BOMBAY HIGH COURT

Narayan Hari Tarkhande

Vs

Yeshwant Raoji Naik

(Fawcett and Madgavkar, J.J. Mirza, J.)

20.03.1928

JUDGMENT

Fawcett, J.

1. The applicant, in this ease, made a complaint before the First Class Magistrate of Malegaon against the opponent, who is a Sub-Inspector of Police, charging him with having, as a public servant, framed incorrect documents with intent to cause injury to the complainant and to save a person from punishment. The offence is punishable under Sections 167 and 218 of the Indian Penal Code. He alleged that the accused had deliberately taken down incorrect statements of witnesses in an investigation made by the accused in a theft case. The accused admits that he recorded the statements in question, in virtue of his office as Sub-Inspector; but he contended that the prosecution was time-barred under Sub-section (3) of Section 80 of the Bombay District Police Act, 1890. This sub-section says :In any case of an alleged offence by a Magistrate, police-officer or other person... by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence... if committed... was of the character aforesaid, the prosecution... shall not be entertained,...if instituted more than six months after the date of the act complained of.

2. The words in this sub-section "any such duty or authority aforesaid" refer back to Sub-section (1) of the same section, which provides that "no Commissioner, Magistrate or police-officer shall be liable to any penalty or to payment of damages on account of any act dona in good faith in pursuance or intended pursuance pf any duty imposed or any authority conferred on him by any provision of this Act or of any rule, order or direction lawfully made or given thereunder."

3. The First Class Magistrate held that the case fell under Sub-section (3) of Section 80 and accordingly dismissed the complaint. The applicant applied in revision to the Sessions Judge of Naaik, but he dismissed "the application, holding that the view taken by the Magistrate was correct. The applicant now applies to us in revision.

4. It was contended by Mr. Pendse on the applicant's behalf that this Sub-section (3) does not cover acts done mala fide and in wilful disregard of a police-officer's proper duty and that the sub-section is only intended to cover acts done bona fide, but in mistaken excess of such duty or authority. In support of this, he relied upon the ruling in *Queen-Empress v. Ganu*[1] and the English cases there were referred to. It is to be noted, however, that Queen-Empress v. Ganu dealt not with Section 80 of the Bombay District Police Act of 1890, but with Section 42 of the former Police Act (Bom. Act VII of 1867). This Section 42, like Section 42 of the Police Act V of 1861, on which it was based, is somewhat differently worded. It says : "All...prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police-powers hereby given, shall be commenced within three month8 after the act complained of has been committed and not otherwise." The words "anything done or intended to be done" are much narrower than the words in Sub-section (3) of Section 80 "any act done under colour or in excess of any such duty or authority." In fact, the words in Section 42 are similar to the words in Sub-section (i) of Section 80, viz., "any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred & c." It is significant that in this Sub-section (t) the words "in good faith" are used, and thereby that sub-section is limited to an act done bona fide or honestly, although it may be done negligently (cf. the definition of 'good faith' in the Bombay General Clauses Act, 1904, Section 3(20). In view of this, it is, in my opinion, very significant that the words "in good faith" are not used in Sub-section (3), The omission, in the circumstances, must obviously be taken to be deliberate. They are generally inserted in cases where it is intended to limit a provision to acts done bona fide as opposed to acts done mala fide. Thus Section 272 of the present Cantonment Act II of 1924 bars a prosecution "for anything in good faith done, or intended to be done, under this Act." In Section 80 of the Civil Procedure Code the words used are, "any act purporting to be done by such public officer in his official capacity," and in regard to a similar contention that those words covered only an act done bona fide and not an act done mala fide, it has been pointed out by Spencer J. in *Koti lleddi v. Sitibiah*[2] that if the Legislature had intended this, it would in all probability nave used the words "in good faith," The tendency of the decisions of this Court in regard to this question, so far as Section 80 of the Civil Procedure Code is concerned, has been against the contention that Mr. Pendse has put forward : cf. *Cecil Gray v. The Cantonment Committee of Poona* [3]and *Ghhaganlal Kishore-das v. The Collector of Kaira*[4]. In my opinion, therefore, this is a contention, that should be overruled.

5. The next question is, whether the words "any such duty or authority as aforesaid" in Sub-section (8) of Section 80 cover an authority to take down statements in a police investigation, Referring back to Sub-section (1) of Section 80, the duty must be imposed or the authority conferred

(a) by some provision of the Act, or

(b) by some provision of a rule, order or direction lawfully made or given under the Act.

6. There is no question here of any authority conferred, under head (b), The only question is whether the duty or authority is one that is imposed or conferred by some provision of the Act within the meaning of Sub-section (1). Admittedly, there is no direct provision in the Police Act about a police-officer taking down statements in a police investigation. But the Government Pleader, in his arguments, relied upon clauaes (b) and (F) of Sub-section (1) of Section 51 of the Act. Section 51(l) runs: "Every police-officer shall (6) to the beat of his ability, obtain intelligence concerning the commission of cognizable offences or designs to commit such offences, and lay such information and take such other steps consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice or to prevent the commission of offences". Clause (f) requires him to "discharge such duties as are imposed upon him by any law relating to revenue or other law at the time in force."

7. Taking Clause (f) first, I doubt whether any duty, imposed upon a police-officer by some other law can properly be said to be a duty imposed upon him by a provision of the Police Act itself, within the meaning of Sub-section (1) of Section 80. It is to be noted that that sub-section does not say "imposed by or under this Act," but only says "imposed by any provision of this Act," There is a difference between these two expressions, as has been pointed out by me in Manibhai v. Nadiad City Municipality where I was dealing with the meaning of the words "any duty imposed by or under this Act" in Sub-section (i) of Section 178 of the Bombay District Municipal Act (Bom. Act III of 1901). I gave reasons for saying that the words "by or under were more extensive than the mere word "by" in such a case. It is to be noted that the provisions of Sub-section (1) of Section 80 are a partial invasion of the ordinary right of a subject in India to sue a public officer for a tort or to prosecute him for an offence; and in these circumstances it is a case, where the sub-section should be construed strictly in favour of the subject : cf. Maxwell on Interpretation of Statutes, 3rd Edition, p. 399. Having regard to this consideration, I do not think that Clause (f) can be relied upon as bringing the case under Sub-section (o) of Section 80.

8. The question of the applicability of Clause (6) is more difficult. Both the lower Courts have held that it makes Sub-section (3) applicable to the duty of taking down statements in a police investigation. No doubt, the words there used are wide enough to cover such a duty, because a police-officer is thereby taking steps consistent with law which are calculated to bring offenders to justice. The Sessions Judge in dealing with this question says that a police-officer is, no doubt, required to take down statements of witnesses under the orders of his superiors, and that he is not required to do so by any provision of the Criminal Procedure Code, I do not agree with that statement. Section 161 of the Code gives express authority to a police investigating officer to

examine witnesses, ands. 162 expressly refers to the contingency of such officer reducing the statements of witnesses to writing. That, obviously, amounts to an implied authority to take down such statements in writing. In my opinion, the police-officer derives his authority from these provisions rather than from anything contained in the Bombay District Police Act, such as Clause (6) of Sub-section (i) of Section 51. This view is supported by the fact that in reproducing the provisions ofs. 16 L of the Criminal Procedure Code in the City of Bombay Police Act, 1902, Section 61(b) of the latter Act expressly states that the police-officer may not only examine orally any person supposed to be acquainted with the facts and circumstances of the case, but he may also reduce into writing any statement made by the "persons so examined. Section 32(I)(b) of the same Act reproduces the provisions of Section 51(1)(b) of the District Police Act, so that the Legislature thought it advisable to express what is plainly implied in Sections 161 and 162 of the Criminal Procedure Code in spite of there being these provisions about a police-officer taking steps to prevent offences and bring offenders to justice. There being, therefore, in my pinion, an authority conferred, or a duty imposed, by the Criminal Procedure Code for a Sub-Inspector like the accused to take down statements in writing, and having regard to the ordinary rule of strict construction that I have mentioned, I incline to the view that Sub-section (1) of s. SO does not cover the duty or authority here in question, and that these sub-sections should be construed as limited only to cases, where the duty or authority is directly imposed or conferred by some provision of the Police Act itself, and as not including one which is covered by the general provisions of Section 51. But, against this view, there seem to me to be two decisions of this Court.

