Director of Rationing and Distribution

Vs

The Corporation of Calcutta and Others

Criminal Appeal No. 158 of 1956

(CJI B.P. Sinha, Syed Jafar Imam, A.K. Sarkar, K.N. Wanchoo, J.C. Shah JJ)

16.08.1960

JUDGMENT

SINHA C.J. –

This appeal by special leave is directed against the judgment and order of the High Court at Calcutta dated February 9, 1955, whereby that Court, in its revisional jurisdiction, set aside an order of acquittal dated December 15, 1953, passed by the Municipal Magistrate, Calcutta, in respect of the prosecution launched by the Corporation of Calcutta, respondent in this Court, against the appellant.

The relevant facts are these. On July 1, 1952, the Corporation of Calcutta made an application for summons under s. 488 of Bengal Act III of 1923, which was substituted by West Bengal Act XXXIII of 1951, against "the Director of Rationing and Distribution representing the Food Department of the Government of West Bengal". The offence complained of was "for using or permitting to be used premises No. 259, Chitpur Road, Upper, for the purpose of storing rice etc., under the provisions of the Bengal Rationing Order, 1943, without a licence under s. 386 for the year, 1951-52, corresponding s. 437 of the C.M.C. Act, 1951". Section 386(1)(a) of the Calcutta Municipal Act is in these terms :-

> "No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Corporation in this behalf, namely, any of the purposes specified in Schedule XIX".

Item 8 of the said Schedule is "storing, packing, pressing, cleansing, preparing or manufacturing, by any process whatever, any of the following articles" and the articles mentioned include rice, flour, etc.

The facts alleged by the prosecution were not denied on behalf of the Department, which was in the position of the accused, but it was contended by way of a preliminary objection that the prosecution was not maintainable in law. After hearing arguments for the parties the learned trial Magistrate passed an order acquitting the accused relying upon a decision of the Calcutta High Court in the case of The Corporation of Calcutta v. Sub-Postmaster, Dharamtala Post Office ((1948) 54 C.W.N. 429), holding that the provisions of s. 386 of the Act, neither in terms nor by necessary implication, bound the Government. The respondent moved the Calcutta High Court in its revisional jurisdiction in Criminal Revision No. 282 of 1954, which was heard by a Division Bench consisting of J. P. Mitter and S. N. Guha Ray, JJ. Guha Ray, J., who delivered the judgment of the Court, Mitter, J., concurring, held that the previous decision of the same High Court in The Corporation of Calcutta v.

Sub-Postmaster, Dharamtala Post Office ((1948) 54 C.W.N. 429) was clearly distinguishable. The distinction pointed out was that the previous decision of the Court had relied upon the decision of the Judicial Committee of the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay ((1946) L.R. 73 I.A. 271), in a case arising before the coming into force of the Constitution. As the present case arose after the advent of the Constitution, the High Court did not feel bound by the aforesaid decision of the Privy Council and therefore examined the legal position afresh. On such an examination, the High Court came to the conclusion that the Indian Legislature in enacting laws acted on the assumption that the Government would be bound unless excluded either expressly or by necessary implication oftener than on the assumption that it would not be bound, unless the Legislature so provided expressly or by necessary implication. The High Court took the view that the decision of the Division Bench of the Madras High Court in Bell v. The Municipal Commissioners for the City of Madras ((1901) I.L.R. 25 Mad. 457) was more in consonance with the law in India than the opposite view expressed in the Privy Council judgment aforesaid. They definitely decided that the law of India, even before the coming into effect of the Constitution, and even at the time of the passing of the Government of India Act, 1935, was that the Government was bound by a Statute unless it was exempted either expressly or by necessary implication. In that view of the matter, the High Court further observed that the question whether the decision aforesaid of the Privy Council was still good law under Art. 372 of the Constitution did not arise and that, if it did, it was inclined to the view that the law declared by the Privy Council was not continued by any provision of law. In effect, the High Court took the view that the State was bound by the Statute unless it was excluded from its operation either expressly or by necessary implication. In that view of the matter, it held that s. 386 of the Act bound the appellant, set aside the order of acquittal and sent the case back to the learned Magistrate for disposal according to law. The appellant made an application for special leave to appeal from the aforesaid judgment and order of the High Court, and obtained special leave in September 1955. It is thus clear that this case had remained pending in this Court for about five years. If this Court agreed with the view expressed by the High Court, the case would have to be tried on merits and the trial would begin more than eight years after the institution of the petition of complaint, but, as will presently appear, this prosecution was misconceived and therefore, in effect, no one has been the worse for the long pendency of the prosecution, which now must come to an end.

