CALCUTTA HIGH COURT

Jitendra Nath Ghosh

Vs

Chief Secretary To The Bengal

(Remfry , J.)

19.07.1932

JUDGMENT

Remfry, J.

1. This is a petition on behalf of Kali Charan Ghosh praying for the issue of a writ of Habeas Corpus or for a mandamus. It appears from the petition that Kali Charan Ghosh was arrested and detained in the Presidency Jail on or about 10th February or 16th February 1932. He claims to be a French subject and it is said that he was arrested near Serampur and that his brother, the present petitioner, was informed on 16th February that Kali Charan had been arrested under the Bengal Criminal Law Amendment Act 6 of 1930, Bengal. The petitioner states that in spite of inquiries he had been unable to ascertain the grounds for this arrest, and has not been able to secure a copy of the warrant under which the detenu is detained, and that the detenu is a good and useful French subject and has never been convicted in a Court of law. A rule was issued on 28th April on the Superintendent of the Presidency Jail, to show cause why the body of the detenu should not be produced in this Court on ground No. 1 of the petition. That ground alleges that the arrest and detention of the said Kali Charan Ghosh are illegal and neither the arrest nor the detention are warranted by the British, Indian or French or International laws or under the constitutional and criminal laws of the British Dominions and Dependencies.

2. A counter-affidavit has been filed on behalf of the opposite party, sworn by a Sub-Inspector of Police, which sets out that, being duly authorized under Section 4, Sub-section 1, Act 6 of 1930 he arrested the detenu on 10th February at Howrah station, and reported the fact to the Local Government, and committed him to the Presidency Jail, in accordance with the provisions of that Act.

3. The affidavit sets out an order of the Local Government of 23rd February 1932 directing that the detenu be detained until the 9th March, and an order of the Local Government of the 11th March for his detention under Sub-section 1, Section 2,Bengal Criminal Law Amendment Act of 1930, which recites that in the opinion of the Government of Bengal there are reasonable grounds for believing that Babu Kali Charan Ghosh is a person in respect of whom an order may lawfully be made under that section. An offer was made to produce the original orders if they were required. On behalf of the petitioner no request was made for the production of the original documents. It was not disputed that the detenu was a French subject. The matter was argued at

length, and with commendable restraint and lucidity by the learned Advocate appearing for the petitioner and counsel appearing for the Crown. It was not disputed that this Court had jurisdiction under Section 491, Criminal P. C., and it was therefore unnecessary to consider any other law under which this Court could issue a writ of Habeas Corpus or a mandamus.

4. For the petitioner it was argued that the Government had no power to arrest or detain the detenu as an act of State. But as the Crown only claimed to have acted under the powers conferred by the Bengal Criminal Law Amendment Act 6 of 1930 as amended by Act 4 of 1932 it is unnecessary to consider this argument. In this case the Local Government passed its order, on 11th March 1932, and Act 4 of 1932 came into force on 23rd March 1932 and accordingly this case must be decided under Act 6 of 1930 as it was before the amending Act 4 of 1932 was passed, for Section 6, Act 4 of 1932 provides that any act done under the provisions of the Bengal Criminal Law Amendment Ordinance, 1931, shall be deemed to have been done under the provisions of Act 6 of 1930 as amended by Act 4 of 1932 as if this Act, i. e., Act 4 of 1932, had commenced on 29th October 1931, but the order in this case was passed under Section 2, Act 6 of 1930, and was not passed under the Ordinance. In the other rule, which was heard by consent at the same time, the only points of difference are, that the order of the Local Government was made on 14th May 1932 and the Act applicable was Act 6 of 1930 as amended by Act 4 of 1932, and the detenu is a British subject.

5. Kali Charan Ghosh, though a French subject, was arrested in British India. By the mere fact that he entered British India he made himself amenable to the , Laws of British India. There is no presumption that he) knew the law enforceable in British India--the law makes no such absurd presumption--but ignorance of the law does not in any way affect his liability thereunder. Such ignorance might be pleaded in mitigation of sentence, if ho were convicted of a crime, but affords him no sort of privilege or immunity. A foreign subject comes within the purview of all acts in force in British India, if he chooses to come into this country, unless indeed any such act specially exempts foreigners. The French law, as far as I am aware, does not purport to give its subjects any privilege or immunity in foreign countries, nor would any such French law, if it existed, be of any avail in British India. There is no provision in International law nor under any convention or treaty, which protects foreigners from the law of the land, once they enter into British India. Therefore the position of Kali Charan Ghosh is exactly the same as far as Act 6 of 1930 is concerned, as that of a British subject.

