A

NAWABKHAN ABBASKHAN

v.

THE STATE OF GUJARAT

February 19, 1974

B [V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.]

Bombay Police Act, 1951, Sections 56 and 142—Prosecution for contravention of externment order—Pending trial High Court quashing the order under Art. 226—Effect of quashing—If void ab initio—*Natural justice.*

The appellant was prosecuted under s. 142 of the Bombay Police Act, 1951 on contravention of an externment order issued under s. 56 of that Act. During
C the pendency of the criminal trial, the High Court, in a petition under Art. 226 of the Constitution, quashed the order of externment on the ground that no opportunity to show cause was given against allegations relating to areas where the acts were alleged to have been committed. In criminal trial, the trial court acquitted the appellant. On appeal by the State the High Court convicted the appellant. It held that the accused had re-entered the forbidden area during the currency of the order. The High Court was of the view that the quashing of the order by the court did not render the order of externment void *ad initio* but it only invalidated the order with effect from the date of the issue of the writ
D quashing the order.

On the question whether the externment order having been quashed by the High Court during the pendency of the criminal trial the order had become void *ab initio* and there being no quit order there was no offence.

Allowing the appeal,

E HELD : that an order which infringed a fundamental freedom passed in violation of the *audi alteram partem* rule was a nullity. A determination is no determination if it is contrary to the constitutional mandate of Art. 19. On this footing the externment order was of no effect and its violation was no offence. Any order made without hearing the party affected is void and ineffectual to bind parties from the beginning if the injury is to a constitutionally guaranteed right. May be that in ordinary legislation or at common law a Tribunal having jurisdiction and failing to hear the parties may commit an illegality which may render the proceedings voidable when a direct attack was made thereon by way
F of appeal, revision or review, but nullity is the consequence of unconstitutionality and so the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void *ab initio* and of no legal efficacy. The duty to hear menacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing. [432 G, 436 F]

An order which is void may be directly and collaterally challenged in legal
G proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt an order which infringes a fundamental freedom passed in violation of the *audi alteram partem* rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, that is, the impugned act or order was never valid. [439 F]

In the present case a fundamental right of the petitioner had been encroached
H upon by the Police Commissioner without due hearing. The Court quashed that order. The legal result is that the accused was never guilty of flouting an order which never legally existed. [439 D-E]

[The Court did not express its final opinion on the many wideranging problems in public law of illegal orders and violation thereof by citizens.] [439 E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 83 of 1970. A

From the judgment and order dated March 5, 1970 of the Gujarat High Court at Ahmedabad in Criminal Appeal No. 673 of 1968.

S. K. Dholakia, for the appellant.

G. A. Shah and *M. N. Shroff*, for the respondent. B

The Judgment of the Court was delivered by

KRISHNA IYER, J. The appeal before us raises a thorny issue of some importance which may be epigramatically expressed as when has the citizen the discretion to disobey an order ? When is a determination *not* a determination ? This riddle has to be solved in the foggy legal light of conflicting decisions and academic opinions, Indian and Anglo-American. To appreciate the contention urged in the case a few facts must be narrated. C

Section 56 of the Bombay Police Act, 1951, (the Act, for short), empowers a Police Commissioner to extern any undesirable person on grounds set out therein and the petitioner fell victim to such a direction issued on September 5, 1967. On contravention of that order he was D prosecuted under Sec. 142 of the Act but was acquitted by the trial Court. The State appealed with success, for the High Court held that the accused had re-entered the forbidden area during the currency of the order. What is crucial for this case is whether the externment order having been quashed by the High Court under Art. 226 of the Constitution on July 16, 1968—during the pendency of the criminal E trial—it had become void *ab initio* and there being thus no quit order in law there was no offence. The learned Judge rejected this effect of the writ issued under Art. 226 and convicted the accused. His reasoning, invigorated by surgical imagery, flowed thus :

> "Now the contravention took place on September 17, 1967 whereas the externment order in question has been quashed about one year thereafter on July 16, 1968. The F question, therefore, is : can a person against whom an order of externment under section 56 of the Bombay Police Act has been issued disobey the said order and contravene the directions contained therein with impunity if subsequently the order is quashed ? If the argument of the learned counsel were to be accepted, though the externment order held the G field and had not been quashed at the material time, no offence would be committed in view of the subsequent quashing of the order. In other words, though the order had not been declared invalid at the material time a contravention thereof would not constitute an offence. A distinction in my opinion has to be drawn between an order which is *ab initio* void and an order which is subsequently quashed on account of H some technical defect or irregularity. If the order was *ab initio* void if it was a nullity from the inception, if it was a still born child, the matter would have stood on a different

