BOMBAY HIGH COURT

Homi D. Mistry

Vs.

Shree Nafisul Hussan

O.C.J. Suit No. 203 of 1953

(N.H.C. Coyajee, A.C.J.)

16.11.1956

JUDGMENT

N.H.C. Coyajee, Actg. C.J.

1. The plaintiff has filed this suit claiming damages from the defendants for wrongful arrest and detention. The plaintiff' says that at the relevant time when his arrest and detention took place he was the Deputy Editor of an English Weekly published in Bombay called "Blitz". Defendant No. 1 was at the relevant time the Speaker of the Uttar Pradesh Legislative Assembly, Defendant No. 2 is the State of Uttar Pradesh. Defendant No. 3 is impleaded because he was at the relevant time Commissioner of Police for the Greater Bombay area, who it is alleged was allowed by defendant No. 4, the State of Bombay, to aid in the arrest and detention of the plaintiff'. According1 to the plaintiff on March 10, he heard through certain newspapers in Bombay that a senior inspector of Uttar Pradesh C.I.D. had left for Bombay with a warrant issued by defendant No. 1 as Speaker of the Uttar Pradesh Legislative Assembly for the arrest of the plaintiff which warrant was duly issued pursuant to a resolution of the Uttar Pradesh Legislative Assembly to enforce the presence of the plaintiff before the Uttar Pradesh Legislative Assembly to answer a charge of contempt of defendant No. 1, the Speaker of the House, arising out of a certain publication of a certain newspaper item published in "Blitz" on September 29, 1951, at a time when the plaintiff was acting as Editor of "Blitz". It is alleged that on reading the said report of the arrival of the C.I.D. Officer from Uttar Pradesh the plaintiff's solicitors addressed a letter to the Commissioner of Police pointing out that it was not open to him to execute or permit execution of the said warrant of arrest inasmuch as it was contended that the Uttar Pradesh Legislative Assembly had no authority or jurisdiction to issue any warrant for execution outside the territorial jurisdiction of the State of Uttar Pradesh. The said solicitors also forwarded a duplicate of the said letter to the Chief Secretary of defendant No. 4, the State of Bombay, requesting him to see that the warrant is not executed against the plaintiff within the territory of defendant No. 4, namely the State of Bombay.

2. It is alleged that an Officer of the Bombay Police, acting under the directions of defendant No. 3, executed the said warrant, by arresting the plaintiff at 5 a.m. on March 11, 1952. The plaintiff was removed to Lucknow via Delhi at 8-30 a.m. in the custody of one S.A. Huq, a Police Officer of the State of Uttar Pradesh. He was taken to Lucknow via Delhi reaching Delhi at 12-30 p.m. on March 12 and was taken from Delhi to Lucknow and at Lucknow he was detained in a room in the Carlton Hotel, Lucknow. It is said and alleged that from 5 a.m. on March 11, 1952, when the plaintiff was arrested till his release on March 18, 1952, in pursuance of a certain Order passed by the Supreme Court of India the plaintiff was illegally detained and falsely imprisoned by defendant No. 1 and defendant No. 2 State, that that detention was carried out without the plaintiff having been produced before a Magistrate.

3. The plaintiff was released because on March 17, 1952, one G.K. Reddy of Delhi filed a petition before the Supreme Court of India under Article 32 of the Constitution of India for the release of the plaintiff and on that petition, which will have to be referred to in detail, the plaintiff was ordered to be released, the petition having been heard on March 18. It is said in the plaint that after hearing counsel for both parties the Judges of the Supreme Court held that the plaintiff was illegally detained and ordered his release forthwith and the plaintiff was set free at 6-30 p.m. in the evening of March 18, 1952. It is said that simultaneously with the release of the plaintiff on March 18 a further notice was served on him by the Speaker calling upon the plaintiff to present himself before the Bar of the said Assembly at 11 a.m. on March 19.

4. The plaintiff contends that the protection of his personal liberty had been guaranteed by Articles 21 and 22 of the Constitution and the entire procedure adopted by the House of Uttar Pradesh against the plaintiff was contrary to and in violation of his fundamental rights guaranteed by the Constitution of India. It is contended in the plaint that defendant No. 1 had no authority to issue a warrant for the arrest and production of any person outside the territorial limits of the State of Uttar Pradesh and that such action was in contravention of Article 22(2) of the Constitution of India and, therefore, without jurisdiction and without any legal authority. It is further contended that defendant No. 2 acted illegally, mala fide and without jurisdiction, that the plaintiff states that defendant No. 3 acted illegally, mala fide and without jurisdiction in directing his subordinates to execute the said warrant, that although the warrant was to produce the plaintiff before the House on March 19, defendant No. 3 acted hastily in executing the said warrant on March 11 and removing the plaintiff or allowing him to be removed from Bombay, and therefore, defendant No. 3 and defendant No. 4 State had acted illegally, mala fide and without jurisdiction in procuring the wrongful arrest of the plaintiff.

5. Defendant No. 1 states that no suit lies against him in his personal capacity or in his capacity as the Speaker and that no cause of action whatever has been made out against this defendant. This defendant submits that all acts done by him were done under authority of a resolution passed by the Legislative Assembly of Uttar Pradesh specifically asking him under a resolution

to issue a warrant for the arrest of the plaintiff for securing his presence before the Bar of the House and that the suit amounts to challenging the validity of the proceedings in the House itself and the legitimate action taken by the House, and further states that there is a bar under the Constitution under Article 212. The insertion in the newspaper complained of by the House is a contempt as set out in para. 3, and that this was referred by him as Speaker by his Order dated October 8, 1951, to the Committee of Privileges under Rule 67 of the Rules of Procedure of the Uttar Pradesh Legislative Assembly. The Report was presented to the House on March 9, 1952, on which day the House adopted the resolution set out in para. 3 and in pursuance of that resolution calling upon him as Speaker of the House to issue a warrant of arrest to the plaintiff, he as the Speaker signed the warrant of arrest and forwarded the same on the same day by a letter to the Chief Secretary of the Government of Bombay with a request to execute it against the plaintiff so as to make the plaintiff attend at Lucknow to be produced before the House. In para. 3 it is further stated that according to this defendant's submission under the provisions of the Constitution of India the House has the same powers and privileges as the House of Commons in the United Kingdom including the power to issue a warrant of arrest against any person, who commits or is to be tried for the contempt of the House, throughout the territories of India. It is further alleged that by a notice of March 18, 1952, the plaintiff was called upon to present himself before the Bar of the Assembly at 11 a.m. on March 19, but the plaintiff intentionally and deliberately failed to comply with the requisition.

6. The written statement of defendant No. 2 states that there is no cause of action against defendant No. 2, the State of Uttar Pradesh. Defendant No. 2 denies that it acted illegally in any way at all in authorizing its officers to execute the warrant issued by the Speaker and that defendant No. 2 acted bona fide and was merely instrumental in giving effect to the warrant issued under the Resolution of the Uttar Pradesh Legislative Assembly. In para. 7 it is submitted that the order made by the Supreme Court releasing the plaintiff was a ruling that was entirely given on a technical ground, viz. that the plaintiff should have been produced before a Magistrate within 24 hours after his arrest, and the grounds on which he was released as set out in the plaint are not correct and accurate. Defendant No. 2 denies having acted illegally and mala fide and without jurisdiction in executing through its officers and authorizing and directing its officers to execute the warrant issued by defendant No. 1.

7. Defendant No. 3 submits that what was done by him was done in good faith and in pursuance of his duty imposed upon him by his superiors and that he was bound in duty to carry out directions of his superiors and to assist in executing the warrant for the arrest of the plaintiff which warrant was duly issued by the Speaker of the Uttar Pradesh Legislative Assembly. He says that the removal of the plaintiff from Bombay was perfectly legal and in accordance with and in pursuance of the directions received by this defendant from higher authorities.

8. Defendant No. 4 denies that it acted illegally, mala fide and without jurisdiction in allowing defendant No. 3, the Commissioner of Police, to execute the warrant legally and properly issued

by the Speaker of the Uttar Pradesh Legislative Assembly. It denies all mala fides on its part, and all defendants deny any liability in this connection.

9. It may be pointed out that no evidence was led but liberty is reserved, after I have decided the several questions posed which are all questions of law, to ask for the recording of evidence on the question of damages alone, if that question arises on the answers to the issues. A statement of admitted facts was submitted to me and has been made part of the record. The arguments advanced on behalf of the plaintiff are all on questions of law and all of them are technical questions and it was agreed between the parties that issues of law not set out in the pleadings are as set out now in the issues. I made a note to the effect that as regards the Uttar Pradesh Legislative Assembly Mr. Palkhivala stated that he does not allege any dishonesty of purpose, but reserved liberty to argue lack of due care and caution, and in those circumstances the Advocate General of Uttar Pradesh did not propose to lead any evidence on the question of bona fides. Mr. Palkhivala also stated that he admitted all responsibility for the article complained of and did not for a moment put forward any justification in connection with the article complained of. Numerous issues on questions of law were argued under two principal heads, whether this suit is maintainable against any of the defendants on several grounds advanced as indicated in the issues, and secondly whether the warrant and detention was valid in law. It was admitted that this was an action in tort against all the defendants, and if there was no cause of action, there could be no remedy against any of the defendants.

10. To my mind, therefore, the question and the principal question to be decided is what is the extent and content of the privilege conferred on a Legislature by Article 194(3), which runs as follows:

> "In other respects, the powers, privileges, and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

This article falls under the heading "Powers, Privileges and Immunities of State Legislatures and their Members". If an admitted privilege is proved for the purpose of investigating and punishing an act of contempt of the House, then the next and the most important question that is posed and which is of vital importance in this suit is whether in pursuance of a resolution of the House a warrant issued for the purpose of bringing a person to the Bar of the House is a warrant that can be executed beyond the territory of the State, Legislature whereof issued the warrant. These two questions are questions that are to be answered first in connection with the maintainability of the suit.

11. It was contended on behalf of the plaintiff by Mr. Palkhivala that the cause of action started

with the issue of the warrant by the Speaker of the Legislative Assembly of Uttar Pradesh. It must be borne in mind in discussing this matter that the Legislatures of a State are the two Assemblies or the Upper and Lower Houses together with the Governor of the Province. The action taken here is an action taken by the House alone and the privilege exercised is the privilege exercisable by the House of the Legislature of a State as provided under Article 194(3). It was contended on behalf of the plaintiff that the plaintiff was not challenging and could not challenge the validity of any proceeding within the four walls of the Legislature itself and therefore Article 212 of the Constitution did not apply and there was no bar to a Court of law enquiring into the complaint of the plaintiff, because it was only after the proceedings had terminated that certain external facts took place outside the territorial limits of the State of Uttar Pradesh on which the cause of action is rested. Neither the arrest nor detention took place in the Legislature or in the House nor did the arrest take place in any part of the territory of the State of Uttar Pradesh and, therefore, these facts on which the cause of action is founded by the plaintiff which are all subsequent to the Resolution of the House did not form part of the proceedings of the Legislature, but the plaintiff depends on the action taken on the writ or warrant outside the territory and outside the jurisdiction of the Legislature and that the writ signed by the Speaker on behalf of the House cannot run beyond the territorial limits of the State of Uttar Pradesh. It was made quite clear on behalf of the plaintiff that he was not challenging the position on the ground of any irregularity of procedure, but on the ground of illegality. That is the main contention on behalf of the plaintiff. It was contended that the protection given by the article is only a protection if the procedure adopted by the Legislature is challenged and that the protection given by Article 212(2) was personal protection with a limitation, that is, where it is within competence of the House and entirely restricted to internal matters of the House. Now, in this connection it must be remembered that the protection claimed under Article 212 is a protection claimed only by defendant No. 1, and he alone relies upon this article end that too under Clause (2). It is obvious that if this power is exercised as contended for under Article 194 of the Constitution, then the Speaker who signs the warrant would clearly be protected under Article 212(2).

