the consideration of this answer with other answers (namely, to questions 2 and 3) or other circumstantial evidence that may convict him. In this respect, the concurring opinion suffers to a greater extent than the majority opinion.[27]

In conclusion, however, it may be stated that the court's judgment that Art. 20(3) does not apply to compulsory obtaining of finger impressions and handwriting from the accused is in the right direction, for by permitting this there is no danger that the police would be led to sit comfortably " in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence "—one of the main arguments in favour of the privilege against self-incrimination. There is no danger that an innocent person will be convicted, that the police will be led to use " third degree " methods, and that the police will become inefficient.

*S. N. Jain**

The State of Orissa v. Bhupendra Kumar Bose—Orissa Municipal Election Validating Ordinance, 1959.

The recent judgment of the Supreme Court in *State of Orissa* v. *Bhupendra Kumar Bose* [1] reversing a Bench decision of the Orissa High Court[2] requires careful study as it raises an important question as to how far the Legislature can directly annul the judgment of a High Court granting relief to a citizen.

In the elections to Cuttack Municipality held early in 1958 the Congress Party (which is the ruling party) came out successful with narrow margins of votes and the chairman was elected from that party. One of the defeated candidates (who belonged to a different party) by an application under article 226 of the Constitution challenged the validity of the said election on the ground that the electoral

27. The main argument of the concurring judges in favour of non-applicability of Art. 20 (3) to handwriting and finger impressions was that "the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself". *Ibid.* at 1820.

* Senior Research Officer, Indian Law Institute, New Delhi.

1. A.I.R. 1962 S.C. 945.
2. O.J.C. No. 12 of 1959 reported in I.L.R. 1959 Cuttack p. 203.

roll was not prepared in accordance with law. His contention was upheld by a Bench of the Orissa High Court.[3] The Bench held that the elections were vitiated by the failure to prepare the electoral rolls properly, set aside the elections and directed the authorities concerned to hold fresh elections in accordance with law. No appeal was taken to the Supreme Court; nor were fresh elections held. Instead, the elections, nullified by the court, were sought to be validated by legislation. Since the State Assembly was not in session at that time the Governor of Orissa issued an Ordinance known as the Orissa Municipal Elections (Validation) Ordinance, 1959.[4] In the preamble to that Ordinance it was stated that the necessity for promulgating it arose because "in certain judicial proceedings" "it had been held that the elections to Cuttack Municipality were invalidated due to some defect or irregularity in the preparation of the electoral rolls and in the fixation of the dates of polling and that decision had created doubts regarding the validity of the elections held in other municipalities also, and the preparation of fresh electoral rolls and the holding of fresh elections would entail heavy expenditure and also give rise to problems regarding the administration of such municipalities during the intervening period." Though the Ordinance consisted of five sections the most important were sections 3 and 4. Section 3 was of a general nature which had the effect or validating the electoral rolls prepared not only for Cuttack Municipality but also for other Municipalities within the State of Orissa. Section 4 had the effect of directly annulling the judgment of the High Court in O.J.C. No. 72 of 1958. This section may be quoted in full:—

> "Section 4:—Any order of a Court declaring the election to Cuttack Municipality invalid on account of the fact that the electoral rolls were invalid on the ground that is specified in sub-section (2) of sec. 3 or on the ground that the date of polling of the election was not fixed in accordance with the Act, or the rules made thereunder, shall be deemed to be and always to have been, of no legal effect whatsoever and the elections to the said municipality are hereby validated."

If the intention of the Governor in promulgating the aforesaid Ordinance was to see that the elections to other municipalities held in Orissa were not successfully challenged on the basis of the judgment

3. O.J.C. No. 72 of 1958 reported in I.L.R. 1959 Cuttack p. 189.
4. Ordinance No. 1 of 1959.

of the Orissa High Court in O.J.C. No. 72 of 1958 thereby causing considerable confusion and heavy expenditure, he might as well have, while respecting the decision of the High Court so far as Cuttack Municipality was concerned, validated the elections held in other municipalities in Orissa. In such case none could question the validating Ordinance inasmuch as it did not directly annul the judgment of the High Court so far as parties were concerned but only took away the precedent effect of it in respect of future litigations that might crop up regarding elections held in other municipalities. But section 4 was passed with the obvious intention of directly annulling the judgment of the High Court thereby depriving the successful litigant of the fruits of his success.

