Privy Council Appeal No. 13 *of* 1918.

Mrs. Annie Besant - - - - - - - - *Appellant*

v.

The Advocate-General of the Government of Madras and another - *Respondents.*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondents.*

(Consolidated Appeals)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MAY, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

These are two appeals for which the appellant, Mrs. Besant, obtained special leave from His Majesty in Council against two decisions of the High Court of Judicature at Madras.

They arise in the following circumstances:—There are in India two legislative Acts of the Governor-General of India in Council relating to printing, one being The Printing Presses and Newspapers Act No. XXV of 1867, and the other being Act No. 1 of 1910 entitled "An Act to provide for the better control of the Press," and shortly "The Indian Press Act, 1910." Under the first Act, Section 4, the person who keeps in his possession a printing press must make and subscribe a declaration

before a magistrate, stating that he has a press for printing, and where it is situated. And by section 5 no printed periodical work containing public news, or comments on public news, shall be published without the printer and publisher making a declaration stating that he is the printer or publisher, the name of the periodical and the place where the printing or publishing is conducted.

Under the second Act, section 3, sub-section 1, the person making the declaration is required to deposit before a magistrate in money, or in certain securities, a sum not being less than Rs. 500, or more than Rs. 2,000, as the magistrate may think fit to require.

But the magistrate may, for special reasons which he is to record, dispense with the deposit, and he has certain powers of cancelling or varying any order made under this sub-section.

By section 4 of the Act the local Government, when it appears to it that any printing press in respect of which any security has been deposited, is used for the purpose of printing any newspaper which contains words, signs or visible representations of a nature deemed to be objectionable under the detailed provisions of the section which will be hereinafter specifically set forth, may by notice in writing addressed to the keeper of the press, declare the security and all copies of the newspaper wherever found forfeited to His Majesty, and after the expiry of 10 days from the date of the issue of the notice of forfeiture, the declaration required of every keeper of a press is to be deemed to be annulled.

By section 17 :—

> "Any person having an interest in any property in respect of which an order of forfeiture has been made under section 4" . . . . [or under certain other sections not material to the present Appeal] "may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the newspaper . . . . in respect of which the order was made did not contain any words, signs, or visible representations of the nature described in section 4, sub-section 1."

And by section 18 :—

> "Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges. . . . ."

By section 23, anyone who keeps in his possession a press without making a deposit under section 3 when required so to do, shall be liable to the same penalty as if he had failed to make the declaration required by the first Act.

On the 2nd December, 1914, the appellant being the owner and keeper of a printing press, and printer and publisher of a newspaper called at that time, and thereafter, "New India," made the declaration required of her under the Act of 1867, and the magistrate before whom it was made using the power of dispensation given to him by section 3 of the Act of 1910, thought fit to dispense with the deposit of the security which under the provisions of the same section she would otherwise have had to give. The document in which the dispensation was embodied

is not contained in the record of these appeals, and their Lordships have not before them the reasons which the magistrate recorded as the grounds for granting this dispensation.

On the 28th May, 1916, the appellant received a notice from the magistrate dated the 22nd May, in which it was stated that he, under sub-section 1 of section 3, cancelled the order dispensing with the security and required her within 14 days to deposit Rs. 2,000 as security.

In accordance with this order the appellant, under protest, as she says in one of her affidavits, deposited the security.

On the 28th August, 1916, she was served with an order dated the 25th August and made by the Governor in Council reciting that 20 passages published in the newspaper and identified in the order were of the nature described in sub-section 1 of section 4 of the Act of 1910, and declaring that the security which the appellant had deposited and all copies of " New India " wherever found were to be forfeited to the Crown.

The appellant thereupon purporting to avail herself of the provisions of section 17 of the Act presented her petition to a Special Bench of the High Court of Judicature at Madras, praying that both the order of the magistrate requiring security and the order of the Governor in Council should be revised and set aside. It being, however, obvious that the procedure under section 17 was not available for questioning any act of the magistrate, the appellant the next day presented what is called a Criminal Revision Petition under sections 106 and 107 of the Government of India Act (5 and 6, George V. c. 61) and section 435 of the Code of Criminal Procedure. This application, also described in the course of the proceedings as an application for a certiorari, was also heard by the Special Bench.