12. Therefore the main question is first to consider what is the power of the House in this connection. It was contended that the order being illegal the fact that it was an order of the House is no defense to an illegal act, and Anson on Law and Custom of the Constitution was quoted at p. 193 where it was commented as follows:

> "On the first point the learned Judge had no difficulty in holding that, though no action could lie against a member of the House for things done in the House, yet that if the thing done was to make an illegal order, the privileges of the House would not shelter those who carried that illegal order into effect outside the House. Nor had he any hesitation in holding that, if the second question were answered in the negative, the act complained of was illegal.

Mr. Palkhivala also relied upon May's Parliamentary Practice, 15th edn., p. 171, to the effect that

> "If such a person pleads an order of the House as his justification, the courts will inquire whether the order is one which the House is entitled to make, not in order to bring within their jurisdiction the Members who voted for the order, or the Speaker or other officer who signed it, but in order to decide, not only whether the act complained of is duly covered by the order, but also whether the privilege claimed by the House does, as pleaded, justify the act of the person who executed its order.

It is argued on this footing that if the Court on enquiry finds that the order made is illegal, then the execution of the order cannot protect the parties who carried out the order. It was contended that in any event if the High Court cannot reach outside its territorial jurisdiction by a writ or even a warrant in case of contempt proceedings, it is inconceivable that a State Legislature could do so. Posing this question that conceding that contempt outside the State could be punished, Mr. Palkhivala argued that the Assembly of a State has no power to issue a warrant having extra-territorial operation, and that if the State laws are limited to the territory of the State, can the privileges of the Assembly travel beyond the State? He referred to Articles 245 and 246 which are under the Chapter "Legislative Relations" and headed "Distribution of Legislative Powers" and pointed out that subject to the provisions of the Constitution Parliament may make laws for the whole or any part of the territories of India and the Legislature of a State may make laws for the whole or any part of the State, and then he referred to Article 246, namely as regards the subject-matter of laws made by Parliament and by the Legislatures of States, and he contrasted that with the language used under Article 142 indicating that under the Constitution enforcement of decrees and orders of the Supreme Court throughout the length and breadth of India had to be provided for by an express provision in the Constitution. Thereafter he referred me to Article 194(3) and argued that all that the article does is to confer powers, privileges and immunities on a House of the Legislature of a State and the members and the committees of a House of such Legislature and the same shall be such as from time to time be defined by the Legislature by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom. He argued that the powers of the Parliament are territorially limited inasmuch as a warrant or a writ of the House of Parliament of Great Britain would not run beyond the limits of Great Britain. Because, no writ would run beyond the boundaries of the realm, and therefore it was argued that the power conferred on the Legislature under Article 194(3) was coextensive with the territorial limits indicated as far as the Parliament of Great Britain is concerned. Now it must be remembered that it has been laid down finally by the Supreme Court that a warrant for contempt has no resemblance to a warrant under the Criminal Procedure Code. Whether a High Court is acting in exercise of its powers to punish for contempt or whether a House is acting under its powers to punish for contempt, these are special jurisdictions exercised by these Courts. In the case of *Sukhdev Singh Sodhi v. The. Chief Justice and Judges of the Pepsu High Court*[1] it was held that Section 527 of the Criminal Procedure Code does not apply to such a case as the power of a High Court to institute proceedings for contempt of itself and to punish the contemner where necessary is a special jurisdiction which is inherent in all Courts of Record, and Section

1(2) of the Criminal Procedure Code excludes such special jurisdiction from its scope, and a judgment of Sir Barnes Peacock was quoted at p. 456 to the effect that the words "any other law" found in the Criminal Procedure Code do not cover contempt of a kind punishable summarily by the three Chartered High Courts. Referring to the Contempt of Courts Act, 1926, repealed by Act XXXII of 1952, the learned Judges of the Supreme Court observed that Section 5 of the Contempt of Courts Act expands the ambit of the authority beyond what was till then considered to be possible, but it does not confer a new jurisdiction, and they observed (p. 463):

> "In any case, so far as contempt of a High Court itself is concerned, as distinct from one of a subordinate court, the Constitution vests these rights in every High Court, so no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority.

It was argued on this basis that if contempt of a Court could not be covered by the Criminal Procedure Code, how could the contempt of a Legislature? It was argued that both are special jurisdictions and it was argued that a series of authorities laid down that although a High Court could try for contempt a party outside the territorial jurisdiction of the High Court, it could not issue a warrant or a writ which would travel beyond its territorial jurisdiction and in this connection I was referred to two cases. The first is the case *In re Horniman*[2] where Chief Justice Beaumont observed that:

[1][1954] S.C.R. 454

[2](1943) 46 Bom. L.R. 94

> "The power to punish for contempt of Court is a power inherent in superior Courts of Record, which in India are the High Courts. Each High Court has inherent power to punish contempt of itself, and that where a High Court considers that a person has committed contempt of itself, although the contempt may have been committed outside its jurisdiction, it can deal with that person, if he were within its jurisdiction. There is, however, no power in the High Court itself to arrest for contempt of Court a person outside its jurisdiction.

This case was strongly relied upon. The next case referred to was *Surendranath Banerjea v. Chief Justice and Judges of the High Court of Bengal*[3] the obstrvations being at p. 179 where their Lordships held that:

> "...The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for British. India and the Code of Criminal Procedure, 1882, but by virtue of the Common Law....

It was argued by analogy that the House, namely the Legislative Assembly of Uttar Pradesh, has no wider powers even if it has powers of a Court of Record and its writ cannot possibly run beyond the territories comprised in the State of Uttar Pradesh. This argument on the face of it, as

put by the learned Counsel, appears to be one which may appear to be acceptable, but the position is to be analyzed closely and we shall have to proceed now to consider what exactly these powers are which are exercised or can be exercised under Article 194 and then consider whether any order passed in a contempt proceeding if that is passed on the footing of an admitted privilege whether the Assembly can send out its warrant outside the limits of the State for execution. For the purpose of appreciating this one has to go back a little historically and consider the position. First of all one must consider what exactly is the content and extent of the privilege and powers conferred by Article 194(3).

13. As regards privileges of members one may first refer to the Government of India Act, 1935. Section 28 prescribes the privileges of members. It comes under Chapter III "Dominion Legislature" and Section 28 says that subject to the provisions of this Act and to the rules and standing orders regulating the procedure of the Dominion Legislature, there shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature. Under Sub-section (2), the privileges of members in other respects are as may be from time to time denned by Act of the Dominion Legislature, and until so defined, shall be such as were immediately before the establishment of the Dominion enjoyed by members of the Indian Legislature. It is apparent from this that the status of a Court is not conferred expressly by this section and there can be no such power to act as a Court of Record unless the power is expressly conferred. It is apparent, therefore, that under the Act of 1935 the position was clearly that although a High Court had the power of punishing for contempt as a Court of Record this power was expressly withheld from the Legislature under the Act of 1935. Now this power is expressly conferred under the Constitution and conferred on the Union Legislature under Article 105(3) which runs as follows:

[3](1883) L.R. 10 I.A. 171

> "In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

Now, the State Legislatures are conferred identically the same powers under Article 194. Under Sub-articles (1) and (2) freedom of speech and immunity from any proceedings as provided for by Section 28 of the Government of India Act, 1935, are repeated and thereafter Sub-article (3) expressly confers on the House a certain power, namely that the powers, privileges and immunities of a House of Legislature of a State shall be such as from time to time may be denned by the Legislature by law, but until so defined it lays down that they shall be "those of the House of Commons of the Parliament of the United Kingdom." In this connection I may refer to a judgment reported in *The Queen v. Richards; Ex Parte Fitzpatrick and Browned*[4] In that case Section 49 of the Constitution of Australia fell to be construed. That section runs as follows:

> "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In a judgment of rare quality delivered by Chief Justice Dixon he stated that shortly put the situation in England was that it was for the Courts to judge of the existence in either House of Parliament of a privilege, "but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise." The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment, the Court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege, it is conclusive and it is no objection that the breach of privilege is stated in general terms. To my mind these weighty observations put in a nut-shell the whole position and the learned Chief Justice observed that the statement of law as set out above appeared to be in accordance with cases by which it was finally established namely the Case of the Sheriff of Middlesex (1840) 113 E.R. 419. The learned Chief Justice quoted the words of Lord Cairns as follows (p. 163):

> "...Beyond all doubt, one of the privileges-and one of the most important privileges of the House of Commons-is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated, been well established in this country that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is.

In other words, again, in the words of Lord Cairns "the privilege or power, namely, of

[4](1955) 92 Commonwealth L.R. 157

committing for contempt, of judging itself of what is contempt, and of committing for contempt by a warrant stating generally that a contempt had taken place." At present I am discussing the content of the privilege as exercised by the House of Commons of the Parliament of the United Kingdom, because the words used in Article 194(3) are "shall be those of the House of Commons of the Parliament of the United Kingdom." The position was analysed in the leading case of *Bradlaugh v. Gossett*[5] and Mr. Seervai rightly drew my attention to certain propositions which were laid down in that case and which stand good today. Justice Stephen at p. 278 observed:

> "...think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal

> proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable, and that is based on the observation that
> "...it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own, (p. 280)

because

> "...it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute-law (p. 280);

and as far as this position is concerned it seems to follow, that the House of Commons has the exclusive power of interpreting a statute so far as the regulation of its internal affairs is concerned and even if it were erroneous in that, the Court has no power to interfere, and as observed by the eminent Judge, extreme cases of hardship do not invalidate the above proposition. It was held that

> "...If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal (p. 285).

In other words although a resolution of the House of Commons cannot alter the law, yet if the House adjudges an action of an outsider as a breach of privilege and arrests him and imprisons him, no habeas corpus will lie if on a return of the writ and on the face of the writ it is stated that the imprisonment was due entirely in pursuance of a warrant of the Speaker and that warrant of the Speaker set out that it was for contempt, even though the warrant does not specify the contempt. That is because, the House of Commons although originally it was a Court of Appeal for the Realm it shed all its judicial aspects except the power to punish for contempt of the House of Commons, and that power has remained and has been exercised at all times in its capacity as a Court of Record. It was held in the leading Case of the Sheriff of Middlesex (1840) 113 E.R. 419 that the warrant although looked at by the Court was not scrutinized by the Court, because the warrant was not bad for omitting to state the grounds on which the parties had been adjudged guilty of contempt and the word "having" in the warrant, was a sufficient averment that the parties had been guilty of contempt. Lord Denman who had inveighed against the interference by

[5](1884) 12 Q.B.D. 271

Parliament on several occasions quoted with approval the observations of Lord Ellenborough which are as follows (p. 425):

> "...If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, or of any other of the Superior Courts, inquire further : but if it did not profess to commit for a contempt, but for some matter appearing

> on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say that in the case of such a commitment,...we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded.

The learned Law Lord further observed (p. 426):

> "...On the motion for a habeas corpus, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case : and I think the production of a good warrant is a sufficient answer.

The whole position is summed up by Dicey on the Law of the Constitution, 9th edn., at p. 55, in the following words:

> "...Each House of Parliament has complete control over its own proceedings, and also has the right to protect itself by committing for contempt any person who commits any injury against, or offers any affront to the House, and no Court of law will inquire into the mode in which either House exercises the powers which it by law possesses, and the learned author Dr. Dicey quotes from the judgment of Justice Stephen as follows (p. 55):
> "...The House of Commons is not a Court of justice; but the effect of its privilege to regulate its own internal concerns, practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly, and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal.

