CALCUTTA HIGH COURT

Girindra Nath Banerjee

Vs

Birendra Nath Pal

(Rankin, J.)

30.03.1927

JUDGMENT

Rankin, C.J.

1. In this case an application was made to Mr. Justice Buckland, purporting to be in the Original Civil v Jurisdiction of this Court for the issue of a writ of habeas corpus, on behalf of one Girindra Nath Banerjee whom I will call "the applicant." The general circumstances giving rise to the application are these. The applicant wa3 arrested on the 25th day of October 1924 at his the then Residence No. 4/3 Malanga Lane in the town of Calcutta. He was kept in custody at the Alipore Central Jail and afterwards at the Midnapore Central Jail. After he had been in custody for some time an order, dated the 19th January 1925, was made under Ordinance No, 1 of 1924 that he should be committed to custody in the Midnapore Jail. On the 12th June 1926 he was served with an order made by the Government of Bengal under the Bengal Criminal Law Amendment Act, 1925, by which he wa3 directed to proceed to Midnapore, to report himself to the Superintendent of Police there, to proceed afterwards direct to the police-station of a certain village in that District and to reside until further orders in that village. He was directed to reside in premises defined and approved by the Superintendent of Police; he was prohibited from leaving such premises at night or from interviewing visitors : he was also directed to report himself twice daily to the officer at the police-station. He was prohibited from receiving visits without permission and was not to converse, communicate or associate with school boys or school masters or to attend at any meeting. He had to deliver unopened to the officer in charge of the police-station all communications sent to him by letter, telegram or otherwise. In particular he was directed not to go beyond certain limits defined in the order.

2. The applicant at the day of his application to this Court was the subject of another order made by the Government of Bengal under the same Act and dated the 29th November 1926. That order was similar in its terms to the one I have already referred to and it directed him in effect, to go to

the Canning Town police-station in the District of the 24-Perganas and to reside in premises defined and approved by the Superintendent of Police there, the restrictions which I have already mentioned being repeated. In particular, the applicant was prohibited from exceeding certain limits defined in that order, viz., on the north Bidyadhari river, on the east Matla river, on the south Canning Town Bazar, on the west siding line from Canning Railway Station up to Bidyadbari river.

3. The applicant had been arrested and detained in jail between October 1924 and some subsequent date; but long before the date of his application to this Court he was not a person who was being detained in jail. His exact position was defined by Section 11 of the Bengal Criminal Law Amendment Act, 1925. That was an Act passed by the local legislature of Bengal. It was made by the Governor of Bengal under the provisions of Section 72E of the Government of India Act. It was made with the previous sanction of the Governor-General under Sub-section (8) of Section 80A of the said Act. The terms of this enactment, so far as it affects the present question, are to be found in Sections 11, 12, 13, 14 and 15. Section 11 prescribes that where in the opinion of the Local Government there are reasonable grounds for believing that any person has committed or is about to commit certain acts in the nature of offences the Local Government, if it is satisfied that he is a member, or is being controlled or instigated by the member of any association of which the object or methods include the doing of any such acts or the commission of any of such offences, may, by order in writing, give certain directions. These directions are : That ha should notify his residence, report himself to the police, reside or remain in a specified area, be committed to custody in jail. The sanction attaching to such an order is that contained in Section 15 of the Act.

4. Section 15 makes it an offence to disobey any direction of such order. It says that a person who comes within its scope shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine. The position of this applicant at the time of this application was that an order, directing him to do or abstain from doing certain specified things, has been made and he was obeying that, order. If he chose at any moment to disobey the order then he would, have to take his chance of being arrested and put before a criminal Court. He would have to take his chance of that Court finding that under Section 15 ha hid committed an offence which rendered him liable to imprisonment for a term which might extend to thra9 years.

