**PRIVY COUNCIL**

Emperor

Vs.

Sibnath Banerji and others

P.C.A No.44 of 1944
(Lord Chancellor, CJ. Lords Thankerton, Porter Goddard and Sir Madhavan Nair JJ.)

17.07.1945

**JUDGMENT**

**LORD THANKERTON J.**

1. This appeal is brought by leave of the Federal Court of India, from a judgment of that Court (Spens CJ, Varadachariar and zafrulla Khan JJ.) dated 31st August 1943, dismissing eight appeals by the Crown against orders and judgments of a Divisional Bench of three Judges (Mitter and Sen JJ., Khundkar J. dissenting) of the High Court of Judicature at Fort William in Bengal, dated 3rd June 1943. The orders and judgments of the High Court were made upon applications under section 491, Criminal PC, for directions in the nature of habeas corpus on behalf of nine persons, detained in various jails in pursuance of orders made under Rule 26, Defense of India Rules, on various dates from 24th October 1940 to 8th March 1943. These orders and judgments directed the release of the applicants. of the nine original applicants, eight are called as respondents in the present appeal, but their Lordships were informed that two of the respondents had been released, namely, Narendra Nath Sen Gupta, respondent 4, on a date before the judgment of the Federal Court, and Bijoy Singh Nahar, respondent 2, after the judgment of the Federal Court. The remaining six respondents, with whom this appeal is now concerned, are under detention by virtue of orders made under Bengal Regulation, 3 of 1818. Having regard to the known and well-settled principle of the English law that a discharge, or an order directing discharge, under a writ of habeas corpus is final and not subject to appeal, and the importance of preserving safeguards of the liberty of the subject, their Lordships asked for arguments of counsel on the competency, in the present case, of the appeals by the Crown from the High Court to the Federal Court, which might equally affect the competency of the further appeal to this Board. It is sufficient to refer to the decision

of the House of Lords in (1890) 15 AC 506,1 where the law of England on this matter is fully dealt with.

2. In the present case, the appeals have proceeded under Sections 205 and 208, Government of India Act, 1935. Section 205 provides as follows :

> "205.-(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.
>
> (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate has been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

3. On the application of the Crown, the High Court granted certificates under Section 205(1) for leave to appeal to the Federal Court. After the decision of the Federal Court, leave was given by them under Section 208(b) to appeal to His Majesty in Council. Their Lordships have come to the conclusion that, in view of the special terms of Section 205 the appeals in the present case were competent. In *Cox v. Hakes*[1]. it was held that the right of appeal given by Section 19, Judicature Act 1878, did not include an appeal against an order of discharge made upon a writ of habeas corpus. Lord Halsbury LC, says :

> "My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of Habeas Corpus or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny that the words of Section 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of Habeas Corpus; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the

object of the statute or the mischief which it was intended to remedy."

4. In their Lordships' opinion, the condition of the law of habeas corpus in India, and the purpose and express words of Section 205 Government of India Act, 1935, afford a contrast to the condition of the English law and the object and general terms of Section 19 of the Judicature Act of 1873. The history of the matter is shortly stated by Sir George Rankin, then Chief Justice, in his admirable judgment in *Girindia Nath v. Birendra Nath*[2] . from which the following quotation may be made: (at p. 749),

> "I proceed, therefore, to enquire whether according to the law in India as it now stands there is or is not power in the High Court to grant the writ of Habeas Corpus at common law independently of Section 491 Criminal Procedure Code. Now in 1870 in 6 Beng LR 392, In the matter of Ameer Khan Norman J. held that the High Court could issue the Habeas Corpus outside the original jurisdiction to the Superintendent of the Jail at Alipore. In 1872 the Code of Criminal Procedure (Act 10 of 1872) was enacted which gave the right to European British subjects detained in custody whether within the limits of the High Court's original jurisdiction or outside those limits to apply for an order directing the person detaining him to bring him before the High Court, in other words for an order under Section 8 in the nature of Habeas Corpus. Section 82 provided that 'Neither the High Courts nor any Judge of such High Courts shall issue any writ of Habeas Corpus, Main prise. De homine replegiando, nor any other writ of the like nature beyond the Presidency towns.' This prohibition cannot in my opinion be confined to the case of European British subjects nor has this been contended before us. In 1875, the High Courts' Criminal Procedure Act (10 of 1875) in Section 148 set out various purposes for which an order in the nature of Habeas Corpus might be made and it gave power to the High Courts to make such, orders in the case of persons within the limits of their original jurisdiction. It went on to say that 'neither the High Court nor any Judge thereof shall hereafter issue any writ of Habeas Corpus for any of the above purposes.' Certain particular matters were excepted, it being stated that nothing in this section applies to a person detained under Bengal Regulation 3 of 1818 and certain other Regulations. But it is quite clear, that for the purposes provided for by section 148, the intention was that relief should be granted under the section and recourse should not be had to the old prerogative writs.... The subsequent history of the matter is shortly this, that when the Code of Criminal Procedure was amended in 1882 the Acts of 1872 and 1875 were comprised in Schedule 1 as enactments repealed by section 2 'but not so as to