In other words, it is as far as adjudication of the question of contempt of the House is concerned, a Court of Record against whose decision, even if erroneous, there, lies no appeal whatever and the House has claimed and has been acknowledged to be a Court of Record for that purpose. Although the exercise of this power emanates from the position retained by it for this purpose as a Court of Record, the right to commit for contempt, as pointed out by the eminent author Anson, finds a surer basis on the necessity of such a power being there for the maintenance of the dignity of the House and not so much on the House of Commons acting in the capacity of a Court of Record. See Anson's Law and Custom of the Constitution, p. 190.

14. It has been laid down, and that proposition of law cannot be disputed, that the privilege of adjudging any contempt of the House without being questioned by any Court of law and the power of committing by a general warrant is a peculiar right appertaining to the Houses of Parliament of the United Kingdom and as held in several decisions it is not and cannot be a legal incident of a Legislative Assembly, that is to say, no Dominion Legislature can exercise that

power unless the power of the House of Commons is expressly conferred on a Dominion Legislature. Now, it is clear as pointed out in The Speaker of the *Legislative Assembly of Victoria v. Glass*[6] that the privilege is enjoyed by the House of Commons of committing for contempt, but it further enjoys the right to commit for contempt and adjudge thereon without any appeal or recourse to a Court of law by the aggrieved party. In the exercise, of that right it has been held that the most important ingredient of that right is of committing and arresting by a general warrant. Therefore it cannot be contended that if in terms the powers of the House of Commons are conferred, not by a statute but by the Constitution, on a House of Legislature in India, the right to commit by a general warrant is a mere incident of the power to* commit of the House of Commons and does not pass to the Legislature on whom the same power is conferred, because, when the power is conferred, it is the power of a Superior Court namely a Court of Record, and powers of the Court of Record or Superior Court to issue a warrant must belong to the House of Commons, and therefore it follows that such power to issue the warrant goes with the power. I was referred in this connection to the case of *Fielding v. Thomas*[7] the relevant observations being at pages 609, 610 and at page 612. It appears that the Lord Chancellor pointed out that (p. 609)

> "...it was enacted that the privileges, immunities and powers to be held, enjoyed and exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that legislature.

At p. 612 it was observed as follows:

> "...Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But in the light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, Section 30 could not be supported.

It was held in the case of *Gosset v. Howard*[8] as follows (p. 172):

[6](1871) 3 P.C. 560, 572, 573
[7][1896] A.C. 600
[8](1845) 116 E.R. 158

> "...it cannot be disputed that the House of Commons has by law the particular

> powers to take into custody.... First, the House, which forms the Great Inquest of the Nation has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience..., bring them in custody to the Bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a willful disobedience of that order, the House undoubtedly has the power to cause the person charged to be taken into custody and to be brought to the Bar to answer the charge: and, further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised. These are the only questions of privilege involved in this inquiry independently of the form of the warrant.

Then, as regards the form of the warrant, Baron Parke remarked as follows (p. 172):

> "The question therefore turns upon the form of the warrant alone. If it be good, and if it authorized all that is alleged to have been done by virtue of it, the defendant was justified:... To connect the defendant with the order, a warrant to him was necessary.

In reference to the power to reach out with this warrant Baron Parke quoted from the leading case of *Peacock v. Bell*[9] that

> "...The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so;

and as far as an inferior Court is concerned

> "...nothing shall be intended to be within the jurisdiction of an Inferior Court, but that which is so expressly alleged:

and thereafter he observed as follows (p. 173):

> "...writs issued by a Superior Court, not appearing to be out of the scope of their jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid acting under them;...for the officers ought not to examine the judicial act of the Court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it;...

Now it is clear that the powers of the Legislature had been expressly limited under the Government of India Act, 1935, in connection with privileges and the right to commit for contempt. It is obvious, therefore, that the Constitution not only removed all these disabilities of the Legislature in the Centre as well as in the States and although the Constitution as cast is more

akin in its frame-work to the Constitution of the United States of America, yet as far as this particular question of privilege is concerned, the framers of the Constitution went to the House of Commons as a model, although, as pointed out in

[9]1 Saund 74

argument, under the Constitution of the United States of America the privileges are lesser than of the House of Commons of the United Kingdom. As far as American authorities go, *Kilbourn v. Thompson*[10] and the case of *Marshall v. Gordan*[11] clarly indicate that neither the precedent nor practice of the English House of Commons nor cases decided by the English Courts of law as regards punishment for contempt apply in America. This position is indicated, because under the Constitution of the United States of America, legislative, executive and judicial powers are clearly defined and distinct and the limitations in this connection negative altogether the possession by the Congress of any judicial authority, similar to the judicial authority possessed and exercised by the House of Commons in pursuance of its privileges in connection with contempt matters. Therefore, it is obvious that the framers of the Constitution being fully aware that no power to punish for contempt was conferred on the Legislatures under the Act of 1935 deliberately gave to the Legislatures the privileges as "those" of the House of Commons and conferred this on themselves, in the very words, as indicated above by me in which England had conferred these powers as set out in the case of *The Queen v. Richards; Ex Parte Fitzpatrick and Browne*[12] In other words, the conclusion that is irresistable to my mind is that the framers intended the House alone to be the sole judge on a question of admitted privilege. To my mind, it is quite clear, therefore, that under Article 194(3) when it prescribes that the privileges shall be those of the House of Commons of the Parliament of United. Kingdom, the power to punish, for contempt is expressly conferred on the House in clear and unequivocal terms, and therefore it must follow that the exercise of that power is identical with that of the House of Commons.

15. That brings me to the connected question whether the warrant signed by the Speaker on behalf of the House can run and be effective beyond the boundaries of the State. It was, as pointed out by me above, very strenuously argued by Mr. Palkhivala that even if these plenary powers to punish for contempt were conceded to the House of a Legislature, there is no ground for holding that the warrant can be executed beyond the limits of such a State. As pointed out above by me, he argued that even as regards the Supreme Court a provision is expressly made in. the Constitution giving effect to the judgments and orders of the Supreme Court throughout the territories of India. It was also pointed out by Mr. Palkhivala that, at no time did the High Courts in India claim to issue warrants executable outside and beyond the jurisdiction of the High Courts and that it would be most unreasonable in these circumstances, to hold that a State Legislature can issue a warrant that is current throughout the length and breadth of India. A subsidiary point was made during the arguments which might as well be disposed of at this stage, namely, that although a resolution was passed by the Assembly and a warrant signed by the Speaker, unlike England, there was no machinery whereby that warrant could be executed by the Legislature. It was pointed out by again referring to Horniman's case (1943) 46 Bom. L.R. 94 that the learned Chief Justice pointed out that the warrant of the High Court could be only executed by the

Sheriff. It was also argued that in England the House of Commons executes its orders through Serjeant-at-arms and therefore the execution of this warrant could not be effected by employing a Police Officer of the Uttar Pradesh State who was aided in the execution of the warrant by Officers of the State of Bombay. I am afraid this contention to my mind would lead to this result that although the power to punish for contempt is given to a Legislature, there is no ancillary power to implement the

[10](1881) 103 U.S. 164, 26 Law Ed. 377
[11](1917) 243 U.S. 521, 61 Law ed. 881
[12](1955) 92 Commonwealth L.R. 157

orders of the Legislature, because no special officers are assigned for the purpose. Use of force for the purpose of enforcing the orders of the Assembly is an absolute ingredient of the privilege to commit and punish for contempt, and merely because there are no officers corresponding to that of the serjeant-at-arms, it does not follow that the content of the privilege is thereby lessened or destroyed, but in my opinion the point of the privilege remains entirely unaffected. For instance under Rule 189 of the Rules of Procedure of the U.P. Legislative Assembly the Speaker is conferred with full authority to carry out the order or the decision of the House and may employ, or authorize the employment of, necessary force at any stage of the proceedings, and under Rule 198 the Speaker might take such steps as may be necessary or such action as the circumstances of the case may in his discretion require for the expulsion of any stranger from any portion of the House. These rides indicate that the Speaker may employ for that purpose and call in aid for that purpose any outside agency and an officer engaged by the Speaker on behalf of the House for the enforcement of such an order is entitled in his turn to ask for outside aid. In England it is clear that the ser-geant-at-arms can employ outside aid. In this case that was sought in the following manner. After the resolution a warrant was signed by the Speaker and made over to an officer of the House who addressed a letter to the Chief Secretary of the Government of Bombay enclosing the warrant and the Chief Secretary passed it on to the Commissioner of Police who endorsed it. Although in the case of Horniman, referred to above, it was held that the High Court as far as contempt is concerned could not execute its warrant outside its jurisdiction, the enactment of Section 5 of the Contempt of Courts Act, 1952, was evidently designed to meet the situation admittedly created before the Act was passed by the ruling in *In re Horniman* and similar judgments, because it is contended, that if the position was crystallized under the authorities prior to 1952 and that remains so after 1952, then Section 5 was useless, but every section enacted in an Act should be given some effect to and the Act does not lay down any procedure at all. Section 5 does not confer any jurisdiction, because that was already there, but it widens it by reaching out, at a party outside jurisdiction and that can only he done by a procedural machinery necessarily ancillary to the wider jurisdiction, it may be pointed out that if it can be argued that there is no machinery to reach out at a party outside the limits of a State, it may also be pointed out that equally there is none to reach at a party within the State and it cannot be that because of the lack of such prescribed machinery the Assembly has no power to implement its decision in connection with contempt and punishment. In this connection it may be incidentally pointed out that although on the Original Side there is an officer described as the Sheriff who could execute a writ, for contempt, it could not be maintained that because there is no special officer the contempt of a division bench on the Appellate Side could not be taken

notice of and an order could not be implemented by a division bench of the High Court for lack of any particular machinery.

16. The privilege of the House in contempt matters must be at least therefore on a par with the power of the High Court under Section 5 of the Contempt of Courts Act.

17. It may be pointed out that jurisdiction of the High Court is expressly limited under Article 226, but that is in connection with, writ matters in the nature of habeas corpus, mandamus, certiorari and similar writs. That is a limitation of the power to issue those writs within the territory of the State itself and not beyond. Under Article 230 Parliament may by law extend the jurisdiction of a, High Court or exclude the jurisdiction of a High Court from any States specified in the First Schedule other than any area not within the State in which, the High Court has its principal seat.

18. I have indicated above the limitations put on the jurisdiction of the High Court which was expressly done so that the Court may not reach out of the territorial limitations of the State in particular matter. There is no such limitation on the exercise of privilege by the House. There arc articles which put limitation on the powers of the executive in respect to matters set out therein, but no territorial limitation is placed on the power conferred by Article 194(3). Limitations on the judiciary are to be found in Articles 225 and 226 and limitations on the executive are to be round in Articles 73 and 162. These arc evidently all express limitations against the State, the executive and the judiciary, and to my mind this cannot be extended by implication to the powers of the House. The limitation, if it is to be imposed on the House in connection with the exercise of its privilege, must be either imposed as an express one in the Constitution, or by the concept of each of the States being an independent State. Enforcement of attendance before the House itself is not set out, because obviously it is conceded as part of the privilege itself. It is not as if the Union of India was formed of independent States surrendering part of its jurisdiction to the Centre and reserving part of the jurisdiction to itself. Evidently the preamble of the Constitution itself shows that every party is a citizen of India. It is inconceivable that although the privilege can be exercised against every citizen within the area of the Uttar Pradesh yet every citizen outside the border of that State can assail the dignity of the House with impunity. The article in the Blitz which is complained of as contempt of the House is not for a moment justified by counsel appearing on behalf of the plaintiff. In these circumstances, the position would be that however great the libel may be as long as the party guilty of contempt remains outside the limits of the State he can with impunity proceed to have his way without the House being able to reach at him. It is true that in England a writ or warrant could be executed if issued by the Speaker only throughout Great Britain and not beyond the realm. I cannot see any reason why a limit, unless imposed by the Constitution should be imposed on the writ of a Court of Record composed of a House of: the Assembly. It may further be pointed out that Article 194(5) is in identical terms with Article 105(3) which provides for the powers, privileges etc. of the Houses of Parliament, namely the Central Assembly and there is no indication whatever in the Constitution to show that

any limitation is expressly or impliedly imposed whereby the writ cannot run outside the territory of the State. Execution of the order of the House is incidental to the power of exercising privilege, and to my mind in the absence of any provision as regards territorial limitation either express or implied it would be tantamount to affecting the content of the privilege itself if the Legislature is denied execution thereof outside the range of the boundaries of the State. In my opinion to hold to the contrary would be to cut down the privilege itself. Article 194 makes Sub-article (1) subject to the provisions of the Constitution, but Sub-article (3) is not made subject to the provisions of the Constitution.