While examining the constitutional validity of the Ordinance the High Court[5] deliberately refrained from saying anything about the invalidity or otherwise of section 3. The court dealt mainly with section 4 and held that it was a piece of discriminatory legislation directed against one person only, that there were no special circumstances to show that he formed a class by himself for the purpose of such legislation and that there was no reasonable relation or nexus between the object sought to be achieved by the Ordinance and the qualities or characteristics on the basis of which he was so classified for the purpose of such legislation. The only reason given in the Preamble to the Ordinance was that huge financial expenditure would be involved in holding fresh elections and that there would be administrative problems during the interim period. The court held that these reasons were not adequate to show that a reasonable nexus existed between the object sought to be achieved and the principles on which he was classified.

The High Court also dealt at some length the argument advanced by the Advocate-General that section 4 and 3 must be construed together, that the successful litigant must be classified along with other possible future litigants who may challenge the elections to other municipalities also and that all of them may reasonably be held to form a separate class by themselves. The court repelled this contention by saying that a successful litigant who has got a judgment in his favour could not reasonably be classified with a possible future litigant who may come to court later on and that in the former case fresh rights have accrued on the basis of the judgment of a court in

5. In O.J.C. No. 12 of 1959.

his favour whereas a future litigant has no such rights apart from the rights under the general law of the land. The court relied on the observations of the Supreme Court in *State of Bengal* v. *Anwar Ali Sarkar*,[6] to the effect that persons grouped together for the purpose of legislation must have common characteristics and must be similarly circumstanced and that the classification should not be arbitrary or irrational. The court also relied on the observations of Mahajan, J., in *Minakshi Mills* v. *A. V. Viswanatha Sastry*[7] to the effect that all litigants similarly situated should have the same procedural rights for relief. A successful litigant cannot be said to be "similarly situated" with a future litigant. Hence the High Court held that the Constitutional validity of section 4 of the Ordinance must be judged independent of section 3 and that as there was no reasonable basis for classification nor any reasonable nexus between the principles on which the classification was based and the object sought to be achieved the section was unconstitutional. The court also relied on the observations of the Supreme Court in *Ameerunnissa Begum* v. *Mahaboob Begum*[8] and *Ramprasad Narayan Sahi* v. *State of Bihar*[9] where legislation against a single person was struck down.

When the matter was taken up on appeal to the Supreme Court their Lordships held that section 4 should not be read in isolation apart from section 3 of the Ordinance. The Supreme Court observed:

> "The object of the Ordinance was twofold: Its first object was to validate the elections to Cuttack Municipality which had been declared to be invalid by the High Court and its other object was to save elections to other municipalities in the State of Orissa whose validity might have been challenged on grounds similar to those on which elections to the Cuttack Municipality had been successfully impeached. It is with this twofold object that section 3 makes provision under its two sub-sections (1) and (2). Having made the said two provisions by section 3 sec. 4 proceeded to validate the elections to Cuttack Municipality. If we bear in mind this obvious scheme of the Ordinance it would be unreasonable to read sec. 4 in isolation and apart from section 3. The High Court was in error in dealing with section 4 by itself

6. [1952] S.C.R. 284.
7. A.I.R. 1955 S.C. 13.
8. A.I.R. 1953 S.C. 91.
9. A.I.R. 1953 S.C. 215.

unconnected with section 3, when it came to the conclusion that the only object of section 4 was to single out Mr. Bose and deprive him of the fruits of his election success in the earlier writ petition."

With great respect to their Lordships it is difficult to understand how sections 3 and 4 could be read together. Section 3 affects future litigants whereas sec. 4 affects only the sole successful litigant. To classify both in one group will be irrational and arbitrary as pointed out by the court in several previous decisions. It will be, to quote the language of the Supreme Court in the *Anwar Ali Sarkar* case,[10] "herding together of certain persons and classes arbitrarily". What is there in common between a successful litigant on the one hand and a future litigant on the other except the fact that both of them are 'litigants' in a general sense? The former is entitled to certain new rights by virtue of a judgment of a competent court of law whereas the latter's rights are yet to be determined by such a court. Their Lordships have not made any attempt to distinguish the court's earlier decisions or to show how it will be rational and not arbitrary to classify both these classes of litigants together.

