

(1913) 09 CAL CK 0002
In the Calcutta High Court
In Re: Mahomed Ali

Date of Decision : 01-09-1913

Acts Referred:

Penal Code, 1860 (IPC) — Section 153A
Press Act, 1910 — Section 12, 17

Citation : (1914) ILR (Cal) 466

Hon'ble Judges : Jenkins, C.J;Woodroffe, J;Stephen, J

Bench : Full Bench

Judgement

Jenkins, C.J.—This is an application to the High Court u/s 17 of the Indian Press Act, 1910, to set aside what is described as an order of forfeiture u/s 12 of that Act.

2. The order of which complaint is made was published in the Calcutta Gazette Extraordinary, July 22nd, 1913, and runs as follows:

Notifications.

No. 2296 P.-D--The 18th July 1913--Whereas it appears to the Governor in Council that a pamphlet entitled "Come over into Macedonia and help us" contains words of the nature described in Section 4, Sub-section (2) of the Indian Press Act, 1910 (I of 1910), inasmuch as they are likely to bring into hatred or contempt certain classes of His Majesty's subjects in British India.

Now, therefore, in exercise of the power conferred by Section 12, Sub-section (1) of the said Act, the Governor in Council hereby declares all copies of the said pamphlet where ever found to be forfeited to His Majesty.

3. This is not the first pronouncement on this pamphlet, for by a similar notification published in the Gazette of India on the 16th July 1913 the Governor-General in Council declared the pamphlet to be forfeited." And even before this there had been a notification to the same effect by the Government of Bombay.

4. Section 12(2) is in these term. "Where any. newspaper book or other document wherever printed, appears to the Local Government to contain any

words, signs or visible representations of the nature described in Section 4, Sub-section (1), the Local Government may, by notification in the local official Gazette, stating the grounds of its opinion, declare such newspaper, book or other document to be forfeited to His Majesty."

5. The relevant portions of Section 4 are as follows: "Whenever it appears to the Local Government that any Printing press in respect of which any security has been deposited as required by Section 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise--to bring into hatred or contempt any class or section of His Majesty's subject in British India," then the consequences indicated in the Act are to follow. There is a difference between the language of Section 4 and of Section 12. u/s 4 what may be declared to be forfeited is "all copies of such newspaper, book or other document." u/s 12 what may be declared to be forfeited is "such newspaper, book or other document." Section 12 stands alone in this respect and its language may be contrasted with that of Sections 6, 7, 9, 11, 13, 16 and 20 as well as Section 4. I doubt whether any difference of operation was intended.

6. Section 17 entitles any person having an interest in any property in respect of which an order of forfeiture has been made u/s 12 to apply to the High Court to set aside the order, but only on the ground that the newspaper, book or other document in respect of which the order was made did not contain any words, signs or visible representations of the nature described in Section 4, Sub-section (1). Together with this section must be read Section 22 by which, with a qualified exception in favour of the High Court, all jurisdiction of the Courts is in effect barred. This section, save for the exception, reproduces Section 16 of the short-lived Press Act of 1878, commonly known as the Vernacular Press Act. Two conditions then are necessary to a forfeiture in accordance with the terms of Section 12. First, it must appear to the Local Government that the publication contains words, signs or visible representations of the nature described in Section 4, Sub-section (1), and, secondly, the Local Government must by notification in the local official Gazette, stating the grounds of its opinion, declare such publication to be forfeited to His Majesty. The first condition" implies that the publication had been seen and read by the Local Government prior to its declaration of forfeiture, for it must first form an opinion. Though there is no evidence as to this, the Advocate General assured us that a copy must have been in the Local Government's possession before the declaration. I will assume this to be so. The second condition is one which has given rise to considerable discussion. It has been urged that it is a necessary condition of an effective forfeiture that the grounds of the Local Government's opinion should be stated, and that this has not been done in the present case.

7. On learning that it appears to the Government in any particular case that there are words of the nature described in Section 4(2), the first question that

occurs to any one whose duty it is to enquire, is why does it so appear, what are the grounds of its opinion?

8. Those responsible for this Act foresaw this, and so they specifically provided that the forfeiting notification should state the grounds of the Local Government's opinion. But when we turn to the notification no such grounds are stated, nothing in the nature or a fact is set forth, there is merely a citation of those words of the section which are invoked.