6. It was argued that Act 6 of 1930 was invalid inasmuch as it affected some Act of Parliament, and thereby contravened Section 80 B, Government of India Act. It was suggested that an "Act of Parliament" in that section meant any proclamation or treaty. That is not the meaning of an Act of Parliament nor were we referred to any treaty or proclamation which this Act contravenes. The Indian Act was said to affect the Habeas Corpus Act and the Bill of Rights, but apart from the fact that neither of these are laws which form part of the law of British India, it is clear from the decision in *R. v. Halliday*[1] that an Act providing for internment of suspected persons, affects neither the Habeas Corpus Act nor the Bill of Rights, and an Act providing |for the detention of suspected persons is in exactly the same position. Neither on authority nor principle, can it be maintained that Act 6 of .1930 in any way contravenes the Government of India Act: see Girindra Nath v. Birendra Nath . Under that Act the Local Legislature was empowered within its sphere to pass such legislation as it might deem necessary for the needs of the territories within its jurisdiction, nor were its powers curtailed; within its own sphere, it can modify or suspend,

curtail or enlarge the rights and liberties of the peoples entrusted to its care, subject to certain safeguards.

7. The next point argued was that under the provisions of the Bengal Criminal Law Amendment Act of 1930 and of Act 4 of 1932, the High Court has the power or possesses an overriding power, to determine whether any person detained under Sections 2 or 4, was legally and properly detained, and reliance was placed on Section 491, Criminal P. C., and on the decision of the Judicial Committee in *Eshugbayi Eleko v. Government of Nigeria*[2] The High Court can consider and determine whether an Act passed by[the Local legislature is within its powers, but if an Act so passed is within those powers, it is not the province of the Courts to consider the propriety of such legislature, nor have the Courts jurisdiction to alter or modify in any way the competent acts of the legislature. Undoubtedly the Courts can decide if any person was legally detained, and whether he was a person to whom any act of the legislature could legally be applied, and whether in his case the Act was properly applied. As I have already said in my opinion it wa3 within the powers of the local legislature to enact this Act. The question whether the detenus concerned are legally detained under the Act depends on the meaning of the Act. The legislature had the power to determine whether any person should be detained only after his case had been tried by a Court of law, or after the question of his detention had been considered by some other authority. The relevant words used are: When in the opinion of the Local Government there are reasonable grounds for believing certain things about any person, he may be committed to custody in jail. The plain meaning of these words is, that the only test to be applied is whether in the opinion of the Local Government there are reasonable grounds. This view is manifestly the only possible view, for the Act proceeds to provide in Section 9, that the case of each detenu shall be considered in a manner therein provided, by two Judges, who are to report to the Government whether or not in their opinion there is lawful and sufficient cause for the order. It is further provided by Section 2 that within a year the order shall be reviewed by the Local Government and such order shall not remain in force for more than a year, unless it is renewed after it has been reviewed. It is therefore clear that the legislature deliberately provided that there should be no right of appeal to a Court of law to adjudicate as to the merits of any order passed by the Local Government. The decision in Bhagat Singh v. Emperor establishes that it is competent for Parliament to make an authority the only Judge of whether certain conditions exist, and the local legislature within its own sphere has all the powers of Parliament. The Local Government has expressed the required opinion, and therefore the detention of both the detenus is prima facie legal. It was argued and correctly argued that the Court must determine whether each detenu belongs to the class of persons to whom the Act applies. The onus of proving that he does not belong to such a class is on the petitioner see per Lord Wrenbury in *Rex v. Halliday*[3]. Under this Act the class concerned consists of persons in respect of whom the Local Government has formed a certain opinion. It is not argued that the Local Government has not expressed that opinion, as regards both the detenus concerned. According to the view expressed by Lord Wrenbury cited above, and the decision of the Judicial Committee in *Eshugbayi Eleko v. Government of Nigeria*[4] the Court is bound to decide if in fact the detenus concerned are members of that class of persons to which alone the Act applies.

8. In the last cited case the right of the executive depended on whether or no the petitioner was a deposed Chief and whether native law or custom required him to leave a particular area. These were not matters which, according to any enactment of the local legislature, were to be determined by the Government alone. In Halliday's case [1917] A.C. 260 the regulation required that the Secretary of State should be satisfied. Lord Wrenbury, as I have said, expressed the view

that it was still open to the petitioner to prove that he was not a member of the class concerned, but Lord Pinlay at p. 269 observed that the duty of deciding that question was by the order thrown upon the Secretary of State and an advisory committee, and pointed out that no tribunal for investigating the question whether circumstances of suspicion existed warranting some restraint, could be imagined less appropriate than a Court of law. The point did not arise for decision in Halliday's case; [1917] A.C. 260 it did arise for decision in Bhagat Singh's case and it was there decided that the Courts could not inquire into the grounds of an opinion formed by the Governor-General where the legislature had made him the sole judge of the matter. Therefore in my opinion, the local legislature having made the only test of the matter the opinion of the Local Government, once that opinion is expressed, the Courts cannot go behind it, except in certain cases which I will consider hereafter. I also agree with the view taken of this point in the case of Miss Pramila Gupta v. W. S. Hopkyns A.I.R. 19S2 Cal. 470 that the test provided by the Act as the only test, was not, who other there were reasonable grounds for the opinion of the Local Government, but whether that opinion existed.