9. In *Queen-Empress v. Ramchandra*[5] it was held that the prosecution of a police-officer for an alleged offence of wrongful confinement, punishable under Section 842 of the Indian Penal Code, was a prosecution for a "thing done or intended to be done under the provisions of this Act," within the meaning of Section 42 of the former Police Act (Bom. Act VII of 1867). The reason given for this view was that the police-officer, having without a warrant arrested and detained, in custody a person in whose possession he found property which he suspected to be stolen, did something which was authorized by Section 21 of the, same Act (Bom. Act VII of 1867), because that section authorized every police-officer to apprehend all persona, whom he is legally authorized to apprehend, and Section 54 of the Criminal Procedure Code authorized the arrest by a police-officer without warrant of any person in whose possession anything is found which may reasonably be suspected to be stolen property, or who may reasonably be suspected of having committed an offence with reference to such thing. It was added that the authority given to arrest in such a case implied an authority to detain. In that case, it was accordingly held that the complaint was time-barred and this Court refused to interfere with the dismissal of the complaint. Section 21 of Bom. Act VII of 1867 contained, in a somewhat curtailed form,

provisions similar to those of Section 51 of the existing Police Act, including a duty to prevent the commission of offences and to bring offenders to justice, such as is referred to in Clause (b) of Sub-section (1) of Section 51. The clause under Section 21, which is referred to in Queen-Empress v. Ramchandra, is one corresponding to Clause (d) of Sub-section (J) of Section 51. The Court, therefore, considered that an authority conferred mainly by the Criminal Procedure Code was something done or intended to be done under the Police Act itself, having regard to the general provisions of Section 21. That, certainly, can be reasonably stated as an authority that goes against the view that I incline to take in this case. Then again, in Madhav *Ganpatprasad v. Majidkhan*[6] the Court assumed that the case there in question fell under the provisions of Sub-section (3) of Section 80. The complaint, in that case, was that a Sub-Inspector of Police had vexatiously seized the complainant's property and so committed an offence punishable under Section 63(b) of the Bombay District Police Act of 1890. The seizure in question was not one that fell under any direct provisions of the Police Act, for instance Section 57, which authorizes a police-officer to take temporary charge of unclaimed property, but was a seizure of property suspected to be stolen, and the complainant had, in fact, been prosecuted for receiving stolen property, but had been acquitted. The act in question, therefore, was one, the authority for which is mainly derived from the provisions of the Criminal Procedure Code, such as the 4th clause to Sub-section (J) of Section 54, by which a person, in whose possession anything is found which may reasonably be suspected to be stolen property, may be arrested without a warrant, ands. 523 of the Criminal Procedure Code, which recognises the power of a police-officer to attach property suspected or alleged to have been stolen; and the authority could only be said to be one conferred by the Bombay District Police Act, if it is considered to be covered by the general provisions of Clause (b) of Sub-section (1) of Section 51. Therefore, this also seems to me an authority against the view I am otherwise taking in this case, although that point was not raised and considered.

10. In these circumstances, I think, that this Bench should not of its own authority decide the application, but that the question whether a duty to take down statements of witnesses in a police investigation is one imposed by a provision of the District Police Act, should be referred to a Full Bench. The point is an important one, which may have far-reaching results. The view taken in the lower Court will result in imposing a period of limitation in regard to charges against police-officers of many offenses under the Indian Penal Code, and it seems to me desirable that it should be considered by a Full Bench.

11. There are two further questions that were raised by the Court in the course of arguments before us, which 1 may hero notice. The first was whether the provisions of Section 74 of the Bombay District Police Act had any effect upon the question we had to consider. That section says : "Nothing in this Act shall be construed to prevent any person from being prosecuted and

punished under any other enactment for any offence made punishable by this Act or from being prosecuted and punished under this Act for an offence punishable under any other enactment: Provided that all such cases shall be subject to the provisions of Section 403 of the Code of Criminal Procedure." The section might possibly be read as preventing the provisions of Sub-section (8) of Section 80 from applying to an offence made punishable not by the Police Act Itself, but by some other enactment, I do not, however, think that this would be a proper construction of the section. It corresponds to Section 26 of the General Clauses Act (X of 1897) and Section 27 of the Bombay General Clauses Act (Bom. I of 1904). These enactments say: "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." The section does not, in my opinion, affect Section 80 of the Bombay District Police Act. It merely provides that a person can be punished either under some provision of the Act or some other enactment that may be applicable, but this is subject to the general rule that he shall not be prosecuted or punished twice for the same offence.

12. The second question was as to the power of the local Legislature in 1890 to repeal or amend the Criminal Procedure Code as to the Bombay Presidency. The suggestion was that the Criminal Procedure Code, which was then in force, viz., Act X of 1882, by Section 191 authorized a Magistrate to take cognizance of any offence except in the cases provided under Sections 195 and 199, which correspond to the same sections in the present Criminal Procedure Code; and that the provision, that he should not take cognizance of the case unless the prosecution was brought within a time limit from the commission of the act complained of, amounted to an amendment of the Criminal Procedure Code. It is to be noted that Section 42 of the Indian Councils Act of 1861 (24 & 25 Vic. c. 67) only authorized the Indian Legislature to repeal or amend any law made prior to 1869, and it was not until the Indian Councils Act of 1892 (55 & 56 Vic. c. 14) was passed that the local Legislature had power to repeal or amend an Act of the Indian Legislature with the previous sanction of the Governor-General. Therefore, in 1890 the Legislature had no such power. The Government Pleader contended that the Ybpwaht proviso to Section 5 of the Indian Councils Act 1892, in effect, did give retrospective validity to any such amendment that had been made before 1892. But, in my opinion, the proviso clearly cannot be given such retrospective operation. It does not contain any words showing that intention, such as are contained in Section 3 of the same Act, where certain provisions are clearly made retrospective. In my opinion, the proviso means merely that, if by oversight, the previous sanction of the Governor-General is not obtained in some Act passed alter 1892, which repeals or amends an Act of the Indian Legislature, it is not thereby to be rendered invalid. The general rule is against retrospectivity in such a case (cf. Hardcastle on Statutory Law, 3rd Ed., page 353); and this is not

a question of procedure, but of an important right, viz., the right of a local Legislature to affect an Act of the Indian Legislature.

13. Another contention of the Government Pleader is, however, in ray opinion, right. This is that really there is no amendment of the Criminal Procedure Code effected by Section 80 of the Bombay District Police Act, The Criminal Procedure Code lays down nothing as to a period of limitation for complaints, and that would naturally be more a subject for the Indian Limitation Act, which covers not only suits and appeals, but also applications. The word 'application' is wide enough to cover a complaint to a Magistrate, where the complainant applies to the Magistrate to issue process against an accused and try him for an alleged offence, though it has, no doubt, been held that the word 'application' in the Indian Limitation Act primarily means a civil application. See *Queen-Empress v. Nageshappa*[7]. Therefore, it would be rather an amendment of the Indian Limitation Act; bat the Indian Limitation Act, which was in force in 1890, viz., the Indian Limitation Act of 1877, like the present Indian Limitation Act, contains a provision saving the effect of any local or special law : see Section 6 of Act XV of 1877. It, thereby, recognised the power of a local Legislature to make special laws as to limitation of applications, and the provisions of Section 80 would constitute, in my opinion, a special local law of the kind contemplated, Sub-section (5) of Section 80 does not bar the cognisance of a Magistrate in all cases, but allows such cognisance, provided the complaint is made within a certain time, Again, it is to be remarked that the provisions of Sub-section (3) of Section 80 are not really an innovation. They follow the provisions of Section 42 of Bom. Act VII of 1867, which, in turn; followed the corresponding provisions of Section 42 of the Police Act V of 1861. The latter was a Government of India enactment, and there was nothing surprising in the local Legislature following a precedent that had been set by the Indian legislature. Therefore, in my opinion, this question should be answered in favor of the provisions of Sub-section (3) of Section 80. But, in view of my other conclusions, I would refer tin following question to a Full Bench :Where an investigating police officer reduces a statement of a witness to writing, and deliberately takes down the statement of such witness incorrectly, is his act one done under colour or in excess of a duty imposed. or an authority conferred, on him by any provision of the Bombay District Police Act 1890?" This will include the question whether an act dona mala fide and in deliberate disregard of his proper duty or authority, falls under Sub-section (3) of Section 80, if the Full Bench sees fit to go into that question.

