PRIVY COUNCIL

Emperor

Vs.

Benoari Lal Sarma

P.C.A.No.1 of 1944
(Lord Chancellor (Viscount Simon), Lords Roache, Porter Goddard and Sir Madhanva Nair JJ.)

06.11.1944

JUDGMENT

LORD CHANCELLOR J.

1. This is an appeal by the Government of India from a judgment of the Federal Court (Varadaehariar C. J. and Zafrulla Khan J., Kowland J., dissenting) dated 4th January 1943, dismissing an appeal from a judgment of the High Court at Calcutta (Sir Harold Derbyshire C. J., Khundkar and Sen JJ.) setting aside a conviction of 15 individuals by a Special Magistrate purporting to act under ordinance No. 2 of 1942 promulgated by the Governor-General on 2nd January 1942. The ground upon which the conviction was set aside was that the Ordinance was ultra vires. The question is largely academic, for upon ordinance 2 being declared by the Federal Court to be ultra vires, Ordinance 19 of 1943 was promulgated to replace it. But in view of the elaborate argument that has taken place and the way in which the topic has been dealt with in the judgments in India, their Lordships think that the better course is to decide the question whether ordinance 2 is invalid, especially as this may be of assistance in deciding other questions which may arise hereafter as to the validity of Ordinances made, in cases of emergency, by the Governor-General under the authority of Section 317 and para. 72 of Schedule 9, Government of India Act, 1935.

2. Their Lordships must, however, make a preliminary observation on the way in which the issue of the validity of the Ordinance has been dealt with by the Indian Courts. The appeal from the Special Magistrate who convicted the accused was brought to the High Court under its criminal revisionary jurisdiction by a petition for revision under Sections 435 and 439, Criminal Procedure Code. This assumes that the

Court below was a valid inferior Court whose decision calls, in the view of the appellants; who were convicted and sentenced by it, for revision. But if the Special Magistrate who tried the case was a valid Court, duly authorised by the Ordinance, then by the very terms of the Ordinance there is no appeal to the High Court. Sen J., at the beginning of his judgment in the High Court, points this out very clearly. If, on the other hand, the Ordinance had no validity, the Special Magistrate was in the same position as a private person who took upon himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of habeas corpus (S. 491, Criminal PC) would be the appropriate remedy. Their Lordships content themselves with pointing this out, without seeking to dispose of the litigation on this ground, as in their opinion the matter can be satisfactorily dealt with by considering whether the objections taken to the Ordinance have any validity.

3. The Governor-General purported to make and promulgate the Ordinance under a power conferred on him by para. 72 of sch. 9, Government of India Act, 1935. That paragraph -which must, of course, be read in the light of the India and Burma (Emergency Provisions) Act, 1940 (whereunder the operation of the words "for the space of not more than six months from its promulgation" was suspended during the period therein specified)- provides as follows:

> "73, The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature ; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws ; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act."

4. It is to be observed that the paragraph does .not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists. In the present instance, such questions are immaterial, for at the date of the Ordinance (2nd January 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared

war on the previous 7th December; Rangoon had been bombed by the enemy on 23rd December and again on 25th December: earlier Ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation, of premises, and so forth. Their Lordships entirely agree with Rowland J.'s view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen; but, as that learned Judge goes on to point out, and, as had already been emphasised in the High Court, the question whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in *Bhagat Singh v. Emperor* [1] and is plainly right. On 3rd September 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General, acting under section 102, Government of India Act, 1935, had proclaimed that "a grave emergency exists whereby the security of India is threatened by war" and thereupon the Indian Legislature acquired power to make laws for a province with respect to any of the matters enumerated in the "Provincial Legislative List," with the result that the Governor-General, acting under para. 72 of sch. 9, had in case of emergency the same width of Legislative power.

5. Two objections, however, were raised to the validity of the Ordinance in connexion with the question of "emergency." The Ordinance recited that "an emergency has arisen which makes it necessary to provide for the setting up of special criminal Courts," and the body of the Ordinance contained the necessary framework for Courts of criminal jurisdiction consisting of Special Judges, Special Magistrates and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal (which fall to be separately considered in this judgment), but the Ordinance did not itself set up any of these Courts, but provided by Section 1, sub-section (3) that the Ordinance "shall come into force in any Province only if the Provincial Government being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded."