The short question for determination in this appeal is whether any offence had been committed by the appellant, as alleged against him. If he was bound by the provisions of the Act to take out a licence on payment of the necessary fees, he must be held to have contravened the provisions of that Statute. It has been contended by the learned Advocate-General of Bengal, representing the appellant, that the decision of the Privy Council referred to above is still good law and that the contrary decision of the Division Bench of the Madras High Court ((1901) I.L.R. 25 Mad. 457) did not take the correct view of the legal position. The argument further is that the Privy Council decision was certainly binding on the Courts in India at the time it was rendered. That was the law of the land as declared by the highest judicial authority. Has that judicial determination been altered by the Constitution ? It has been argued that the law in India, even after the coming into effect of the Constitution, continues to be the same as the law in England in respect of the prerogatives of the Crown. The Act in question does not make any express provision binding the Government and there was nothing in the Act to show to the contrary by necessary implication. The Act could operate with reasonable efficacy without being held to be binding on the Government. It was further pointed out that the High Court had failed to take into consideration the fact that that High Court itself had construed the Calcutta Municipal Act of 1923, which was replaced by the present Act of 1951, on the basis of the Privy Council decision not to have bound the Government. The Act of 1951 did not

make any provision expressly abrogating that view. Hence, it is argued the High Court should have felt bound by the previous decision of that very Court given on the basis of the Privy Council decision; and had erred in taking the opposite view. The argument further was that the State is not a person within the meaning of the penal section with reference to which the prosecution had been launched. The common law could not have been overridden impliedly by a course of legislation. The common law applies to India even after the Constitution, not because there is the King or the Queen, but because it is the law in force. In other words, what was the prerogative of the sovereign has now become the law of the land in respect of the sovereignty of the State. Thus the law of England, which in its source was the prerogative of the Crown, was the common law of the land and was adopted by the Constitution by Art. 372, subject to the reservations contained therein. The Attorney-General for India as also the Advocates-General of Madras and Bombay supported the contention raised on behalf of the appellant.

Mr. N. C. Chatterjee, who appeared on behalf of the respondent, contended that the State is a legal person as recognised in Art. 300 of the Constitution and was, therefore, capable of rights and obligations; that unless there is an express exclusion of the State by the Legislature, the Act would apply to all, including the State. He further contended that under the Constitution there is no King and, therefore, there cannot be any question of prerogative. Any exemption from the operation of the statute must be found in express immunity under the law and cannot be implied. He went to the length of contending that a State's prerogative is inconsistent with the whole Constitution. Whatever may have been the legal position before the coming into effect of the Constitution, it has not countenanced the continuance of any such prerogative as is contended for on behalf of the appellant. Another line taken by Mr. Chatterjee is that when the State embarks upon a business, it does so not in its sovereign capacity, but as a legal person, subject to the same rights and liabilities as any other person. In effect, therefore, he contended that the State is a person within the meaning of s. 386 of the Act; that the doctrine of immunity of States from the operation of its laws cannot be invoked after the advent of the Constitution, and, alternatively, that even if the immunity is available to the State as a sovereign power, it is not available to the State when it embarked upon a commercial undertaking and that, in any case, the State was bound by the law by applying the rule of necessary implication from the provisions of the Act.

In this case it is manifest that it is the Government of West Bengal which is sought to be prosecuted through one of its officers. The prosecution is not against a named person, but against the Director of a named Department of the Government. The person who was the Director of the Department at the relevant date, that is to say, in the year 1951-52 may not be the same person who answered that description on the date the prosecution was launched. In essence, therefore, it is the Government of West Bengal which has to answer the charge levelled by the respondent, the Corporation of Calcutta. Whether a prosecution against such an indeterminate person would or would not lie is a matter which has not been raised and, therefore, need not be discussed. The question most canvassed before us in whether the penal section invoked in this case applies to Government. It has been contended, and in our opinion rightly, that the provisions of the penal section neither by express terms nor by necessary implication are meant to be applied to Government. The decision of the Judicial Committee of the Privy Council ((1946) L.R. 73 L.A. 271), if it is good law even now, completely covers this case, but the decision of the High Court, now under examination, has taken the view that the earlier decision of the Division Bench of the Madras High Court ((1901) I.L.R. 25 Mad. 457) has laid down the correct law, and not the Privy Council decision. We have, therefore, to decide which of the two decisions has taken the correct view of the legal position as it obtained on the day the prosecution was launched.

It is well-established that the common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is not necessarily bound by a statutory law which binds the subject. This is further enforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless the statute, being for the public good, it would be absurd to exclude the King from it. Blackstone (Commentaries, Vol. I, 261-262) accurately summed up the legal position as follows :-

> "The king is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised .... affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. For it would be of most mischievous consequence of the public, if the strength of the executive power were liable to be curtailed without its own express consent by constructions and implications of the subject. Yet, when an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject; any, likewise, the king may take the benefits of any particular act, though he be not specially named." (Quoted at p. 355 of Holdsworth, A History of English Law, Vol. X).

The King's prerogative is thus created and limited by common law and the sovereign can claim no prerogative, except such as the law allows. (See Halsbury's Laws of England, Vol. 7, Third Edition, para. 464, at p. 221).