Patkar, J.

14. In this case the complainant Narayan Hari lodged a complaint against the Sub-Inspector of Police under Sections 167 and 215 on the ground that he, as a public servant, framed incorrect documents, that is, deliberately took down incorrect statements of witnesses in an investigation

made by him in a theft case. The Magistrate held that the prosecution was barred under Section 80, Sub-section (2), of the Bombay District Police Act. The complainant made an application to the Sessions Judge for an order for further inquiry. The learned Sessions Judge agreed with the view of the Magistrate and dismissed the application.

15. It was argued on behalf of the accused that the protection under Section 80, Sub-section (3), extended to official acts done in good faith and did not extend to official acts done mala fide, and reliance was placed on the case of *Queen-Empress v. Ganu*[8] and the cases cited therein. Having regard to the wording of Section 42 of Bom. Act VII of 1567, under which the case of Queen-Empress v. Ganu was decided, and the absence of words "good faith" in Sub-section (3) of Section 80 of Bombay Act IV of 1890, I am inclined to agree with the view of my learned brother that the contention on behalf of the accused is not sustainable.

16. I think, however, that the words "any such duty or authority as aforesaid" in Sub-section (3) of Section 8O refer to the duty imposed or any authority conferred by any provisions of this Act, or any rule, order or direction lawfully made or given thereunder as stated in Sub-section (1) of Section 80 of the Bombay District Police Act IV of 1890. The question that arises for decision is whether the taking clown of statements of witneases in a police investigation is a duty conferred by the provisions of the Bombay District Police Act or any rule, order or direction lawfully made or given thereunder. It is not suggested that there is any rule, order or direction, lawfully made or given under the Police. Act but it is suggested that the duty of taking down statements in an investigation is conferred by Clauses (b) and (f) of Section 51(1) of the Bombay District Police Act. The learned Sessions Judge holds that the wide words of Section 51(1), Clause (h) include the duty of writing down statements of witnesses for the purpose of sifting the case and finding out the guilty person. He, however, held that the police-officer was not required to write down statements by any provisions of the Criminal Procedure Code. Section 51(2), Clause (b), refers to the general duty of the police-officer to bring offenders to justice or to prevent commission of offences, and does not deal with the specific duty of taking down statements during the investigation. Such duty, in my opinion, is impliedly imposed by 68. 161 and 162 of the Criminal Procedure Code. I also think that Section 51(1), Clause (f) does not impose on the police-officer the duty of taking down the statements of witnesses in an investigation. If the Sessions Judge is right in his view that such a duty is not imposed by the Criminal Procedure Code, then Section 51(7), Clause (f), would not be of any avail, If such duty is imposed by the Criminal Procedure Code, as I think it is, then Section 51(1), Clause (f) requires of the police-officer to discharge such duty as is imposed by any other law for the time being in force. The obligation, therefore, under Section 51(1), Clause (f), is to discharge the duty imposed by any other law for the time being in force. But the duty in question is not a duty imposed under the Police Act but would be a duty imposed by Sections 161 and 162 of the Criminal Procedure Code. This is an important

point dealing with the right of a subject to prosecute a police-officer for taking down incorrect statements. I think Section 80, Sub-section (3) ought to be strictly construed in favor of the subject. The case of *Queen-Empress v. Ramohandra (1885) Unrep. Cr. C. 220(Supra)* and the case of *Madhav Ganpatprasad v. Majidkhan (1917) I.L.R. 41 Bom. 737 s.c. 19 Bom. L.R. 677* (Supra)seem to be apparently in conflict with this view. I, therefore, agree that this question should be decided authoritatively by a Full Bench.

17. The other question as to whether the local Legislature has power to repeal or amend the Criminal Procedure Code has been fully dealt with in the judgment of my learned brother. With regard to the power of repeal or amendment granted to the local Legislature by Section 5 of the India Councils Act of 1892 (55 Daotatbaya & 58 Vic. c. 14), I may refer to the case of *Laxmi Tatya v. Aba Appaji*[9] and Ilbsrts Government of India, 3rd Edition, 146. The imposition of limitation by Section 80, Sub-section (5), is more an amendment of the Indian Limitation Act rather than an amendment of the Criminal Procedure Code, and is said to be saved by Section 6 of Act XV of 1877 which was in force at the time when Bom. Act IV of 1890 was passed. In this connection I may refer to the case of *Queen Empress v. Nageshappa*[10] *and Queen-Empress v. Ajudhia Singh*[11]

18. For these reasons I agree that the main question involved in this ease should be referred to the Full bench.

19. The reference was heard.

20. Pendse, with G.B. Chiiale, for the applicant. The questions to be considered are (1) whether the act done by the police-officer was an act done under colour or in excess of authority imposed by the Bombay District Police Act; (2) whether the taking down of the statements of a witness in an investigation in a deliberately false manner was an act empowered by the Bombay District Police Act. I submit that in considering the applicability of Section 80, Sub-section (3), the question of bona fides or mala fides ought not to be discussed. The actual words "under colour of duty" would mean having semblance of authority and not merely false authority. There must be reasonable ground for supposing that he had authority. An act done without any semblance of authority or reasonable ground cannot be said to be done under colour or in excess of authority. Presence or absence of actual malice in such a case is not an ingredient but will only go to prove a case of aggravated damages. In respect of such an act no motive would be necessary as Sub-section (3) of Section 80 is only intended to cover acts done under reasonable supposition of duty though in mistaken excess of such duty or authority. This is made clear by reference to Section 140 of the Bombay City Police Act, Sub-sections (3) and (4). Sub-section (3) is in the same terms as Sub-section (3) of Section 80 of the Bombay District Police Act; and Sub-section (4) points out that in a suit against a police-officer, plaint shall be rejected unless it is alleged that the

act complained of was done maliciously or without reasonable and probable cause. I rely on Queen Empress v. Ganu (1889) Unrep. Cr. C. 486.

Fawcett, J.

21. That case was under Section 42 of Bom. Act VII of 1867 in which different wording is used].

22. No doubt, but there are English authorities interpreting the words "act done or intended to be done" under circumstances similar to those contemplated by Section 80, Sub-section (3), of the Bombay District Police Act as identical with the phrase "under colour of office." They are on a par.

Fawcett, J.

23. The word 'colour' can be used in good or bad sense. Question is in what sense it is intended to be used in a statute: see Section 99, Indian Penal Code.]

24. It must be taken to be used as colour office : there must be colour of authority. It is a wider term than "good faith" used in Sub-section (1) of Section 80, giving wider latitude of action but there must be at least reasonable supposition that the act was being done under colour or in excess of authority. In fact the language of Section 99 of the Indian Penal Code also supports my interpretation, as the Legislature there uses the words "good faith under colour of office." That 'colour of office" cannot mean under false colour, because in that ease the phrase "colour of office" could not have been used in conjunction with the words "good faith" in Section 99, Indian Penal Code. I rely upon the rule of interpretation "a word is known by the company it keeps," The phrases "good faith" and "false colour" arc quite contradictory. I rely on *Cook v. Leonard*[12] *Morgan v. Palmer*[13]*; Parton v. Williams*[14] *and Koti Eeddi v. Subbiah*[15]

25. The next point is whether the duty to take down statements is imposed by the Bombay District Police Act 1890. I submit that it is a duty imposed by the Criminal Procedure Code : no doubt the decisions in *Queen-Empress v. Jlamchandra (1885) Unrep. Cr. C. 220*(supra) *and Madhav Ganpatprasad v. Majidhhan (1917) I.L.R. 41 Bom. 737, s.c. 19 Bom. L.R. 677*(supra) are apparently against me. However, I submit that the right to arrest by a police-officer is declared by Section 54 of the Criminal Procedure Code. It is the Code which declares the legal rights of the officer and the executive part of the powers and duties is regulated by the Police Act. Section 21 of Bom. Act VII of 1867 and now Section 51(1)(6) of the Bombay District Police Act 1890.