19. Before I come to the conclusion on the question of privilege and the question of the execution of the warrant outside the limits of Uttar Pradesh, I may refer to two authorities cited by Mr. Palkhivala on behalf of the plaintiff. The first is the case of *Anand Bihar Mishra v. Ram Sahay*[13] and this decision is relied upon for the proposition that even in internal matters the.Court would interfere if there was illegality unless it merely

[13][1952] M.B. 145

amounted to irregularity, and the observations at pages 175 and 176 were relied upon. I find it difficult to see how reading these observations it throws any light on the subject discussed before me. All that the learned Judge after quoting the case of *Bradlaugh v. Gossett* observed was (p. 176):

> "...I am, therefore, disposed to think that even if it be assumed in the present case that Shri Ram Sahay did not make an oath or affirmation under Article 188, this Court cannot restrain him from taking his seat and from discharging the duties and functions of the Speaker.

Thereafter certain observations were made by the learned Judge 'Mr. Justice Dixit which are as follows (p. 176):

> "...It is obvious that the objections to the validity of any person holding the office of Speaker in the form in which they have been raised here, can never arise in England. If the jurisdiction of the English Courts to determine matters challenging the legality of any person in the office of Speaker of the House of Commons is excluded, it is because of the limits imposed by the law of their Constitution, on the various Institutions of Government and thus upon the extent to which the Courts are required to control the Parliament which is supreme. To my mind, the objections raised by the petitioner as to the legality of the continuance of Shri Ram Sahay in the office of Speaker under Article 385 of the Constitution is not one relating to the internal affairs of the Assembly. ...the determination, of the matter by the House or the Speaker is not conclusive. The question raised is of declaring the status of a person on the interpretation of the Constitution. Under our Constitution it is the duty of this Court faithfully to expound and Hive effect to it according to its own terms. The claim, therefore, that it is not the function of this Court to

> declare whether under the Constitution Shri Ram Sahay has or has not the status of the Speaker...being one opposed to the first principles of the Constitution, must be rejected.

The question discussed in this case has no direct bearing or any bearing in my opinion on the issues arising before me, the main question arising before me being whether there is anything in the Constitution cutting down the effect of Article 194(3). The second, case, which I need refer to, cited on behalf of the plaintiff, is the case of *Sradhakar Supakar v. Speaker, Orissa Legislative Assembly*[14] The only proposition laid down by the bench in that case was that the rules adopted by the Speaker of the Orissa Legislative Assembly, in exercise of the powers conferred by Article 208(2) of the Constitution, clearly lay down that it is the primary function of the Speaker to regulate the conduct of the business and procedure of the Assembly and Rule 39 of the said rules further confers on him the power to decide all points of order that may arise, and therefore by Article 212(2) of the Constitution the High Court is debarred from issuing under Article 226 any direction to the Speaker. The only passages relied upon are to be found at, pages 214 and 215. The question discussed there was the applicability of Article 212(2) and whether an officer of the Legislature could be proceeded against under Article 226, and all that was observed was that there can be no doubt that Article 212 constitutes a bar to the jurisdiction of the Court extending over the Speaker while functioning in his capacity as such inside the

[14][1952] Cut. 209

Legislature to regulate the conduct of business of the Assembly by virtue of the powers vested in him by the Constitution. Neither the ratio nor the discussion in that case to my mind is applicable to the questions posed before me.

20. In the circumstances I have come to the conclusion that under Article 194(3) the Constitution confers powers on the House which are identical with the powers enjoyed by the House of Commons of the Parliament of the United Kingdom and I have fully discussed what those privileges enjoyed in England are. I have also referred to the decision of Chief Justice Dixon and I feel that all. the reasoning applied there by that eminent Judge in connection with Section 49 of the relevant Australian statute apply in full measure to the construction of Article 194(3), I have also come to the conclusion that the warrant in this case on a reading of it is clearly a general warrant indicating that the party was required in connection, with, a contempt proceeding and therefore no Court would be entitled to scrutinize such a warrant and decide whether it was a proper and valid warrant or not. As regards execution of the warrant in Bombay, I have assigned reasons why in my opinion in the absence of any restrictions either express or implied in the Constitution itself I am not prepared to hold that it cannot be executed beyond the limits of the State of Uttar Pradesh and I may again refer to the quotation to the effect that "the rule for jurisdiction is, that nothing shall, be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so." It is clear, therefore, to my mind that the House of the Legislative Assembly of Uttar Pradesh was fully entitled to protect its dignity by the exercise of the privilege expressly conferred on it under Article 194 and in exercise of that privilege it issued a warrant which on the face of it states that it is for contempt of the House, and therefore that

warrant being a general warrant, is not subject to scrutiny and that it can be validly executed outside the borders of the State of Uttar Pradesh.

21. In connection with this question of writ two further observations have to be made before I conclude this subject. In arguing the question of the capacity of the House to issue a writ that can run outside its territorial limits, the Advocate General of Uttar Pradesh argued that territorial orders may sometimes have validity and effect outside the State and within India on, the ground that there is such a concept as a territorial nexus, and if the law is for the territory but has connection with the subject-matter and having effect outside the territory, it is not necessarily extra-territorial, and referred me to the language used in Article 245 of the Constitution. Reliance was placed in this connection on the case of *Wallace Bros. & Co. Ltd. v. Comr. of I-T*[15] That was a case where the question arose whether the company, which was incorporated and. the control and management of its affairs was situated exclusively in the United Kingdom and which, was a member of the firm of "Wallace & Co. carrying on business in Bombay, was liable to pay income-tax both arising in British India and arising without British India, and it was held, that the company was properly assessed to income-tax on the whole of its income. It was held that the derivation from British India of the major part of its income for a year gives to the company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived, and that if it is so at home in British India, it is a person properly subject to the jurisdiction of the Central Indian Legislature. Lord Uthwatt posed the question whether the provisions of Section 4A

[15](1948) 50 Bom. L.R. 482, P.C.

of the Income-tax Act was ultra vires the Indian Legislature. In considering this question after discussing the relevant sections of the Act and the guidance given by the Act and the English authorities he came to the conclusion, in his own words that (p. 486):

> "The resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him income tax may properly extend to that person in respect of his foreign income, and that flowed from the phrase "taxes on income" used in the Government of India Act, 1935. The further observation indicates the basis of this judgment, and it is as follows (p. 486):
>
> "The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test. Their Lordships propose to confine themselves to that short point and do not propose to lay down any general formula defining what territorial connection is necessary. In their view the derivation from British India of the major part of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be

derived. If it is so at home in British India, it is a person properly subject to the jurisdiction of the Central Indian Legislature.

22. Similar reliance was placed on the judgment in the case of *Wadia v. Commissioner I.-T., Bombay*[16] the judgment being of the Federal Court. The learned Chief Justice Sir Harilal Kania at page 296 laid down the four heads set out under which a subject would fall within the ambit of the charging section, namely Section 4, and stated that on a scrutiny of the four heads "it is clear that there is some connection between the person earning income in that way and British India, in each case." He then examined several judgments on this question which laid down the test as regards the correct principles to determine whether the jurisdiction in question was extra-territorial or not. He indicated that each of the four heads showed a real connection between the person receiving income under the particular head and India and that once such connection is held to exist, it is unnecessary to ascertain the extent of the connection. Thereafter the learned Chief Justice quoted the passage from the judgment of the Privy Council I have just referred to, namely

> "the resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him income-tax may properly extend to that person in respect of his foreign income, and the learned Chief Justice said that the only short question was whether income arising out of a transaction with these incidents establishes some real territorial connection between the person and British India or not. The matter is entirely one where the subject to be controlled is within territorial jurisdiction and his activities or income outside the jurisdiction is controlled under a special Act. The question is, therefore, one of enforcing a valid piece of legislation within the territorial limits of the State. The question argued before me is not what can be enforced within the State as covered by the above authorities, but what can be enforced outside the State i.e. outside the territories

[16](1948) 51 Bom. L.R. 287 F.C

> and therefore in my opinion these decisions cannot help and they have no applicability to the situation before me.

23. The last point in connection with this point argued by the Advocate General of Uttar Pradesh was that in any event even if the arrest were held to be illegal in Bombay, from the time the plaintiff entered the territories of Uttar Pradesh the detention was fully legal and his original illegal arrest was entirely immaterial, and lie strongly relied upon the judgment of the High Court of Bombay in the case of *Emperor v. Vinayak Damodar Savarkar*[17] The question discussed before the bench was, where a party is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country. Savarkar was charged with conspiracy under Sections 121, 121A, 122 and 123 of the Indian, Penal Code and was committed for trial before a Special Bench. Savarkar had been arrested in England under the Fugitive Offenders Act. Whilst he was being brought under arrest

Savarkar escaped from police custody at Marseilles and was recaptured on French soil. He, therefore, claimed asylum of that country and contended that the Court had no jurisdiction over him, and took no further part in the trial. The trial was challenged on the ground that the Court had therefore no jurisdiction to try him in those particular circumstances, his recapture and arrest following thereon being entirely illegal. On behalf of the Government it was argued, without admitting any of the allegations made as regards the recapture, that the circumstances of Savarkar's re-arrest were entirely irrelevant. That contention was upheld on the ground that where a man is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country. In support of that Chief Justice Cockburn's charge to the Grand Jury in the case of *Queen v. Nelson and Brand Charge to the Grand Jury*[18], was set out by the Appeal Court and Lord Chief Justice Cock-burn observed us follows (p. 229):

> "...Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him'.

In other words these decisions come to this that the illegality of arrest in a foreign country is entirely irrelevant to the actual trial for an offence under the Penal Code or the criminal law of the land, but the observations of Lord Chief Justice Cockburn indicate that an independent action would lie by the accused whether he was convicted or acquitted

[17](1910) I.L.R. 35 Bom. 225 : S.C. 13 Bom. L.R. 296

[18]2nd Edition p. 118

against the parties that had brought about his illegal arrest and that was reiterated in Ex parte Scott (1829) 9 B. & C. 446. Chief Justice Sir Basil, Scott with reference to the case of *Muhammad Yusuf-ud-din. v. The Queen-Empress*[19] remarked as follows (p. 230):

> "It is to be observed however that the Lord Chancellor in delivering judgment was careful to point out that their Lordships were called upon to pronounce their opinion as to the legality of the arrest, but they had nothing to do with the question whether or not if the accused had been found within. British territory he could have been lawfully tried and convicted; nor with the consequences of the arrest being lawful or otherwise.

24. The only point that is made in this decision is that an illegal arrest cannot be a plea to a bar on a trial for offence and is irrelevant for that purpose. Therefore it cannot have any bearing at all on the question before me whether the arrest itself was illegal or not in law.

