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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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Farewell

We regret we have to announce that the BULLETIN will cease publication from this issue.

On an earlier occasion we took the readers into our confidence and apprised them of the difficulties we have had continuously to encounter. We wrote then :

The BULLETIN involves those who have made themselves responsible for it in an unbearably heavy financial loss. Those who write in it do so as labour of love : not a pie is charged to the paper on this account. Few will have an adequate idea of the immense amount of time and energy that has to be devoted to the bringing out of the paper — and this has to be done by men who have other public work to attend to. But even so, the mere printing and distribution of the journal entails a loss, which has so far been cheerfully borne by a few individuals. But this cannot in the nature of things be a permanent arrangement. The BULLETIN must at least be able to pay its way when all editorial charges are excluded from the accounts as they have been so far.

We made at that time an appeal to our subscribers that they should give each of them one more subscriber in order to resolve our financial difficulties. We said :

Our patrons themselves are, taking the bulk of them, very poor, and we know that this additional burden will be too much for them. But unless they make up their minds somehow to shoulder it, the BULLETIN cannot live long. We wish it to live if only because we may through it be enabled to serve the cause we and they have so much at heart, and if even our collective efforts do not succeed in bringing enough money to meet the bare printing and postage charges, they may find one day that the paper has gone out of existence—very much to their grief and our grief.

Our difficulties have persisted and they have now compelled the promoters of the BULLETIN to close it down. Those who were actually engaged in conducting it were never under a delusion that the BULLETIN, as conducted, was doing any great service to the cause of civil liberties ; they could only plead that they did their best. The cause for their regret is that this is, as we said

earlier, the "only organ" in India devoted to the cause. But perhaps the regret is misplaced. It may be that when those interested in civil liberties find that there is no organ left to serve the cause, they will step into the breach and provide our country with a Bulletin edited with a far greater knowledge of the principles of civil liberties and a much keener insight into the civil liberties problems that beset us than we could ever boast of. We for our part keenly cherish the hope that the discontinuance of this particular organ will pave the way for another and better organ being ushered into existence, one which will inspire the public at large to take greater interest in problems of civil liberties and the rulers to be more attentive to the claims of individual freedom.

It only remains for us sincerely to thank our subscribers for the help we have so far derived from them. Good-bye!

Suppression of Civil Liberties in Punjab

P.-S. P. LEADERS' REPORT

Three leaders of the Praja-Socialist Party—Mr. Triloki Singh, leader of the Opposition in the U. P. Legislative Assembly, Mr. S. Gurupadaswamy, M. P., and Mr. Nath Pai, M. P.,—who had been deputed by the Party's National Executive to study and report on the condition of civil liberties in Punjab have in their report said : "There is widespread infringement of civil liberties in the State and harassment of people on a large scale. Infringement of civil liberties in Punjab is a usual phenomenon. Earlier agitations were dealt with no less severely, but inquiries from various sources revealed that this time (during the present Punjabi Suba agitation) infringement was more widespread and harassment was on a larger scale."

Indiscriminate searches of Sikhs at railway and bus stations and approaches to gurdwars and their arrest on mere suspicion were being made in the State. Arrests had also been made of defence counsel in various places and Sikh lawyers in general were afraid of accepting briefs for Akalis. The State Government had promulgated orders under sec. 144 Cr. P. C. banning public meetings and assembly of more than four persons in support of the Punjabi Suba agitation. "Those against the agitation are freely given permission to hold meetings."

DETENTION WITHOUT TRIAL IN COLONIES

SAFEGUARDS PROPOSED BY AN INTERNATIONAL JURISTS' UNIT

Concerned apparently at the large number of persons arrested and detained without trial in Kenya and Central Africa, "Justice," which is the British section of the International Commission of Jurists, charged its Colonial Committee with the task of considering what circumstances could be deemed to justify granting Governors of Colonies power to make regulations authorizing detention of persons without trial and also to consider what are the minimum safeguards that should be provided against abuse of such power. The committee's report was presented to Mr. Macleod, Secretary of State for the Colonies, recently by a deputation which included Professor L. A. C. Gower and Messrs. Bowen and Rawlinson, Queen's Counsel and Members of Parliament. Mr. Macleod discussed the matter with the deputation and promised to give it further consideration.

The committee's proposals, as summarized by "The Times" are :

The committee urges that the proposed detainee should be brought before a magistrate within 48 hours of his arrest and that the issue of a warrant against him with a view to the making of a detention order should be proved.

It is further suggested that within 28 days afterwards there should be a judicial inquiry into the proposed order by a Judge or a person who has held high judicial office.

The person named in the order should have the right to legal representation at the inquiry and every effort should be made to provide him with free legal aid.

To enable the person to prepare his defence the Crown should give him as much information as possible about the case against him but should have the right to withhold information which would make possible the identification of witnesses who might be endangered if their identity was discovered.

The hearing should be in public, unless, in the view of the tribunal or on the application of the Attorney General, it is expedient in the interest of public order or security to exclude the public or any specified person or persons from a part or the whole of the proceedings.

The tribunal should make a confidential report to the Governor consisting of findings of fact, and where necessary of law, on the issues arising out of the proposed order, and a recommendation whether or not the order should be made.

Within seven days of receiving the tribunal's report the Governor should order the person to be set free or detained as he thinks fit after considering the report.

The Governor should submit weekly reports to the Secretary of State giving the names of persons detained. The committee's report says that if in any case the Governor's decision to detain the person was contrary to

the tribunal's recommendations this should also be stated. The Secretary of State should publish monthly the information given by the Governor, and the Governor should keep detention orders under constant review.

If the person has not been set free before the expiry of 12 months from the date of the order his case should be reviewed by the tribunal and annually afterwards. Throughout the period of detention, the detainee should have the right of effective access to his legal advisers.

The committee says that the granting and exercise of power to the Governor to detain persons without trial should be exceptional and that they should be made only in and for the duration of an emergency. No Governor should be allowed to have such powers permanently.

Power to detain without trial should not be conferred except in circumstances envisaged in Art. 15 of the European Convention of Human Rights — "in time of war or other public emergency threatening the life of the nation."

The committee says sections of the Northern Rhodesia and the Kenya security ordinances do confer such powers on the Governor in circumstances other than those envisaged by Art. 15. In this respect they are therefore open to objection.