A footing. In the present case the child was alive and kicking and apparently healthy. It has subsequently died during the course of an exploratory operation. The order has been held to be invalid and is quashed on the ground that it cannot be sustained on account of some defect, infirmity or irregularity which has been subsequently discovered. It cannot be said that the order was void *ab initio*. The order of the High B Court passed on July 16, 1968 does not render the order nullity from its very inception. It is not retroactive. It does not render the order of externment "non est". What it does is to invalidate it with effect from the date of the issue of the writ quashing the said order. If the argument of the learned counsel were to be sustained it would result in an C anomalous situation. The externment order can be violated with impunity if a subsequent writ petition is allowed and the order is quashed. The contravention, however, would constitute an offence if the writ petition is rejected. It is not possible to take a view which would result in such an anomalous situation. There is no principle in upholding the respondent's claim that he has a right to violate an order passed by an D authority having jurisdiction to pass it, if subsequently he can persuade the court that there was an in-built lacuna or latent defect in the said order. In other words he claims to have the right to judge for himself whether the order is legal or not and in anticipation of the court upholding his contention, the right to violate it with impunity. Be it realised that these powers are vested into the administration to enable it to take E prophylactic action to protect the society from imminent dangers. These powers cannot be allowed to be robbed of their potency at the sweet will of the person proceeded against in anticipation of a subsequent favourable verdict of the court."

There are some untoward potentialities and legal anomalies visualised by the learned Judge which lend assurance to the juridical concept that F an order or act quashed by a court is valid until judicially set aside or declared void. We have to examine the validity of this temporary validity imputed to an otherwise bad order. When does a bad order become bad ?

Violation of natural justice is the vice of the order which was defied by the accused. We will first set out the relevant provision in G the Act and the ground of decision in the writ petition, shorn of unnecessary portions. Section 56 reads :—

"Whenever it shall appear in Greater Bombay and other areas for which a Commissioner has been appointed under section 7 to the Commissioner and in other area or areas to which the State Government may, by notification in the Official Gazette, extend, the provisions of this section, to the District Magistrate, or the Sub-Divisional Magistrate specially empowered by the State Government in that behalf (a) that the movements or acts of any person are causing or calculated

to cause alarm, danger or harm to person or property, or (b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, or (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant the said officer may, by an order in writing duly served on him or by beat of drum or otherwise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease or to remove himself outside the area within the local limits of his jurisdiction (or such area and any district or districts, or any part thereof, contiguous thereto) by such route and within such time as the said officer may prescribe and not to enter or return to the said area (or the area and such contiguous districts, or part thereof, as the case may be), from which he was directed to remove himself."

The vital freedom guaranteed under Art. 19 of the Constitution becomes a fleeting fragrance if a police or magisterial officer can whisk you away by a more executive-than-judicial fiat. This strange power, whose constitutionality is not challenged before us, is hopefully fettered in its exercise by Section 59 which runs thus :—

"(1) Before an order under section 55, 56 or 57 is passed against any person the officer acting under any of the said sections or any officer above the rank of an Inspector authorised by that officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. If such person makes an application for the examination of any witness produced by him, the authority or officer concerned shall grant such application; and examine such witness, unless for reasons to be recorded in writing, the authority or officer is of opinion that such application is made for the purpose of vexation or delay. Any written statement put in by such person shall be filed with the record of the case. Such person shall be entitled to appear before the officer proceeding under this section by an advocate or attorney for the purpose of tendering his explanation and examining the witness produced by him.

(2) The authority or officer proceeding under sub-section (1) may, for the purpose of securing the attendance of any person against whom any order is proposed to be made under section 55, 56 or 57, require such person to appear before

A him and to pass a security bond with or without sureties for such attendance during the inquiry. If the person fails to pass the security bond as required or fails to appear before the officer or authority during the inquiry, it shall be lawful to the officer or authority to proceed with the inquiry and thereupon such order as was proposed to be passed against him may be passed."