25. In these circumstances I have given sufficient reasons above why I have come to the conclusion that the writ docs run. I have stated that if it does run, all officers or any one else aiding in the execution of the writ would be protected, because as laid down by May at p. 97, both Houses consider every branch of the civil government as bound to assist, when required, in executing their warrants and orders, and have repeatedly required such assistance.

26. In regard to the Commissioner of Police, defendant No. 3, it is obvious that if the Court of law as stated above could not scrutinize the warrant, the Commissioner of Police could not do so, but apart from that it is argued that the action of the Police Commissioner was such that a remedy against, any such action was barred under the Bombay City Police Act of 1951. Section 161 of that Act, it is argued, is a complete answer on behalf of defendant No. 3. The section refers to suits or prosecutions in respect of acts done under color of duty as not to be entertained if not instituted within six months of that Act and the section runs as follows:

> "161(1) In any case of alleged offence by the Commissioner, a Magistrate, Police officer or other person, or of a wrong alleged to have been done by such Commissioner, Magistrate, Police officer or other person, by any act done under color or in excess of any such duty or authority as aforesaid, or wherein, it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the Act complained of.
>
> (2) In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall be bound to give to the alleged wrong-doer one month's notice at least of the intended suit with a sufficient description of the wrong complained of, failing which such suit shall be dismissed.
>
> (3) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service, and shall state whether any, and if any, what tender of amends has been made by the defendant. A copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the

[19](1897) L.R. 24 I.A. 137

> plaintiff of the time and manner of service thereof.

The section itself is quite clear and action against such an officer would be barred against him. Against this it is argued on behalf of the plaintiff that the section does not apply if the plaintiff succeeds on merits. I do not see how the section does not apply because it talks of any act done under colour or in excess of any such duty or authority as aforesaid. Therefore to my mind it would come within this section. The next argument was that it must be such duty or authority as

aforesaid and I was referred to Sections 159 to 160 and it was argued that the indemnity given would only cover the party if he carried out such duty or authority. I do not see how this indemnity is qualified by the terms of Sections 159 and 160 and therefore in. any event there is a clear bar of limitation to this action even if the plaintiff had a remedy, for that remedy under this section stands barred against defendant No.3.

27. If the warrant is subject to scrutiny, the only other point that was being made was that the warrant being addressed to the Commissioner of Police is bad (exh. A). It is stated that the jurisdiction in contempt matters must be exercised by the Tribunal through its own officers and that there is no provision under the rules nor under any law. It was argued that the House of Commons exercised the execution of its warrants through Sergeant-at-arms and that the High Court would exercise it through the Sheriff. I have already pointed out in my judgment above that there is no machinery provided for this, and whether that was so intentionally or not, a warrant of this nature cannot be held to be bad because it is addressed to the Commissioner of Police, As pointed out by me above, even if it is addressed to the Sergeant-at-arms by the Speaker of the House of Commons, the Sergeant-at-arms would take in aid in. execution of the warrant through the Police or even any civilian, I need not dilate on this point as I have considered the question of the machinery for execution of the warrant at some length in my judgment above and I am unable to come to the conclusion as suggested on behalf of the plaintiff that the warrant being addressed in the manner in which exh. A is addressed is therefore bad. It cannot be denied that an officer of the House, whoever he may be, can take other aid. It was signed by the Speaker and made over to an officer of the House who addressed a letter to the Chief Secretary enclosing the warrant. The power to punish for contempt must imply and implies procedure to enforce it and it, must be part of the privilege of the House to make its orders effective.

28. On this finding the suit would not be sustainable, but as trial Court I have to answer, other questions on the footing that my conclusion arrived at above is not correct.

29. The next question arising, if this answer were otherwise given, would be, whether the defendants are liable for damages in tort. But before I deal with that question, it is necessary to dispose of certain other points raised in connection with parliamentary practice and that would be more convenient to deal with at this stage, apart from the further questions whether the defense is barred on the principle of res judicata on account of a certain judgment obtained by the plaintiff in connection with his detention from the Supreme Court of India and the further question whether the exercise of the privilege under Article 194(3) is in contravention of the fundamental rights provided for under the Constitution.

30. The question posed is the question whether the prorogation of the House and the re-assembling of the House on March 7, 1952, amounted to a new Session of the House and whether the business transacted prior to the prorogation lapsed. The Privileges Committee was appointed and met on November 3, 1951, December 1, 1951, and on December 21, 1951. The report of the Privileges Committee was signed on January 18, 1.952. The Legislative Assembly

was prorogued on February 20, 1952, and the Session met again on March 7, 1952. It is argued that all business apart from pending Bills lapsed on February 20, 1952, when the Assembly was prorogued and all business came to an end on February 20, 1952, and could not have been continued in the new Sessions which met on March 7, 1952. The Motion on which a resolution was passed (exh. D) is dated March 7, 1952, namely, a decision that a warrant should be issued for the production of the plaintiff before the Bar of the House on March 19, 3952. On this question Mr. Palkhivala relied upon the observations in May's Parliamentary Practice at pages 264 and 265. Under the heading "Effect of prorogation and adjournment" May states that the effect of a prorogation is

> "at once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end, but all proceedings pending at the time are quashed, except impeachments by the Commons and appeals before the House of Lords. Every bill must therefore be renewed after a prorogation, as if it were introduced for the first time.

On the other hand it is pointed out that an adjournment of the House has no such effect on parliamentary proceedings and that after adjournment each House proceeds to transact the business previously appointed and all proceedings are resumed at the stage at which they were left before the adjournment. In further support of this contention Mr. Palkhivala pointed out that under our Constitution pending bills alone are excepted and that is expressly provided for if one reads Article 174 with Article 196. Article 174(2) states that the Governor may from time to time prorogue the House or either House and Article 194(3) states that a Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof. Anson in his Law & Custom of the Constitution at page 73 states that prorogation ends the session of both Houses simultaneously, and terminates all pending business, and a Bill which may be pending at the date of the prorogation must begin at the earliest stage when Parliament is summoned again and prorogation is effected at the end of a session either by the King in person or by Royal Commission. In this connection my attention was drawn to Rule 171 of the Rules of Procedure of the U.P. Legislative Assembly. It is under the Chapter headed "General Rules of Procedure" and Rule 171 runs as follows:

> "When the Assembly is prorogued all pending notices shall lapse but all Bills which have been introduced shall be carried over to the list of pending business of the next session.

It is argued that all pending matters are thereby brought to an end, that the new session therefore should have started the matter dc nova if they could, but it was argued that they could not do so and that the new Session could not take cognizance of contempt of the old Session. This is attempted to be supported by the proposition that punishment cannot extend beyond the Sessions in which the matter is considered and that the power of the House of Commons is only to commit and detain for the term of the session and that the House of Commons cannot detain a prisoner for a period beyond the current session as referred to by May in Parliamentary Practice at page

100. It is further argued that under Rule 2, which provides for definitions, "prorogation" is denned to mean the ending of a session by an order of the Governor under Clause (2)(a) of Article 174 of the Constitution. It is further pointed out that under Rule 49 it is provided that at the commencement of every session, the Speaker shall nominate a Committee of Privileges consisting of 10 members and therefore in these circumstances it is contended that there must be a new Committee of Privileges at the commencement of every session. On this footing it was argued very strenuously that the plaintiff was arraigned before one Committee of the House and sentenced by another Committee and that one session of the House does not dovetail into another except that under the Constitution itself Bills arc expressly saved. It is argued that the Report which was made in one Session could not be acted upon in the next Session, because, that Report lapsed or was quashed following upon the prorogation of the House and that Report which was the foundation on which the punishment could be meted out was no longer there and therefore the very foundation on which the punishment was founded did not exist. In support of this certain Rules of Procedure of the Assembly were referred to. Rule 53 provides that after the report of the Privileges Committee has been placed on the table of the House, the Chairman of the Committee or any member of the Committee or any member of the House may move that the Report of the Committee be taken into consideration, and Rule 57 provides under Sub-rule (2) for a substantive motion on the subject. It is argued on the above footing that therefore the proceedings were a nullity, the matter having lapsed in the session prior to the one in which the Assembly mot again and passed the resolution on March 7, 1952.

31. Now the facts in connection with this point are not in dispute at all between the parties, but it was argued on behalf of defendant No. 2 that whether pending proceedings lapsed or did not lapse is entirely a matter of procedure and Rules of Procedure are dealt with under Article 208 of the Constitution, namely, that a House of Legislature of a State may make rules for regulating, subject to the provisions of the Constitution, its procedure and the conduct of its business. It is important to note that the rules are to be made by the Legislature, and in the absence of such rides under Sub-clause (2) of Article 208 the Rules of Procedure find standing orders in force immediately before the commencement of the Constitution shall have effect. In other words in the absence of any specific rules being made by the Legislature the procedure that was in existence before the commencement of the Constitution is to apply. It is clear that the Constitution, although it grants the privileges and immunities of the House of Commons under Article 194(3), does not assimilate the procedure of the House of Commons for the purposes of the working of a House of the State under the Constitution. This is clear from Article 208(2) that until, rules are made as regards procedure by the Legislature, the procedure of the former Legislature applies and not the procedure of the 'House of Commons of the United Kingdom. It must be remembered despite the reference to May that although a new session is referred to, the same House re-assembles and meets again. Therefore whether the business lapses or not is entirely a matter of procedure. The contention on behalf of the plaintiff that business pending in one session cannot be taken up by another, is not to my mind a sustainable one, because the House or the Constitution of the House does not end with prorogation, and if it does not end with

prorogation, does the power to punish come to an end merely because the House ceases to do business and function an a House for a particular period of time? If the contention on behalf of the plaintiff were sustainable, then the result would be that unless a contempt is committed in the face of the House there would be no power of the House to punish in certain circumstances, because, first of all notice is to be given to the party and time would be essential to enable the party to defend, and if contempt is committed at the end of a session and just before prorogation, there will be no time or opportunity to hear the party at the Bar or to investigate the contempt through a Committee of Privileges, and this would be the natural result if the contention were accepted. As pointed out by May at p. 133:

> "Either House will punish in one session offences that have been committed in another...(and) it also appears that a contempt committed against one Parliament may be punished by another; and libels against former Parliaments have often been punished.

32. In this connection it must be remembered that under Article 85 the President is empowered from time to time to summon each House of Parliament to meet at such time and place, as he thinks fit and he may from time to time prorogue the Houses or either House of the Legislature of the State and the Governor may from time to time prorogue the Houses or either House and dissolve the Legislative Assembly. It is clear from this that although the Legislative Assembly is dissolved, the Council of States is not dissolved, and therefore in India there cannot be a dissolution of Parliament, and therefore in India it would follow that the contempt would be the contempt of the same Legislature. As pointed out by Basu in his Commentary on the Constitution of India, Vol. I, at pages 526 and 527, that

> "...on a proper reading of Article 85(2) implies that Parliament, as referred to in Article 79, will be regarded as a permanent institution, though there may be changes in the Houses [and therefore] the Parliament of India will never stand dissolved, though one of its Houses may be. This is a departure from the English precedent, for in England, it is 'Parliament' that is dissolved even though the House of Lords is a hereditary body. So, when Parliament is dissolved, there is no House of Lords, until the next Parliament is summoned, and under the Constitution as pointed out by Basu, the Council of States can effectively function while the House of the People remains dissolved.

33. It is, however, not correct to say that there was prosecution by one House and punishment by another. In fact, if facts are looked at, nothing was actually before the House and brought before the House until after prorogation and it was for the first time before the House on March 7, 1952. The Privileges Committee is merely an investigating committee and under the Rules a, Privileges Committee can be asked to report at the instance of the Speaker who may refer matters to it suo motu without the House referring any matter to the Privileges Committee. It is the Resolution of March 7 of the House that was being implemented and the whole of the cause of action is laid on events between March 11 and 18 and not after March 18.