Mirza, J.

26. You say how the arrest is to be effected is directed. by the Police Act and how he is legally

empowered is pointed out by the Criminal Procedure Code.]

27. Yes, that is so; the distinction is between a theoretical declaration of a right and the actual exercise of that right. Section 80, Sub-section (3), points out "under colour...of duty as aforesaid" and that means the duty as prescribed by the provisions of that Act. But the Bombay District Police Act does not directly authorize the taking down of statements. The direct authority for the purpose is the Criminal Procedure Code, Sections 161 and 162. In Madhav Ganpatprasad v. Majidkhan we find that a police-officer seized certain property and detained it. An application was filed against the officer under Section 63(d) of the Bombay District Police Act, It was held that the act of seizure was an act authorized by the Bombay District Police Act under Section 51(3), In fact Section 51 of the Criminal Procedure Code gives legal right to search and seize; and Section 51(3) of the District Police Act directs the executive part of the work. So this authority is not against my contention. So also Queen-Empress v. Ramchandra is not against me. In both these cases the executive part of the Act was directly done under the Bombay District Police Act.

28. Moreover, there is a great amount of difference between an executive act and the act of taking down statements. The latter is a quasi-judicial act and therefore not falling under Chap. V of the Bombay District Police Act which is expressly headed "Executive powers and duties of the police." The statements are admissible under Section 162 of the Criminal Procedure Code; they can be used for the purpose of contradicting a prosecution witness under certain conditions.

29. P.B. Shingne, Government Pleader, for the Crown. In interpreting Section 80 of the Bombay District Police Act 1890 we have to compare the language of different sub-clauses. In Sub-section (7) and (8) the words "good faith" are used which are absent in Sub-section (3). By Sub-section (1) is meant that the police-officer must act within duty and under Sub-section (3) it may be beyond the scope of duty, that is, the police-officer does something which is not strictly official but while doing it he pretends to act as an officer. The Legislature in framing the wording of Sub-section (3) wanted to give absolute protection to a police officer even if he acted maliciously under colour of duty.

30. The language of Section 42 of Act V of 1861 is limited. The words used are "anything done or intended to be done". Such is not the language in Sub-sections (3) and (4) of Section 80 of the Bombay District Police Act.

31. So also Section 140(3) of the Bombay City Police Act is the same as in Section 80(3) though Section 140(4) indicates that malice and want of reasonable cause must be alleged.

32. Under Section 99, Indian Penal Code, "good faith" is associated with "under color of

authority" meaning that he has to act in good faith, none the less he may act beyond or in excess of duty. The test is whether he reasonably believed that he was authorized to act.

33. We find the Legislature wanted to protect officers under Sub-sections (1) and (2) for any act done in good faith"; under Sub-section (8) for any act done under colour or in excess of dutygood faith not materialand under Sub-section (4) no suit to be maintained without notice.

34. Moreover, the legislature intended that if the conduct of the police-officer was to be inquired into, it must be done within six months of the wrong complained of, otherwise the complaint would be dismissed. We find similar provision under other enactments: cf Section 167 of the Bombay District Municipal Act; Section 257 of the City of Bombay Municipal Act.

35. In the English cases cited by the applicant, the language of enactments is different.

36. On the second point, I submit that to take down statements is a duty imposed by the Bombay District Police Act 1890. Chapter V of the Act is headed "Executive Powers and Duties of the Police." And Part V of the Criminal Procedure Code is termed "Information to the Police and their powers to investigate." The heading of the District Police Act, Chap. V. is wider and may include duties to investigate and to record statements. Section 51(1)(b) of the Act empowers a police-officer to obtain intelligence of the commission of a cognizable offence and to lay such information before a superior officer. This implies power to record statements; otherwise it is not possible to get proper information and to report.

37. The references to sections of the Bombay City Police Act are not useful. By virtue of Section 1, Criminal Procedure Code, it is enacted that nothing in the Code shall apply to the Bombay City Police Act. It is a special law in which many sections of the Criminal Procedure Code are introduced and the powers of the police are specially denned because the Criminal Procedure Code is not applicable, e. g., Sections 101 and 104 of the City of Bombay Police Act are the same as Sections 99 and 103, Criminal Procedure Code; Section 61 is the same as Section 161 of the Code.

38. Power to record a statement does not specifically exist in the Bombay District Police Act because there the Criminal Procedure Code is applicable, while in the Bombay City Police Act, it had to be specifically given because the provisions of the Criminal Procedure Code on the point will not apply to the City of Bombay.

Mirza, J.

39. According to you there is power to take down statements though they may not be accurate and could not be used in evidence without permission,]

40. Yes, that is the restrictive purpose but the statements can be taken. Law does not prohibit recording of statements.

41. The ruling in *Queen-Empress v. Ganu*[16] has no application, It fell under Section 42 of the Bombay District Police Act (VII of 1867). The wide provisions of Section 80 of the Bombay District Police Act 1890 were not then existing.

42. I rely on *Koti lietldi v. Subbiah*[17] in which it was held that even if the act was done mala fide, notice was necessary though the case fell under Section 80 of the Civil Procedure Code. The authority in *Madhav Qanpatijrascul v. Majidkhan (1917) I.L.R. 41 Bom. 737, s.c. 19 Bom. L.R. 677*(Supra) is not directly against me. There the point was whether the application not having been made within six months from the date of seizure of property by the police-officer, it was barred under Section 80, Sub-section (8), of the Bombay District Police Act 1890. It was held that so long as the seizure continued the period went on running and therefore the application was not barred under Section 80, Sub-section (3), of the Act.Cur. adv. vvlt.

43. The facts in the second case, which was a civil ease, were that on August 19, 1920, Dattatraya (defendant No. 1), who was a Sub-Inspector of Police, was investigating a cognizable offence against two berads. He sent for the plaintiff Annappa and questioned him as to his connection with the berads, The plaintiff disclaimed all knowledge about the berads. Then, it was alleged, the defendant No. 1 grew angry and said to the plaintiff: "You have and are telling a lie," The plaintiff still protested his innocence, when defendant No. 1 abused him and pulled him up by his moustache. It was further alleged that Pavdi (defendant No. 2), who was a Naik, at the instance of defendant No. 1, beat the plaintiff' on his cheek.

44. On October 23, 1920, the plaintiff filed a suit to recover Rs. 6,000 as damages from the defendants for their alleged wrongful treatment of him.

45. The defendants raised a preliminary objection that the suit was bad for want of notice either under Section 80, Sub-section (J,), of the-Bombay District Police Acts, 1890, or under Section 80 of the Civil Procedure Code. The trial Judge overruled the objection, and held-on merits that the use of foul and indecent abuse by defendant No. land the beating of plaintiff by defendant No. 2 by the order of defendant No. 1 and the pulling of plaintiff's moustache by defendant No. 1 were proved. The plaintiff's claim was, therefore, decreed, and he was awarded Rs. 1,500 as damages from the defendants.

46. The defendants appealed to the High Court.

47. The appeal was first heard by Marten C.J. and Crump J, on July 22, 1927, when their Lordships made a reference to a Full Bench, observing as follows:

Crump, J.

48. In this case a preliminary objection has been taken that the suit is not maintainable because no notice was given by the plaintiff to the defendants as required by s. 0, Sub-section (4), of the Bombay District Police Act IV of 1890. It was also objected that notice was required under Section 80 of the Code of Civil Procedure.

49. In order to consider these preliminary objections it is necessary to set out briefly the facts alleged in the plaint as forming plaintiff's cause of action. The plaintiff alleges that at about 9:30 a. m. on August 20, 1920, he happened to be passing the office of defendant No. 1, who is a Police Sub-Inspector, and he was called into the office. Defendant No. 1, with the assistance of defendant No. 2, then proceeded to question him as regards two berads who were in the office, and put to him certain questions. The plaintiff denied any knowledge of the two berads in question, whereupon defendant No. 1 accused him of telling lies and afterwards getting angry, seized him by the moustache and pulled him into an upright position. Then defendant No. 2 at the instigation of defendant No. 1 beat him. Plaintiff then left the office, and was again called back and was further threatened by defendant No. 1. It may be explained that these two police-officers ware engaged in investigating into certain charges of criminal offences committed by these berads and that it was alleged that the plaintiff had been harbouring these or some other offenders connected with them.