The procedural safeguards proposed by the committee may not be very striking, though in some respects it will be found on a close examination of them that they are better than those provided in our detention law. In one respect the proposals fall short of what is provided in this country, viz., that the Governor is authorised under these proposals to detain a person even if the tribunal recommended his release. According to our law, the Advisory Committee's opinion, if favourable to the detainee, is binding on the Government. The committee evidently thinks that in Colonies, which presumably are politically backward, the Governors should have greater discretionary authority than in more progressive countries, but the Colonial Secretary is charged to keep a close watch on the detentions ordered by the Governor. Similarly, whereas our law prescribes twelve months as the maximum period of detention under any particular detention order, it is not to be so under the committee's proposals. However, it is provided that detentions which last longer should be subject to review again by the tribunal.

But all these are comparatively small points. The main proposal of the committee on which we should concentrate attention is about the strict limitation of circumstances in which alone the committee thinks that any detention would be justified even in Colonies where, in its opinion, the rulers must enjoy wider powers than elsewhere. The committee says :

Power to detain without trial should not be conferred except in circumstances envisaged in Art. 15 of the European Commission of Human Rights: — "in time of war or other public emergency threatening the life of the nation."

The circumstances justifying detention are practically identical with those in which the writ of habeas corpus can be suspended under Art. I, sec. 9, par. 2 of the United States Constitution. Everyone agrees that in a national crisis imminently threatening the security of the State, personal freedom is liable to be abridged. But in our country detentions can be ordered and are ordered not only when national security is in danger but even when public order is likely to be disturbed (not to speak of detentions merely to curb anti-social activities like blackmarketing). There is a vital difference between circumstances imperilling the security of the country and those endangering merely public order. And this is recognised by the "Justice" committee which was also asked to state what safeguards should be devised in the

matter of orders of restrictions of a less severe type than orders of detention—confinement of a person to his usual place of residence or prohibition from entering a specified area. Most of the procedural safeguards suggested above are, in the judgment of the committee, applicable to such restrictive orders also, and it says that "any restriction on freedom of movement or assembly is a serious infringement on the liberty of the subject which should not be imposed casually or maintained longer than is necessary." But it expresses the opinion that such restrictive orders should be allowed to be imposed "in an emergency threatening public disorder or an outbreak of violence." This shows that there is a difference, not merely of degree but of kind, between circumstances calculated to endanger the security of the State and circumstances in which minor breaches of the peace are apprehended. All that the persons devoted to the preservation of civil liberties in India want is that a threat to the national security should be the sole justifying ground for the issue of a detention order.

FUTURE OF THE CENTRAL AFRICAN FEDERATION SOUTHERN RHODESIA ON THE ROAD TO ADVANCEMENT

After the memorable success achieved by the British Government in devising an agreed solution of the problem of constitutional advance in Tanganyika, Nigeria and particularly in Kenya and Nyasaland, it seems very likely that its efforts in solving the most ticklish part of this problem—the future of the Central African Federation—will be crowned with success. If this happens, a luminous example will have been set of interracial co-operation between peoples belonging to different races at different levels of political and economic development.

Only a few months back this prospect seemed extremely bleak; it almost appeared then that the whites of this land were determined to go the South African way. The riots that occurred at Bulawayo in Southern Rhodesia in the last week of July had already come to be described as Central Africa's Sharpeville. The riots started over the banning of a meeting of the National Democratic Party and arrests of its leaders, and the disturbances spread to Salisbury itself. The irony of it is that Sir Edgar Whitehead's Southern Rhodesian Government, which used to boast that not a shot had been fired within the last sixty years, resorted to firing and took other strong measures, associated in our memories with the Nationalist Government of the Union of South Africa, in order to check the activities of a moderate party which had come into existence only a year ago. The party was known not to be acting subversively. It made open attempts to bring about political reforms in a thoroughly constitutional manner. It consisted of politicians who thought that Mr. Garfield Todd's Central Africa Party pursued a line which was a trifle too liberal

to be effective in the prevailing state of the white settlers' mind. It was becoming very popular with Africans, but all its influence was derived from the fact that it was less radical than the multi-racial Central Africa Party, which was at one time a great force. Even so the Whitehead Government chose to come down hard on such a middle-of-the-road party. As the "Guardian" says, the party "was preparing documents for submission to a constitutional conference, and no doubt when the Government got wind of this it decided that things were going altogether too far" and that it must make an exhibition of force to put African nationalists in their place. These events brought conviction to many that "racial partnership" was bound to prove a hollow cry so long as Sir Edgar Whitehead presided over the destinies of Southern Rhodesia, and in fact Mr. Todd and Mr. Joshua Nkomo, the former leader of Southern Rhodesia's African National Congress, went so far as to make a formal representation to the British Government to suspend the Southern Rhodesian Constitution and to intervene with adequate armed forces to ensure a peaceful transition to establish democratic government based on the will of the people. The representation said:

Ranged against the great mass of our people are 200,000 whites (4 per cent. of our population) with police, an army, and an air force [who are] in the name of civilization... refusing liberty, denying justice, and flouting the lessons of history. Britain is supporting an undemocratic, unjust Government which if left to itself must soon disintegrate, causing widespread suffering.

The wave of political arrests of distinguished African leaders whose aim was only to obtain a greater measure of self-government for their country and who followed strictly non-violent methods in their campaign produced a strong reaction everywhere. The inflamed racial antagonisms which these incidents brought about are known to have alarmed Whitehall, which took Sir Edgar Whitehead's action as an affront to its considered policy of as quick a transfer of power to Africans as possible and even conservative quarters in London pressed the Government for a decisive expression of displeasure. European liberal opinion in Southern Rhodesia itself seemed at last to realize that time had come to admit Africans to a share of government in their own country. Even Sir Edgar's United Federal Party appeared to be shaken out of its complacency. It came to appreciate that ominous storm clouds were gathering and that it would not do merely to bolster internal security but that something must be done by adopting constitutional reforms to create a spirit of racial co-operation. Till now Sir Edgar was thinking of political advance of Southern Rhodesia only in terms of removal of the reservations on the constitutional power of its Government. Southern Rhodesia is a self-governing colony, but there is a provision in its Constitution which instructs the Governor to reserve for the consideration of the United Kingdom Government any law "whereby natives may be subject or made liable to any conditions, disabilities, or restrictions to which persons of European descent are not also subjected or made liable." The British Government naturally thought when the Constitution was drawn up in 1923 that since Africans who formed nine-tenths of the population were not in a position to defend themselves against discriminatory legislation, the Imperial Power should be ready to intervene in their behalf. Sir Edgar accompanied a demand for the abolition of this safeguard against discriminatory legislation with the threat that Southern Rhodesia would secede from the Central African Federation if Southern Rhodesia was to remain static while Northern Rhodesia and Nyasaland were moving towards self-government. In short Sir Edgar was keen only on maintaining intact white supremacy in the colony. But now enlightened public opinion in the United Kingdom and in Southern Rhodesia itself is apparently making even Sir Edgar realize the necessity of introducing a measure of real democratic reforms in the Constitution of the colony.

