

BOMBAY HIGH COURT

Kaikhushru Sorabji

Vs

Commissioner of Police

(Kania, J.)

11.01.1946

JUDGMENT

Kania, J.

1. This rule was issued at the instance of the petitioner calling upon the respondent to show cause why a writ of certiorari should not be issued against him for production of the records, relating to the order dated October 2, 1945, under which the respondent ordered that the telephone connection of Mr. B. Shah numbered 30323 be cut off for a period of one year, and that the said Mr. B. Shah do forthwith surrender the telephone apparatus installed at the place mentioned in the order and the fittings in connection with it. In the petition it is stated that the petitioner is carrying on business of selling cold-drinks in a shop at Marwadi Bazaar. According to him the telephone is used for his business and by his clients. When the order was handed over to him on October 2, 1945, he asked the officers why the order was so made. According to the petitioner those officers told him that the telephone was being used for recording bets in American futures and for other gambling purposes. The petitioner protested but without any result. The petitioner then applied to the respondent to cancel the order but got no relief. He- applied to the Adviser to H. B. the Governor of Bombay in the Home Department to review the order, but his application was rejected. He has therefore made this petition for the issue of the writ as mentioned above,

2. When the application was made on November 15, J granted the rule because it was contended that using the telephone for the purpose of gambling was not a user against which an order under Rule 17(i) (a) (H) (a) of the Defence of India Rules could be made. The respondent has filed affidavits in reply. He has denied the conversation alleged to have taken place between the petitioner and the police-officers at the time the order was served. In his affidavit the respondent has stated that he had passed the order as he was satisfied that the telephone was being used in a manner which was not in public interest but was detrimental to it. The two police-officers have also made a joint affidavit denying the conversation alleged by the petitioner in his affidavit. The petitioner has filed an affidavit in rejoinder stating that the conversation did take place, and that the denial of the police-officers was untrue. The learned counsel appearing for the petitioner

applied for leave to lead oral evidence to substantiate his allegation about the conversation and to disprove the denial of the police-officers. He also contends that the deponents on the other side must be tendered for cross-examination, so that it may be determined by the Court whether the telephone was disconnected on the ground of gambling, as alleged by the petitioner, or on the ground of public safety, as alleged by the respondent.

3. Before going into the details of the controversy it is" necessary to bear in mind that the present application is for a writ of certiorari. Applications of this kind have been frequent in recent months and the jurisdiction of the Court to issue such writs has been considered in several cases. In *Short and Mellor*, the nature of the writ of prohibition is described as (p. 70):A judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court, preventing the inferior Court from usurping jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

This was approved by the Lord Chancellor in *Clifford and O'Sullivan* [1921] 2 A. C. 570, 589, and thereafter again accepted in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co*¹. This authoritative exposition of the nature of the writ has been accepted by a bench of our Court in *Muljee Sicka & Co. v. Municipal Commissioner*² and more recently in *Lady Dinbai Petit v. Noronha*³

4. The result of these authorities clearly is that it is only in cases of judicial or quasi-judicial orders that the writ can issue. The present petition gives rise to two questions: (1) whether the order in dispute is a quasi-judicial act; and (2) whether the order is bona fide and made under the Defence of India Act and Rules. It is necessary to decide the first question first because even if the petitioner succeeds on the second question he cannot obtain the writ of certiorari unless the first question is also decided in his favor. The present order is purported to be made under Rule 17(i) (a) (ii) (a) of the Defence of India Rules, the relevant portion of which runs as follows:The Director General, Posts and Telegraph, or any person authorised by him may by an order direct that any subscriber's telephone connection to any exchange shall be cut off for such period as may be specified.It is also provided that where an order has been made under the above provision, the subscriber shall surrender the telephone apparatus and fittings on the premises to such person as may be specified in the order. It is not contend-ed by the petitioner that the respondent is not the person authorised by the Director-General, Posts and Telegraph, to pass the order under the aforesaid provision. The learned counsel for the petitioner relied on Section 2(1) of the Defence of India Act in support of his contention that the rules must be framed under one of the heads mentioned in that sub-section. He further relied on Section 15 of the Defense of India Act which runs as follows:Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consistent with the purpose a f insuring public safety and interest and the defence of British India.It was contended on behalf of the petitioner that every order which interferes with the ordinary avocations of life of a person or enjoyment of his property must be the result of a decision by the authority which gives rise to that state of affairs, and therefore the order is a

quasi-judicial decision. In support of this contention the definition of "Judicial Act" in Shrods Judicial Dictionary, second edition, (Supplement) as under:but, for the purpose of this question, (what is judicial), a ' Judicial' act seems to be, an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others (per May C. J. in *The Queen v. Corporation of Dublin*⁴ vindicated by Palles C. B., and Fitz-Gibbon L. J. in *Reg. (Wexford Co. Council) v Local Gov. Board*⁵.) was relied upon. The following observations of May C. J. in *The Queen v. Corporation of Dublin* are the basis of this definition (p. 377) :but for the purpose of this question a judicial act seems to be an act done by a competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the facts of such a body involving such consequences would be judicial acts.

