Edward Ezra and ors. Vs. the State

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Court : Kolkata

Decided On : Apr-29-1952

Reported in : AIR1953Cal263,56CWN875

Judge : Chakravartti and ;Sinha, JJ.

Acts : Criminal Law (Amendment) Ordinance, 1943 - Sections 3, 4, 4(1) and 5; ;West Bengal Criminal Law(Amendment) Ordinance, 1950;Constitution of India - Articles 13 and 14; ;General Clauses Act, 1897 - Section 6; ;Code of Criminal Procedure (CrPC) , 1898 - Section 423(1)

Appeal No. : Criminal Appeal Nos. 92 to 96 of 1950

Appellant : Edward Ezra and ors.

Respondent : The State

Advocate for Def. : J.K. Mukherjee and ;Sukumar Mitra, Advs.

Advocate for Pet/Ap. : Ajit Kumar Dutta, ;Amal Kumar Basu and ;Biren Maitra, Advs. (in No. 92), ;D.N. Chakravarti, Adv. (in No. 93), ;S.K. Das, ;Benode Behari Haldar and ;Bireswar Chatterjee, Advs. (in No. 94), ;J.P. Mitter

Judgement :

Chakravartti, J.

1. These appeals are succeeding on two legal grounds concerning the validity of the trial at which the Appellants were convicted and it is therefore hardly necessary to state any facts other than those which bear on those grounds. The trial was held under the provisions of the Criminal Law Amendment Ordinance (29 of 1943). It appears that after the Ordinance had been promulgated, it was amended eleven times and adapted twice, with the undetected result that the thread of continuity, at least as regards the constitution of the Tribunal by which the Appellants were being tried, had snapped at a vital point. It was also overlooked that while the trial was proceeding under a special law, the new Constitution of India had come into force with its declarations of fundamental rights.

2. These are five appeals before us. The appellant in Appeal No. 95 is Major J. Phillips who was Accused No. 1 in the ease and had been, at all material times, the Controller of Telegraphs Stores, Alipore. The appellant in Appeal No. 94 is Captain A. J, Rodrigues who was accused No. 2 & had been the Deputy Assistant Engineer, Purchase Section, The appellant in Appeal No. 93 is Jagat Bhusan Biswas who was Accused No. 4 and had been the Stock-Holder, Wire Godown. The appellant in Appeal No. 92 is Edward Ezra who was accused No. 6 and had supplied large quantities of copper strips and Mclntyre sleeves to tne Telegraph Stores. Appeal No. 96 is by Nanda Lal Dey, accused No, 7, who also had been a supplier of stores and had supplied, besides copper strips and Mclntyre sleeves, large quantities of bolts and nuts.

3. Along with the appellants, two other persons were placed on their trial as accused Nos. 3 and 5. Accused No. 3 was one Dasarathi Mukherjee who had been the Sub-store-Keeper of the Construction Branch, but as he died during the course of the trial, the prosecution as against him abated. Accused No. 5 was one Dhruba Chandra Banerjee who had been the Purchase Clerk in the Telegraph Storeyard at all relevant times. He turned approver and gave evidence as a prosecution witness.

4. As our decision is not going to turn on the merits, I shall state the prosecution case and the defence only in the barest outline. Tne case for the prosecution is

that as Controller 9f Telegraph Stores, Phillips had the duty of procuring stocks of all varieties of Telegraph Stores and supply them on demand to the Branch Stores, Depots and Divisions throughout India. His functions and the manner in which he was to discharge them were both defined by rules. The various Depots, Divisions and' Branch Stores would send him demands for their requirements or rather estimates thereof in writing and on receipt of those requisitions he would have first to prepare an amalgamated list of the year's requirements and then proceed to procure them either from the Telegraph Workshops or througn the Indian Stores Department. He would procure such articles from the workshops as the workshops could manufacture and supply, but for ether articles, he would have to place indents on the Indian Stores Department which would either buy them from the market by means of regular contracts with suppliers or procure them from other sources. Phillips himself had no authority to make direct purchases except when on actual demand for some item of stores could not be met out of the existing stock in the godown, but even in such cases he could make purchases only upto a limit of Rs. 500/- for a single item and, on emergent occasions, upto a limit of Rs. 1000/-. In making such purchases, he would have to invite openly tenders from firms and stockists of repute out of a list of approved concerns maintained in his office, consider the tenders received along with the recommendation of the officer-in-charge of the Purchase Section and then make a choice of the lowest tender consistent with the required quality. His procurements had thus to be limited to the Departmental demands received by him and his power of making direct purchases was not only circumscribed by a financial limit, but also controlled by certain rules as regards the method of its exercise. Bulk purchases were entirely the concern of the Indian Stores Department from which Phillips was to ask for stores that he could not obtain from the workshops.

5. During the last War, however, telegraph stores were required not only by the Posts and Telegraphs Department, but also bv the War and the Defence Departments which required them for operational needs. Accordingly, sometime in the middle of 1941, the post of a Director of the Telegrapn Storeyard and Workshops, snortly called jj. S. W., was created and it became the duty of the officer appointed to that post to co-ordinate tne demands of tne Controller of Telegrapn Stores for telegraph goods and such demands made by other

Departments of the Government, it was to him tnat indents from all Departments went and it was for him to organise tne production or procurement of the stores required so that it would be for him, to see what stores could be obtained from the workshops and what stores had to be purchased or procured from elsewhere and also to determine primarily in what order tne stores required by the various Departments would be supplied. Any disputed question of priority as between the different Departments would be determined by higher authorities. It is the case of the prosecution that Phillips, as the Controller of Telegraph Stores, had no concern with the demands received from the War and the Defence Departments which were mostly not demands for stores to be procured by purchase, but demands for production by the workshops with materials supplied by Departments themselves. Such demands could be no excuse or justification for Phillips making any direct purchases. According to the prosecution, his functions as well as responsibilities were limited to the needs of his own Department which were to be met by supplies from the workshop, whenever possible or by purchases through the Indian Stores Department, supplemented, in cases of emergency by petty purchases made by himself within the limits of his financial competence. Even when stores were manufactured for him by the workshops, he had to go to the Indian Stores Department for the necessary raw materials and ask for them by indents.

6. It will now be possible to explain what the charges against the appellants are. It is alleged that in 1942, when the War was at its height, a careful and well-laid plan was evolved for using the power to make petty purchases which Phillips had as a cover for his making enormous purchases of certain varieties of stores, though the same were not really required and purchasing them from a favoured group of contractors at exorbitant rates in return for bribes paid by them to Phillips and to certain of his subordinate officers in league with him. The central figure in that scheme was necessarily Phillips and he chose his associates with great circumspection. He took in Jagat Bhusan Biswas, accused No. 4, who was the Stock-Holder at the Wire or Works and Cables godown and utilised him for supplying fictitiously low figures as to the stock position to Dasarathi Mukherjee, accused No, 3, who was the Sub-Store-Keeper in the Construction Branch.

The next ally was Dasarathi, who helped by submitting to the Purchase Section grossly exaggerated figures as to the requirements of the Department on the basis of the low stock position, as communicated by Jagat. The recruits from the Purchase Section were Rodrigues, accused No. 2, who was the Deputy Assistant Engineer and Dhruba, originally accused No. 5 and subsequently a prosecution witness, who was the Purchase Clerk. The duty of Rodgrigues was to check the demands so that no supplies in excess of actual requirements might be procured to ascertain the possibilities of production by the workshops so that no unnecessary purchases might be made and to ensure, by means of calling for open tenders, that whatever stores were purchased from the market, were purchased at a fair rate. It was for him to recommend to Phillips that a certain quantity of a certain item of stores might be purchased, to tabulate the tenders received and to submit them to Phillips with his suggestions as to the party or parties with whom orders might be placed. He co-operated in carrying out the scheme of fraud by acting on the false figures supplied by Dasharathi and Jagat which he knew to be false, by not calling for open tenders but making, instead, a pretence of ascertaining 'the tone of the market' by telephonic enquiries limited to certain firms which were in the conspiracy and sometimes even by making a false record of such enquiries, though in fact none had been made.

The approver Dhruba, who was the Purchase Clerk, had officially the duty of attending to the correspondence in the Purchase Section and drawing up contracts to be entered into with the tendering firms, but in practice he came to be the person who handled the business with the contractors in the first instance, selecting firms to be included in the approved list and recommending firms to which contracts for supply might be given. As all business relating to purchases was transacted through him and all relevant papers passed through his hands, he had to be taken into confidence and he helped by becoming a willing party to the irregularities and lending himself to the carrying out of the scheme. Phillips made it easy for Dasarathi and Jagat to make false reports as to the requirements and for Roderigues to act on them with impunity by discontinuing the old system of recoupment indents under which the various Branch Stores and Depots and Divisions had to submit written indents for their needs, so that by reference to them, the existence or otherwise of an actual demand for a certain variety of

stores at a given point of time and the necessity for its procurement could always be checked. As the documentary evidence of actual demands was thus eliminated, Jagat, Dasarathi and Roderigues found themselves free to say, when, a purchase was intended to be made, that a necessity for such purchase existed. Thus, Jagat and Dasarathi combined to create a false appearance of necessity; Roderigues utilised the misrepresentation for recommending a purchase and also contrived to make the exorbitant rates sanctioned appear normal by confining his enquiries to a number of friendly dealers or not making any enquiries at all, while Dhruba assisted by doing all the incidental clerical work and putting the deal through. It is alleged by the prosecution that for all these services, the officers were systematically bribed by the contractors who obtained the orders.

7. The next part of the prosecution case relates to the role played by a group of contractors who are said to have been accomplices of the officers. It is alleged that there was a ring of them, some trading in several names, and they worked on the basis of an understanding as between themselves and with the officers in such a way that each got a contract in his turn in one or other of his trade names, the rates charged and paid appeared to be in order though in fact they were grossly excessive and the purchases appeared to be within the financial competence of Phillips, though in reality they were enormously in excess. The 'modus operandi' was as follows: One of tne contractors would make an oiler to supply a large quantity of a certain item of stores and Rouerigues, on being referred to, would duly report, with the co-operation of Dasarathi and Jagat, that such stores were required. He would then make a show of obtaining quotations from the market by sending out a circular letter to other contractors of the ring or make telephonic enquiries of them and the latter, knowing tnat the contract was intended to be given to the confederate who had made the offer and what rate he had quoted, would themselves quote slightly higher rates so that the rate quoted along with the offer might appear to be the lowest. When the offer was made by a person trading in several names, he himself would, quote higher rates in the names of his other so-called firms. Sometimes, even such enquiries were made after the olfer had already been accepted, just to put the record in order, or not made at all and false entries were made on slips of paper of quotations alleged to have been obtained or, again, the order was placed before the replies to the enquiries had been

received, because it was known what the replies would be.

It was possible to carry out this plan, because in regard to items of stores purchased in this manner, the practice of making entries in the Tender Register of tenders called for and quotations received was discontinued. After aa offer was accepted, the next step taken would be to place a 'reservation order' for the entire quantity of stores offered, but as the value of that quantity would be much in excess of the financial competence of Phillips, a suitable device for evading the difficulty was evolved and the supply was split up into a succession of instalments, each within the limits of Phillips' authority. Thus, though in the bulk, the purchase made under each reservation order greatly exceeded the financial powers of Phillips and he could never have purchased the quantity without reference to higher authorities if he took it in one lot, the device of instalments made the direct purchases by himself possible and conferred on them an external appearance of regularity. These reservation orders or copies of them were never sent to the higher authorities, although contracts of their value could only be made by the Indian Stores Department or, in rare cases, by Phillips under authority delegated by them.

The method followed was that after a reservation order had been placed, the stores covered by it would be gradually appropriated by means of a succession of requisitions and then paid for, but although there was an obvious element of uncertainty in this procedure so far as appropriations were concerned and it increased towards the latter part of the period of conspiracy when the reservation orders came to contain a 'break contract' clause which expressly authorised Phillips to cancel an order at his pleasure, the contractors willingly submitted to it, because they knew that the system had been devised in the common interest of the officers and themselves and felt sure that the quantity for which an order had been placed would, in the end, be taken. Indeed, so sure did they feel that they dumped their stores in the telegraph godowns in advance, in anticipation of requisition orders, and so far as the Wire Godown was concerned, Jagat helped the contractors by receiving such advance supplies and allowing them to be clumped in the godown without the knowledge of the Ledger Section.