34. Therefore, it is clear that this is a matter which is part of the procedure of the House and English practice is not assimilated under the Constitution for the purposes of procedure and there is nothing in the Constitution or the Rules lending colour to the arguments advanced. Under the Constitution legislative procedure is laid down under Article 107 in connection with the Union Parliament and under Sub-clause (3) a Bill pending' in Parliament shall not lapse by reason of the prorogation of the Houses and under Sub-clause (4) a Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People. Under Article 196(5) a Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on the dissolution of the Assembly. Far from the plaintiff's case being supported by these articles, it is clear that this is purely a matter entirely of procedure. A similar provision is to be found in the Act of 1935 whereby under Section 30 a Bill pending in the Dominion Legislature is not to lapse by reason of the prorogation of the Legislature. Even reading Rule 171 of the Rules of Procedure of the Madhya Pradesh Legislative Assembly, it says that when the Assembly is prorogued all pending notices shall lapse. In these circumstances it is not possible to accept the contention on behalf of the plaintiff that all pending matters, whatever they be, must lapse apart from Bills that are saved from lapsing under the Constitution.

35. In this connection, the defendants have argued that even under the English practice, if it were applied, the plaintiff has no case on this point. Because, it is clear that the question is, was the matter pending at the end of the Sessions namely what was pending at the time of prorogation. It is argued that nothing was pending at the time of prorogation and only an. enquiry had been directed under the rules and therefore there was nothing pending even if the English practice were considered applicable to the circumstances. There was no matter pending at the instance of the House. As regards the procedure in the House of Commons, May at p. 250 points out that:

> "When Parliament is prorogued before a return is presented, it is not the modern practice to renew the address or order in the following session, but the order is held to have force from one session to another until it is complied with...orders of a former session have been read, and the papers ordered to be laid before the House forthwith.

Now on behalf of the plaintiff it was argued that the 'Report was made by one Committee and that each session must appoint its own Privileges Committee for the current session, the underlying suggestion being that if a reference had to be made to a new Privileges Committee, the result may have been different. Now, if one looks at Rule 49 of the Rules of Procedure, it is headed "Committee of Privileges" and Sub-rule (1) says that at the commencement of every session the Speaker shall nominate a Committee of Privileges consisting of 10 members, including the Deputy Speaker who shall be its Chairman, and therefore the Speaker could appoint the Privileges Committee consisting of former members by reappointing them and therefore there is no question of a lost opportunity as far as the plaintiff is concerned.

36. The rules in connection with the question of privilege under Chap. 8 of the rules show that under Rule 44 a breach of privilege may be brought to the notice of the House by a Report of a Committee and under Rule 48 the Speaker may consider the matter fit to be referred to a Committee of Privileges for report. The Report may be under Rule 54 by the Secretary and under Rule 61 unless the breach, of privilege is committed in the actual view of the House, the House shall at some proper stage of the proceedings before the sentence is passed give an opportunity to the person charged to be heard in explanation or exculpation of the offence, and under the proviso' it is unnecessary for the House to give the party in certain circumstances any opportunity to be heard. The Report was in these circumstances considered by the House on March 7, 1952, and if one reads exh. D, it discloses no action of the House so far on the Report itself. The resolution of the House is of March 19, on which day the Report was considered, but the plaintiff does not depend for his cause of action on anything that took place after March 18, 1952. In these circumstances, it is clear that there is no question of the Report having lapsed and that it could not be considered by the session that mot after prorogation. It is pointed out in May at page 265 under Note (g) that:

> "Proposals have been made to provide, either by statute or by standing orders, for the suspension of bills from one session to another, or for resuming proceedings upon such bills, notwithstanding a prorogation. These schemes have been discussed in Parliament and carefully considered by committees: but various considerations have restrained the legislature from disturbing the constitutional law by which parliamentary proceedings are discontinued by prorogation.

37. It is argued that even otherwise if it is a matter of procedure and if it is wrong procedure, Article 212(1) is a complete answer, namely, that the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure." In these circumstances, in my opinion the point made on behalf of the plaintiff is not maintainable, namely, that the proceeding had lapsed and the subject could not be considered by the House which met after prorogation.

38. A point was attempted to be raised on behalf of the plaintiff, namely, that although it is well established that a House has power to punish by imprisonment and also order the party to be arrested and brought before the Bar of the House, there was no power to detain the prisoner prior to his sentence for any length of time and that be was arrested on March 11, and released on March 18, the returnable date for presenting himself before the Bar of the House being March 19, and that it was not part of the privilege to detain a party for a term before the returnable date. That question not being in the pleadings, nor having been set out in the statutory notice, was held by me to be a point that could not be raised and thereupon it was not argued any further.

39. It was further argued that the detention has been held to be void under Articles 21 and 22 of

the Constitution by the Supreme Court which is conclusive on this question; that facts were admitted before the Supreme Court on which a judgment was delivered which is conclusive; that the statement contained in para. 7 of the plaint is not traversed and therefore on the broad principle of res judicata the defendants cannot be heard to say to the contrary. When the plaintiff was under detention a petition was presented to the Supreme Court by a friend of the plaintiff, one G.K. Reddy, against defendant No. 1 and defendant No. 2 State under Article 32 of the Constitution of India for the release of the plaintiff, and the grounds set out are set out in para. 7 of the plaint, namely, that it was not competent for defendant No. 1 as the Speaker of the Legislative Assembly, Uttar Pradesh, or for any person appointed or authorized by him or defendant No. 2 State to execute a warrant issued by defendant No1 outside the territorial jurisdiction of defendant No. 2 State; that defendant No. 3 and defendant No. 4 acted illegally and without jurisdiction, and thirdly that the plaintiff's arrest and detention was ultra vires of the Constitution as infringing and contravening Article 19(1), Article 21 and Article 22 of the Constitution of India; that the said Legislative Assembly and defendant No. 1 had no authority to try the plaintiff for the alleged contempt, and lastly that the said Legislative Assembly had no authority to make rules or exercise powers inconsistent with the fundamental rights guaranteed by the Constitution of India. It is perfectly true that a petition in that form was presented. Now it is clear from a copy of the judgment annexed to the plaint itself that the learned Judges of the Supreme Court passed an Order and the judgment is headed "Order". It is quite clear from this order that when the petition was opened certain facts were admitted by both parties, first that the petitioner in that petition was arrested in Bombay on March 11 and taken in custody to Lucknow to be produced before the Speaker of the Uttar Pradesh Legislative Assembly to answer a charge of breach of privilege, that the plaintiff was not produced before a Magistrate within 24 hours of his, arrest and remained in detention in the Speaker's custody at Lucknow. The Attorney-General admitted before the Bench that this allegation was well-founded,

> "that is to say, that since his arrest on the 11th March, Mistry has not been produced before a Magistrate; but is still detained in custody.

Thereupon the learned Judges on these admitted facts came to the conclusion that that was a clear breach of the provisions of Article 22(2) of the Constitution of India and concluded, by saying

> "In view of the admitted facts it is perfectly clear that, this provision of the constitution has been contravened and the said Mr. Mistry is entitled to his release.

This is the whole of the order passed. It must be remembered that on these admitted facts the learned. Judges simply indicated that Article 22(2) had been contravened. The only parties before the Supreme Court were defendants Nos. 1 and 2. The question is what her on the principle of res judicata the defendants in this suit, are barred from contending that the detention was proper and valid in the eye of the law. On a reading of the judgment it is clear that the conclusion arrived at on this order was on admitted facts which indicated that the Constitution had been infringed.

There is no mention in the order that the warrant was the warrant of the Legislative Assembly of Uttar Pradesh or that the warrant was for contempt of the said House. The Uttar Pradesh Legislative Assembly was not impleaded as a party nor were defendants Nos. 3 and 4 in the present suit. All that was admitted on which the conclusion necessarily followed was the arrest at the instance of and the custody of the Speaker. The whole of this evidently hangs on. the averments set out in para11 of the petitition which is exh. F which runs as follows:

> "Your Petitioner states that since his arrest and detention on the 11th March 1952 the said Homi Dinshaw Mistry has not been produced before any Magistrate and has been kept in custody of either the first or the second Respondent or both without the authority of any Magistrate. Your Petitioner therefore, submits that the Respondents have violated the fundamental right guaranteed under Article 22 of the Constitution of India and that the arrest and detention of the said Homi Dinshaw Mistry is ultra vires, illegal and invalid.

40. Now it is abundantly clear that under Article 141 of the Constitution any law declared by the Supreme Court, shall be binding on all Courts within the territories of India. The question is whether there is any declaration of law to be found in this order. There is only a statement of admitted facts and the sequitur that on these admitted facts Article 22(2) must be applied. But, altogether apart from that there is a decision of the Supreme Court itself reported in *The State of Punjab v. Ajaib Singh*[20] and in that judgment the learned Judges have had reason to refer to this petition. Before discussing that case, it is necessary to set out certain points. The first is that the Speaker is not the authority that issued the warrant. The warrant was issued by the High Court of Parliament namely the House of the Legislative Assembly and the signature to the warrant was appended by the Speaker entirely in his administrative capacity. I am entirely of the opinion that the manner in which the facts were admitted indicated that the warrant was looked at as if it was, issued by the executive and not by a judicial authority. The warrant exh. K is signed by the Speaker in pursuance of the 'Resolution of the House, and therefore in my opinion clearly the authority issuing the warrant was the House and not the Speaker. It is perfectly true and rightly pointed out by Mr. Palkhivala that the body of the petition does indicate the allegation that it was in pursuance of certain contempt proceedings that the warrant was issued, but, those statements were not made the basis of the judgment, but certain admitted facts as regards the period of detention and non-production before a Magistrate within twenty-four hours. Therefore if the Order which amounts to a judgment is to be binding it would be binding, as I have pointed out above, under Article 141 as laying down the law.

41. Now the case of *The State of Punjab v. Ajaib Singh* is the last word on the subject and their Lordships have referred to the Slits case in that judgment. That case was considered under the Abducted Persons (Recovery and Restoration) Act under which Police Officers are authorized to take abducted persons into custody and deliver such persons to the officer1 in charge of the camp, and the question was raised whether such an arrest was contrary to the scope of Article 22 of the Constitution. It was held that (p. 269):

> "...the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under Section 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Article 22(1) and (2) of the Constitution and therefore the Abducted Persons (Recovery and Restoration) Act does not infringe the fundamental right guaranteed by Article 22 of the Constitution.

The argument in that case was set out at p. 262, namely that the Constitution commands that every person arrested and detained in custody shall be produced before the nearest Magistrate within twenty-four hours excluding the time requisite for the journey from the place of arrest to the Court of the Magistrate and that Section 4 of that Act required the police officer who takes the abducted person into custody to deliver such, person to the custody of the officer-in-charge of the nearest, camp for the reception and detention of
abducted persons, and they held that (p. 263):

[20] [1953] S.C.R. 254

> "...whatever may be the effect of the absence from the Act of provisions similar to those of Article 22(1), the provisions of Article 22(2) which is wholly inconsistent with Section 4 (of the Act) cannot possibly, on account of such inconsistency, be read into the Act. The sole point for our consideration then is whether the taking into custody of an abducted person by a police officer under Section 4 of the Act and the delivery of such person by him into the custody of the officer-in-charge of the nearest camp can be regarded as arrest and detention within the meaning of Articles 22(1) and (2). If they are not, then there can be no complaint that the Act infringes the fundamental right guaranteed by Articles 22(1) and (2).