> restore any jurisdiction or form of procedure not existing or followed' on 1st January 1883 (Act 10 of 1882). The matter remained very much in the same position until 1923, when a right was given to everybody within the appellate jurisdiction of this Court to make an application under Section 491 of the present Criminal Procedure Code. The question which arises is whether for any of the purposes mentioned in what is now section 491, it is open to an applicant still to say that he will make his application independently of that section altogether for the prerogative writ of Habeas Corpus on the civil side of the High Court, J. observe that it has been stated in certain cases that, if there is to be any question of the abolition of this right then the Legislature must say so in the most specific terms. Whether that be a correct view in a matter of procedure of this kind need not be discussed for the Legislature has used the most specific terms; and it is plain that the Indian Legislature never intended that the Courts in giving relief of this character should for any of the purposes mentioned in Section 491 be at liberty to act under it or under the old procedure."

5. In the recent case in *Matthen v. District Magistrate, Trivandrum* [3] this judgment was approved by the Board, and it was held that, in cases covered by section 491, the power to issue a common law writ of habeas corpus in British India had been taken away by legislation, and the powers conferred by Section 491 substituted therefore. The present applications were under section 491. Under section 404, Criminal PC, no appeal lies from any judgment or order of a criminal Court except as provided for by the Court or by any other law for the time being in force. There is no provision in the Code for an appeal from an order made under section 491, there is no conviction or acquittal in such proceedings, and section 417, which taken along with the new section 411A (2) enacted by Section 2, Amending Act of 1948 (Act 26 of 1948) allows an appeal on behalf of the Government only from an order of acquittal is equally inapplicable. Accordingly, as regards appeal, the position under the Criminal Procedure Code as to proceedings under Section 491 is in effect the same as the position stated in *Cox v. Hakes*. [4]

6. Turning again to section 205, Government of India Act of 1935, their Lordships are clearly of opinion that the section relates to both the civil and criminal jurisdiction of the High Courts; the terms of sub-section (2) of Section 210 appear to put this beyond doubt, and their Lordships agree with the decision of the Federal Court to this effect in *Hori Ram v. Emperor*. [5] Further, the width of the language used is striking, viz., "any judgment, decree or final order of a High Court," and "it shall be the duty of every High Court in British India to consider in every case." The purpose of the provision is

to confer a right of appeal in every case that involves a substantial question of law as to the interpretation of the Act or any Order in Council made there under. The object is clearly to secure uniformity of decision in every High Court by the determination of a Court superior to them all. On the most moderate view of the matter, the securing of that object is at least as important in cases of habeas corpus, in which such questions are very apt to arise, as in other cases. In the absence of an express exception of habeas corpus cases, and having in view the terms and purpose of the section, their Lordships are unable to limit the terms of the section by mere construction so as to exclude these cases from its operation. Accordingly, section 205 of the Act of 1935 provides one of the exceptions referred to in section 404, Criminal Procedure Code. Their Lordships are therefore of opinion that the appeals from the High Court were competent, and it follows that the appeal to His Majesty in Council was also, competent, and they will proceed to deal with the appeal on the merits.