8. It is to be stated here that in spite of the general character of the prosecution case, the actual prosecution is limited to three varieties of stores, viz., copper strips, Mclntyre sleeves and bolts and nuts of certain sizes; and although according to the prosecution, the ring of contractors involved in the supply of those stores included not only Edward Ezra, accused No. 6 and Nanda Lal Dey, accused No. 7, but also one Niranjan Paul and eight other persons who, between themselves owned sixteen other firms, the actual prosecution is limited to Ezra who supplied copper strips and Mclntyre sleeves and Nandalal who supplied those stores and bolts and nuts as well. Niranjan Paul, who had supplied only bolts and nuts, was examined as a prosecution witness. Only copper strips and Mclntyre sleeves were stocked in the Wire Godown of which the Stock-Holder was Jagat and he, as already stated, is among the accused; but the stock-holder of the Posts and Masts Godown where the bolts and nuts were stocked was not included in the prosecution.

9. It has further to be pointed out that the prosecution does not allege that any part of the stores, said to have been purchased, was not actually purchased or that any stores were removed and misappropriated after they had been received. All quantities purchased were fully accounted for and although at one time there was a huge accumulation, because purchases had been made without corresponding necessity, the stock was cleared off in 1944 when, on account of a sudden turn in the War situation, exceptionally heavy supplies for military needs were called for. The main charge laid by the prosecution is thus limited to causing wrongful loss to the Government in money to the extent of the difference between the price at the proper rates and that at the inflated rates allowed and to doing so on receipt of or by paying bribes.

10. The volume of the transactions questioned by the prosecution will appear from the relevant figures. According to certain tables compiled by the Tribunal, reservation orders in respect of Mclntvre sleeves were for 10,40000 pieces, of which 7,67,574 were supplied and the price paid for the supplies was Rs. 3,45,305. Reservation orders in respect of copper strips were for a total of 187 lakhs of which 11004600 were supplied and the price paid for the same was Rs. 17.57,949/-. Reservation orders in respect of bolts and nuts were for 19275 cwts.

of which 18042.5 cwts. were supplied and the price paid was Rs. 18,08,848/-. Certain quantities of bolts and nuts were purchased otherwise than under reservation orders and the total quantity purchased by the two methods was 19769 cwts. the price of which was Rs. 19,71,577/-. It must, however be stated that in the case of bolts and nuts, certain small quantities were purchased from some firms which the prosecution does not allege to have been in the conspiracy. Out of the total purchase of 19,709 cwts. of bolts and nuts of the total value of Rs. 19,71,577/-, 5961 cwts. of the value of Rs. 5,98,213/- were supplied by four firms which, according to the prosecution, were all owned by Nanda Lal Dey. Three of those firms supplied 22.15.975 cooper strips of the value or Rs. 3,52,939/- out of the total purchase of 1,10,04,600 pieces of the value of Rs. 17,57,949/-. One of those firms supplied 21,900 Mclntyre sleeves of the value of Rs. 10,879/- against reservation orders for 59,000 pieces. The supplies by Ezra were 13,15,675 copper strips of the value of Rs. 2,11,073/- and 2,62,634 Mclntyre sleeves of the value of Rs, 1,13,582/- out of the total purchase of 7,67,574 pieces of the value of Rs. 3,45,305/-. It is alleged by the prosecution that for the supplies of the copper strips, an excess payment of Rs. 1,30,425-4 as was made to Nanda Lal Dey on the basis of inflated rates and similarly an excess payment of Rs. 58,901-3 as, was made to Ezra. Although the general case made for the prosecution covers over-payment not only for copper strips but also for Mclntyre sleeves and bolts and nuts, the specific charges are limited to copper strips only.

11. On the above allegations, which include only the broad outlines of the prosecution case, seven charges were framed against the six accused persons, viz., Phillips, Roderigues, Dasarathi, Jagat, Ezra and Dey. As already stated, the prosecution as against Dhruba was withdrawn and he was examined as a prosecution witness. Of the seven charges, the seventh may be left out of account, because it was a charge against Dasarathi alone who is dead. Charge I was a general charge of conspiracy against all the accused persons under Section 120B, Penal Code, read with Sections 409 and 161 and it alleged that between April, 1942 and December 1944, the four public servants, along with Ezra, Dey, Dhruba, Niranjan Paul and the proprietors of sixteen other firms, tabulated under eight heads, had been 'parties to a criminal conspiracy to commit the offences of criminal breach of trust and of giving and accepting bribes in the manner following,

to wit, by dishonestly allowing inflated rates to accused Nanda Lal Dey and Edward Ezra and to the said Niranjan Paul and the proprietors of the other firms mentioned above in respect of supplies of stores, namely, copper strips, McIntyre sleeves and bolts and nuts made by them and by obtaining gratification other than legal remuneration as a motive or reward for giving of such orders.'

Charge II was a charge under Section 409, Penal Code, directed against Phillips, and it included two counts, one in respect of a sum of Rs. 1,30,425/4/-, alleged to have been wrongfully paid by him to Dey for supplies of copper strips and the other in respect of a sum of Rs. 58,901/3/-, alleged to have been similarly paid to Ezra in breach of trust, also for supplies of copper strips. The third charge against Phillips was charge V, under section 161, I.P.C., and that also included two counts, each charging Phillips with having received a bribe of Rs. 500/- from Niranjan Paul on a particular date 'as a motive or reward for doing an official act to wit, giving orders for supply of stores.' It is to be noticed that while the accusation in the conspiracy charge was not the giving of orders by itself, but only allowing inflated rates on the orders, as admitted before us by the learned Counsel for the State, the specific overt act alleged in charge V was nothing more than placing orders with Niranjan Paul which suggests, if anything, only undue preference.

As regards the remaining charges, charge III was against Roderigues, Dasarathi, Jagat & Nandalal Dey and charge IV was against the first three persons and Ezra. Each was a charge under Section 109, read with Section 409 of the Indian Penal Code, the first charging the accused with having aided and abetted Phillips in committing criminal breach of trust as a public servant in respect of a sum of Rs. 130425/4/-, alleged to have been wrongfully paid to Nandalal Dey on the basis of inflated rates and the second charging the accused concerned therein with having similarly abetted Phillips in respect of the alleged over-payment of a sum of Rs. 58,901-3-0 to Ezra. Charge VI, a charge under Section 161, I. P.C., was against Roderigues alone and included two counts, each charging him with having received a bribe of Rs. 50/- from Niranjan Paul on a particular date 'as a motive or reward for showing him favour in your official capacity in the matter of getting orders for the supply of stores.' One of the dates was the same as that on which Phillips was charged, by the first count in charge V, with having received a bribe of

Rs. 500/- from the same Niranjan.

12. The defence of the appellants again need be set out only in broad outline. Ail pleaded not guilty. Phillips denied that the purchases in question had been made by him without necessity, without authority and at inflated rates, as alleged. According to him, they had been made in order to meet urgent demands coming from not only by the Posts and Telegraphs Department but also from the Defence Department, the Army, the Air Force, the Defence Services Lines of Communication Board and the South East Asia Command and some purchases had also been made by way of building up stores in anticipation of demands which was a perfectly legitimate thing to do. All had been absolutely bona fide purchases made at current market rates and in accordance with a method known and applied in his office since the time of his predecessors. The method which included calling for quotations from certain individual firms and placing reservation orders had particularly been resorted to, because the leisurely procedure of inviting cpen tenders by means of advertisements and concluding formal contracts through the Indian Stores Department was wholly out of place during the emergency of the War when quick supplies of enormous quantities of stores were needed for urgent military purposes. It was also the defence of Phillips that as regards the existence of demands, selection of firms, ascertainment of rates and the placing of orders he had depended entirely, as he had to, on his subordinates, Roderigues, Dasarathi and Jagat. In any event, he pleaded further, no charge under Section 409, I. P.C. or of conspiracy to commit an offence under that section could be maintained against him, inasmuch as he had no dominion over the funds of the Telegraphs Stores.

13. The defence of Roderigues was that he had only carried out the orders of Phillips and in the matter of selection of firms, had relied on the recommendations of Dhruba. He had not called for tenders by advertisement but had obtained quotations from certain individual firms, because that method was authorised by Phillips and because in view of the emergent War situation, it was the more expeditious and appropriate method. He repudiated the charges of bribery.

14. The defence of Jagat was that it was not part of his duty to acquaint the Controller with the stock position and he had never done so. Nor had he supplied any information, false or otherwise, to the Purchase Section. It was true that contractors had been allowed to dump stores in his godown, but that practice was an old one and the dumping in the present case had been authorised by Phillips himself which he, as a subordinate officer, could not question. He had no concern whatever with the purchases made by Phillips and had received no illegal gratification in connection with them.

15. The defence of Ezra and Dey was that they were bona fide contractors and had supplied stores to Phillips in the course of bona fide business. They denied that the rates paid to them were unconscionably high and pleaded further that, in any event, they were entitled to charge any rates they liked and the mere fact that Phillips accepted those rates when he might possibly have bought cheaper elsewhere could not show that they had abetted Phillips in committing an offence under section 409, I. P.C. They also complained that they should have been charged with having conspired with the proprietors of certain other firms who were not going to be before the Court either as accused or witnesses. A special defence was taken on behalf of Dey to the effect that there was a misjoinder of parties inasmuch as there was nothing in the prosecution evidence before charge as to any connection or understanding or arrangement between Ezra and himself.

16. In support of its case, the prosecution examined 45 witnesses, 44 before charge and one after the charges had been framed. The documents exhibited on behalf of the prosecution were 1452 in number. The defence called no witness, but proved 373 documents through the prosecution witnesses themselves during their cross-examination and relied strongly on the documentary evidence. Six documents were admitted in evidence as Court exhibits. After the defence had proved certain documents which purported to be statements of costings or analyses of rates called for and received by Phillips from five of the firms named in the conspiracy charge, but with which Ezra and Dey were not connected, a suggestion was made that representatives of those firms might be examined as Court witnesses in order that the genuineness or bona fides of the documents, which the prosecution questioned, might be tested and explanations obtained as

to the circumstances in which they had been submitted. The defence strongly objected to the summoning of such witnesses at that stage, mainly on the ground that after the defence had proved certain documents which disproved a part of the prosecution case, the prosecution could not be allowed to fill up gaps in its evidence by cross-examining Court witnesses, particularly since if such witnesses would support the prosecution case in spite of being members of accomplice firms, the prosecution should have examined them earlier on its own behalf. In the end, the Tribunal decided not to examine the persons concerned as Court witnesses.

17. In addition to the evidence referred to above, the Tribunal also took into account as against Phillips and Jagat certain accretions to their property under the provisions of Sections 9 and 10 of the Ordinance. The accretions, in the case of Phillips, were deposits in two banking accounts and in the case of Jagat, a plot of land and some gold ornaments. The explanation of Phillips was that the deposits represented his winnings on the race course and Jagat's explanation was that the land and the ornaments had been purchased out of the sale proceeds of his snare in his ancestral house and of some old ornaments of his wife, as also his savings out of his salary and subsidiary earnings as a private tutor.

18. The proceedings before the Tribunal commenced on 20-9-1946, wflen the petition of complaint was filed and tne arguments were concluded on the 2b-3-1950. Judgment was reserved and it was delivered on me 26th May next. The proceedings tnus lasted for about 3 years and 9 montns.

19. The Tribunal acquitted Phillips and Roderigues of the charges under Section (161?), I.P.C. (charges V ana VI respectively) on tne ground that tne evidence of tne accomplice Niranjan Paul on wnich they were based had not been corroborated in material particulars by independent evidence. They found all other charges proved against all the accused. Tnus, all tne five Appellants were found guilty under Charge I (Section 120B, read with Sections 409 and 161).