5. It is important, to notice that the applicant at the time of his application was not within the limits of Calcutta and the person who is said to have him in custody was a member of the police force who was not within the limits of Calcutta. Both of these persons were at Port Canning in the District of the 24-Parganas. The only connexion with Calcutta which this matter would appear to have is that the applicant says (and it is not contradicted) that ha is a person whose

ordinary residence is within the limits of this Court's Original Jurisdiction. The circumstance that some years ago when ha was first arrested, not under this Act but under a different enactment, he was at the time at Calcutta, would appear to have nothing to do with this case. The circumstance that he is a person who is an ordinary resident of Calcutta may have something to do with this case. If it be true that a parson ordinarily resident within the Original Jurisdiction of this Court although he be an Indian is clothed with certain rights given originally years ago by Parliamentary enactment to Englishmen in England and if it be true that when he goes into the Mofussil he carries those rights about with him as a kind of personal law differentiating him from ordinary Indian subjects of His Majesty who belong to the 24-Parganas, than the circumstance that he is ordinarily resident in Calcutta may be a matter of considerable importance.

6. An application having been made to the learned Judge for a writ of habeas corpus the learned Judge in the first place directed notice to go to the respondent and without issuing a rule nisi heard the application in the presence of both parties, the Advocate-General appearing on behalf of the respondent. In the result he refused to make any order on the application, on the ground that he was not satisfied that the respondent had the custody of the applicant in any sense sufficient to warrant his directing that the respondent should produce the body of the applicant before the Court. The learned Judge did not have occasion to deal with the main ground of the application. The main ground of the application before him and before us has been that the Bengal Criminal Amendment Act, 1925, was ultra vires of the local legislature and on that question the learned Judge did not pronounce.

7. The matter coming before this Court on appeal the Advocate-General took a preliminary objection that no appeal lay on the ground that the Letters Patent of this High Court since 1919 when Clause 15 was amended excepts from the general right of appeal every sentence or order made by a Judge in the exercise of criminal Jurisdiction. Logically, therefore, there are three questions before us, first, whether there is a right of appeal, secondly, whether the respondent is a person to whom a writ of habeas corpus could be directed, thirdly, whether or not the contention that the Act of 1925 is illegal is correct. Both the question of the right of appeal and the question decided by the learned Judge are matters of some difficulty, particularly the former. In order to decide the question of the existence of the right of appeal it is necessary to determine such questions as for example whether it is open to the applicant to get relief in the nature of a habeas corpus otherwise than under Section 491 of the Criminal Procedure Code.

8. It appeared to us that as there are more persons than the applicant in the situation created by the Act of 1925 it was hardly consistent with the proper conduct of the public business that this question raised by him should be avoided by reason of pleas in bar directed to the particular relief claimed. It seemed to us that it would be more reasonable to examine the matter as a whole

because whether this applicant has a right of appeal or not, whether or not habeas corpus is the correct form of remedy in this case, it must be the duty of this Court sooner or later to determine the very important question whether a certain number of people are being illegally detained under a void Act of the local legislature.

9. I propose partly as a matter of convenience and partly for other reasons to deal first with the careful and elaborate argument of Mr. Chatterjee on the question whether or not the Act of 1925 is ultra vires of the authority which purported to make it. I would point out Wit in doing so, I shall treat this applicant according to the true facts of his position and not as a person committed to custody in jail. I am going to treat him as a person against whom an order has been made under Section 11, who is obeying that order, and who is apprehensive that if he disobeys the order he may either be put on his trial in a Court of Haw for an offence created by Section 15 of the Act, or (perhaps) be made the subject of another order under Section 11(f).

10. The contention of Mr. Chatterjee is based upon the terms of the Government of India Act itself. The section with which we are chiefly concerned is Section 80A. By the first clause it is enacted that: The local legislature of any province has power subject to th3 provisions of this Act to make laws for the peace and good government of the territories for the time being constituting that province.