9. The notification amplified to fit the circumstances of this case seems to take this shape; "It appears to the Local Government that these are words likely to bring into hatred or contempt a class or section of His Majesty's subjects in British India and the grounds of its opinion are that the words are likely to bring into hatred or contempt certain classes of His Majesty's subjects in India."

10. But the repetition of an opinion cannot be its grounds, and yet that is all that the notification burnishes in the shape of grounds. This is obviously insufficient and not a compliance with the terms of the Act.

11. Moreover, I think, that this direction in the section is mandatory and that the Legislature intended to impose, and has imposed, on the Local Government an imperative obligation to state the grounds of its opinion.

12. The language of section i may be compared. It requires that the notice forfeiting the copies of the publication should be in writing and state or describe the offending words, signs or visible representations. These provisions as to the statements to be contained in forfeiting documents were, I think, designedly inserted and were intended to be a check on the power of forfeiture vested in the Local Government; for it is easy to see that the obligation to state "grounds furnishes a valuable safeguard.

13. The statement of grounds may, for another reason too, be regarded as an essential part of the Legislature's scheme; for it might help the High Court to perform the duties cast on it u/s 17.

14. And in fact we have in this case been considerably embarrassed, as will appear later, by the absence of grounds.

15. The notification therefore appears to me to be defective in a material particular, and but for Section 22 of the Act it would, in my opinion, be our duty to hold that there had been no legal forfeiture.

16. That section, however, provides that every declaration purporting to be made under the Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place. The result is that though I hold the notification does not comply with the provisions of the Act, still we are, in my opinion, barred from questioning the legality of the forfeiture it purports to declare.

17. This brings me to the question whether the pamphlet under discussion

contains words of the nature described in Section 4, Sub-section (i).

18. The provisions of Section 4 are very comprehensive, and its language is as wide as human ingenuity could make it. Indeed, it appears to me to embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other.

19. It is difficult to see to what Lengths the operation of this section might not plausibly be extended by an ingenious mind. They would certainly extend to writings that may even command approval.

20. An attack on that degraded section of the public which lives on the misery and shame of others would come within this wide spread net: the praise of a class might not be free from risk. Much that is regarded as standard literature might undoubtedly be caught.

21. It is, however, urged that even so this pamphlet is outside both the spirit and the words of the section. And now I will notice the argument that has been addressed to us as to this.

22. The pamphlet, it is said, is an appeal to His Majesty's subjects, followers of the Christian faith; and it is an appeal to them as Christians to move the British Government to such individual or concerted action as will put a stop to outrages that shock all feelings of humanity, if they in fact occurred.

23. And so, it is contended this is an appeal to the people of a Christian nation, just because they are a Christian nation, and thus would be the first to protest against the cruel disregard of the principles of its faith, by some who profess to be its adherents, and against acts so abominable as to have earned the scathing denunciation of the Christian Monarch of one of the allied nations. Nor does the argument rest there; for it is brought to our notice that the pamphlet contains passages which show that Christianity as a creed is not attacked, notably that which states (p. 28) that it "was ever the symbol of humanity and mercy"; and that it states that those who were fighting under the Cross betrayed it. It is true that it refers to crusades (p. 3) but this has reference not to any crusade proclaimed by Christianity but to the proclamation of the King of Bulgaria. On the other hand there are passages which expressly state that Turkish excesses are not condoned, which show that the Christians are not attacked as such and narrate the protests made and help given by Christians other than the Balkan allies engaged in the war. There is no racial or political tie between the Balkan allies and the Christian subjects of His Majesty's in India which would make it possible that wrongs committed by the former should be considered imputable to the latter. Nor is there really any creedal link because it is not suggested that the acts complained of were done in the name of and with the authority of Christianity but in betrayal of it. On the contrary, it is argued, the suppression of this pamphlet might tend in the Mussalman mind to band the Christians of this country with the authors of these wrongs and make it appear that it was desired that these should not be made public lest they might throw discredit of Christian

subjects in India.

24. The pamphlet then, it is said, so far from bringing Englishmen or His Majesty's Christian subjects into hatred or contempt, is the highest compliment that could be paid to them.