After argument, both applications were refused; all the Judges agreeing that they should be refused, but not being in agreement as to the grounds on which the revision petition failed, and not being wholly in agreement as to all the articles in the newspaper which might merit condemnation.

The petitioner thereupon applied to the High Court for leave to appeal in both cases, and on this leave being refused by the High Court applied to His Majesty in Council for special leave to appeal, and this leave having been given (as already stated) in respect of both orders, both matters are now before their Lordships.

It will be convenient to consider first the application to quash the order of the magistrate. This question divides itself into two parts: was the procedure adopted a competent and suitable method of reviewing the order, and if it be open to review is it to be deemed an illegal and unwarranted order?

It is convenient to consider first the nature of the order, or supposed order. The Statute contemplates that in ordinary cases security shall be deposited, and the only duty of the magistrate is to fix the amount, having regard to the two limits, and to receive it.

Then follows the proviso :—

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

It was contended before their Lordships that to read this proviso as enabling the magistrate to cancel or vary an order of dispensation would be to make a proviso upon a proviso, and to collect a positive enactment out of that which was only a qualifying provision. But it is well settled that there is no magic in words of proviso, and that the plain meaning must be given to the words of the legislature, and those words enable the magistrate to cancel or vary any order made under the sub-section, which should mean among other orders orders of dispensation.

If the magistrate having fixed the minimum security may vary his order by imposing the maximum, there is no reason why he should not, as time goes on, think fit to require security when at first he thought fit to require none. Under the second sub-section a power of requiring a deposit, where none up to that moment had been required, is given in certain cases to the local Government, and it is natural to suppose that what the local Government may do in a proper case under sub-section 2, may be done in a proper case by the magistrate under sub-section 1. It is somewhat difficult to find any case, other than this one, to which the word cancel would be properly applicable. If the normal course is adopted, and a deposit is required, and if the magistrate thereafter thinks it too much or too little, the appropriate word for the new order is that it is one varying the old. But if he were to cancel *simpliciter* an order fixing the deposit at a particular sum, it is difficult to see what would happen. There must be a deposit unless there is a positive order of dispensation ; the cancelling of an order fixing the deposit at say Rs. 2,000, would leave the keeper of the printing press in the position of having to apply to the magistrate to make some further order, either fixing a new sum or dispensing with any ; and till such new order had been made and complied with, the keeping of the printing press would apparently be an unlawful act, so that the cancellation of the order fixing the deposit at Rs. 2,000 would be injurious instead of beneficent to the keeper of the press. But if the magistrate had originally thought fit to dispense with security and afterwards changed his mind, the right phrase to use would be that he had cancelled his order of dispensation.

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

Their Lordships are in agreement in this respect with the opinion of Ayling, J., and in disagreement with the view of

Seshagiri Aiyar, J. The officiating Chief Justice Abdur Rahim, J., agreed in principle with Seshagiri Aiyar, J., and so expressed himself in his judgment upon the other application.

It is next contended on behalf of the appellant that the act of the magistrate in cancelling the dispensation was a judicial order, and was bad, because she was given no opportunity of being heard before an adverse order was made against her.

To this argument several answers have been given ; that the order might be treated as an *ex parte* order which it would have been open to her to move to discharge instead of complying with it as she did under protest ; that as a judicial order it was still one made by the magistrate within the exercise of his jurisdiction, and that the omission to hear her was only an irregularity which could not be reviewed, or at any rate could not be reviewed by process of certiorari ; and lastly, that the act was not a judicial act but one done in the exercise of administrative functions.

It was on this last ground that all three Judges in the High Court decided the point against the appellant ; and without pronouncing any opinion on the other grounds their Lordships agree that this one furnishes a sufficient answer.