When the Rhodesias and Nyasaland were brought together in 1953 in a Federation enjoying self-government in its own sphere, it was thought this association of diversely situated territories would conduce to the advancement and welfare of all the inhabitants and in particular would foster partnership and co-operation between black and white. That at any rate being the avowed aim, the federal Constitution naturally provided for African participation in government, to however limited an extent. The Federal Assembly now consists of

60 members, 44 of whom are elected. Of these 12 are Africans elected on a special voters' roll with lower qualifications. There are also junior ministers among Africans. The share of Africans in the legislative and executive power is small enough in all conscience, but in the colony of Southern Rhodesia they do not enjoy any political power. Its Legislature consists of thirty members, not one of whom is an African. The franchise which is weighted in favour of Europeans does not admit even a single member to be elected. Only some 2,200 Africans are on the voters' rolls in an electorate of 65,000. Thus an all-white Legislature orders the affairs of a quarter million Europeans and nearly three million Africans. Even town councils are all manned by Europeans.

But fortunately it now appears that the Southern Rhodesian Government is contemplating a change. In the second week of August Sir Edgar Whitehead announced that the membership of the colony's Parliament would be increased from 30 to 50 and that new constituencies would be created giving Africans an opportunity for the first time to return their own candidates. It is anticipated in knowledgeable circles that this will bring at least four Africans into Parliament and that they would almost certainly be nationalists. It is not by any means a big reform, but it is at least a beginning indicating that after the shock of the Bulawayo and Salisbury riots Sir Edgar's Government has at last been forced to an agonizing reappraisal of its relationship with other races.

Another sign that Europeans in Southern Rhodesia are now willing to accept a change in their relationship with Africans is afforded by the fact that the Government is moving to end land reservations for the whites. A select committee has recommended repeal of the Land Apportionment Act passed by the Southern Rhodesia Parliament in 1930. The Act divided the country into European and African areas and established the principle of racial segregation in Southern Rhodesia. The total land assigned for African occupation is at present 42 million acres and the total for European occupation is 48 million acres. That is to say, land has been divided almost equally between Europeans and Africans although the ratio of population now is only one to 12. The Act is regarded by the whites as their Magna Carta. The committee says in its report that it is illogical to reserve land in a particular area for purchase by members of one race to the exclusion of members of the other race, and recommends that rural land anywhere in Southern Rhodesia should be purchasable by any person of any race or colour. The report is warmly welcomed by most Africans and received with dismay and alarm by many European farmers. There is a likelihood that the Government will accept the committee's recommendation to repeal the Act, for Sir Edgar Whitehead has said that apartheid is a luxury that Southern Rhodesia cannot afford.

Another promising sign of enlightened thinking in governmental quarters is negotiation by the Government for a substantial increase in African wages in several industries. After a rise was secured in the wages of Africans on Rhodesian railways, negotiations have now been concluded for a similar rise in the clothing industry, and this is expected, as the "Times" puts it, "to start a chain reaction throughout industry for improved African earnings." The Southern Rhodesian Minister of Labour said recently that a rate of £168 a year should be regarded as the standard wage for Africans as the married urban African could not make ends meet on less. And yet average African earnings are still less than £100 a year. It is obvious that unless Africans are able to obtain a decent living they will never believe that partnership between the races is real. Moreover, "it is understood that the Government is also toying with the idea of introducing legislation against the social colour bar" which prevails in Southern Rhodesia; and it is said that a large section of the ruling United Federal Party would like to see racial discrimination in hotels, restaurants, cafes and cinemas abolished, and that Sir Edgar Whitehead has

been putting pressure on hotels to open to non-Europeans.

If Southern Rhodesia really practises inter-racial partnership, then alone will there be any chance of Northern Rhodesia and Nyasaland remaining within the Federation. There can be no doubt that some form of close association is necessary for economic reasons, but if Africans see no sign of genuine racial co-operation being aimed at there can be no doubt that the Protectorates will secede from the Federation. It is reported that the Monckton Commission has recommended that the granting of independence to the Federation that Sir Roy Welensky, Federal Prime Minister, asks for should be conditional upon the granting of the specific right to each of the component territories to secede after a trial period of five years. Obviously, the Commission thinks that the right of secession will alone compel the whites in the country to give a new deal to Africans, which is their due. That in its opinion is the only guarantee of the continuation of federation on the basis of racial partnership.

MUZZLING OF THE PRESS

A MEASURE PROPOSED FOR ASSAM

We had thought that the Punjab Press Act authorizing the Executive to muzzle the press at its sweet will — by imposing prior censorship, prohibiting publication altogether, banning entry of foreign newspapers etc. — was allowed by the Central Government to have its sway only because this Government was not aware of its existence; otherwise, it was our belief, Mr. Nehru's Government would have, either by moral suasion or by compulsion, made the Kairon Government in the Punjab withdraw a measure the like of which in its severity it would be hard to find in the history of press laws in any democratic country. But the truth is that the Government of India itself is no better respecter of press freedom than the Government of the Punjab. This has become evident from the fact that the Parliamentary delegation which inquired into the Assam riots has included in its recommendations one for enacting a Press Law which would be almost as stringent as the Punjab Press Act. It is true that the delegation which made this proposal was unofficial in composition, but the proposal (which apparently originally emanated from the Assam Government) has received endorsement from Mr. Nehru, which shows that the Central Government itself is as little appreciative of the value of the liberty of the Press in a democratic society as either the Punjab Government or the Assam Government.

The proposal is that when a notification of a state of emergency is made (obviously by the President of India) for a specified area in Assam, publication of "false" or "exaggerated" news should be made an offence; that

newspapers circulating in the area should be required to publish official contradictions of false and exaggerated news "in such place and in such manner as may be directed;" and that newspapers would be placed under an obligation to avoid headlines and pictures likely to inflame passions. The reason given by the Assam Government is that certain sections of the press "had endangered the peace of the State" by giving publicity to false rumours or exaggerated accounts of disturbances. In face of such a situation, the Government says that it "cannot be a mere spectator to activities which incite passion and hatred among the various communities" and that "if necessary, it will not hesitate to enforce by law such controls as may be necessary for the maintenance of law and order and the preservation of amicable feelings among the people."

