CHAPTER X

THE JUDICIAL CORRECTIVE

1. INDIVIDUAL'S RIGHT TO MOVE THE HIGH COURT

When a person is aggrieved by the order made by the Government, and he is interested in the publication, he may apply to the High Court for setting aside the order of forfeiture.[1] Before the Constitution, the interest could only be proprietory. It was held that the right to obtain the forfeited copy of the journal in exchange for the applicant's own was not a sufficient interest to enable him to move the Court.[2] When the publisher of a book moved, and the author did not take any interest in the application, the Allahabad High Court expressed surprise.[3] But after the Constitution any person having the right to freedom of speech, which includes the right to receive the information, may also move the Court.

Within two months from the date of the order, he has to make the application.[4] According to a decision given before the Constitution,[5] time should be reckoned from the date of the order, not from the date of service of notice or the publication of the notification. As the remedy provided was by way of petition, not by appeal, the Court declined to give the benefit of section 5 of the Limitation Act and extend the period for sufficient cause shown. As the petition under section 99-B is in the nature of an application for granting of a writ, direction or order for the enforcement of a fundamental right, for which there is no period of limitation fixed the extended benefit may also be given in this case on the ground of reasonableness.

2. BURDEN OF PROOF

The provision says[6] that the High Court shall set aside the order of forfeiture, if it is not satisfied that the publication in respect

1. Section 99-B, Criminal Procedure Code.
2. *In re Abul Kalam Azad*, 16 Cr.L.J. 698 (1915). This was a case under the Press Act, 1910.
3. *Saigal* v. *Emperor*, A.I.R. 1930 All. 401.
4. Section 99-B, Criminal Procedure Code.
5. *Abdul Haq* v. *Emperor*, 15 Cr.L.J. 222(1914).
6. Section 99-D.

of which the application is made does not contain seditious or other material as is referred to in the section. It looks as if the burden of proof is placed on the applicant to show that the publication ordered to be forfeited does not contain seditious or other material. There was a confict of opinion on the matter.

The source of conflict may be traced to differences in concept under the Indian and the English laws. Under the Indian law, he who goes to a court should prove his case. Under the English Law, that which is not prohibited by law may be taken to be permitted. Therefore the burden lies on the party alleging the publication to be objectionable.

Under the Press, Act, 1910, the Calcutta High Court held[7] that the almost impossible task of proving the negative was on the applicant. In *Annie Besant* v. *Government of Madras*,[8] Ayling, J. did not think that such burden was cast on the applicant.

Under the Criminal Procedure Code, the Lahore High Court held that the burden was on the Government.[9] The Allahabad High Court was wavering.[10]

The High Court of Andhra Pradesh seems to be of the view that the onus is on the Government.[11] But the court has not referred to the constitutional right of freedom of expression.

Closely connected with the burden of proof is the question as to who has the right to begin. That side which begins has the right to give reply and thus say the last word on the matter before the court. This was probably also the reason for placing the burden of proof on the applicant sometimes. In *Baijnath* v. *Emperor*,[12] although the Allahabad High Court considered that the burden lay on the Government, the Government Advocate was asked to begin

7. *In re Mahomed Ali*, I.L.R. 41 Cal. 466. In *Annie Besant* v. *Government of Madras*, A.I.R. 1918 Mad. 1210, the Offg., Chief Justice agreed.
8. A.I.R. 1918 Mad. 1210.
9. *Lajpat Rai* v. *Emperor*, A.I.R. 1928 Lahore 245.
10. In *Baijnath* v. *Emperor*, A.I.R. 1925 All. 195. The Court said that it was more convenient if the Government had begun their case.
In *Kali Charan Sharma* v. *Emperor*, A.I.R. 1927 All. 649, it was held that the applicant should convince the Court that the order was a wrong one.
In *Harnam Das* v. *State of U.P.*, A.I.R. 1957 All. 538, the view was affirmed.
11. *Veerabrahmam* v. *State of A.P.*, A.I.R. 1959 A.P. 572.
12. A.I.R. 1925 All. 195.

for the sake of convenience. In *Saigal* v *Emperor*,[13] the same High Court thought that it was manifestly most convenient if the Government Advocate began. When all facts are placed before the court, no question of onus arises.

As the burden of proof is necessarily on the Government after the Constitution, the case for the Government should be first presented. At the end, if necessary for the petitioner, the last word may be allowed to be said. Any procedural objection may thus be got over.

3. EVIDENCE TO BE ADDUCED

The notified publication is to be primarily admitted as evidence to establish the nature or tendency of it.[14] On its own merits the order should be capable of justification. It is the general rule. No external evidence need be admitted if the nature or tendency is clear.[15] If it is not clear external evidence may be admitted in support or rebuttal.[16] When a book was the subject of forfeiture, other volumes forming part of the series which are also notified to be forfeited [17] or a preface separately published[18] was admitted.

