State vs Padma Kant Malviya And Anr. on 28 September, 1953

Equivalent citations: AIR1954ALL523, 1955CRILJ904

JUDGMENT

Malik, C.J.

1. I have read the judgments prepared by learned brothers Desai and Muherji, jj. and agreed to the answers proposed by them.

2. So far as the second question is concerned, it presents no difficulty and it is not necessary for me to add anything to what has already been said. All that the Oaths Act provides is, that nothing contained in the Oaths Act shall authorise the administration of oath to an accused person in a criminal proceeding. Reliance is not placed by the learned Government Advocate on anything in the Oaths Act to entitle him to cross-examine the contemner.

3. The third question is a little difficult. Article 20(3) of the Constitution provides that:

> "No person accused of any offence shall be compelled to be a witness against himself,"

We are concerned with the words "accused of an offence". I shall not like in this case to consider the larger question whether the words "accused of" are restrictive and mean a person against whom proceeding in a criminal court for any offence committed by him has in fact been started.

To similar provision in the Constitution of the United States though slightly differently worded, the American Courts have given a much wider meaning. Confining myself, tnerefore, to the word 'offence', (sic) the word has not been defined in the Constitution but Article 367 provides that unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution. The word 'offence' has been defined in the General Clauses Act (No. 10 of 1897) as meaning "any act or omission made punishable by any law for the time being in force'. I think the words "made punishable by any law for the time being in force" are important.

In Article 13(3) of the Constitution "law" is defined as "including any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." "Law as in force", on the other hand, have been defined as "including laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed....."

No doubt these two definitions are applicable only to Article 13 of the Constitution and cannot, therefore, be treated as a sure guide.

In Article 336 of the Constitution though law has not been defined, existing law has been defined which would only include statute law. That, however may also not be a sure guide. It is, however, important to note that nothing can be a crime or an offence unless the law makes it so.

4. It is not necessary to give in detail how the Criminal Law has developed in this country.

Before the passing of the Penal Code and the modification of the law, Criminal Law applied in the presidency towns and within a certain area thereof was the Criminal Law of England, but in the rest of the country where the courts established by the British were functioning it was mostly the Mohamedan Law relating to crimes that was applied. The Penal Code was drafted in 1837 though for various reasons it could not be enacted till '1860. The general principles upon which the Code was based was described as follows (see letter of Lord Auckland dated 14-10-1837, and Parliamentary Papers 1837-38 (673), 41, 463):

> "Your Lordships in Council will perceive that the system of penal law which we propose is not a digest of any existing system, & that no existing system has furnished us even with a groundwork".

Then the prevailing state of Criminal Law in India was described and then it was said:

> "Under these circumstances we have not thought it desirable to take as the ground-work of the code any of the systems of law now in force in any part of India. We have, indeed to the best of our ability, compared the code with all those systems, and we nave taken suggestions from all; but we have not adopted a single provision merely because it formed a part of any of those systems."

The Penal Code was enacted in 1860 and it purported to codify the Criminal Law of India as applicable to the country, its Preamble is as follows :

> "Whereas it is expedient to provide a general Penal Code for British India; it is enacted as follows."

Section 2 is to the effect that:

> "Every person shall be liable to punishment under the Code and not otherwise for every act or omission contrary to the provisions thereof....."

And Section 5 is to the effect that:

> "Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 & 4, William IV, Chapter 85, or of any Act of Parliament

> passed after that Statute in anywise affecting the East India Company or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of Her Majesty .....or of any special or local law."

A special or local law was thus saved by Section 5.

(5) Coming to the definition of the word "offence", in the Penal Code, Section 40 of the Code provides that:

> "Except in the chapters and Sections mentioned in Clauses 2 and 3 of this Section, the word "offence" denotes a thing made punishable by this Code."

Clause 2 mentions certain Sections of Chapter 4 and Chapter 5A and lays down that in this Section "the word "offence" denotes a thing punishable under the Code or any special law or local law as hereinafter defined";

and in certain Sections mentioned in Clause 3 the word "offence", it is laid down, "has the same meaning when the thing punishable under the special or local law is punishable-under such law with imprisonment for a term of six months or upwards, whether with or without fine."

Section 41 defines "special law" as "a law applicable to a particular subject"; and Section 42 defines "local law" as "a law applicable only to a particular part of the territories comprised in India."

6. Again, in the Explanation to Section 203 it is provided that in Sections 201, 202 and 203, Penal Code:

> "The word "offence" includes any act committed at any place out of India, which if committed in India, would be punishable under any of the' following Sections";
>
> and then a number of Sections are quoted.

7. Chapter 4 of the Act gives the General exceptions and many acts which would otherwise be offences are said to be not offences if done under certain circumstances or by certain individuals.

8. The word "offence" throughout the Code has, therefore, been used in the sense of a law enacted by a competent Legislature.

9. Soon after in the year 1861, the first Criminal Procedure Code was enacted (Act No. 25 of 1861) in which the word "offence" was not defined but Section 21 gives us clear indication as to what it meant. The Section was to the following effect:

> "The Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable

> under the Indian Penal Code (Act 45 of 1860) or under any special or local law (except offences which are by any such law made punishable by some other authority therein specially mentioned), and in the investigation and trial of the offences hereby declared to be within their jurisdiction, shall be guided by the provisions of this Act."

10. In the Code of 1898 (Act 5 of 1898), which is at present in force, the word "offence" has been defined in Section 4 (o) as meaning "any act or omission made punishable by any law for the time being in force"; and Section 21 of the Code of 1861 has been replaced by Section 5 of the new Code, which is as follows:

> "(1) All offences under the Indian Penal Code, shall be investigated, inquired into, tried and otherwise dealt with according to provisions hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

11. Soon after the Penal Code became law the Letters Patent of various High Courts were drafted and the Letters Patent of this Court, Clause 23 is to the following effect:

> "And we do further ordain that all persons brought for trial before the said High Court of Judicature at Allahabad either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal reference or revision charged with any offence for which provision is made by Act No. 45 of 1860 called the "Indian Penal Code" or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts and not otherwise."

12. This provision was made to make it clear that the Penal Code alone was to be applied to all cases provided for in that Code. Thus any other system that may have been followed before was to be deemed to be superseded by the Code which alone was to apply to cases provided for by it.

In this connection, I may mention that Maharaj Nund Coomar was tried and hanged for the offence of forgery under the Law of England applied to Presidency towns, but after 1860 any one guilty of such an offence could be convicted only under the appropriate Sections of the Code.

13. In -- 'Satish Chandra v. Ram Doyal', AIR 1921 Cal 1 (SB) (A), Mookerjee A. C. J. at page 6 has observed as follows:

> "It is in our opinion indisputable that all persons brought before the High Court for trial in the exercise of its original criminal jurisdiction, or in the exercise of its jurisdiction as a Court of Criminal Appeal, Reference or Revision, if charged with an offence under the Penal Code, shall be liable to punishment under that Code and not

> otherwise. This does not militate against the view that the High Court has jurisdiction, like the Supreme Court, to punish for contempt of Court, which, as was pointed out in -- 'Surendranath v. Chief Justice and Judges of High Court of Bengal', 10 Cal 109 (PC) at p. 131 (B) is not an offence under the Penal Code. 'It is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both; that part of the Common Law of England was introduced into the presidency towns when the late Supreme Courts were respectively established by the Charters of justice'." Again, at page 5 he has said: "The two Sections taken together declare that offences defined by special and local laws continue to be punishable as before; in other words, all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws, and the other laws enumerated in Section 5, and these alone and none others are punishable as offences'." (Italics here in ' ' are mine).

14. In -- 'Gopal Naidu v. Emperor', AIR 1923 Mad 523 (2) (C) it was held by a Full Bench that by the codification of the Criminal Law it was intended that a person should be punished under or for an offence under the Indian Penal Code or any special or local law and the rules of Common Law of England were excluded.

15. Personal law of the Hindus, Mohammedans or others relating to crimes is no longer enforceable by the Indian Courts, nor is it permissible to create any new offences by any custom howsoever well established. Questions relating to succession inheritance, marriage or caste or any religious usage or institution, however, have to be decided according to personal law, if there are no legislative enactments to the contrary and, if on those points personal law is silent, the rule for guidance of the Courts is to be the rule of justice, equity and good conscience.