B

The externment order was subject to this obligation of judicialisation. Mr. Justice Bhagwati (as he then was) in quashing the order reasoned :—

"The show cause notice started with a general allegation that the petitioner was desperate and dangerous man and was
C committing acts involving force and violence..... This general allegation was then particularised and four different kinds of acts were specifically set out in clauses 1 to 4 with an overriding statement that these different kinds of acts were committed by the petitioner during the period from January 1967 upto the date of the show cause notice in "the aforementioned localities", i.e. the localities known as Narol,
D Dani Limda Jamapur, Chandola and Benrampura localities situate within the limit of Kagdapity, Gaikwad Haveli and Maninagar Police Stations..... None of the allegations in the show cause notice contained any reference to the area round about these specified localities and the petitioner was therefore not called upon to meet any allegation in regard to the area round about the specified localities. Even so, the
E Deputy Commissioner of Police relied on material which purported to show that the petitioner was guilty of different kinds of act in the area round-about the specified localities and acting on such material proceeded to hold that he was satisfied that the petitioner was engaged in the commission of acts involving force and violence..... The externment order is so far as it was based on the satisfaction of the Deputy
F Commissioner of Police that the petitioner was engaged in the commission of acts involving force and violence and acts punishable under Chapter XVI and XVII of the Indian Penal Code in the roundabout area within the limits of Kagdapity, Gaikwad Haveli and Maninagar Police Stations was, therefore, clearly beyond the scope of the show cause notice. No
G opportunity to show cause against any allegation relating to the roundabout area within the limits of Kagdapity, Gaikwad Haveli and Maninagar Police Stations was afforded to the petitioner and the externment order must therefore be held to be invalid.

There is also a second ground on which we must hold
H the externment order to be invalid. It is well settled that it is a mandatory requirement of section 56 that the externing authority must from a subjective opinion that witnesses are not willing to come forward to give evidence in public against

the person sought to be externed by reason of apprehension on their part as regards the safety of their person or property. This requirement is clearly not satisfied in the present case... it is clear that the opinon formed by the Deputy Commissioner of Police is only as regards the witnesses who are victims of the said incidents and not as regards the other witnesses. This opinion would clearly not be the requisite opinion contemplated by the mandatory requirement of section 56.

We therefore allow the petition and make the rule absolute by issuing a writ quashing and setting aside the externment order passed by the Deputy Commissioner of Police against the petitioner."

This judgment is now final and binds State and subject alike. But does the demolition of the externment order take effect retroactively? If it does, the accused is not guilty; if not, he is.

The constitutional perspective must be clear in unlocking the mystique of 'void' and 'viodable' vis-a-vis orders under the Act. The Act is a constraint on a fundamental right and so the scheme of Art. 19 must be vividly before our minds if extraordinary controls over human rights statutorily vested in administrative tribunals are to be held in constitutional leash. Freedom of movement, of association, of profession and property, are founding commitments and severe restraints thereon must be strictly construed, not in the name of natural justice—an elusive phrase—nor in literal loyalty to Section 59 but in plenary allegiance to the paramount law. The restriction on the fundamental right must be reasonable and the harsher the restriction the heavier the onus to prove reasonableness. The High Court in Special Criminal Application 18 of 1969 held the basic condition clamped on the authority to hear and be satisfied according to the 'due process' prescriptions of Section 59 had been violated and the order was liable to be quashed. In short, the finding was that the deprivation of the petitioner's fundamental right having been effected in a mode which is not reasonable, as statutorily expressed in Section 59 of the Act, is illegal and unconstitutional. Once the jurisprudential underpinnings of Section 56 and 59 of the Act are seen, the invalidatory effect is plain. An unconstitutional order is void, consequential administrative inconveniences being out of place where an administrator abandons constitutional discipline and limits of power. What about the peril to the citizen if an official, in administrative absolutism, ignores the constitutional restrictions on his authority and condemns a person to flee his home? A determination is *no* determination if it is contrary to the constitutional mandate of Article 19. On this footing the externment order is of no effect and its violation is no offence.

Unfortunately, counsel overlooked the basic link-up between constitutionality and deviation from the *audi alteram partem rule* in this jurisdiction and chose to focus on the familiar subject of natural justice as an independent requirement and the illegality following upon its non-compliance. In Indian constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by

A courts into those great rights enshrined in Part III as the quintessence of reasonableness. We are not unmindful that from Seneca's Medea, the Magna Carta and Lord Coke, to the constitutional norms of modern nations and the Universal Declaration of Human Rights it is a deeply rooted principle that 'the body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished nor destroyed in any way' without opportunity for defence and one of the first B principles of this sense of justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side.