11. These words "for the peace and good government" appear in the first clause of Section 71 of the Act and also in Section 72. Section 71 says that the Local Government of any part of British India to which that section applies may propose to the Governor-General in Council the draft of any regulation for the peace and good government of that part. Thereupon the Governor-General in Council may approve it and it shall have the like force of law subject to the like disallowance as if it were an Act of the Indian legislature.

12. Section 72 gives the Governor-General power to make ordinances in case of emergency. The language of that section is that: The Governor-General may, in case of emergency, make or promulgate ordinances for the peace and good government of British India or any part thereof.

13. So that the phrase "peace and good government" applies not only to the local legislature but to the Governor-General's power of making ordinances and the power of making regulations in parts of India where there is no Legislative Council. In my judgment it is reasonably clear that these words are used because they are words of the widest significance and it is not open to a Court of law to consider with regard to any particular piece of legislation whether in fact it is meritorious in the sense that it will conduce to peace or to good government. It is sufficient that they are words which are intended to give, subject to the restrictions of the Act, a legislating power to the body which it invests with that authority. There is nothing in that expression which

can be the foundation of any reasonable argument to the effect that the Act of 1925 was outside the jurisdiction of the local legislature.

14. Again there is in the history of the present question nothing which need detain us. It is quite true that the matters covered by the Act in question were previously dealt with by ordinances made by the Governor-General under Section 72. That in no way complicates or affects the question of law which is now before us. The local legislature has not purported to control or supersede any ordinance so far as the applicant is concerned or at all.

15. The main argument of Mr. Chatterjee - in my judgment the only argument upon this point which the Court requires to examine at any length - is the argument to the effect that the Act of 1925 is obnoxious to the 4th clause of Section 80A. That clause runs: The local legislature of any province has not power to make any law affecting any Act o£ Parliament.

16. Now before proceeding to consider this matter concretely it may be as well to refer to certain passages in the Government of India Act which have or may be thought to have some importance for the interpretation of Clause 4. The phrase here is "affecting any Act of Parliament" and we have to consider carefully the implications of those words. It is clear enough from the second clause of the same Section 80A that subject to certain sanction for special cases the local legislature has power to "repeal or alter as to that province" any law made by any authority in British India whether made before or after 1919. Clause (2) of Section 65 which deals with the Indian legislature says that it shall not have power unless expressly so authorised by an Act of Parliament to make any law "repealing or affecting any Act of Parliament passed after the year 1860 and extending to British India" or certain other Acts which need not particularly mention. Section 84 in its first clause contains these provisions: A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall to the extent of that repugnancy but not otherwise be void.

17. The question, therefore, is whether the power conferred by Section 11 of the local Act of 1925 to give the directions given by the Government of Bengal to the applicant or Section 15 of the said Act which purports to make any disobedience thereof a punishable offence, are repugnant to Clause 4 of Section 80A which says that the local legislature shall not make a law affecting any Act of Parliament. If they are, then to that extent they would be void. It they are not, then they are valid.

18. Attention has been drawn by Mr. Chatterjee to the fact that the Act of 1925 was passed under Section 72E, that is to say, not by the vote of the Legislative Council but by certification. This circumstance has no bearing in my judgment upon the question before us. The statute in such circumstances says that the Bill shall on signature by the Governor become an Act of the local

legislature and that the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to. The question, therefore, remains whether as an Act of the local legislature it is intra or ultra vires.

19. Now the argument by which it is sought to show that the enactment is ultra vires of the powers conferred by the local legislature is as follows : It is said and quite correctly that it has long been accepted law in this Province that the English common and statute law as it existed in the year 1726 was applied in Calcutta not merely to Europeans in Calcutta but to all persons within the limits of the Original Jurisdiction of this Court. The history of this matter has been set out in many books of reference and it is no part of my indention to burden this judgment with an historical disquisition, but it is quite true that ever since the Charter of 1726 which established the Mayor's Court of Calcutta it has been generally accepted that the law which prevails within the Original Jurisdiction -began as I have stated. English statute and English common law as it stood in 1726 was "applied" to Englishmen in this town and with certain special modifications, in certain respects which do not now matter, to the Indian inhabitants as well. But at this time Calcutta was a factory, and part of the, territory over which the Mogul Emperor was the sovereign. The cases to which I will refer as showing the nature of the introduction of the law of England as id stood in 1726 are three only.