16. That being the legal position that nothing can be treated as a crime unless made so under some statutory provision, the word "law" in the definition of the word "offence" in the General Clauses Act must mean statute law. In other words, the definition in the General Clauses Act, Section 3(37) that " 'offence' shall mean any act or omission made punishable by any law for the time being in force", means made punishable by the Penal Code or by a Statute passed by a competent legislature.

If I am right in my view that "offence" in Article 20(3) of the Constitution must mean what is made an offence by statute, then the answer to the third question must be that a contemner is not a person accused of an offence within the meaning of Article 20(3) of the Constitution unless it can be held that contempt has been made punishable by any law passed by a competent legislature.

17. The only other point that remains to be considered is whether contempt of court has been made an offence under any statute. The history as regards jurisdiction of the High Courts in India to punish for contempt of the High Courts or courts subordinate to them is dealt with at some length by Jenkins C. J. in the case of -- 'Governor of Bengal v. Moti Lal Ghosh', AIR 1914 Cal 69 (SB) (D). The jurisdiction of the High Courts, as court of record, to punish for contempt of the High Court was never doubted.

The lower courts had, however, no such power and the first piece of legislation giving them such power was Act 30 of 1841 for repressing obstructions to justice in certain Courts of the East India Company, and by Section 1 it was enacted that all persons using menacing questions or expressions otherwise obstructing justice in the presence of any Zillah or City Magistrate, Joint Magistrate or other officer under a Magistrate empowered to try a civil case or any superior or inferior court, Civil or criminal, or the East India Company, shall be liable to be fined by the authority whose proceedings were obstructed to a fine not exceeding Rs. 200/- and in default of payment of fine to an imprisonment not exceeding one month, but the proviso to the Section showed that these did not prevent an indictment in Her Majesty's Supreme Court for such an offence. This. Act is not of much importance for our purposes as the High Courts, as Courts of Record, do not derive their jurisdiction to deal with cases of contempt of lower courts under this Act,

18. In the Indian Penal Code there are certain Sections in Chapter 10 dealing with contempt of the lawful authority of public servants and the Sections which deal with contempt of court may be said to be Sections 175, 178, 179, 180 and 228, but offences under these Sections can be tried in accordance with the provisions of the Criminal P. C. and the procedure is prescribed in Sections 480, 481 and 482 of that Code. The High Courts, as Courts of Record, do not derive their jurisdiction to punish for contempt of the lower courts or the High Courts from the Penal Code or the Criminal P. C., nor are the punishments by the High Courts under the Sections of the Penal Code.

19. The Contempt of Courts Act (Act ,12 of 1926), also to my mind, cannot be said to be the Jaw which makes contempt punishable.

Some difference of opinion had arisen on the point whether the High Courts had power to punish for contempt of the lower courts, specially the subordinate criminal courts. The Calcutta High Court in 'Moti Lal Ghosh's case, (D)', had taken the view that the High Court had no such jurisdiction. The Madras High Court in the case Of 'K. Venkat Rao', 12 Ind Cas 293 (Mad) (E), held that the High Court had jurisdiction. In the Bombay High Court in -- 'Emperor v. Balkrishna Govind Kulkarni', AIR 1922 Bom 52 (F) there was some difference of opinion between Sir Norman MacLeod, C. J. and Shah, J.

In the Allahabad High Court in -- 'Hadi Husain v.Nasir Uddin Haider', AIR 1926 All 623 (SB) (G), it was held that the High Court had jurisdiction to take cognizance of cases of contempt of subordinate civil Courts but the question whether it had similar powers to take cognizance of contempt of inferior criminal courts was left undecided.

It was on that account that the Contempt of Courts Act of 1926 was passed for resolving these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of court, as the Preamble of the Act would show. The Act does not define what is contempt and all that it provides is that the High Court will have jurisdiction, power and authority in respect of contempt of subordinate courts, as it has power in respect of contempt of the High Court except in cases coming under Section 2(3) of the Act.

The maximum punishment that can be awarded is, however, laid down in the Act. Act 12 of 1937 merely amends the Contempt of Courts Act of 1926 and provides that the High Court's power of imposing a sentence is the same as that of contempt of subordinate courts.

20. The only other provision to which reference may be made is the Constitution and Article 215 provides that "Every High Court shall be a court of record and shall have all the powers of such a Court including the power to punish for contempt of itself." If, therefore, there could be any doubts on the point, these doubts must be deemed to have been resolved by this Article, which clearly indicates that the High Court possesses the power to punish for contempt of itself as it is a court of record. It cannot be said that this power is conferred by the Legislature. The power, which the High Court already possessed, is recognised by it.

21. In '10 Cal, 109 (B)', their Lordships of the Judicial Committee laid down that "by the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court and the jurisdiction of the High Court to commit for contempt has not been affected by Criminal P. C., 1882.

Their Lordships farther observed that the offences of contempt of Court and the powers of the High Courts to punish it are the same in such Courts as in the superior Courts in England. This is also evident from the fact that the Contempt of Courts Act, 1926, and the Constitution recognise the High Court's power to punish for contempt and do not purport to confer the said jurisdiction.

22. In -- 'Bathina Ramkrishna Reddy v State of Madras', AIR 1952 SC 149 (H), Mukherjea J. has said:

> "It may be pointed out in this connection that although the powers of the High Courts in India established under the Letters Patent to exercise jurisdiction as Superior Courts of Record in punishing contempt of their authority or processes have never been doubted, it was a controversial point prior to the passing of the Contempt of Courts Act, 1926, as to whether the High Court could, like the Court of King's Bench in England, punish contempt of courts subordinate to it in exercise of its inherent jurisdiction. The doubt has been removed by Act 12 of 1926 which expressly declares the right of the High Court to protect subordinate courts against contempt. ....."

So far as I can see, therefore, there is no statute law which makes contempt an offence and punishable as such.

23. The question then arises that if nothing can be an offence unless the law, i.e., statute law, makes it so, how is it that contempt, specially the contempt that is classed as criminal contempt, is punishable by the High Court as Courts of Record.

24. My learned brothers have pointed out that contempt has been divided into two broad heads of criminal contempt and civil contempt. In --'Moti Lal Ghosh's case (D)', Mookerjee, J. thus distinguished the two:

> "The distinction between criminal and civil contempt is of a fundamental character,, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A Civil contempt is failure to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the Instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases."

The learned Judge pointed out that it was conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in some cases but in ordinary cases the line of demarcation was not difficult to determine. As an illustration of civil contempt reference may be made to Order 39, Rule 2, Sub-rule (3), Civil P. C. (Act 5 of 1908).

25. To my mind, even criminal contempt cannot be said to be a crime made punishable by law and it, therefore, does not come under the definition of the term 'offence', in the General Clauses Act though by ancient practice it has been made punishable by Courts of Record. The jurisdiction of the Courts of Record to punish for contempt is based, whatever its old history in England might have been which it is not necessary here to give, on the realisation that it is essential for the proper discharge of their duties and of the courts subordinate to them.

The Courts exist for the determination and the enforcement of the' rights of those who come before it for redress or for determining the guilt and punishing the wrong doer. Anything said or done which is likely to hamper or impede the course of justice or prejudice the case of any party before a Court of law is treated as contempt of Court, as "it affects the due administration of Justice for which alone the Courts exist. In cases of contempt, therefore, the effect on the administration of justice is the main factor on which stress is laid in awarding punishment.

In -- 'AIR 1952 SC 149 (H)', Mukherjea, J. has said:

> "It is well known that the aim of the contempt proceeding is 'to deter men from offering any indignities to a court of justice' and an essential feature of the proceeding is the exercise of a summary power by the court itself in regard to the delinquent." To the same effect are the remarks of the Supreme Court in the case of -- 'Brahma Prakash v. State of Uttar Pradesh', AIR 1954 SC 10 (I):
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> "It admits of no dispute that the summary jurisdiction exercised by superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Courts."

In 'Ex parte Robinson', (1873) 19 Wallace 505 (J), Field J. said:

> "The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of Courts, and consequently to the due administration of justice."

In 'Cartwright's case', (1873) 114 Madss 238 (K), Gray, C. J. observed:

> "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority....,..."

IN this connection it may be pointed out that for similar reasons the legislature has jurisdiction to punish as contempt a breach of the privilege of the legislature. Articles 105 and 194 of the Constitution define the powers, privileges and immunities of Parliament and the State legislatures in Part A States and its members and Clause 3 of the two Articles provide that in other respects the powers, privileges and immunities of the members & of the legislatures shall be unless otherwise defined by law, the same as that of the House of Commons.

