The Federal Court Report

1944 - Vol. VI

Part 1

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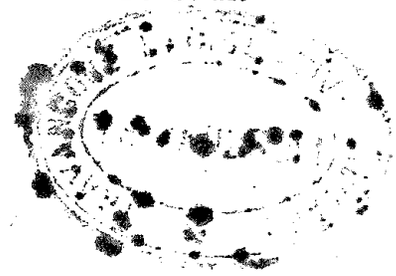
F. C. R.



THE FEDERAL COURT REPORTS

Containing cases determined by the Federal Court of India and by the Judicial Committee of the Privy Council on appeal from that Court.

1944–Vol. VI.

PART I.

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[1944] F.C.R.

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JUDGES

OF THE

FEDERAL COURT

DURING THE PERIOD OF THESE REPORTS.

THE HON'BLE SIR PATRICK SPENS, *Chief Justice of India.*

THE HON'BLE SIR SRINIVASA VARADACHARIAR.

THE HON'BLE SIR MUHAMMAD ZAFRULLA KHAN.

SIR BROJENDRA LAL MITTER, *Advocate-General of India.*

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS PART

INDEX

Aug. 17, 18, 19, 20, 21, 24, 25, 26, 27, 29, 31.

KING EMPEROR *v.* SIBNATH BANERJEE.
KING EMPEROR *v.* BIJOY SINGH NAHAR.
KING EMPEROR *v.* DEBOBRATA ROY.
KING EMPEROR *v.* NARENDRA NATH SEN GUPTA.
KING EMPEROR *v.* NANI GOPAL MAJUMDAR.
KING EMPEROR *v.* NIHARENDU DUTT MAJUMDAR.
KING EMPEROR *v.* BIRENDRA CHANDRA GANGULI.
KING EMPEROR *v.* PRATUL CHANDRA GANGULI.
KING EMPEROR *v.* SASANKA SEKHAR SANYAL.

(Cases Nos. XIII to XXI of 1943.)*

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Governor-General —Legislative powers—Ordinance amending s. 2, sub-s. (2), Defence of India Act, to enlarge rule-making power of Central Government—Provision that the new clause shall be deemed always to have been substituted and that orders already made cannot be called in question—Validity of Ordinance—Power of detention of Provincial Government—Necessity of enquiry and 'being satisfied'—General order for detention of persons on recommendation of Police—Validity—Meaning of 'Provincial Government'—Delegation of powers of Provincial Government—Express delegation under s. 2 (5), Defence of India Act, whether necessary—Exercise of powers by officers authorised by ss. 59 (3) and 49—Legality—Government of India Act, 1935, ss. 59 (3), 49; Sch. VII, List I, entry No. 1; List II, entry No. 1—Defence of India Act, 1939, s. 2 (2)—Defence of India Rules, r. 26—Defence of India (Amendment) Ordinance (XIV of 1943), ss. 2, 3 —Evidence Act (I of 1872), ss. 17, 18, 20.

Rule 26 of the rules framed under the Defence of India Act, 1939, provided that "the Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, it is necessary so to do, may make an order.....
(b) directing that he be detained". The Federal Court declared that this rule was *ultra vires* as it went beyond the rule-making power conferred on the Central Government by the Defence of India Act. The Governor-General thereupon promulgated the Defence of India (Amendment) Ordinance (XIV of 1943)

* Cases Nos. X, XI, XII, XXV, XXVII, XXVIII, XXX and XXXII of 1943 were also heard along with these appeals.

1943

King Emperor v. *Sibnath Banerjee.*

which substituted a new clause for clause (x) of s. 2 (2) of the Defence of India Act, whereby the rule-making power of the Central Government was enlarged so as to cover the terms of rule 26. Section 2 of this Ordinance enacted that the new clause shall be deemed always to have been substituted, and s. 3 of the Ordinance further enacted that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under s. 2 of the Defence of India Act:

Held, by the Court (SPENS C.J., VARADACHARIAR and ZAFRULLA KHAN JJ.— (*i*) Whether s. 2 of the Ordinance was valid or not, s. 3 of the Ordinance was not invalid or *ultra vires* as it was within the ordinance-making powers of the Governor-General and was not so dependent upon, or connected with, s. 2 of the Ordinance as to be incapable of being given effect to by itself, *i.e.*, irrespective of whether s. 2 was valid or not;

(*ii*) that it was a condition precedent for the valid exercise of the power of detention conferred by rule 26 that the Provincial Government should have applied its mind and become satisfied that such detention was necessary for preventing the person proceeded against from acting in a manner prejudicial to the matters mentioned therein, and therefore orders of detention made in pursuance of a general order that if the Police recommended detention of any person under rule 26 such person may be detained, were invalid.

Held also, (*per* VARADACHARIAR and ZAFRULLA KHAN JJ., SPENS C.J., dissenting) — that 'Provincial Government' in rule 26 means the Governor acting with or without the advice of his ministers, and delegation of the powers of the Provincial Government under the Defence of India Act could be made only under the provisions of s. 2, sub. s. (5), of the said Act, and in the absence of a delegation made under that sub-section the authority to be satisfied under rule 26 was the Governor himself. *Per* SPENS C.J.—Whatever be the exact meaning of the words 'Provincial Government', the Constitution Act on its true construction does authorize the Provincial Government to deal with the executive business arising out of the administration of the Defence of India Act and its rules, not excepting rule 26, in accordance with the rules of business made under s. 59 (3) and the powers conferred by s. 49, and those powers are not controlled and superseded but are only supplemented by the express power of delegation contained in s. 2 (5) of the Defence of India Act, to any officer or authority subordinate to the Central Government.

The expression 'reasons of state connected with defence'

and 'reasons connected with the maintenance of public order' in entry no. 1 of List I and entry no. 1 of List II are wide enough to include 'public safety or interest' and s. 2 of the Defence of India Act is not *ultra vires* the Indian legislature on the ground that the matters covered by it do not fall within the items mentioned in the Lists.

Section 59 (2) of the Constitution Act only prohibits a duly authenticated order being called in question on one ground and one ground only, namely, that it is not an order or instrument made or executed by the Governor. It does not prevent the Courts from enquiring into the accuracy of a recital contained therein and from coming to the conclusion that the recital is inaccurate if there is sufficient evidence to prove its inaccuracy.

Answers given by a minister in the Legislative Assembly in his capacity and in discharge of his duties as minister are admissible in evidence under ss. 17, 18 and 20 of the Evidence Act.

APPEALS from the Calcutta, Lahore, Madras and Allahabad High Courts.

Cases Nos. XIII to XXI were appeals preferred by the Bengal Government from orders passed by the Calcutta High Court. Cases Nos. IX, XI, XII, XXV, XXVII, XXVIII, XXX and XXXII of 1943, appeals against orders passed by the Allahabad, Lahore and Madras High Courts were also heard along with Cases No. XIII to XXI.

The facts of the cases and the arguments of counsel appear from the judgment.

Sections 2 and 3 of the Defence of India (Amendment) Ordinance (No. XIV of 1943) were as follows:—

2. *Substitution of new clause for clause (x) of Section 2 (2), Act XXXV of 1939.*—For clause (x) of sub-section (2) of Section 2 of the Defence of India Act, 1939, (XXXV of 1939), the following clause shall be substituted, and shall be deemed always to have been substituted, namely:—

"(x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having

1943

King Emperor v. *Sibnath Banerjee.*

acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything."

3. *Validity of orders made under rule 26, Defence of India Rules.*—For the removal of doubts it is hereby enacted that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under Section 2 of the Defence of India Act, 1939.

The cases were heard on August 17, 18, 19, 20, 21, 24, 25, 26, 27 and 29.

S. M. Bose, A.-G. of Bengal, (*M. N. Ghosh* with him) for the Crown in Cases Nos. XIII to XXI.

S. C. Gupta (*Raghbir Singh* with him) for the respondents in Cases Nos. XIII and XX.

J. C. Gupta (*P. K. Bose* with him) for the respondents in Cases Nos. XIV to XIX and XXI.

P. K. Bose for the respondent in Case No. XVIII.

B. B. Tawakley (*Raghbir Singh* with him) for the appellants in Cases Nos. IX, XI and XII.

Dr. Narain Prasad Asthana, A.-G. of the United Provinces, (*Sri Narain Sahai* with him) for the Crown in Cases Nos. IX, XI and XII.

Malik Barkat Ali (*Amar Nath Mehta* and *Raghbir Singh* with him) for the appellants in

Cases Nos. XXV and XXX.

M. Sleem, A.-G. of the Punjab, (*S. M. Sikri* with him) for the Crown in Case No. XXV.

J. P. Dwivedi (*Raghbir Singh* with him) for the appellant in Case No. XXII.

Sir Alladi Krishnaswami Aiyar, A.-G. of Madras, (*N. Rajagopala Iyengar* with him) for the Crown in Cases Nos. XXVII, XXVIII, XXX and XXXII.

Advocates General who appeared in response to notices issued to them under Order XXXVI, rule 1, of the Federal Court Rules, 1942:—

Sir Brojendra Mitter, A.-G. of India, (*Rai Bahadur Harish Chandra* and *Radhe Mohan Lal* with him).

Sir Alladi Krishnaswami Aiyar, A.-G. of Madras, (*N. Rajagopala Iyengar* with him).

N. P. Engineer, A.-G. of Bombay, (*M. M. Desai* with him).

Aug. 31. The judgment of Varadachariar and Zafrulla Khan JJ. was delivered by Zafrulla Khan J. Spens C. J. delivered a separate judgment.

ZAFRULLA KHAN J. These appeals have been preferred by the Bengal Government against orders passed by the Calcutta High Court directing the release of nine persons who were being detained under rule 26 of the Defence of India Rules. The detention orders had been passed on various dates in the years 1940 and 1942. By a judgment given on the 22nd April of this year, this Court held rule 26 of the Defence of India Rules to be *ultra vires* in that it went beyond the rule-making power conferred on the Central Government by the Defence of India Act. Immediately after this judgment was pronounced, the applications out of which these appeals have arisen were filed under s. 491 of the Criminal Procedure Code praying for the release of the detenus concerned on the ground that their detention was illegal. On the 28th April, the Governor-General promulgated

1943

King Emperor v. Sibnath Banerjee.

Zafrulla Khan J.

an Ordinance, XIV of 1943, whereby the rule-making power of the Central Government under the Defence of India Act was made wider so as to cover the terms of rule 26 as it had all along stood. The section was so worded as to make this change operative as from the date of the Defence of India Act itself. By another section of the Ordinance it was provided: "For the removal of doubts it is hereby enacted that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under s. 2 of the Defence of India Act, 1939." When the *habeas corpus* applications came on for hearing, reliance was placed upon the Ordinance as an answer to the applications, with the result that the validity of the Ordinance itself was challenged. Other questions were also raised in support of the applications. The various contentions have been summarized by Mr. Justice Mitter as follows:—

I. That the whole of s. 2 of the Defence of India Act, both in its original and amended forms, is *ultra vires* the Indian Legislature.

II. That the portion of clause (x) of s. 2 (2) of the said Act which has been added by the amendment made by the Ordinance is *ultra vires* the Indian Legislature and accordingly of the Governor-General's powers under s. 72 of the Ninth Schedule. The corresponding portions of rule 26 of the Defence of India Rules are bad and consequently the orders of detention in the cases we have before us are bad.

III. That the Governor-General has no power to repeal or amend *directly* any Act of the Federal Legislature by an Ordinance made and promulgated under s. 72 of the Ninth Schedule of the Government of India Act, 1935.