Now, what are the facts in regard to the role of the Press in this matter? The Assam Government itself is known to have played down the gravity of the situation betokening almost a complete collapse of the administration; such a responsible paper as the "Statesman" charges the Government with having "prevented information coming out." And if the Press was not alert in doing its duty of informing the public, the seriousness of the problem posed by the riots would not have been brought home to the country at large. In publishing news some newspapers must have been guilty of exaggeration, but their fault is certainly greatly exaggerated by the Government. The "Statesman" says: "Whatever harm insufficient verification and overemphasis may

have caused, it was almost certainly less than the good achieved by bringing the seriousness of the Assam situation to all-India notice." And again: "Whatever its aberrations, in ensuring that India should wake up to the crimes committed in Assam and their possible consequences to the country at large, the Calcutta Press acted with a very proper sense of responsibility." It appears that the Assam Government, whose supersession was being demanded for the disgraceful breakdown of the administrative machinery, is here trying to make the Press the scapegoat for its own incompetence. But what pains us most is that Mr. Nehru has not plainly told the Government that a press gag cannot be thought of. The need for keeping a Congress Ministry in power has apparently greater weight with him than the need for preserving the liberty of the press, which is at the basis of a democratic society.

Mr. Nehru can, if it so pleases him, take comfort from the fact that India is not at present the only Commonwealth country to adopt legislation for controlling the Press. South Africa, for instance, is engaged in passing a law providing for an extensive measure of censorship on all forms of reading matter and visual entertainment in the Union. Its Publications and Entertainments Bill provides that nobody shall publish "any undesirable newspaper"—a newspaper or even part of it being "undesirable" if it:

(a) prejudicially affects the safety of the State;

(b) can have the effect of disturbing the peace or good order; prejudicing the welfare; bringing any section of the inhabitants of the Union into ridicule or contempt; harming relations between any sections of the inhabitants of the Union;

(c) is otherwise on any ground objectionable.

The Union Government has come up against the same sort of weaknesses of the Press as the Assam Government.

"The itch of Governments to control the Press is a contagious disease and one extremely hard to shake off," says the "Guardian" ruefully. This disease has spread to Ghana, in which a bill providing for imposition of censorship and a ban on importation of publications was rushed through Parliament under a certificate of urgency on 23rd August. The measure empowers the President to set up a preventive "scrutiny" of newspapers which to his mind have systematically published matter "calculated to prejudice public order or safety." It also empowers him to forbid the import of publications that are in his view "contrary to the public interest."

Ceylon's Press Bill is very much milder. In that country two large press organizations, responsible for publishing most of the daily national newspapers, are going to be broken up. The original idea was to nationalise these organizations by the method of taking up 51 per cent. of the share capital. When this proposal was vehemently attacked by the Press throughout the world, the Govern-

ment relented. It is not going now to acquire a controlling interest and to create thereby a Government monopoly. But, even so, the Government will be in a position to exercise effective, if not absolute, control over the Press. Yet it must be recognized that, as the "Guardian" says: Ceylon "is a long way from the policies pursued in Ghana" and — shall we say in India? *

Segregation in Residential Areas

Ruled Unconstitutional

Enforcement of racial segregation in residential areas directly by legislative fiat was held unconstitutional as a denial of equal protection of the laws guaranteed by the Fourteenth Amendment in *Buchanan v. Warley*, 245 U. S. 60 (1917), and such a blatant statutory discrimination has since then been a thing of the past in the U. S. A. Further, in *Shelley v. Kraemer* (infra) the Supreme Court in 1948 barred the invoking of governmental power by private landlords in enforcing restrictive agreements that they had arrived at among themselves to exclude Negroes from the occupation of their houses. This was an important decision with far-reaching effects. But the question still remained undecided whether the guarantees of the Fourteenth Amendment would be held to have been infringed where State aid in giving effect to restrictive agreements by private groups is not so direct and substantial as in *Shelley* but somewhat slight and indirect.

Such a question arose recently in Los Angeles. There a redevelopment agency constructed houses and, in relocating dispossessed tenants, furnished to landlords lists of white or coloured tenants, so that those who would accept only white tenants could with the help of the lists exclude non-white persons. To what extent was the State responsible for the resulting racial discrimination? The question was referred to the Attorney General of the State, and he ruled that such segregated rental listings were unconstitutional. He said:

Landlords may continue as private owners to accept or reject any tenants, but they cannot avail themselves of governmental listing services if racial discrimination is practised.

What sort of Fourteenth Amendment might it be that would countenance active sponsorship by the redevelopment agency of racial discrimination by private landlords?

This ruling was based upon Supreme Court decisions in two cases, both of California, to which a reference may here be made because of their importance. In *Shelley v. Kraemer*, 344 U. S. 1 (1948), the Court held that the State's judicial process cannot be used to give effect to private covenants which restrict use and occupancy of real estate to persons because of race or colour. In a later case the Court set out the effect of this decision as follows:

The law [applicable in the Shelley case] did not make the covenant itself invalid; no one would be punished for making it, and no one's constitutional rights were violated by the covenantor's voluntary adherence thereto. Such voluntary adherence would constitute individual action only. When, however, the parties cease to rely upon voluntary action to carry out the covenant and the State is asked to step in and give its sanction to the enforcement of the covenant [by the State courts, it would constitute a denial of the Equal Protection clause of the Fourteenth Amendment].

Later, the question arose whether a party to a racial restrictive covenant could bring an action for damages for breach of the agreement. A Missouri supreme court in 1949 in *Weiss v. Leason* 359 Mo 1054 225 S. W. 2nd 127, upheld this right, though it is clear that if the courts may be used to seek damages for breach of the covenant, then the Shelley decision would be rendered practically valueless. But the U. S. Supreme Court set the matter right in *Barrows v. Jackson*, 346 U. S. (1953). In this case the Court held that a restrictive covenant could not be enforced at law by a suit for damages against a co-covenantor who broke the covenant. Here were involved owners of residential estates in Los Angeles who entered into a covenant running with the land and restricting the use and occupancy thereof to persons of the white or Caucasian race and obligating the signers to incorporate this restriction in all transfers of land. Leola Jackson, one of the parties to the covenant, permitted non-white persons to occupy the premises and an action at law for damages was brought against her by other parties for breaching the covenant. The Court said:

To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of their property. The result of that sanction would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminating manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a State court at law to sanction the validity of the restrictive covenant here involved would constitute State action as surely as it was State action to enforce such covenants in equity [declared in *Shelley v. Craemer* to deny equal protection of the laws to the Negroes].