It is not necessary to go into the history how the power to punish as contempt for breach of the privilege came to be exercised, but it is now well recognised in England that:

> "Such powers are essential to the authority of every legislature. The functions, privileges and disciplinary powers of a legislative body are thus ciosery connected. The privileges are the necessary complement of the functions, and the disciplinary powers of the privileges." (See May's Parliamentary Practice, 16th Edn. 41). At page 89 of the same book it pointed out that "It is necessary to emphasize the fact that the power possessed by each of the Houses is a general power of committing for contempt analogous to that possessed by the superior courts, and is not restricted to cases in which the privileges enjoyed by the House, in its collective capacity or by its Members as such, have been violated, lest a contrary inference should be drawn from the fact that in recent years nearly all the offences that have been punished by either House have been adjudged to be breaches of privilege."

It is not necessary to go into this matter further not to deal with the question what are the breaches of the privileges of Parliament or of its members, These powers possessed by the legislatures in India are for the proper carrying out of its functions as is the power possessed by the courts for the proper carrying out of their work.

26. Though, therefore, the provisions of Section 5(2), Criminal P. C., or Section 5, Oaths Act, or Article 20(3) of the Constitution may not apply to the case of contempt punishable by the High court, as a Court of Record, in all cases of criminal contempt the summary procedure adopted by the Court, as far as possible, be such that it should not militate against the rules of natural justice. In such cases, to my mind, the burden must be put entirely on the prosecution to prove its case, as was

done by Jenkins, C. J., in 'Moti Lal Ghosh's case, (D)' and if it has not been proved by the prosecution that contempt was committed by the contemner, he should get the benefit of such a finding. It is open to the contemner to leave it to the prosecution to prove its case, but where a contemner enters into a defence and files an affidavit, or a document on which he wants to rely, or goes into the witness-box, he cannot object to his being subjected to cross-examination.

27. On a careful consideration I am of the opinion, in agreement with my learned brothers, that a contemner being tried by the High Court under its inherent jurisdiction, as a Court of Record, is not a person accused of an offence within the meaning of Article 20(3) of the Constitution.

28. The only other question that remains to be answered is the first question which is as follows:

> "(1)(a) Whether contempt of court is an offence within the meaning of Section 5(2), Criminal P. C.? (b) If it is, whether the procedure prescribed by that Code for the investigation, enquiry and trial of an offence must be followed?"

In view of what I have already said while dealing with the third question it must follow that contempt of court is not an offence within the meaning of Section 5(2), Criminal p. C. I have already quoted Section 5(2) which deals with offences created by special or local law, which, I have already said, must mean enacted law. The second part of the question, therefore, does riot arise.

Desai, J.

29. The following questions have been referred to us by a Division Bench, before which proceedings for contempt of court are pending against the opposite parties:

> "(1)(a) Whether contempt of court is an offence within the meaning of Section 5(2), Criminal P. C.;
>
> (b) If it is, whether the procedure prescribed by that Code for the investigation, inquiry and trial of an offence must be followed:
>
> (2) Whether the alleged contemner is an accused person within the meaning of Section 5, Oaths Act, 1873;
>
> (3) Whether the alleged contemner is a person "accused of an offence" within the meaning of Article 20(3) of the Constitution, and can he, if he voluntarily makes an affidavit, be cross-examined upon it."

30. The proceedings were started on an application made on 7-10-49 by the City Magistrate, Allahabad, through the Additional District Magistrate under Sections 2 & 3, Contempt of Courts Act, 1926. A case under Section 145, Criminal P. C. was pending in his court between Harjiwan Das Nagar and opposite party No. 1. During its pendency the opposite parties are said to have published a pamphlet, which is alleged to interfere with the fair trial of the case. When the publication of the

pamphlet was brought to the notice of the City Magistrate by Harjiwan Das Nagar, he applied for contempt proceedings against the opposite parties. When this Court issued a notice to them, opposite party No. 1 appeared on 1-5-50 and filed an affidavit stating that he had nothing to do with the publication or printing or circulation of the pamphlet, that he never sent a copy of it to the City Magistrate or his staff and that, in any case he was tendering unqualified apology to the court if it held that he was guilty of contempt.

The other opposite party also filed an affidavit on the same day. The Government Advocate informed the court that he desired to cross-examine opposite party No. 1 on the affidavit sworn by him and the case was adjourned to 16-5-50. On 16-5-50 the opposite party challenged the right of the Government Advocate to cross-examine him. He relied upon a decision of this court in -- 'Emperor v. Benjamin Guy Homiman', AIR 1945 All 1 (L). 'The learned Judges hearing the matter doubted the correctness of that decision and referred the questions to us.

31. Section 5(2), Criminal P. C. runs as follows:

> "All offences under any other law shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences".

32. "Offence" is defined in Section 4(o) of the Code to mean "any act or omission made punishable by any law for the time being in force". It was argued on behalf of the opposite party that contempt of court is an act made punishable by the Contempt of Courts Act, 12 of 1926, that consequently it is an offence within the meaning of the Code and that it must be investigated, enquired into and tried according to the Code.

Section 342 of the Code lays down that no oath shall be administered to the accused. The word "accused" is not defined in the Code, but if contempt of court is an offence within the meaning of the Code, there would be no difficulty in holding that the contenmer is an accused within the meaning of Section 342. The word, "accused" evidently means a person accused of an offence as defined in the CODE.

On behalf of the learned Government Advocate, it was contended that contempt is not an act made punishable by the Contempt of Courts Act, that it is made punishable under the inherent and the supervisory powers of the court and that the word "law" in the definition of "offence" does not include the inherent and the supervisory powers. The Contempt of Courts Act of 1926 was an Act to define and limit the powers of certain courts in punishing contempts of courts. It was enacted to resolve the doubts that had arisen as to the powers of a High Court to punish contempts of subordinate courts. Section 2 of it provided that High Court would have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to them as they had and exercised in respect of contempts of themselves and that no High Court could take cognizance of contempt of a subordinate court where it was an offence punishable under the Penal Code.

Section 3 provided that contempt of court might be punished with simple imprisonment for a term extending up to six months or with fine or with both. The intention oi the legislature was that the limit of punishment laid down in Section 3 was for contempts of High Courts and subordinate courts both and this was made clearer by an amendment of the Act in 1937.

On the passing of the Constitution, new High Courts were established. Article 214 lays down that there must be a High Court for each State. Article 215 lays down that every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. The Supreme Court was established under Article 124 and Article 129 made it a court of record and conferred upon it all the powers of such a court including the power to punish for contempt of itself.

With the establishment of new High Courts the Contempt of Courts Act of 1926 became obsolete and in 1952 another Contempt of Courts Act, Act No. 32 of 1952, was enacted. That is the Act now in force. Section 3 of it provides that a High Court can punish contempts of subordinate courts "in accordance with the same procedure and practice..... as it has and exercises in respect of contempts of itself".

Section 4 provides that contempt of a High Court or of a subordinate court can be punished with imprisonment extending up to six months and fine extending up to two thousand rupees.

33. In the well-known case, -- 'R. v. Almon', (1765) Wilm 243 (M), Wilmot, J. said:

> "The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage, as supports the whole Fabric of the Common Law; it is as much the 'lex terrae', and within the exception of Magna Charta, as the issuing of any other legal process whatsoever".

Cooley, in his "Constitutional Limitations", 8th edition, Vol. 1, p. 668, footnote 2, writes:

> "The power to punish contempts summarily is incident to courts of record, and the courts have generally held that cases of contempt are not triable by jury. The object of the power would be defeated in many cases if they were."

Sutherland, J. said in -- 'Michaelson v. United States', (1924) 69 Law Ed 162 (N):

> "That the power to punish for contempts is inherent in all courts * * * may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power." According to 'Corpus Juris', Corpus

> Juris Secundum, Vol. 17, paragraph 43: "the power that courts possess for contempt does not depend upon constitutional, nor, at least as to courts established by constitutional provisions, upon legislative grants but it, on the broad ground of public policy, is, and was at Common Law, inherent, it being necessary for self-protection and for the execution of judicial functions. It is an essential auxiliary to the due administration of law."