The English judges had to mainly depend on the English translations for forming their opinions. The official English translation was characterised by the Lahore High Court in *Lajpat Rai* v. *Emperor*[19] as "bald". As English has been the court language, and the judges who had ultimately to decide the question before the Constitution were not acquainted with the languages of India, extracts in English of the objectionable publication[20] and sometimes the English translation of the whole book were admitted.[21]

After the Constitution, most of the High Court judges hearing the application and at least one Supreme Court Judge, when an appeal is taken to the Supreme Court may be expected to be familiar with the language of the objected book. Therefore, the difficulties in

13. A.I.R. 1930 All. 401.
14. *In re Amrita Bazar Patrika*, A.I.R. 1920 Cal. 478. This was a case under the Press Act, 1910.
15. *Premi Khem Raj* v. *Chief Secretary, Jaipur Government*, A.I.R. 1951 Raj. 113.
16. *Khalil Ahmad* v. *State*, A.I.R. 1960 All. 715.
17. *Baijnath* v. *Emperor*, A.I.R. 1925 All. 195.
18. *Harnamdas* v. *State of U.P.*, A.I.R. 1957 All. 538.
19. A.I.R. 1928 Lah. 245.
20. *Baijnath* v. *King Emperor*, A.I.R. 1925 All. 195.
21. *Saigal* v. *Emperor*] A.I.R. 1930 All. 401.

regard to translation which arose before the Constitution are not likely to be there. Indeed when doubts have arisen, the judges looked into the original.[22] When the Supreme Court has to decide the question in appeal, it is desirable that the judge familiar with the language in which the publication is written, should participate in the hearing. If for any reason it is not possible for the judge to participate, the Chief Justice of India may invoke the power under Art. 127 of the Constitution and request a High Court Judge familiar with the language of the publication to participate.

When the hearing is on an application for setting aside the order of forfeiture in respect of a newspaper, "any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency" of the representation contained in the newspaper for which the order is made.[23] Therefore, any copy of the newspaper, whether published before the one ordered to be forfeited or after it, may be admitted. Thus a very wide latitude is given. If it is open to both sides to adduce such evidence advantages and disadvantages will be equal.

In deciding the case[24] under the Press Act, 1910, Woodroffe J. held that the section applies only if there is any doubt as to the nature or tendency of the words used and if the articles stood alone. When there was no ambiguity as to the character, nature or tendency apparent on the face of the articles he said that the section did not apply. There seems to be no reason for so restricting a plain statutory provision. The object of enacting section 99-E of the Criminal Procedure Code is, as the corresponding section of the Press Act should have been, to make similar facts of a particular nature admissible, the admissibility of which is otherwise doubtful.

The section says that other issues of the newspaper may be given in aid of the proof of the nature or tendency of articles for which a newspaper is proposed to be forfeited. There was a doubt as to whether the benefit of offering the other issues in evidence is equally available to the Government and the applicant. The Punjab Chief Court said[25] that expressions of loyalty used by the paper in other issues were not relevant. The Madras High Court

22. *Veerabrahmam* v. *State*, A.I.R. 1959 A.P. 572, per Bhimashankaram, J.
23. Section 99-E, of the Criminal Procedure Code.
24. *In re Amirta Bazar Patrika*, A.I.R. 1920 Cal. 478.
25. *Ghulam Qadir Khan* v. *Emperor*, 15 Cr.L.J. 493 (1914).

held[26] that issues of the same paper may be admitted to rebut the evidence offered by the Government with reference to same issues. The position seems to be this. If the Government did not offer evidence by reference to other issues the applicant cannot get such evidence admitted. But if the Government's evidence contained in other issues of the newspaper is admitted the applicant is equally entitled. The probative value of evidence provided by other issues, in any case, is tenuous.

4. POSITION OF HIGH COURTS

An application for setting aside the order of forfeiture shall be presented to the High Court having jurisdiction.[27] The Press Act, 1910, empowered the local Government to pass an order. When the Central Government operating as the local Government passed an order, the Calcutta High Court did not possess jurisdiction to set it aside.[28]

In the matter of setting aside the order two questions seem to arise. First, the order might not be in accordance with the requirements of the statute under which it is passed. Secondly, in respect of the appreciation of the subject matter of publication, the Government might have misunderstood it. An order of the latter type according to the statute is "setting aside the order." To distinguish between the two types vacating the order of the former types is called here, for the sake of clarity, quashing.

(a) *Quashing the order*

If the grounds of opinion of the Government in passing an order of forfeiture are not given whether or not there is any remedy for the aggrieved party has been the question ever since the passing of the Press Act. The Calcutta High Court in deciding a case under the Press Act, 1910, said that there was no remedy for the applicant, even though the mandatory provision of stating the grounds was not complied with. In coming to the decision, the Calcutta High Court heavily relied on section 22 of the Press Act, which laid down that an order purporting to be passed under the act should be taken as conclusive evidence that a forfeiture has been made. It is said that section 22 was "an undemocratic and unequitable provision."[29]

26. *Besant* v. *Government of Madras*, A.I.R. 1918 Mad. 1210.

27. Sec. 99-B, Criminal Procedure Code.

28. *In re Abul Kalam Azad*, 16 Cr.L.J. 698 (1915).