The prerogative of the Crown in respect of property is thus stated in the same volume of Halsbury's Laws of England, para. 980, at p. 465 :-

> "The Crown not being bound by any statute whereby any prerogative right, title, or interest belonging to it may be divested or abridged, unless expressly named or bound by clear implication, property owned, and occupied by the Crown is exempt from taxation unless rendered liable either by express words or necessary implication. Moreover, an express exemption of particular classes of Crown property in a statute is not in itself sufficient to raise the implication that such property only is exempt, and that other property not falling within the exception is bound, such clauses being inserted merely ex majore cautela." That was the law applicable to India also, as authoritatively laid down by the Privy Council in the case referred to above. That decision was rightly followed by the Calcutta High Court as stated above. That would be the legal position until the advent of the Constitution.

The question naturally arises : whether the Constitution has made any change in that position ? There are no words in the Constitution which can be cited in support of the proposition that the position has changed after the republication form of Government has been adumbrated by our Constitution. It was argued on behalf of the respondent that the existence of such a prerogative is negatived by the very form of our new set up, that is to say, it was contended that the republication form of Government is wholly inconsistent with the existence of such a prerogative. In our opinion, there is no warrant for such a contention. The immunity of Government from the operation of certain statutes, and particularly statutes creating offences, is based upon the fundamental concept that the Government or its officers cannot be a party to committing a crime - analogous to the 'prerogative of perfection' that the King can do no wrong. Whatever may have been the historical reason of the rule, it has been adopted in our country on grounds of public policy as a rule of

interpretation of statutes. That this rule is not peculiar or confined to a monarchical form of Government is illustrated by the decision of the Supreme Court of U.S.A. in the case of United States of America v. United Mine Workers of America ((1947) 330 U.S. 258 : 91 L.Ed. 884), where it is laid down that restrictions on the issue of injunctions in labour disputes contained in certain statutes do not apply to the United States Government as employer or to relations between the Government and its employees and that statutes in general terms imposing certain restrictions or divesting certain privileges will not be applied to the sovereign without express words to that effect. Similarly, in the case of United States of America v. Reginald P. Wittek ((1949) 337 U.S. 346 : 93 L. Ed. 1406), the question arose whether the District of Columbia Emergency Rent Act applied to government-owned defence housing or to government-owned low-rent housing in the District, and it was ruled by the Supreme Court, reversing the decision of the Municipal Court of Appeals, that the statute in question did not apply to the United States Government which was not a "landlord" within the meaning of the Act. The decision was based on the rule that a general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect. Another illustration of the rule is to be found in the case of Jess Larson v. Domestic and Foreign Commerce Corporation ((1949) 337 U.S. 682 : 93 L. Ed. 1628). In that case a suit by a citizen, in effect, against the Government (War Assets Administration) for an injunction was dismissed by the District Court on the ground that the Court did not have jurisdiction, because the suit was one against the United States. The Supreme Court, by majority, held that the suit as against the United States must fail on the ground that according to the laws of the country the sovereign enjoyed an immunity which was not enjoyed by the citizens. The case of Roberts v. Ahern ((1904) 1 C.L.R. 406) is another illustration of the same rule. It was held by the High Court of Australia in that case that the Executive Government of the Commonwealth or of a State is not bound by a statute unless the intention that it shall be so bound is apparent.

On the other hand, Art. 372 of the Constitution has specifically provided that subject to the other provisions of the Constitution all the laws in force in this country immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or by other competent authority. The expression "law in force" has been used in a very comprehensive sense as would appear from the provisions of sub-cls. (a) and (b) of cl. (3) of Art. 13 of the Constitution. If we compare the provisions of Art. 366(10) which defines "existing law" which has reference to law made by a legislative agency in contradistinction to "laws in force" which includes not only statutory law, but also custom or usage having the force of law, it must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force. It is thus clear that far from the Constitution making any change in the legal position, it has clearly indicated that the laws in force continue to have validity, even in the new set up, except in so far as they come in conflict with the express provisions of the Constitution. No such provision has been brought to our notice. That being so, we are definitely of the opinion that the rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms or by necessary implication, is still good law.

But Mr. Chatterjee further contended, alternatively, that even if it were held that the Government as a sovereign power may have the benefit of the immunity claimed, it is not entitled to that immunity when it embarks upon a business and, in that capacity, becomes subject to the penal provisions of the statute equally with other citizens. This question was not raised below and has not been gone into by the High Court, nor is it clear on the record, as it stands, that the Food Department of the Government of West Bengal, which undertook rationing and distribution of food on a rational basis had embarked upon any trade or business. In the absence of any indication to the contrary, apparently this Department of the Government was discharging the elementary duty of a sovereign

to ensure proper and equitable distribution of available food-stuffs with a view to maintaining peace and good Government. Therefore, the alternative argument suggested by Mr. Chatterjee has no foundation in fact.