25. This is the argument and it may be a very forcible one when addressed to those who can be swayed by it. The Executive Government can be moved by such reflections; our investigation is of a more prosaic order.

26. The Advocate-General has admitted, and I think very properly, that the pamphlet is not seditious, and does not offend against any provision of the Criminal Law of India.

27. But he has contended, and rightly in my opinion, that the provisions of the Press Act extend far beyond the Criminal law; and he has argued that the burden of proof is cast on the applicant," so that however meritorious the pamphlet may be, still if the applicant cannot establish the negative the Act requires, his application must fail.

28. And what is this negative? It is not enough for the applicant to show that the words of the pamphlet are not likely to bring into hatred or contempt any class or section of His Majesty's subjects in British India, or that they have not a tendency in fact to bring about that result. But he must go farther, and show that it is impossible for them to have that tendency either directly or indirectly, and whether by way of inference, suggestion, allusion, metaphor or implication. Nor is that all, for we find that the Legislature has added to this the all-embracing phrase "or otherwise."

29. And here I may, not inappropriately, invite attention to Section 153A of the Penal Code which has such affinity to the statutory provision governing this case, that it may be regarded as its basis. That section was added to the Penal Code in 1898, and was directed against the promotion and attempts to promote feelings of enmity or hatred between different classes.

30. It will be noticed that the feeling here described is one of enmity or hatred: no provision is made for contempt. But the more important divergence is that while the Penal Code requires that the enmity or hatred should be not only towards a class but by a class, there is no such limitation in the Press Act as to the source from which these hostile feelings should proceed; it aims against all hatred or contempt regardless of those by whom it is entertained. Nor is this the only direction in which there is a greater stringency in the Press Act. To Section 153A there is appended an explanation which declares it not to be an offence to point out without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce the feelings of enmity or hatred, indicated in the section. And yet no such qualifying words are to be founded in Section 4 of the Press Act, and this is the more remarkable because the qualifying explanations of Section 124A are introduced, though they

relate to an even graver offence.

31. It may be that this omission was an oversight; but whether that be so or not the Government insists on the absence of this explanation, though it leads to a curious result.

32. I think the Government is entitled to stand on the letter of the law, though it deprives Mr. Mahomed Ali of an opportunity of relying on an explanation conceived in the spirit of that which forms part of Section 153A of the Penal Code.

33. Had the Press Act incorporated the explanation to Section 153A, as it has that to Section 124A, Mr. Mahomed Ali might perhaps have made a very strong case in view of the Advocate-General's admission as to the character of the pamphlet and the applicant's purpose and intentions.

34. The applicant, however, contends strenuously that the pamphlet does not come even within these all-embracing terms of the Act, and that the Legislature aimed, at something wholly different. The incalculable powers of forfeiture vested in the executive are a sure sign that the Act was called into being by urgent political necessity. And it is of sufficiently recent date to enable us all to remember that the mischief aimed at was the prevalence of political assassination and anarchical outrage. Comprehensive words were designedly used to catch crime and the incitement to crime posing in the guise of innocence.

35. The Act was directed against crime and aimed at its prevention. I doubt whether publications with an authorship, a source, and purpose like those of the present pamphlet were thought of; and I recognise the force of the argument that the Act is now being applied to a purpose never intended. But be that so or not, if the Legislature has employed language wide enough to cover the pamphlet, this lack of reserve affords no answer to the forfeiture now attacked.

36. I have already dealt with one phase of the absence of grounds in the notification. This defect, and the Government's failure to place before us any materials beyond those furnished by the applicant have sensibly added to our difficulties in discharging the peculiar duties cast on us by the Act.

37. The notification does not even specify the classes that might be brought into hatred or contempt or which of these two diverse sentiments is apprehended, And so when Mr. Norton rose to address the Court he had to seek this information from the Advocate General.

38. The first answer implied that it included Christians, Greeks and Englishmen, but as under the Act the classes are limited to those composed of His Majesty's subjects in India, the Greeks were withdrawn and the first and the last retained. Still the answer in its original form is not without its significance, though it was afterwards modified.