Now, we may as well examine the invalidatory consequence of violation of natural justice on a judicialised administrative act like the externment order under Sec. 56. The wider questions of error C versus excess of jurisdiction, declaration of invalidity as distinguished from voidable orders being avoided, order void *ab initio* and valid till voided retroactively by competent tribunal and the directory-mandatory and ministerial—Judicial dichotomies and allied problems, present, on current precedents, a picture of juristic jungle and need not be ordered into a garden for the limited purposes of this case. A learned author has cynically said : 'The case law, however, affords the D usual spectacle of anarchy upon which order can hardly be superimposed'.(1)

Here, a tribunal, having jurisdiction over area, person and subject-matter, has exercised it disregarding the obligation to give a real hearing before condemning. Does it spell death to the order and make it still-born so that it can be ignored, defied or attacked collaterally ? Or does it mean nullifiability, not nullity, so that before disobeying it a E court must declare it invalid ? Or, the third alternative, does it remain good and binding though voidable at the instance of a party aggrieved by a direct challenge ? And if a court voids the order does it work retroactively ?

All these lines of approach have received judicial blessings from the House of Lords in the landmark case of *Ridge* v. *Baldwin.*(2) F The legal choice depends not so much on neat logic but the facts of life—a pragmatic proposition. Where the law invests an authority with power to affect the behaviour of others what consequence should be visited on abuse or wrong exercise of power is no abstract theory but experience of life and must be solved by practical considerations woven into legal principle. Verbal rubrics like illegal, void, mandatory, jurisdictional, are convenient cloaks but leave the ordinary man, like G the petitioner here, puzzled about his remedy. Rubinstein poses the issue clearly :—

> "How does the validity or nullity of the decision affect the rights and liabilities of the persons concerned ? Can the persons affected by an illegal act ignore and disregard it with impunity ? What are the remedies available to the aggrieved H parties? When will the courts recognize a right to compensa-

(1) Jurisdiction And Illegality—Rubinstein.
(2) [1963] 2 All E.R 66.

tion for damage occasioned by an illegal act? All these questions revert to the one basic issue; has the act concerned ever had an existence or is it merely a nullity ? A

> Voidable acts are those that can be invalidated in certain proceedings; these proceedings are especially formulated for the purpose of directly challenging such acts.....On the other hand, when an act is not merely voidable but void, it is a nullity and can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon. In other words, it is subject to 'collateral attack'." B

Kelson's view, when a court holds an act a nullity, is that it is not a declaration of nullity; it is a true annulment, an annulment with retroactive force'. C

Even so, the dilemma of the petitioner is, if an authority in excess or error of jurisdiction directs an illegal act, should the citizen suffer it until upturned in a legal proceeding directly or collaterally? Can he resist the injury even if the seal of authority simulates validity? The eloquent words of Wedderburn quoted by Rubinstein in the context of nullity is pertinent:— D

> "What is a sentence? It is not an instrument with a bit of wax and the seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper : a sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled." E

Illegal acts of authorities, if can be defied on self-determined voidness, startling consequences will follow, as the High Court apprehends. A detenu will beat back, a builder will put his wall on the forbidden line, a court officer will meet with physical resistance, all because the order is, on the view of the affected party, a nullity and is later proved so before a court. Not every action by a Government agency carries with it the force of law and naturally what should he do if he concludes that the action is invalid? Should he disobey, face penal proceedings and get his violation legitimated by Court? Is there no alternative to breaking the law or order to expose the lawlessness of the law or order? A recent book ('Discretion to Disobey' by Kadish and Kadish(1)) establishes this line of thought from Benjamin Courtis, a former Supreme Court justice, who argued to the Senate on behalf of President Andrew Johnson(sic) during the latter's impeachment trial a century ago : F G

> "I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent H

(1) A Study of Lawful Departures from Legal Rules p. 105 1973—Stanford University Press, California, U.S.A.

A either upon private citizen or public officers. If this is the measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patrotic duty of a citizen to raise a question whether a law is within the Constitution of the country."

On this view it is almost as though the Constitution contained the words to be found in the constitution of one contemporary German state : "It is the right and duty of every man to resist unconstitutionally exercised public power."