In addition, Philips was found guilty under Section 409, I.P.C. (Charge II) in respect of both the counts of tne charge. Roderigues and Jagat were found guilty under both the charges under Section 109, read with Section 409 I. P.C. (charges III & IV). Ezra was found guilty under charge IV and Nanda Lal De was found guilty

under Charge III.

20. The sentences passed on the appellants are as follows:

Phillips: -- Charge I : Rigorous imprisonment for 4 years and a fine of Rs. 10,000/-, in default rigorous imprisonment for 1 year.

Charge II: 1st Count: rigorous imprisonment for 3 years and a fine of Rs. 130425-4-0 in default, rigorous imprisonment for 1 year; 2nd Count: rigorous imprisonment for 3 years and a fine of Rs. 58901-3-0 in default, rigorous imprisonment for 1 year, the substantive sentences of imprisonment under both the charges to run concurrently.

Roderigues:-- Charge I: Rigorous imprisonment for 3 years and a fine of Rs. 10,000/-, in default rigorous imprisonment for 1 year.

Charge III: Rigorous imprisonment for 1 year and a fine of Rs. 2000/-, in default, rigorous imprisonment for six months.

Charge IV: Do.

The substantive sentences of imprisonmentunder all the three charges to run concurrently.

Jagat:-- Charge I: Rigorous imprisonment for 1 year and a fine of Rs. 2000/-, in default, rigorous imprisonment for 6 months:

Charge III: Rigorous imprisonment for 6 months and a fine of Rs. 500/-, in default rigorous imprisonment for 3 months;

Charge IV: Do.

The substantive sentences of imprisonmentunder all the charges to run concurrently.

Ezra:-- Charge I: Simple imprisonment for B months and a fine of Rs. 20,000/- in default, simple imprisonment for 3 months;

Charge IV: Simple imprisonment for 9 months and a fine of Rs. 10,000/-, in default, simple imprisonment for 3 months.

The substantive sentences of imprisonment to run concurrently.

Dey: Charge I: Rigorous imprisonment for 3 years and a fine of Rs. 20,000/-, in default, rigorous imprisonment for 1 year;

Charge III: Rigorous imprisonment for 1 year and a fine of Rs. 10,000/-, in default, rigorous imprisonment for 6 months,

The substantive sentences of imprisonment to run concurrently.

In the case of Ezra, the imprisonment awarded was simple, presumably because of his age wnich was given as 71 years. In the case of Philips, me sentences of fine under the two counts of Charge 11 were passed under Section 10 of tne Ordinance which, as amended by Ordinance VII of 1946, requires the Special Tribunal to impose a sentence of fine equivalent to the amount or value of other property found to have been procured by the offender by means of the offence, in addition to any other sentence that may be imposed.

21. As already stated, the accused have preferred five separate appeals to this Court. The learned Counsel on their behalf addressed us extensively on the facts of the case, but they also took two legal objections to the validity of the trial which appear to us to be well-founded and which make it unnecessary for us to consider the arguments directed to the value or the effect of the evidence. Indeed, Mr. Mukherjee who appeared for the State himself conceded that so far at least one of the objections was concerned, he could see no answer to it. If I have yet set out the prosecution and the defence cases at some length, it is only to give some indication of the complexity and magnitude of the case which will be relevant to the consideration of a suggestion made to us at the end of the hearing to which I shall in due course refer.

22. The legal objections taken were the following:

I. That the Special Tribunal which commenced the trial as a tribunal composed of three members and concluded it as a tribunal composed of only two of them after the third member had resigned, was no longer, after such resignation, a legally constituted tribunal, in spite of the amendment of Section 4 of Ordinance 29 of 1943 by Section 3 of Ordinance I of 1950, subsequently enacted into Act IX of 1950, and, accordingly, all proceedings before the tribunal as composed of two members, were utterly void;

II. That, further, the provisions of Ordinance 29 of 1943, as amended from time to time, being arbitrarily discriminatory and as such repugnant to Article 14 of Constitution, they became void when the Constitution came into force by virtue of the provisions of Article 13(1) and accordingly all proceedings had under the provisions of the Ordinance after 26-1-1950, were devoid of legal validity and of no effect.

23. It may be pertinent to point out that the two legal objections seek to hit the proceedings practically at the same stage and the same point of time. After the resignation of one of the members, the Tribunal resumed the hearing as a two-member Tribunal on 16-1-1950, when the argument on behalf of the prosecution commenced. On 28-1-1950, which was the first date of hearing after the Constitution had come into force, the argument for the prosecution was still proceeding. Thus, if either of the two objections succeeds, practically the same part of the proceedings will be invalidated.

24. In order to appreciate the first point, it is necessary to refer to the history of Ordinance 29 of 1943 and the connected Acts. We are indebted to Mr. Mukherjee, the learned Counsel for the State, for compiling that history upto January 1946, which was by no means an easy task to perform, because, unfortunately and very curiously, copies of the amending Ordinances are not readily available even from official sources and they are not easily traceable elsewhere. However that may be, it appears that the principal Ordinance was promulgated by the Governor-General on 11-9-43 and before the present case was allotted to the Tribunal, which was on 27-8-1946, the Ordinance had been amended eleven times. We were unable to obtain the date on which this particular Tribunal, which came to be known as the

First Special Tribunal at Calcutta, was first constituted, but that date is not of any importance since the material portion of the provision regarding the Constitution of Special Tribunals on which the Appellants rely remained unaltered. The material portion of the provision regarding the composition of Special Tribunals also remained unaltered till long after the present case had been allotted to the First Appellate Tribunal at Calcutta.

25. The provision regarding the constitution of Special Tribunals is contained in Section 3 of the Ordinance which, as it stood originally, provided as follows:

'3. The Central Government may, by notification in the Official Gazette, constitute for the purposes of this Ordinance two Special Tribunals, one to sit at Calcutta and the other to sit at Lahore.'

26. The latter part of the section whichdeals with the number of Special Tribunals andtheir location was subsequently amended fromtime to time, by Ordinance 16 of 1944. Ordinance LII of 1944 and finally by Ordinance 12of 1945 which conferred on the Central Government a general power to constitute suchfurther Special Tribunals as it might considernecessary. But the primary requirement thata Special Tribunal must be constituted by notification in the Official Gazette was never modified and was in fact expressly repeated in theomnibus clause added by Ordinance 12 of 1945.That clause provided for the constitution offurther Special Tribunals 'by like notification.'(27) The provision regarding the compositionof Special Tribunals is contained in Section 4 (1) ofthe principal Ordinance which, so far as ismaterial, reads as follows: 4(1). A SpecialTribunal constituted under this Ordinance shallconsist of three members.

28. Then follow provisions regarding the qualifications of the members which have been amended since the Ordinance was first promulgated, but since nothing turns in the present case on the qualifications, it is not necessary to refer to the amendment.

29. Two other provisions of the principal Ordinance require to be referred to. By Ordinance XL of 1944, promulgated on the 26th August of that year, a new sub-section, numbered (1A), was inserted in Section 6, although it was really a proviso

to Section 4 (1). It reads as follows:

'6(1A) Notwithstanding anything contained in Section 4, any two members of a Special Tribunal may proceed with the trial of a case during the temporary and unavoidable absence of the third member:

Provided that all three members shall be present when after the evidence has been concluded, the prosecutor or the accused or his pleader is addressing the Special Tribunal and when the judgment is delivered.'

The other provision to which it is necessary to refer is Section 6(3) which occurred in the Ordinance, even as originally promulgated. It reads as follows:

'6 (3): A Special Tribunal shall not, merely by reason of a change in its members, be bound to recall and rehear any witness, who has given evidence and it may act on the evidence already recorded by or produced before it.'

30. It will be noticed that Section 6(1A) does not provide for a case of vacancy among the members of a Tribunal but only for a case where a member, while still a member, is unable to attend a sitting or sittings. Section 6 (3), however, obviously contemplates that members may be changed, but even that section does not authorise a Tribunal to proceed with a case after a member has ceased to be a member and before his successor is appointed. It may further be pointed out that the Ordinance contains no provision for filling up an individual vacancy in the Tribunal merely by appointing a new member in the place of a member who may resign or may be removed. The only provision regarding the constitution of Special Tribunals is Section 3 and consequently whenever a vacancy occurs, the situation can only be met by constituting a fresh tribunal by a notification under Section 3, composed of the two old members and the new member appointed to succeed the outgoing member. In practice, that appears to have been the procedure always followed by the Government.

31. Before I proceed to the next relevant provision of law, it is necessary to interpose the history of the First Appellate Tribunal at Calcutta since the date when the present case was allotted to it. On the 20-9-1946, when the petition of

complaint was filed, the members were Mr. M A. Ispahani, Mr. P.R. Barucha & Mr. N. C. Basu, the first-named being the President. Mr. Isnahani was succeeded by Mr. Lethbridge who continued to be the President till the sitting of 8-5-1947. He was then succeeded as President by Mr. Barucha & a new member, Mr. E. M. Joshi, was appointed to take Mr. Barucha's plane. The Tribunal remained a tribunal composed of Mr. Barucha. Mr. Joshi and Mr. Basu till the 16-12-1949 when Mr. Basu resigned.

32. I may observe in passing that frequent occasion appears to have arisen to take advantage of the provisions of Section 6(3) and to proceed with the hearing in the absence of a member. Mr. Basu was absent on as many as 53 days till at last he resigned. Mr. Barucha and Mr. Joshi were also absent on occasions, sometimes on three or four hearing days at a stretch. Besides, Mr. Joshi ioined the Tribunal after the trial had proceeded for about nine months.

33. The resignation of Mr. Basu was accepted by a notification dated the 20-12-1949 with effect from the 16th. After his resignation, the remaining members of the Tribunal went on adjourning the case from date to date, in anticipation, as they said in the order-sheet, of orders of the Government, reconstituting the Tribunal. This they were bound to do, because as the examination of witnesses had been concluded and the case had reached the stage of argument, they could not have proceeded with the hearing in the absence of the third member, even if such absence had been a temporary one. But the situation was one of a vacancy to which even Section 6 (1A) did not apply at all and the two remaining members rightly took the view that before they could function further, the Tribunal required to be 'reconstituted.' Obviously, they expected that the Government would proceed in the same manner as on previous occasions and would reconstitute the Tribunal in the form of constituting a fresh Tribunal, composed of a new member and themselves, fay means of a fresh notification under Section 3. Actually, however, the Tribunal was not reconstituted in that form. Instead, the Governor of Bengal promulgated an Ordinance, called the Calcutta Special Tribunal (Change of Composition) Ordinance (West Bengal Ordinance, I of 1950), by which the Central Ordinance of 1943, 'as modified by the Bengal Special Tribunal (Continuance) Act, 1946' was amended. The Ordinance was promulgated on the 11-1-1950 and it

was subsequently enacted into an Act of the Legislature, with slight modifications as West Bengal Act, 9 of 1950 which came into force on 15-3-1950.

34. It is necessary to pause here for a moment to explain what the Bengal Special Tribunal (Continuance) Act, 1946 was. Ordinance 29 of 1943 was promulgated on 11-9-1943 in exercise of the powers conferred on the Governor-General by Section 72 of the Ninth Schedule to the Government of India Act, 1935. Under the provisions of that section, an Ordinance made thereunder could remain valid and effective only 'for the space of not more than six months from its promulgation.' Previously, however, by Section 1(3), India and Burma (Emergency Provisions) Act, 1940, an Act of the British Parliament, it had been enacted that as respects Ordinances promulgated during the period specified in Section 3 of the Act, Section 72 of the Ninth Schedule to the Government of India Act, 1935 shall have effect as if the words 'for the space of not more than six months from its promulgation' were omitted. The period specified in Section 3 was the period between the date of the passing of the Act and the date declared by His Majesty to be the end of the emergency which had caused the passing of the Act, both inclusive. The Act was passed on 27-6-1940 and the 1-4-1946 was declared to be the date on which the emergency had come to an end. Ordinance 29 of 1943 was passed between those dates.