The magistrates to whom this power is entrusted by the Act are the District Magistrates and the Chief Presidency Magistrates. Those to whom power was entrusted by the Act of 1867 were " any person exercising the full powers of a magistrate," and were to include " Magistrates of Police and Justices of the Peace." At that time there were no Chief Presidency Magistrates.

It was argued before their Lordships that the change in the second Act, that is in especial the substitution of the Chief Presidency Magistrate for territory within his jurisdiction, showed an intention on the part of the Legislature to make the action of the magistrate judicial and not administrative. But their Lordships do not think that this change alters the nature or character of the action of the magistrate. It is true that the duties of the Chief Presidency Magistrate are primarily judicial ; but the magistrates outside the Presidency town exercise both judicial and administrative functions, and the district magistrate is principally an administrative officer. These two considerations appear to balance one another. The action of the magistrate under sub-section 1 of section 3 is (like the action of the magistrate under sub-section 1 of section 8) analogous to the action of the local Government under the second sub-section in the same clauses, and the action of the local Government is clearly administrative.

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

Further, in this connection the provisions of section 22, upon which comment will shortly be made, must not be left out of sight. If a declaration of forfeiture by the local Government can only be questioned in one respect and by one method—it is not unreasonable to suppose that the legislature did not intend to open the Courts of Law to enquiries as to the exercise of so comparatively unimportant an official act, discretionary and in some respect facultative as it is.

The act of the magistrate is after all only the withdrawal of a privilege which need never have been granted. It is not like a condemnation in which case justice requires that the person to be condemned should first be heard. It would have been in their Lordships opinion more discreet, and it would have removed an occasion for comment and complaint, if the magistrate had given the appellant some opportunity for making her observations before the privilege was withdrawn ; it might have been a wiser discharge of his duty as an officer. But having said this, their Lordships are unable to go any further.

It results, therefore, that if the order of the magistrate was open to examination, either upon process of certiorari or by a way of revision, the consequence of an examination would be to leave the order as it stands ; and this consequence is not without its bearing upon the question, which is prior in order of reasoning, whether it was competent to the Court to enter upon any such examination. The appellant based her demand partly upon the Code of Criminal Procedure and partly upon the supposed common law power to grant a writ of certiorari. She did not rely upon the power of revision given by the Code of Civil Procedure.

It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the appellant as charged with an offence. They are at the utmost proceedings which rendered the appellant if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty.

In any view, as their Lordships have intimated their opinion that the magistrate in withdrawing the order of dispensation was not acting judicially, it follows that this is not a case for revision under the Code of Criminal Procedure.

As to certiorari it was contended on behalf of the respondent in the High Court, that there is no power in the High Court to issue a writ of certiorari, or alternatively that the provisions of section 22 forbid recourse to this writ in cases which come under the Press Act.

As to the first point it would seem that at any rate the three High Courts of Calcutta, Madras and Bombay, possessed the power of issuing this writ (see *Re the Justices of the Supreme Court of Judicature at Bombay.* 1 Knapp, pp. 1, 49, 51, 55 ; and *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta* I.L.R., 11 Cal. p. 275). Whether any of the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question.

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

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

> 22. Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act.

As to this section it was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away the right to it remained, notwithstanding the very express but still general words of this section.

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

Even were it to be said that the order was of that quasi judicial kind to which certiorari has sometimes been applied in England or in India, the Press Act may quite reasonably have intended to take it away, and there is no reason why full effect should not be given to its language.

It was contended in the High Court and before this Board that it was beyond the competency of the Indian Legislature to enact section 22 and possibly even to enact the Press Act. This argument which was mainly founded upon the language of Norman, J., in the case of *Ameer Khan* (6 Bengal L.R. p. 451) received some encouragement from the O.C.J. But their Lordships find themselves unable to appreciate it.

The order of the High Court dismissing this application was therefore right, and the appeal from it must be dismissed.