IV. That it is *only* the Central Indian Legislature that has the power to repeal or amend an Act of the

Central Indian Legislature passed under the provisions of s. 102 of the Government of India Act.

V. That the Governor-General has no power to legislate by such an Ordinance on any subject enumerated in List II of the Seventh Schedule of the Government of India Act.

VI. That in any event the Governor-General has no power to give retrospective operation to such an Ordinance.

VII. That in any event the Ordinance (XIV of 1943) cannot affect proceedings which were pending at the date of its promulgation.

VIII. That s. 3 of the Ordinance (XIV of 1943) has no independent existence apart from s. 2 of the said Ordinance and must stand or fall with that section.

IX. That rule 26 of the Defence of India Rules had no existence in the eye of law on the 29th September, 1939, when the Defence of India Act was passed and so does not exist even now either in its original or amended forms.

X. That even if rule 26 be not *ultra vires* the detention of the nine persons whose cases are before us was improper.

On questions I, II, IV, V, VI and VII, the three learned Judges who constituted the Bench unanimously rejected the contentions urged on behalf of the detenus. In respect of questions III, VIII and X, two of the learned Judges (Mitter and Sen JJ.) upheld the contentions urged on behalf of the detenus, while Khundkar J. took a different view. On question IX, Mitter and Khundkar JJ. agreed, but Sen J. disagreed. In the result Mitter and Sen JJ. directed the release of the detenus. Hence these appeals.

As a matter of convenience, we heard along with these appeals three other groups of appeals against orders passed by the High Courts of Madras, Allahabad and Lahore on similar applications under s. 491. In those cases, the High Courts dismissed

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

the applications and the appeals were preferred by or on behalf of the detenus. It will be convenient to deal with the Bengal appeals in the first instance. During the pendency of the appeals one of the detenus, Sasanka Sekhar Sanyal, the respondent in Case No. XXI, has been released and it is therefore not necessary to deal with that case.

The Advocate-General of Bengal and the Advocates-General of the various Provinces addressed full arguments to us questioning the correctness of the reasoning and the conclusions of Mitter and Sen JJ. on questions III, VIII and X. On behalf of the detenus these findings were supported, and their counsel also took exception to the reasoning and conclusion of Mitter and Khundkar JJ. in respect of question IX and to the unanimous conclusion of the three learned Judges on questions I and II. In discussing question VI, the learned Judges of the High Court do not seem to have attached any importance to the difference between the provision in s. 2 of the Ordinance which makes the substituted provision take effect as from the date of the Defence of India Act itself and the provision in s. 3 which prevents any question being raised as to the validity of orders theretofore passed under rule 26. This distinction was stressed in the course of the argument here.

The third question has been framed in general terms, without reference to the particular enactment (the Defence of India Act) with which the Ordinance was dealing and without reference to the terms of the Ordinance itself. It draws no distinction between an attempt made by an Ordinance to amend or repeal a permanent enactment of the Legislature and an attempt to amend or repeal an Act of limited duration, like the Defence of India Act. Again, it draws no distinction between cases where the Ordinance merely enacts a law to come into operation from the date of the Ordinance and one where it attempts to declare that even before the date of its enactment the law must be deemed to have been different from what the

pre-existing statute had enacted. The same remarks may be made as to the possibility of an Ordinance declaring that even after the expiry of the period of the Ordinance the law shall remain what it had been declared to be by the Ordinance and not what it would be according to pre-existing legislation. The question seems to assume that all these cases will stand on the same footing and admit of one general and comprehensive answer whether in the affirmative or in the negative. It also assumes that all conceivable forms of amendment will be governed by one and the same rule and that the power to repeal will stand on the same footing as the power to amend. The discussion before us of various aspects of the question has shown that the question might not admit of a general or comprehensive answer and that different aspects might be governed by different considerations.

On behalf of the Crown, it was broadly maintained both here and before the High Court that whatever a legislature in India can do by way of amending, modifying or repealing one of *its own* enactments can as well be done by an Ordinance in relation to any enactment of that legislature. Sections 108 and 110 of the Constitution Act were relied on as negativing the existence of a general principle that one legislature cannot in the absence of power expressly conferred amend, modify or repeal enactments passed by another legislature. Counsel for the Punjab detenus argued by way of answer to this contention that in 1861 (when s. 72 of the present Ninth Schedule to the Constitution Act was first enacted), and indeed up to 1919, Parliament had proceeded on the assumption that unless *expressly* authorized so to do, a legislature in India would not have power to amend, repeal or modify even its own enactments. He also maintained that the concluding words of s. 72 providing that an Act of the legislature might 'control or supersede' an Ordinance indicated that the two legislating authorities were not co-ordinate but that

1943

King Emperor v. Sibnath Banerjee.

Zafrulla Khan J.

the legislature was the paramount authority.

On behalf of the detenus, it appears to have been contended before the High Court that the legislature and the Ordinance-making authority being two distinct legal entities, though operating in the same field (as to subject-matter and as regards local extent), each can legislate only by itself and cannot *directly* amend or repeal any measure passed by the other, unless clearly empowered to do so. This contention was repeated before us. It was not disputed—except by counsel for the Punjab detenus—that an Ordinance may *in effect* modify the operation of a statute by enacting something repugnant to the provisions of the latter. When certain instances were put to counsel, the difficulty of maintaining this extreme position became evident. Take for instance the Ordinance that was considered by the Court in *In the Matter of Ananda Bazar Patrika* (1): it *added* two offences to the list of offences specified in s. 4 of the Indian Press (Emergency Powers) Act, 1931, and it was in terms stated in the Ordinance itself that such should be the law only during the time that the Ordinance was in force. There was no other interference with the existing legislative enactment. Such an addition can in one sense be described as an "amendment" of the Act. If the Ordinance-making authority can create new offences and make them triable and punishable in a manner provided for in a pre-existing enactment, there can be no purpose in insisting that the Ordinance must be self-contained and must reproduce all the provisions of the pre-existing Act. It was rightly maintained by counsel for the Crown that the validity or invalidity of an Ordinance should not be made to depend upon mere drafting devices or on the draftsman's ingenuity. Take again a case like *Des Raj* v. *The Crown* (2): the Ordinance there in question denied to the accused the benefit of certain provisions of the Criminal Procedure Code, such as those relating to trial by jury or with the aid of assessors, appeal to the High Court, etc.

(1) [1932] 37 C. W. N. 104

(2) [1930] I. L. R. 12 Lah. 26

It could not be said that it was beyond the power of the Ordinance-making authority to exclude certain of the provisions of the Criminal Procedure Code in certain specified classes of cases; indeed, s. 1 (2) of the Code recognizes this possibility. Here again, it will be difficult to maintain that this result can be achieved only by a self-contained Ordinance and not by one which purports to modify or exclude certain provisions of the pre-existing law.

Alternatively, the rule was formulated in a different form before us by counsel for some of the detenus, *viz.*, that the Ordinance-making authority could declare its own intention as to what the law should be during the period that the Ordinance was to be in force, but it could not adopt a course which would attribute to the legislature an intention different from what it had declared in its own enactment. One or two illustrations may help to elucidate this test or principle. Section 108 of the Constitution Act assumes that a legislature in India may repeal or amend an Act of Parliament extending to British India. When this power is exercised by an Indian legislature, it cannot be made to appear that Parliament had passed an enactment different from what in fact it had; what the Indian legislature can do is to declare that within the local area of its legislative authority, the law shall be as enacted by itself and not as enacted by Parliament. The same will be the case when the Indian legislature purports to repeal an Act passed by Parliament: [*cf.* also ss. 92(2) and 95(3) of the Constitution Act]. In such cases, neither the terms nor the operation of the Parliamentary enactment would be affected in areas over which the Indian legislature had no control. The position thus stated is clear enough, because the "local extent" of the legislative power is clearly different in the two cases. Will not the governing principle be the same, where the capacity of the two legislative authorities even though co-extensive as regards local extent and subject-matter, differs in respect of the time limit during which their respective enactments can operate?

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

The legislature can at any time enact a measure and such measure can remain in force without any limit of time; but the exercise of the Ordinance-making power is limited in two ways, (i) by the limitation as to the circumstances in which it can be exercised, and (ii) by the limitation as to the time during which any measure so enacted can remain in operation. The existence of an emergency is a condition precedent to the exercise of the power. The fact that the Court cannot go behind a declaration of emergency made by the Ordinance-making authority cannot affect this question. The power was intended to be availed of and could be availed of only in an emergency, whereas ordinary legislation is not governed by any such limitation. Similarly, an Ordinance is necessarily of limited duration, whether under s. 72 or under the terms of the India and Burma (Emergency Provisions) Act of 1940. If an Ordinance purported to declare that during a period *anterior* to the emergency or even *after the termination of the period* of the Ordinance, a provision of statute law was or would be different from what the legislature had enacted, would it be any better than an attempt by the Indian legislature to affect the operation of an Act of Parliament outside the local limits of the jurisdiction of that legislature?

An attempt to repeal a pre existing statute may furnish another useful illustration. That an Ordinance can for the period of its duration *suspend* the operation of the whole or any portion of a pre-existing statute, appears to us to admit of no doubt. In such a case, the pre-existing law would come into operation again on the expiry of the period of the Ordinance. But suppose the Ordinance purported to *repeal* a pre-existing statute or part thereof. One of the counsel for the Crown thought that the pre-existing law would in that case also be revived on the expiry of the term of the Ordinance; but another contended that this would be a matter of construction and that if there was nothing in the language of the Ordinance to suggest that the repeal

was intended to be temporary, the pre-existing law might not be revived merely by reason of the expiry of the period of the Ordinance. In support of this contention, he drew our attention to the discussion in Craies' Statute Law (4th edition, pp. 357 *et seq.*). This will no doubt be the position when Parliament, which is competent to pass either a temporary law or a permanent law, chooses to pass a temporary measure, and by such measure, repeals a pre-existing law. Can the position be the same when an authority which can pass *only* a temporary law purports to repeal a pre-existing permanent statute? The impugned Ordinance enacts "for clause (x) of sub-section (2) of section 2 of the Defence of India Act, 1939, the following clause shall be substituted, and shall be deemed always to have been substituted ....." Leaving out of consideration for the moment the fact that the Defence of India Act itself is in terms a temporary measure, suppose an Ordinance attempted to make a similar provision in respect of a section in a statute of permanent operation. What would be the position on the expiry of the period of the Ordinance? If the pre-existing statutory provision could be deemed *always* to have been what the Ordinance substituted for it, it might be a difficult question to decide whether the provision in the original statutory form would be revived at all.