But at one time it was thought that the effect of the Parliamentary Act, 1940 might only be that the limitation of six months would remain suspended during the period mentioned in Section 3 of the Act so that it would come into operation again on the expiry of that period and all Ordinances made within the period would cease to have effect after six months from the date of such expiry, i.e., after 30-9-1946. It was because of that doubt, as stated in the preamble, that the Bengal Special Tribunals (Continuance) Act (12 of 1946) was passed and brought into force on 30-9-1946, providing that barring Section 5(1) which empowered the Government to allot cases to Special Tribunals, all other provisions of the Ordinance of 1943 would continue in force and all acts done under the Ordinance would remain valid and effective. The precaution was unnecessary, because, as the Federal Court has since pointed out in -- 'J. K. Gas Plant . v. Emperor'. (1947) F C R 141: 52 Cal W N (FR), 25, the Ordinances made within the period mentioned in the Act of 1940

are subject to no time-limit at all as regards their duration, unless imposed by the Ordiances themselves, and the period only sets the limits of time, ordinances made during which would have that ettect. The passing of the Bengal Act thus created the somewhat peculiar situation that Ordinance 29 of 1943 continued to remain effective of its own force and at the same time was continued by an Act of the Provincial Legislature.

35. To return now to Ordinance 1 of 1950, it amended Ordinance 29 of 1943 not in general but only in its application to the First Special Tribunal at Calcutta and the amendment with which we are concerned was to provide by Section 3(1) that thenceforward the principal Ordinance would apply to that particular Tribunal and to cases pending before it at the time,

'subject to the following modifications, namely:

(a) in Sub-section (1) of Section 4, for the words 'three members', the words 'two members' shall be substituted;

(b) Sub-section (1A) of Section 6 shall be omitted.'

36. The effect of the amendment was thus to reduce the numerical strength of the Tribunal from three to two members and, consequentially, to delete the provision that in the case of a temporary absence of one of the members, the remaining two might proceed with the trial of a case. Reference may also be made to the substitution of a new provision for Section 6(4) to the effect that in the event of a difference of opinion between the two members, the Provincial Government shall appoint a third member, notwithstanding the provisions of Section 4(1), and that the Tribunal, as so constituted, shall re-hear arguments and deliver judgment in the case.

37. After receiving a copy of the amending Ordinance from the Government of West Bengal, Mr. Barucha and Mr. Joshi resumed the hearing of the case on 16-1-1950, obviously on the basis that by virtue of the Ordinance there was a properly constituted Tribunal, composed of themselves. No notification re-constituting the First Special Tribunal under the provisions of the amended Ordinance as a tribunal

composed of Mr. Barucha and Mr. Joshi was issued. On the other hand, no objection to the constitution of the Tribunal was taken on behalf of the accused. Mr. Barucha and Mr. Joshi concluded the hearing of arguments and in due course delivered judgment.

38. It may be convenient to dispose of here a minor point, faintly argued on behalf of the Appellants. It was contended that Ordinance 29 of 1943 being a Central Ordinance, the Governor of Bengal had no power to amend it by an Ordinance of his own. There is no substance in the contention, though the legislative steps taken by the local authorities appear to have been of a confused character. By the Bengal Special Tribunals (Continuance) Act (12 of 1946), the provisions of Ordinance 29 of 1943 were, in effect, adopted by the Bengal Legislature and re-enacted with certain amendments, as an Act passed by itself. Thereafter, there could be no question of amending the Central Ordinance, as such, since the provisions of the Ordinance had become in Bengal the provisions of a Bengal Act by which they had been adopted and given further life. But presumably, in 1950, the Governor was advised that the Central Ordinance had not expired with the expiry of six months from the termination of the period specified in the Parliamentary Act of 1940, but was still surviving and accordingly he proceeded to amend, not the Bengal Act but the Central Ordinance itself. It appears that he did so in a perfectly legal and constitutional manner. The preamble of the Ordinance recites that instructions of the Governor-General had been obtained and that being so, the provisions of Proviso (b) (i) to Section 88(1) of the Government of India Act, 1935, read with section 108(2)(b), were duly complied with.

39. The main contention of the appellants regarding the constitution of the Tribunal was that the mere reduction of the numerical strength of the First Special Tribunal at Calcutta to two members would not bring into existence a validly constituted Tribunal composed of Mr. Barucha and Mr. Joshi in the absence of a notification constituting a Tribunal composed of them. In my opinion, that contention is well-founded. In fact, Mr. Mukherjee who appeared for the State very fairly conceded that he could not possibly resist the objection.

40. A very similar case had recently to be dealt with by the Supreme Court in -- 'United Commercial Bank Ltd, v. Their Workmen', (1951) S C R 380. The Act there concerned, the Industrial Disputes Act, provides by Section 7(2) that a Tribunal 'shall consist of such number of members as the appropriate Government thinks fit' and Rule 5, framed under Section 38 of the Act, provides that the appointment of a Tribunal, 'together with the names of the persons constituting the..... .Tribunal', shall be notified in the official Gazette. Bodies dealt with by the Act are Boards, Courts of Inquiry, and Tribunals, but so far ay a Tribunal is concerned, there is no provision, as there is in the cases of a Board and a Court of Inquiry, that it 'may act, notwithstanding the absence of the Chairman or any of its members or any vacancy in its number', provided there is the prescribed quorum. Section 8(1) deals with all the three classes of bodies and it provides as follows:

Section 8(1). If the services of the Chairman of a Board or the Chairman or other member of a Court or Tribunal cease to be available at any time, the appropriate Government shall, in the case of a Chairman & may, in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Board, Court or Tribunal so re-constituted.

41. The facts of the case were that the services of one of the members of a Tribunal, composed of the Chairman and two members, ceased to be available for a certain period as he was appointed to another Tribunal and the Government informed the Chairman and the remaining member that they did not intend to appoint a new member in his place at the time. Thereupon, the Chairman and the remaining member proceeded with the cases pending before the Tribunal and made certain intermediate awards in the absence of the third member. Thereafter, the third member rejoined the Tribunal and after further proceedings before the Tribunal, as composed of three members, the main award was made and signed by all of them. The intermediate awards and the main award were all challenged before the Supreme Court and all were held to be invalid by the majority of their Lordships. We are concerned in the present case only with the reasons given for the invalidity of the intermediate awards.

42. The reasons given, broadly stated, are that Section 8(1) deals only with the case where on the services of a member ceasing to be available, the Government elects to appoint a new member in his place, in which case the Tribunal is 're-constituted', but the section has no concern with a case where the Government chooses not to make an appointment. It is not implicit in the section that in the latter case, the Chairman and the remaining member automatically become a properly constituted Tribunal. Nor does the Act provide, in the case of a Tribunal, that it may act notwithstanding the absence of a member or in spite of there being a vacancy among the members. The situation that had arisen in the case was one of a vacancy. A Tribunal composed of the Chairman and one of the original members would be a different Tribunal from the original Tribunal, composed of the Chairman and two members. Such a Tribunal, being a new and different Tribunal, could be validly constituted only by a notification under Rule 5 which applies as much to the case of a vacancy as to the case of the first constitution of a Tribunal, for, in both cases, a new Tribunal is brought into existence. No such notification having been issued, the two persons who had purported to function during the intermediate period did not constitute a valid Tribunal and, accordingly, the awards made fay them were void.

43. In my opinion, the facts of the present case are even stronger. Like the Industrial Disputes Act in its application to Tribunals, Ordinance 29 of 1943 also does not provide for a case of vacancy. Both Section 6(1A) which provides for the temporary absence of a member and Section 11(b) which provides for the making of rules to meet the case of a permanent absence contemplate that the member concerned remains a member.

It is true that Ordinance 1 of 1950 dealt specifically with the First Special Tribunal at Calcutta which was notified and known to be a Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu and that Section 3(1) (a) of the Ordinance reduced the number of the members of that Tribunal from three to two. But it is no more implicit in the provisions of that section that Mr. Barucha and Mr. Joshi automatically became a validly constituted First Tribunal than it is implicit in Section 8(1) of the Industrial Disputes Act that on the services of a member of a Tribunal ceasing to be available and the Government choosing not to appoint a

successor, the Chairman and the remaining members automatically continue to constitute a validly constituted tribunal.

It appears to me that the effect of the amendment of Section 4(1) of the principal Ordinance in the present case, by which the number of the' members of the Tribunal was reduced from three to two, is exactly the same as the effect of Section 8(1) of Industrial Disputes Act in its application to a case where the Government does not choose to appoint a new member. It is true that who the remaining members of the First Special Tribunal were, was known, but so it was known in the case before the Supreme Court who the Chairman of the Tribunal concerned was and who was the remaining member. All that Ordinance 1 of 1950 provides is that the First Special Tribunal at Calcutta shall instead of being composed of three members as in the case of other Tribunals constituted under the Ordinance, be composed of two members. But as Mr. N. K. Bose pointedly and pertinently asked, which two? The provision has reference only to the numerical strength of the Tribunal, but none to its actual personnel.

Indeed, so far as the amendment itself is concerned, the two members of the Tribunal need not have been Mr. Barucha and Mr. Joshi at all, but might well be two outsiders, newly appointed, and even if the choice was to be limited to the original members, there is no reason in the amendment itself why the two members should not have been Mr. Basu and Mr. Barucha or Mr. Basu and Mr. Joshi. As pointed out by the Supreme Court in the case already cited, a Tribunal composed of two of the three original members is a different Tribunal from the original Tribunal of three members. If so, such a Tribunal could be validly brought into existence only by a notification under Section 3 which prescribed the only method of constituting a Tribunal and which had not been amended. Even if, therefore, the amendment of Section 4(1) is to be read with the notification dated 20-12-1949 by which the resignation of Mr. Basu was announced, it required a notification to constitute a valid Tribunal composed of Mr. Barucha and Mr. Joshi. No such notification having been issued, no properly constituted Tribunal, composed of Mr. Barucha and Mr. Joshi, ever came into existence.

44. It may be added that, as pointed out by Mukheriea J., in the 'United Commercial Bank case', (1951 S C R 380), a Tribunal cannot be conceived of as an entity different from the members of which it is composed and it cannot be said that whatever changes might occur in the composition of a Tribunal, the identity of the tribunal, once it is constituted, remains intact. It cannot therefore be argued that the Tribunal concerned having been specified in the Ordinance and the size of that Tribunal having been reduced by the Ordinance itself, no further notification specifying the names of the members of the Tribunal, as reduced, was necessary.

In the case before the Supreme Court also, the relevant Act contained provisions by virtue of which the size of a Tribunal would become reduced in certain circumstances and those circumstances had come to arise. Nevertheless, the Supreme Court held that a notification was necessary and the reason is clear. A tribunal has no concrete existence apart from the members composing it and therefore a mere definition of the numerical strength of the membership of a tribunal does not bring a tribunal into existence. In order that a tribunal may 'be constituted in fact, it is essential that its members should be named and their names notified. A statutory declaration or a notification, containing only the number of the members of a tribunal, would be perfectlv meaningless. I am therefore of opinion that notwithstanding the legislative reduction of the size of the First Special Tribunal, a notification constituting a new tribunal of two named members under Section 4(1), as amended, was further neressary and the fact that Section 3 does not expressly require the names of the members to be included in the notification, like Rule 5. Industrial Disputes Act rules, does not make the reasoning of the Supreme Court decision any the less applicable.

45. In any event, it appears to me that the gap which occurred between the resignation of Mr. Basu and the promulgation of Ordinance 1 of 1950 was fatal. Ordinance 29 of 1943, apart from the amendment made by the Bengal Ordinance, knew only of a tribunal composed of three members. Under Section 4, as it stood in tne Central Ordinance, there could only be a tribunal composed of three members or no tribunal at all. It was under that section that the First Special Tribunal had originally been constituted and that section, in its unamended form, was in force on 16-12-1949 when Mr. Basu resigned. It continued to be in force in

that form up to 11-1-1950, not till which date was the Bengal Ordinance promulgated. The legal result of that sequence of events clearly was that the moment Mr. Basu's resignation came into effect, the First Special Tribunal at Calcutta, which had existed so long, ceased to exist--for, at that date, it could have no valid existence as a tribunal of two members. Between 16-12-1949 when Mr. Basu's resignation took effect and 11-1-1950 when the Ordinance was promulgated, there was no First Special Tribunal at Calcutta and Mr. Barucha and Mr. Joshi were not members of any such Tribunal. On 11-1-1950, therefore, there could be no question of changing the composition of any existing First Special Tribunal at Calcutta, for, the old Tribunal was not only dead but also, to adopt an apt expression used by Mr. Mukherjee, 'decomposed'.