39. The pamphlet would doubtless bring into hatred the unchristian Christians whose deeds of atrocity are described.

40. The theory presented is that the reflection of this hatred might fall, not indeed on the Government, but on His Majesty's Christian and English subjects in British India. If this be the Government's view with all the information at its disposal, the Court, no more informed than the man in the street, cannot (in my opinion) affirm this could not be so, and affirm it with a degree of assurance that would entitle it to set aside a measure of safety on which the Government had solemnly resolved.

41. The Advocate-General has convinced me that the Government's view of this piece of legislation is correct, and that the High Court's power of intervention is the narrowest: its power to pronounce on the legality of tire forfeiture by reason of failure to observe the mandatory conditions of the Act is barred: the ability to pronounce on the wisdom of the executive order is withheld: and its functions are limited to considering whether the applicant to it has discharged the almost hopeless task of establishing that his pamphlet does not contain words which fall within the all comprehensive provision of the Act. I describe it as an almost hopeless task, because the terms of Section 4 are so wide that it is scarcely conceivable that any publication would attract the notice of the Government in this connection to which some provision of that section might not directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise apply.

42. I have said that the ability to pronounce on the wisdom or unwisdom of executive action has been withheld. There was good reason for this. Courts of Law can only move on defined lines, and act on information brought before them under limited conditions.

43. It is not so with the Executive authority. It would be paralysed if it had to observe the restrictions placed on the Courts. Its action can be prompted by information derived from sources not open to the Courts, and based on considerations forbidden to them; it can be moved by impressions and personal experiences to which no expression can be given in a Court, But which may be a very potent incentive to executive action.

44. The Government may be in possession of information which it would be impossible to disclose in a Court of Law, and yet obviously requiring immediate action.

45. Therefore a jurisdiction to pronounce on the wisdom or unwisdom of executive action has been withheld and rightly withheld. It may be a question whether even the semblance which this Act provides should not have been withheld as it was by Act IX. of 1878.

46. Political considerations and reasons of State are the life blood of executive action, but they have no place in a Court of Law. "The constitution" said Lord Mansfield, "does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences, how formidable soever they might be: if rebellion was the certain consequence, we are bound to

say, fiat justitia, ruat caelum" John Wakes Case (1770) 19 How. State Trials 1112.

47. The fact is that the Executive and Judicial authorities stand on a wholly different plane for the purposes of arriving at a decision as to the propriety of executive action. And the one can not sit in judgment on the determinations of the other. Si judicas, cognosce; si regnas, jube.

48. And what then is the conclusion of the whole matter; of the two alleged checks on executive action, supposed to be furnished by the Act, one, the intervention of the Courts, is ineffectual, while the other, for this very reason can be, and in this case has been disregarded, without impairing the practical effect of forfeiture purporting to be under the Act.

49. One word more, and that is as to the motive of the present application. The applicant Mr Mahomed Ali, is by no means unknown in India; he is a journalist of position and repute. Though he is not an accused, he tells us that he regards himself as under the stigma. which (he declares) must attach to any journalist who has come under the operation of an Act directed, primarily at any rate, against a criminal movement marked by outrages which so shocked the public sentiment as to call for this drastic legislation. But even if he has not succeeded in proving the negative that fate and the law have thrown in his way, at least his application has not been wholly in vain.

50. The Advocate-General, representing the Government, has publicly announced, that Mr. Mahomed Ali's forfeited pamphlet is not, in his opinion, a seditious libel, and indeed that he attributes no criminal offence to Mr. Mahomed Ali: he was even willing to concede and believe he was acting in the highest interests of humanity and civilization. In this, I think, the Advocate General made no admission which it was not proper for him to make.

51. Mr. Mahomed Ali then has lost his book, but he retains his character; and he is free from the stigma that he apprehended. And this doubtless will be some consolation to him when we dismiss, as we must, his present application. I think there should be no order as to costs.

Stephen, J.