In -- 'Bessette v. W. B. Conkey Co.', (1903) 194 US 324 at p. 326: 48 Law Ed 997 at p. 1001 (O), Brewer, J. said:

> "The power to punish contempt is inherent in all courts."

He quoted on page 1005 of the Lawyer's Edition from previous authorities stating that "it has always been one of the attributes -- one of the powers necessarily incident to a Court of Justice that it should have this power of vindicating its dignity of enforcing its orders of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power"

> and that "the power of a court to make an order carries with, it the equal power to punish for disobedience of that order".

In -- '10 Cal 109 (B)', Sir E. Peacock stated at p. 131 that contempt of court by defaming the Judge is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both and that the High Courts in India being superior courts of record, have the same power by virtue of the Common Law of England.

The High Courts in India have powers of superintendence over subordinate courts and these powers include the power to punish for contempts of subordinate courts. Thus a High Court derives the power to punish for contempts of courts from its own existence or creation; it is not a power conferred upon it by any law. The Act of 1928 merely recognised the existence in every High Court of the power to punish for contempts of subordinate courts.

The Clayton Act prescribed a special procedure and punishment for trial of contempts, consisting of wilful disobediance of a lawful writ, process, order, rule, decree or command of any district Court of the United states or of any court of the District of Columbia, if the acts of contempt were also liable to be punished as criminal offences. Mr. Justice McReynolds said as regards the Act in -- 'Myers v. u. S.', (1923) 68 Law Ed 577 at p.579 (P):

> "To disobey a judicial order is not declared criminal by the Clayton Act, it recognizes that such disobedience may be contempt, and having prescribed limitations, leaves the court to deal with the offender".

34. Exactly the same is the position of our 1926 Act.

35. "The legislature cannot define what shall be considered contempt of court"; see Cooley, Vol. 1, p. 181. In the case of 'Bessette', at p. 1005 (O), Mr. Justice Brewer re-affirmed the view taken by the Supreme Court in 're Debs', (1899) 158 US 564 (Q), that the "inquiry as to the question of disobedience has been from time immemorial, the special function of the court", that it is not technical rule and that "to submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency".

Every court of record in Englana "is the sole and exclusive Judge of what amounts to a contempt of Court"; -- 'Rainy v. The Justices of Sierra Leone', (1852-53) 8 Moo PC 47 at p. 54 (B).

That is why the Judicial Committee denied to itself the power to interfere with an order of a court of record imposing a fine for contempt. That decision was referred to as an authority by the Judicial Committee in the case of 'Surendra Nath Banerjee, (B)', and was followed by the Chief Court of Avadh in -- 'P.L. Jaitley v. Sir Iqbal Ahmad', AIR 1945 Oudh 266 (S). It is thus clear that it is not law that has made contempts of courts punishable, or conferred upon a High Court the power to punish for contempts.

36. What the Constitution (Article 215) and the Contempt of Courts Acts of 1926 and 1952 have done is simply to recognise that contempts are punishable, and punishable by High Courts under their inherent and supervisory powers, and to regulate these powers.

It was expressly stated in the preamble of the Act of 1926 that it was enacted to define and limit the powers exercisable by High Courts in punishing contempts. In the face of this statement in the preamble it cannot be argued that the Act was enacted to create the powers or that contempt is made punishable under a law since 1926. The Act of 1920 not only did not define contempt of court but also did not contain any provision making it punishable. "Contempt" was not defined in the Act, not because it was difficult, or not necessary, to define it but because the legislature had no power to define it, a court of record having the exclusive power to define and' determine what amounts to contempt. Though the words used in Section 2 were "shall have and exercise", it did not confer powers upon a High Court but simply recognised their existence.

Some High Courts were exercising those powers, but others thought that they did not have them and Section 2 confirmed that they had them. Section 3 by itself did not make contempt punishable; it assumed that it was punishable and only fixed limits to the punishment that could be imposed. The word used, was "may" and not "shall". Had the legislature made contempt punishable for the first time by enacting that Section, it would have used the word "shall", as it has used in punitive Sections of the Penal Code.

Its object behind its enactment was expressly to limit the powers exercisable by a High Court in punishing contempts of courts. If the real nature of the power to punish for contempts is understood, there should be no difficulty in understanding that the Acts did not by themselves make contempts punishable. As the power is inherent and incidental and as it is witnin the exclusive jurisdiction of courts of record to decide what amounts to contempt of court, there was nothing to be done by the legislature except to recognise it and regulate its exercise.

The position in India is not different from that in America which is described in 'Corpus Juris Secundum, Vol. 17, p. 58' in the following words: "Except where the Constitution otherwise provides, the legislature may not destroy or abridge, or limit, as by definition, the inherent power of courts to punish for contempt. Although there is authority to the contrary, the legislature may however, regulate the use of the power, and in some jurisdictions, ...the punishment that may be imposed.

Statutes purporting to grant a court power to punish acts which it has the inherent power to punish are simply declaratory of the Common Law, and such statutes, as well as those defining contempts, or regulating contempt proceedings, do not limit the inherent power to punish". In 'Michaelson's case, (N)', Sutherland, J. said at P. 167, with regard to the power to punish for contempts:

> "The attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted."

37. With great respect to the learned Judges deciding the case of 'B. G. Horniman, (L)', I do not agree with their conclusion (though it is approved by Chitaley in his commentary on Criminal P. C. and Tek Chand and Ram Chandra in their books on Contempts of Court), that contempt is an act made punishable under a law for the time being in force within the meaning of Section 4(o) of the Code nor with the learned Judges who decided -- 'P. L. Jaitley v. Sir Iqbal Ahmad', (S) and respectfully agree with the learned Judges of the Bombay High Court who decided in 're B. G. Horniman', AIR 1944 Bom 127 (T).

The Allahabad case was an off-shoot of the Bombay case against B. G. Horniman, A Bench of this Court, purporting to act under Criminal P. C., issued a warrant of arrest against B. G. Horniman who was residing in Bombay, for contempt of this Court. B. G. Horniman was arrested by the police of Bombay in execution of the warrant and was released on bail by the Chief Presidency Magistrate. He challenged the order of the Chief Presidency Magistrate on the ground that the alleged contempt was not an offence within the meaning of the Code and that no warrant of arrest could be issued against him by this Court to the police of Bombay. The challenge was upheld by the High Court of Bombay.

Beaumont, C. J. relying upon the case of --'Surendra Nath Banerjee (B)', held that contempt of Court is not an offence which is dealt with by Eny law within the meaning of Section 5(2) of the Code. The learned Chief Justice, with the concurrence of Sen, J., discharged the bail bonds executed by B. G. Horniman. When the matter of the discharge of the bail bonds was put up before a Bench of this Court, it disagreed with the decision of the learned Chief Justice of Bombay, said that contempt of the High Court is an act punishable under a law for the time being in force and that since the passing of the Contempt of Courts Act, 1926, the decision in -- 'Surendra Nath Banerjee's case (B)', was no longer in force The learned Judges did not explain what happened to the inherent powers which this Court had at the time of the passing of the Act in 1926 and why in spite of their existence, statutory provision was made for the exercise of those powers, They remarked on page 4 that the offence of contempt of the High Court "can be enquired into according to the provisions of that Code as set out

in Section 5(2)". The word used in Section 5(2) of the Code is "shall" and how that word was changed into "can" is not explained.

If contempt of court were an offence within the meaning of the Code, it was bound to be investigated, enquired into and tried according to the Code, there being no enactment in force regulating the manner and place of investigating, enquiring into or trying the offence. Common law is not an enactment. The Act of 1926 did not regulate the manner or place of investigating, enquiring into or trying contempts of courts. It laid down that a High Court should adopt the same procedure and practice for punishing the contempt of subordinate courts as it adopts for punishing its own contempts but did not in any manner specify or regulate the procedure and practice. Not a single authority was cited before us laying, down that the procedure for the punishment of, contempts of courts is governed by the Code.