The test applied by the learned Judges of the Supreme Court shortly put was the test whether the warrant issued was a warrant by executive authority or a warrant issued by a judicial authority, and they posed the question whether the protection under Article 22 extends to both categories of arrest as indicated above and if not which of them comes under its protection. This is what they say in that connection (p. 268):

> "...In the case of arrest under a warrant issued by a court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. It is also perfectly plain that the language of Article 22(2) has been practically copied from Sections 60 and 61 of the Code of Criminal Procedure which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The

> requirement of Article 22(1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest without a warrant of Court, for, as already noted, a person arrested under a court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected.

They sum up the position by saying that (p. 269):

> "...In other words, there is indication in the language of Article 22(1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority.

Thereafter they emphasize this position by indicating that "the Blitz case" relied upon proceeded on this very view, for there the arrest was made on a warrant issued, not by a Court, but, by the Speaker of a State Legislature and the arrest was made on the distinct accusation of the arrested person being guilty of contempt of the Legislature, So that it is clear that on admitted, facts it was held that it was a Speaker's warrant and therefore a warrant by the executive. It is quite clear that the question whether the warrant issued at the instance of the House in contempt proceedings is a judicial, warrant or not, was not posed, nor was any argument advanced on any point on either side before the order was passed by the Supreme Court, on the said Petition. As I have indicated, the last word is in the judgment of the Supreme Court in the case of *The State of Punjab v. Ajaib Singh.* Applying the test laid down by their Lordships and following the observations of their Lordships in this case where they have indicated how they entertained the petition in The Blitz case, I have come to the conclusion that this is a judicial warrant and on the face of it indicates that the warrant is issued in connection with, contempt of the House and therefore it would clearly fall within one of the categories indicated by their Lordships. The categories indicated are two and it is within the category of judicial warrant that this warrant necessarily falls and therefore cannot draw the protection afforded by Article 22 of the Constitution. It is clear to my mind therefore that the ratio is clearly laid down in Ajaib Singh's case and there is no ratio to be drawn from the order dictated on the petition presented by the plaintiff which would make Article 141 of the Constitution applicable. In this connection the observations of the Privy Council in the case of *Mata Prasad v. Nageshar Sahai*[21] should be kept in mind. The observations are as follows (p. 417):

> "In view of the peculiar course adopted by the Subordinate Judge in dealing with this case and in order to prevent other Courts in India from falling into the same error, their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them whether on account of 'judicial dignity' or otherwise, to question its decision on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the

Judicial Committee.

The only principle on this question enunciated by their Lordships of the Supreme Court is to be found in Ajaib Singh's case, and I am not entitled to rely upon the judgment in the petition and draw any logical results attending thereon. That the ratio must not be carried to a logical conclusion in another case is laid down in the judgment reported in *Quinn v. Leathem*[22] the relevant passage being at page 506. Lord Halsbury observed in his judgment as follows (p. 506):

> "...Now, before discussing the case of *Allen v. Flood*[23] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

In the result the contention of the plaintiff on this point could only be sustained and be sustainable if there was a declaration of law laid down by the Supreme Court in the judgment delivered on the Petition and if no later decision of the Supreme Court were available on the subject. In these, circumstances as indicated above, I am of the opinion that the decision of the Supreme Court on the petition the order whereof is appended to the plaint is not a bar against the defendants.

[21](1925) L.R. 52 I.A. 398 : S.C. 28 Bom. L.R. 1110 [23][1898] A.C. 1

[22][1901] A.C. 495

42. The next point that must, be dealt with is an argument presented on behalf of the plaintiff that the action of the defendants in obtaining the arrest and detention of the plaintiff was contrary to the fundamental rights provided under our Constitution. Now Mr. Palkhivala in answer to my question conceded that this Court has no jurisdiction to declare any one article as overriding another or to hold that one article negatives the effect of another. According to Mr. Palkhivala the privileges of the Assembly as a House are controlled by the provisions made and set out in the Constitution in connection with fundamental rights and it was argued from that that the House had no power to commit for contempt where the committal is in denial of any fundamental right prescribed by the Constitution. It was argued that if there was any inherent right in the House to try and punish for contempt prior to the Constitution, the Constitution itself has circumscribed that right now and it was therefore argued that the power conferred under Article 194(3) is cut down. It was contended that the judgment of the Supreme Court on the petition upheld the fundamental rights against the privilege of the Legislature. Now the question is, are the rights under Article 22 superior to and above the privilege conferred and expressly conferred by Article 194 of the Constitution and does Article 19(1)(a) similarly control and cut down the power

conferred by Article 194? The attempt to my mind to do this must necessarily lead to the question namely, are the privileges and powers conferred under Article 194(3) cut down in terms or by implication, and it was argued that the immunity of the Speaker even if conceded in carrying out the orders of the House cannot avail any of the other defendants. It was contended that the Legislature is not a Court and for that purpose May on Parliamentary Practice was also again resorted to. The quotation of Justice Coleridge at p. 165 of May's Parliamentary Practice was relied upon where he said:

> "... In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties : it has no means of doing so; it claims no such power; powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between courts; and, in the only sense therefore in which this argument would be of weight, it does not apply. In any other sense the argument is of no force.

It is perfectly true that although the House of Commons started as the judicial arbiter of the nation it lost all its functions as a Court of law, but it retained and exercised that part of its functions as a Court of law for the preservation of the dignity of the House, namely the power to try and punish for contempt. To that extent it is to my mind a Court, nonetheless for Justice Coleridge himself used the words "except where it is itself a party, in the case of contempts." Therefore now we must consider how far do the fundamental rights affect the privilege set out under Article 194. As I have indicated above there is no expression used nor is there anything implied to suggest that anywhere in the Constitution Article 194 has been qualified or cut down. Every fundamental right must be a justiciable one, and if it is a justiciable one, scrutiny of the Court must be there, and if so, it would lead to scrutiny by the Court in the internal affairs of a Legislature which must on that argument become necessary and found inevitable. Now under Article 105 and Article 194 privilege is in fact the same as the privilege enjoyed by the British Parliament, and if it is to be enjoyed, in the same manner, the words of Article 194 are quite clear-the privileges are those of the British Parliament-, then unless outside control is eliminated the essence of privilege would be destroyed, because it would then not be able to survive if scrutiny by Courts is allowed, and as set out in May at pages 171 and 172 even statute law is not binding on the House of Commons where it is considering its internal affairs.

43. Apart from that the manner in which Article 194 is framed gives an indication on this point, because Article 194(1) alone is made subject to the provisions of the Constitution and Sub-head (3) is not made subject to the provisions of the Constitution and it is a legitimate inference to draw that the framers of the Constitution did so deliberately. In Sub-clause (3) of that article, there appear the words "in other respects" which clearly indicate a clear dividing line indicating the clear adoption of the absolute privilege of the House of Commons, As I have indicated, this article is an exact replica of Section 49 of the Constitution of the House of Representatives of

Australia and in the case 1 have already referred to namely, *The Queen v. Richards; Ex Parte Fitzpatrick and Browne*[24] it is indicated at page 164 in very clear language as follows:

> "...For Section 49 says that, until the powers, privileges and immunities of the House are declared by Act of Parliament, the powers, privileges and immunities of the House shall be those of the Commons House of Parliament of the United Kingdom at the establishment of the Commonwealth. The language is such as to be apt to transfer to the House the full powers, privileges and immunities of the House of Commons. As Lord Cairns has said, an essential ingredient, not a mere accident, in those powers, is the protection from the examination of the conclusion of the House expressed by the warrant.

Now turning to Article 13 which prescribes the effect and extent of fundamental rights, it is clear that Article 13 does not show any intendment to affect the other articles of the Constitution. For instance, Article 14 lays down express limitation on the State as defined by Article 12 and limitations on the State arc to be found in several other articles. In Article 12 the words "other authorities" are used, but the words "other authorities" following upon the words, "local authorities" clearly show that the expression "other authorities" must be construed ejusdem generis with "local authorities" and cannot possibly include the Legislative House of a State. In this connection it must be remembered that the privilege and power conferred is not of the Legislature as such, for the Legislature includes both the Houses and the Governor, but the privilege is the privilege of the House of the Legislature and the House is not, included in the definition of the State as set out in Article 12 of the Constitution. The House, looking to the manner in which the privilege is conferred, is a separate entity not coming under Article 12 or Article 79. In these circumstances, the only conclusion one can come to is that none of the articles apply to the House of the Legislature and control Article 194 and that there is no express limitation on the House although limitations are to be found on the powers of the State, on the powers of the judiciary and on the powers of the executive, nor can. I find anywhere in the Constitution that there is any such limitation by implication. Therefore, fundamental rights are to be read as limitation on the Government or on the Legislature, but not as controlling other parts of the Constitution and the reason for limitations on the executive and legislative interference is to be found in the judgment of the Supreme Court in the case of The *State of Went Bengal v. Subodh Gopal Bose*[25] the

[24](1955) 92 Commonwealth L.R. 157 [25][1954] S.C.R. 587

relevant observations being at p. 607 where Chief Justice Patanjali Sastri observed that:

> "...Though, as pointed out...protection against executive action is not really needed under systems of Government based on British Jurisprudence according to which no member of the executive can interfere with the liberty or property of a subject except in pursuance of powers given by law, our Constitution-makers, who were framing n written Constitution, conferred such protection explicitly by including the executive Governments of the Union and the States in the definition of "the State" in Article 12. A fundamental right is thus

sought to be protected not only against the legislative organ of the State but also against its executive organ.

Also see *Ananthakrishnan v. State of Madras*[26] It is, therefore, clear that construction of articles set out in the Constitution with reference to fundamental rights must he made to reconcile with Article 194, namely leaving the privileges of the House inviolate and not make the privileges nugatory by such reading of other articles. In this connection also I may finally refer to *Queen v. Richards* where it is clearly held that the identical section, namely Section 49 of the relevant Act considered by that Court was not to be made subject to the other parts of the Constitution. On the contrary, in my view if there is any indication, it is the other way about, because, so many other articles of our Constitution including' Article 194(1) are made subject to the provisions of the Constitution and yet the founder's of the Constitution did not make Article 194(3) subject to the provisions of the Constitution.

44. Before proceeding with an important question that was argued in connection with the liability of the defendants in tort, I may again refer to the immunity claimed by the Speaker, defendant No. 1, under Article 212(2). Protection to the Speaker and Officers is evidently based on the complete supremacy of the House and the orders of the House have to be executed through the Speaker and powers of the Speaker are regulated by Rule 65 of the Rules of Procedure which says that the Speaker, or any other person authorized by him, in this behalf, shall have the power to execute all the orders passed and. sentences inflicted by the House. Therefore, when the warrant was issued by the House and ordered to be issued by the House it was signed by defendant No. 1, the Speaker, merely for the purpose of carrying out the order of the House. This is not in any sense an external act. In fact when the resolution of the House of March 7, 1952, was passed, the Speaker had to act under Rule 62 which says that the Speaker may summon the party charged by notice or warrant to appear before the House at any stage of the proceedings. Evidently the House did not want to wait until the plaintiff came within jurisdiction, but wanted the plaintiff to be taken into custody wherever the plaintiff may be found and to be brought before the Bar of the House. Therefore, fixing of the date and taking into custody naturally flowed from the resolution itself and the putting of the date or the returnable date in the warrant is to my mind, a ministerial act, namely fixing of date for the production of the party charged with the offence on any day before the conclusion of the Session. The warrant signed by the Speaker was passed on to the Secretary of the Legislative Assembly who passed it on to Bombay.