7. The present applications under section 491, Criminal PC, were filed on 24th April 1948, two days, after the decision of the Federal Court in *Keshav Talpade v. Emperor* [6] under which it was held, reversing the decision of the Bombay High Court refusing to make an order under Section 491 for release of the applicants, that Rule 26, Defiance of India Rules was ultra vires, and was not warranted by the Defense of India Act, 1939. On 28th April 1943, the Governor-General made and promulgated Ordinance No. 14 of 1943 under Section 72 of Schedule 9, Government of India Act, 1935. By Section 2 of the Ordinance, a new clause was substituted for clause (x) of Section 2(2), Defense of India Act, 1939. Section 3 of the Ordinance provided, "that no order heretofore made against any person under Rule 26, Defense 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, Defense of India Act, 1939."

8. The amendment effected by Section 2 of the Ordinance removed the grounds on which the Federal Court had pronounced Rule 26 to be ultra vires. The terms of Rule 26 were not altered by the Ordinance. In the present applications, *Keshav Talpade v. Emperor* [7] was taken as binding on them by both the High Court and the Federal Court and the new Ordinance No, 14 was the main object of challenge by the applicants. But before this Board, the Crown has placed in the forefront a challenge of the correctness of the decision in ILR 1944 Bombay 1836and success in that contention would vindicate the validity of Rule 26 and would supersede any consideration of ordinance

no. 14. It is therefore necessary to dispose of this question first.

9. The material portions of Section 2 Defense of India Act, 1939 (Act 35 of 1939), as amended by Section 2, Defense of India (Amendment) Act, 1940 (Act 19 of 1940), are as follows:

> "2-(1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the Defense of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.
> (2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may, empower any authority to make orders providing for all or any of the following matters, namely:
> * * * * * *
> (v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers or with States in India, or to prejudice the maintenance of peaceful conditions in the tribal areas, or to promote feelings of enmity and hatred between different classes of His Majesty's subjects:
> * * * * * *
> (x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the Defense of British India, 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."

10. The material part of Rule 26, as it has stood since 1940, is as follows :

> "26-(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the Defense 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."

11. In *Keshav Talpade v. Emperor* [9] the Judgment of the Federal Court was delivered by Gwyer CJ, who first dealt with the main argument of the appellant, which had been rejected by the High Court, and proceeded (at p. 206):

> "We, therefore, reject the main argument addressed to us on behalf of the appellant, and, if there were nothing more in the appeal, we should dismiss it without further discussion. There is, however, another aspect of the case, which was not argued until the Court itself drew the attention of counsel to it; for it seemed to us that it was open to question whether Rule 26 itself in its present form was within the rule, making powers conferred by the Defense of India Act. If it is not within those powers, then it must be held void and inoperative, either in whole or in part; and the orders made under it will be similarly open to challenge."

12. The learned Judge then proceeded to discuss paras. (v) and (x) of Section 2(2) of the Act, and for reasons fully stated by him, he came to the conclusion that Rule 26 was not within the powers conferred by sub-section (2) of Section 2 and p. 214) he stated :

> "The Legislature having set out in plain and unambiguous language in para. (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to pray in aid the more general words in Section 2(1) in order to justify a rule which so plainly goes beyond the limits of para. (x); though if para. (x) were not in the Act at all, perhaps different considerations might apply....We are compelled therefore to hold that Rule 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid."

13. Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of Section 2 Defense of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt - as the learned Judge himself appears to have thought - that the general

language of sub-section (1) amply justifies the terms of Rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

14. Their Lordships are therefore of opinion that ILR 1944 Bombay 1836 was wrongly decided by the Federal Court, and that Rule 26 was made in conformity with the powers conferred by sub-section (1) of section 2 Defense of India Act. It is, accordingly, unnecessary for their Lordships to consider whether Rule 26 was not also within paras. (v) and (x) of sub-section (2) of Section 2 contrary to the opinion of the Federal Court, and their Lordships express no opinion on the matter. As already stated, their Lordships are also relieved from any consideration of Ordinance 14 of 1948. As regards the remaining questions, counsel for the Crown stated them under two main heads, viz., first, whether the orders of detention can be questioned in view of the provisions of Section 59(2), Government of India Act, and Section 16, Defense of India Act, and secondly, assuming that they can be so questioned, whether there were materials on which the Courts below could properly decide that the orders were not made in conformity with Rule 26, The order for detention of respondent 1, which is typical of the other cases, is as follows :