9. That last cited decision is in my opinion an authority which we should follow, but having regard to the decision in *Eshugbayi Eleko v. Officer Administrating the Government of Nigeria* [5]--but see In re Carroll [1931] 1 K. B. 317 there is some doubt as to whether it. is binding on us, and these petitions have therefore been considered on all the points. It was also argued that this Court was bound to consider whether reasonable grounds existed for an opinion formed by the Local Government under Section 2, Bengal Criminal Law Amendment Act of 1930, because similar words in Section 144, Criminal P. C., had been so construed and reliance was placed on the decision in *Subodh Chandra v. Emperor*[6] But in the first place, the words of an act must be construed in the light of their context, and it by no means follows that the same words bear the same meaning in two Acts directed to different objects. And in the second place, the decision of the Judicial Committee in Bhagat Singh's case A.I.R. 1931 P.C. 111 establishes the correct way in which the Bengal Criminal Law Amendment Act should be interpreted for the Judicial Committee were considering sections directed to deal with a very similar object. The only doubt, in my opinion, is whether in the light of the decision of Judicial Committee the Courts can inquire into the grounds of an opinion of a Magistrate formed in respect of a case under Section 144, Criminal P. C.

10. But however that may be on a consideration of the whole Act, I have no doubt that the legislature intended that the Local Government should be the sole judge as to whether reasonable grounds existed in respect of any case which it had to consider under the Bengal Criminal Law Amendment Act.

11. The last point for consideration is of the greatest importance and that is the argument that the Court must decide under Section 491, Criminal P. C, whether the orders complained of were though [legal, improper. The expression "improperly" in that section cannot include any consideration of the question whether the legislation in question is proper, for it is beyond the province of a Court to consider any such matter. The local legislature within its sphere can alter or modify any previous legislation and create exceptions to rights given by previous enactments and therefore the mere fact that it does so cannot be regarded as improper. The word "improperly" therefore can only refer to cases in which although the forms of law have been observed there has been a fraud on an act or an abuse of the powers given by the legislature.

12. The Courts can and in a proper case must consider and determine the question whether there has been a fraud on an act or an abuse of powers granted by the legislature: see Eshugbayi Elecho v. Government of Nigeria A.I.R. 1931 P.C. 248 at p. 670. But although in accordance with British jurisprudence and with the jurisprudence of British India no member of the executive can interfere with the liberty or property of a British subject or of a foreigner in our land except on the condition that he can and if duly called upon must support the legality of his action before a Court of justice; before that Court of justice his position is not less advantageous than that of any ordinary litigant and therefore a petitioner alleging fraud or an abuse of his powers against him must set out his case with the same precision as is essential in alleging fraud against any other litigant and his case fails unless he can establish it as pleaded.

13. There is no sufficient allegation in the petitions before us of any fraud or of any abuse of powers. There is nothing before us which begins to show that the detention of these two detenus was in the only relevant sense improper or that the opinions duly expressed by the Local Government are anything but honest opinions. There is nothing to suggest that it could possibly be established that the Local Government has in any way abused the powers entrusted to it. It was decided in In re Sarno [1916] 2 K. B. 742(Supra) that the Court must also consider whether there has been any misuse of the powers given to the executive but that although the Court should not insist on technicalities, the petitioner must satisfy the Court that there has been in fact a misuse of such powers. A vague allegation is not sufficient but if it is established that there has been a misuse of its powers the fact that the forms of the law have been strictly adhered to will not suffice. But in the two cases before us there is nothing to show that there has been any misuse of the powers given to the Local Government by the local legislature. Therefore in my opinion the detention of these two detenus is neither illegal nor improper. It was also argued that the arrest of Sudhu Kumar Ghose was illegal and that the orders extending the period of his detention before the final order under Section 2 of the Act were illegal.

14. There is no ground for any such contention the arrest and subsequent detention were strictly in accordance with the provisions of the Act.

15. In the case of Kali Charan Ghosh the order under Section 2 was made before the rule was issued and no question therefore arises as to the legality of his arrest for the powers given by Sections 2 and 4 of the Act are independent of each other and a detenu could not claim to be released unless the final order under Section 2 was illegal or improper. As far as the present matter is concerned there is no material difference between the provisions of Section 2, Act 6 of 1930 and those provisions as amended by Act i of 1932. As was expounded in the impressive speech of Lord Shaw in Halliday's case [1917] A.C. 260(supra) the question to be determined in these rules is one of the gravest importance to every British subject. But after giving these petitions my most careful consideration in my opinion, the authorities cited are conclusive and these two Rules should be discharged.

Mallik, J.

16. I agree. I do not think I can advantageously add anything to the judgment of my learned brother.

Cases Referred.

1[1917] A.C. 260
2A.I.R. 1931 P.C. 248
3[1917] A.C. 260 at p. 308
4A.I.R. 1931 P.C. 248
5A.I.R. 1928 P. C. 300
6A.I.R. l925 Cal. 278