50. For our present purposes we do not propose to consider whether the facts alleged are made out. It is enough to say that in addition to the technical defences already suggested, the defendants denied the facts alleged. But the necessity of notice either under Section 80 of the Civil Procedure Code or under Section 80, Sub-section (4) of the Bombay District Police Act, are points which stand in limine, and they have to be disposed of before we can consider what are the true facts of this case.

51. As to Section 80 of the Code of Civil Procedure, the words there used are, "any act purporting to be done by a public officer in his official capacity." That these defendants are public officers is plain, but it is in our judgment, assuming the facts alleged true, impossible to hold that the act done purported to be done by the defendants in their official capacity. The case was one of assault and battery in which damages were sought, and it would be absurd to suggest that a police-officer who has been guilty of assault and battery can say that he purported to commit that assault and battary in his official capacity. Therefore, the objection under Section 80 of the Civil Procedure Code must necessarily fail.

52. With reference to the discussion in the lower Court's judgment we would remark that we have referred to the case of Bhag-chand v. Secretary of State in which the true scope of Section 80 of

the Code of Civil Procedure is exhaustively discussed. That case removes much of the conflict which has hitherto existed as regards the scope of that section and it has inter alia decided that the view taken by this Court that in cases of injunctions no notice under Section 80, Civil Procedure Code, is necessary, is not the correct view of the scope of the section, but in the present case what we really hold is that the facts now alleged do not come within the section at all, and, therefore, quite apart from the remedy which the plaintiff seeks to enforce, the section can have no application.

53. But coining to Section 80, Sub-section (4), of the Bombay District Police Act, the matter is not so clearly free from doubt. It is necessary to consider for the purposes of that section whether there is any provision of the Bombay District Police Act or any rule or order or direction made thereunder imposing a duty or conferring authority in the exercise of which duty or authority these defendants were acting. And if that were so, it would further be necessary to consider whether this assault and battery is an act done under colour or in excess of such duty or authority. If these questions are answered in the affirmative, then Section 80, Sub-section (4), of the Bombay District Police Act, is a bar to the prosecution of the present suit.

54. Now a difficulty arises in disposing of these questions here and now owing to a reference which has been made by a Criminal Appellate Bench of this Court on April 11, 1927, to a Full Bench of the Court. That reference has not yet been disposed of, and it raises a question which though not precisely identical with that now before us is so closely allied to it that it will be difficult for us to decide this question without running the risk of coming into conflict with the decision of that Full Bench which remains to be pronounced. The question there raised is couched in the following terms Where an investigating police officer reduces a statement of a witness to writing, and deliberately takes down the statement of such witness incorrectly, is his act one done under colour or in excess of a duty imposed, or an authority conferred, on him by any provision of the Bombay District Police Act, 1860?

55. That question is propounded with reference to Sub-section (8) of Section 80, and the point there was whether the special rule of six months' limitation applied to a complaint of an offence committed by a police-officer, but the words of Sub-section (4) of Section 80 referred back to the words used in Sub-section (5) of the same section, and thus it is clear that if in the case of an offence committed the limitation of six months under Sub-section (S) of s, SO is applicable, it would follow that in the case of a suit with reference to the same offence notice would be required under Sub-section (4) of the same section, Under these circumstances it appears to us essential that the point now before us should be decided by the same Full Bench as that which will be constituted to hear the question referred in the criminal case.

56. The precise questions which we propose to submit to the decision of the Full Bench will be

framed hereafter.

57. The questions referred to the Full Bench were as follows:

1. Were both or either of the defendants acting in the discharge of a duty imposed or in the exercise of an authority conferred by the Bombay District Police Act or by any rule or order or direction made under that Act ?

2. Can the alleged assault or battery be said to have been committed under colour or in excess of such duty or authority?

58. The reference was heard.

59. P.B. Shingne, Government Pleader, for the appellants. I submit that notice was necessary as the wrong complained of was done under colour or in excess of authority. Assuming that the police-officer sent for the plaintiff maliciously and assaulted him, this was done while he was doing official work of investigating into a criminal offence.

Madqavkar, J.

60. The police-officer was in his supposed power.]

61. None the less, he was not beyond his powers. The point is whether he was or he was not within his power. I refer to Koti Iteddi v. Subbiah (1917) I.L.R. 41 Mad. 792 F.B. There the action of a Village Munsif, so far as it related to payment, was within his power and the point was whether the payment having been made fraudulently after being aware of the attachment by the civil Court (i. e. in consequence of want of bona fide), the Village Munsif had forfeited his right to notice. It was hold that he had not, under Section 80 of a the Civil Procedure Code.

Malgavkar, J.

62. The question of bona fides or mala fides arises with respect to payment of money : whether the act was within his power or not is a different question.]

63. The question of mala fides does arise even when the officer acts under colour or in excess of authority.

64. A.G. Desai, for the respondent. I submit that on the finding of the lower Court, no notice would be necessary under Section 80 of the Civil Procedure Code, 1908 The question is whether notice is needed under Section 80, Sub-section (4), of the Bombay District Police Act. I submit that even under this Act, notice is not necessary. Section 80, Sub-section (4), is ultra vires of the local Legislature. They had no power to enact it. The old general Police Act (V of 1861) was an

Imperial Act. Under Section 42 of the Act, notice was necessary in case of "acts done or intended to be done under the provisions of the Act." Similar provision was to be found under Section 42 of Bom. Act V of 1867. It is for the 6rst time in 1890 that additional limitations are provided by Sub-sections (3) and (4) of the Bombay District Police Act. Under Section 4 of the Civil Procedure Code, the power of the local Legislature to enact is saved provided that the Act that they may pass is consistent with the already existent provisions of law and the Civil Procedure Code. By enacting Sub-sections (3) and (4) of Section 80 the Bombay Legislature were overriding the provisions (Section 42) of Imperial Act V of 1861. Moreover, it was not until the Indian Councils Act of 1892 (55 & 56 Vic, c. 14) was passed that the local Legislature had power to repeal or amend an Act of Indian Legislature with the previous sanction of the Governor General. The Bombay District Police Act being of 1890 there was nothing to empower the local Legislature to make any changes.

65. Even under the Civil Procedure Code, according to the old Code of 1859, no notice of suit was necessary. The provisions relating to notice were introduced for the first time by Act X of 1877, Section 424, and the words "in respect of any act purporting to be done by him in his official capacity" were introduced by the amending Act XII of 1879, Section 71. By the Code of 1882 (Section 424) and the Code of 1908 (Section 80) the sumo words are kept up. So I submit that notice being not necessary in respect of any act not done by the public officer in respect of his official capacity under the Code, the enacting of Section 80, Sub-sections (3) and (4), by the local Legislature is ultra vires. By Sub-section (3) additional limitation is laid down by providing that the wrong done must be under colour or in excess of authority and by Sub-section (J) it is stated that in respect of "wrong as aforesaid" notice of suit is necessary.

66. Secondly, whether the act of the Sub-Inspector was such as was referable to the Bombay District Police Act or the Criminal Procedure Code, I submit that it is referable to the Criminal Procedure Code, Sections 160,161. The police-officer with a view to ascertain the nature of the offences committed by berads sent for the plaintiff and there the offences of assault occurred. He was sent for under Section 160, Criminal Procedure Code.

Fawcett, J.

67. As a police-officer dealing with a criminal offence he could act under Section 51(7), Clause (6), of the Bombay District Police Act]

68. Under that section he must take steps "consistent with law," and that is the Criminal Procedure Code, because he derives his authority to investigate the offence under Section 160, Criminal Procedure Code. Supposing there was no Police Act, he would be acting only under the Criminal Procedure Code.