Had the Ordinance been promulgated on 16-12-1949, so as to bring it into force before or simultaneously with the resignation of Mr. Basu, it might perhaps be argued with some plausibility that no break of continuity had occurred and all that had been done was that the composition of an existing Tribunal had been altered by making a law which the Governor or the Legislature could validly do. Whether even in such a case the necessity of a fresh notification would be obviated, unless the Ordinance itself named the members of the Tribunal, as reduced, is very doubtful. But, in any event, a break having been allowed to occur and the old Tribunal having gone out of existence, all that could possibly be done after the promulgation of the Ordinance, if a Tribunal was to be had, was to constitute a fresh Tribunal by a fresh notification, although by reason of the amendment of Section 4(1), it might properly be a Tribunal of two members and although the members chosen might be Mr. Barucha and Mr. Joshi. There having been no such notification, there was no validly constituted Tribunal composed of Mr. Barucha and Mr. Joshi and therefore the proceedings had before them and the judgment delivered by them were void and of no effect.

46. There is also another circumstance bearing on this point to which I refer with some diffidence, because the facts are not clear. Mr. Mukherjee was asked to place before us the notifications by which the Tribunal of three members, as last composed had been constituted and the resignation of Mr. Basu had been accented. In compliance with that direction, he produced copies of two

notifications, one, Notification No. 6269-J. dated 18-11-1947 and the other. Notification No. 6822-J, dated 20-15-1949. The former is a notification under West Bengal Ordinance No 9 of 1947 by which a Special Tribunal, composed of Mr. Barucha, Mr. Joshi and Mr. Basu, was constituted for the purposes of that Ordinance to sit at Calcutta. The provisions of Ordinance 9 of 1947 were subsequently re-enacted as an Act of the West Bengal Legislature, the West Bengal Criminal Law Amendment Act (7 of 1947). It appears that the West Bengal Ordinance and the West Bengal Act of 1947 are virtually reproductions of the Central Ordinance No. 29 of 1943, providing in particular that a Special Tribunal constituted under them shall consist of three members. The notification produced by Mr. Mukherjee could not be the first notification constituting a Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu for the purposes of the present case, because it is dated 18-11-1947, whereas it appears from the order-sheet that the first date on which Mr. Joshi attended the sittings of the Tribunal was 13-6-1947.

There must have been, however, reasons why a second notification became necessary. Why Ordinance No. 9 of 1947 was promulgated is not clear, but Mr. Mukherjea suggested, perhaps correctly, that after the partition of Bengal, doubt was perhaps felt about the continued applicability of the old Central and Bengal Laws in West Bengal and therefore West Bengal promulgated an Ordinance of her own and re-constituted the Tribunal under that Ordinance. But if the Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu which dealt with the present case was constituted by the notification produced by Mr. Mukherjee, the number of its members could not possibly be reduced by Ordinance 1 of 1950, because it did not purport to amend either Ordinance 9 of 1947 under which the notification was issued and the Tribunal constituted or Act 7 of 1947, based on that Ordinance. In that case, the law under which the Tribunal had been constituted and which required a Tribunal to consist of three members remained unamended and a Tribunal composed of two members was clearly not a validly constituted Tribunal. It appears that in 1950 the advisers of the Ordinance-making authority forgot not only Bengal Act 12 of 1946 by which the provisions of the Central Ordinance 29 of 1943 had been adopted and made an enactment of the Bengal Legislature but also West Bengal Ordinance No. 9 of 1947 and West Bengal Act 7 of 1947 which

had been passed in terms of Ordinance 29 of 1943 and under which the First Special Tribunal at Calcutta had been re-constituted.

47. The first point taken by the Appellants is sufficient for the disposal of the appeals but I am of opinion that the second point taken by them is also a sound one, although I have felt some difficulty in coming to that conclusion. The point, it will be remembered, is that the trial of the Appellants under the provisions of Ordinance 29 of 1943 after the Constitution had come into force was bad, since those provisions were repugnant to Article 14 of the Constitution.

48. We have to consider the Ordinance as it stood at the time when the present case was allotted to a Special Tribunal, i.e., as it stood after the eleventh amendment made by Ordinance VI of 1946, promulgated on 17-1-1946. The Ordinance mentions a number of offences in a Schedule which, save for offences under the Hoarding and Profiteering Prevention Ordinance 1943 and under rules made under the Defence of India Act, are all offences under the Penal Code and it provides by Section 5 (2) that Special Tribunals constituted under it shall have jurisdiction to try the cases for the time being respectively allotted to them in respect of such of the offences specified in the Schedule as may be preferred against the several accused. There can be no doubt that as compared with persons tried for the same offences under the ordinary law, the Ordinance subjects the persons dealt with under it to differential treatment, though the difference is not as serious as in the case of the West Bengal Special Courts Act, recently pronounced on by this Court in -- 'Anwar Ali Sarkar v. State of West Bengal', : AIR1952 Cal150 (F. B) and by the Supreme Court in the -- 'State of West Bengal y. Anwar Ali Sarkar', (1952) S.C.R. 284. Still, the difference is substantial and is such as to affect the persons concerned prejudicially.

Thus, offences under the Indian Penal Code specified in the Schedule are all, except those under Sections 417 and 161, triable both by a Court of Session and a Presidency Magistrate or a Magistrate of the 1st class and in the case of a trial for such offences under the ordinary law, the Magistrate would, if he , thought he could not award the sentence called for, commit the accused to the Court of Session. In most cases, that course would be adopted, because the offences are

bribery, cheating, criminal breach of trust as a clerk or public servant and reception, disposal or concealment of stolen property and in cases chosen for allotment to Special Tribunals, they would generally involve huge amounts of money. The Ordinance, however, provides by Section 6 (1) that a Tribunal may take cognizance of offences without the accused being committed to it for trial and that it shall, in trying the accused persons, follow the procedure of warrant cases. The expectation or possibility of the benefit of a trial by jury or at least with the aid of assessors and of the advantage of commitment proceedings in which the prosecution would have to disclose its evidence in advance are thus both affected.

Again, section 6 (2) provides that the provisions of Section 196A of the Criminal Procedure Code shall not apply and thus the safeguard of a sanction for the prosecution for certain classes of criminal conspiracy is taken away. Section 8 takes away the authority of any Court to transfer any case from a Special Tribunal, whereas Section 5 (1) gives an uncontrolled power of transfer to the Government and Section 8 also bars the jurisdiction of the High Court to make any order under Section 491 of the Criminal Procedure Code. Section 6 (1A), again, provides for the Tribunal proceeding in the absence of a member and exposes the accused to the risk of being tried by persons who have not heard a part or it may be the greater part, of the evidence and not seen some of the witnesses at all. A similar risk is involved in the provision of Section 6 (3) that a Special Tribunal shall not, merely by reason of a change in its members, be bound to recall or re-hear any witness. Some very drastic provisions are contained in Sections 9 and 10, but Mr. Mukherjee rightly pointed out they involved no discrimination, since exactly similar provisions had been incorporated in the General Law by Ordinance VI of 1946, promulgated on the same date as Ordinance 7 of 1946 and since, for reasons already explained, that Ordinance, being subject to no time-limit, remains valid and effective to this day. But even apart from Sections 9 and 10, the provisions of Ordinance 29 of 1943 are substantially different from those of the general law.

49. Such difference, however, would not amount to unjustifiable discrimination if it could be shown that the cases liable to be dealt with under the Ordinance formed a class, marked off by some difference which bore a just and reasonable relation to the objects of the Ordinance. The objects of the Ordinance, as stated in the pre-

amble, are 'more speedy trial and more effective punishment', but neither of them can form the basis of any valid classification. The first was considered both by this Court and the Supreme Court in the case of --'Anwar Ali Sarkar', : AIR1952 Cal150 (FB) and 1952 S C K 284 (SC)) and held to be too vague and indefinite to be capable of furnishing any reasonable basis of classification. The second is obviously open to the same objection. But a more serious difficulty in the way of relying on those objects as the basis of any classification at all is that they cannot be imported into Section 5(1) of the Ordinance which is the provision laying down what cases may be brought under it and which gives the Government uncontrolled power to allot any case it likes to a Special Tribunal, save that, by reason of the provisions of Section 5(2), the case must involve pne or more of the offences specified in the Schedule. Section 5(1), as last amended, provides, so far as is material, that 'the Central Government may from time to time by notification in the official Gazette allot cases for trial to Special Tribunal' and Section 5(2), as already stated, provides that 'the Special Tribunals shall have jurisdiction to try the cases for the time being respectively allotted to them under Sub-section (1) in respect of such of the charges for offences specified in the Schedule as may be preferred against the several accused'. The effect of these provisions is that although the Schedule specifies a number of offences, it is not all cases of those offences which are to be tried by special Tribunals but only such cases as the Central Government may, in its absolute discretion, allot to them. It is thus clear that Section 5(1) of the Ordinance, read with Section 5(2), corresponds to that part of Section 5(1) of the West Bengal Special Courts Act which authorises a special court to try such 'cases' as the State Government may direct and accordingly the section must be held to be repugnant to Article 14 of the Constitution on the authority of the decision in the -- State of West Bengal v. Anwar Ali Sarkar', (1952) S C R 284 and to have become void under Article 13(1) on the Constitution coming into force.

50. There is however, a special difficulty in the present case, constituted by the fact that the trial under the Ordinance had commenced before the Constitution came into force and was, at its date, pending. In the case of --'Keshavan Madhava Menon v. State of Bombay', (1951) S C R 228, it was held by the Supreme Court that the continuance, after the Constitution, of a trial for an act done before the

Constitution which was an offence under a law valid at the time, was not barred under Article 13(1), although the law concerned might now be inconsistent with a fundamental right. The reason given was that Article 13 rendered pre-existing laws void only to the extent that they were inconsistent with the fundamenal rights, but as those rights were creations of the Constitution and had only come into existence along with it, there could be no question of a pre-existing law encroaching on a fundamental right in so far as it was applied to an act done before the Constitution when the fundamental rights did not exist. Accordingly, such an act could be punished under the pre-existing law even after Constitution, although the law might be repugnant to the Constitution, and now void, in so far as it made such an act an offence. In so punishing the act, no violation of any fundamental right would be involved. The decision, however, is to my mind distinguishable, inasmuch as the trial in that case was under the ordinary law and therefore the form or the procedure of the trial itself, when it was continued after the Constitution did not constitute any infringement of any fundamental right. As I understand the decision, it means that in so far as a preconstitution law may operate to forbid or impede a post-Constitution exercise or enjoyment of a fundamental right, it is ineffectual and if such a law is applied to restrict the present exercise of a fundamental right, such application of it would be void. If so, the trial of the Appellants under the provisions of the Ordinance, so far as it was held after the Constitution, was void, because it was in the trial being held in a special forum and in the procedure of the trial that the infringement of the fundamental right of equality before the law lay and, consequently, during every moment of the trial after the Constitution such infringement was suffered.

51. A subsidiary point requires consideration. In 're Keshava Madhava Menon', : AIR1951 Bom188 , the Bombay High Court reached the conclusion, subsequently affirmed by the Supreme Court, along another line. It held that that the word 'void' had been used in Article 13(1) in the sense of 'repealed' and since Article 367(1) made the General Clauses Act applicable to the interpretation of the Constitution, proceedings under the impugned Act pending at the date of the Constitution would not be affected, even if the Act was inconsistent with the fundamental right conferred by Article 19(1)(a), as alleged. The Supreme Court found it unnecessary to consider that reasoning, because it was able to hold the continuance of the

proceedings to be valid without the aid of the General Clauses Act. As already explained, it held that although a pre-existing law might be inconsistent with some fundamental right, still, in so far as it authorised punishment for an act done before the Constitution, it had not been declared void by Article 13(1) and accordingly to that extent it remained valid even after the Constitution under the limitation contained in Article 13(1) itself. That being so, proceedings under such an Act in respect of a pre-constitu-tion act, could be lawfully continued after the Constitution.