It only remains to consider the other alternative argument that even if the State has not been bound by the penal section in the statute in question in express terms, it must be deemed to be bound by it by necessary implication. But no specific provisions of the statute in question have been brought to out notice which could lend any support to this alternative argument. It has not been shown to us that if the section which was sought to be applied against the Government were held not expressly to apply to Government, the law will lose any of its efficacy, or that its working will be hampered in any way. It must, therefore, be held that there is no substance in this contention either.

The appeal is accordingly allowed, the judgment under appeal set aside and the acquittal of the appellant confirmed.

SARKAR J. –

The appellant is an officer of the Government of West Bengal. He was prosecuted before a Municipal Magistrate of Calcutta for storing rice in certain premises without obtaining a licence for that purpose from the respondent, the Corporation of Calcutta, as required by s. 386 of the Calcutta Municipal Act, 1923. That was an Act passed by the legislature of the former Province of Bengal and may, for the present purpose, be taken to have been passed by the legislature of the State of West Bengal. In storing the rice the appellant had acted in his official capacity and for carrying out the West Bengal Government's rationing scheme.

The Magistrate acquitted the appellant holding that the Act did not bind the Government as it was neither expressly nor by necessary implication made bound, and so, the appellant who had been prosecuted as representing the Government would not be liable for non-compliance with its provisions. On revision the High Court at Calcutta held that the English rule that a statute did not bind the Crown unless expressly or by necessary implication made bound, did not apply to Indian statutes and so as the Government would be liable for breach of the provisions of the Calcutta Municipal Act. In this view of the matter, the High Court set aside the order of acquittal and sent the case back to the Magistrate for disposal on the merits. This appeal has been taken from the order of the High Court with special leave granted by this Court.

The main question is whether the English rule that "The Crown is not bound by the provisions of any statute unless it is directly or by necessary implication referred to" applies to India. It is said that the rule is based on the English law of Crown prerogatives and has no application to India since the promulgation of our Constitution as we have now republican form of government where no question of royal prerogatives can arise. It is pointed out that the prosecution was in this case started since the Constitution came into force and whatever may have been the position earlier, the Government can no longer take shelter under the English rule.

I think the rule applies to India even after the Constitution. It seems to me that the rule as applied in modern times, is really a rule of construction of statutes and is not dependent on royal prerogatives. This is the view that appears to have been taken in all recent authorities, to some of which I wish now to refer.

In Craies on Statutes (5th Ed.) it is stated at p. 392 that "The rule is analogous, if no equivalent, to

the rule already stated that the common law is not presumed to be altered by statute". The rule, therefore, is based on the presumed intention of the legislature and is, hence, a rule of construction of statutes. Then I find it stated in Attorney-General v. Donaldson ((1842) 10 M. & W. 117, 1237 152 E.R. 406) that "It is a well established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect; for it is inferred prima facie that the law made by the Crown with the assent of the Lords and Commons, is made for subjects and not for the Crown". Again in Coomber v. Justice of Berks ((1883) 9 App. Cas. 61, 65) it was said in reference to this rule, "In Rex v. Cook, 3 T.R. 519, the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down". In the Australian case of Roberts v. Ahern ((1904) 1 C.L.R. 406, 417), it was said, "This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of Alderson, B." The words referred to are what I have already set out from Attorney-General v. Donaldson (1842) 10 M. & W. 117, 1237, 152 E.R. 406).

In America too this rule has been applied as a rule of construction though there is no King there but the government is of the republican form. So in United States v. United Mine Workers of America ((1947) 330 U.S. 258, 272; 91 L. Ed. 884, 920) it was observed, "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only." Again in reference to the same rule it was said in United States v. State of California ((1936) 297 U.S. 175, 186; 80 L. Ed. 567, 574). "The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt".

In our country also in Bell v. The Municipal Commissioners for the City of Madras ((1901) I.L.R. 25 Mad 457, 485), a case on which much reliance has been placed by the respondent, it was said after referring to various English cases dealing with the rule, "This emphatic statement of the rule being founded upon general principles of construction is undoubtedly applicable as much to Indian enactments as to Colonial or Imperial Statutes". It was also said at the same page, "The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown".

Then I find that in England the rule protects from the operation of a statute not only what may strictly be called Crown prerogatives, or whatever is nowadays left of them, but all the Crown's rights, title and interest : see Halsbury's Laws of England (3rd Ed.) Vol. VII, p. 465. In volume XXXI of the Second Edition of the same treatise it is stated with reference to the rule that, "The Crown for this purpose means not only the King personally, but also the officers of State and servants of the Crown when acting within the scope of their authority on behalf of the Crown in the discharge of executive duties". In Mersey Docks v. Cameron ((1865) 11 H.L.C. 443, 508; 11 E.R. 1405), Lord Cranworth after referring to the various instances where the rule had been applied to exempt buildings occupied for purposes of the government from rates and other impositions, said, "These decisions however have all gone on the ground more or less sound, that these might all be treated as buildings occupied by the servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country". Again in Coomber v. Justices of Berks ((1883) 9 App. Cas. 61, 65), Lord Blackburn after referring to certain observations of Lord Westbury in the Mersey Docks case ((1865) 11 H.L.C. 443, 508; 11 E.R. 1405) said, "He there says that the public purposes to make an exemption "must be such as are required and created by the government of the country, and are, therefore, to be