69. On the second question, whether the Act was done under colour or in excess of any duty or authority, I submit that the police-officer was in no way justified in seizing the moustache of the plaintiff and pulling him into an upright position. The words "under colour or in excess of authority" mean that the act was contemplated in the course of authority, There must be some semblance of authority, though it may be even false or in excess of the authority intended, e, g., if a police-officer believing he has authority to arrest does, in the course of such belief, assault or causes violence that act would be under colour, but supposing if a Sub-Eegistrar who has no authority at all to arrest, does arrest a person he would not be acting under colour or in excess of authority. I rely on *Queen-Empress v. Ganu*[18] *Muhammad Saddiq Ahmad v. Panna Lal' (1903) I.L.R. 26 All. 220(Supra); Mumtaz Humin v. Lewis*[19] *and Koti Reddi v. Suhbiah*[20]

70. Shinqne, in reply. It was not Ultra vires of the local Legislature to enact Sub-sections (3) and (4) of Section 80 of the Bombay District police Act. Under 21. & 25 Vic. c. 67, Section 42(1861), the local Legislature had power to make laws or amend laws so far as they would affect the Presidency. This is recognised in *fremhankar Raghunaihji v. Government of Bombay* [21]*Under 55 & 56 Vic c. 14, Section 5(passed in 1892 to amend the Indian Councils* Act 1861) power was given to amend any law made before this Act, with the previous sanction of the Governor General, So the combined effect of 24 & 25 Vic. c. 67, Section 42, and 55 & 56 Vic. c. 14, Section 5, was that the local Legislature had power to make laws and regulations and the enactment of Sub-section (3) and (4) of Section 80 was not ultra vires.

71. Secondly, the act of the police-officer was referable to Section 51(1), Clauses (a) and (b). He was ordered by his superior to investigate into offences committed by berads and by "lawful means" (Clause (a) was giving effect to those orders by obtaining intelligence, Clause (p) regarding the commission of offences); and while he was so engaged, the plaintiff was called in and the assault took place.

72. The decision in *Muhammad Saddiq Ahmad v. Panna Lal (1903) I.L.R. 26 All, 220(supra)* did not affect the point in question as it turned on the application of Section 42 of Police Act V of 1861. So also the case of Mumtas Husain v. Lewis (1910) 7 A.L.J. 301 referred to Section 424 of the Civil Procedure Code, 1882, the language of which was different.

73. Lastly, the words "wrong aforesaid" mentioned in Sub-section (4) referred to "wrong" mentioned in Sub-section (3) of Section 80 and has no reference to Sub-section (1) of that section.

Cur adv. vult.

74. The following judgments were delivered in both the references.

Madgavkar, J.

75. The question referred to the Full Bench in criminal revision is as follows:Where an investigating police-officer reduces a statement of a witness to writing, and deliberately takes down the statement of such witness incorrectly, is his act one done under colour or in excess of a duty imposed, or an authority conferred, on him by any provision of the Bombay District Police Act, 1890? "This will include the question whether an act done mala fide and in deliberate disregard of his proper duty or authority falls under Sub-section (3) of Section 80, if the Full Bench sees fit to go into that question.

76. The latter question has also been argued before us, For the purposes of this reference, it suffices to state that in an alleged complaint for theft, the Sub-Inspector of Police in the Nasik District recorded the statements of two witnesses, and being of opinion that the complaint was false, forwarded the papers his superior officers to the Magistrate for what is termed a "B" summary, in other words, asking permission of the Magistrate to class the complaint as false. More than sis months after the Sub-Inspector had recorded the statements, Narayan Hari lodged the present complaint against the Sub-Inspector under Sections 167 and 218, Indian Penal Code, in that he had deliberately and inaccurately recorded statements which they never made. The Magistrate and in revision the Sessions Judge were of opinion that the complaint must be dismissed under Section 80, Sub-section (8), of the Bombay District Police Act (IV of 1890), as having been filed more than six months after the date of the act complained of.

77. In revision here the learned Judges (Fawcett and Patkar JJ.) were of opinion that mala fide of itself did not exclude the operation of Sub-section (3) but were doubtful whether the duty or authority of a police-officer to record statements of witnesses could be said, within the meaning of Sub-section (1) of Section 80, to be a duty imposed or authority conferred either by some provisions of the Act such as Clauses (b) and (f) of Sub-section (1) of Section 51, or by some provision of a rule, order, or direction, lawfully made or given under the Act. But having regard to the decisions of this Court in *Queen-Empress v. Ramchandra (1885) Unrep. Cr. C. 220* (Supra)and *Madhav Ganpatprasad v. Majid-khan (1917) I.L.R. 41 Bom. 737, s.c. 19 Bom. 677(Supra)* they made the reference in question.

78. The questions referred in the second reference are as follows:

1. Were both or either of the defendants acting in the discharge of a duty imposed or in the exercise of an authority conferred by the Bombay District Police Act or by any rule or order or direction made under that Act ?

2. Can the alleged assault or battery be said to have been committed under colour or in excess of

such duty or authority ?

79. In this appeal the plaintiff Annappa alleged that the appellant defendant Sub- Inspector having sent for him and questioned him in regard to offences of which two persons belonging to the criminal tribe (berads) were suspected, committed various acts of battery and assault on the plaintiff by himself and with the help of the police constable defendant-appellant No. 2. The defendants police-officers raised an issue that they were entitled to notice under Section 80 of the Civil Procedure Code and under Sub-section (4) of Section 80 of the Bombay District Police Act IV of 1890. The lower court held that they wee not entitled to such notice as the illegal acts complained of were not acts done under colour or in excess of the duty or authority. On the merits the Subordinate Court held that certain acts of assault were proved against defendant No. 1 who was the Police Sub-Inspector and awarded damages against each of the defendants. In appeal to this Court the two questions stated above have been referred to us.

80. The referring judgment of Fawcett J, covers most of the arguments before us. Two main questions of law are common to both the references, The acts complained of are alleged to have been committed by the police-officers during the investigation of a cognizable offence and the arguments on these points are common. The question in each case, applying the words of Sub-section (3) or (4) of Section 80 of the Bombay District Police Act, is whether in one case the act of recording the statements of the two witnesses alleged by the complainant to be false and in the other the alleged act of battery and assault were acts done under colour or in excess of any duty imposed or any authority conferred on the police-officers by any provisions of the Bombay District Police Act or of any rule or order or direction lawfully made or given thereunder.

81. It is argued by Mr. Desai in the civil reference that the Bombay District Police Act IV of 1890 is itself ultra vires. The argument based on the local Act repealing or amending the Code of Criminal Precedure is fully stated in the referring judgment of Fawcett J. It was also argued that the Bombay District Police Act is also bad inasmuch as it limited further the remedy of the subject against Government or public officers beyond the scope of Section 80, Civil Procedure Code, and that under Section 4, Civil Procedure Code, such limitation, unless specifically saved, was invalid.

82. As regards the Code of Criminal Procedure, I am of opinion that no section of the Bombay District Police Act, certainly not Section 51 or 80, with which we are now concerned, can be said to repeal or amend the Code of Criminal Procedure.

83. As regards Section 80, Civil Procedure Code, Section 4, so far from in. validating any limitation has, in my opinion, precisely the opposite effect; unless any specific provision in the Civil Procedure Code limits any special or local law or its provisions, the latter-stand good.

Similarly, it is argued that some specific proviso as in Section 25, Clause (2), was necessary before Section 80 could be modified by any local Act, There is, however, an obvious difference in law between the local Government and the Provincial Legislature. For these reasons we are of opinion that the argument that the Bombay District Police Act is ultra vires fails.