20. The first is the well-known judgment of Lord Stowell in the case of "The Indian Chief" (1801) 3 Rob.Adm. 28 which is perhaps the most accurate of all the statements of the history of this matter. The second is the case of *Mayor of Lyons v. E.I. Co.*[1] in which Lord Brougham-delivered the judgment of the Privy Council in 1836.upon the question whether the Statutes of Mortmain were parte of the law of the Supreme Court. The third is the case of the *Advocate-General of Bengal v. Rani Swarnomoyee Dassee*[2] where Lord Kingsdown gave the judgment of the Privy Council upholding the decision of Sir Barnes Peacock and other Judges and deciding that the doctrine of forfeiture to the Crown of the properties of persons who are felons of themselves was not part of the law of England which had been introduced into or received in Calcutta. Now those three cases are sufficient to show the nature of the introduction of the English law. In Blackstone's commentaries and other books there was much learning as to what happened when Englishmen went out and settled in uninhabited; countries and as to what happened in the case of conquered or ceded territories.

21. The cases I have referred to are important as showing this that the introduction of English law into the factory of Calcutta and its position after Calcutta had ceased to be a factory and the English Crown had obtained rights of sovereignty is not a case within any of these principles. Calcutta was not the plantation or settlement of an uninhabited country, nor in 1726 was it a country conquered from acceded by the Moguls. The position was that there being a factory of

the English, in a territory which had a sovereign of its own, that sovereign permitted the: introduction of English law within the limits of the factory and that introduction in the end extended not merely, to Europeans themselves but to those who associated themselves with Europeans land became part of the inhabitants of that place. In the cases of the *Mayor of Lyons v. E.I. Co*[3]. and The Advocate-General of Bengal v. Rani Swarnomoyee Dassee [1863] 9 M.I.A. 387, the question is discussed in the Privy Council on the basis that one has to see how much of the English law was introduced by the practice of the place and with the sanction of the sovereign.

22. If there is one more elaborate way of going wrong, open to this Court, than another, it is to argue from the analogy of the Colonial Laws Validity Act and from considerations of that kind. The plantation of places in Australia may be cases where from the moment of the settlement the English settlers from that first carried with them their own law because the sovereignty of the Crown of England went with them. That is not the case with Calcutta. English common law and statute law as in 1726 was not imported into Calcutta by virtue of any right of sovereignty in the British Crown nor by virtue of the fact that Englishmen at international law or otherwise carried with them their own statutes, but because by the sanction and permission of the sovereign of the place the community was allowed to practice its own law and to introduce in part the laws to which they had been accustomed. These laws were applied even to Englishmen only in part and only with adaptation to the local circumstances. It was on those propositions that the cases to which I have referred were decided.

23. Now the argument of Mr. Chatterjee is that the 4th clause of Section 80A which says that the local legislature has no power to make a law affecting any Act of Parliament prevents it from making any law which would affect the operation of any of the statutes, prior to 1726 which were introduced into the area of Calcutta at the time when the Mayor's Court Charter was first granted. I am of opinion that that argument distorts the meaning of the 4th clause of Section 80A. Such a clause as that is doubtless wider than the mere provision that the local legislature shall not have power to repeal an Act of Parliament and the word "affect" may cover any interference with the will of Parliament as expressed in a statute. But what Clause 4 of Section 80A refers to and preserves from interference is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter. It may well be that it guards against any possibility that a local legislature might attempt to interfere with the operation of Acts of Parliament that do not technically extend to India. But it cannot be construed as meaning that because in 1726 when there was no Other law the Courts in Calcutta adopted the law that prevailed at home subject to many modifications, therefore, any part of that law so introduced which originated in statute as distinct from common law cannot be interfered with by the local legislature. In my judgment that would be giving an extraordinary meaning to a very

simple phrase appearing in an enactment which is concerned to delimit the jurisdictions of local legislatures under Parliament.