It will be noticed that unlike an amendment merely in the nature of an addition to a pre-existing statute, s. 2 of Ordinance XIV attributes to the legislature a provision very different from what it in fact had enacted. In justification of the adoption of this course by the Ordinance-making authority, it was claimed on behalf of the Crown that any legislative authority with "plenary powers" could enact a law with retrospective operation. It seems to us misleading to *assume* that the Ordinance-making authority enjoys plenary powers of legislation and then seek to deduce therefrom the inference that it must have the power to enact a provision with retrospective operation. As regards "subject

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

matter" its powers may be co-extensive with those of the ordinary legislature but, as already pointed out, there are at least two limitations upon its powers. It is necessary to refer to a certain ambiguity in the use of the expression "retrospective operation". It was observed by Buckley L. J. in *West* v. *Gwynne* (1): "Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been what it was not, that I understand to be retrospective..... ...The question here is as to the ambit and scope of the Act, and not as to the date as from which the new law is to be taken to have been the law". An enactment which declares that even in the past the law must be taken to have been different from what in fact it was has sometimes been spoken of as 'retroactive'. Assuming that the ordinary legislature can pass a 'retroactive law' in the sense above explained [see *Phillips* v. *Eyre*(2), *The King* v. *Kidman*(3) and *Miller* v. *Raith*(4)] it would not necessarily follow that the Ordinance-making authority must also have the power to pass a retroactive law. It has no doubt been held that in an emergency, it would be for the Governor-General to decide what law was required to meet the emergency; but the enactment of a retroactive law may in one view be said to raise a question of 'jurisdiction' or 'power' and not merely a question of aptness or expediency. The power to enact provisions interfering with pre-existing rights and the remedies therefor—though these are also sometimes spoken of as 'retrospective'—stands on a different footing, because such provisions will declare the law only for the period during which the Ordinance is in force and not for an anterior or a subsequent period, though their effect may be to deprive parties of rights accrued at an anterior date and of remedies in respect of such rights. In *Abeyesekera* v. *Jayatilake* (5) Lord Darling observed: "It may be true that "not Jove himself upon the past hath

(1) (1911) 2 Ch. 1 at pp. 11, 12.
(2) (1870) L. R. 6 Q. B. 1.
(3) (1915) 20 Com. L. R. 425.
(4) (1942) 66 Com. L. R. 1.
(5) [1932] A. C. 260 at p. 267.

power"; but legislators have certainly the right to prevent, alter or reverse the consequences of their own decrees". There was no complication in that case of one legislative authority attempting to modify or nullify the operation of a law enacted by *another* authority, but the observation brings out the difference between changing the law for the past and modifying or taking away its consequences. These authorities may justify a finding in favour of the Crown as regards the validity and operation of s. 3 of the Ordinance, but they do not compel a like answer as regards the power of the Ordinance-making authority to enact a retroactive law.

There was lengthy discussion before us as to the bearing and effect of the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1) particularly of the observations on pp. 366 and 367. It was contended for the detenus that *two* propositions had been laid down here, (i) a broad statement (on p. 366) to the effect that 'the repeal of a Provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion' as the Dominion Parliament 'has no authority conferred upon it by the Act to repeal directly any provincial statute', and (ii) a narrower statement (on p. 367) to the effect that the Parliament of Canada would have no power to pass a prohibitory law for the Province of Ontario and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that Province'. On behalf of the Crown, it was maintained that the second or narrower proposition was all that was laid down by their Lordships in the case and the observation on p. 366 implied nothing more when read with the context. The controversy would seem to turn on the significance of the words 'whether it does or does not come within the limits of jurisdiction prescribed by s. 92' occurring on p. 366.

As the general question framed by the Calcutta

(1) [1896] A. C. 348.

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

High Court cannot be satisfactorily answered without further discussion of the above and other similar aspects of the problem, we refrain from expressing any final opinion upon it, as no such decision is necessary for the disposal of these cases. The view that we take as to s. 3 of the Ordinance makes it unnecessary for us to pronounce any decision in respect of s. 2.

Proceeding next to question VIII, it seems to us that in spite of the language of the preamble, s. 3 of the Ordinance cannot be said directly to amend or repeal any provision of the Defence of India Act, nor, as we read it, is it so dependent upon s. 2, or so connected with it as to be incapable of being given effect to by itself, *i.e.*, irrespective of whether s. 2 is valid or not. The 'doubts' referred to in the opening words of s. 3 may well include doubts as to the validity of s. 2. Section 3 merely deals with the remedies of parties and the power of the Court to give redress in respect of a breach of the pre-existing law and might well have been enacted either by the legislature or by the Ordinance-making authority without any provision corresponding to s. 2 of the Ordinance. The operativeness of such a provision is of course subject to the limitation referred to by Willes J. in *Phillips* v. *Eyre*(1) that the authority which enacts it must be one which "could have authorized by antecedent legislation the acts done": otherwise, by the device of precluding an investigation by the Court, a legislative authority would be able to do indirectly what it could not do directly. [See *Board of Trustees of Lethbridge* v. *Independent Order of Foresters*(2)]. We express no opinion on the question what the effect of this provision would be if, after the expiry of the Ordinance, any question should be raised as to the validity of orders of detention passed prior to the enactment of the Ordinance.

It was contended that even if s. 3 should be held to be valid and independently operative, it would not

(1) [1870] L. R. 6 Q. B. 1 at p. 17. (2) [1940] A. C. 513 at pp. 533-534.

avail the Crown much, because that section proceeded on the assumption that at the time the orders of detention were passed, rule 26 of the Defence of India Rules was at least *de facto* in existence, whereas according to counsel for the detenus, this was not the case. This was question IX before the High Court. Section 3 of the Ordinance has to be read in the light of s. 21 of the Defence of India Act. Counsel maintained that an *ultra vires* rule was as good as *non-existent*, and that rule 26 (which has been originally framed under the Defence of India Ordinance) could not therefore be held to have been continued by s. 21 of the Defence of India Act. This ignores the fact that s. 21 only requires the rule to have been 'made'—not validly made—under the earlier Ordinance. The object of s. 21 was only to avoid a break in the operation of the rules and to obviate the necessity of promulgating them afresh under the new enactment. It had no reference to the validity or validation of the rules. The case is not analogous to that contemplated by s. 16 which gives 'finality' to certain orders. Such a provision was held by this Court in *Keshav Talpade's* case to be applicable only to orders which would not be *nullities* as having been passed under an *ultra vires* rule.

As regards questions I and II, the argument before us was limited to the ground that 'public safety or interest' was not one of the heads specified in entry no. 1 of List I or entry no. 1 of List II of the Seventh Schedule to the Constitution Act as subjects in respect of which Indian legislation might provide for 'preventive detention'. The judgment of this Court in *Talpade's* case clearly proceeded on the footing that such legislation was covered by the two entries. We think that the expressions 'reasons of state connected with defence' and 'reasons connected with the maintenance of public order' are wide enough to include 'public safety or interest'.

Counsel for the Punjab detenus challenged the

1943

King Emperor v. Sibnath Banerjee.

Zafrulla Khan J.

validity of the whole Ordinance on another ground. He recognized that the question of emergency was one for the Governor-General and not for the Court to decide. But he said that when the nature of the emergency had been stated by the Governor-General or even by counsel for the Crown, it would be open to the Court to consider whether it would not be an abuse of or a fraud on the power to treat the facts disclosed as a pretext for the exercise of the emergency power. If it would be an abuse of or fraud on the power, he contended that the case must be treated as one of *absence* of power. This argument was urged on the basis of an answer given by the Advocate-General of India (in the course of the argument before us) and of a statement said to have been made by counsel for the Crown before the High Court at Lahore, to the effect that it was the decision of this Court in *Talpade's* case that necessitated the promulgation of the Ordinance. Counsel contended that it would be preposterous to treat a decision of this Court as an 'emergency' justifying the exercise by the Governor-General of his extraordinary power of promulgating Ordinances. It does not seem to us necessary to deal with the larger issues involved in this contention. Such an argument would be available only if it could be suggested that the power had been exercised for a corrupt purpose or for purposes foreign to the power. (See Farwell on Powers, ch. X). Can that be said to be the case here? The decision of this Court might have led to promulgation of the Ordinance. But the 'emergency' was the apprehended danger to peace and public safety, likely to arise from the release of thousands of detenus in obedience to the decision of this Court. It is not within the province of the Court to examine the justification for the apprehension or assess the extent of the possible danger.

We now turn to question X. We may point out in passing that the assumption to be made is not that rule 26 is not *ultra vires*, but only that its validity has been put beyond question by s. 3 of the Ordinance. On this footing the validity of the orders of detention

in these cases was questioned on the ground that they had not been made in accordance with the provisions of the rule. The relevant portion of rule 26 runs as follows:

"The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order:

(a).....

(b) directing that he be detained."

We are not here concerned with the Central Government.

The relevant portion of the orders of detention which is the same in each case, runs:

"And whereas the Governor has been satisfied that with a view to preventing the said person from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order or the prosecution of the war, it is necessary to make the following orders to continue his detention:

Now, therefore,.....the Governor is pleased to direct—

(a) that the said person shall until further orders be detained....."

It was urged on behalf of the Crown that the orders being on their face regular and in conformity with the language of the rule, it was not open to the Court to investigate their validity any further. It was also urged that the orders had in fact been made in conformity with the provisions of the rule. Section 59(2) of the Constitution Act was sought to be called in aid in support of the proposition that the

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

validity of the orders must be presumed by the Cour and could not be questioned. All that that sub section secures is that the validity of an order o instrument made or executed in the name of th Governor and authenticated in such manner as ma be specified in rules made by the Governor, shal not be called in question *on the ground* that it is no an order or instrument made or executed by th Governor; that is to say, in the case of an order o instrument purporting to be made or executed by th Governor and duly authenticated, it must be pre sumed that it was made or executed by the Governor No question as to who made these orders was raise by the respondents. What was questioned was th correctness of the recital in the orders that th Governor had been satisfied that with a view t preventing these persons from acting in a certai manner, certain action was necessary. It was con ceded that the Court could not be invited to in vestigate the sufficiency of the material or the rea sonableness of the grounds upon which the Governo had been satisfied. The gist of the contention wa that these cases were never before the Governor that the Governor had never applied his mind t them, and that therefore it could not be said that th Governor had been satisfied.

To meet this contention, reliance was placed b the Crown on the presumption that official acts hav been regularly performed. The words 'may presume in s. 114 of the Indian Evidence Act leave it to th Court to make or not to make the presumption according to the circumstances of the case, and th presumption when made is rebuttable. Referenc was made in this connexion to *Liversidge* v. *Si John Anderson*(1) and *Greene* v. *Secretary of State fo Home Affairs* (2). The question in those cases wa whether the Home Secretary had reasonable caus to belive that certain persons were of hostile associa tions and that by reason thereof it was necessary t exercise control over them. It was held that th

(1) [1942] A. C. 206.

(2) [1942] A. C. 284.

matter was one for the executive discretion of the Secretary of State, and that the Court was not entitled to investigate the grounds on which the Secretary of State came to believe the persons concerned to be of hostile associations, or to believe that by reason of such associations it was necessary to exercise control over them. There is no suggestion anywhere in the speeches of their Lordships in those two cases that if the statement that the Secretary of State believed those persons to be of hostile associations had itself been challenged, it would not have been open to the Court to look into that question. If the ground of challenge against the orders there sought to be impugned had been that the cases had never been placed before the Secretary of State at all, so that he never had any opportunity of exercising his mind with respect to them, we have not the slightest doubt that this would have been held to be a proper ground of challenge in a court of law. At p. 224, ([1942] A.C.) Viscount Maugham observed : " In my opinion, the well known presumption *omnia esse rite acta* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with ". In *Greene's* case he quoted with approval the following passage from the judgment of Goddard L. J. in the Court of Appeal (p. 295, [1942] A. C.): " I am of opinion that where on the return an order or warrant which is valid on its face is produced it is for the prisoner to prove the facts necessary to controvert it, and in the present case this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit. It must depend on the ground on which the return is controverted, but where all that the prisoner says in effect is 'I do not know why I am interned. I deny that I have done anything wrong', that does not require an answer because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise. "

1943

King Emperor v. *Sibnath Banerjee*.

Zafrulla Khan J.

In *Liversidge's* case Lord Wright observed at p. 262 ([1942] A C.) : " MacKinnon L. J. who agreed with his brethren said that power of the Home Secretary to issue a valid order depended on the fulfilment of a condition, the existence of a state of mind in the Home Secretary, that is, that he had reasonable grounds for believing certain facts to exist, and by implication that he honestly entertained that belief. Goddard L. J., I think, also treated the material issue as being what is the Home Secretary's state of mind ".