Palles C.B. in *Beg, v. Local Government Board* observed as follows (p. 373) :to erect a tribunal into a ' Court'... .so as to make its determination judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It a otherwise of a ministerial power...But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial.These observations and the cases came to be viewed recently by Bhagwati J. in *Juggilal Kamlatpat v. Collector of Bombay* (1945) 47 Bom. L.R. 1070. In that case the learned Judge was concerned with the requisition of certain property under Rule 75(a) of the Defence of India Rules. That rule inter alia empowers the authority, before passing an order of requisition, expressly to call for information, to inspect the premises, and to -determine the question whether the premises should be requisitioned or not. Bearing in mind the clear words of Rule 75(a) read along with Section 15, the learned Judge came to the conclusion that the determination of the question under Rule 75(a) was a quasi-judicial act. Under the circumstances he considered that there was jurisdiction to issue a writ of certiorari in the case before him. The observations in that case, and the observations of May C.J. and Palles C.B. have to be read along with the facts of the respective cases. I am told that an appeal has been preferred against the decision of Bhagwati J. and the same is pending before the Federal Court, Tunder the circumstances I refrain from expressing any opinion on the facts of that case and the view expressed by the learned Judge. It is sufficient for me to state that in Rule 17 there are no provisions like those in Rule 75(a), and the considerations which the learned Judge thought applied to the facts of that ease do not apply here. The observations of May G.J. and Palles C.B. were also in eases of rating by a local authority.

5. It appears to me that unless the authority invested with the power to pass: an order had to act judicially, i.e. to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise. The two sides cannot include himself as he is the deciding authority. In respect of orders permitted to be passed under the Defence of India Act and Rules, I am unable

to hold that in every case the authority passing the order necessarily acts in a quasi-judicial capacity. Section 15, as worded, is applicable to every order passed under the Act, as the order is bound to affect the personal freedom or avocation of an individual or the use of the individual's property. I am therefore unable to accept the larger contention urged on behalf of the petitioner that because of Section 15 of the Defence of India Act every order passed under the rules is necessarily of a quasi-judicial character. To borrow the words of Das J. in *In re Banwarilal Roy* (1844) 48 C. W. N. 766, whether an act is a judicial or quasi-judicial act, -or a purely executive act, will depend on the terms of the particular rule, the nature, scope, and effect of a particular power, in exercise of which the act may be done read with the provisions of Section 15 of the Act.

6. In the present case, in my opinion, the act of the respondent in making the order is not quasi-judicial. He has not to consider a proposition and opposition. He has not to weigh different facts and/or law and decide whether the order should be made or not. The law requires him to be satisfied that the order is necessary under one of the heads mentioned in Section 2(1) of the Defence of India Act. That mental process is not a result of weighing the pros and cons of the matter. He has to be satisfied that the order is required to be made because the circumstances make out a case under one of the heads mentioned in Section 2(1) of the Defence of India Act. To accept, the petitioner's contention would mean that every order passed under the Rules is quasi-judicial. I am not prepared to accept that contention, and so far as I am aware no Court has accepted it. I am concerned only with the order made in the present case and the words used in Rule 17(i) (a) (ii) (a) and (Hi). The order passed under these sub-rules in my opinion is not quasi-judicial and no question of a writ of certiorari can therefore arise.

7. I am not going into the second question, because the petition fails on the first objection. As and when occasion arises, the disputed question of fact set out in the affidavits filed on the petition may have to be gone into and, decided. For the reasons stated above the petition fails. The rule is discharged with costs.

8. On the petitioner's application I direct that the telephone apparatus and fittings should not be removed for two weeks from to-day.

Cases Referred

1(1920), Ex parte [1984] 1 K. B. 171

2(1980) 41 Bom. L.R. 984

3(1945) 47 Bom. L.R. 500

4(1878) L.R. 2 Ir. 371, 376, 377

5[1908] 3 Ir. R. 349, 378