On the other hand, besides the authorities already mentioned there is -- 'In re K. L. Gauba' AIR 1942 Lah 105 (U), in which Pull Bench, of the Lahore High, court held that the Code is not applicable to summary proceedings for punishing contempts. A Pull Bench of this Court held in 'AIR 1928 All 623 (G)', that this Court has jurisdiction to deal with a libellous attack upon it in a summary manner. Sulaiman, J. said in that case that inherent power of preventing 'brevi manu' attempts to interfere with the administration of Justice in the subordinate courts must exist in every High Court because, among other facts, the ordinary remedy under the penal laws of the land, meant for offences against officers, in their individual capacity, would, if resorted to, be cumbrous and cause considerable delay and that dealing out swift justice in a summary proceeding is the only way of protecting them effectively. As stated in Oswald's Contempt of Courts, 3rd edn., p. 8, "the usual criminal process to punish contempts was found to be cumbrous and slow, and therefore the Courts at an uncertain date assumed jurisdiction themselves to punish the offence summarily, 'brevi manu', so that cases might be fairly heard, and the administration of justice not interfered with."

Wilmot, J. said in the case of 'Almon, (M)', that contempt of court "calls out for a more rapid & immediate redress than any other obstruction whatsoever". It is said in 'Corpus Juris', Corpus Juris Secundum, Vol. 17, p. 72' that the procedure in contempt proceedings is governed by Common Law rules & is not restricted to the procedure prescribed by the criminal law. The learned Judges themselves did not say that they were bound to follow the procedure laid down in the Code. If the proceedings for contempts of courts are not governed by the Code, it necessarily follows that Section 5(2) of the Code is not applicable and that contempt of court is not an offence within the meaning of the Code.

Collister, J. remarked on page 4 that contempt was not defined in the Act just as insult is not defined in Section 228, Penal Code. But while Section 228 expressly makes the act of offering any insult punishable, when it was not punishable previously, there was nothing in the Contempt of Courts Act to make the act of contemning courts punishable for the first time.

I have already said that contempt was not defined in the Act because the Act did not purport to make contempt punishable and it was conceded to be 'ultra vires' the legislature to define contempt in the case of 'P. L. Jaitley, (S),' the learned Judges held that contempt proceedings are of a criminal

nature and that contempt is an "offence". They did not refer to the definition of "offence" in the Code and seem to have described contempt as "offence" in a general way.

Their Lordships of the Judicial Committee also had described contempt as an offence in a general way in the case of 'Surendra Nath Banerjee, (B)'. The learned Judges did not express any opinion on the decision in the Bombay case of 'B. G. Horniman, (T)'.

38. My answer to question l(a) is "No". The other part of the question does not arise. If the first part were answered in the affirmative, the second part also would have to be answered in the affirmative.

39. Article 20(3) of the Constitution lays down that no person accused of an offence shall be compelled to be a witness against himself. This provision is based on the fifth amendment to the American Constitution stating that no person shall be compelled in any criminal case to be a witness against himself. The word "offence" is interpreted in the General Clauses Act in exactly the same language as is used in Section 4(0) of the Code. The General Clauses Act applies in the interpretation of the Constitution, vide Article 367. As contempt of court is found to be not an offence within the meaning of the Code, it cannot be an offence within the meaning of Article 20(3) of the Constitution also.

40. Contempt has been divided into civil contempt and criminal contempt. It cannot be disputed that the contempt that we are considering is criminal contempt; the object of the proceedings is not to enforce compliance with any order made by a court but to punish for interference with the administration of justice by a court.

In -- 'Wellesley v. The Duke of Beaufort', (1831) 2 Buss & M. 639 (V), the Lord Chancellor said:

> "Now convictions, and the sentences that follow upon them, are of two sorts; either formally, upon trial, by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formally, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence".

Thus the Lord Chancellor treated contempt as an offence, holding a person guilty of contempt as convicting him and punishment for contempt as a sentence. The Supreme Court of United States denies to itself the jurisdiction to entertain an appeal from an order of commitment for contempt on the ground that the order is one in a criminal matter; in -- 'City of New Orleans v. The N. Y. M. Property Co.', (1874) 87 US 387 (W) it is stated that contempt of court is a specific offence and that imposition of fine for contempt of court is a judgment in a criminal case.

Brewer, J. observed in the case 'Bessette' at p.1001 (O):

> "A contempt proceeding is sui generia. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty is punished."

41. He quoted with approval the following from the opinion of sanborn J. in 're Nevitt' 54 C. C. A.622 (X);

> "Proceedings for contempts are of two classes,
>
> -- those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

The contempt that was being considered by Brewer, J., consisted of violation of a perpetual injunction decreed by a court. It was treated as coming more fully within the punitive class than within the remedial class. It was regarded like misconduct in a court room or disobedience of a subpoena.

According to Corpus Juris (11), p. 8:

> "Although a contempt of court is in a sense sui generis, it is commonly regarded as in the nature of a crime although not necessarily as a criminal offence. However, criminal contempts ... .are offences against organised society and public justice..... .and the proceedings to punish it (them?) are punitive".

When their Lordships of the Judicial Committee remarked in the case of 'Surendra Nath Banerjee, (B)', that a contempt of a High Court by a libel is an "offence" which by the Common Law of England is punishable by the High Court in a summary manner, they meant that it is a criminal wrong.

The Contempt dealt with in -- 'O'shea v. O'shea', (1890) 15 PD 59 (Y) consisted of publishing in a newspaper an article commenting on the conduct of the petitioner in a pending action against his wife for dissolution of marriage. The contempt proceedings were held to be a "criminal cause or matter". Cotton, L. J. pointed out that there are many contempts that are not of a criminal nature, for instance, when a man does not obey an order of a court made in some civil proceeding, to do or to abstain from doing something. Lindlay, L. J. had no doubt that:

> "The proceeding is a summary conviction for a criminal offence" (page 64), In -- 'Gompers v. United States', (1913) 58 Law Ed 1115 (Z) Holmes, J. remarked at page 1120 that if contempts "are not criminal, we are in error as to the most fundamental characteristics of crimes". Though contempt may be a crime, it is not an offence, ss that word is understood in our Constitution. The provision in Article 20(3) is differently worded from that in the Fifth Amendment. Therefore, the dictum in --

'Gompers v. Buck's Stone and Range Co.', (1910) 55 Law Ed 797 at p. 807 (Zl) that a contemner may not be compelled to be a witness against himself cannot be applied in India.

42. Contempts are divided, into civil and criminal contempts, but it does not follow that they are to be dealt with differently in every respect and that the proceedings in one are governed by Civil P. C. and those in the other, by Criminal P. C. The division of contempts into two classes is for particular purposes only.

For example, there is a right of appeal or review from an order passed in a civil contempt while an order passed in a criminal contempt is held to be final. This was made clear in the case of 'Bessette, (O)'. The Crown has the power to grant pardon or not according as the contempt is criminal or civil; vide Oswald's Contempt, p. 4. The rule of benefit of doubt prevails in a criminal contempt, but not in a civil contempt.

In some cases it is laid down that the sworn answer of the accused fully denying the alleged contempt is conclusive in a criminal contempt taut not in a civil contempt, vide 'Corpus Juris (11)', at p. 108. - While there exists a difference between civil and criminal contempts as regards these matters, no authority exists laying down that there is a difference as regards the procedure also. All contempts punishable under the inherent and the supervisory powers, civil or criminal, are governed by the same procedure.

In -- 'Gompers V. Buck's Stone and Range Co., (Zl)', Lamar, J. referred to "many elements of similarity in procedure and punishment" between the two classes. McReynolds, J. made it clear in the case of 'Myers, (P)', at p. 580 that the proceedings to punish contempts are not "criminal prosecutions"' within common understanding. The fact that the contempt in the instant case was criminal contempt does not attract the provision in Article 20(3) any more than it attracts the provision of Section 5(2) of the Code. A contemner is not "accused of an offence" and cannot claim immunity from being sworn as a witness.

43. The privilege against self-crimination is merely an option of refusal, not a prohibition of enquiry. When an ordinary witness is on the stand and a criminating fact is desired to be proved through him, the question may be asked, and it is for him then to say whether he would exercise the option given him by the law. It cannot be known beforehand whether he would refuse. To prevent the question would be to convert the option into a prohibition. A witness cannot declare himself to be incompetent to testify as a witness, but must be sworn and can claim his privilege only when he has been asked a question, the answer to which would tend to incriminate him.

But the case of an accused who offers to give evidence in defence is different. The privilege permits him to refuse answering any question whatever in the cause, on the general principle that it tends to criminate. See Wigmore on Evidence, Vol. 8, 3rd Edn. pp. 388, 391 and 392. Any fact which is relevant to an enquiry whose sole or essential object is to charge a specific crime upon the accused is an incriminating fact.