But no coloured persons were before the Court complaining that their constitutional rights had been violated, and the ordinary rule is that the Supreme Court does not

recognize the standing of any person to vindicate the constitutional rights of some third party. Still the Court departed from this usual rule because of the "unique situation" which the case presented. The Court said:

It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property. This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity [Shelley].

NANAVATI CASE

Extent of Governor's Power under Art. 161

Ruling of the Supreme Court

After Commander Nanavati was sentenced to life imprisonment by the Bombay High Court on the charge of committing the murder of Mr. Ahuja (vide p. vi: 69 of the BULLETIN), Nanavati filed a petition under Art. 136 of the Constitution in the Supreme Court seeking special leave to appeal against this judgment. He also filed an application seeking exemption from complying with the rules of the Supreme Court which require an accused to surrender before his petition on merits is heard.

When the petition for special leave and the application for exemption from surrendering came up before a Division Bench of the Supreme Court in April, the application was referred to the Constitution Bench to decide the constitutional question arising out of it. The question involved was "as to what is the content of the power conferred on the Governor of a State under Art. 161 of the Constitution and whether the order of the Governor of Bombay (suspending the life sentence) impinges on the judicial powers of this Court with particular reference to its power under Art. 142 of the Constitution."

The Constitution Bench on 5th September held by a majority decision of 4 to 1 that the Governor of Bombay had no power under Art. 161 to suspend the life sentence passed on Commander Nanavati when the matter was sub-judice in the Supreme Court. In view of this conclusion the Court dismissed Commander Nanavati's application for exemption from complying with the rules of the Court requiring a petitioner to surrender before his special leave petition was heard.

The Chief Justice, who delivered the judgment of the majority, dealt with the argument of Mr. Seervai, Attorney-General of Bombay, that there could never be a conflict between the exercise of power by the Governor under Art. 161 and by the Supreme Court under Art. 142 because the power of the Governor under Art. 161 was executive power while the power under Art. 142 was judicial power and the two did not act in the same field. His Lordship said:

That, in our opinion, is over-simplification of the matter. It is true that the power under Art. 161 is exercised by the executive while the power under Art. 142 is that of the judiciary, but merely because one power is executive and the other is judicial, it does not follow that they can never be exercised in

the same field. The field in which the power is exercised does not depend upon the authority exercising the power but upon the subject matter. What is the power which is being exercised in this case? The power is being exercised by the executive to suspend the sentence; that power can be exercised by this Court under Art. 142. The field in which the power is being exercised is also the same, namely, the suspension of the sentence passed upon a convicted person. It is significant that the Governor's power has been exercised in the present case by reference to the appeal which the petitioner intended to file in this Court. There can, therefore, be no doubt that the judicial power under Art. 142 and the executive power under Art. 161 can within certain narrow limits be exercised in the same field.

It will be seen that the ambit of Art. 161 is very much wider and it is only in a very narrow field that the power contained in Art. 161 is also contained in Art. 142, namely, the power of suspension of sentence during the period when the matter is sub judice in this Court. Therefore, on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that Art. 161 does not deal with the suspension of sentence during the time that Art. 142 is in operation and the matter is sub judice in this Court.

If there is any field where the two powers can be exercised simultaneously the principle of harmonious construction has to be resorted to in order that there may not be any conflict between them. On that principle the power under Art. 142 which operates in a very small part of the field in which the power under Art. 161 operates, namely, the suspension and execution of sentence during the period when any matter is sub judice in this Court must be held not to be included in the wider power conferred under Art. 161.

... But it was contended by Mr. Seervai that the words of the Constitution, namely Art. 161, do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument in so far as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case, to that extent the power of the executive is limited in view of the words either of secs. 401 (executive power to suspend or remit sentences) and 426 (suspension of sentence by an appellate court pending appeal and release of appellant on bail) of the Code of Criminal Procedure and Arts. 142 and 161 of the Constitution.

Dealing with the contention that the rule-making power of the Supreme Court was no more than subordinate legislation and hence in the case of conflict between the rules and the powers of the Governor under Art. 161 the rule must yield, His Lordship said:

This argument overlooks the fact that in substance and effect the conflict is not between the said rule and Art. 161 but between the wide powers conferred on this Court by Art. 142 and similar wide powers conferred on the Governor under Article 161. It would, therefore, be fallacious to suggest that compliance with the rule would become unnecessary because a higher power under Art. 161 has been

exercised by the Governor and so in the face of the order passed by the Governor there is no longer any need to comply with the rule.

The judgment said that although the rules were framed under Art. 145, the source of power of the Court to grant bail or to suspend sentence pending hearing of any criminal matter was derived from Art. 142. "In the decision of this question the legal character of the rules that may be framed under Art. 145 cannot have any material bearing."

The judgment said that it was "strenuously urged before us" that the power of granting pardon was wide and absolute and could be exercised at any time, that is, even in respect of criminal matters which were sub judice. The argument was that the power to suspend sentence was part of the larger power to grant pardon.

This argument is fallacious; it ignores the essential difference between the general power to grant pardon, etc., and the power to suspend sentence in criminal matters pending before this Court.

Disagreeing with the majority view, Mr. Justice Kapur held that the Governor's power under Art. 161 was absolute and not subject to the Supreme Court rules.

WRIT OF QUO WARRANTO

Appointment of Government Pleader

Petition Dismissed

Mr. A. Ramachandran, Advocate, filed a petition in the High Court of Madras for the issue of a writ of quo warranto to try the right of Mr. Alagiriswami to the office of Government Pleader, Madras. The latter was previously Judge in the City Civil Court; by a notification dated 22nd June 1960 the Government of Madras appointed him to be the Government Pleader "on his retirement from the Madras State Higher Judicial Service."

The petitioner challenged the validity of the appointment, maintaining that the appointment was made in contravention of the rules pertaining to the appointment of Government Pleader; that in making the appointment the Government were actuated by an ulterior and collateral motive wholly foreign to the lawful exercise of the powers vested in them; and that in these circumstances the appointment was liable to be set aside.

A division bench consisting of Mr. Justice P. V. Balakrishna Aiyar and Mr. Justice Jagadisan heard the petition and on 26th August dismissed it in separate but concurring judgments.

The Advocate-General argued that the post of Government Pleader was not an office of a public nature inasmuch as the Government Pleader was only an agent of the Government and that therefore quo warranto did not lie for the purpose of trying a claim to that office. Their Lordships rejected this argument. Mr. Justice Jagadisan remarked that a Government Pleader performed various functions (besides that of conducting in courts cases to which the Government were a party) and most of these were "of an independent and responsible character." The office must therefore be held "to be a public office within the scope of a quo warranto proceeding."

