable to the workmen no compensation was admissible in such event. The Supreme Court examined the provisions of standing orders 16 and 17, read with sec. 40 of the Bombay Industrial Relations Act, and ruled that the question raised in the present matter was quite different and was not covered by the standing orders. The Court held that social justice required that the loss incurred by the management and the workmen should be shared and in its view the basis on which the Industrial Court had made its directions did not warrant any interference. Accordingly the appeal by the workmen was allowed and the order of the Labour Appellate Tribunal was set aside and that of the Industrial Court restored.

Enforcement of Rationalization

DURING PENDENCY OF DISPUTE

The Northbrook Jute Co. Ltd. and the Dalhousie Jute Mills Ltd. formulated a rationalization scheme and decided to introduce it after obtaining the consent of the Works Committee that the change might be introduced at any time. Accordingly the managements of the mills gave the necessary notice to the workmen. However, the workmen objected to the scheme and the dispute arising therefrom was consequently referred to the Industrial Tribunal for adjudication. In the meantime the management put the scheme into effect on 16th December 1957, but the workmen refused to continue to work. Thereupon the management declared a lock-out. Subsequently a settlement was arrived at between the managements and the workmen, and as a result thereof work was resumed in most of the departments on 20th December and in all departments on 21st December.

The workmen's demand for wages for these five days was referred as a dispute to the Tribunal. The workmen's contention was that they could not work during the period in dispute because of the illegal lock-out by the management. The management's case was that the workmen had gone on an illegal strike; that since the

representatives of the workmen on the Works Committee had agreed to the rationalization scheme all the workmen were bound by it. The Tribunal found that the employers' attempt to put the scheme in operation during the pendency of the reference amounted to a contravention of sec. 33 of the Industrial Disputes Act, 1947, which prohibits any change in the service conditions of workmen during the pendency of adjudication proceedings. Consequently it ruled that the refusal of the workmen to work after this change did not amount to an illegal strike and also that the subsequent lock-out by the management was illegal. On the point of the Works Committee's consent, the Tribunal held that workmen's representatives represented them only for the purposes of the functions of the Works Committee, and thus the decision of the Committee in this case did not become binding on the workmen. Thus the Tribunal decided that the workmen were entitled to be paid wages for the period during which mills had been closed.

The companies preferred an appeal to the Supreme Court, which on 23rd March upheld the award of the Tribunal and dismissed the appeal. The Court held (Mr. Justice K. C. Das Gupta delivering the judgment) that the members of the Works Committee could not bind all the workmen by an agreement made on such an important issue as rationalization, the introduction of which would, according to the Court, result in rendering some workmen surplus and also increase the workload on others. Such a change in the conditions of service to the prejudice of the workmen, in the opinion of the Court, fell within the scope of sec. 33 of the Industrial Disputes Act and justified the strike by the workmen. The Court accepted the view that the workmen were entitled to wages for the period of the lock-out.

Bonus Award to Workmen

DETERMINATION BY THE SUPREME COURT

Messrs. Pierce Leslie and Co., a private limited company engaged in various activities like sale of cashew nuts and coir products on an extensive scale in South India and has a very large number of employees all over the country, paid to its 882 monthly-paid employees bonus for the year 1954-55 equal to three months' basic wages, but the employees were not satisfied with this amount.

The claim of the workmen for higher bonus was referred to the Industrial Tribunal at Coimbatore. The case of the company was that the nature of the business in which it was engaged involved special risks and therefore it should be allowed dividend on capital and interest on working capital at rates which were higher than the normal rate of 6% and 4%, respectively. These claims were rejected by the Tribunal. The Tribunal accepted only partially the company's claims as regards rehabilitation allowance and the amount used as

working capital. It awarded a bonus equal to five months' basic wages in addition to the three months' already paid by the company.

The company preferred an appeal against this award in the Supreme Court, and the Court on 9th March partially allowed the appeal, reducing the additional bonus to the equivalent of three months' basic wages.

It was urged by the appellant before the Supreme Court that the Tribunal had erred in disallowing the claim of the company to a higher return on the investment capital and the working capital. The company pleaded that its business involved special risks and shareholders should be duly compensated for these risks.

In connexion with the claim the Court observed that interest on gilt-edged securities had varied from 3% to 4% in the last few years and this was the normal return on capital by way of interest. It was only because investment in industry involved some special risks that the courts had allowed a higher return on such capital, and a 6% return has been considered to be adequate. This meant an additional return of 2% to 3% to compensate for the risks involved in the business. "In a particular industry where the risk is appreciably less than usual there will be good cause for providing less than 6%; and in an industry where extraordinary risks are run more than 6% should reasonably be provided for."