Therefore, an accused in a criminal case is exempted by the privilege from all answers whatsoever; Wigmore, p. 356. When Phipson in his treatise on Evidence said on p. 216 that the prohibition is against self-incrimination and not against entry in the witness box, he evidently referred to the case of an ordinary witness and not to that of an accused entering the witness box on behalf of himself or a co-accused. It is said by Willoughby on the Constitution of the United States, Vol. 2, p. 1165, that if an answer would tend merely to disgrace but not to incriminate the witness, the privilege does not apply, and that if, however, the answer is one which can have no bearing upon the case except to impair the credibility of the witness, he may refuse to answer. Therefore, if the opposite party were "accused of an offence", he could refuse to be sworn altogether (provided he had not waived the privilege).

44. The privilege against self-crimination can be waived.

> "It is well established that a witness having voluntarily taken the stand, may be compelled to disclose the whole facts regarding the matters concerning which he has testified;" (Willoughby on page 1166).
>
> "It has never been doubted that the privilege like all privileges, is in itself waivable". (Wigmore, Vol. 8, p. 435).
>
> An ordinary witness waives the privilege by exercising his option of answering.
>
> "The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question for the reason that no relevant fact could be inquired about that would not tend to criminate him. On this very hypothesis then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all." (ibid pp. 440-41).
>
> Wigmore further observes on p. 441 that:
>
> "The spirit and the purpose of the privilege cannot be violated by any questioning after the accused has once voluntarily taken the stand".

There is no unanimity about the effect of the waiver, but the greatest support according to Wig-more (pp. 445-449) is for the view that the waiver extends to all matters relevant to the issue meaning thereby to exclude collateral matters, i.e., facts merely affecting credibility.

If the opposite party were entitled to the privilege conferred by Article 20(3) he had to exercise the privilege at the very outset and should not have sworn the affidavit at all. By swearing the affidavit on oath, he waived the privilege. Swearing the affidavit was tantamount to entering the witness box. He was sworn once and that was enough to make him forfeit his privilege.

45. When the opposite party swore the affidavit and filed it in court and the court accepted it, he became liable to be cross-examined on the affidavit. The other party had a right to cross-examine him on the affidavit. He could not insist upon the affidavit being treated as evidence without being subjected to cross-examination. The opposite party's counsel said that the affidavit may not be read in the case at all. I think it is too late for him to withdraw the affidavit.

46. In 're Quartz Hill etc., Company, Ex parte Young', (1882) 1 Ch D 642 (Z2), Brett, L. J. said:

> "I think it most important that no person who has taken a step with a view to gaining an advantage should be at liberty to withdraw it if he finds that it will not answer. Lord Hatherley accordingly held that where a party had proposed himself as a witness and filed an affidavit, he could not, when threatened with cross-examination, withdraw the affidavit and escape cross-examination. I cannot imagine anything more calculated to bring the course of justice into contempt than to allow a person to file evidence which if there is no cross-examination makes in his favour, but which he knows will break down on cross-examination, and then to withdraw it if he finds that cross-examination is threatened."

He said that it was a principle applicable to proceedings before every tribunal.

47. In -- 'Clarke v. Law', (1855) 2 K & J 28 (Z3), Sir W. Page Wood V. C. said:

> "When a party gives notice that he intends to use at the hearing an affidavit made by him, he is both a party and witness. If he had filed a new affidavit, he could not say that he would not use it. He had propounded himself as a witness, and cannot be allowed, if not cross-examined, to use his affidavit, but if threatened with cross-examination to withdraw it; having tendered himself as a witness, he is bound to submit to cross-examination."

Here the opposite party had clearly used the affidavit made by him. Therefore he could not say that he was withdrawing it and should not be examined.

My answer to the third question is as follows:

> "No. He can be cross-examined on the affidavit voluntarily made by him."

48. Section 5, Oaths Act requires oath to be administered to all witnesses i.e., all persons who may lawfully be examined or give evidence before any court. There is an express provision saying that this does not mean that oath should be administered to an accused in a criminal proceeding.

I think the word "accused" and "criminal proceeding" must be understood in the same sense in which those words are used in Criminal P. C. A contemner, even though the contempt committed by him is of criminal nature, is not an accused in the narrow sense in which the word is used in Criminal p. c. The proceedings against him may be criminal proceedings for certain purposes but

not for the purpose of deciding whether an oath should be administered to him or not. I have already shown that contempt proceedings are special proceedings not governed by any rule. I have also referred to the passage in 'Corpus Juris (11)' at p. 108 suggesting that a contemner can file an affidavit on oath. The opposite party has already sworn an affidavit.

If Section 5, Oaths Act, prevented an oath being administered to him, he has not explained how he swore the affidavit. He is sought to be cross-examined on the affidavit itself and if the Oaths Act did not stand in the way of his swearing the affidavit it cannot stand in the way of his being administered oath again in the witness-box. My answer to the second question is "No".

Mukerji, J.

49. This reference to a Pull Bench arises out of certain contempt proceedings which were initiated against the opposite parties on a petition made to this Court by a court subordinate namely, the court of the City Magistrate, Allahabad.

50. It is not necessary for the purposes of this reference to go into the facts of the matter in any detail. The Bench which made the reference formulated three questions and has sought the answers to those questions from us. The questions formulated were these:

> "(1)(a) Whether contempt of court is an offence within the meaning of Section 5(2), Criminal P. C., (b). If it is, whether the procedure prescribed by that Code for the investigation, inquiry and trial of an offence must be followed;
>
> (2) Whether the alleged contemner is an accused person within the meaning of Section 5, Oaths Act, 1873;
>
> (3) Whether the alleged contemner is a person accused of an offence within the meaning of Article 20(3) of the Constitution, and can he, if he voluntarily makes an affidavit, be cross-examined on it."

The opposite parties, it appears, filed an affidavit in these proceedings in support of their case. The Government Advocate wished to cross-examine the opposite parties in respect of that affidavit a right which he possessed under the general law. On behalf of the opposite parties objection was taken to their being put on their oath and thereafter subjected to cross-examination.

The question, therefore, that arose was whether the opposite parties were justified in law in talcing the stand that they did in regard, to the right which was asserted, of cross-examination, by counsel on behalf of the State. The true answer to the question depends on the answers which are to be returned to the questions which were formulated by the Bench hearing the petition and which questions I have already quoted in full above.

51. The proceedings which have given rise to this reference to the Full Bench were proceedings in contempt. The contempt jurisdiction or the jurisdiction of the High Court to punish contemners has

an ancient history. This court exercised this jurisdiction upto 1950 by virtue of its being a Court of record; there was no statute or any other written law which conferred this jurisdiction on this Court directly.

In 1950, when we had our Constitution, this Court, along with all other High, Courts in the country, had this right recognised by Article 215 of the Constitution. The words of this Article are these:

> "Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

52. Even if this right had not been specifically, recognised by the Constitution, the right of the High Courts, which were Courts of record, would not have been impaired inasmuch as the existing jurisdictions of the High, Courts, unless altered or curtailed by appropriate law, were to continue, even on the coming into force of the Constitution.

It may here be pointed out that the jurisdiction under which High Courts act for punishing contemners is a very special and a very important jurisdiction of these Courts. By a long course of precedents the procedure followed in the exercise of this jurisdiction had become so thoroughly settled that it enjoyed the same legal status as other procedural law of the land contained in statutes.

53. No statute law from the earliest times to the present day has ever defined or even attempted to define "contempt". It was always for the courts, when faced with any particular case, to determine whether or not the facts alleged amounted to contempt. Precedents became the only guide for determining and knowing the meaning of contempt. The action of Legislatures in not attempting to define contempt or hedge in the jurisdiction of High Courts to punish for contempt by cumbrous rules of procedure was undoubtedly based on great wisdom. It has always Been a matter of fundamental importance that the streams of justice should flow unimpaired and uncontaminated by any influences, big or small, and that the majesty of the law and the purity of its administration should be protected and guarded ruthlessly and zealously wss of the highest importance for the security and welfare of any properly constituted State. Conferring powers on the highest courts of the land to punish people who acted in derogation and in obstruction of their dispensing justice the noblest attitude of the State, was, therefore, based on the supremest wisdom of man.

54. A contemner was looked upon by the law not as an accused in the sense in which a breaker of the law is looked upon, but he was looked upon as an offender who stood more or less in a class by himself.