24. The Statute of Uses, the Statute of Frauds and various other statutes were observed in old Calcutta, other statutes were not. It is quite true that with reference to the criminal law the Courts endeavoured to put into practice English statutes and principles and English procedure including of course the procedure and principles which safeguard the personal liberty of the subject. So far as the Criminal Jurisdiction is concerned I apprehend that they did that in the case of persons accused of committing crimes within the limits of Calcutta whether they were inhabitants of Calcutta or whether they were inhabitants of the Mofussil. So late as 1842 it was stated in the case of Maharanee of Lahore (1848) Taylor 428 that: that English law as to personal liberty does prevail in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta, the English law on this subject is the personal law of a class, viz., British subjects which they carry with them. The common law of England, which gives the right to this writ, has been introduced in Calcutta with the general body of the English law.

25. Since the time when the laws enforced by the Courts in Calcutta were taken from England in the way to which I have referred there have been various arrangements for giving local laws to Calcutta and to other parts of India. There were the old Regulations which had to be registered by the Supreme Court. By 3 and 4 Will. Section 4, C. 85 legislative powers were given to the Governor-General in Council. The chief land-marks in recent years have been the East India Councils Act of 1861 and and the Government of India Act of 1919. It has to be observed that when the High Courts in 1861 were founded to be one Court for the whole province the introduction of such Courts was part of a much wider scheme. The Indian Penal Code, the Code of Civil Procedure and the Code of Criminal Procedure date from about the same time, and I need only refer to the Letters Patents of 1862 and 1865 to show how these things went together. Since then, one by one the territories which formerly used to be occupied by this system of English laws introduced by practice or by consent or by the prerogative have been conquered by definite provisions made by competent legislative authority in India itself. A very good instance is the Contract Act.

26. At one time the English law of contract was applied in India; then that was changed. It was directed that the personal law was to apply to contracts and to questions of succession and family law. That matter was dealt with so far as contract was concerned by the enactment in the Indian Contract Act of what may be called a statutory common law. In the same way English conveyancing statutes have been replaced by a general law in the Transfer of Property Act. No part of the law has been more thoroughly covered than the criminal law. The old English law introduced into Calcutta has been superseded by the Indian Penal Code (cf. Clause 30, Letters

Patent, 1865). The old principles of English practice in criminal cases have been reduced to a Code of Criminal Procedure, which now applies in the Original Jurisdiction of the Court. If in 1924 any ingenuous inhabitant of Calcutta asked himself: How is it that I am not liable to be arrested arid imprisoned save by due process of law and after access to the Courts of the country.

27. The answer I conceive would have made no reference to the Magna Charta. The answer would have been that there is no warrant for any such process in the Code of Criminal Procedure and many safe-guards in the Code of Criminal Procedure to protect against it. It does not matter whether one is an inhabitant of Calcutta or a comparatively unhappy inhabitant of Alipore, one's rights in this matter have been reclaimed from the old law introduced from England and they are part of the great statutory common law of India which has now no special application to the city of Calcutta. It is to my mind therefore in the present case doubly wrong to maintain that Act of 1925 in this respect affects Acts of Parliament. These are matters which were at one time controlled not by Act of Parliament but by the power which determined to regulate itself by certain Acts of Parliament. They have been taken under control by the legislature of India and from a lawyer's point of view the rights of the subject depend upon that code of law which is now common law throughout the whole country. Although that Code enshrines the old principles it cannot be contended that the Magna Charta and the Petition of Eights have been affected by the Act of 1925. I do not admit it as a sound proposition of present day law that a citizen of Calcutta who goes to the Mofussil is for any purpose of the Criminal law in a different position, if he be an Indian, from any other Indian whom he meets. In my judgment the contention that the Magna Charta and the other statutes to which reference has been made entitle this Court to hold the Act of 1925 to be ultra vires is a contention which fails.