deemed part of the use and service of the Crown;" and in Greig v. University of Edinburgh ((1868) L.R. 1 H.L. (Sc.) 348) he more clearly shews what was his view by using this language, "property occupied by the servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, become exempt from liability to the poor-rate"." In this case it was held that lands with buildings constructed thereon and used by country justices, and for police purposes were not liable to income-tax. In Cooper v. Hawkins ([1904] 2 K.B. 164) it was held that an engine-driver employed by the Crown who drove a steam-locomotive on Crown service at a speed exceeding the limit specified by regulations made under a statute, was not liable as in the absence of express words, the statute did not bind the Crown. Lastly, I refer to Roberts v. Ahern ((1904) 1 C.L.R. 406, 417) where a person acting under the orders of the Government of the Commonwealth of Australia had been prosecuted for having carted away nightsoil from a Post Office without a licence from, and without having given any security to, the local authority as was required by an enactment of the State of Victoria. It was held that he was not liable to prosecution because, "The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statutes unless that intention is apparent :" p. 418. It was also said that "The doctrine is well settled in this sense in the United States of America :" (p. 418). It is unnecessary to multiply instances where acts of the executive government have received the protection of the rule.

All this would seem to put it beyond doubt, that whatever its origin, the rule has long been regarded only as a rule of construction. It has been widely used to exempt executive governments from the operation of statutes quite apart from protecting prerogative rights of the British Crown strictly so called. It has been held reasonable to presume that the legislature intended that executive governments are not to be bound by statutes unless made bound expressly or by necessary implication. It would be equally reasonable to do so in our country even under the present set up for the presumption has all along been raised in the past and especially as the applicability of the rule can no longer be made to depend on the prevailing form of government. In countries with a republican form of government, the Sovereign would be the State, and its acts, which can only be the acts of its executive limb would be, under the rule exempt from the operation of its statutes. Whether the royal prerogative as understood in England, exists in the present day India is not a question that can arise in applying what is a pure rule of construction of statutes.

Further it is quite clear that the rule has been applied by courts in India in the construction of Indian statutes all along at any rate upto the promulgation of our Constitution, except in the solitary instance of Bell's case ((1901) I.L.R. 25 Mad. 457) earlier referred to. It would therefore be right to hold that the legislatures in our country have proceeded on the basis that the rule would govern the enactments passed by them. That being so and remembering that the rule is one of construction, there would be no reason to deny its application to Indian statutes after the Constitution. The new republican form of government adopted by us would not warrant a departure from the long established rule of construction.

It was then said that the course of legislation in India would indicate that it was not intended even before the Constitution that the rule would apply to Indian statutes. This contention was based on Bell's case ((1901) I.L.R. 25 Mad. 457). That case seems to me to have proceeded on a basis not very sound. On an examination of certain Indian statutes it was said, "It is noteworthy that as an general rule government is specially excluded whenever the Legislature considered that certain provision of an enactment should not bind the Government". From this the conclusion was drawn that "According to the uniform course of Indian legislation, statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be

inapplicable to the Government". It seems to me that this decision overlooks the uniform course of decisions of Indian Courts applying the rule in the construction of Indian statutes. The legislature must be deemed to have known of these decisions and if they wanted to depart from their effect they would have passed a statute bringing about the desired result. No such statute was ever passed. It is well-known that in these circumstances the legislatures must be taken to have proceeded on the basis that the decisions were correct and the rule was to be applied to the statutes passed by them. That being so, an examination of the course of Indian legislation would be irrelevant. The cases where the Government was expressly excluded must be taken to be instances of exemptions ex majori cautila : see Hornsey Urban Council v. Hennel ([1902] 2 K.B. 73). Furthermore, it seems to me that a comparison of the number of statutes where the Government had been specially excluded from their operation with the number where the statutes are silent on the subject, is, at best, a very unsafe guide for deciding whether the rule should be applied to Indian enactments. I therefore dissent from the view expressed in Bell's case ((1901) I.L.R. 25 Mad. 457), that the rule does not apply in India.

Now it seems to me that in storing the rice in the present case, the Government of West Bengal was performing one of its governmental functions. It was storing rice for purpose of rationing, that is, making food-stuff available to citizens in time of scarcity. That such activity is a part of the government's duty is unquestionable. The act for which the appellant was prosecuted was, therefore, an act of the West Bengal Government done in discharge of its ordinary duties as the government and the rule would prevent the Act from applying to make the Government liable for a breach of it.