More apposite to the present case are these remarks of the same C authors :—

"If a policeman, in the exercise of his office, orders a Black person to leave a park in a Southern town, is the citizen obliged to obey the policeman's order and wait until later to invoke some remedy to challenge its validity ? Can the citizen be constitutionally convicted of some crime based on his refusal to obey the policeman's order, even if a court D should later determine that the order was unconstitutional ? Not long ago the Supreme Court considered just this case. It had little difficulty reaching a decision. The order was found to be an unconstitutional violation of the defendant's rights first because it was designed to enforce racial discrimination in the park, and second because it was based on the possibility of unlawful troublemaking by others rather E than on any wrongdoing by the defendant. So much was sufficient to require a reversal of the defendant's conviction : "Obviously,... one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution. The policeman's order was treated like a statute : obedience to an unconstitutional order of an official F is not required, even though the order has not yet been ruled invalid by a court. The citizen is at liberty to make his own judgment of the order's validity and to act accordingly. If he turns out to be wrong, of course, he is answerable. But if he turns out to be right, he is not answerable in any way and not for disobeying the order, since the order was invalid, and not for undertaking himself to decide in advance G that the order was invalid, since he was at liberty to make that decision.

Where the situation escalates into active resistance and perhaps the use of force, typically involved in cases of resistance to unlawful arrest or to the execution of some process, such as serving a search warrant, the interest in the physical welfare of the policeman and the citizen (as well as others) H may often produce a contrary answer. Indeed, an increasing number of jurisdictions afford no right to resist an arrest made under colour of authority, even if the arrest is later determined to be invalid. The citizen is obliged in this circum-

stance to yield and submit his case to the courts. As the Model Penal Code concludes, "It should be possible to provide adequate remedies against illegal arrest, without permitting the arrested person to resort to force—a course of action highly likely to result in greater injury even to himself than the detention." A

The law in this area is full of alarming conundrums hardly resolved by academic writing or judicial dicta. B

We may narrow down the scope of the discussion by confining it to breaches of the *audi alteram partem rule*. Does this defect go to jurisdiction? Perhaps not all violations of natural justice knock down the order with nullity. In *Dimes* v. *Grand Junction Canal*(1) bias or pecuniary interest in the judge was held to render the proceedings voidable, not void. It must be conceded that even this proposition is not out of the penumbra of doubt and dispute (*vide* A.I.R. 1958 S.C. p. 86). Formalistic moulds will not solve these issues of life and juristic policy enacted with clarity into the statute book is the necessity of this lawless region of the rule of law. The common man and the Courts are confronted with issues we have touched upon; and, against the background of processual guarantees under the Constitution, the law of jurisdiction and illegality has to be legislatively settled, not as logical extensions of juridical doctrine but empirical formulations based on experience. Grave implications of law and order lurk behind this murky branch of public law. C D

Where hearing is obligated by a statute which affects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. May be that in ordinary legislation or at common law a Tribunal, having jurisdiction and failing to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review, but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void and *ab initio* of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing. May be, this is a radical approach, but the alternative is a travesty of constitutional guarantees, which leads to the conclusion of post-legitimated disobedience of initially unconstitutional orders. On the other hand law and order will be in jeopardy if the doctrine of discretion to disobey invalid orders were to prevail. As Learned Hand observed :— E F G

> "The idea that you may resist peaceful arrest.... because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine (the question is) not a blow for liberty but, on the contrary, a blow for attempted anarchy." H

(1) [1852] 3 H.L.C. 759.

A The opposite view is expressed by the California Supreme Court in a case where one Yick came into the country unlawfully but was held by the deputy sheriff without authority. He escaped and his abettor in the escape was convicted but in appeal the Court held :—

> "An escape is classed as a crime against public justice, and the law, in declaring it to be an offense, proceeds upon the theory that the citizen should yield obedience to the law; B that when one has been, by its authority or command, confined in a prison, that it is his duty to submit to such confinement until delivered by due course of law. But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape." C

American case-law is conflicting and doubtful expressions like "void on its face" "transparently invalid" have been used. We must remember the words of Justice Frankfurter "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny". We dwell on these possible views to underscore D the difficulties of solution.

English Judges also have not been uniform. Granting the order against a party to be void, does it have to be so declared by a court at his instance of can the citizen interpret for himself and act on the basis of invalidity. The problem was considered by the Judicial Committee in *Fernando's*(1) case where a minister dissolved a municipal E council without opportunity to be heard. Lord Upjohn stated the position thus :—