If their Lordships thought that the appellant had made any way, they would have had to consider whether she was not, according to the practice prevailing in cases of certiorari, too

late in making her application. Indeed, what advantage the appellant would have gained if she had succeeded upon this application is not very apparent. The power of the local Government to make a forfeiture under Section 4 no doubt depends upon there being a deposit to forfeit. But at the time the order was made, 25th August, 1916, there had been in fact a deposit since 5th June; and the appellant had taken no steps to get herself relieved from the order made on the 22nd May directing the deposit, or to get it back.

Even were it contended that the deposit ought to be regarded as having been so unwarrantably exacted that it ought to count as non-existent, there was nothing to show that the local Government was or ought to have been aware of this. Further, section 22 makes the declaration of the local Government conclusive as to there being a forfeiture.

Lastly, the appellant made no application by way of certiorari or otherwise to quash the declaration of forfeiture; and the only way in which it was attacked was by using the procedure under section 17, which as pointed out in the High Court is available only for one purpose, that is of showing on the merits that the published articles were not deserving of forfeiture.

Their Lordships have now to deal with the other appeal. Section 4, sub-section 1, of the Indian Press Act is in so far as it is material in the following terms:—

> "(1) Whenever it appears to the Local Government that any printing-press in respect of which any security has been deposited as required by section 3 is used for the purpose of printing or publishing any newspaper, book, or other document containing any words, signs, or visible representations which are likely or may have a tendency—directly or indirectly—whether by inference, suggestion, allusion, metaphor, implication, or otherwise— . . . .
>
> "(*c*) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India, or any Native Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief; or . . . .
>
> "(*e*) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order; . . . .
>
> the Local Government may, by notice in writing to the keeper of such printing-press, stating or describing the words, signs, or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press and all copies of such newspaper, book, or other document, wherever found, to be forfeited to His Majesty.
>
> "EXPLANATION I.—In clause (*c*) the expression 'disaffection' includes disloyalty and all feelings of enmity.
>
> "EXPLANATION II.—Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred, contempt, or disaffection do not come within the scope of clause (*c*)."

The notice of forfeiture issued on the 25th August, 1916, stated that in the opinion of the Governor in Council 20 passages

published in the appellant's newspaper on various dates from the 7th June to the 17th August were of the nature described in section 4, sub-section 1, and declared the security deposited by the appellant to be forfeited. The articles in question were numbered consecutively from 1 to 14, seven articles being numbered 4 and marked with consecutive letters of the alphabet. Thereupon the appellant availed herself of the remedy given to her by sections 17 and 18 and applied to a Special Bench of the High Court to set aside the order on the ground that the newspaper did not contain " any words, signs or visible representations " of the nature described in section 4, sub-section 1.

This application as already stated was heard by the same Judges as those who sat upon the application for a certiorari. In the unanimous opinion of the Bench, the articles numbered 2, 11, and 13 were within the terms of section 4, sub-section 1, clause C. S. Aiyar, J., thought that article 11 was also obnoxious to clause E. The majority of the Bench, that is to say, the O.C.J. and Ayling, J., thought articles 1, 6, 10 and 12 obnoxious to clause C. Ayling, J., thought article 7 obnoxious to clause E, and articles 9 and 14 obnoxious to clause C. S. Aiyar, J., thought article 8 obnoxious to clause C. In accordance with these conclusions the Court dismissed the application made by the appellant.

The balancing of important political considerations which is effected by adding explanation No. 2 to the enacting words which are found in the earlier part of the section has its analogy in sections 124A and 153A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform.

It is perhaps not easy to see how explanation 2 with its qualifications, adds to, or detracts from the direct language of clause C. A similar observation might be made upon section 124A of the Penal Code. The utmost that can be said is that the addition of the explanation with its apparent repetition of the positive enactment in the guise of a qualification of the explanation shows an almost meticulous care by the Legislature to balance the two considerations, prominence being given to the first consideration in the first part of the section, and to the second in the explanation.

In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony.