The effect of the Supreme Court judgment will therefore be that if a citizen, after protracted litigation gets a judgment in his favour, and if he happens to belong to a party different from that in power for the time being, the latter can, by passing a validating legislation, annul the judgment obtained by him. I may give the following illustration. Suppose a person who is a prominent leader of the Opposition has obtained a simple money decree, say, for one lakh of rupees against the Cuttack Municipality for damages sustained through breach of contract. If the Government want to victimise him and deprive him of the fruits of his decree the easiest would be to push through a piece of validating legislation to the effect that "notwithstanding the judgment of any court" it shall be deemed that there was no breach of contract in that case and also to add that in respect of similar contracts of other municipalities also it shall be deemed that there was no such breach of contract. The object of the enactment may be given in the preamble as "avoiding huge expenditure that may have to be incurred by the municipalities in paying up the decretal amount causing serious administrative problems." The far reaching effect of such a piece of validating legislation especially in the present set up of Government where there is no effective opposition can be easily imagined. The

10. [1952] S.C.R. 284.

power conferred on the High Courts by Article 226 can be made illusory if the Legislature chooses to intervene in this manner.

In the United States such a piece of legislation directly annulling the judgment of a court would perhaps be unconstitutional in view of the clear separation of powers envisaged in their Constitution.

> "Legislative action cannot be made to retroact upon past controversies and to reverse decisions which the courts in exercise of their undoubted authority, have made, for this would not only be exercise of judicial power, but it would be its exercise in its most objectionable form, since the Legislature in effect would sit as a court of review to which parties might appeal when dissatisfied with the ruling of Courts." [11]

In India, however, such separation of powers is not so clearly laid down in the Constitution. In the well known *Sathi* case[12], Mukherjee, J., of the Supreme Court declined to embark upon the discussion as to how far the doctrine of separation of powers was recognised in our Constitution. In that case legislation was struck down on the ground that it offended Article 14. But in a later decision [13] of the Supreme Court the same learned Judge, as C.J., observed :

> "The Indian Constitution has not recognised the doctrine of separation of powers in its absolute regidity, but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another."

It is primarily the functions of a superior court of appeal or revision to annul the judgment of an inferior court and if the aforesaid observations of the Supreme Court be taken as a guide, it must be held that the Legislature cannot directly annul the judgment of a High Court and thus deprive the successful litigant of the rights obtained by him through that judgment. In *Barahiya Tal's* case [14] the learned Chief Justice observed :

> "Therefore in my judgment although the legislature has power to reopen past controversies and make laws retrospectively or repeal a statute or modify it, or even pass a validating Act, it has no

11. *Cooley's Constitutional Limitations*, Eighth Ed. p. 190.
12. A I.R. 1953 S.C. 215.
13. *Ram Jawaya* v. *State of Punjab*, A.I.R. 1955 S.C. 549.
14. Cited at page 164 of Prem's Law of Indian and American Constitutions, Vol. I (1960).

power to reverse a decision of any High Court because such a power in its nature, is essentially judicial, and has not been conferred on the Legislature by the constitution either expressly or impliedly."

If the Legislature cannot directly annul the judgment of a High Court it cannot also do so indirectly by singling out a successful litigant for the purpose of hostile, or discriminatory piece of legislation as has been done in section 4 of the Ordinance in the case mentioned above.

It may be further mentioned that when the Ordinance was placed before the Orissa Legislative Assembly in February 1961 and a Bill was sought to be moved with a view to place the Ordinance on a permanent footing, the Assembly refused to give its assent with the result that the Ordinance expired by efflux of time as provided in Article 213 (2) of the Constitution. This itself is eloquent testimony not only to the unpopularity of the Ordinance, but also to the malafides of the executive in getting such a piece of validating legislation promulgated.

It is true that where a judgment has the effect of creating far reaching administrative problems validating legislation may become necessary with a view to take away the precedent effect of the judgment but it will be against all rules of fair play and natural justice to take away the binding character of the judgment as between the parties to the litigation by such legislation. A person incurs heavy expenditure with a view to get his rights adjudicated and it is unjust if ultimately the Legislature steps in depriving him of the rights so obtained by himself after costly and protracted litigation.[15] It should be possible to evolve a convention by which any validating piece of legislation should exclude from its operation the successful litigant, though it might affect future litigants or even litigants whose cases are pending in law courts at the time of the passing of such legislation.

*Gobind Das**

15. In his recent address at the convocation of the Madras University, Justice Subba Rao of the Supreme Court points out that the so-called fundamental rights of liberty and property are most illusory in as much as by legislative action the executive can either abridge or completely deprive a citizen of those rights. *Madras University Convocation address*, 1962.

* Barrister-at-Law ; Secretary, Indian Law Institute Regional Branch, Orissa.