In *Greene's* case Lord Romer observed (p. 309 [1942] A. C.) : " In the present case, it is plain that Sir John Anderson was of opinion that there was reasonable cause for his belief, and that he did honestly believe, that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. It necessarily follows that so far as the appellant relies on the absence of proof that there was in fact reasonable cause for such belief the appeal must fail ".

The whole question in those two cases was whether under the Regulation in question, it was incumbent upon the Secretary of State to prove that the cause which led him to believe that the person against whom action was taken in each case was of hostile associations and that by reason thereof it was necessary to exercise control over him, would in the opinion of the Court amount to reasonable cause. Their Lordships held that the question whether there was or was not reasonable cause was one for the Secretary of State and not for the Court. It was not disputed that before action could be taken under the Regulation, the Secretary of State must believe that the person concerned was of hostile associations and that by reason thereof, it was necessary to exercise control over him. We may observe that the head-note in *Greene's* case[1] reads as though the production of an order regular in form would have been conclusive, but their Lordships' speeches in the two cases leave no room

(1) [1942] A. C. 284.

for doubt that the presumption attaching to an order regular on the face of it is only a rebuttable presumption.

This brings us to the question, which is the authority that must be satisfied before an order under rule 26 can be made. On the language of the rule, so far as the cases before us are concerned, it must be the 'Provincial Government'. This, according to the Crown, means the Governor or officers subordinate to him [s. 49 (1) of the Constitution Act], or the authority or officers to whom this function may have been allotted by rules of business framed in accordance with s. 59 (3) of the Act. The argument was that inasmuch as action to be taken under rule 26 was in the nature of the exercise of executive discretion, it fell within the executive authority of the Province within the meaning of s. 49. On its being pointed out that this would lead to the result that *any* officer subordinate to the Governor, even one of the lowest grade, could as a matter of course exercise the very drastic powers conferred by the Defence of India Rules, which could not reasonably be presumed to have been intended by the legislature, it was urged that the matter would be regulated by rules of business framed under s. 59 (3). We are unable to accede to this contention. The executive action or authority dealt with in ss. 49 and 59 must relate to matters with respect to which the Legislature of the Province has power to make laws [s. 49 (2)]. Section 124 (2) makes provision for Federal legislation conferring powers and imposing duties upon a Province or officers and authorities thereof relating to matters with respect to which a Provincial Legislature has no power to make laws. We are of the opinion that whenever powers of this kind or indeed other special statutory powers are conferred, they must to the extent to which specific provision has been made in the statute conferring the powers, be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof.

1943.

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

In this view of the matter, it is unnecessary to make any reference to the Rules of Business on which reliance was placed on behalf of the Crown. We may however observe in passing that the only rule on which reliance was placed in this connexion (rule 16) makes no reference to the exercise of the power of detention under the Defence of India Rules. It merely authorises the making of standing orders by ministers with reference to their normal duties. No standing order framed in pursuance of the rule was placed before us. Nor have we been able to discover any other rule in the Rules of Business supplied to us on behalf of the Bengal Government which covers this matter.

Rule 26 of the Defence of India Rules confers the power of detention on the "Provincial Government". Rule 3 (1) provides that the General Clauses Act, 1897, shall apply to the interpretation of the Rules. For the definition of "Provincial Government" for the purpose of the Rules, recourse must therefore be had to the General Clauses Act. Sub-section (43*a*) of s. 3 of that Act defines "Provincial Government" in a Governor's Province as the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment according to the provision in that behalf made by and under the Government of India Act, in other words, it means the Governor acting in his discretion (in which case his ministers are not entitled even to tender their advice to him), or the Governor exercising his individual judgment (in which case he must give his ministers the opportunity of tendering advice but is under no obligation to accept that advice), or the Governor acting on the advice of his ministers. In each case it must be the Governor who acts, whether without the advice of his ministers or after such advice has been tendered, and in the latter case, whether in accordance with such advice or differing from such advice. It was pointed out to us that the definitions in the General Clauses Act are applicable only in the absence of anything repugnant in the subject or context, and our

attention was drawn to a number of Defence of India Rules with regard to which it was contended that the expression "Provincial Government" could not possibly mean the Governor, whether acting on advice or contrary to advice or without advice. Assuming that the context of some of the rules indicates that the expression "Provincial Government" must in those rules be given a meaning or significance different from the definition of that expression as set out in sub-s.(43a) of s. 3 of the General Clauses Act, that consideration cannot be permitted to govern the interpretation of that expression in rule 26, which deals with matters of the gravest import and confers powers that involve the exercise of the highest responsibility. There is nothing in the language of the rule itself which would constrain us to hold that "Provincial Government" in that Rule means anything other than what it would mean under the definition in the General Clauses Act.

It was then urged that the volume and multifariousness of the duties imposed upon the Provincial Government by the Defence of India Rules must necessitate the delegation in many cases by the Provincial Government of its powers to officers subordinate to it and that it must be presumed that this delegation could be effected under its Rules of Business. Sub-section (5) of s. 2 of the Defence of India Act furnishes a complete answer to this line of argument. That sub-section expressly authorises the Provincial Government to delegate the exercise of powers conferred and the discharge of duties imposed by the Defence of India Rules upon the Provincial Government; and we are of the opinion that any such delegation must be made in accordance with the provisions of that sub-section. We were asked to confine the operation of this sub-section to cases of delegation to district officers and to hold that cases of delegation within the Provincial secretariat were governed by the provisions of s. 49 (1) read with s. 59 (3) of the Constitution Act. We are

1943

King Emperor v. *Sibnath Banerjee*, — *Zafrulla Khan J.*

unable so to restrict the operation of s. 2 (5) of the Defence of India Act, both for the reason that there is no warrant in the language of that section for importing any such restriction into its operation, and for the reason that the language of s. 49 (1) of the Constitution Act makes no distinction between secretariat officers and district officers.

The question whether any delegation that the Provincial Government might desire to make of its powers and duties under the Defence of India Rules must be made in conformity with the provisions of s. 2 (5) of the Defence of India Act, or may be deemed to be covered by Rules of Business and standing orders framed under s. 59 (3) of the Constitution Act, is not a mere matter of form. The Defence of India Rules confer extremely wide and drastic powers and it may reasonably be expected that where a delegation of any of these powers is made under s. 2 (5) of the Act, care would be taken to ensure that the officers and authorities to whom the delegation is made are selected with due regard to the nature and scope of the powers delegated. This would not be the case under Rules of Business and standing orders which were presumably framed without any reference to powers the exercise of which might be necessitated by an emergency like the one with which the country is at present faced. Again, it may be a question whether a power conferred for instance on a minister by delegation under s. 2 (5) of the Defence of India Act, could be validly sub-delegated by him by standing orders.

We may observe in dealing with this part of the case that Khundkar J. says in his judgment that rule 26 is a rule under paragraph (x) of sub-s. (2) of s. 2 [of the Defence of India Act] and the Federal Court has so held, and that it is not a rule under sub-s. (1) of s. 2. He then goes on to observe that s. 2 (5) of the Defence of India Act cannot be availed of in the case of rule 26 because it contemplates delegation of powers and duties conferred and

imposed by rules framed under sub-s. (1) of s. 2 and not under sub-s.(2) of s. 2. These observations of the learned Judge are with due respect based upon a misreading of the judgment of this Court in *Keshav Talpade's* case. It would not be correct to say that s. 2 of the Defence of India Act confers two kinds of rule-making powers, one under the first sub-section and the other under the second sub-section. The rule-making power is conferred under the first sub-section and all that the second sub-section does is to set out the conditions under which rules in respect of the particular subject-matters enumerated in its paragraphs may be made in the exercise of powers conferred under the first sub-section. Any other view would lead to the anomaly that on the subjects enumerated in the paragraphs of sub-s. (2) there might be two sets of rules, one conferring unconditional and unlimited powers by virtue of being framed under sub-s. (1) and the other being subject to restrictions and limitations in conformity with conditions and restrictions prescribed by sub-s.(2), a state of affairs the contemplation of which could not possibly be attributed to the Legislature. The result is that in our opinion, in the absence of a delegation made under s. 2 (5) of the Defence of India Act, the authority to be satisfied under rule 26 must be the Governor. The Advocate-General of Bengal stated that so far as these cases were concerned Government did not rely on any delegation under s. 2 (5) of the Act.

It was next contended on behalf of the Crown that the subject of preventive detention was one falling within the field of ministerial responsibility and that cases of preventive detention must be held to have been determined by the Governor on the advice of the appropriate minister. Assuming for a moment that that was so, even then the action must be the action of the Governor. In such case, the Governor would be satisfied with regard to the

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

matters specified in rule 26 on the advice of his minister. It would not be for the Court on a challenge raised to that effect to inquire into the reasonableness or otherwise of the minister's advice, nor into the question what advice the minister tendered or indeed whether he tendered any advice at all. The question as to which of the Governor's various capacities or spheres of activity was attracted in these cases is really not relevant to the purpose in hand. The rule requires that before making an order of detention the Governor should be satisfied on certain matters. Whether he is satisfied an advice tendered to him, or on a personal consideration of the material submitted to him, is, so far as the Courts are concerned, immaterial.

We have, however, great difficulty in accepting the proposition urged before us that the subject of preventive detention in cases like the present must be held as a matter of law to fall within the field of ministerial responsibility. That in respect of certain matters the Governor must act in his discretion and that in respect of certain other matters he must exercise his individual judgment is specifically provided by the Constitution Act. There is no matter with regard to which the Constitution Act lays down that it must necessarily be determined by the Governor according to the advice of his ministers. The field of ministerial responsibility is not defined in any positive manner in the Act, but is adumbrated in a residuary sort of manner, that is to say, it comprises matters with respect to which the Governor is not required to act in his discretion and does not choose to exercise his individual judgment. The question whether *any* matter falls within one or other of the special responsibilities of the Governor is left to be determined by the Governor himself. Once he declares that in his opinion a certain matter falls within the scope of any one or more of his special responsibilities, no court of law has any say with respect to it. Section 50 (3) of the Constitution Act lays down that if any question arises whether any

matter is or is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment. Nor can any argument be founded upon any obligation or duty that may be laid upon the Governor by his Instrument of Instructions, inasmuch as the validity of anything done by the Governor cannot be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him [s. 53 (2)].

The field of ministerial responsibility therefore would, with respect to any particular matter, be as wide or as narrow as the Governor might choose to make it, and of no matter can it be predicated as a proposition of law that its determination must depend upon the advice of a Minister as it necessarily falls within the field of ministerial responsibility, inasmuch as the Governor might at any time, with respect to any matter, decide that having regard to the circumstances of the case it falls within the scope of one or more of his special responsibilities. The question, if it properly arises at all in any particular case, must be determined as a question of fact and practice. In the cases before us, it appears to have been assumed on all hands before the High Court that the subject was one of the special responsibilities of the Governor to be determined by him in the exercise of his individual judgment. This was not challenged in the grounds of appeal filed in this Court, though counsel for the Bengal Government decided to urge before us that the matter fell within the field of ministerial responsibility. The material on record does not bear out his contention. There are indi-

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

cations in the affidavit of Mr. Porter (Addition Home Secretary to the Bengal Government) that th action taken in some of these cases was not in accor ance with the advice of the minister. This show that this subject has been treated in the Provinc of Bengal as falling within the special responsibilit of the Governor. In the answers given by the Hom Minister with reference to these cases on the floor o the Bengal Legislative Assembly on behalf of th Government, it is specifically stated that these matter were treated as the special responsibility of the Governor. It must also be remembered that though cases of only nine persons have come up before us, the powers conferred by rule 26 have in the Province of Bengal been exercised in respect of thousands of His Majesty's subjects and it would be difficult to hold that the matter did not fall within the special responsibility of the Governor as set out in paragraph (a) of sub-s. (1) of s. 52 of the Constitution Act.