6. In view of this last provision, it was contended that the Ordinance was invalid either because the language of the section showed that the Governor-General,

notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called "delegated legislation," by which the Governor-General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself. There is, in their Lordships' opinion, no valid ground for either of these contentions. As regards the first one, it is enough to say that an emergency may well exist which "makes it necessary to provide for the setting up of Special Criminal Courts" without requiring such Courts to be actually set up forthwith all over India. Any other view would appear to deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became even more critical to the part of India where it was necessary to apply them, It would in fact (as Beaumont C. J. observed in reference to a similar objection in the Bombay High Court, in *Shreecant Pandurang v. Emperor* [2] *at p. 351*), deny to the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. He may well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. A very similar situation arose in this country when, under the Emergency Powers Act, the Government devised and prepared for instant application a system of Zone Courts which were to be put into force only if, owing to invasion by the enemy or the like, the ordinary Courts in some part of the country were judged unable to function satisfactorily. Sen J. in the High Court expressed the opinion that

> "the provisions of this Ordinance proclaim unmistakably that the Governor-General did not think that an emergency which necessitates the Ordinance actually existed. He may have thought that such an emergency may arise at some future time. That, however, is not enough. The Governor-General had no power to promulgate this Ordinance unless he was of opinion that the emergency requiring it actually existed; it is therefore ultra vires of the Governor-General."

7. With all respect to the learned Judge, their Lordships are quite unable to accept this reasoning : it is perfectly possible, and indeed it is quite obvious, that the Governor-General regarded the situation on 2nd January 1942, as constituting an emergency - in view of what was happening it would be remarkable if he did not-and this justified and authorized the Ordinance providing in advance for Special Courts. It does not in the least follow that the bringing of Special Courts into actual existence and operation all

over India must take place at the same time.

8. The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General, acting under para. 72 of Schedule 9, must himself discharge the duty of legislation there cast upon him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under section 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial Legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a Special Court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar J. on this part of the case. The latter Judge appositely quotes a passage from the judgment of the Privy Council in the well-known decision in**,** *Charles Russell v. The Queen* [3]. In that case the Canadian Temperance Act, 1878, was challenged on the ground that it was ultra vires of the powers of the Parliament Act of Canada. The Temperance Act was to be brought into force in any county or city, if upon a vote of a majority of the electors of that county or city favoring such course, the Governor-General by Order in Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. Their Lordships said:

> "The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate. Parliament itself enacts the condition and every thing which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of

> Canada, when the subject of legislation is within its competency.... If authority on the point were necessary, it will be found in the case of*, The Queen v. Burah* [4] lately before this board."

9. The next objection to be considered is the contention that Section 26 of the Ordinance, which is framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the Special Courts constituted under the Ordinance, was ineffective and ultra vires as being in conflict with section 223, Government lot India Act, 1985. Section 223 provides :

> "Subject to the provisions of this part of this Act, to the provisions of any Order in Council made under this or any other Act, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred upon that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court. . . shall be the same as immediately before the commencement of Part 3 of this Act."

10. Previous to 1935 the High Court had revisional jurisdiction over the Magistrates' Courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an Ordinance made by the Governor-General under para. 72, as the Governor-General's Ordinance was not an "Act of the appropriate Legislature." "Legislature," it was said, only means the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor, and the Governor-General when making an Ordinance in cases of emergency under para. 72 was not either of these Legislatures. The argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in Section 311(6) of the Act, which says:

> "Any reference in this Act to .... Acts or laws of the Federal or a Provincial Legislature shall be construed as including a reference to an Ordinance made by the Governor-General."

11. There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under para. 72 may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do. There remains to be considered another objection to the validity of the Ordinance which is, as their Lordships understand, the main ground upon which it has been held to be ultra vires. The objection may perhaps be stated in more ways than one, but the substance of it, as appears both from the judgment of Sir Harold Derbyshire in the High Court and of the Chief Justice in the Federal Court, is

that the Ordinance makes it possible to discriminate between one accused and another, or between one class of offence and another, so that cases may be tried either in the Special Courts or under the ordinary and well-established criminal procedure according to the direction and decision of Provincial authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the Judges in India who have had this case before them, and in view of the well-established practice in India by which decisions in criminal cases are open to review by a higher Court, it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the Ordinance. The following are the sections of the Ordinance which appear to have given the Judges in India most concern:

> "5. A Special Judge shall try such offences or classes of offences, or such cases or classes of cases as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing direct..."
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> "10. A Special Magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct. . .,"
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> "14. If any question arises whether, under any order made under Section 5 or Section 10, an offence is tribal by a Special Judge or a Special Magistrate, the question shall be referred for decision to the authority which made the order and the decision of that authority shall be final."
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> "16. (1) A Summary Court shall have power to try such offences or classes of offences, or such cases or classes of cases as the District Magistrate, or in a Presidency town the Chief Presidency Magistrate, or a servant of the Crown authorized in this behalf by the District Magistrate or Chief Presidency Magistrate, may by general or special order direct:
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> Provided that no person shall be tried by a Summary Court for an offence which is punishable with imprisonment for a term exceeding two years, unless it is an offence specified in sub-section (1) of Section 260 of the Code.
>
> (2) The District Magistrate or Chief Presidency Magistrate may by general or special order give directions as to the distribution among the Summary Courts within his jurisdiction of cases friable by them under sub-section (1)."