The section 124A of the Indian Penal Code has been the subject of careful consideration in the cases of the *Queen Empress* v. *Tilak*, I.L.R. 22 Bombay, pp. 112 and 528 (in which case this Board refused leave to appeal. See 25 I.A., p. 1), the *Queen Empress* v. *Ramchandra Narayan*, ibid., p. 152, and the *Queen Empress* v. *Amba Prasad*, I.L.R. 20, Allahabad, p. 55; and though as already stated the language of this section is not precisely the

same as the language in the Press Act these judgments are of considerable assistance towards the construction of section 4.

In substance the question under clause C of section 4, sub-section 1, comes to this ; are the passages such as in fact to excite, or do they disclose an attempt (which implies intention) to excite, hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India ; and in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the articles.

As regards the question of hatred or contempt of a class or section, it was argued that the object of the article was to attack the system, not a class or section. It may be assumed, for the purposes of this case, that there may be reference to a class or section of His Majesty's subjects so couched as to show that the attack is merely upon a school of opinion, and that unless the language is such as to excite hatred or contempt of persons, it may escape condemnation. But assuming this, the appellant remains face to face with the difficulty that there is language used in certain of the articles which may legitimately be construed as tending by inference or suggestion to excite hatred or contempt in such a fashion that it may become personal.

It may well be that the primary object was a legitimate attack upon a system, but unless care is taken it becomes difficult to make a fierce attack upon a system without conveying some imputation upon the class which the system makes or which carries the system into practice. And it must be remembered that those words in clause C which refer to the hatred or contempt of a class or section are not limited by explanation 2, and that there has been in this respect some departure from the policy of the Penal Code, which superadded a qualifying explanation which has not found place in the Press Act.

As to clause C the majority of the Judges in the High Court were brought to the conclusion that the attacks on Anglo-India or Anglo-Indians or the bureaucracy as the case may be, were calculated whatever might have been the primary object of the writer to bring into hatred or contempt persons forming a class or section of His Majesty's subjects, namely, English Civil servants in India, in some cases Englishmen in India generally.

All the Judges thought that several passages were calculated to bring the Government into hatred and contempt, and this after giving due weight to explanation 2. There were also as already stated findings by Ayling and S. Aiyar, JJ. bringing some of the articles under clause E, a clause which it should be noted is not qualified by any explanation.

Upon careful perusal of the several judgments their Lordships find that weight has been properly given to the several portions of the section. They do not find that the section has been misconstrued. There remains only the question of application in detail of the principles of the Law to the language of the various articles.

When their Lordships have progressed so far, the question becomes one which partakes so much of the nature of a question of fact, that it would be difficult for their Lordships, even if they were inclined to construe the natural tendency of the words differently, to interfere with the conclusions arrived at by the Court in India. For the Judicial Committee when it sits to advise His Majesty in the exercise of his prerogative in criminal cases, does so under constitutional limitations which, as has often been explained, and notably in the case of *Dal Singh* v. *The King Emperor* 44 I.A., p. 137 (and in *Tilak's* case already quoted) preclude it from exercising the full functions of a Court of Criminal Appeal.

It should be added that for the purpose of considering, not the intention to excite, but the fact whether the articles are such as to excite, the Judges in India with a far closer knowledge of the character of the people likely to read the articles, have better means of judging than their Lordships in England.

Here the matter might rest. But in the particular circumstances of this case, and after the elaborate argument at the Bar, their Lordships think it well to go further, and to say that if they considered it proper to look into the matter in detail, they would hold that the articles which were the subject of unanimous condemnation, and at least some of those which came under the censure of Judges in the High Court, were obnoxious to the provisions of clause C, and possibly in some cases to those of clause E, and that the Court was right in supporting the declaration of forfeiture. Their Lordships will therefore humbly recommend His Majesty that both these appeals should be dismissed with costs.

In the Privy Council.

MRS. ANNIE BESANT

v.

THE ADVOCATE-GENERAL OF THE GOVERNMENT OF MADRAS AND ANOTHER.

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DELIVERED BY LORD PHILLIMORE.

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