Towards the close of the argument, it was contended on behalf of the Bengal Government that what actually happened in respect of cases of detention in the Province of Bengal was that if the Home Minister agreed that the order of arrest under rule 129 of the Defence of India Rules should be converted into an order of detention under rule 26, the matter was treated as falling within the field of ministerial responsibility; but if the Minister disagreed, the matter became one for the special responsibility of the Governor. In other words, it was suggested that the question whether a particular matter did or did not fall within the scope of the special responsibilities of the Governor was settled not with reference to the nature of the particular matter, but upon the nature and effect of the advice that the Minister concerned had tendered in respect of it. If the Governor found himself in agreement with such advice, he was content to treat the matter as one of ministerial responsibility; if he disagreed with it, he made it a matter of his special responsibility.

In support of this suggestion our attention was invited to the following statement of the Home Minister in the Bengal Assembly :—

" Ordinarily when a man is arrested under rule 129, the case must come up to me at some stage. Now, if I agree that the order under rule 129 should be converted into one under section (sic) 26, no difficulty arises. But in some cases I am of opinion the detention is not justified and in those cases it becomes Governor's responsibility."

We are unable to read this statement as meaning that the question became the Governor's responsibility only when the Minister was of the opinion that the detention was not justified. The Home Minister had already stated earlier :—

" As regards members of the Legislature, we have laid it down that they should as a matter of course be brought to the notice of the Government before they are detained under rule 26. In some cases the order of arrest under section (sic) 129 has been converted into detention under rule 26 under my orders. In some cases I have not approved *but as is well known the matter is one which is the Governor's special responsibility.*"

In the light of this statement, the later statement made by the Minister, which is relied upon by counsel and has been set out above, could only mean that the subject of detention was treated by the Governor as a matter of his special responsibility. When the Governor found that the Minister's advice was in favour of detention, he accepted that advice but when he found that the Minister's advice was against detention, he overruled the Minister as he was entitled to do in the exercise of his individual judgment. These statements taken together cannot mean that the question became the Governor's responsibility only when and because he disagreed with the advice tendered by the Minister. In any case we would be reluctant to attribute such an attitude to the Governor.

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

It now becomes necessary to examine the material on record for the purpose of determining whether the requirements of rule 26 have been complied with in respect of the orders of detention that have been relied upon by the Crown as an answer to the applications for the issue of writs of *habeas corpus* in these cases. We have already made reference to the contention that the presumption set out in illustration (e) to s. 114 of the Evidence Act, *viz.*, that official acts have been regularly performed, attaches to these orders. Before any such presumption can arise, it must be shown that the orders are on the face of them regular and conform to the provisions of the rule under which they purport to have been made. We have set out earlier the relevant portion of the orders of detention which is the same in each case. This reads as if all that the authority making the order was satisfied about was that the person concerned in each case should be detained and it was not certain as to the reason for detaining him, *i.e.*, whether that person was to be prevented from acting prejudicially to the defence of British India, *or* acting prejudicially to the public safety, *or* acting prejudicially to the maintenance of public order, *or* acting prejudicially to the efficient prosecution of the war. We were told that the order is a cyclostyled form in which the name and particulars of the person to be detained are filled in as need arises. It is possible that the ministerial officer responsible for the drawing up of the order merely copied into this part the relevant portion of the language of the rule itself, and failed to notice that though the word "or" before the words "efficient prosecution of the war" was perfectly in order in the rule, it was out of place in the orders of detention. It was suggested that some sort of reasonable meaning could still be read into this part of the orders of detention, but we see no reason to adopt a meaning different from that which would *prima facie* attach to the language used.

Assuming, however, that the orders are regular in form and are open to no objection on the face of

them, there is so much material on the record showing that the requirements of rule 26 were grossly violated in the making of the orders that it would not be safe to make any presumption regarding their validity. This material is contained in the affidavits filed on behalf of the respondents and the counter-affidavit sworn to by Mr. Porter, Additional Home Secretary to the Bengal Government. Objection was taken on behalf of the Crown to the admissibility in evidence of the answers given by the Home Minister, Bengal, in the Bengal Legislative Assembly to questions put to him regarding detention under rule 26. These answers are contained in Annexure 'A' to the affidavit sworn to by Mr. Nalinakshya Sanyal. Before the High Court formal proof of the proceedings of the Legislative Assembly was waived by the Crown. We are unable to sustain the objection raised regarding the admissibility of these answers. It is not disputed that the answers were given by the Home Minister in the Legislative Assembly in his capacity and in the discharge of his duties as such Minister. He was the person to whom the duty of answering questions on the subject had been allocated by the Governor under the Rules of Business. The answers relate to matters which were put in issue before the High Court. In our opinion they were admissible under sections 17, 18 and 20 of the Evidence Act.

These answers read with Mr. Porter's affidavit disclose a state of affairs in respect of the exercise by the Bengal Government of its powers under rule 26, which can only be described as lamentable. The largest number of cases of detention in the Province of Bengal appear to have arisen in connexion with the disturbances of August and September of last year. In these cases the procedure adopted appears to have been that the police sent up lists of persons detained under rule 129 together with a recommendation that these persons should be detained under rule 26. There upon orders for detention under rule 26 were issued forthwith as a matter of

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

routine, and on receipt of further and detailed material from the police, each case was submitted to the Minister concerned who was then expected to scrutinize such material *to see whether there was any reason why the detention should not be continued.* If he discovered such reason he presumably made a recommendation for release which was sent up to the Governor, as the matter was one of his special responsibility. In case nothing further was heard from the Minister after submission of the cases to him, nothing was done, and the detention continued.

" We may draw attention in this connexion to the following statements made by the Home Minister in the Bengal Legislative Assembly in answer to questions on the subject :

" We have adopted the device of issuing orders under Defence rule 26 pending scrutiny of the information submitted to us, because this ensures to those who are under detention the rather more favourable concessions allowed to security prisoners, the absence of which was in some cases made a matter for protest or complaint by or on behalf of those concerned. "

" All that I can say is this, that cases are put up and as a matter of routine the order under section (sic) 129 is converted into one under rule 26, unless there are special reasons why a recommendation should be made for their release."

" The arrest is forthwith reported to Government for orders in accordance with the requirements of the law and and to meet objections made by or on behalf of prisoners and to give them the benefit of the concessions enjoyed by security prisoners *pending the consideration of the cases* orders under Defence of India rule 26 (1) (b) ordinarily issue at once. Later, the recommendation of the police officer, together with the materials furnished in support of the recommendation are carefully considered by Government and the orders of detention

issued are reviewed and cancelled or confirmed according to the nature of the information against the individual concerned."

In answer to the question whether he was aware that, as a result of the arrangement under which the police were empowered to arrest anybody and detain him automatically beyond the statutory limits, abuses were taking place, the Minister stated:

"It is possible rather it is probable that these things happen. I do not go so far as to say that these things do not happen, in some cases they may happen."

He stated further:

"Sir, I refer to the general order under which the cases of the members of the Legislature must invariably be put up before me as privileged persons. As regards other cases, I ask for lists of arrests and if I find that there are certain gentlemen about whom I personally hold this view that it is unlikely that they might be guilty, the general order given is that as quickly as possible the order under rule 129 should be converted into an order under rule 26 and then all the cases should be brought up before me."

There was apparently no limit of time within which a "review" of these cases was to be completed by the minister. In the case of Nanigopal Mazumdar, for instance, the automatic order of detention under rule 26 following upon arrest under rule 129 and a recommendation by the police for detention was issued on the 8th March, 1943. By the 24th May, 1943 (the date on which Mr. Porter's affidavit was sworn) the detailed material upon which the recommendation of the police had been made, had not yet been received and the case had not therefore been put up for "review".

Even with regard to the 1940 cases (Nos. XV and XX) it does not appear from Mr. Porter's affidavit that they were at any stage considered by the Governor. In Birendra Ganguli's case (No. XIX), the arrest under rule 129 took place on 16th August

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

and the order under rule 26 was made on 14th September by Mr. Porter, *in anticipation of the orders of the Home Minister*, though the maximum period of detention permitted under rule 129 was not due to run out till the 15th October and the Minister was actually able to dispose of the case on the 18th September. There was thus no urgency of any kind and no reason has been disclosed by Mr. Porter why he thought it necessary to pass the order of detention himself. In the case of Niharendu Dutt Majumdar, (No. XVIII) the only inference that can be drawn from Mr. Porter's affidavit is that the case was never put up even before the Home Minister in spite of the latter's express instruction that *all* cases of Members of the Legislative Assembly must be put up before him. As Mr. Porter occasionally took it upon himself to direct the issue of orders of detention, and there was not even a suggestion before the High Court or before us that any of the cases with which we are now concerned was put up before the Governor, it is plain that this case was finally disposed of by Mr. Porter himself.

It was suggested on behalf of the Crown that before the issue of orders of detention under rule 26, at least Mr. Porter satisfied himself that it was necessary to issue the orders: (see para. 12 of his affidavit). In at least three cases, Mr. Porter has stated that he considered the materials before him; and *in accordance with the general order of Government* directed the issue of an order of detention. In two of these cases, the matter was later submitted for consideration to the Minister *on receipt of fuller material from the police*. It is obvious that Mr. Porter could not possibly have considered the fuller material, as he calls it, before directing the issue of an order under rule 26. In the third case, as already pointed out by us, even the fuller material was still awaited on the date of Mr. Porter's affidavit.

Any consideration of the available material by Mr. Porter before the issue of a detention order did not amount to compliance, either in the letter or in

the spirit, with the provisions of rule 26. According to his own affidavit Mr. Porter was acting on the basis that the final order in each case had to be passed by the Governor or the Minister. Between a person dealing with a matter on the footing that the responsibility for the final decision has been laid upon his shoulders and one dealing with it on the assumption that he is dealing with it only provisionally till the matter can be considered on fuller material by some higher authority, there must be a wide difference both in fact and in law.

We cannot condemn the procedure adopted in these cases too strongly. It would be difficult to conceive of a more callous disregard of the provisions of the law and of the liberty of the subject.

The following observations occur in this Court's judgment in *Keshav Talpade's* case:

"We confess that an order in the terms of that under which the appellant in the present case has been detained fills us with uneasiness. It recites that the Government of Bombay "is satisfied that, with a view to preventing the said Keshav Talpade from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war", it is necessary to make an order of detention against him. This reads like a mere mechanical recital of the language of rule 26. We do not know the evidence which persuaded the Government of Bombay that it was necessary to prevent the appellant from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war; but we may be forgiven for wondering whether a person who is described as an authorized petition writer on the Insolvency Side of the Bombay High Court was really as dangerous a character as the recital of all these four grounds in the order of detention suggests. The order does nothing to remove the apprehension we have already expressed that in many cases the persons in whom

1943

King Emperor v. *Sibnath Banerjee.*

Zafrulla Khan J.

this great power is vested may have had no opportunity of applying their minds to the facts of every case which comes before them".

We regret to have to observe that the apprehensions there expressed have on the material that has been brought on the record of the cases now before us turned out to be justified.