52. I agree with the Chief Justice that this application must be dismissed. In view however of its novelty, and of the difficulties to which it gives rise, I consider that I should express my own view of the question involved. If we take advantage of the statement made by the Advocate-General that the classes whom it is alleged the pamphlet before is likely to bring into hatred are Englishmen and Christians, and confine our attention to the parts of the Press Act that apply to the present case, the position we are in may be correctly described as follows:

53. It appears to the Local Government that the pamphlet before us contained words that were likely, directly, indirectly or (to abbreviate) in some possible way, to bring Englishmen or Christians being His Majesty's subjects in British India, into hatred as a class. They accordingly published a notification in the

Local Gazette declaring the pamphlet forfeited, and giving as a ground of their opinion that the pamphlet was likely to bring-"Englishmen and Christians into hatred, the fact that it was likely to bring them into hatred. The result of this notification was that the Police in Calcutta confiscated the pamphlet, and Mr. Mahomed Ali now applies before us to have the confiscation set aside on the ground that the pamphlet is not likely to bring such Englishmen and Christians as have been described into hatred, and it is this negative proposition that Mr. Norton seeks to prove on his behalf.

54. The case he makes before us is twofold. In the first place, he says that the pamphlet cannot have the effect ascribed to it. In the second, he says that the notification published by the Government is bad because it does not state the grounds of the opinion that the Government have formed about the pamphlet, which it must do according to Section 12; that therefore the confiscation is illegal, though in that case there may be no ground for the application he is making. He naturally presses for a decision on the first ground, but, if he cannot obtain that, he asks for a declaration that the notification and the confiscation are both bad.

55. Logically, however, the question of our jurisdiction must be considered first. As to this I am of opinion that the notification is not according to law. Looking at the section, and indeed at the Act as a whole, I have no doubt that the provision in Section 12 that the grounds of the opinion on which the Local Government have acted must be stated, is mandatory and not merely directory. There can be no doubt that it is framed, for the protection of any person whose property may be confiscated, and not merely for purposes of administrative convenience. The ground of an opinion must in this case, if not always, be a fact or facts, and no fact is disclosed merely by a specific relation of the elements that the Jaw requires to be present in order for legal consequences to follow. i have already described the statement of the grounds in terms which seem to me to lead to an absurdity; but I have taken pains to make them correct. I cannot say what facts should be stated. I do not think for example, that it can be the case that the "Local Government should state to us all the information on which they have acted, for I cannot suppose that we are to revise their action as a whole. On the other hand we have, it appears, power to revise their action to some extent, and for this purpose some statement of fact seems essential.

56. But because the law has not been followed in this matter, I cannot hold that the notification is void in such a way as to deprive us of jurisdiction. For, such are the provisions of this Act, that if our jurisdiction to revise the action of the Government u/s 17 is taken away, no other remedy is open to the person whose property is confiscated, and the Local Government can by their own laches deprive him of the only relief that the law provides. Such a conclusion seems to me so contrary to all principles of justice that I cannot accept it, or apply to the present case the general principle that where exceptional powers are conferred on an executive authority and a special procedure for their exercise is provided,

a failure to follow that procedure will prevent an exercise of those powers. Also, though I cannot say what facts are to be stated in order to disclose the ground for the opinion on which the Local Government acts, I think it may be the case that a statement of facts too meagre to give an applicant u/s 17 any real assistance, would be sufficient to satisfy the requirements of Section 12. Further, our jurisdiction is very closely confined by the terms of Section 19, with which Sections 17 and 22 must be read; and I have doubts whether it may not be that we can only answer the question indicated in Section 17, assuming that everything else has been rightly done.

57. I am of opinion, therefore, that we have jurisdiction to consider the question before us on its merits, and it is my duty therefore to do so. It is impossible, however, to do this without first noticing the point of view from which Mr. Norton has asked us to consider the case. He did not contend that this Act was penal, but he dwelt at length on the intentions of the persons who wrote the pamphlet, apparently in Constantinople, and of the applicant who as I understand published it, or at least proposed to publish it, here. With these I conceive that we have nothing to do directly, we have only to consider what effect the publication is likely to produce. The intentions of the writer and publisher may be of importance on the principle that these men are not likely to produce an effect they did not intend: but otherwise we need not consider them. Nor can I accede to the argument that this Act was passed only to prevent active crime. I can only judge of its purpose from its contents, and as I read it its purpose is to prevent the publication of anything that may be dangerous in any of the ways described in Section 4; and the means supplied to Government for doing this have no relation to the propriety of the conduct, still less to the criminality of the publisher or the reader. The purpose of the Act as I read it, may be to prevent crime, but is to do so not by detecting or punishing criminals, but by preventing persons now innocent from becoming criminals. Consequently I need scarcely say that I consider that no slur has been cast on Mr. Mahomed's character by the confiscation of his pamphlet. A man may own a mad dog without blame; and no slur is cast on his character if it is confiscated.