> "Calcutta, the 27th October 1942.
> Whereas the person known as Shibnath Banerjee, M. L. A., son of late Dwarikanath Banerjee of 3/1 Kali Banerjee Lane, Howrah, is detained in the Howrah Jail under the provision in Rule 129, Defense of India Rules;
> and whereas the Governor is satisfied that, with a view to preventing the said person from acting in any manner prejudicial to the Defense 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;
> Now, therefore, in exercise of the powers conferred by clause (b) of Sub-Rule (1) and Sub-Rule (5) of Rule 26, Defense of India Rules, the Governor is pleased to direct-
> (a) that the said person shall until further orders be detained;
> (b) that until further orders the said person shall continue to be detained in the Howrah Jail; and
> (c) that during such detention the said person shall be subject to the conditions laid down in the Bengal Security Prisoners Rules, 1940.
> By order of the Governor,
> S. B. Bapat,
> Addl. Dy. Secy, to the Govt. of Bengal."

15. Except that in the case of respondent 6, Niharendu Dutt Majumdar, there was no previous arrest under Rule 129 and that in some cases the order was signed on behalf of the Governor by "A. E. Porter, Addl. Secy. to the Govt. of Bengal," there is no material difference from the above order in the case of the remaining orders. The Crown maintained 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, and relied on the statutory provisions already referred to. It should, however, be stated, that Rule 3 (1), Defense of India Rules provides that the General Clauses Act, 1897, is to apply to the interpretation of these rules as it applies to the interpretation of a Central Act, and that, under section 3 (43a), General Clauses Act,

> "(43a) 'Provincial Government,' as respects anything done or to be done by the 'Provincial Government after the commencement of Part 3, Government of India Act, 1935, shall mean -
> (a) in a Governor's Province, 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 said Act ... ."
> Section 59 (2), Government of India Act, on which the Crown relies, provides :
> "Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor."

16. In the opinion of their Lordships, the contention of the Crown goes too far, as the subsection only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. Their Lordships agree with the statement by the learned Chief Justice of the Federal Court, viz. :

> "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 tact 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."

17. On this point the Federal Court was unanimously against the Crown. The other statutory provision relied on by the Crown before the Board was not, it appears, brought before the Federal Court; it was Section 16, Defense of India Act, which provides as follows :

> "16.-(1) No order made in exercise of any power-conferred by or under this Act shall be called in question in any Court.
> (2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that Authority."
> Sub-section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger, as stated by the Chief Justice in the passage just cited. Sub-section (2) raises a presumption of fact, which may be displaced, though here again the burden is likely to be heavy. Section 4, Evidence Act, provides :
> "Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

18. Accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the orders fails. On construction of Rule 26, the majority of the Judges of the Federal Court held that the Governor must be personally satisfied as to the matters therein set out, and that, in view of the admission by the Crown that in none of the cases before them had the Governor himself considered the case, the orders for detention were not in conformity with the Rule. They based their conclusion mainly on the power of delegation (which has admittedly not been exercised in the present case) conferred by sub-section (5) of Section 2 , Defense of India Act, which provides as follows:

> "(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-section (4) to be exercised or dischargd by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the

Central Government."

19. The learned Chief Justice disagreed, holding that sub-section (5) was merely supplementary, and afforded no ground for excluding the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chap. 2 of part 3, Government of India Act, 1935. Their Lordships are of opinion that the learned Chief Justice was right. It will be remembered that the definition of Provincial Government in section 3 (43A), General Clauses Act, refers one to the provisions of the Government of India Act, for the action or non-action of the Governor, and this takes one to Chap.2 of Part III, which is headed "The Provincial Executive- The Governor". The material sections are as follows:

> "49. (1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, Judge, or officer or any local or other authority.
>
> (2) Subject to the provisions of this Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws." '
>
> "50. (1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion :
>
> Provided that nothing in this sub-section shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.
>
> (2) The Governor in his discretion may preside at meetings of the council of ministers.
>
> (3) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this 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 be ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment."
>
> "52. (1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say :
>
> (a) the prevention of any grave menace to the peace or tranquillity of the

Province or any part thereof ; .....

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken."