The Court next dealt with the petitioner's contention that though the rules contemplated the selection of the Government Pleader from practising advocates, Mr. Alagiriswami was not an advocate either on 22nd June 1960 on which date the order to appoint him Government Pleader was made, being then City Civil Court Judge, nor on 1st July 1960 when he gave up the post he was holding before.

Mr. Justice Jagadisan observed that Mr. Alagiriswami "was an Advocate of the High Court of Madras, entitled as of right to practise as an advocate, his judicial career having become extinct by reason of his retirement from the State Higher Judicial Service, and that his appointment as Government Pleader as a direct recruit from the Bar is in consonance with the Government Order of 1932," and "there is nothing implicit in the G. O. to warrant the imposition of a further qualification, namely, that the person should be practising the profession besides merely being on the roll as an advocate." Mr. Justice Balakrishna Aiyar remarked, there could be no doubt whatever that the intention of the rules was that where a selection was made from among the advocates, the selected candidate should have been a person really practising at the Bar, as distinct from one who was merely on the rolls of the High Court. It was true that after vacating the post of Judge in the City Civil Court, Mr. Alagiriswami formally reverted to the Bar. But, His Lordship said :

It must be agreed that if we have regard to the substance of the matter what was done in the present case was not so much to comply with the rules as to evade them and circumvent them. Still there was a technical compliance — rigidly formal compliance — with the rules and Mr. Alagiriswami became a practising advocate in the strictest and narrowest sense of that phrase. That Government should have been actively and diligently privy to and abetted the evasion of the rules they had themselves formulated was the subject matter, and quite properly too, of some severe criticism by counsel for the petitioner.

The principal charge which the petitioner made against the Government was that Mr. Alagiriswami's appointment as Government Pleader was made to facilitate his chance of promotion to a Judgeship of the High Court. "The real purpose was to beat the queue of officers in front of Mr. Alagiriswami, to by-pass that queue and to confer on Mr. Alagiriswami a preferment which he would never have normally earned. This action of the Government was wholly devoid of bonafides." Dealing with this contention, His Lordship observed : "Harsh criticism all this apparently is but it is essentially just."

The Advocate-General had submitted that Judges of High Courts were appointed by the President and that being so, how could the Law Minister possibly say what the President and others whom he might consult do in the future? On this point His Lordship said :

That is true enough. Mr. Subramaniam (Law Minister) does not possess powers of clairvoyance. But the gravamen of the charge made by the petitioner is not met by disclaiming prophetic powers. This is just another exercise in evasion. Mr. Subramaniam was able to parry his questioners; but his attempt would have collapsed had he been in the witness-box. If there was no

substance either in the allegations or in the charge, Government could have said so in forthright terms. That would have been the quickest way of silencing all criticism.... Why was not this done? The answer is easy. The sponsors of the scheme for the promotion of Mr. Alagiriswami as High Court Judge knew that if they spoke the truth, their plans would be ruined. Should the President be once apprised of the facts, he would not give the name of Mr. Alagiriswami a second look. The matter was just as simple as that. So the truth must be concealed. Hence all this dissimulation. It is perfectly manifest that we have before us a wholly indefensible essay in favouritism, a deft adaptation to modern conditions of old palace crafts. Mr. Subramaniam can still find use for certain of the less delectable devices resorted to by some individuals when for a time they happen to be repositories of segments of the secular power.

On this point Mr. Justice Jagadisan observed that questions of alleged motive underlying the order of appointment were wholly foreign to the scope of the proceedings before the Court. His Lordship said :

Acts of favouritism by way of backdoor appointment and deviations from fair play and justice are not uncommon features in the administration of any Government in any country. But the jurisdiction of the courts is not the role of a sentinel on *qui vive* to guard against the vagaries of the State Executive.... The province of this Court in a quo warranto proceeding is to determine whether there has been a usurpation of a public office and not to search the conscience of the appointing authority to ascertain his motive.

Holding that the G. O. of 1929 relating to the appointment of the Government Pleader ceased to have statutory force on the repeal of the Classification Rules in 1930, Mr. Justice Balakrishna Aiyar said that in the "present case the rules themselves, being devoid of statutory force, remained merely as declarations — no doubt public and explicit declarations, but still only declarations — by Government of their intentions and line of conduct."

But there are no legal sanctions behind them and in such situations the only safeguards must be the sense of responsibility, the respect for propriety, the regard for decorum, and the obligation to behave fairly and beyond all else to behave honestly, which must actuate and bind holders of every public office of whatever consequence. It follows that against unhappy adventures like the present adventure in the disposition of governmental patronage courts could give no worthwhile relief. The corrective must be applied in the first instance by those in administrative or operational control, and ultimately by a resentful and uncompromising public opinion. In the result the petition was dismissed.

ADMISSIBILITY OF CONFESSIONS

Punjab High Court Judgment

A Division Bench of the Punjab High Court on 18th August held that sec. 27 of the Indian Evidence Act

dealt with confessional statements of accused persons made by them while in police custody.

The petitioner, Davi Ram, a peon in Delhi Corporation, was entrusted with Rs. 10,249 for deposit. On June 28, 1958, he left on his bicycle for depositing the amount. At 1 p. m. he lodged a complaint with the police that while he was on his way to deposit the amount, he was waylaid by three people and robbed of his bag containing the money.

During the investigation of the case, the petitioner told the police he had handed over the money to Raghbir Singh, a man from his village. In pursuance of his statement he was taken to his village where at his instance Raghbir Singh produced before the police the bag containing the amount. The petitioner was thereupon charged under sec. 409, I. P. C., for embezzling the amount. He was found guilty and was convicted by the trial magistrate. His conviction was maintained on appeal by the Sessions Judge. Aggrieved by the judgments of the lower courts, the petitioner preferred a revision petition in the High Court.

The courts while convicting the petitioner relied upon the confession made by him to the police officer on June 29 in addition to the other evidence. The petitioner argued under sec. 27 of the Indian Evidence Act the confession was inadmissible because when he made the statement he was not an accused and he did not make that while he was in police custody.