Then it is said that the Act binds the Government by necessary implication. In support of this argument we were referred to certain provisions of the Act which expressly exempted the Government from their operation. I am unable to agree that this raises the necessary implication. It has been said in Halsbury's Laws of England (2nd Ed.) Vol. XXXI at p. 523 that "A general prerogative of the Crown is not deemed to have been abandoned by implication by reason of the specific exemption in a statute of any class of the servants of the Crown from acting in compliance with the prerogative, nor by reason of the fact that the Crown has foregone or curtailed its rights in some other direction in another part of the statute"; see also Hornsey Urban Council case ([1902] 2 K.B. 73) earlier referred to. These observations would show the unsoundness of the contention raised by the respondent.

Lastly, it is said that the purpose of the Act was to prevent adulteration of food-stuffs and this object would be wholly defeated unless Government was bound by it. It is not in dispute that if this were so, that might be a ground for holding that the Act bound the Government. On this aspect of the case reference may be made to Province of Bombay v. Municipal Corporation of Bombay ((1946) L.R. 73 I.A. 271). I am however unable to hold that the purpose of the Act would be wholly or at all defeated if the Government were not bound by it. It seems to me that s. 386 of the Act, the breach of which is complained in this case, is concerned with the use of premises and not with the prevention of adulteration of food-stuffs as was contended for the respondent. The provisions with regard to adulteration of food-stuffs are contained in a different part of the statute. There is nothing to show that the purpose of the Act would wholly be defeated if some premises were used contrary to the term of the Act.

I would for these reasons hold that the Act did not bind the Government and the prosecution of the appellant for an act done in the discharge of his duties as an officer of the Government cannot be maintained. This appeal should therefore be allowed and the order of the High Court set aside and that of the Magistrate restored.

WANCHOO J. –

I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and my brother Sarkar J. I agree with their conclusion but my reasons are different. I therefore proceed to state my reasons for coming to the same conclusion.

The facts have already been stated in the judgment of my Lord the Chief Justice and I will not therefore repeat them. Suffice it to say that the Corporation of Calcutta initiated this prosecution, in substance, of the State of West Bengal through its Director of Rationing and Distribution under s. 488 of the Calcutta Municipal Act No. III of 1923, (now equivalent to s. 537 of the Calcutta Municipal Act, No. XXXIII of 1951), for using or permitting to be used certain premises for the purpose of storing rice, etc. under the provisions of the Bengal Rationing Order, 1943, without a licence under s. 386 of Act III of 1923, (now equivalent to s. 437 of Act XXXIII of 1951). The State did not deny the facts; but it was contended on its behalf that the prosecution was not maintainable in law. The Magistrate held that the provisions of s. 386 of the 1923 Act did not apply to the State either expressly or by necessary implication and therefore passed an order of acquittal. The Corporation took the matter in revision to the High Court, which distinguished an earlier decision of the High Court relied upon by the Magistrate and held that after India became a democratic republic from January 26, 1950, the High Court was not bound by the decision of the Privy Council in a similar matter reported in Province of Bombay v. Municipal Corporation of the City of Bombay ((1946) L.R. 73 L.A. 271) and that the rule of construction based on the royal prerogative that the Crown was not bound by a statute unless it was expressly named therein or at any rate could be held to be bound by necessary implication, did not apply in India after January 26, 1950, and that the true rule of construction on which the Indian legislatures acted was that the State would be bound unless excluded either expressly or by necessary implication. The High Court therefore held that s. 488 of the Act of 1923 read with s. 386 bound the State and set aside the order of acquittal and sent the case back to the Magistrate for disposal according to law.

The most important question thus is, whether the rule of construction derived from the royal prerogative in England can still be said to apply in India after January 26, 1950. If this rule of construction based on the royal prerogative does not apply, it would necessarily follow that the ordinary rule of construction, namely, that the State would also be bound by the law like anybody else unless it is expressly excluded or excluded by necessary implication, would apply. Now the rule of construction based on the royal prerogative is a survival from the medieval theory of divine right of Kings and the conception that the sovereign was absolutely perfect, with the result that the common law of England evolved the maxim that "the King can do no wrong". In course of time however the royal prerogative in England was held to have been created and limited by the common law and the sovereign could claim no prerogatives, except such as the law allowed nor such as were contrary to Magna Carta or any other statute or to the liberties of the subject. The courts also had jurisdiction to inquire into the existence or extent of any alleged prerogative. If any prerogative was disputed, they had to decide the question whether or not it existed in the same way as they decided any other question of law. If a prerogative was clearly established, they could take the same judicial notice of it as they took of any other rule of law : (see Halsbury's Laws of England, 3rd Edition, Vol. 7, p. 221, para. 464).