18. I propose next to consider whether the various enactments of the Indian legislature leading up to the Code of Criminal Procedure, in its present form, have in providing a form of procedure applicable to a case of this class abolished expressly or impliedly any right there would have been in the Supreme Court to grant the high prerogative writ of habeas corpus. Now that question was adverted to in 1911 in the case of Rudolph Stallman (1911) 39 Cal. 164 and it was adverted to in terms which were intended to cast grave doubt upon the authority of the Indian legislature to make any provision which would take away the old writ of habeas corpus. One of the learned Judges said that: If the question arose for consideration we should have to examine the principles recognized in the cases of Ameer Khan (1870) 6 B.L.R. 392 (Supra), Maharanee of Lahore (1848) Taylor 428(supra) and *Surendra Nath Banerjee v. Chief Justice and Judges of the High Court of Bengal*[4]

19. So far as I can find for many years past this question instead of being dealt with and determined has been left on the basis that it was extremely doubtful whether the Indian

legislature can be supposed to have had the power of prohibiting even for certain purposes recourse to the old writ of habeas corpus. [Sections 106 and 131(3) of the Government of India Act would seem to have removed, the doubt in the case of statute passed by the Indian legislature after 1919.]

20. It does not seem to me to be possible to conduct public business in an atmosphere of doubt maintained after this manner upon such a point and as we have to pronounce upon the question whether there is in this case a right of appeal, I think we are called upon to decide the question. The Indian High Courts Act of 1861 (24 and 25 Vic, chapter 104) by its 9th clause gave power to Her Majesty to set up High Courts which should have such jurisdiction, power and authority as Her Majesty may, by such Letters Patent, grant and direct subject, however, to such directions and limitations as to the exercise of Original Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and, save as by such Letters Patent may be otherwise directed and subject to and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Court in the same Presidency abolished under this Act at time of the abolition of such last mentioned Courts.

21. That was Section 9 of the Act and it plainly authorised Her Majesty under the Letters Patent to put qualifications to the extent to which the powers of the old Courts should come down to the High Courts and it likewise made this very matter subject to the legislative powers of the Governor-General in Council. The Letters Patent of 1865 were issued under additional powers conferred by 28 Vic, C.15 (cf. Section 6 thereof) and carried out these directions. Both by Clause 44 and by other clauses (see 01. 38 in particular) it was expressly provided that the provisions of the Letters Patent were to be subject to the legislative powers of the Governor-General in Council.

22. The matter which has given rise to difficulty is apparently this that in the East India Councils Act of the same year there was a provision in Section 22 that the Governor-General in Council shall not have the power of making any laws or Regulations which shall repeal or in any way affect "any provisions of any Act passed in this present Session of Parliament," etc. This provision gave rise to discussion in two cases : *Queen v. Meares*[5] *and Emperess v. Burah*[6] An examination of these decisions and of the statutes and Letters Patents convinces me that the doubts thrown upon the power of the Indian legislature prior to the Government of India Act to make enactments which should modify the exercise by the High Court of the powers previously possessed by the Supreme Court are unfounded. I see no reason whatever for holding that the old writs or forms of procedure were put beyond the reach of the Indian legislature.

23. 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 of the Criminal procedure Code. Now in 1870 in the case of Ameer Khan (1870) 6 B.L.R. 392 Mr. Justice Norman held that the High Court could issue the writ of 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 81 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 mainprise de homine replegiando, not any other writ of the like nature beyond the Presidency Towns.

24. 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 (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.

25. 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. Rules were made by this Court under Section 148 of the Act (cf. Belchamber's Rules and Orders, Ed. 1880, p. 253). 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 the 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.