84. On the further question as to how far the alleged acts of the officers fall within Sub-sections (3) and (4) of Section 80 of the Bombay -District Police Act, the English authorities based on English statutes differently worded are of little assistance. On the wording of Section 80 of Bom. Act IV" of 1890 two questions arise. Firstly, whether the duty imposed or authority conferred could be said to be by any provisions of the Act or whether, as Fawcett J. was inclined to think, could be said rather to be a duty imposed or authority conferred under the Code of Criminal Procedure. The Code of Criminal Procedure is adjective criminal law and Chapter V defines the powers of the police to investigate. The duties and powers of investigation into cognizable cases are laid down under Section 156. Section 160 authorizes any police-officer making an investigation under that Chapter to require in writing the attendance before himself of any persons. Section 161 directs their oral examination, which, as is plain from Section 162, may, if the police-officer chooses, be reduced to writing. Similarly, Chapter V of the Bombay District Police Act defines the executive powers and duties of the police and Section 51(1), Clause (b), directs that every police-officer, to the best of his ability, should obtain intelligence concerning the commission of cognizable offences or designs to commit such offences and lay such information and take such other steps consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice. This duty includes, in our opinion, the duty and authority conferred by the section quoted above of the Code of Criminal Procedure. Section 59, therefore, is wide, and the fact that a portion of the duty and authority under Section 51 is also included in the duty and authority under the Code of Criminal Procedure does not preclude the limitation in Sub-section (3) or notice in Sub-section (4) prescribed by Section 80 of the Bombay District Police Act. This view is in accordance with the ruling of this Court in *Queen-Empress v. Ramchandra (1885) Unrep. Cr. C. 220(Supra)* and the assumption in Madhav Ganpatprasad v. Majidkhan (1917) i.l.r. 41 Bom. 737, s.c. L.R. 677(Supra)

85. Turning to the second point, namely, how far the two particular acts were done under colour or in excess of such duty or authority, and how is,? mala fides excludes limitation or notice, the intention of Section 80 and of Sub-sections (3) and (4) is not, in our opinion, doubtful. Sub-sections (1) and (2) enact good faith in pursuance or intended pursuance of any duty imposed or any authority conferred as a good defence against any penalty or damages. And the policy of eub-s. (3) is that wrongs alleged by any acts done under colour or in excess of duty or authority should be brought before the Courts with as little delay as possible. Clearly not every act because it is done by a Magistrate or police-officer is thereby necessarily an act having any relation to his

duty or authority; and whether prima facie the act alleged was so done is a question on the facts in each case "which ordinarily should not be difficult of answer.

86. A similar question of limitation arises under Article 14 of the second schedule of the Indian Limitation Act which prescribes a year from the date of the order to Bet aside any act of any officer of Government in his official capacity. As I have observed recently in *Sulleman v. Secretary of State*[22] It suffices to say that...the question is not merely one of form but also of substance...it does not suffice for an officer of Government to purport to act in his official capacity to bring his act or order within the purview of Article 14, or for the subject to allege that the act was wrong or to rofrain from expressly asking the Court to set aside the order to take it out of the purview of the Article.

87. In the two cases now under consideration the recording of the statements of the two witnesses was an act which the accused Sub-Inspector could not have performed except under colour of his duty or authority, and whether the record of these statements was accurate or inaccurate and in the latter case whether the inaccuracy was inadvertent or deliberate, and in the last case whether there was in fact mala fides in law, are all, in our opinion, questions which are irrelevant to the question of limitation of six months, so long as the act itself was an act done under colour of his duty, as it was in the first case.

88. In the second case, however, while the acts of the Sub-Inspector from the summoning of the plaintiff and questioning him also fell under colour of his duty or authority, by no process of reasoning can the alleged acts of battery and assault be said to fall under such colour or in excess of such duty or authority.

89. Hypothetical cases are better perhaps avoided. But in a case where a prisoner is being arrested or while under arrest is being taken to the lock-up and offers resistance, such acts of battery and assault, even if they are in excess of the force necessary to prevent escape, would probably require notice under Sub-section (3) of Section 80. There is no such allegation here. Even if the alleged acts of battery and assault took place, the simple fact that they were committed while the witness was being questioned or during the investigation of the cognizable offence, cannot., by mere proximity of time, make the act done under colour or in excess of the duty or authority of the police-officer. As regards the notice under Section 80, Civil Procedure Code, in the second reference, we entirely agree with the view of the Full a Bench in *Koti Reddi v. Subbiah*[23] and the observations of Sada-shiv Ayyar and Spencer JJ. at pages 810 and 812. The nature of the act and how it is related to the duty or authority of the officer or if it could be said to be done under colour or in excess is one question. The question of the state of mind of the officer and his bonafides or mala fides is quite another. It would be difficult for the Courts to add the second element when the Legislature merely prescribes the first as necessary and sufficient for

limitation under Sub-section (8) or notice under Sub-section (4) of Section 80 of the Bombay District Police Act or notice under Section 80 of the Code of Civil Procedure. We cannot agree with the view of Banerji J. in *Muhammad Saddiq Ahmad v. Panna Lal (1903) I.L.R. 26 All. 220(supra)* and we prefer the view of the same Court in *Mumtaz Husain v. Lewis (1910) 7 A.L.J. 301(supra)* where it was held that an Assistant Engineer of the P.W.D. assaulting or beating his subordinate was not entitled to the notice under Section 424 of the old Code of Civil Procedure of 1882.

90. Our answers, therefore, to the present references are as follows:In Criminal Revision No. 20 of 1927.Where an investigating police-officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by Section 51(1), Clause (b), of the Bombay District Police Act, whether he acts bona fide or otherwise, and even if he acts mala fide and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly.

91. Answer to reference in F.A. No. 346 of 1924.

(1) Both the defendants were acting in the discharge of the duty imposed and the authority conferred by Section 51(1), Clause (6), of the Bombay District Police Act, when they summoned' the plaintiff and questioned him in regard to the alleged offence, (2) The alleged assault or battery cannot be said to have been committed under colour or in excess of such duty or authority.

Fawcett, J.

92. I agree. The words "colour of office" can be used both in a good sense and in a bad sense. But a reference to the definition of this expression in both Stroud's Judicial Dictionary and Wharton's Law Lexicon shows that ordinarily it is use in a bad sense, viz, an act unjustly done by the countenance of office, being grounded upon falsity, to which the office is a shadow or colour. Therefore, it seems to me that it clearly can cover an act done in bad faith as well as an act done in good faith. Section 99 of the Indian Penal Code supports this view, as it inserts the words "in good faith" between the words "public servant acting" and the words "under colour of office."

93. After hearing the further arguments that have been placed before us, I modify the view to which I said I was inclined in my referring judgment in the criminal case. I think that Section 51(a)(b), of the Bombay District Police Act sufficiently covers the duty imposed on an investigating police-officer of writing down statements of witnesses in a case in which he is investigating, and that Section 80, Sub-section (3), accordingly applies in that case.

94. I would add that the remarks of their Lordships in *Bkagohand Dagadusa v. Secretary of State*

for India [24] show that we should not be guided by English authorities on different expressions in English statutes in regard to the meaning of Sub-sections (3) and (4) of Section 80 of the Bombay District Police Act. The case of *Koti Reddi v. Subbiah (1917) I.L.R. 41 Mad. 792, F.B.(supra)* is referred to in their Lordships judgment at page 743, and the view taken in the former case has their Lordships' approval.

95. Mr. Desai contended that, so far as Sub-section (4) of Section 80 of the Bombay District Police Act, 1890, may be held to go beyond the provisions of Section 80 of the Civil Procedure Code and thus impose additional restrictions on the right to sue, it is ultra vires of the local Legislature. In support of this he referred to the fact that, as mentioned in my referring judgment in the connected case, it was not until 1892 that a local Legislature had power to repeal or amend an Act of the Indian Legislature with the previous sanction of the Governor-General, But, in my opinion, this contention cannot succeed in view of the provisions of Sub-section (1) of Section 4 of the Code of Civil Procedure. This says :

In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

96. There is no specific provision in the Code, or elsewhere, to prevent Section 80 being within this sub-section, so that it does not limit or otherwise affect the local provisions of Section 80 of the Bombay District Police Act in regard to the notice required in the special case of suits of the kind mentioned therein, The sub-section clearly cannot be construed as Mr. Desai contends it should, viz., that, in the absence of a specific provision allowing Section 80 of the Code to be modified by a local Legislature, anything inconsistent with Section 80 in an Act of the local Legislature is ultra vires. It really says the exact, reverse, viz., that the Cede shall not ordinarily prevail to override inconsistent provisions in local or special laws : cf. Aga *Mahomed Hamadani v. Cohen*[25]. Therefore, whatever might be the possible objections to Sub-section (4) of Section 80, if Section 4 of the Civil Procedure Code had not been enacted, the contention, in our opinion, entirely fails. No doubt Section 4 of the Code of 1882 (XIV of 1882) is not in such wide terms as the present Section 4, and would not in itself save a subsequent local enactment, such as Section 80 of the Bombay District Police Act; but we are concerned only with the existing law, and not with the law as it was prior to the present Code.