On these considerations the Court rejected the claim for a higher return on the invested and working capital as in its view the business of the appellant did not involve any extraordinary risks. The Court also did not agree with the claim of the appellant for a higher rehabilitation allowance or for enhancing the figures of working capital said to have been utilized in the business.

The Supreme Court accepted the figure of available surplus calculated by the Tribunal and examined whether the Tribunal had adopted a correct approach to the problem of its distribution. It was found by the Court that the company was employing a large number of employees other than those concerned in the dispute and therefore the balance in the hands of the company could not be treated as a matter only between the company and the employees who had made the present demand. On a consideration of the circumstances the Court held the workmen should be given an additional bonus equal to three months' wages instead of five months' as awarded by the Industrial Tribunal.

Recovery of Excess Pay from Workmen

SUPREME COURT'S JUDGMENT

The workmen of the Sassoon and Alliance Co. engaged in the business of manufacturing silk and art fabrics in Bombay, asked for increased wages and the Government of Bombay referred their demand to the Industrial Court. But while the proceedings were pending

the parties reached an agreement that they would accept the scheme of wage standardization which the Wage Board might fix in respect of them. It was also agreed that the recommendations of the Wage Board should have retrospective effect as from April 1, 1948.

In view of this agreement the matter was referred to the Wage Board, which passed orders on October 14, 1952. The Board fixed wages of certain categories at rates which were lower than the rates already being paid by the company, and in view of the agreement it directed that the wages as fixed by it should have effect as from April 1, 1948. The workmen appealed from this order to the Industrial Court, and the matter was finally taken in appeal to the Labour Appellate Tribunal, Bombay.

The Appellate Tribunal considered the question whether the excess paid to the workmen ought to be recovered by the management. It felt that when the management and the workmen entered into the agreement to give retrospective effect to the wage rates to be fixed by the Wage Board neither party contemplated that these rates would be less than the prevailing rates. In these circumstances and in the interests of industrial peace the Tribunal directed that the excess paid during the period up to June 30, 1953, should be treated as irrecoverable but the extra payments made thereafter could be recovered.

The mills preferred an appeal to the Supreme Court, which dismissed the appeal on 11th March. The mills argued that the direction of the Tribunal was illegal and without jurisdiction. It was submitted that in dealing with the question of jurisdiction of the Tribunal to make the order in question, it would not be right to allow considerations of sympathy with the workmen to outweigh the legal issue involved in the matter. It was further stated that the amount involved was about Rs. 2 lakhs and the appellant was not in a position to forego this amount.

According to the Supreme Court, the effect of the direction of the Labour Appellate Tribunal was to fix a later date for the operation of the order of the Wage Board, and such an order was within its powers. The Court further observed that the view taken by the Labour Appellate Tribunal was on the whole just and fair and therefore even though there was some force in the technical objection raised by the appellant there was no reason why such a technicality should be allowed to prevail. The appeal was, accordingly, dismissed.

Scope of Sec. 33, I. D. Act.

DEFINED BY THE SUPREME COURT

In the *New India Motors (Private) Ltd.* there was a dispute pending before the Industrial Tribunal relating to some apprentices, and during the pendency of these proceedings the company terminated the services of Mr. K. T. Morris, who was holding the post of field service representative on the ground that the management had decided to abolish the post. Being aggrieved by this order, Mr. Morris filed a complaint before the Industrial Tribunal before which the dispute was pending and claimed reinstatement. Mr. Morris' application was made under sec. 33 read with sec. 33 A of the Industrial Disputes Act.

Sec. 33 provides that during the pendency of any proceedings before a Tribunal an employer shall not discharge a workman "concerned in such dispute" without the express permission of the Tribunal. If the employer violates this provision, sec. 33 A enables the workman to apply to the Tribunal for relief. The Industrial Tribunal after hearing the parties directed the reinstatement of Mr. Morris. Thereupon the management preferred an appeal in the Supreme Court challenging the correctness of the Industrial Tribunal's decision.

Its main contention was that it was not open to the respondent to apply to the Tribunal under sec. 33 A as he was not a workman "concerned in the dispute" which was pending before the Tribunal. The expression, it was urged, should be limited to mean a workman directly or actually concerned in such disputes. Since the pending dispute involved only seven apprentices, the respondent, it was submitted, could not claim to be concerned in the dispute.