> The question of royal prerogative was also considered in Attorney-General v. De Keyser's Royal Hotel Limited ([1920] A.C. 508). It was held therein that even where there was prerogative it could be curtailed by a statute, if the statute dealt with something which before it could be affected by the prerogative, inasmuch as the

> Crown was a party to every Act of Parliament. Thus in modern times, the royal prerogative is the residue of discretionary or arbitrary authority which at any time is legally left in the hands of the Crown and is recognised under the common law of England. Two things are clear from this modern conception of royal prerogative, namely, (1) that there must be a Crown or King to whom the royal prerogative attaches, and (2) that the prerogative must be part of the common law of England. Both these conditions existed when the Privy Council decision in Province of Bombay v. Municipal Corporation of the City of Bombay ((1946) L.R. 73 I.A. 271) was given in October 1946; the King was still there and the Privy Council held that the English common law rule of construction applied to Indian legislation as much as to English statutes. I may mention however that in England also the rule has come in for criticism by writers of books on law. Glanville L. Williams in his treatise on "Crown Proceedings" says at p. 53 :
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> "The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae."

Again at 54, the author says -

> "With the great extension in the activities of the States and the number of servants employed by it, and with the modern idea, expressed in the Crown Proceedings Act," (compare in this connection Art. 300 of our Constitution), "that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than it does not."

After January 26, 1950, when our country became a democratic republic and the King ceased to exist, it is rather otiose to talk of the royal prerogative. It is also well to remember that the English common law as such never applied to India, except in the territories covered by the original side of the three Chartered High Courts, namely, Calcutta, Bombay and Madras, (see Kahirodebihari Datta v. Mangobinda Panda ([1934] I.L.R. 61 Cal. 841, 857)) though sometimes rules of English common law were applied by Indian courts on grounds of justice, equity and good conscience. It seems to me therefore that to apply to Indian statutes a construction based on the royal prerogative as known to the common law of England now when there is no Crown in this country and when the common law of England was generally not even applicable, (except in a very small part), would be doing violence to the ordinary principle of construction of statutes, namely, that only those are not bound by a statute who are either expressly exempted or must be held to be exempt by necessary implication.

In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Pt. III thereof as well as by other provisions in other Parts : (see Virendra Singh and others v. The State of Uttar Pradesh ([1933] 1 S. C.R. 415). It is to my mind inherent in the conception of the rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power - executive, legislative and judicial - has disappeared and in our republican Constitution, sovereign power has been distributed among various organs created thereby, it seems to me that there is neither justification nor necessity for continuing the rule of construction based on the royal prerogative. It is said that though the King has gone, sovereignty still exists and therefore what was the prerogative of the King has become the prerogative of the sovereign. There is to my mind a misconception here. It is true that sovereignty must exist under our Constitution; but there is no sovereign as such now. In England, however, the

King is synonymous with the sovereign and so arose the royal prerogative, But in our country it would be impossible now to point to one person or institution and to say that he or it is the sovereign under the Constitution. A further question may arise, if one is in search of a sovereign now, whether the State Government with which one is concerned here is sovereign in the same sense as the English King (though it may have plenary powers under the limits set under our Constitution). This to my mind is another reason why there being no King or sovereign as such now in our country, the rule of construction based on the royal prerogative can no longer be invoked.

Reliance was placed in this connection on certain cases from Australia and Canada and also from the United States of America. So far as Australia and Canada are concerned, the cases are not of much help for the Crown exists there still. Besides in Canada and in most of the provinces of Canada and in New Zealand provisions have been specifically introduced in the Interpretation Acts laying down that no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby : (see Street on "Governmental Liability", at p. 152).

In the United States also, it is doubtful if the royal prerogative as such is relied on as the basis of certain principles which are in force there. In United States of America v. United Mine workers of America, Etc. ((1947)330 U.S. 258 : 91 L. Ed. 884), the Supreme Court did say that there was an old and well-known rule that statutes which in general terms divested pre-existing rights and privileges would not be applied to the sovereign without express words to that effect. But there was no discussion of the royal prerogative as such in the judgment and the rule was called a well-established rule of construction only. Besides the Court went on to consider the words of the statutes under consideration and held that on a proper construction of them the United States was not bound.

In United States of America v. Reginald P. Wittek ((1949) 337 U.S. 346 : 93 L. Ed. 1406) Supreme Court did say that a general statute imposing restrictions does not impose them upon the government itself without a clear expression or implication to that effect; but this decision was based mainly on the terms of the State statute there under consideration and the surrounding circumstances and legislative history of the statute concerned. Another case in the same volume is Jess Larson v. Domestic and Foreign Commerce Corporation ((1949) 337 U.S. 682 : 93 L. Ed. 1628) at p. 1628, where a suit was brought against an officer of the United States and it was held that it was in substance a suit against the sovereign government over which the court in the absence of consent had no jurisdiction. There is no discussion in this case of the royal prerogative having continued in the United States and the decision seems to have turned on some law of that country which provides that a suit against the Government could not be tried in a court in the absence of consent. As against these decisions I may refer to H. Snowden Marshall v. People of the State of New York ((1920) 254 U.S. 380 : 65 L. Ed. 315) to show that royal prerogative as such is losing ground in the United States, if nothing more. When dealing with the priority of a State over the unsecured creditors in payment of debts out of the assets of the debtor, the Supreme Court held that whether the priority was a prerogative right or merely a right of administration was a matter of local law and the decision of the highest court of the State as to the existence of the right and its incidents would be accepted by the Federal Supreme Court as conclusive. Again in Guaranty Trust Company of New York v. United States of America ((1938) 304 U.S. 126 : 82 L. Ed. 1224), the Supreme Court held that the immunity of the sovereign from the operation of statutes of limitation, although originally a matter of royal prerogative, was now based upon the public policy of protecting the citizens of the State from the loss of their public rights and revenues through the negligence of the officers of the State, showing that some of those immunities which in England were claimed as royal prerogatives, though preserved in the United States, were so preserved for other reasons.