In view of what we have just observed, it was not necessary for us to examine each individual case to see whether the order of detention was open to objection. We have however, as a matter of fact considered each case and have come to the conclusion that every one of these orders is bad in law as in no case does it appear that the matter was considered by the Governor at any stage, much less that at the time the order was made he was satisfied with regard to any of the matters set out in the order of detention.

It was observed by Mitter J. that the position taken up by the learned Advocate-General before the High Court was that the orders of detention must be taken to be orders made by the Provincial Government itself, though none of the cases (except one) had been brought up before or considered by the Governor himself. Sen J. also records: "The learned Advocate-General stated that except perhaps in the case of Sasanka Sekhar Sanyal there was no question of the Governor being personally satisfied within the meaning of rule 26". We pointedly drew the attention of the Advocate-General to these observations and he again reaffirmed (i) that it was not his case that the Governor himself had considered the case of any of the eight persons with whom we are now concerned, and (ii) that he did not rely on any delegation by the Governor under s. 2 (5) of the Defence of India Act. It is therefore unnecessary for us at this stage to consider the nature and incidence of the burden of proof or the kind of presumption to be made in the circumstances of the case, or even to consider whether the evidence

taken as a whole does not rebut the usual presumption as to the regularity of official acts. We are accordingly of the opinion that all the eight appeals should be dismissed.

Cases Nos. IX, XI, XII, XXV, XXVII, XXVIII, XXX and XXXII of 1943.

ZAFRULLA KHAN J.—These are appeals against orders passed by the High Courts of Allahabad, Lahore and Madras dismissing applications made to them under s. 491 of the Criminal Procedure Code for the release of certain persons detained under rule 26 of the Defence of India Rules. The circumstances in which these applications were made were similar to those in which applications were made in the Bengal cases which we have just disposed of. As most of the contentions raised were common to the two sets of cases, we heard them together. The detenus concerned in Cases Nos. IX and XII (from Allahabad) have been released during the pendency of these appeals ; it is therefore not necessary to deal with them.

In this batch of cases no question as to the order of detention not conforming to the requirements of rule 26 was raised; the discussion in our judgment in the Bengal cases of what has been referred to as Question X has no bearing on this batch. The conclusion reached in that judgment as to the validity and operativeness of s. 3 of Ordinance XIV of 1943 is sufficient to warrant the dismissal of these appeals. In Cases Nos. XI, XXV, XXVII, XXVIII, XXX and XXXII the appeals are accordingly dismissed.

SPENS C. J. —I have had the opportunity of reading and considering the judgment just delivered by my brother Zafrulla Khan on behalf of himself and my brother Varadachariar. With their judgment as to the validity of Clause 3 of Ordinance XIV I am in complete agreement. I further agree that in view of our decision on Clause 3, there is no necessity for

1943

King Emperor v. Sibnath Banerjee.

Spens C. J.

the disposal of the cases before us to come to a decision on the validity of Clause 2 of the Ordinance. On that part of the case I have nothing further to add.

On the special points which have been raised by evidence in the Bengal cases, I take a somewhat different view to that taken by my brothers in regard to all the cases and in four I differ in my conclusion from that at which my brothers have arrived. I must therefore explain my reasons.

Rule 26 of the Defence of India Rules is in the following terms so far as material :--

" The Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war it is necessary so to do, may make an order....directing that he be detained."

The rule requires in my judgment that, before any order can validly be made in any case, the particular case shall be considered by someone duly authorized on behalf of the Provincial Government to pass an order for detention and that that person shall be satisfied that it is necessary that the person concerned should be detained for one or other or more of the reasons specified in the rule.

In each case the order for detention is duly authenticated on behalf of the Provincial Government in accordance with the provisions of s. 59 (2) of the Constitution Act. Each order contains a recital to the following effect:

"And whereas the Governor is satisfied that, with a view to preventing the said person from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public

order, or the efficient prosecution of the war, it is necessary to make the following orders to continue his detention; ".

It has been suggested that (1) the form of the recital indicates by use of the word "or" that no final consideration has been given to each case and that all that the investigating authority has done has been to form a rough conclusion that the case may come within one or other of the reasons quoted and that (2) the use of a cyclostyled form of order indicates a like lack of careful consideration, and that therefore the order is not good *ex facie*. I do not accept these arguments. In my judgment the form of recital is one which a layman might reasonably use when he was satisfied that the case must come within one or other of the specified categories without being prepared to pledge himself with legal exactitude to any particular one or more of the categories. Nor do I think that the cyclostyling of the forms, having regard to the circumstances in which many of these orders may have been made, is sufficient to raise serious doubts as to the validity of the orders. I do not think therefore that the form of the order discloses anything irregular on these grounds on its face.

The detenus further claim (a) that there is admissible evidence to establish that not only is that recital incorrect in each case but that in fact there was not, as required by the rule, any proper consideration by, or any proper satisfaction on the part of, any properly authorized person before the orders for detention were made, and (b) that accordingly such orders were and must remain invalid.

The first question which arises is whether having regard to the recital contained in these orders, which on the face of them appear to be validly made, it is permissible for the truth and accuracy of the recital to be inquired into by this Court. It was suggested that s. 59 (2) of the Constitution Act made it impossible for any such inquiry to take place. In my judgment however, s. 59 (2) prohibits a duly authenti-

1943

King Emperor v. *Sibnath Banerjee.*

Spens C. J.

cated order being called in question on one ground only, namely, that it is not an order or instrument made or executed by the Governor. It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate. If however in any case a detenu can produce admissible evidence to that effect, in my judgment the mere existence of the recital in the order cannot prevent the Court considering such evidence and, if it thinks fit, coming to a conclusion that the recital is inaccurate. If authority is required for the views stated above, it can in my judgment be found in the speeches of their Lordships in the *Liversidge* case (1) and the *Greene* case (2).

In this case the detenus have in fact produced evidence which for the reasons explained in the preceding judgment of my brothers is admissible and which establishes from the report of answers and statements made by the Chief Minister in the Bengal Legislative Assembly in February and March 1943, that on the 1st of October, 1942, orders were given to those by whom cases of persons detained under rule 129 were being considered that if the Police recommended detention under rule 26 of any such persons, detention orders under rule 26 should be made as a matter of routine without any further proper inquiry by or satisfaction on the part of any person at that stage that the cases really came

(1) [1942] A. C. 206. (2) [1942] A. C. 284.

within the provisions of rule 26. In answer to the evidence put in by the detenus the Government of Bengal put in an affidavit deposed to by the Additional Secretary, Home Department. This affidavit confirms the giving of the order by the Home Minister as to the routine dealing with these cases above referred to, though it also suggests that despite the routine order some inquiry beyond that required by the routine order was made by the Additional Secretary. Further, the evidence indicates that the order may have been given in the interests of the detenus as it is suggested that persons detained under rule 26 may have some privileges in jail, as compared with persons detained under rule 129. This cannot of course justify the course of procedure adopted. It was wholly wrong to direct that orders should go as a matter of course on Police recommendation and that the real consideration should follow the making of the order. It is impossible in my judgment for the Court to be satisfied that after such a general order was given, there was, before the orders for detention were made, any full or proper inquiry by any one or any proper satisfaction on the part of any one that each case was one where it was necessary to make an order for detention under rule 26 without that person's mind having been influenced by the improper routine order. The facts disclosed in these cases appear to me to bring them within the exceptional class of cases referred to by Lord Wright in the *Liversidge* case (1). In my judgment therefore none of the orders made in these cases, where persons had been arrested and were being held under rule 129, after the 1st of October, 1942, can be upheld as valid.

There are however three cases where the orders for detention were made before the 1st of October, 1942. These consist of (1) Case No. XV, (2) Case No. XIX, and (3) Case No. XX. In Case No. XV the order for detention was made as long ago as the 24th of October, 1940, in Case No. XIX the order

(1) [1942] A. C. 206 at p. 261.

1943

King Emperor v. *Sibnath Banerjee.*

Spens C. J.

for detention was made on the 14th of September 1942, and in Case No. XX the order for detention was made also as long ago as the 28th of October, 1940. The position as regards these cases is as follows. An application was made in each case under s. 491 of the Criminal Procedure Code solely on the ground that by reason of the judgment of this Court in the *Talpade* case the detention was unlawful. Each application was verified in the first instance solely by a formal affidavit. At a later date the detenu in Case No. XV was given leave to put in and did put in an affidavit himself. This affidavit suggests nothing more than that his arrest and detention had not been made in good faith, an allegation quite insufficient by itself, unless supported by facts, to raise a *prima facie* case against the validity of the order for his detention. No such facts were alleged by him. In Case No. XXI however an affidavit by Dr. Nalinakshya Sanyal was permitted to be put in and in the Court below it was taken to be assumed that a similar affidavit was put in in each of the other cases then before the Court. The detenus in Cases Nos. XV, XIX and XX are entitled to the benefit of this evidence. It is therefore to the evidence of Dr. Sanyal, its annexure containing the report of the answers and statement of the Chief Minister in the Bengal Legislative Assembly, and the answering affidavit of Mr. Porter to which we must look for any evidence on behalf of these three detenus raising a *prima facie* case that these orders made prior to the 1st of October, 1942, were invalid. In these three cases the position in law is in my judgment as follows. The application under s. 491 is made by or on behalf of a detenu. The Crown justifies the detention by putting in the original order of detention with the recital of the satisfaction of the Governor and Ordinance XIV of 1943. If the Ordinance or Clause 3 thereof is held valid, the onus is then entirely shifted on to the detenu to establish at least a *prima facie* case that the order of detention in his particular case was invalid on grounds other than those derived

from the decision in the *Talpade* case. It is not sufficient merely to allege that the detention is not in good faith or *bona fide* or anything of that sort. Facts have got to be alleged by the detenu sufficient to persuade the Court that, although the order *ex facie* indicates that everything that should have been done has been properly done, it is entitled or it is proper for the Court, to call upon the Crown further to justify what is expressed to have been done in the order : [*vide* Lord Maugham in the *Liversidge* case (1) and Lord Wright's observations in the *Greene* case (2)]. The detenu must accept the position that the presumption *omnia esse rite acta* applies to the order and that once the order is proved or admitted, the Court should *prima facie,* until the contrary is *proved,* assume it to have been properly made. The burden of proof is clearly on the detenu, and it is for this Court to determine in these three cases whether that burden has been discharged.

I have read carefully through the extracts from the proceedings of the Bengal Legislative Assembly referred to by Dr. Sanyal. I am unable to find anything in those extracts which goes to prove that these three particular orders, all made before, and too long before, October 1st, 1942, were improperly made, save only a general statement by the Home Minister that cases may have occurred where persons arrested under rule 129 have been detained although no order has been passed. Even if such a statement were sufficient *prima facie* to discharge the requisite burden of proof, which I doubt, any suggestion that anything of that sort occurred in any of these three cases is dispelled at once by the answering affidavit of the Additional Secretary. Further, there is nothing in the evidence of Mr. Porter relating to these three cases which indicates that anything was done which could not in my judgment properly have been authorized to be done by the Provincial Government.

(1) [1942] A.C. 206 at p. 224 (2) [1942] A.C. 282, at p. 299.

1943

King Emperor v. Sibnath Banerjee.

Spens C. J.