"59. (1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(Sub-section (2), already quoted.)

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.

(5) In the discharge of his functions under sub-sections (2), (3) and (4) of this section the Governor shall act in his discretion after consultation with his ministers."

20. Rules of Business have been framed by the Governor of Bengal under section 59, under which it is not disputed that questions of detention fail to be transacted in the Home Department. Under Rule 12 all orders or instruments made or executed by or on behalf of the Government of Bengal are to be expressed to be made by or by order of the Governor of Bengal; and under Rule 13 save in cases of special authorization, every order or instrument of the Government of Bengal is to be signed by either a Secretary (an Additional Secretary), a Joint Secretary, a Deputy Secretary, an Under-Secretary or an Assistant-Secretary to the Government of Bengal, and such signatures are to be deemed to be the proper authentication of such orders or instruments.

21. In the first place, their Lordships observe that the provisions of chap. 2 of Part. 3 of the Act of 1935 as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such decision. Counsel for the respondents submitted a contention, which the majority of the learned Judges in the Federal Court had accepted, based on

sub-section (2) of section 9 of the Act of 1935, to the effect that the sub-section limited the operation of the section to matters with respect to which the Provincial Legislature has power to make laws, and that the subject-matter of the Defense of India was not within those powers. The learned Judges, in confirmation of this view, referred to sub-section (2) of Section 124 which provides that,

> "an Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorize the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof."

22. Their Lordships are unable to agree with such a narrow reading of these provisions, which would involve the necessity of the Federal Legislature making provision in each case for the executive machinery to carry out the powers and duties so imposed, instead of using the existing Provincial machinery. This view is supported by sub-section (4) of section 124 which provides inter alia that where an Act of the Federal Legislature, by virtue of sub-section (2), confers powers and imposes duties upon a Province or officers and authorities thereof in relation to a matter with respect to which a Provincial Legislature has no power to make laws, the Federation is to pay to the Province such sum as is agreed, or determined by arbitration, in respect of any extra costs of administration incurred by the Province in connexion with exercise of those powers and duties. This appears to contemplate extra costs incurred by the existing machinery of Provincial Administration. Their Lordships construe sub-section (2) of section 9 as providing an extensible limit and not a maximum limit, and the provisions of sub-section (2) of Section 124 as affording a means of such extension. But, further, their Lordships construe the incorporation of the General Clauses Act, both in the Defense of India Act, and in the Defense of India Rules, with its reference in section 3 (43a) to the provisions of Part 3 of the Act of 1935 as to the acting or non-acting of the Provincial Governor, as necessarily embodying the relevant provisions of chap. 2 of Part 3, including in particular Section 49.

23. It is for the same reasons that their Lordship are unable to accept the respondents' contention, also agreed to by the majority Judges in the Federal Court, that the provision of sub-section (5) of section 2 Defense of India Act, provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add, on this contention, that sub-section (5) of Section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a

corresponding divestiture of the Governor of any responsibility in the matter, whereas under Section 49(1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name.

24. The respondents next contended that, assuming that Section 49 did apply, this question was one which involved a special responsibility of the Governor within the meaning of Section 52 (1) of the Act of 1935, and therefore required the individual judgment of the Governor. In their Lordships' opinion, they are excluded from considering the somewhat debatable question whether the present matter does fall within head (a) of Section 52(1), by the provisions of Section 50(3), as the contention of the respondents is that the Governor should have exercised his individual judgment. Nor is it necessary for their Lordships to consider whether "individual judgment" excludes the operation of Section 49 (1). So far as it is relevant in the present case, their Lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of Section 49(1), and so far as the decision in, *Emperor v. Hemendra Prosad Ghoshe* [9] decides that a minister is not such an officer their Lordships are unable to agree with it. While a minister may have duties to the Legislature," the provisions of Section 51 as to the appointment, payment and dismissal of ministers, and Section 59(3) and (4) of the Act of 1935, and the Business Rules made by virtue of Section 59 place beyond doubt that the Home Minister is an officer subordinate to the Governor.

25. Their Lordships are therefore in agreement with the learned Chief Justice of the Federal Court that such matters as those which fell to be dealt with by the Governor under Rule 26 could be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of chap. 2 of Part 3 of the Act of 1935, and, in particular, under the provisions of Section 49 and the rules of business made under section 59.