Their Lordships accepted the argument of the petitioner and held that sec. 27 provided an exception to sec. 26 of the Act only. Sec. 26 of the Act dealt with the case of a person who was in police custody at the time he made the confession. As the person accused of committing an offence could only be in police custody, therefore sec. 26 dealt with the person accused of an offence. Dealing with sec. 27, Their Lordships said :

The confessional statement which is being considered is a statement which is made by a person in police custody. It is also made by a person accused of an offence. Now, if we consider these two phrases together, it follows inevitably that the person, when he made the statement, was an accused person and he was also in police custody. Hence only those confessional statements are being considered under sec. 27 which are made by accused persons while they are in police custody.

Such confessional statements are admissible in evidence provided they have led to discovery of a fresh fact. If the statement is made by a person who is a stranger or is a prosecution witness, then such statement is not admissible in evidence despite the fact that it amounts to a confession and does lead to the discovery of a new fact.

The Court held that the statement was made by the petitioner on June 29 while he was a prosecution witness. At trial time he was neither accused of any offence nor was he in police custody. The statement made by him was therefore inadmissible in evidence. Their Lordships, however, found that the conviction of the petitioner was established by other evidence on the record and, therefore, upheld his conviction and dismissed the petition.

The petition was heard by the Chief Justice and Mr. Justice Shamsher Bahadur.

APPLICABILITY OF ROYAL PREROGATIVE

Municipal Act Not Binding on State SUPREME COURT JUDGMENT

Even after the promulgation of the Constitution, the Government of India and the State Governments are not bound by the provisions of statutory enactments unless they are included expressly or by necessary implication, according to the opinion of the Constitution Bench of the Supreme Court vide its judgment delivered on 16th August.

The appeal by the Director of Rationing and Distribution, representing the Food Department of the Government of West Bengal, from the judgment of the High Court of Calcutta against the Corporation of Calcutta, was allowed by the Supreme Court. The appeal by the Department arose out of the order of the High Court directing that the appellant be prosecuted for storing rice in certain premises without obtaining a licence from the Corporation of Calcutta, as required under sec. 386 of the Calcutta Municipal Act.

In storing the rice the appellant had acted in his official capacity and for carrying out the West Bengal Government's rationing scheme. The appellant's defence before the High Court had been that a statute did not bind the Government according to the rule of construction derived from the royal prerogative in England which still applies in India after January 26, 1950. The High Court, however, rejected this contention and held that after the passing of the Constitution the English rule of construction did not apply to India.

The most important question therefore before the Court was "whether the English rule that the Crown is not bound by the provisions of any statute unless it is directly or by necessary implication referred to applies to India." If this rule was applicable then the appellant could not be prosecuted.

Mr. Justice Sarkar (who delivered a separate judgment), agreeing with the judgment of the Court, examined the English and American decisions on the point. He observed :

All this would seem to put it beyond doubt that, whatever its origin, the rule has long been regarded only as a rule of construction. It has been widely used to exempt executive governments from the operation of statutes quite apart from protecting prerogative rights of the British Crown strictly so called. It has been held reasonable to presume that the legislature intended that executive governments are not to be bound by statutes unless made bound expressly or by necessary implication.

It would be equally reasonable to do so in our country even under the present set-up, for the presumption has all along been raised in the past and especially as the applicability of the rule can no longer be made to depend on the prevailing form of government. In countries with a republican form of government, the sovereign would be the State, and its acts, which can only be acts of its executive limb, would be under the rule exempt from the operation of its statutes. Whether the royal prerogative, as understood in England, exists in the present-day India is not a question that can arise in applying what is a pure rule of construction of statutes.

Further it is quite clear that the rule has been applied by courts in India in the construction of Indian statutes all along at any rate up to the promulgation of our Constitution, except in the solitary instance of Bell's case. It would therefore be right to hold that the legislatures in our country have proceeded on the basis that the rule would govern the enactments passed by them. That being so and remembering that the rule is one of construction, there would be no reason to deny its application to Indian statutes after the Constitution. The new republican form of government adopted by us would not warrant a departure from the long established rule of construction.

The Court accordingly held that the Calcutta Municipal Act did not bind the Government and the prosecution of the appellant for an act done in the discharge of his duties as an officer of the Government cannot be maintained. The appeal was accordingly allowed and the order of the High Court was set aside.

INDUSTRIAL DISPUTES ACT

Reference of a Dispute for Adjudication MUST NOT BE REFUSED FOR PUNITIVE REASONS

The workmen of Firestone Type & Rubber Company demanded gratuity, holidays, classification of employees and bonus for 1952-53 from the management. The matter was referred to the Conciliation Officer who submitted a report to the Bombay Government. After examination of the report the Government informed the workmen that the dispute could not be referred to the Tribunal "for the reason that the workmen resorted to go-slow during the year 1952-53."

The workmen challenged this decision before the High Court and both the single judge and the Appellate Bench of the High Court held in favour of the workmen. They issued a mandamus against the State of Bombay directing the Government to reconsider the matter and ignore the fact that there was a slow-down during the year 1952-53 but to take into account only such reasons as were relevant to the question of determining whether a reference should or should not be made. The State of Bombay and the Company preferred appeals against this decision in the Supreme Court.

The Supreme Court on 18th August dismissed the appeals. Examining the powers and duties of the Government in relation to the making of a reference under the Industrial Disputes Act, the Supreme Court observed that the Act vested a discretion in the Government whether to make a reference or to decline to do so. In coming to its conclusions the Government could take into consideration not only the report of the Conciliation Officer but also other relevant facts which may come to its knowledge or which may be brought to its notice.

In considering the question whether a reference should be made, according to the Court, the Government could not take into consideration facts and circumstances which were neither relevant nor germane. In the present case the Court observed that it was difficult to appreciate how the misconduct of the workmen which formed the basis of the Government's decision could have any relevance to their application for a reference of the dispute. The Court observed:

Under these circumstances, we are unable to hold that the High Court was in error in coming to the conclusion that the impugned decision of the

Government is wholly punitive in character and must in the circumstances be treated as based on a consideration which is not germane and is extraneous.

It is clear that the Act has been passed in order to make provisions for the investigation and settlement of industrial disputes, and if it appears that in cases falling under sec. 12 (5) the investigation and settlement of any industrial dispute is prevented by the appropriate Government by refusing to make a reference on grounds which are wholly irrelevant and extraneous a case for the issue of a writ of mandamus is clearly established. In the result we confirm the order passed by the High Court though not exactly for the same reasons.

BOMBAY TENANCY ACT, 1948

No Excessive Delegation OF LEGISLATIVE POWER TO THE EXECUTIVE

By a majority judgment the Supreme Court on 25th August upheld the validity of sec. 6 (2) of the Bombay Tenancy and Agricultural Lands Act as it stood prior to its amendment in 1956 and declared that the delegation to the Government of the power to fix a lower rent than the maximum payable in any particular area was not unconstitutional.