The materials in each case were examined by Mr. Porter and the Home Minister consulted. In Case No. XV and Case No. XX the order was not made until the instructions of the Home Minister had been received. In Case No. XIX after Mr. Porter's examination of the case he put the matter before the Home Minister, but as the period for which detention under rule 129 was about to expire or had just expired before he actually received the Home Minister's instructions he himself made the order. The deduction which the Court should, I think, draw from this evidence is that whilst the normal procedure was for the Additional Secretary to examine the cases, make his recommendations to the Home Minister and act on the latter's instructions Mr. Porter would be justified in an emergency in making the order himself and reporting the matter to the Home Minister. Such a procedure might in my judgment both in fact and in law have been validly authorized by the Provincial Government. In the absence of proof that the procedure disclosed in these cases in Mr. Porter's affidavit either was not in fact or could not in law be properly authorized by the Provincial Government, in my judgment the presumption that everything was properly done should be held by this Court to prevail. There is no evidence that in fact what was done was not authorized. I have considered whether in law there is anything to prevent the duty of dealing with these cases being assigned to Mr. Porter, an Additional Secretary, to investigate and report to the Home Minister and act normally on his instructions but in an emergency to act himself. In my judgment there is nothing in law which would prevent this procedure being authorized by the Provincial Government. If, therefore, the Court ought to act upon the presumption, there is no legal difficulty in the way.

It is true that neither Mr. Porter's affidavit nor the statements and answers of the Home Minister set out what in fact was the prescribed procedure

for dealing with these cases, or indicate the rules of business or other authority under which such procedure could be properly prescribed. The result was that the Advocate-General for Bengal took such facts as appeared from the evidence and attempted to establish affirmatively from these facts and certain sections of the Constitution Act and rules of business of the Provincial Government that the procedure adopted was in fact duly authorized. If the burden of establishing this affirmative case had been on the Advocate-General, I should have felt difficulty in finding that he had discharged it in the absence of clear evidence of what was the procedure prescribed and of the authority by whom and the manner in which it was prescribed. The Advocate-General did however satisfy me by his argument that what appears from the evidence to have been done might legally have been prescribed by the Provincial Government and in my judgment that is sufficient to rebut any suggestion which arises, if indeed any suggestion does arise, from the evidence on which these detenus are entitled to rely as suggesting the inaccuracy of the recitals in the orders for detention.

At one time I was inclined to agree with my brothers that, having regard to the provisions in s. 2 (5) of the Defence of India Act, there ought to have been an express delegation to some officer under that section to deal with these cases. I am satisfied however that that is not necessary and that that clause only requires a delegation where matters cannot be dealt with by the Provincial Government in the manner in which it normally deals with its executive business.

I have come to the conclusion that the Constitution Act on its true construction does authorize the Provincial Government to deal with the executive business arising out of the administration of the Defence of India Act and its rules, not excepting rule 26, in accordance with rules of business made under s. 59 (3) and the powers conferred by s. 49,

1943

King Emperor v. *Sibnath Banerjee.*

Spens C. J.

and that those powers are not controlled and superseded (to use an expression very familiar in this case) but are supplemented by the express power of delegation, contained in s. 2 (5) of the Defence of India Act, to any officer or authority not being an officer or authority subordinate to the Central Government. This power of delegation so conferred goes further as regards the selection of the person or authority to execute the powers or duties on behalf of the Provincial Government than any powers expressly or impliedly available under the powers of the Constitution Act to a Provincial Government for carrying out its executive duties. This power of delegation appears to me to be a most useful supplementary power to deal with difficult or distant administrative problems which would strain the ordinary machinery of Provincial Government. Moreover, if this express power was intended to supersede or modify the powers contained in the Constitution Act for the carrying on of the executive business of the Province, I should have expected the provisions of the Defence of India Act to have made that position clear beyond doubt and to have found sub-clause (5) of s. 2 introduced by some words such as "notwithstanding anything in the Government of India Act, 1935" to indicate that if any of the new duties and powers were to be assigned to officers of the Provincial Government, such assignation was not in any case to be effected under the normal powers of the Government of India Act but must be effected by some delegation under sub-clause (5) of s. 2. It follows that I accept the argument of the Advocate-General that such matters as those to be dealt with under rule 26 could be dealt with in accordance with rules of business made or to be made under s. 59 (3) of the Constitution Act.

I am accordingly of the opinion that in these three cases the appeals should succeed.

There remains Case No. XVIII. This is the case of a detenu who had not previously been

arrested under rule 129 when the order for his detention was made. His case also did not come within the purview of the objectionable routine order. Here again the evidence upon which the detenu is entitled to rely (which includes Dr. Sanyal's affidavit and the annexure thereto) does not appear to me to raise a *prima facie* case against the accuracy of the similar recital in the order for his detention. On the contrary in this case the deduction which I draw from the whole evidence is that the procedure adopted is consistent with the literal accuracy of the recital, namely, that the Governor satisfied himself personally before the order was made. What I have said of the last three cases equally applies to this case. In my judgment, therefore, the appeal in this case should also be allowed.

There are two points on which I desire to say something further: (1) It was suggested by the Advocate-General of Bengal that the satisfaction required by rule 26 was not a condition precedent to the exercise of the power. I do not take this view. I have already indicated that in my opinion it is a condition to be fulfilled before an order can be validly made. This condition requires in my judgment the exercise of executive discretion and demands a quasi-judicial consideration of the materials before him by the person authorized to deal with the matter. I use the phrase "quasi-judicial" as no doubt the person to be satisfied can allow his mind to be influenced by materials and evidence at which no one acting in a strictly judicial capacity could look. But in my judgment the person to be satisfied has to direct his mind expressly to those materials in the light of the terms of rule 26 before coming to a decision in each case. (2) Having regard to the view which I have taken of these cases from Bengal, it is not necessary in my judgment to determine who or what is meant by "the Provincial Government" in rule 26. Whatever meaning is given to that phrase, whether applying the definition from the General Clauses Act or not, in my view the

1943

King Emperor v. *Sibnath Banerjee.*

Spens C. J.

procedure adopted in these cases could have been legally authorized under the Constitution Act by rules of business made under s. 59(3) of that Act, and, as I have previously said, in my view that is sufficient to dispose of these cases.

In my judgment these four appeals should be allowed, but in view of the judgment of my brothers the appeals will be dismissed in the same manner as the other Bengal appeals.

As regards the appeals other than the appeals from Bengal, I of course agree with the judgment of my brothers that those appeals also shall be dismissed.

Appeals dismissed.

Agent for the appellant in Cases Nos. XIII to XXI: *B. Banerji.*

Agent for the respondent in Cases Nos. XXVII, XXVIII, XXX and XXXII: *Ganpat Rai.*

Agent for the respondent in Cases Nos. IX, XI and XII: *Sumair Chand Jain Raizada.*

Agent for the respondent in Case No. XXV: *Tarachand Brijmohanlal.*

Agent for the respondents in Cases Nos. XIII to XXI: *P. K. Bose.*

Agent for the appellants in Cases Nos. IX, XI, XII and XXV: *Sri Narain Andley.*

Agent for the appellants in Cases Nos. XXVII and XXX: *Naunit Lal.*

Agent for the Governor-General in Council: *K. Y. Bhandarkar.*

Agent for the Province of Bombay: *B. Banerji.*

Agent for the Province of Madras: *Ganpat Rai.*

THAKUR JAGANNATH BAKSH SINGH

v.

THE UNITED PROVINCES.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Federal Court—Leave to appeal to His Majesty in Council—Practice—Grant of leave depends on the facts and circumstances of each case.

The question of grant of leave to appeal to His Majesty in Council must be dealt with on the facts and circumstances of each case and it is neither possible nor desirable to crystallize the rules relating to the exercise of the Court's discretion in the matter.

Their Lordships granted leave as the case involved not only a question as to the interpretation of the Constitution Act but broader questions relating to a controversy which had long been agitated in the Courts in India, namely, the nature and extent of the rights secured to Taluqdars by the Oudh Settlement and the extent of the immunity thereby secured to them from legislative interference, pecuniary interests of very large value were also involved, and a very large number of people were vitally interested in the decision of these questions.

Prabhatchandra Barua v. *King Emperor* (1) referred to.

APPLICATION for leave to appeal to His Majesty in Council.

This was an application for leave to appeal to His Majesty in Council under s. 208 (b) of the Government of India Act, 1935, from the judgment of the Federal Court dated the 22nd April, 1943, in Case No. XI of 1942, *Thakur Jagannath Baksh Singh* v. *The United Provinces.* The applicant alleged that the question involved in the suit and the appeal, namely, the validity of the United Provinces Tenancy Act (XVII of 1939) was of great importance to a great mass of people of the province and involved a substantial question of law relating to the interpretation of the Government of India Act, 1935. The applicant desired to appeal on the following grounds :—

(1) (1930) I. L. R. 58 Cal. 430; 57 Ind. App. 228.

1943

Thakur Jagannath Baksh Singh v. The United Provinces.

"(1) As it was admitted by counsel on behalf of the Government and assumed by the Federal Court that the provisions of the Act did cut down the absolute rights granted to the Taluqdars by the Sanads it should not have been held that the impugned legislation fell within entry No. 21 of the Provincial Legislative List, as any legislation in order to be within that List should have recognized as beyond the scope of any further legislation the rights already granted, and the Legislature could only legislate keeping in view as fixed points what had already been granted by the Sovereign power.

(2) It was the Taluqdars' contention that the Provincial Legislature could only regulate or legislate on the relations between landlord and tenant in so far as they were open matters, capable of being adjusted and under guise of legislating on the relations between landlord and tenant the legislature had no right to entrench upon what at the time were the recognized rights of the Taluqdars in the lands covered by their Sanads.

(3) The provisions of s. 299 (2) are a sufficient indication of the limitations on the power of the legislature and are not confined to the acquisition of land for public purposes and it is not a sufficient answer to the spirit of the section to point out that the impugned Act was merely regulating the relation of landlord and tenant, and only incidentally diminishing thereby the rights which the landlord had hitherto exercised, for, in fact and in effect, it was the confiscation of the rights of the Taluqdars and the granting of them to others who had no such rights.

(4) Section 300 of the Constitution Act warrants the view that Parliament did not intend the executive action of the Crown to be questioned by legislation, and whatever may be the general rule as to the right of the Crown in its legislative capacity to derogate from a grant in its executive capacity, s. 300 was intended to form an exception to the general rule if there is any such, and the cases relied

on are not authority for the extreme proposition that in no case can the doctrine of derogating from one's own grant be applied against the exercise of legislative action contrary to an executive grant.

(5) The British Parliament when granting legislative powers to the different Legislatures in British India may, as a matter of policy, have decided not to make grants made hitherto subject to modification or extinction by any of the legislatures, and this is a very important question that arose for decision and has not been given the full consideration that it deserved.

(6) The Constitution Act by expressly reserving to the Executive the power to derogate from a Crown grant, must be taken to have excluded legislative interference with it.

(7) The decision with regard to the effect of the Crown Grants Act does not take into consideration many of the arguments based on its provisions, and in particular the argument that any legislation contrary to its provisions would be ineffectual and void, and the Federal Court has erred in holding that nothing in the Crown Grants Act could limit the power of a Legislature to pass such legislation as it thought fit thereafter if by that is meant that the force and effect of a Crown grant could be nullified by an Act of the Provincial Legislature.

(8) The pith and substance of the impugned Act is the confiscation of rights granted by the Crown and it is only a colourable exercise of jurisdiction to invoke entry No. 21 of the Provincial List.

(9) The Federal Court has not decided in detail certain specified sections impugned as *ultra vires* and in particular those sections that empowered the Local Government to do certain acts which according to s. 300 could only be done by the Governor in the exercise of his individual judgment".