97. It may be said that, if Sub-section (4) of Section 80 of the Bombay District Police Act was ultra vires, when it was enacted, Section 4 of the Code of 1908 will not suffice to give it legal validity. But this ignores the wide provisions of Section 22 of the Indian Councils Act, 1861 under which the Code was passed. An act can be validatory by implication, as well as by express

words.

98. But, in any case, I do not think that Sub-section (4) of Section 80 of the Police Act can be said to "repeal or amend" Section 424 of the Civil Procedure Code of 1882, and therefore to be ultra vires of the local Legislature in 1890. No doubt, so far us the former is inconsistent with the latter, it is by implication a repeal or amendment of it, cf. *Hari v. Secretary of State for India*[26] But there is no necessary repugnancy between the two enactments, so that "the two cannot stand together", cf. Church-wardens, *&c. of West Ham v. Fourth City Mutual Building Society*[27] and Tabernacle Permanent Building Society v. Knight [1892] A.C. 298 Section 80, Sub-section (4) of the Bombay District Police Act left Section 424 of the Civil Procedure Code unaffected in the sense that it still continued to operate in the Bombay Presidency, The local Legislature did not reduce the period of. the notice from two months to one month for all public officers in respect of all acts purporting to be done in an official character; but it merely provided for special cases of the kind mentioned in Sub-section (3) of Section 80 and this it could validly do under the power of making laws and regulations for the peace and good government of the province under Section 42 of the Indian Councils Act of 1861.

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99. The Bombay District Police Act 1890 by Section 80, Sub-section (3) prescribes six months as the period of limitation for a prosecution or suit against a police-officer in respect of an alleged offence committed or wrong done by him 'by an act done under colour or in excess of any such duty or authority as aforesaid.' The duty or authority here mentioned has reference to 'any duty imposed or any authority conferred on him (here the police-officer) by any provision of this Act or of any rule, order or direction lawfully made or given thereunder' (see Section 80, Sub-section (1)). In the first reference before us the act of the police-officer in respect of which the complaint was made was that in the course of the investigation of an offence by him ho with the object of injuring the complainant and screening from punishment the suspect, made a false and incorrect record of the statements made to him by certain witnesses and thereby committed offences under Sections 167 and 218 of the Indian Penal Code. In the second reference, the defendants who are police-officers are alleged to have committed assault and battery on the plaintiff in the course of their investigation of a cognisable offence alleged to be committed by two berads and thus to have caused him damage. The prosecution in the first reference and the suit in the second reference would both be beyond time if Section 80, Sub-section (3) in applicable.

100. Section 51(1)(b) of the Bombay District Police Act imposes a duty on the police-officer inter alia to obtain intelligence concerning the commission of cognizable offences. In both cases before us the police-officers concerned were ostensibly engaged in performing a duty imposed on them by Section 51(1)(b). Prima facie they would be entitled to the protection of Section 80,

Sub-section (3), unless the complainant in the one case and the plaintiff in the other case show that the acts complained of had no relation actual or "colourable" to the duties imposed or the authority conferred on the officer and were not to be regarded as being merely in excess of the duty imposed or authority conferred by the Act.

101. The object of the Bombay District Police Act, in my opinion, is not to create a ' droit administratif' in favour of police and other officers whose conduct to a very large extent it regulates, Section 80, Sub-section (1), confers on such officers complete immunity in respect of acts done in good faith in the performance of duties imposed by the Act. Sub-section (3) has no reference to acts done in good faith. It would suffice if the act done is or appears to be within the scope of the officer's duty or is even in excess of the authority vested in him by the Act, The period of six months laid down in the sub-section is intended to protect, in my opinion, the police-officer as well as Government who may become liable for damages in respect of an alleged tort the police-officer might commit in the course of his employment.

102. The word 'colour' in its legal sense is defined in Webster's Dictionary (1927 Edn., p. 440 (14) as 'an appearance or semblance of a right, authority, office, or the like,' A police-officer who commits an assault or battery on a person he arrests for a cognizable offence, can no doubt in certain violent cases where the accused cannot be reasonably apprehended without resorting to those means be said to be acting within the scope of his duty or under colour of his duty or authority. An assault in the technical sense is implied in every arrest. Where there may appear to be no justification for the police-officer in effecting an arrest to commit a battery, he would still appear to be acting either in excess of his duty or authority or under colour of such duty or authority. In the second reference before us can it be said that the police-officers in committing the alleged acts of assault and battery were acting under colour of a duty imposed or an authority conferred by the Act or that they were merely acting in excess of such authority? The police-officers may have believed that if they beat the plaintiff he would be induced to give them the information they wanted with reference to the cognizable offence they were investigating. That in itself would not make the dealing of blows by them to the plaintiff a part of their duty or authority under the Act or something akin to but in excess of such duty or authority. Even supposing, what is not the case here, that they had represented to the plaintiff at the time they beat him, that as police-officers they were entitled to beat him until he disclosed to them what they believed he knew about the commission of the offence, such conduct would not, in itself, in my opinion, bring the act under one performed under the colour of duty imposed or authority conferred by the Act or in excess of such duty or authority. Section 51(1)(c) doss not authorize a police-officer to touch the body of any person in the course of obtaining intelligence. For a thing to be the 'colour" of another there must be some likeness or semblance between the two. There is no likeness or semblance between committing assault and battery on the one hand and obtaining

intelligence on the other. When the Act authorizes the police-officer to obtain'intelligence the 'obtaining' it contemplates is by means which are lawful and not those which in the absence of a provision to the contrary in this or any other Act are forbidden by the general law of the country, Apart from a special provision to the contrary a police-officer is as much governed by the general law as any private citizen.

103. In the first reference before us it is contended that as the act of the accused was done mala fide it does not fall under Section 80, Sub-section (3). It is urged that 'colour of duty or authority' must be held to mean that the semblance to duty or authority is a reasonable one. It is contended that where mala fides are alleged there is no room for a reasonable semblance. 1 fail to see the force of the argument. An act may be done by the police-officer mala fide and yet it may appear to be done under the semblance of a duty imposed or authority conferred by the Act, If the Legislature wanted the protection of Section 80, Sub-section (3) to be restricted to bona fide acts they would have inserted in its appropriate place in this Sub-section the words 'in good faith' as they have done in the previous two sub-sections.

104. The questions in the two references should, in my opinion, be answered as proposed by my brother Madgavkar.

Cases Referred.

1(1889) Unrep. Cr. C. 486
2(1918) I.L.R. Mad. 792, 812
3(1910) I.L.R. 34 Bom. 583, s.c. Bom. L.R. 615
4(1910) I.L.R. 35 Bom. 42. s.c. 12 Bom. L.R. 825
5(1885) Unrep. Cr. C. 220
6(1917) I.L.R. 41 Bom. 737, s.c. 19 Bom. L.R. 677
7(1895) I.L.R. 20 Bom. 543
8(1889) Unrep. Cr. C. 486
9(1908) 10 Bom. L.R. 924
10(1895) I.L.R. Bom. 543
11(1888) I.L.R. 10 All. 350
12(1827) 6 B.& C. 351
13(1824) 2 B.& C 729, 734, 736
14(1820) 3 B. & C Ald. 330, 332
15(1918) I.L.R. 41 Mad. 792, 810 F.B
16(1889) Unrep. Cr. C. 486
17(1917) I.L.R. 41 Mad. 792, F.B
18(1889) Unrep. Cr. C. 486; 1928
19(1910) 7 A.L.J. 301
201917. I.L.R. 41 Mad. 792. 810 F.B
21(1871) 8 B.H.C. (A.C.J.) 195
22(1927) 30 Bom. L.R. 431 (p. 433)
23(1917) I.L.R. 41 Mad. 792 F.B
24(1927) I.L.R. 51 Bom. 725, 747, s.c. Bom. L.R. 1227, P.C
25(1886) I.L.R. 13 Cal. 221, 223

26(1903) I.L.R. Bom. 424, 442-3, s.c. 5 Bom. L.R. 431
27[1892] 1 Q.B. 654