In England, from where courts in India borrowed the entire law of contempt, contempt was divided into two classes. One class was given the denomination of criminal contempt while another class of contempt was designated civil contempt. This is also indicative of the fact that contempt was not treated as an offence within the meaning of the criminal law.

55. The first question which has been referred to us is concerned with an answer as to whether contempt of court is an offence within the meaning of Section 5(2), Criminal P. C. Section 5(2) of the

Code provides for the trial of offences against other laws. If contempt can truly be said to fall within the definition of the word "offence" in the Code then it would be difficult to say that the trial of a contemner for contempt would not have to be carried out in accordance with the procedure laid down by Criminal P. C., but if "contempt" does not come within the definition of the word "offence" as provided for by Section 4(1)(o), Criminal P. C. then obviously Section 5(2) of the Code would not, in terms, apply. "Offence" has been defined by Section 4(1)(o) of the Code in these words:

> " 'offence' means any act or omission made punishable by any law for the time being in force: it also includes any act in respect of which a complaint may be made under Section 20 of Ehe Cattletrespass Act, 1871:"

56. That contempt is an act is undoubted. Further that the act is punishable is also undoubted, but what is not so undoubted is the fact that it is made punishable by "any law for the time being in force". As has been pointed out earlier, there is no statute law which makes the offence of contempt or defines it and makes it thereby, punishable.

The question then is whether the word "law" in the definition refers to statute law only or does it include all that other law which though not contained in statutes yet has the same force and binding effect as law contained in statutes. The Criminal P. C. does not define "law". The General Clauses Act has not defined "law" as such but has defined "Indian Law". It cannot be contended with any force that we are not in effect concerned with "Indian law" when we are attempting to find the true meaning of the word "law" as used in Section 4(1)(o), Criminal P. C. The definition of "Indian law" in the General Clauses Act is in these words:

> " 'Indian law' shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act:"

57. From the aforesaid definition it is manifest tnat "Indian law" which must be the true meaning or the true connotation of the word "law" in Section 4(1)(o), Criminal P. C., means written law. It is appropriate to notice at this stage that there is a class of contempts which have been catalogued as "offence" in the Penal Code, namely the offences which have been provided for by Sections 175, 178, 179, 180 and 228, Penal Code.

Section 480, Criminal P. C. makes provision for the trial of certain cases of contempt and these cases, it would be noticed by a reading of the Section, are cases of those contempts which fall within the ambit of Sections 175, 178, 179, 180 and 228, Penal Code. Sections 481 and 482 are analogous and complementary provisions to Section 480, Criminal P. C. The fact that the Penal Code makes certain types of contempts offences and that Criminal P. C. prescribed a procedure for the trial of these offences, a procedure which is different from the procedure which has to be followed for the trial of other offences covered by Penal Code, is clearly indicative of the fact that the framers of the

Codes wished to make statute law in regard to only certain types of contempts and they did not consider it desirable to cover the entire field.

58. It may be appropriate also to notice at this stage that there is a type of contempt which is provided for by Civil P. C., namely, by Order 39, Rule 2(3), where provision has been made for punishing a person disobeying an injunction granted by a court.

59. In 1914 a bill was introduced in the Indian Legislative Council, as it then was, with the object of increasing the categories or classes of contempts of courts which could be punished as offences under the Penal Code, but this proposed legislation did not materialize. Instead, however, the Legislature passed an Act, Act 12 of 1926, called the Contempt of Courts Act.

The reason for this enactment was that there was a conflict in India in regard to the power of the High Courts to punish for contempts of courts subordinate to them. The Madras and the Bombay High Courts held the view that they possessed the power to protect their subordinate courts against contemners and that they had the right to punish such contemners while the Calcutta High Court took the contrary view. Doubt was also expressed in certain quarters as to whether or not the courts of judicial commissioners had the power to punish for such contempts.

The Contempt of Courts Act 1926 resolved these doubts and made certain provisions. This Act, however, did not attempt a definition of "contempt". By Section 2 of the Act the power of the superior courts to punish for contempts was recognised. The same Section by Sub-section (2) stated that "a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in Sub-section (1)."

By Section 3 a limit on the power to punish for contempt was placed.

The provisions of this Act, which consists only of three Sections, indicate that it neither made contempt an offence nor provided for any punishment, in terms, for such an offence.

60. Section 1(2), Criminal p. C. lays down the extent of the Code. This Section is in these words:

> "It extends to the whole of British India; taut, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force or shall apply to....."

61. From the above it will be clear that "special law", "any special jurisdiction", and "any special form of procedure prescribed" were excepted from the purview of Criminal P. C.

62. If law in Section 5(2), Criminal P. C. means only statute law, as I think it does, then the procedure prescribed in the Code cannot be made applicable to contempt proceedings not falling under Sections 175, 178, 179, 180 and 228, Penal Code.

If, on the other hand, the meaning of law is wide enough to include laws, other than statute law, then under the provisions of Section 1(2) the reference to the form of procedure prescribed by "any other law" cannot also be confined to statute law and would embrace the procedure which has been followed by the courts dealing with certain classes of contempts, a procedure which is now well established by practice, and some of which are laid down in the rules of the Court.

63. The jurisdiction under which this Court acts when it punishes a contemner is a "special jurisdiction" which has been 'conferred on it or is inherent in it as a Court of record, and the procedure which the Court has followed and follows is a "special procedure" within the meaning of Section 1(2), Criminal P. C. In my view, therefore, contempt of court is neither an offence within the meaning of Section 5(2), Criminal P. C., nor is the procedure prescribed by the Code in regard to investigation, inquiry and trial of an offence applicable to proceedings initiated against a contemner by the High Court, I may here also refer to a decision of the Privy Council in -- '10 Cal 109 (B)', wherein their Lordships of the Judicial Committee of the Privy Council stated that the Penal Code did not provide against a contempt of court committed by the publication of a libel out of court, when the court is not sitting, and neither in Chapter 21 nor else-

where it provided for the punishment of a contempt of court by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties.

They further said that because the publisher of the libel could be punished for defamation under the Code, it did not follow that he could not be punished summarily by the High Court for a contempt of court. Their Lordships further pointed out in this case that the provisions of Section 5, Criminal P. C., 1882, relating to the procedure under which "all offences under the Indian Penal Code" and "all offences under any other law" are punished, to not include a contempt of the High Court committed by the publication of a libel out of court, when the court is not sitting, although such contempt may include defamation.

Their Lordships pointed out that such a contempt was more than mere defamation, and was of a "different character".

Their Lordships, however, refrained from considering the true meaning of the words "any special jurisdiction or power conferred by any other law now in force" as used in Section 1(2), Criminal P. C. This case, in my judgment, supports the view that I have expressed that the offence that a contemner commits is not in 'pari materia' with offence to which Criminal P. C. applies. The authority of this decision is not shaken by anything that has been enacted by the Contempt of Courts Act of 1926. A contrary view was expressed by Collister and Allsop, JJ. in -- 'AIR 1945 All 1 (L)'. In this case Collister, J. held that a contempt of the High Court is an offence which can be enquired into in accordance with the provisions of Criminal P. C. Allsop, J. however, in a separate judgment said thus;

> "It is doubtless true that the Contempt of Courts Act when, it recognized our jurisdiction also recognized our procedure and practice, but once we hold, as I think

> we should, that a contempt is an offence within the meaning of the Code of Criminal Procedure we can exclude from operation only those portions of the Code which are positively repugnant to existing procedure and, as at present advised, I see no reason for thinking that it was ever illegal for this Court to seek the assistance of the appropriate officers of the Crown for the purpose of attaching the person of the offender and that the provisions of the Code for the issue of warrants of arrest are not inapplicable."

64. From the aforequoted words of Allsop, J. it is clear to me that he was attempting to reconcile two conflicting positions, namely, the position where it is held that contempt is not an offence within the meaning of Criminal P, C. and the position where it is so held. The learned Judge felt the necessity for doing so because in his view the provisions contained in Criminal P. C. for the trial of offences did not in their entirety apply to proceedings taken by the High Courts for the trial and punishments of "contempts".