12. Sir Harold Derbyshire found that the sections above quoted were invalid. He pointed out, with justice, that the Ordinance left it to the local Government, or to some officer of the local Government empowered by it in that behalf, to direct what offences or classes of offences, and moreover what cases or classes of cases, should be tried by the Special Courts. He thought that this amounted to repealing the Code of Criminal Procedure in part, for under the Ordinance there would be no trial by jury and no right of appeal and no right of revision by superior Courts, including the High Courts, such as are enacted by the Code. "In effects" he said,

> "it is the Provincial Government or the District Magistrate acting not in a judicial capacity but in an administrative capacity that deprives the subject of his right under the Code and repeals its valid provisions as far as he is concerned. That, in my view, is repealing the Code of Criminal Procedure in part-in that instance legislation ad hoc for the man's case."

13. He added that he did not find authority in Section 72 to justify this result and in his view the above-quoted sections, which he declared invalid, purported to authorize persons other than the duly authorized Legislature constituted under the Government of India Act, 1935, to repeal ad hoc certain provisions of the Criminal Procedure Code and of the Letters Patent of the High Court. Khundkar J. agreed with the Chief Justice on this point and stated his objection to the above-quoted sections of the Ordinance thus:

> "The result is that no man accused of an offence may know whether he is to be tried by a Court under the Code, subject to all the safeguards provided by the Code, including a right of appeal or revision under the Code, or to be tried on the mere motion of the Provincial Government or of an officer of the Crown empowered by the Provincial Government, by some one or other of the Special Courts under the Ordinance. The Provincial Government or an officer of the Crown empowered by the Provincial Government is endowed with a power that is far reaching, unfettered by rule, unconditional and subject to no supervision by the High Court or by any Court under the Code. It is a power to direct any person accused of any criminal offence to be tried by one or other of the Courts constituted under the Ordinance."

14. The learned Judge goes on to point out what he regards as "the possible mischief which may flow from the unwise or injudicious exercise of such a power," fortifying his criticism by quotations from well-known writers on jurisprudence such as Anson and Salmond; and he concludes that the above-quoted sections are ultra vires on the

ground that the Ordinance 'gives to the Provincial Governments a "power to effectuate jurisdiction of Special Criminal Courts by making orders in individual cases or groups of cases." Sen J., as their Lordships understand, did not differ from the Chief Justice and Khundkar J., in this view, though he rested his decision that the Ordinance was ultra vires on other grounds which their Lordships have already indicated. In the Federal Court the Chief Justice dwelt on the value of the revisionary jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused and another by directing trial in different Courts. He developed his objections on this point by elaborate references to the constitutional principles involved in certain decisions of the Supreme Court of the United States and of the High Court of Australia, and quoted passages from the writings of Sir Courtenay Ilbert and of Sir Cecil Carr to illustrate the relation between executive and legislative powers in the British Constitution.

15. He concluded that Sections 5, 10 and 16 of the Ordinance are

> "open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute and unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised."

16. This was the ground upon which the Chief Justice and Zafrulla Khan J. based their decision that the appeal of the Crown should be dismissed.

17. With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well-framed legislation it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what Court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle. Rowland J., at the beginning of his dissenting judgment, collects a number of striking quotations from previous judgments delivered in the Privy Council as to the proper rule of construction. Again and again, this Board has insisted that in construing

enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. The learned Judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written Constitution of India which debars the Executive Authority, though specially authorized by the statute or Ordinance to do so, from giving directions after the accused has been arrested and charged with crime as to the choice of Court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed. Indeed, Rowland J. points out that if it were held that where two sets of Courts exist side by side power cannot be delegated to pass an order directing that a case shall come before the Special Court and not before the Court under the Code, this would throw doubt on a long course of legislation in India where this very thing is enacted. The learned Judge cites 13 instances, and, in addition to these, refers to the discretion conferred by the Army Act and by the Air Force Act upon the prescribed authority to decide in a particular case, where a Criminal Court and a Court martial would both have jurisdiction, before which Court the accused shall be brought for trial. There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of Courts should rest with an Executive Authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the Legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India. Their Lordships will humbly advise His Majesty that the appeal should be allowed. The judgment of the Federal Court must be set aside and the Ordinance 2 of 1942 declared not to be ultra vires.

Appeal allowed.

Cases Referred.

1. 18 AIR 1931 PC 111 : 12 Lah. 280 58 IA 169 : 131 IC 415 (PC),

2. 30 AIR 1943 Bombay 169 : ILH (1913) Bom 331 : 207 IC 147 (FB),

3. (1882) 7 AC 829

4.(1878) 3 AC 889