The Supreme Court on 22nd March dismissed the appeal, the judgment being delivered by Mr. Justice Gajendragadkar. Examining the scope of the protection granted to workmen by sec. 33 of the Act, the Court stated that in enacting sec. 33 the legislature wanted to ensure a fair and satisfactory inquiry of the industrial dispute undisturbed by any action on the part of the parties which might create a fresh cause for conflict. That being so, a narrow construction of sec. 33 would tend to defeat the object of the Act. The court examined the decision regarding the construction of this section by the different High Courts and while approving the broad construction by the High Courts of Madras and Andhra it disagreed with the view taken by the Bombay High Court.

According to the Supreme Court, "the expression workmen 'concerned in the dispute' included all workmen on whose behalf the dispute had been raised as well as those who would be bound under sec. 18 of the Industrial Disputes Act by the award which may be passed in the dispute."

A Lock-out and a Lay-off

SUPREME COURT'S CONSTRUCTION

The management of the Kairabatta Estate shut down work from 28th to 31st July 1957 as the workmen had, it was alleged, indulged in rowdyism. The workmen then submitted before the Industrial Tribunal that this amounted to a lay-off and that they should be paid compensation as prescribed in the Industrial Disputes Act. The Act defines a "lay-off" as the failure, refusal or inability of an employer to give employment to workmen employed by his industrial establishment on account of shortage of power, raw material or breakdown of machinery or "for any other reason." The Industrial Tribunal gave an award in favour of the workmen, and the management then preferred an appeal in the Supreme Court.

The management submitted that there was no lay-off, but the closure was a case of justified lock-out. The Act defines a "lock-out" as the "closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him." The Supreme Court on 24th March found that the closure of the works by the management

and the consequent refusal to give work to the workmen mounted in this case to a lock-out and therefore held that the Industrial Tribunal was in error in coming to the finding that the closure was in fact a lay-off and that the employees were thus entitled to compensation therefor. Mr. Justice Gajendragadkar, speaking for the Court, said :

A lock-out [as defined in sub-sec. (1) of sec. 2 of the Industrial Disputes Act] can be described as the antithesis of a strike. Just as a strike is a weapon available to the employees for enforcing their industrial demands, a lock-out is a weapon available to the employer to persuade by coercive process the employees to see his point of view.

According to the Court, the closure was brought about in this case as a coercive measure and therefore it was a lock-out and not a lay-off. Therefore, the Court held the workmen were not entitled to any lay-off compensation.

The appeal was accordingly allowed and the award of the Tribunal was set aside.

NOTES

Anti-Obscenity Statute Struck Down

Under a Los Angeles ordinance one Mr. Eleazar Smith, a bookseller of the city, was convicted of possessing a book on obscianism. In the trial he had offered to introduce evidence bearing on community standards, but the trial judge did not allow it. Mr. Smith preferred an appeal in the Supreme Court, and the Court in a unanimous opinion set aside the conviction. Justice Brennan, who wrote the opinion, stressed that the ordinance tends to penalize booksellers "even though they had not the slightest notice of the character of the books they sold." By dispensing with any requirement of prior knowledge of the book's contents, the ordinance imposes a "severe limitation on the public's access to constitutionally protected matter." "If the bookseller is criminally liable without knowledge of the contents, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." The ordinance, "though aimed at obscene matter, has a tendency to inhibit constitutionally protected expression." "A statute which stifles freedom of expression by making the individual reluctant to exercise it cannot stand under the Constitution." Justice Frankfurter in a concurring opinion emphasized the importance of "contemporary community standards" in judging obscenity and said the right to introduce such evidence should be allowed under due process in obscenity prosecutions.

Fifth Amendment Firings Held Void

Two studio musicians, Gottlieb and Fordis, were summoned for questioning by the Un-American Activities Committee of the House of Representatives, but they invoked the Fifth Amendment and exercised their right of silence. Thereupon the Universal International Pictures, with whom Gottlieb and Fordis

had a contract, fired them. The musicians then brought a suit against their employer for damages for breach of contract, and the Superior Court of Southern California ruled that they were entitled to damages. Judge Gitelson said the studio's contract with the union required no exposition of political beliefs or associations. Neither could sections of the California governmental code relating to the non-employment of Communists be applied to a contract between a private employer and its employees. He condemned the assumption that those who claim the constitutional protection of the First and Fifth Amendments are either criminals or perjurers. He specifically ruled that the exercise of constitutional rights "could not and should not be reprehensible or revolting to reasonable men." Neither should it "shock the sensibilities of reasonable men," nor be construed as "indicative of corruption or indecency or depravity." On the contrary, the judge declared, "the sensibilities of all men should be to assert and support those essential and valuable rights."

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I, R. G. Kakade, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dated 13-4-1960

(Sd.) R. G. Kakade
Signature of Publisher.