The Supreme Court was able to dispose of the case on that basis, because the trial there was under the general law and in the continuance of the trial after the commencement of the Constitution, no violation of any fundamental right was involved. I have already shown that in the present case the continuance of the trial under the Ordinance did involve an invasion of a fundamental right and accordingly it becomes necessary to consider whether Section 6(e), General Clauses Act, has any application. In my opinion, it has none.

Although the Supreme Court did not decide that the word 'void' in Article 13(1) was not synonymous with 'repealed', Das, J., who delivered the majority judgment, had occasion to observe that 'the effect of Article 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute'. That, if I may say so with respect, appears to be plain, for not only is the general meaning of the word 'void' different taut, as occurring in Article 13(1), it cannot also be read in the sense of 'repealed'. The Article covers 'all laws in force -- immediately before the commencement of the Constitution' which obviously include customary laws and to speak of repealing such laws would obviously be inappropriate. Again, the same expression 'shall be void' is used in Article 13(2) which deals with laws made after the Constitution and it is equally inappropriate to read the Article as saying, by that expression, that if, after the Constitution, the State makes any law in contravention of any fundamental right, such law shall be 'repealed' or shall 'stand repealed.' With respect, the view taken by the Bombay High Court does not appear to me to be correct.

If the word 'void' in Article 13(1) has not the meaning of 'repealed', the General Clauses Act offers no obstacle to giving effect to its provisions even in respect of

proceedings pending at the date of the Constitution. The Article declares that on and after the date of commencement of the Constitution, all existing laws, so far as they may contain provisions inconsistent with any of the fundamental rights, shall be ineffectual and void. Ordinance 29 of 1943 is inconsistent with Article 14 of the Constitution, as already explained. Consequently, on the Constitution coming into force, the Ordinance ceased to be valid and since there was no longer any valid Ordinance 29 all proceedings purported to have been had under it after the date of the Constitution were utterly void.

52. It was not argued on behalf of the State and I do not think it can be said that whatever the inconsistency of the (Ordinance with the general law and therefore with Article 14, the proceedings held after the Constitution had come into force involved no inequality of treatment. After the commencement of the Constitution all that was done was that a part of the argument for the prosecution which had already commenced and the arguments for the defence were heard. Still, however, the accused were being tried by two persons, acting as a Sessions Court, but without the aid of a jury or assessors. They were being so tried for offences which, under the ordinary law, might have to be tried by a jury. One of the offences for which they were being tried required sanction under Section 196A, Criminal P.C., but they were being tried without such sanction. They were also being tried by two persons, each of whom had not heard a part of the evidence. They were prevented from approaching the High Court for a transfer of the case or for a 'de novo' trial. These and other departures from the general law which were gravely prejudicial to the accused, were involved even in the stage of argument and in the pronouncement of judgment against the accused by the Tribunal.

53. For the reasons given above, it must be held that the trial of the Appellants in so far as it was held after 16-12-1949, was bad, because the Tribunal before which it was held was not validly constituted and in so far it was held after 26-1-1950, it was also bad, because it was held under a law which had become void.

54. The next question is what order we ought to make. It was submitted on behalf of the Appellants that in view of the evidence in the case which, according to them, did not establish the offences charged, we should direct an acquittal. It was in

anticipation of that submission that we heard the appellants on the merits, because the appeal was an appeal on the facts and if it appeared from the evidence which had been concluded before a validly constituted tribunal that the prosecution had clearly failed to prove its case, it would not be proper to direct a retrial, even if there had been no valid trial by a competent tribunal of first instance. Having been taken through the evidence and having heard the appellants, I am unable to say that there is not sufficient in it which, if believed, would establish the offences charged.

The case made by the prosecution is one of a gigantic fraud, carried out with a great elaboration of steps in aid and it is to give some indication of its magnitude and complexity that I have set out the prosecution and the defence cases at some length, although what I have given are only outlines. The evidence is voluminous and the number of the exhibits, which is large enough, does not yet give a correct idea of their size, many of them being registers or collections of ledger and bin cards nor of the complicated nature of the information to be extracted from them, e.g., quantities of issues as against quantities of supplies as on different dates during the space of several years. Much again depends on the credibility of the two accomplices and on the extent to which their evidence is corroborated by contemporary correspondence between a wide circle of officers and the innumerable office-notes on the tenders or letters. The evidence, so far as we were taken through it, is not such that, even if believed, it would be clearly insufficient for the purposes of the prosecution and in those circumstances and also in view of the vastness and complexity of the evidence and the fact that there has been, no valid trial, I think an order for a retrial is the only proper order that can be made.

55. But in making such an order and in having to throw upon the accused the appalling burden of going through again what they had once to endure for three years and nine months, it is impossible to avoid a feeling of deep distress. Nor can it be agreeable to the prosecution that all its labours should be thrown away. That such a situation should have been created by the law-making authorities of the State making error after error and the Government committing further errors in applying such laws as were made, adds to the feeling of distress. Even if the

accused are guilty of the offences with which they are charged, they have only deserved to be punished adequately for their transgressions, but not also the agony and strain of two protracted trials. Such considerations, however, cannot weigh with a Court so as to restrain it from making the order which the law requires. They are matters to be considered by the Government in deciding whether actually a retrial will or will not be proceeded with.

56. As all the evidence in the case was concluded at a stage when the Tribunal was stillproperly constituted, I have considered whether it would be possible to direct that the retrial should be on the evidence already recorded. In my opinion, no such direction can be given. To do so would be virtually to direct something like a further enquiry which cannot be done in an appeal or to direct a partial retrial which the Code does not contemplate. It would also be to direct a Court to try the accused on evidence which it had not heard and evidence taken before a Tribunal which would constitutionally be, in respect of cases arbitrarily allotted to it as the present case was, a bad tribunal today. I ought to add that the difficulties were pointed out by us at the end of the hearing and no such order of partial retrial was asked for by Mr. Mukherjee.

57. In the result, the appeals are all allowed, the convictions of all the Appellants and the sentences passed upon them are set aside and they are directed to be retried in accordance with law by a Court of competent jurisdiction.

58. The appellants will continue to remain en the same bail till 6th May next on which date they must appear before the Registrar, Original Side, and furnish bail, of like amounts as under the present bonds with like sureties as at present, for their appearance before the Court or Tribunal, if any, before which they may be called upon to appear for the purposes of a retrial.

59. On their furnishing such securities, they will continue to remain on bail.

60. It is expected that if it is decided to hold a retrial, the necessary steps in that behalf will be taken with reasonable expedition.

61. Let the attention of the Registrar, Original Side, be drawn to this order and let the original bail bonds which have been obtained from the Court below be placed before him for his guidance.

62. SINHA, J.: These are five consolidated appeals against the judgment of the First Special Tribunal sitting at Calcutta, dated 26-5-1950. By that judgment, all the five accused persons have been convicted and sentenced to varying terms of imprisonment and fine.

63. As it transpires, however, the tribunal which passed judgment was not a validly constituted tribunal at all, and had no power either to hear arguments or to pronounce judgment. In 1943, during the continuance of the last World War, it was felt that a large number of persons had managed successfully to exploit the war situation to their own profit, and that corruption and bribery had taken place on a large scale. It was further felt that the ordinary laws of the land were not sufficiently drastic to cope with this emergent situation and the Governor-General of India, under powers conferred upon him by Section 72, Government of India Act, promulgated an ordinance known as 'The Criminal Law Amendment Ordinance 1943 (Ordinance XXIX of 1943).' This Ordinance came into operation on 11-9-1943. The preamble of the ordinance recites

'Whereas an emergency has arisen which makes it necessary to provide for the more speedy trial and more effective punishment of certain offences punishable under the Penal Code.....'

The events as they have happened in this case stand as a grim reminder of the fact that special legislation hastily promulgated and leisurely administered, more often than not defeats its own purpose. The first information in this case was laid on 24-2-1945 and the petition of complaint was filed on 20-9-1946. Thereafter, there was an elaborate, costly and prolonged trial and after approximately five years the judgment was pronounced consisting of over three hundred and fifty closely typed pages. And now it is found that this enormous expenditure of energy, time and public money has been wholly wasted and the entire performance must now be repeated once more.

64. The facts of this case in so far as it is necessary to state them have been exhaustively dealt with in my lord's judgment and I do not intend to repeat them. I shall concern myself only with expressing my views on the two preliminary points of law taken on behalf of the accused which are sufficient by themselves to dispose of the cases. In order however to appreciate the preliminary points it is necessary to bear in mind certain dates which I set out hereunder in chronological order.

April 1942 to December 1944:Period of the alleged conspiracy between all the accused. (Charge I).

1st April to 31st March 1944:Period covering Charge II against Major Phillips.Do:Period covering Charge III against Captain Bodrigues, Dasarathi Mukherji, Jagat Bhusan Biswas and Nandalal De.

Do.:Period covering Charge IV against Captain Bodrigues, Dasarathi Mukherji, Jagat Bhusan Biswas and Edward Ezra.

4th November 1942 to 20th May 1943:Dates on which bribes are alleged to have been received by Major Phillips.

4th November 1942 to 28th April 1943:Dates on which bribes are alleged to have been received by Captain Bodrigues.

28th April 1943 to 11th June 1943:Dates on which bribes are alleged to have been received by Dasarathi Mukherji.

11th September 1943:Ordinance No. 29 of 1943 (Central).26th August 1944:Ordinance No. 40 of 1944 (Central).24th February 1945:The First Information Report.12th May 1946:Ordinance No. 12 of 1945 (Central).4th July 1945:Ordinance 22 of 1945 (Central).17th January 1946:Ordinance of 6 of 1946 (Central)20th September 1946:Petition of complaint.30th September 1946:The Bengal Special Tribunal (Continuance) Act 1946. (Bengal Act 12 of 1946) adapting Ordinance 29 of 1943.

28th October 1946:Trial commenced. All accused appear and are released on bail. Case opened by the prosecution.

6th May 1947:Examination of witnesses commenced.9th October 1947:West Bengal Criminal Law Amendment (No. II) Ordinance 9 1947.

18th November 1947:Notification No. 6269-J under Ordinance 9 of 1947 constituting a special tribunal consisting of Mr. Bharucha (President), Mr. Joshi and Mr. N. C. Basu.

1st January 1948:West Bengal Act 7 of 1947 confirming Ordinance 9 of 1947.

13th May 1948:Examination of prosecution witnesses concluded.26th May 1948:Charges framed.28th June 1948:Cross-examination of witnesses commenced.23rd June 1949:Cross examination concluded28th August 1949:Examination under S. 342 commenced24th October 1949:Examination of accused concluded.16th December 1949:Mr. N. C. Basu resigned.20th December 1949:Notification No. 6822-J of the Government of West Bengal accepting the resignation of Mr. N. C. Basu from the tribunalconstituted by Notification dated 23rd September 1943.

3rd, 5th and 7th January 1950:Proceedings adjourned on the ground 'Tribunal not yet constituted. '

11th January 1950:The Calcutta Special Tribunal (Change of Composition) Ordinance 1950. (Ordinance 1 of 1950).

12th January 1950:A copy of Ordinance 1 of 1950 received by Mr. Bharucha and Joshi.

16th January 1950:Arguments commenced.15th March 1950:The Calcutta Special Tribunal (Change of Composition) Act 1950.25th March 1950:Arguments concluded.26th May 1950:Judgment pronounced.

It will now be convenient to set out the preliminary points of law as raised by Mr. Basu and adopted by the other accused:

1. The Tribunal (describing itself as 'the First Special Tribunal (Calcutta)') which heard arguments and passed judgments in these cases, was not a legally constituted tribunal inasmuch as: (a) The Governor or the State Legislature were not competent to promulgate ordinances or to pass Acts affecting a central ordinance. (b) Assuming that the State of West Bengal was capable of constituting a special tribunal consisting of two members to try the cases, no such tribunal was ever constituted, in the absence of the requisite Notification to that effect. Consequently, after the acceptance of the resignation of Mr. N. C. Basu, the remaining two members of the tribunal were 'functus officio' and had no right to hear arguments or to pass judgment.