By a notification under the Bombay Tenancy and Agricultural Lands Act, 1948, the Government of Bombay fixed the maximum rent payable by tenants of the lands situated in the areas specified in the notification.

Among the areas thus specified was the area in which the appellants' lands were situated. By a subsequent notification the Government prescribed rates of rent for these areas lower than the maximum rates fixed under the earlier notification.

The notification was issued under sub-sec. 2 of sec. 6 of the above Act. This section provides that the Provincial Government may by a notification in the official gazette fix a lower rate than the maximum rent payable by the tenants of lands situated in the particular area or may fix such rate on any other suitable basis as it thinks fit.

The petitioner challenged the validity of this section and the notification under it on the ground that they delegated legislative powers to the executive authorities.

The Supreme Court, examining the arguments advanced by the appellants, Messrs. V. M. Sanjanwala and the Pratap Spinning, Weaving and Manufacturing Company Ltd., observed that delegation is a constituent element of the legislative power as a whole. The extent to which such delegation is permissible was now well settled and before such delegation is made the legislature must lay down the policy and principles and must afford guidance for carrying out the said policy.

Applying the tests laid down by the Supreme Court in Bagla's case and in the case of the Edward Mills Company, the Court felt that the impugned section did not suffer from excessive delegation. The Court further observed that the power to fix rent at a rate lower than the maximum was neither unfettered nor uncanalized. According to the Court the Act in question had laid down principles for the guidance of the Provincial Government in this connexion. Accordingly, the Court said:

In our opinion, therefore, having regard to the legislative policy laid down by the Act in its preamble and in the other relevant sections to which we have referred, and having regard to the guidance

which has been provided for fixing a reasonable rent under sec. 12 (3), it would not be possible to hold that the power delegated to the Provincial Government by sec. 6 (2) suffers from the infirmity of excessive delegation.

The appeals against the State of Bombay were accordingly dismissed.

SALES TAX

Supply of Aviation Spirit TO FOREIGN-GOING PLANES

In a suit filed by Burmah-Shell Oil Storage and Distributing Company of India Ltd. against the State of Bombay and another for a refund of Rs. 1,90,390 paid towards sales tax Mr. Justice K. K. Desai at the Maharashtra High Court on 25th August held that the sale of aviation spirit and/or aviation turbine oil to foreign-going aircraft by the plaintiffs by direct supply into the tanks of such aircraft at Santa Cruz airport was not sale in the course of export out of the territories of India within the meaning of Art. 286 (1) (b) of the Constitution, and consequently, the plaintiffs were not exempt from the payment of sales tax on such a sale.

The plaintiffs had entered into agreements for the sale of aviation spirit and oil to Air-India International and the British Overseas Airways Corporation for their aircraft flying to foreign countries for consumption during such flights.

They submitted that they were exporters of the goods sold to aircraft proceeding outside India and the aviation spirit and oil sold to foreign-going aircraft for consumption during flights was exempt from the payment of sales tax.

The State denied that the plaintiffs were exempt from the payment of sales tax in respect of the aforesaid sale and denied its liability to refund any amount already paid as sales tax by the plaintiffs.

His Lordship, in giving judgment, examined the evidence led in connection with the contracts for the sale of aviation spirit and oil and said that the necessary result was that the plaintiffs as sellers had completely performed and carried out all their obligations before the goods were carried outside the territory of India. The sale was not for any foreign destination and the delivery was not to be effected at any place outside the territory of India. The goods in question were exported by the carriers for consumption during the flights of the aircraft and the carrier purchasers were themselves exporters and not the plaintiffs. The sale of goods in the present case was not associated with any contract for the export of the goods and the sale was to be effected by physical delivery of the goods locally in India.

His Lordship, therefore, held that the contracts for sale as mentioned in the plaint could not be taken to be contracts involving sale by the export of the goods outside the territory of India and, consequently, the plaintiffs were not exempt from the payment of sales tax on the aviation spirit and oil sold to the Air-India International and the British Overseas Airways Corporation.

In the result, the plaintiffs' suit was dismissed.

SEA CUSTOMS ACT

Suit Against the Union Government

"CUSTOMS ACTED WITHOUT JURISDICTION"

Holding that the Additional Collector of Customs had acted without jurisdiction in imposing a penalty of Rs. 9,000 under sec. 167 (8) of the Sea Customs Act upon the plaintiff, Haim Agajan, Mr. G. A. Thakkar, Judge, Bombay City Civil Court, on 19th August passed a decree for Rs. 9,000 against the defendant, the Union of India, and in favour of the plaintiff.

The plaintiff had exported three consignments of precious stones from Bombay to Messrs. Akron Pearl and Gem Company, New York, U. S. A., and for that purpose he had made the necessary declarations to the Customs authorities. On March 30, 1956, the Customs authorities searched the plaintiff's premises and seized certain files and documents.

Thereafter, he was charged with a contravention of the Government notification dated August 4, 1947, issued under sec. 12 of the Foreign Exchange Act, in that he had made a false declaration regarding the full export values of the precious stones.

He was, therefore, ordered by the Additional Customs Collector to pay a penalty of Rs. 9,000. The plaintiff paid the amount under protest and filed this suit against the Union of India for recovery of the said sum.

As regards the jurisdiction of the City Civil Court to entertain such a suit, the Judge held that if the impugned order was shown to be wholly without jurisdiction or patently in excess of jurisdiction, then the ordinary Civil Court had jurisdiction to quash such an order.

Proceeding further, the Judge said that sec. 12 (1) of the Foreign Exchange Regulation imposed an obligation upon the exporter to make a declaration before he could export the prohibited goods, viz., precious stones. Thus, the making of a declaration was a condition precedent to the export of the prohibited goods. It was undisputed that the plaintiff had made the requisite declaration before the specified authority. But it was alleged that the plaintiff had made a false declaration by undervaluing the correct value of the goods.

In the opinion of the Judge the making of a false declaration could not be said to be a violation of notification or the provisions of sec. 12 (1) of the Act. Neither the Act nor the notification prohibited any misstatement in the requisite declaration. In the opinion of the Judge a false declaration could not be said to amount to "no declaration."

If there was a false declaration, the plaintiff could be prosecuted but the Collector of Customs had no jurisdiction to impose any penalty for a false declaration. Penalty could be imposed if there was no declaration at all.

In the result the Judge set aside the order of the Customs authorities and passed a decree for the refund of Rs. 9,000 to the plaintiff.