26. 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. I 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.

27. There may or may not be purposes for which habeas corpus is available and which are not within Section 491. For any purposes which are not within Section 148 of Act 10 of 1875 the old writ may survive within the limits of the Original Jurisdiction. After all the writ of habeas corpus had several forms and different uses. But there is no question of applicants having a choice as to whether to be governed by the Indian statute or whether to have recourse to such right as an historical enquiry of some difficulty might disclose as having been the law of the Supreme Court at a former time. The policy of Section 148 of Act 10 of 1875 is exactly the same as that of Section 50 of the Specific Belief Act with regard to mandamus. It has to be remembered that one of the reasons that led to the abolition of the Supreme Court was the fact that the various jurisdictions of the Supreme Court were wrapped in a good deal of confusion. Indeed it was stated on very high authority that for one reason or another, the Supreme Courts have come to stand at last in circumstances in which it is a very hard matter to say what are their rights, their duties or their use.

28. That was the language of Sir Charles Grey and Sir Edward Ryan, distinguished Judges of the Court (Heckle's Rules and Orders - Preface).

29. In my judgment the right to the kind of relief sought in this case would have been solely under the Criminal Procedure Code. This would have been an exercise of Criminal Jurisdiction and no appeal would lie under Clause 15 of the Letters Patent. But the Bengal Criminal Law Amendment (Supplementary) Act of 1925 - an Act of the Indian legislature - expressly provided that the powers conferred by Section 491 of the Code should not be exercised in respect of any person arrested or detained in custody under the Local Act. The Local Act is an Act which was intended to supplement the ordinary criminal law in Bengal and the question whether or not a particular person is legally detained under it has to be dealt with, if at all, under the Code of Criminal Procedure, I do not think therefore that the principles acted on in Clifford and O'Sullivan (1921) 2 A.C. 570 govern the application of clause 15 of the Letters Patent to this case. The applicant has done all he can to claim that he is entitled to a remedy on the civil side of the Court and apart from its Criminal Jurisdiction. If we limit him to that he would have a right of appeal at the expense of all chance of success.

30. I ought here to add that Act 10 of 1872 and Act 10 of 1875 do not seem to have been brought to the notice of the Judges who took part in deciding In re R. Nataraja Iyer (1912) 36 Mad.

72(Supra), Re Kochunni Elaya Nair A.I.R. 1922 Mad. 215(Supra), In re E.P. Govindan Nair A.I.R. 1922 Mad. 499(supra) or the case of Mahomedalli v. Ismailji .

31. It can serve no useful purpose now to discuss the correctness of Mr. Justice Norman's decision in the case of Ameer Khan (1870) 6 B.L.R. 392(suupra) that habeas corpus could issue to the Mofussil, but in so far as he proceeded upon the 4th clause of the Charter of 1774 the opinion of Sundara Ayyar, J., in In re R. Nataraja Iyer (1912) 36 Mad. 72(Supra) that he misconstrued that clause coincides with the views of Sir Lawrence Jenkins, C.J., and Stephen, J., in *Governor of Bengal v. Motilal Ghosh*[7]

32. With regard to the question whether the Respondent has been shown to have such custody or control of the appellant as would entitle this Court to direct a writ of habeas corpus, I am of opinion that this matter lies very close to the border-line. After examining the position which is disclosed by the affidavits I am not, however, satisfied that this particular respondent is shown to have such custody or control of the applicant as would entitle the applicant to get a direction to the respondent that he should produce him before the Court. On that point I think the decision of the learned Judge must be upheld. This appeal must be dismissed.

Majumdar, J.

33. I agree.

Cases Referred.

1[1836] 1 Moo.P.C. 175
2[1863] 9 M.I.A. 386
3[1836] 1 Moo.P.C. 175
4(1883) 10 Cal. 109
5[1874] 14 B.L.R. 106
6[1879] 4 Cal. 172
7[1913] 41 Cal. 173