Besides it must not be forgotten that though the Crown no longer remained in the United States after the attainment of independence the American colonies out of which the United State arose were colonised by English settlors who carried the common law of England with them to America with the result that the first Constitution of some of the States (like New York) after independence provided that the common law of England which together with the statutes constituted the law of the colony before independence should be and continue to be the law of the State subject to such alterations as its legislature might thereafter make : (see H. Snowden Marshall v. People of the State of New York((1920) 254 U.S. 380; 65 L. Ed. 315), at p. 317). That may account for the United States recognising some of those prerogative rights which were in force in England; though even so, the basis for such recognition is now more the law or public policy than any royal prerogative as such. The position in our country was somewhat different. We had the King but the common law of England did not, as already indicated, apply as a rule in this country. Now that the King has also gone, there seems to be no reason for continuing the royal prerogatives after January 26, 1950.

Further it appears to me that the royal prerogative where it deals with substantive rights of the Crown as against its subjects, as, for example, the priority of Crown debts over debts of the same nature owing to the subject, stands on a different footing from the royal prerogative put forward in the present case, which is really no more than a rule of construction of statute passed by Parliament. Where, for example, a royal prerogative dealing with a substantive right has been accepted by the Courts in India as applicable here also, it becomes a law in force which will continue in force under Art. 372(1) of the Constitution. But where the royal prerogative is merely a rule of construction of statutes based on the existence of the Crown in England and for historical reasons, I fail to see why in a democratic republic, the courts should not follow the ordinary principle of construction that no one is exempt from the operation of a statute unless the statute expressly grants the exemption or the exemption arises by necessary implication. On the whole therefore I am of opinion that the proper rule of construction which should now be applied, at any rate after January 26, 1950, is that the State in India whether in the Centre or in the States is bound by the law unless there is an express exemption in favour of the State or an exemption can be inferred by necessary implication. The view taken by the Calcutta High Court in this connection should be accepted and the view expressed by the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay ((1946) L.R. 73 I.A. 271) should no longer be accepted as the rule for construction of statutes passed by Indian legislatures.

Let me then come to the question whether on the view I have taken of the rule of construction, the prosecution in this case can be allowed to continue. There is nothing in the Act of 1923 or in the Act of 1951 exempting the State specifically from any of the provisions of the Calcutta Municipal Act. In this case the State is being prosecuted under s. 488 (or s. 537 now) and that section provides for fine for breach of s. 386 (or s. 437 now). The provision is a penal provision and immediately a question arises whether the State as such, apart from its individual officers as natural persons, is liable to prosecution under the criminal law or has to be exempted from the operation of the provisions of criminal statutes by necessary implication. A criminal proceeding generally ends with punishment which may be imprisonment, or fine, or both. Now it does not require any elaborate reason to realise that the State as such cannot be sentenced to imprisonment because there is no way of Keeping it in prison; therefore, by necessary implication, the State is exempt from all penal statutes and provisions providing for sentences of imprisonment or death. Then come those penal provisions which impose fines, like the present case, and the question is whether in such a case also the State must be deemed by necessary implication to be exempt from the penal provision. Generally speaking fines when inflicted by courts are realised by the State and go to the coffers of the State. In effect, therefore if the State as such is to be prosecuted under a penal statute imposing

fine the result is that the Court will sentence the State to fine which will go to the State itself. It is obvious that if such is the result of a prosecution, namely that the accused gets the fine, the intention could never be that such a prosecution should be launched. Therefore where the penalty is fine and the fine goes to the State, it must be held that by necessary implication the law does not intend the State to be prosecuted for such an offence. In the present case I find that under s. 81 of the Act of 1923 (or the corresponding s. 115 of the Act of 1951) the fines imposed by the Magistrate will not go to the Corporation but in the usual way to the State. Under the circumstances whatever other methods may be possible for enforcing the provisions of s. 386 (or s. 437 now) against the State it cannot be intended to be enforced by prosecution resulting in fine which would go to the State itself. In these circumstances it must be held that by necessary implication the State is exempt from the penal provisions contained in s. 488 (now s. 537). I would therefore allow the appeal, set aside the judgment of the High Court and restore the order of acquittal by the Magistrate.

Appeal allowed.

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