

CALCUTTA HIGH COURT

Emperor

Vs

Hemendra Prosad Ghosh

(Panckridge, J.)

07.06.1939

JUDGMENT

Panckridge, J.

1. The two articles out of which these two references arise are alleged to be attacks upon the Council of Ministers in Bengal and it is complained that they are seditious and in breach of Section 124-A, I.P.C., which provides: Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
2. Section 17, I.P.C., provides: The word 'Government' denotes the person or persons authorized by law to administer executive government in any part of British India,
3. The questions asked are: Under case No. 2 of 1939,(a) whether the Hon'ble Ministers of Bengal are subordinate officers to H.E. the Governor within the meaning of Section 49, Government of India Act, 1935? (b) whether the Council of Ministers should be considered as "Government established by law."
4. Under case No. 3 of 1939, (a) whether the ministry of a Province can be said to form a part of the executive Government of that Province in the sense implied by Section 17, I.P.C.? The reference is under the first part of Section 432, Criminal P.C., and asks us specific questions but does not enable us to deal completely and finally with the matter. The Government of India Act, 1935, defines the rights and duties of ministers and their relation to the Government of a Province.
5. Section 49(1) of the Act provides that 'the executive authority' (which is the same thing in our opinion as legal authority to administer executive Government of a Province) 'shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him.'
6. Section 59 (1) provides: All executive action of the Government of a Province shall be

expressed to be taken in the name of the Governor.

7. Section 50 (1) provides: There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion.

8. Section 51 (1) provides: The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure.

9. Sub-section (4) of Section 51 provides: The question whether any, and if so what, advice was tendered by ministers to the Governor shall not be inquired into in any Court.

10. Sub-section (5) of Section 51 provides: The functions of the Governor under this Section with respect to the choosing and summoning and the dismissal of ministers, and with respect to the determination of their salaries, shall be exercised by him in his discretion.

11. Section 53 provides that the Instrument of Instructions which it is proposed that His Majesty shall issue to the Governor shall be laid before Parliament previous to issue. In para. 8 of the Instrument of Instructions issued to the Governor of Bengal it is stated:

In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by or under the Act to exercise in his discretion, our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his ministers, unless....

12. Section 59(3) provides: The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

13. There is no specific provision in the Government of India Act nor in any other Statute or Act which we are aware of vesting the ministry with executive functions. On the other hand such functions "shall", in the words of Section 49 of the Act, "be exercised by the Governor either directly or through officers subordinate to him." The use of the word "aid" in Section 50 does not, in our view, vest the ministers with any right to exercise executive authority, since such a construction would be contrary to the clear provision in Section 49, nor can the rules for the transaction of the business of the Government of Bengal made under Section 59(3) of the Act override or alter, in law, the same clear provisions. Again, the Instrument of Instructions, which cannot be and does not purport to be, in contradiction of the Act, clearly contemplates the Governor exercising the powers conferred upon him (save where in certain instances specified he acts alone) "guided by the advice of his ministers." The Instrument of Instructions contemplates the Governor, and not the ministers, exercising executive authority. The position appears to be that, unless the ministry can be held to consist of officers subordinate to the Governor within the meaning of Section 49(1) of the Act, it cannot exercise executive functions. In our view, ministers chosen from the elected representatives of the people of the Province for the purpose of carrying into effect, if possible and within prescribed limits, their wishes, and acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor within the meaning of Section 49, Government of India Act, 1935. It follows therefore that although in

popular language, the ministers may be referred to as "the Government" they are not "the Government" within the meaning of Sections 17 and 124-A, I.P.C. Whatever may happen in practice, the ministers are, in law, the Governor's advisers. For these reasons we are of the opinion that the answers to all the three questions put to us is No.

14. Although the Presidency Magistrates have, under Section 432, Criminal P.C., the power to refer for the opinion of the High; Court any question of law which arises at the hearing of any case pending before them, it may be undesirable - and in our view in this case it was undesirable - to make the reference in the form it came before us. It has involved giving a decision on law, divorced to some extent from the facts. It may be that when the learned Magistrates have dealt with these charges according to law, the same matters may come before this Court on appeal. The more desirable course is for the Magistrate to use the second part of Section 432, Criminal P.C., which provides that he may give judgment in any such case subject to the: decision of the High Court on such reference. By adopting this course, duplicity of hearing in both Courts would probably be avoided and all the facts would be before this Court once for all. Section 205(1), Government of India Act, 1935, provides: An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that; the case involves a substantial question of law a» to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is, involved and of its own motion to give or to withhold a certificate accordingly.

15. In our opinion this case involves a substantial question of law as to the interpretation of the Government of India Act, 1935. But at the same time we are of the opinion that the decision we have given is an opinion and not a judgment or decree or final order of the Court. It may be that hereafter the same matter will come before us again after it has been dealt with by the Presidency Magistrates. Accordingly, we-give no certificate.