2. The relative Ordinances and Acts under which the trial was held offend against Article 14 of the Constitution and are void under Article 13(1) thereof. The whole trial, or alternatively that portion of it which was held after the Constitution came into being, is invalid.

65. Before I deal with the points raised, it will be necessary to recapitulate the history of the special legislation, under or in virtue of which, the cases were tried. The original Ordinance 29 of 1943 has been amended eleven times and adapted twice. It is not necessary to notice all the Acts and Ordinances but only the chief ones. I will proceed to deal with them chronologically. 'The Criminal Law Amendment Ordinance 1943, Ordinance No. 29 of 1943.' This Ordinance came into operation on 11th September 1943. All the subsequent Acts and Ordinances are based on this and are either variations or adaptations. The important provisions are set out below: Section 3 -- 'Constitution of Special Tribunals'. -- The Central Government may by notification in the Official Gazette constitute for the purposes of this Ordinance two Special Tribunals, one to sit at Calcutta and the other at Lahore. Provided that either such special tribunal may, if it is satisfied that it will tend to the general convenience of the parties or witnesses in any particular case, sit for the trial of that case in a place other than Calcutta or Lahore.

Section 4 -- 'Composition of Special Tribunals'. -- 'A special tribunal constituted under this ordinance shall consist of three members.....'

Section 5 -- 'Cases triable by Special Tribunals'.-

(1) The Special Tribunals shall have jurisdiction to try the cases respectively allotted to them in the First Schedule in respect of such of the charges for offences specified in the second Schedule as may be preferred against the several accused and any such case which is at the commencement of the ordinance pending before any Court shall be deemed to be transferred from that Court to the Special Tribunal to which it is allotted.

(2) When trying any such case as aforesaid, a special tribunal may also try any offence not specified in the second schedule which is an offence with which the accused may under the Code of Criminal Procedure 1898 be charged at the same trial.

66. Under Sub-section (1) of Section 6, a special tribunal may take cognizance of offences without the accused being committed to it for trial and follow the procedure appropriate to the trial of warrant cases. Under Sub-section (2) the special tribunal is to be deemed to be a Court of Session trying cases without a Jury. Under Sub-section (3), a special tribunal is not bound to recall or rehear any witness merely by reason of the fact of a change in its members. Under Section 7, appeal against any order or sentence of the Special Tribunal is barred and the High Court is given only a limited power of revision under Section 8. Under Section 9, special rules of evidence arc introduced. Where an accused failed to account satisfactorily for any of his pecuniary resources or property disproportionate to his known sources of income, that was to be a 'relevant fact' which could be taken into consideration. Further, if he accepted or agreed to accept etc, any illegal gratification from anyone seeking facilities for transport or a contract etc., then it was to be presumed that he did so with the motive etc., as required by Section 161. Finally, there are special provisions as to punishment. In the first schedule is given a long list of names and the offences with which they were charged.

67. 'Ordinance 40 of 1944' -- Came into operation on 26th August 1944. This added a new sub-section viz. 1A to Section 6 and runs as follows:

6(1A) Notwithstanding anything contained in Section 4, any two members of a special tribunal may proceed with the trial of a case during the temporary and unavoidable absence of the third member;

Provided that all three members shall be present when after the evidence has been concluded the prosecutor or the accused or his pleader is addressing the special tribunal and when the judgment is delivered.

68. 'Ordinance 12 of 1945' -- Came into operation on 12th May 1945. Section 5 was amended by renumbering the sub-sections and introducing the following as Sub-section (1):

'The Central Government may from time to time by notification in the official Gazette allot cases for trial to each special tribunal and may also from time to time by like notification transfer any case from one special tribunal to another or withdraw any case from the jurisdiction of a special tribunal or make such modifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary.'

69. 'Ordinance 22 of 1945'-- Came into operation on 4th July 1945. It altered the provisions as to qualifications necessary for becoming a member of the tribunal and restored to the High Court its powers under Chap. 32, Criminal P.C. (Appeals, references and revisions).

70. 'Ordinance 6 of 1946'--Came into operation on 17th January 1946. This is a little-known ordinance which made special provisions as regards the law of evidence similar to that contained in Section 9 of Ordinance 29 of 1943 applicable to all trials. (Also see the Prevention of Corruption Act, 1947--Act 2 of 1947 which zqade legislative provision to the same effect).

71. 'The Bengal Special Tribunal (Continuance) Act 12 of 1946'-- This Bengal Act came into operation on 30th September 1946. It adapted all the provisions of the Ordinance 29 of 1943 except Section 5 (1) which was omitted. The Act was passed as it was apprehended that the period of War emergency having expired on 1st April 1946, it was doubtful whether the Ordinance 29 of 1943 was effective any longer. The emission of Section 5 (1) is significant and will be dealt with later. Powers conferred upon Central Government by the original ordinance were conferred upon the Provincial Government.

72. 'West Bengal Criminal Law Amendment (No. 2) Ordinance 1947 (West Bengal Ordinance 9 of 1947)'--This came into operation on 9th October 1947. This Ordinance also adapted the provisions of the Central Ordinance 29 of 1943. It must have been thought that due to the partition of Bengal it was doubtful whether the original ordinance or the Act 12 of 1946 applied any longer.

73. 'The West Bengal Criminal Law Amendment Act, 1947--(West Bengal Act 7 of 1947)'--Came into operation on 1st January 1948. This Act continued the provisions of Ordinance 9 cf 1947 and contained provisions similar to the original ordinance.

74. Section 4 of the Act runs as follows:

'Cases triable by Special Tribunals-(1) The Provincial Government may from time to time by notification in the official Gazette allot cases for trial to each special tribunal, and may also from time to time by like notification transfer any case from one special tribunal to another or withdraw any case from the jurisdiction of a special tribunal or make such notifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary.

(2) The special tribunals shall have jurisdiction to try the cases for the time being respectively allotted to them under Sub-section (1) in respect of such of the charges for oifences specified in the schedule may be preferred against the several accused and any such case which is at the commencement of this Act or at the time of such allotment pending before any Court or another special tribunal shall be deemed to be transferred to the special tribunal to which it is so allotted:

(3) When trying any such case as aforesaid, a special tribunal may also try any offence whether or not specified in the Schedule which is an offence with which the accused may, under the Code of Criminal Procedure, 1898 be charged at the same trial.'

75. The provisions of the Prevention of Corruption Act 1947 (11 of 1947) were made applicable to trials under the Act.

76. The High Court could entertain appeals, references or revisions as from a Court of Session trying cases without a jury but the power of transfer was taken away.

77. Reverting now to the preliminary points, it is quite clear that there is no substance in point 1(a). The provisions of the Central Ordinance 29 of 1943 have now been (with modifications) incorporated in a local Act, and adapted in another. It is not argued before us that the State Legislature was not competent to pass such Acts or that either Act 12 of 1946 or Act 9 of 1950 are 'ultra vires' the local Legislature. It is therefore profitless to consider whether a local ordinance could modify a central ordinance or a local Act affect a Central Ordinance. This however is the appropriate place to point out the confusion that has arisen by reason of the successive amendments and adaptations of the original Ordinance 29 of 1943, and the passing of the local Acts. The original ordinance was promulgated in 1943, by the Governor General in exercise of the powers conferred upon him by Section 72, Government of India Act, 1935. As such, it could remain effective for a period for six months only. But by an Act of the British Parliament, namely the 'India and Burma (Emergency Provisions) Act, 1940', Section 1(3), it was enacted that in the case of any ordinance promulgated between the date of the passing of the Act and the date declared to be the end of the emergency (which happened on 1st April 1946) this limitation as to the period of an ordinance would be deemed to have been omitted. Hence the Ordinance 29 of 1943 did not come to an end on the date of the ending of the emergency or six months after it. (See the Federal Court decision -- 'J.K. Gas Plant . v. King-Emperor', 52 Cal WN (FR) 25).

78. It follows therefore that the Central Ordinance as well as the local Acts are effective. Now the notification under which Mr. Bharucha (as President), and Messrs. Joshi and N. C. Basu (as members) were appointed, is Notification No. 6269-J dated 18-11-47 and reads as follows:

'In exercise of the powers conferred by Section 2 read with Sub-section (1) of Section 3 and by Sub-section (3) of Section 3 of the West Bengal Criminal Law Amendment (No. 2) Ordinance, 1947 (West Bengal Ordinance No. 9 of 1947), the Governor is pleased to constitute for the purposes of the said Ordinance a special

tribunal to sit at Calcutta consisting of the following:

(1) Mr. P.R. Bharucha, Bar-at-Law, President,

(2) Mr. E.M. Joshi, Bar-at-Law, (3) Mr. N.C. Basu, District & Sessions Judge (Retd.)--Members.

By order of the Governor, Sd/- B. K. Guha, Secretary.'

Coming now to Ordinance I of 1950, and Act 9 of 1950 which continues its operation, we find that they define 'The principal ordinance' as the Criminal Law Amendment Ordinance, 1943 as modified by the Special Tribunal (Continuance) Act, 1946 (i.e. Act 12 of 1946), and amend Sub-section (1) of Section 4 of the 'principal ordinance' by reducing the number of members from three to two. This, however, leaves Act 7 of 1947, outstanding and unaffected. The notification which constituted the three members (Messrs. Bharucha, Joshi and Basu) as a tribunal was made under ordinance 9 of 1947 and neither that ordinance nor Act 7 of 1947 which replaced it have been affected by ordinance I of 1950 or Act 9 of 1950. Coming now to the notification No. 6822-J, dated 20-12-49 accepting the resignation of Mr. N. C. Basu, it states as follows:

'The Governor has been pleased to accept with effect from 16-12-1949, the resignation tendered by Sri Narayan Chandra Basu from membership of the Special Tribunal constituted by the Government of India, War Department Notification No. 1322 dated 23-9 1943, as subsequently amended.'

79. Therefore the following perplexing questions arise: (1) As long as Act 7 of 1947 is in operation, is it enough to amend the ordinance 29 of 1943 as modified by Act 12 of 1946? Since Act 7 of 1947 remains unaffected, we arrive at the curious result that a special tribunal must consist of three members under Act 7 of 1947 and two members under Ordinance I of 1950 or Act 9 of 1950. (2) The Special tribunal consisting of Messrs. Bharucha, Joshi and Basu was constituted by notification No. 6269-J dated 18-9-1947, under West Bengal Ordinance No. 9 of 1947 which would be deemed to be a notification also under Act 7 of 3947. Under Bengal Act 12 of 1946 Section 3(3), all notifications under Ordinance 29 of

1943 would continue in force until superseded or amended by the Provincial Government under that Act. The notification No. 6822-J, dated 20-12-1949 accepts resignation of Mr. N. C. Basu from the Special Tribunal constituted by the Government of India notification No. 1322 dated 23-9-1943 as subsequently amended. Mr. Basu became a member in 1946 (we have not got the specific notification appointing him in 1946, before us). But can it be said that the notification No. 6269-J under West Bengal Ordinance, 9 of 1947, (continued by West Bengal Act 7 of 1947) is an 'amendment' of the original notification No. 1322, dated 23-9-1943 under the central ordinance, as that ordinance is still in force? If not, his resignation is not an effective one, or it may be an effective one so far as the original notification No. 1322 is concerned but not so far as notification No. 6269 J is concerned. (3) What is the effect of the principal, ordinance being still alive? That Ordinance can only be amended by another Central Ordinance or a Central Act & it still contains the provision that there shall be three members in a Special Tribunal.