26. There remain the criticisms on the manner in which the individual cases of detention have been dealt with. The six cases with which this appeal is concerned are the cases of respondents 1, 3, 5, 6, 7 and 8. In view of the opinions already expressed by their Lordships, the orders for detention in each of these cases must be taken as ex facie regular and proper, and it follows, as already stated, that there is a heavy burden on the respondents to displace the presumption enacted by Section 16(2), Defense of India Act. The respondents were enabled to raise the question as to whether the Governor was bound to give his personal consideration to the matter, by reason of the Crown's admission that he had not in fact done so in any of these cases. They were

also able to raise a question as to the so-called routine order of 1st October 1942 because of Mr. Porter's admission in his affidavit. The majority of the Federal Court held all the detention orders to be bad because of the first of these admissions, though they also deal with the routine order, and criticise adversely the whole procedure. The learned Chief Justice agreed with the majority as to the cases which were subject to the routine order; he disagreed as to the necessity for personal satisfaction of the Governor, holding that the procedure authorised by Section 49 was available to the Governor, but he held that the routine order vitiated the orders as to which it operated. One of these three cases-that of respondent 2, Bijoy Singh Nahar, is not before the board, as he was released shortly after the judgment of the Federal Court. On the other hand, as regards the cases of the present respondents 3, 6, 7 and 8, he stated that he was unable to find in the evidence anything which established even a prima facie case that the orders under Rule 26 had been improperly made or to contradict the accuracy of the narrative of the orders. Thereby he differed from the majority of the Court as regards these cases.

27. The evidence before the Federal Court consisted of affidavits by the respondents, the counter affidavit by Mr. Porter, Additional Home Secretary to the Bengal Government, and certain statements and answers regarding detention under Rule 26 given by the Home Minister, Bengal, in the Bengal Legislative Assembly. In common with the Chief Justice of the Federal Court, their Lordships have been unable to find anything-apart from the routine order - in these statements and answers of the Home Minister which affords evidence of improper procedure in the individual cases before the Court, even assuming that such evidence was admissible, which, in the opinion of their Lordships, was at least open to doubt. It is the evidence of Mr. Porter that establishes the application of the routine order in some of these individual cases. Further, there is nothing in the affidavits filed by the respondents which establishes such a prima facie case, and they were not so founded on at the hearing before the board. The respondents' case was founded on the statements and answers by the Home Minister, as to which their Lordships have expressed their view above, and Mr. Porter's counter affidavit, which their Lordships will now consider.

28. In para. 8 of his affidavit Mr. Porter states that on 1st October 1942, the Home Minister directed that on receipt of the report of arrest under Rule 129, Defense of India Rules, together with a recommendation by the Police for detention under Rule 26 in respect of persons arrested in connexion with the disturbances or suspected of being so connected, orders of detention under Rule 26 (1) (b) should at once be issued

as a matter of course subject to review by Government on receipt of further details to be supplied in each case by the Intelligence Branch. That clearly meant the substitution of the recommendation by the police in place of the satisfaction of the Governor prescribed by Rule 26, and equally rendered any order under Rule 26 in conformity with the Home Minister's direction, to which their Lordships have already referred as the routine order, ab initio void and invalid as not being in conformity with the requirements of Rule 26, Their Lordships now turn to the cases before them, to which the routine order applied, and they quote the statement of Mr. Porter with regard to the first of these two cases, that of respondent 1:

> "10. Sibnath Banerji : He was arrested by the Police under Rule 129, Defense of India Rules, on 20th October 1942. On 27th October 1942, I considered the materials before me and in accordance with the general order of Government directed the issue of an order of detention under Rule 26 (1)(b), Defense of India Rules. On receipt of fuller materials the case was later submitted for consideration of the Honourable Home Minister, Bengal, from whom no order directing withdrawal or modification or the order of detention was received."