> "Apart altogether from authority their Lordships would be of opinion that this was a case where the Minister's order was voidable and not a nullity. Though the council should have been given the opportunity of being heard in its defence, F if it deliberately chooses not to complain and takes no step to protest against its dissolution, there seems no reason why any other person should have the right to interfere. To take a simple example to which their Lordships will have to advert in some detail presently, if in *Ridge* v. *Baldwin* the appellant Ridge, who had been wrongly dismissed because he was not given the opportunity of presenting his defence, G had perferred to abandon the point and accept the view that he had been properly dismissed, their Lordships can see no reason why any other person, such, for example, as a ratepayer of Brighton should have any right to contend that Mr. Ridge was still the Chief Constable of Brighton. As a matter of ordinary common sense, with all respect to other opinions that have been expressed, if a person in the position H of Mr. Ridge had not felt sufficiently aggrieved to take any action by reason of the failure to afford him his strict right

(1) L.R. [1967] 2 A.C. 337, 352 (*Darayappah* v. *Fernando*)

to put forward a defence, the order of the watch committee should stand and no one else should have any right to complain..... Their Lordships deprecate the use of the word void in distinction to the word voidable in the field of law with which their Lordships are concerned because, as Lord Evershed pointed out in *Ridge* v. *Baldwin* quoting from Sir Frederick Pollock, the words void and voidable are imprecise and apt to mislead." A B

In *Ridge* v. *Baldwin* (supra) Lord Reid and Lord Hodson opted for 'nullity', Lord Evershed and Lord Devlin supported the 'voidable' theory and Lord Morris of Broth-Y-Gest struck a practical note in between. The learned Lord said :—

"It was submitted that the decision of the watch committee was voidable but not void. But this involves the inquiry as to the sense in which the word "voidable", a word deriving from the law of contract, is in this connexion used. If the appellant had bowed to the decision of the watch committee and had not asserted that it was void, then no occasion to use either word would have arisen. When the appellant in fact at once repudiated and challenged the decision, so claiming that it was invalid, and when in fact the watch committee adhered to their decision, so claiming that it was valid, only the court could decide who was right. If in that situation it was said that the decision was voidable. that was awaited. But if and when the court decides that the appellant was right, the court is deciding that the decision of the watch committee was invalid and of no affect and null and void. The word "voidable" is, therefore, apposite in the sense that it became necessary for the appellant to take his stand : he was obliged to take action for unless he did the view of the watch committee, who were in authority, would prevail. In that sense the decision of the watch committee could be said to be voidable." C D E

In *Spackman* v. *Plumstead Board of Works*(1) (181), Lord Selborne said :— F

"There would be no decision within the meaning of the statute if there was anything of that sort done contrary to the essence of justice."

In 1959 A. C. 83 Lord Somervell of Harrow highlighted the dilemma of 'void' and 'voidable' in these effective words :— G

'Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken ? .....The distinction between void and voidable is by no means a clear one....."

The test of *ex-facie* illegality or bad on its face or in Lord Radcliffe's words 'it bears no brand of invalidity on its forehead', is also unworkable in the work-a-day world of law. Error of jurisdiction and error H

(1) (1885) 10 A.C. 229.

A within jurisdiction, have been suggested as a means to cut the Gordian Knot. Many great writers have dealt with the subject but few have offered a fair answer to the question, is a determination a determination at all when made without a statutory hearing and when is it void and to what extent? Decisions are legion where the conditions for the exercise of power have been contravened and the order treated as void. And when there is excess or error of jurisdiction the end product is a B semblance, not an actual order, although where the error is *within* jurisdiction it is good, particularly when a finality clause exists. The order becomes 'infallible in error', a peculiar legal phenomenon like the hybrid beast of voidable voidness for which, according to a learned author, Lord Denning is largely responsible. The legal chaos on this branch of jurisprudence should be avoided by evolving simpler concepts which work in practice in Indian conditions. Legislation, rather than C judicial law-making will meet the needs more adequately. The only safe course, until simple and sure light is shed from a legislative source, is to treat as void and ineffectual to bind parties from the beginning, any order made without hearing the party affected if the injury is to a constitutionally guaranteed right. In other cases, the order in violation of natural justice is void in the limited sense of being liable to be avoided by court with retroactive force.

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In the present case, a fundamental right of the petitioner has been encroached upon by the police commissioner without due hearing. So the Court quashed it—not killed it then but performed the formal obsequies of the order which had died at birth. The legal result is that the accused was never gulity of flouting an order which never legally existed.

E We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or F by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the *audi alteram partem rule* is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, *i.e.* the impugned act or order was never valid. The French jurists call it L'indevistence or outlawed order (p.127), Brown and Garner, French Administrative Law) and could not found the ground for a prosecution. On this limited ratio the ap- G pellant is entitled to an acquittal. We allow his appeal.

P. B. R. *Appeal allowed.*