80. Having pointed out these difficulties, I shall now deal with point 1(b), upon the footing that Mr. N. C. Basu validly retired with effect from 20-12-1949 and that the only provision applicable as to the number of persons constituting a special tribunal is Section 4 (1) of the 'principal ordinance' as defined by ordinance 1 of 1950 (and continued by Act 9 of 1950). It is of course admitted that no appointment of a Special Tribunal is valid without a sufficient notification under Section 3. The tribunal o three members was constituted by notification dated 18-11-1947. On the date of the retirement of Mr. N. C. Basu (20-12-1949), the special tribunal as then constituted was reduced to two members and ceased to be a special tribunal at all, because under Clause 4(1) of the 'principal ordinance' it is laid down that a special tribunal constituted under the ordinance 'Shall consist of three members.' On 11-1-1950, the ordinance I of 1950 came into operation which states that as from the commencement of the ordinance a special tribunal shall consist of two members. But Section 3 is still there and such a special tribunal would have to be constituted by a notification. No such special tribunal existed at the date of the commencement of the ordinance and none has ever been constituted and there can, in my opinion, be no question that Messrs. Bharucha and Joshi had no right whatsoever to proceed to hear arguments and pronounce

judgment, since they had become 'functus officio' several weeks before the Ordinance came into operation.

In fact the point is so unarguable that Mr. Mukherjee appearing on behalf of the prosecution, fairly conceded that he had no answer for it. The confusion is entirely due to the fact that it was taken for granted that the dead and defunct tribunal could be revived and resuscitated by the simple expedience of reducing the required number from three to two. But before an enactment can revive the deed it will at least have to say, 'Lazarus arise,' and those words are wanting here. There is no notification appointing Messrs. Bharucna and Joshi as a Special tribunal entitled to try the cases. It is not for us to say whether under the circumstances a further notification will be enough. The difficulties are writ large, and have been indicated above. If authority is at all required, reference may be made to the case of -- 'United Commercial Bank Ltd. v. Their Workmen', : (1951)ILLJ621SC .

That case was under the Industrial Disputes Act, under which was constituted an Industrial tribunal (Bank disputes). By a notification dated 13-6-1949 the Central Government constituted an Industrial tribunal in bank disputes consisting of Mr. Sen Chairman, Mr. Varma & Mr. Mazumdar. On 24-8-1949, a second notification was issued appointing Mr. Chandrasekhar Aiyer in the place of Mr. Verma whose services had ceased to be available on and after 23-11-1949. The services of Mr. Aiyer were subsequently lent to the ministry of external affairs as a member of the Indo-Pakistan boundary disputes Tribunal. Although the Government had taken the view that there was a vacancy, it did not notify the same. Mr. Aiyer rejoined the tribunal on 20-2-1950, but in the meantime the tribunal with its two remaining members had gone on hearing disputes and several awards had also been made.

81. It was held by the Supreme Court thatwhen the services of a member ceased to beavailable, the rest by themselves had no rightto act. As Kania C. J. put it

'.....A tribunal of three consisting of Mr.Sen, Mr. Mazumdar and Mr. Chandrasekhara Aiyar is a different tribunal from cne consisting of two viz. of Mr. Sen and Mr. Mazumdar only.'

82. The learned Judges were divided on the point as to whether a fresh notification was necessary when Mr. Aiyar rejoined, but that difficulty does not arise here as Mr. N. C. Basu had resigned and his resignation was accepted fay a notification. In the Industrial Disputes Act, there was a provision as to vacancy but there is none in this case, which makes it all the more worse for the prosecution. Here we have a three-member tribunal constituted by a notification. If there is to be a two-member tribunal then the same must be constituted by an express notification. As soon as one of the three members ceased to be a member the original tribunal ceased to exist. The necessity of such a notification has been emphasized by the learned Chief Justice in these words:

'It is, therefore, obligatory on the appropriate Government to notify the composition of the tribunal and also the names of the persons constituting the same. In respect of a tribunal which is entrusted with the work of adjudicating upon disputes between employers and employees which have not been settled otherwise, this provision is absolutely essential. It cannot be left in doubt to the employers or the employees as to who are the persons authorised to adjudicate upon their disputes. This is also in accordance with notifications of appointments of public servants discharging judicial or quasi-judicial functions. The important thing, therefore, to note is that the number forming the tribunal and the names of the members have both to be notified in the official Gazette for the proper and valid constitution of the tribunal.'

83. It follows, therefore, that the three-member tribunal which ceased to exist is quite different from the two-member tribunal which has yet to be constituted. In my opinion, therefore, the preliminary point 1(b) succeeds.

84. The second preliminary point is also, in my opinion, a sound one. Article 14 of the Constitution runs as follows:

'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

Article 13(1) is in the following terms:

'All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they sre inconsistent with the provisions of this part shall to the extent of such inconsistency be void.'

The way this point is formulated is this. It is said that the 'principal ordinance' as well as Act 7 of 1947 (which stands independent of the principal ordinance) both discriminate as to the person of the accused and the law and procedure adopted to try him. Thus the accused are not getting equality or equal protection before the law. The following points, therefore, arise for determination: (1) What is the meaning of 'equality before the law or the equal protection of laws' as used in Article 14 of the Constitution? (2) How have the accused being discriminated against? (3) The trial having been completed, and only the arguments and delivery of judgment having taken place after the Constitution came into operation, what law has been affected and how it reacts on the verdict of the tribunal?

85. As regards the first point, reference may be made to the Full Bench decision of --'Anwar Ali v. State of West Bengal', : AIR1952 Cal150 (FB), a decision, which has since been upheld by the Supreme Court in -- 'State of Bengal v. Anwar Ali', (1952) SCR 284. That was a case under the West Bengal Special Courts Act, 1950, and it was held that Section 5 (1) of the Act was 'ultra vires' the Constitution as it offended against Article 14. Das Gupta J. held that the entire Act was 'ultra vires', a view subsequently upheld by the Supreme Court. Section 5 (1) of the impugned Act is in the following terms:

'1. A special court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing direct.'

It was held that in so far as this section empowered the Government to try any case, it offended against Article 14, but not in so far as it refers to 'offences' or 'classes of offences' or 'classes of cases'.

86. 'Equality before the law' is an expression taken from the English Common Law whereas the words 'equal protection of the laws' has been taken from the American Constitution. According to the Supreme Court, --'Charanjit Lal v. Union

of India', (1950) SCR 869, they mean very much the same thing, under our Constitution. According to Dicey, (Law of Constitution, 1939, p. 47) equality before the law does not mean an absolute equality of all men which is a physical impossibility but the denial of any special privilege by reason of birth, creed or like in favour of any individual and also the equal subjection of all individual and classes to the ordinary Jaw of the land administered by the ordinary law courts. In the words of Jennings (Law of Constitution, 3rd Edn,, p. 49) it means:

'That among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and to be prosecuted for the same kind of action should be the same kind for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence.'

87. Professor Willis dealing with the equal protection clause in the American Constitution States as follows:

'The Guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and in the liabilities imposed. The inhibition of the amendment... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation.....'

88. 'It must be admitted' said Mukherji J. in -- 'Charanjit Lal v. Union of India', (1950)SCR 869:

'that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme Court of America, 'Equal protection of laws is a pledge of the protection of equal law' See -- 'Yick Wo v. Hopkins', (1885) 118 U S

356 at p. 369 and this means 'Subjection to equal laws applying alike to all in the same situation' vide -- 'Southern Railway Co. v. Greene', (1909) 216 U S 400. In other words there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same.....Therecan certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character (See Willis Constitutional Law, 580). It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them which is not imposed upon others guilty of like delinquency' See -- 'Gulf C & S.F.R. & Co. v. Bills', (1898) 163 U S 150 at p. 159. The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws and if the law deals alike with all of a certain class it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made and classification made without any substantial basis should be regarded as invalid (See -- 'Southern Railway Co. v. Greene', (1896) 216 U S 400 at p. 412).'

89. Applying this test of classification it was held in -- 'Anwar Ali's case', 1952 S C R 284 (ibid) that the power of the Government to allot 'any' case to the tribunal could not pass the test and was bad. The impugned Act in that case was also held to be bad because it curtailed the rights of the accused persons in several important respects, e.g., it abridged the right of appeal and revision and in the case of a right of trial by jury, deprived them of such trial.

90. Applying these principles to the present case what do we find. In the original Section 5, the accused persons mentioned in the first schedule were picked out arbitrarily and directed to be tried by the special tribunal under Ordinance 29 of 1943 which contained provisions similar to the West Bengal Special Courts Act, 1950. By Ordinance 12 of 1945, Section 5 (1) was introduced which made the matter much worse. The Central Government could by notification allot 'any' case it liked (which obviously is not a reasonable classification) to any special tribunal. Thus the position was exactly that which prevailed in -- 'Anwar Ali's case', 1952

SCR 284.

Section 5(1) was, however, omitted by Bengal Act 12 of 1946 but in West Bengal Act 7 of 1947 we find Section 4 which is in similar terms and this Act is still in operation. Besides this, both under the 'principal ordinance' (now adapted by Act 9 of 1950) and Act 7 of 1947, various other disabilities have been imposed, e.g., the right of trial by Jury has been negatived. The tribunal can take cognizance of oifences without the accused being committed for trial, although it acts like a Court of Session but follows the procedure of warrant cases. The authority of any Court to transfer has been taken away. What, however, strikes me as most prejudicial is the provision that all the members need not be present during the examination of witnesses. The result is that a member who never saw the witnesses could be called upon to appraise the evidence or a member might listen to the examination of a witness without hearing the cross-examination, with the result that he might form a view which cannot be dispelled. This is not only prejudicial to the accused but offends against the basic principles of a fair judicial proceeding. Then we have the special rules of evidence, but since these are now applicable to all trials, they need not be considered. There also remain the special provisions for punishment. Can there be any doubt that under this special legislation a person may be arbitrarily singled out for a kind of punishment which is not meted by the ordinary Courts to persons committing similar offences? Equal protection means

'that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences,' 'Barbier v. Cannolly', (1885) 113 U S 27.

91. There can be no doubt that the provisions of the 'principal ordinance' (now adapted by Act 9 of 1950) as well as of Act 7 of 1947, offend against Article 14 and are void under Article 13(1). There is, however, a further difficulty. The principal ordinance and the Act above-mentioned came into operation before the Constitution came into being and the entire trial took place before 2G-1-1950 save that a part of the argument was heard after that date and of course the judgment was delivered afterwards.

The case cited before us on this point is --'Keshava Madhava Menon v. State of Bombay', (1951) SCR 228. There, an offence was committed which ceased to be an offence after the Constitution because the law concerned was inconsistent with a fundamental right. The trial was being held by the ordinary Courts and the question was could the trial proceed. It was held that under Article 13(1), only that much of a law is void which infringes a provision of the Constitution. It was pointed out that the offence had already been committed and there was no fundamental right which prohibited a proceeding to punish an offence already committed. But this case is clearly distinguishable. In the present case, the offence is still an offence but the tribunal which continues to try the case and the law and procedure it applies after the Constitution came into being are repugnant to Article 14, inasmuch as they are the result of discrimination.

The question may be looked at from another angle. After the Constitution came into being a citizen is entitled to say that he must have the equal protection of the laws and should not be exposed to the peril of trial or punishment which citizens similarly placed would not have to be subjected. The very trial itself andthe persons trying the cases are the outcomeof something which discriminates, and, therefore, cause infringement of the fundamentalright. Can there be any doubt that even afterthe Constitution came into being these accusedcontinue to be singled out for a trial andpunishment which would not normally be metedout to like accused, under like circumstances.Take the case of another citizen who has committed a similar offence shortly prior to 26-1-1950 and a complaint has been preferred againsthim, after that date. Would he, as a matter ofcourse, be tried by a special tribunal? Couldhe be absolutely denied the right to be triedby a Jury (If he was otherwise entitled to it)?Could he be punished more than what is laiddown in the Indian Penal Code? Since theanswers are clearly in the negative, it mustfollow that every moment that the trial of theaccused in this case proceeded after the Constitution came into being, there was clear discrimination and a clear breach of a fundamentalright. And apart from other things, the specialtribunal, in awarding sentence proceeded interms of the 'principal ordinance' and Act 7 of1947, both of which offended against Article 14and are void. It follows also that the specialtribunal which owes its existence to those lawscan no longer act and their judgment cannotbe supported. The second preliminary pointalso succeeds. I,

therefore, agree with the ordermade by my Lord.