29. A.T. Markose, *Judicial Control of Administrative Action in India*, 717(1956).

Even though a provision corresponding to section 22 of the Press Act, was not repeated under the Criminal Procedure Code when it was amended in 1922, the courts still adhered to the earlier interpretation. As the only ground on which a High Court could set aside the order of forfeiture was that the publication in question did not contain seditious or other material of the nature described in section 99-A of the Procedure Code, they said[30] that they could not give relief on the ground of a defective notification.

Even after the Constitution where the citizen is entitled to the exercise of the freedom of expression, and the High Courts may grant extraordinary remedies, the High Courts of Allahabad,[31] Rajasthan and Andhra Pradesh[32] held that there was no remedy for the reason the grounds of opinion were not stated by the Government. But the Calcutta High Court, adhering to its earlier view in *In re Mahomed Ali*,[33] held[34] in 1955 that the notification is to be "set aside." The majority of the Supreme Court in *Harnamdas* v. *State of U.P.*,[35] reversing the Allahabad decision, upheld the Calcutta view. If for a ground not contained in the notification the courts upheld the order of the Government, it is for the reasons found by the Court, the majority said. The Court is not empowered to do it. On the other hand Das Gupta, J. dissenting said that if a notification is set aside for a defective content the grounds on which it may be set aside are being enlarged and the only ground on which it may be done is that the publication in respect of which the order is made does not contain seditious or other matter as was described. When it is said that the order is to be set aside, the position in contemplation of the majority was that the order should be quashed. The dissenting judge had in his mind that it should be set aside. Thus there is indeed no difference in the proposition sought to be laid down.

(b) *Setting aside the order*

The ground on which the order of forfeiture may be set aside

30. *Baijnath* v. *King Empero-*, A.I.R. 1925 All. 195. This was the view of all the High Courts before which the question arose.

31. *Harnamdas* v. *State of U.P.*, A.I.R. 1957 All. 538.

32. *Veerabrahmam* v. *state* AIR 1959 A. P. 572

33. I.L.R. 41 Cal. 466.

34. *Arun R. Ghose* v. *State of West Bengal*, 59 C.W.N. 495

35. *Harnamdas* v. *State of U.P.*, A.I.R. 1961 S.C. 1662. *Sarkar* J. delivered the leading judgment. With him Gajendragadkar, Wanchoo, Rajagopala Ayyangar JJ. agreed.

is that the publication notified did not contain seditious or other matter. Therefore the court is to be satisfied in regard to this matter. On the question as to what facts should be disclosed, the following observation made by Stephen J. is relevant. He said:[36]

> "I cannot say what facts should be stated. I do not think, for example, that it can be the case that the local Government should state to us all the information on which they have acted, for I cannot suppose that we are to revise their action as a whole. On the other hand we have, it appears, power to revise their action to some extent, and for this purpose some statement of fact seems essential."

(c) *Finality of the High Court decision*

No order passed or action taken under section 99-A shall be called in question[37] in any court otherwise than in accordance with the provisions of section 99-B laying down that Special Bench of the High Court may set aside the order of forfeiture. Thus an attempt to give finality to the decisions of the High Court was made. It is only a finality under the provisions of the Criminal Procedure Code. If under a paramount law like the Constitution[38] or the Government of India Act,[39] or under the law of prerogative enabling the judicial Committee to grant special leave to appeal if appeal lies, even if statute of a subordinate legislature expressly denies the right of appeal,[40] appeal could still be taken to a higher tribunal from the decision given by a special Bench under section 99-B of the Code of Criminal Procedure. Constitution being the paramount law and the jurisdiction of the Supreme Court being derived from the Constitution unalterable except by an extraordinary procedure,[41] the Supreme Court may entertain an appeal against the decision of the Special Bench under Article 132 with its own certificate, or under a certificate of the High Court that a constitutional question, like the one involving fundamental rights is wrongly decided, or under Article 136 by way of special leave. Indeed this is how statutes passed by legislatures subject to a paramount law are construed.[42] The Judicial Committee entertained

---

36. Roy, Law Relating to Press and Sedition, 196 (1915). This passage is not reported in the Calcutta Series of the Indian Law Reports.
37. Section 99G.
38. See Arts. 132, 135 and 136.
39. See Sec. 205 of the Government of India Act, 1935.
40. *Emperor* v. *Vimalbai Deshpande* A.I.R. 1946 P.C. 123.
41. See Article 368.
42. See *Nadan* v. *The King*, [1926] A.C. 482.

an appeal by special leave against the order passed by the Special Bench in *Annie Besant* v. *Advocate-General of Madras*,[43] when Press Act, 1910, was in force. The position cannot be different thereafter when the provisions are substantially embodied in section 99 (A to G) of the Code of Criminal Procedure and the power of the Supreme Court to entertain appeals is in no way less than that of the Privy Council. The Supreme Court on a special leave application entertained an appeal against the order of the Allahabad High Court and recently decided it on merits.[44]

---

43. A.I.R. 1919 P.C. 31.

44. *Harnamdas* v. *State of U.P.* ,A.I.R. 1961 ALL. 1662.