1943. Nov. 1. *Pyare Lal Banerji* (*K.K. Raizada* with him) for the applicant. This is an application for leave to appeal to the Privy Council. There is

1943

Thakur Jagannath Baksh Singh v. *The United Provinces.*

difference between certifying a case as fit for appeal and merely granting leave to appeal. There are no conditions to be fulfilled before leave to appeal could be granted. There are several cases where leave has been granted under the Administration of Justice Appeals Act, 1934, of the United Kingdom. Whenever there is a question of law, leave is granted. The granting of leave is more or less a formality. There is no necessity to certify that the case is a fit one for appeal as in the case of appeals under s. 205 of the Government of India Act.

[VARADACHARIAR J. There are important questions in this case other than the interpretation of the Constitution Act or the Rules.]

Attorney-General for Alberta v. *Attorney-General for Canada* (1), a ruling which has an important bearing on this case, was not cited at all at the previous hearing. It was held in this case that curtailing rights of reversion to the Crown is *ultra vires* even though the legislature has power to legislate in respect of succession. Altering succession is one thing and depriving Crown of the rights of reversion is a different thing. The Legislature has in this case confiscated the rights of Taluqdars under the Sanads in the guise of legislating in relation to landlord and tenant. The case is not covered by entry No. 21 of the Provincial Legislative List. The Indian Legislature has no power to take away rights conferred by Government Sanads.

Dr. Narain Prasad Asthana, A.-G. of the United Provinces (*Sri Narain Sahai* with him) for the respondent. The Act came into force long ago, in 1940. It has not been attacked by other Taluqdars and rights have been settled and adjusted in several instances in accordance with the Act. It should not be disturbed now. The practice of the Court is not to grant leave unless difficult questions of law are involved: *Subrahmanyan Chettiar* v. *Muttuswami Goundan* (2). The only relief claimed in the case was that the Act was *ultra vires*.

(1) [1928] A. C. 475.

(2) A. I. R. 1941 F. C. 69.

VARADACHARIAR J. This case comes under the second category mentioned in that case, namely, 'cases which are likely to affect a large number of interests'. We are aware of the local difficulties. The question raised is of great importance to the province.

ZAFRULLA KHAN J. In the matter of leave it is what we think on the whole case that counts.

SPENS C. J. Leave will be granted. Judgment will be pronounced tomorrow.

Nov. 2. The judgment of the Court was delivered by SPENS C. J. This is an application by one of the Taluqdars of Oudh for leave to appeal to His Majesty in Council against the decision of this Court, dated the 22nd of April, 1943, in what may be conveniently referred to as the United Provinces Tenancy Act litigation. In 1939, the United Provinces Legislature enacted a comprehensive law (United Provinces Tenancy Act, 1939, No. XVII of 1939) dealing with the rights of landholders and tenants in that Province. The Taluqdars contended that several of the provisions of that Act seriously curtailed their pre-existing rights under sanads issued to them at the time of the Oudh Settlement and one of them filed the suit for a declaration that the Act or at least certain of its provisions were *ultra vires*, invalid and inoperative. It was urged in support of this claim that this legislation did not fall under entry No. 21 of List II of the Seventh Schedule to the Constitution Act and that some of the impugned provisions were opposed to the spirit, if not the letter, of ss. 299 (2) and 300 (1) of the Constitution Act. Reliance was also placed on the broader ground that the doctrine that a grantor might not derogate from his own grant applied even to limit legislative powers and it was lastly contended that in view of the provisions of s. 3 of the Crown Grants Act, 1895, the rights of the Taluqdars must be held to be unaffected by the provisions of the Tenancy Act. These contentions

1943

Thakur Jagannath Baksh Singh v. *The United Provinces.*

were overruled by the trial court as also by this Court. Hence this application for leave to appeal to His Majesty in Council.

Opposing the application, the Advocate-General of the United Provinces maintained that the circumstances of the present case differed in no material respect from some of the previous cases in which this Court had declined to grant leave and he drew our attention to the reasons given in some of those cases. Those very judgments make it clear that the question of grant of leave to appeal must be dealt with on the facts and circumstances of each case and that it is neither possible nor desirable to crystallize the rules relating to the exercise of the Court's discretion in the matter. The present litigation involves not only a question as to the interpretation of the Constitution Act, but broader questions which bear on a controversy which has long been agitated in the courts in India, namely, the nature and extent of the rights secured to Taluqdars by the Oudh Settlement and the extent of the immunity thereby secured to them from legislative interference. The affidavit accompanying the present petition for leave makes it clear that the decision in this case must affect pecuniary interests of very large value. The number of people (Taluqdars and tenants) vitally interested in the decision of this question is undoubtedly very large and it is inevitable that this controversy which has been acute in this country for some years must arise again and again every time that the legislatures in India attempt to deal with the rights of landholder and tenant in some of the Indian Provinces. The judgment of the Lordships of the Judicial Committee in *Prabhatchandra Barua* v. *King Emperor* (1) has not touched upon the questions raised in the present litigation. All these circumstances make this a case in which in our judgment leave should be granted. Leave is accordingly granted. *Leave granted.*

Agent for the applicant: *B. Banerji.*

Agent for the respondent: *Sumair Chand Jain.*

(1) (1930) 57 Ind. App. 228; I. L. R. 58 Cal. 430.

KESHAV TALPADE *v.* KING EMPEROR.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Federal Court—Practice—Appeal from order dismissing application for writ of habeas corpus—Applicant released by Government before hearing of Appeal—Procedure—Propriety of pronouncing opinion on the merits—Criminal Procedure Code, 1898, s. 491.

Where an application for a writ of *habeas corpus* under s. 491 of the Criminal Procedure Code was dismissed by the High Court and the applicant preferred an appeal to the Federal Court from the judgment of the High Court, but the applicant was released by the Government before the appeal came on for hearing: *Held*, that all that the Court could do at this stage was to dismiss the appeal on the ground that no order on the application could be made and that the Court would not pronounce an opinion on the correctness of the judgment of the High Court.

APPEAL from the High Court at Bombay.

This was an appeal from an order of the Bombay High Court dated July 2, 1943, in Criminal Application No. 86 of 1943. The facts are stated in the argument of counsel for the appellant.

1943. Nov. 1. *G. N. Joshi* (*D. P. Dhupkar* with him) for the appellant. The appellant was arrested on the 24th August, 1942, under r. 129 of the Defence of India Rules and detained under r. 26 of the said Rules. He filed an application in the nature of a writ of *habeas corpus* under s. 491, Cr. P. C., being Criminal Application No. 86 of 1943, for his release. This application was dismissed on the 10th March, 1943, and an appeal was preferred to the Federal Court. The Federal Court decided on the 22nd April, 1943, that r. 26 was *ultra vires* and remitted the case to the High Court for disposal of the case in the light of the observations made in judgment of the Federal Court. Ordinance XIV of 1943 was promulgated on the 28th April, 1943, to validate r. 26. The Bombay High Court referred the case back to the Federal Court for a declaration as to the nature of the order that was to be substituted for the order appealed against. The Federal Court by their order of the 31st May,

1943

Keshav Talpade v. *King Emperor.*

1943, confirmed their previous order of the 22nd April, 1943, and returned the papers to the Bombay High Court observing that it will be for that Court to adopt such course as it deemed most convenient in the light of the observations contained in their order. The matter was again heard by the Bombay High Court and in a judgment dated 2nd July, 1943, the High Court, by a majority, held that the detention of the appellant was not invalid in view of the Ordinance dated the 28th April, 1943, which in their view had retrospective effect. The appellant has preferred an appeal to this Court and it is now before your Lordships. The appeal was filed on the 10th August, 1943. Under s. 209 of the Constitution Act the decision of this Court must be given effect to by the High Court. The detention of the appellant from the 22nd April till his release was illegal.

[SPENS C. J. If the appellant has been set free, how can this appeal be proceeded with ?]

Though my client has been released, I want a pronouncement by this Hon'ble Court that his detention from the 22nd April till his release was illegal.

N. P. Engineer, *A.-G. of Bombay*, (*M. M. Desai* with him) for the respondent. The appellant was released on the 10th of August, 1943.

Nov. 2. The judgment of the Court was delivered by SPENS C. J. This appeal arises out of an application for a writ of *habeas corpus* made by the appellant to the Bombay High Court in February, 1943. The matter had come before this Court on two previous occasions in April and May, 1943, but the orders of this Court on those occasions did not finally dispose of the matter. By its order dated 2nd July, 1943, the High Court (by a majority judgment) dismissed the application and this appeal has been preferred against that order.

The appellant takes exception to the grounds on which the High Court has rested its judgment, including its view as to the effect of the orders of this Court. But it is admitted that the appellant has

already been released. This appeal was filed on the 10th of August and it is stated by the Advocate-General of Bombay that the appellant was released on that very day, though it is not quite clear whether the order of release was passed on that date or the appellant was in fact set free on that date. As the appellant is no longer in custody, his learned counsel admits that no order can hereafter be made on the *habeas corpus* application; but he nevertheless asks us to pronounce an opinion on the correctness of the High Court's judgment. We do not see our way to adopt any such course. All that can be done to this stage is to dismiss the appeal on the ground that no order on the application can now be made.

Appeal dismissed.

Agent for the appellant: *R. G. Naik.*

Agent for the respondent: *B. Banerji.*

KING EMPEROR *v.* KESHAV TALPADE.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Federal Court—Practice—Leave to appeal to His Majesty in Council from order arising out of application for writ of habeas corpus—Detenu released during pendency of application for leave to appeal—Incompetency of application.

Where, during the pendency of an application for leave to appeal to His Majesty in Council against an order made in an appeal arising out of a *habeas corpus* application, the detenu was released by the Government on their own initiative: *Held*, that, as there was no longer any pending matter in which leave to appeal could be granted and the original petitioner had no longer any interest in the *habeas corpus* proceedings, leave could not be granted.

APPLICATION for leave to appeal to His Majesty in Council.

This was an application under s. 208 (b) of the Government of India Act, 1935, for leave to appeal to His Majesty in Council from the judgments of the Federal Court dated the 22nd April, 1943, and 31st May, 1943, in Federal Court Case No. V of 1943.

1943

King Emperor v. *Keshav Talpade.*

The facts of this case appear from *Keshav Talpade* v. *King Emperor* reported *supra*, p. 57.

1943. Nov. 1. *N. P. Engineer; A.-G. of Bombay* (*M. M. Desai* with him) for the applicant. The case involves a difficult question of law, *viz.*, whether r. 26 of the Defence of India Rules is invalid. My contention is that sub-s. 2 (10) of the Defence of India Act does not limit the powers conferred by sub-s. 1. Sub-section 1 governs the matter. The view that it is controlled by sub-s. 2 (10) is not correct.

[Their Lordships pointed out that the fact that the detenu had been released on the 10th August affected the competency of this application.]

G. N. Joshi for the opposite party was not called upon.

Nov. 2. The judgment of the Court was delivered by SPENS C. J. This is an application by the Government of Bombay for leave to appeal to His Majesty in Council against an order made by this Court on the 22nd April, 1943, in an appeal arising out of a *habeas corpus* application. It is admitted that the detenu has been released by the Government on their own initiative, notwithstanding the dismissal of the *habeas corpus* application by the High Court. We are of the opinion that there is no longer any pending matter in which leave can be granted to appeal to His Majesty in Council. Moreover, the original petitioner, who has been released by the Government, has no longer any interest in the *habeas corpus* proceeding. In these circumstances, we do not see our way to grant leave merely on the ground that the Government are disposed to question the correctness of some of the grounds on which the order of this Court, dated the 22nd April, 1943, was based. The application is accordingly dismissed.

Application dismissed.

Agent for the applicant : *B. Banerji.*

Agent for the opposite party : *R. G. Naik.*