Collister, J. however, took the view that contempt of the High Court was an act made punishable under a law for the time being in force within the meaning of Section 4(o), Criminal P. C. He expressed the opinion that the offence could be enquired into according to the provisions of that Code as set out in Section 5(2). With great respect to the learned Judge I am unable to agree with the view taken by him. The view expressed by Allsop, J., in my opinion, and I express it with, respect, is not strictly logical for I can see no reason why if contempt be an "offence" within the meaning of Criminal P. C. then the procedure prescribed by the Code for the trial of "offences" should not be strictly followed and the procedure which High Court followed for the trial of such "offences" should be adhered to.

The Bench was dealing with a situation which had arisen on account of a divergence of opinion between this Court and the Bombay High Court in regard to this Court's power to arrest and bring a contemner, who was residing beyond the territorial limits of this Court, before it. The Bombay view is to be found in -- 'AIR 1944 Bom 127 (T)'. In this case Beaumont, C. J. held that:

> "The power to punish for contempt of Court is a power inherent in superior courts of record, which in this country are the High Courts. Each court has inherent power to punish contempt of itself."

65. The learned Chief Justice further held that the nature of proceedings in contempt were such, as not to bring them within definition of an offence within the meaning of Criminal P. C. Reliance was placed by Beaumont, C. J. on the decision of the Privy Council in -- '10 Cal 109 (B)'. Beaumont, C. J. also pointed out the distinction that there was between those classes of contempt which fell directly either within the ambit of Civil P. C. or within the ambit of the Penal Code.

The conflict that arose on account of the divergent views expressed by the Allahabad High Court and the Bombay High Court in regard to the power of the court to arrest a contemner from outside the jurisdiction of the Court has now been set at rest by an amendment of the Contempt of Courts Act. The amendment to the Act has not, however, touched the procedure which the High Courts have

consistently followed during the long course of their existence in dealing with cases of contempt. This, to my mind, is also an indication of the fact that the Legislature did not consider it desirable to alter that procedure.

66-67. I am, therefore, of the opinion that both the parts of question I referred to the Full Bench should be answered in the negative.

68. The second question, namely, whether the contemner is an accused person within the meaning of Section 5, Oaths Act, 1873, need not, in my view, detain us long. The words of Section 5, Oaths Act with which we are concerned are these:

> "Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person....."

69. It has already been indicated earlier that a contemner is not in the same position as an accused person. An accused person within the meaning of Section 5, Oaths Act must be one who is accused of having committed an offence as defined in the General Clauses Act. It has also been noticed earlier that an offence which a contemner commits does not fall within that definition.

The words of Section 5 do not create a prohibition against administering an oath either to an accused person or to a contemner. All it says is that the Oaths Act was not to be treated as an authority for administering to an accused person an oath. We know that under the Prevention of Corruption Act, (Act 2 of 1947), an accused person can take the oath and be a witness in his own favour so that there is no inherent prohibition or disability in an accused person taking the oath. The prohibition to administer oath to the accused is provided for by Section 342(4), Criminal P. C. Section 342 provides for the examination of an accused person and Sub-section (4) of that Section says that while an accused is being examined by the court he shall not be put on his oath. It is, therefore, clear that in those cases to which Section 342, Criminal P. C. applies oath cannot be administered to an accused, but where that Section does not apply, there is, in law, no prohibition to administer an oath to an accused person. I have already expressed the view that a contemner is not an "accused" within the meaning of Oaths Act and I have also expressed the view that contempt is not an offence within the meaning of Criminal P. C. Therefore, I must hold that Section 5, Oaths Act 1873 has no application to an alleged contemner.

70. I would, therefore, answer the second question also in the negative.

71.The last question that has been referred to the Pull Bench is, whether an alleged contemner is "a person accused" within the meaning of Article 20(3) of the Constitution and whether he can, if he voluntarily makes an affidavit, be cross-examined on it. Article 20(3) is in these words:

> "No person accused of any offence shall be compelled to be a witness against himself".

72. This provision of our Constitution is analogous to the provision contained in the 5th amendment of the American Constitution wherein they provide a similar prohibition in these words:

> "Nor shall any person be compelled, in any criminal case, to be a witness against himself".

73. The guarantee which was thus furnished by the 5th amendment was a guarantee apart from the "due process". The American lawyers have given this guarantee a short name -- the name under which this guarantee is popularly referred to is "the Guarantee against self-incrimination". The prohibition which is contained in our Constitution is a prohibiton against compelling a man to be a witness against himself; so appears to be the import of the American guarantee.

74. Counsel for the applicants attempted to read in the words of Article 20(3) of the Constitution a guarantee to the accused to decide whether or not he would submit himself to be cross-examined in regard to an affidavit which he had filed in this case. There is, in the words of Article 20(3),' no prohibition against a person, who is accused of an offence, being cross-examined in case he has chosen to enter the witness-box and take the oath. The right to cross-examine a person arises under the Evidence Act. The testimony that a man gives, can only be taken into account if that testimony has been tested by cross-examination, at any rate, if there was an opportunity to the other side to test the truth or otherwise of the statement by cross-examination.

75. The word "offence" in Article 20 of the Constitution must, in my judgment, mean the violation of a law in force. That it is so is indicated by the use of these very words in Article 20(1) of the Constitution. The expression "law in force" has not been defined in the Constitution for all purposes of the Constitution though it has been so defined for the purpose of Article 13 of the Constitution in Article 13(3)(b). If it were permissible to take the meaning of the words "laws in force" as given in Article 13(3)(b) into account in order to find out the meaning of similar words used in Article 20 then it would appear that these words have quite a wide connotation and may include the law of contempt as well, but that does not appear to have been the intention of the framers of the Constitution, as will appear from what follows later.

The word "offence" in Article 20 has to hear the same meaning with the framers of the Constitution intended for it. We have seen that the General Clauses Act has been made applicable for the interpretation of words used in the Constitution by Article 367. "Offence" has been defined in the General Clauses Act, and that word in the Constitution must, therefore, bear the same meaning as has been given to it in the definition contained in the General Clauses Act. I have already noticed that the definition of the word "offence" in the General Clauses Act does not apply to a contemner it must, therefore, follow that a contemner cannot be a person "accused of an offence" within the meaning of Article 20(3) of the Constitution.

76. The next question is, whether a contemner, when he voluntarily makes an affidavit, can or cannot be subjected to cross-examination thereon? This question stands on a slightly different footing from the question already considered.

77. The guarantee which has been given in Article 20(3) is a guarantee against "self-incrimination" and not a guarantee against being cross-examined in regard to the truth or falsity of any statement made by a person in an affidavit. The applicant who put in the affidavit cannot, in my judgment, refuse to be cross-examined by taking shelter behind Article 20(3). He can, however, refuse to answer a question which, if answered, would incriminate him. Reference was made to the case of -- 'Brown v. Walker', (1895) 40 Law Ed. 819(24). It is not necessary for me to notice this decision in any detail.

In America this guarantee has been interpreted by the courts and applied to particular situations and a good synopsis of these decisions can be found in Weaver's Constitutional Law 1946 Edn. p. 457 as also in Willis' Constitutional Law 1936 Edn. pp. 517-520. Willoughby refers to it in his Constitution of the United States in Vol. 2, p. 1165 onwards, It has been stated by Willoughby at p. 1166 that "this constitutional privilege against self-incrimination is available to any one who may be incriminated by the testimony or other evidence that is asked for. It is not limited to a defendant at bar or to party defendants. Furthermore the constitutional privilege applies as well to testimony or other evidence called for in civil proceedings as in criminal actions. It applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

This statement of the law Willoughby appears to have got from the decision in -- Brown v. Walker. (Z4)', referred to above. According to the American view, however, this guarantee is a "personal privilege" and it may be waived so that if the accused voluntarily takes the witness stand in his own behalf he subjects himself to the same rule regarding cross-examination as any other witness. This is clear from the decision in -- 'Rafiel v. United States', (1925) 271 U. Section 494 (Z5).

78. I would, therefore, answer the third question also in the negative.

BY THE COURT

79. Our answer to the questions referred to us for opinion is as follows:

> "(1) (a) Contempt of court is not an offence within the meaning of Section 5(2) of the Code of Criminal Procedure; (b) In view of our answer to the previous question this question does not arise.
>
> (2) The alleged contemner is not an accused person within the meaning of Section 5 of the Indian Oaths Act, 1873.
>
> (3) An, alleged contemner is not a person accused of an offence within the mean ing of Article 20(3) of the Constitution & if he has voluntarily filed an affidavit, he can be cross-examined on it."