58. This view is, in my opinion, confirmed by a reference to the provisions of the Penal Code that deal with cognate matters. By Section 153A of that Code, it is an offence to promote feelings of enmity between different classes of His Majesty's subjects, but it is explained that it is not an offence to point out without malicious intention, and with an honest view to their removal, matters which are producing or have the tendency to produce such feelings of hatred. Thus when the law is dealing with the matter of creating hatred of a class from the point of view, of Criminal Law, Its action is restricted to cases where what is promoted is hatred by one class of another, and words and so forth used without malice and honestly to remove the causes of hatred are not punishable. But in the present case the law applies to hatred by anyone, possibly only by one man, and the explanation as to the intention of the person who uses them is omitted. It seems that the Legislature must have had Section 153 A in view when it enacted

Section 4(c) of the Press Act, and I therefore suppose that the omission in the latter of any provision like the explanation in the former was intentional. Again explanation (ii) of Section 4(2) of the Press Act excludes from the scope of the Act "comments expressing disapprobation of the measures of the Government... with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government... without exciting or attempting to excite hatred." This is obviously adapted from two explanations to Section 124A of the Penal Code, which are applicable here, because if hatred is in fact excited, the explanation does not apply, whatever may have been the intention of the person who excited it.

59. From the relation of this Act to the Penal Code, I therefore conclude that the scope of this Act has been made far wider than that of the Code. So wide indeed are the powers that the Legislature has conferred on the Government that they would be able to confiscate a newspaper containing words that might cause one man to hate, or even to condemn a class, if such there should unhappily be, who sought to embarrass the Government of the country by murder and robbery. When such wide powers were conferred on Government, I cannot but suppose that it was intended that they should be widely used.

60. This brings me to the actual question that I conceive that I have to decide, namely, whether Mr. Norton has shown that the pamphlet before us is not likely to bring Englishmen and Christians into hatred. And in attempting to form an opinion on it, I find myself in a position which is unfamiliar to me, and in which, as far as I am aware no Judge in the British Empire has been placed, since the remote days of early English Jurisprudence. I have to decide a question of fact on such evidence as is supplied by one document. The side on whom the onus of proving his case is cast is not in a position to give any evidence. As the other side has not called any witnesses, no cross-examination has taken place.

61. The answer to the question I have to decide depends on the social and political state of Mahomedans in India or perhaps of certain sections of them. As to this such information as I have is unverified and general to a high degree; it has never been my duty to acquire information on the matter; and absolutely none has been supplied to me on this occasion. Under these circumstances I have no doubt that any opinion I may express will be received by others with the respect that is due to the office I have the honour to hold, but it will be impossible for me to share in this feeling. The question put to us is so framed that any doubtful point is to be decided against the applicant.

62. Coming to the pamphlet itself, I have no doubt that I must answer the question before me against the applicant.

63. [His Lordship then described the nature, and contents of the pamphlet, as set out above, and continued:]

64. The disinterested humanity of the writers is beyond question, and they certainly had a right to make an appeal to Englishmen as they" did. Mr."

Mahomed Ali is entitled to a presumption that he acted with like humanity, and it is not suggested that he committed any unlawful act or did anything wrong in publishing the pamphlet in India. But these considerations do not touch the question whether the pamphlet is not likely to make Mahomedans hate Christians. A perusal of the accounts of the outrages is likely to excite anger in the mind of any reader who does not regard the pamphlet as a false document which we have no reason for doing. I can well understand that in the mind of some Indian Mahomedans anger might easily and perhaps justifiably turn to a hatred of the allies, from which, making allowances for the infirmities of human nature, a hatred of the co-religionists of the allies would seem but a short step especially for those whose co-religionists are involved in a national disaster.

65. Such is my opinion on the question I have to answer. Acting on such information as I have, I entertain no doubt as to what my answer should be which is that the applicant has failed to make out his case, and that the application must be dismissed. But the absence of doubt is probably largely due to the absence of evidence, and cannot be taken as going far towards showing that the opinion is correct.

66. I agree that costs should not be awarded in this case.

Woodroffe, J.

67. I agree with the judgment of the Chief Justice.