29. Their Lordships are unable to read Mr. Porter's statement that he bad considered the materials before him as involving anything more than that he had considered the report of the arrest and the recommendation of the police to see if there was material sufficient to justify the issue of an order under the routine order. It cannot mean that, in spite of the direction of the Home Minister in the routine order, he considered the materials before him so as to satisfy himself, independently of the police recommendation that an order under Rule 26 should be issued. That would not be in accordance with the requirement of the routine order that - the police having recommended it - the order of detention should be issued as a matter of course Further, the inaction of the Home Minister on the later submission of the fuller materials to him could not cure the invalidity of the order of 27th October 1942. The case of Ramgopal Majumdar, respondent 5, is stated in para. 11 of Mr. Porter's affidavit, and is substantially the same as that of respondent 1. The order in his case was issued by Mr. Porter on 8th March 1943, and no further materials had been received at the date of the affidavit, 24th May 1943. Their Lordships agree with the unanimous conclusion of the Federal Court that the orders of detention in the cases of the present respondents 1 and 5 are invalid.

30. There remain the cases of respondents 3, 6, 7 and 8. The orders of detention in these cases were earlier in date than the routine order of 1st October 1942, and are not

affected thereby. As their Lordships have already stated, there is no evidence in these cases sufficient to rebut the presumption as to their regularity. There is only one point on which their Lordships desire to add an observation. In paras. 2, 3 and 4 of his affidavit Mr. Porter states that in the cases of Debabrata Roy present respondent 2, Pratul Chandra Ganguly, present respondent 8, and Birendra Ganguly, present respondent 7, he himself considered the materials supplied and, in fact, the orders of detention were signed by him, In the case of Niharendu Dutt Majumdar, present respondent 6, Mr. Porter, in para. 6 of his affidavit, does not say by whom the case was considered. The order of detention is signed by S.B. Bapat, Deputy Secretary to the Government of Bengal. This is a case typical of the application of the presumption, and, if the respondents' had wished to probe the matter, in case the consideration might have been by some one not qualified as an officer subordinate to the Governor within the terms of Section 49 of the Act of 1935, they should not have let the matter rest there, but proceeded either by counter affidavit or by cross-examination of Mr. Porter on his affidavit. As they did not take such a course, the presumption remains undisturbed.

31. Accordingly, their Lordships agree with the Chief Justice of the Federal Court that the orders of detention in the cases of respondents 3, 6, 7 and 8 were valid, and the appeal of the Crown will be allowed in the case of these four respondents. Counsel for the Crown stated to their Lordships that, without prejudice to any further action under Rule 26 that the Crown may find it expedient or necessary to take, it was not intended that any further action should be taken against these four respondents under the particular orders which are before the board in this appeal. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed as respects respondents 3,6,7 and 8, and the judgments and orders of the Courts below should be set aside, and that it should be declared that the order of detention under Rule 26, Defense of India Rules, in each of these cases was a valid and proper order; that in the case of respondents 1 and 5 the appeal should be dismissed and the judgments and orders of the Courts below should be affirmed. There will be no order as to costs.

Order accordingly.

Cases Referred.

1. (1890) 15 AC 506 : 60 LJ QB 89 : 63 LT 392 : 39 WR 146,

2. 14 AIR 1927 Calcutta 496: 54 Cal 727 : 102 IC 647,

3. 26 AIR 1939 PC 213 : ILR 1939 Madras 744 : ILR (1939) Kar PC 324 : 66 IA 222 : 182 IC 551 (PC),

4. (1890) 15 AC 506 : 60 LJ QB 89 : 63 LT 392 : 39 WR 146,

5. 26 AIR 1939 FC 43 : ILR (1940) Lahore 400 : ILR (1939) Kar FC 132 : 1939 FCR 159 : 181 IC 317 (FC),

6. 30 AIR 1943 FC 1 : ILR (1943) Kar FC 26 : ILR 1944 Bombay 183 : 1943 FCR 49 : 207 IC 1 (FC),

7. 30 AIR 1943 FC 1 : ILR (1943) Kar FC 26 : ILR 1944 Bombay 183 : 1943 FCR 49 : 207 IC 1 (FC),

8. ILR 30 AIR 1943 FC 1 : ILR (1943) Kar FC 26 : ILR 1944 Bombay 183 : 1943 FCR 49 : 207 IC 1 (FC),

9. ILR 26 AIR 1939 Calcutta 529 : ILR (1939) 2 Calcutta 411 : 183 IC 349 (SB)