45. In these circumstances it is clear that the Speaker acted as an officer of the House and signed the warrant in performance of the duty arising in connection with the internal

[26][1952] 1 M.L.J. 208, 222

affairs of the House. On the admitted facts this position shows that defendant No. 1 did nothing except in his capacity as Speaker. The immunity is an absolute one and officers are protected even if the warrant is wrongly executed by others, and this is a clear bar under the Constitution

and stands on a different and a higher footing to a bar under a statute. In my opinion, therefore, as far as defendant No. 1 is concerned, the immunity provided by the Constitution is available and complete.

46. I have already stated that I am unable to see any reasoning set out in the case reported in *Anand Bihari Mishra v. Ram Sahay*[27] the relevant passage relied upon being at pages 173 and 174. A further judgment relied upon is in the case of *Raj Narain Singh v. Atmaram Govind*[28] The only passage relied upon in that judgment is at the end of the judgment in para. 68, where the learned Judge observed as follows (p. 712):

> "...I would have felt little difficulty in holding that the petitioner would have been entitled to relief by this Court because in my judgment the privileges, immunities and powers of the House or its Speaker could not override the positive prohibitions contained in the Constitution, nor could they make the provisions of Part III-the Fundamental Rights-nugatory, even though Article 194(3) has not been made specifically subject to the other provisions of the Constitution. To hold otherwise would he to place the Speaker or the Legislature of a State, above the Constitution-that, in my judgment, can never be held.

With, the utmost respect to the learned Judge, for reasons I have set out above. I am unable to adopt this reasoning set out in this paragraph.

47. If the conclusion I have arrived at, namely that the writ issued at the instance of the House can be executed beyond the territorial limits of Uttar Pradesh State, is correct, no further question would arise as regards liability. In connection with this writ I may state that under the Parliamentary practice if it is effective, then every officer, who is called upon to help in the execution of the writ by arrest of the person is bound to do so under pain of himself becoming liable for contempt in not aiding in. the execution of the order, and the same would apply, it appears from May's Parliamentary Practice, to every citizen called upon to aid in the execution of the said order. If that position is a correct position, no liability in tort would arise.

48. If, however, the position were otherwise, the question would arise, which I must determine, namely whether defendants Nos. 2 and 4, as Governments of their respective States are liable in tort, because in that event this would be an actionable wrong, and it is contended on behalf of the plaintiff that there is no distinction between a relief sought against a Government of a State on the ground of tort against property and on the ground of tort against the person of a party.

49. Now the question posed as regards the liability of the Government has been considered in numerous authorities. The question to be determined is, it is contended and rightly contended, different from the position prevailing in England. In England shortly put, the King can in theory do no wrong and therefore the Crown was at all times immune

[27][1952] M.B. 145
[28][1954] Cr. L.J. 691

from any action on the ground of tort committed by officers of the Crown. Even that position was modified subsequently by allowing a citizen if he felt aggrieved by an action against his property by the State to proceed by way of Petition of Bight and the Courts did entertain such a petition as that was an appeal against an act of an officer of the Crown and a grievance was laid under a petition which could be entertained and special procedure for that purpose was thereby adopted. The position in law in India is different and that came about by historical reasons inasmuch as the East India Company which was a trading corporation also held sovereign powers. Inasmuch as it was a trading corporation, all causes of action arising against it flowing upon its trading activities could be entertained by Courts of law, find when the East India Company's powers and duties were taken over by the Crown, the right to proceed against the East India Company survived to parties by express enactments and that was successively revived under different Government of India Acts as ultimately reflected in Section 176 of the Government of India Act of 1935 prior to which the suits could be filed against the Secretary of State for India in Council. The Secretary of State for India in Council was made a body corporate for the purpose of enabling it to sue and for enabling parties to sue it. That liability was embodied in Section 176 which says that:

> "The Dominion may sue or be sued by the name of the Dominion of India and a Provincial Government may sue or be sued by the name of the Province, and,...sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

This statutory right to sue is bodily preserved under our Constitution by Article 300 of the Constitution and it preserves intact what was enacted under Section 176 of the Government of India Act of 1935.

50. Now it appears that discussion has flowed on this question under several heads, namely whether an act of the Government is an act of State or a commercial venture or an act effected in the exercise of a statutory duty by officers of the Government, if authorised by the State, or for the benefit of the State and lastly where the State directs an act not covered by statutory duties. At one time there appeared to be a certain amount of confusion between the concept of an act of a State and an act flowing upon the exercise of sovereign powers possessed by the State. But it is clear that an act of State is an act which takes place to the prejudice of a foreigner and in those circumstances a Court would have no jurisdiction to enter upon an enquiry against the State. That was explained in the leading judgment of *Eshugbayi Eleko v. Government of Nigeria (Officer Administering*[29]*)* Lord Atkin delivering the judgment of the Judicial Committee said that (p. 671):

> "...A suggestion was made by one of the learned judges that the order in this case was an act of State. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of

waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of

[29][1931] A.C. 662

the act.

This observation was prefaced by the remark:

> "...In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive (p. 670).

Now the plaintiff lays this claim for damages against the State of Uttar Pradesh and the State of Bombay, defendants Nos. 2 and 4 respectively on the ground that both these parties directed an act carried out by certain officers which was not covered by statutory duties. It is alleged that the Government acted in ordering implementation of the warrant and thereby authorized and directed an illegal act. In fact it is pointed out that in the written statement of defendant No. 3, he states that he carried out the orders as issued by his superiors and thereby impliedly meant the State of Bombay. It is argued that the letter from the Secretary of the Uttar Pradesh Legislative Assembly dated March 7 to the Chief Secretary to the Government of Bombay enclosing the warrant dated March 7, 1952, is in itself a clear directive by the Government of Uttar Pradesh.

51. As far as defendants Nos. 2 and 4 go, they deny that any act in this connection was authorized by either of these Governments and they point out that the plaint itself clearly makes out a case as far as defendant No. 4 goes, that they were guilty of allowing their officer or officers to implement the warrant, but no direct authority in the sense of issuing of an order to carry out the arrest was at any time relied upon or pleaded. I am of the opinion that both defendant No. 2 and defendant No. 4 did call upon certain officers to execute the warrant, and if I am wrong on the other issue as regards the validity of the execution of the writ out of the territorial limits of Uttar Pradesh, defendants Nos. 2 and 4 cannot plead any immunity on the ground of lack of maintainability of the action by virtue of non-liability for tort by a Government on a discussion of the decisions which I proceed to consider.

52. The sheet-anchor of the defendants' arguments rests upon a leading decision, namely the case of the *P. & O. S.N. Company v. Secy. of State for India*[30] In that case after reviewing the different enactments and the rights and privileges and the liability of the East India Company and the successor of the East India Company, namely the Secretary of State for India, under different statutory enactments, the learned Judge, Chief Justice Sir Barnes Peacock, made certain

observations. He observed that:

> "This, as a general rule, is true, for it is an attribute of sovereignty, and an universal law, that a State cannot be sued in its own Courts without its consent.

But he pointed out that under 21st and 22nd Vict. Chap. 106, the Secretary of State in Council is rendered subject to the same liabilities as those which previously attached to the East India Company and that in determining the question whether the East India

[30](1861) 5 B.H.C.R. Appx. A, p.1

Company would, under the circumstances, have been liable to an action, the general principles applicable to sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. The case considered by the learned Judge was the case of an action arising out of an accident to a certain horse belonging to a party and the damage arising from an act of persona employed in Government service executing a Government undertaking, and the learned Judge observed as follows (p. 13):

> "We are of opinion that for accidents like this, if caused by the negligence of servants employed by Government, the East India Company would have been liable, both before and after the 3rd and 4th Wm. IV., c. 85 and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India...and that it would be inconsistent with common sense and justice to hold otherwise.

The learned Chief Justice who was a Judge of great eminence after that finding proceeded to say (p. 14):

> "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action would lie.

That has given rise to the argument that where an act complained, of was an act exercised by the State by virtue of its sovereign rights or exercised by an officer to whom certain powers flowing from that sovereign right are delegated, then an action against the State would be barred.

53. Now taking the authorities, the first is the case of *Forester v. Secretary of State for India in Council*[31] In that case the question was whether the resumption of certain lands in the possession of the Begum was an act of State or whether an act that could be one that could be sued upon. Their Lordships of the Privy Council held that the resumption could not be construed as an act of State at all, because it was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; but it was the resumption, under colour of a legal title,

of lands previously held from the Government by a subject under a particular tenure and the Government had resumed it upon the alleged determination of that tenure and that therefore the validity of the title to resume is prima facie cognizable by the municipal Courts of India. At page 16, their Lordships quoted from the judgment of Lord Kingsdown as follows:

> "...What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighboring state, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up has no foundation, and their Lordships

[31](1872) L.R. I.A. Sup. Vol. 10

concluded by saying (p. 17):

> "...If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would prima facie be cognizable by the municipal Courts of India.

This question has been considered by the Calcutta High Court in the case of *Uday Chand Mahtab v. Province of Bengal*[32] The learned Judge Mr. Justice Chakravartti at p. 145 said that the law as to the vicarious liability of the Crown in India for acts or omissions of its subordinate officers or agents is now fairly well-established. He then traced the history under the different statutes and said that the root authority on the point was the decision of Sir Barnes Peacock in the case of *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India* and he summed up at page 146 as follows:

> > "...One class are acts of State, properly so called, such as making a treaty, commandeering private property for war purposes, or quelling civil disturbances by force. Such acts are never justifiable in Courts of Law, and since the Crown itself is not answerable for such acts in its Courts, there is no principle upon which it could be made liable for the acts of its officers or subordinates. The immunity is absolute. The other class of acts are those which are done under the sanction of some municipal law or statute and in exercise of powers thereby conferred

As regards the other claws of acts he sub-divided them into two (a) those consisting in detention by the Crown of land, goods or chattels belonging to the subject and (b) those done by officers of the Crown in the discharge of their official duties and that in connection with the latter no action would lie except in cases where it can be proved that the impugned act had been expressly authorized by the Crown or that the Crown had profited by its performance. The learned Judge

observed (p. 147):

> "...The reason why no right of action lies except on proof of special authorization by the Crown is that, in the absence of such proof, the act is considered to have been done in exercise of the power or the discretion vested in the officer by the relevant law and not in pursuance of any implied authority derived from the Government.

This position has been considerably elaborated in the judgment which Mr. Palkhivala referred me to, the case being *Slate v. Rini Senabati*[33] At p. 615 Mr. Justice Ahmad considering the different exceptions under which the State would be liable stated that where the acts complained of consist in detention by the State of land, goods or chattels belonging to the subject though in fact those acts are done by the officers of the State in the exercise of power given to them under the municipal law, a cause of action would arise, and the subject has a right to maintain an action against the State, lie said, however, that the acts done in the exercise of sovereign powers are broadly divisible into two groups, the first covering the acts of State properly so called, such as making u treaty,

[32][1942] 2 Cal. 141

[33](1945) I.L.R. 32 Pat. 603

commandeering private property etc., the second covering' the acts done under colour of municipal, law as to which the agent at any rate is always responsible. Now considering these authorities it is argued on behalf of defendants Nos. 2 and 4 that the judgment of Sir Barnes Peacock in the case of Peninsular and Oriental Steam Navigation Company, has been approved by their Lordships of the Privy Council in the case of *Secretary of State for India v. Moment*[34] at page 48 and therefore unless the decision in the Peninsular and Oriental Steam Navigation case is dissented from by the Privy Council or the Supreme Court, it stands as good law today. The reason why it was argued by Mr. Seervai that this is the last word and is still, good law having been approved by their Lordships of the Privy Council, is to be found in a certain observation made by Lord Haldane in the case of *Secretary of State for India v. Moment.* The question that their Lordships of the Privy Council, were considering in this case was whether Section 41(b) of Act IV of 1898 (Burma.) which enacted that no civil Court was to have jurisdiction to determine a claim to any right over land as against the Government, was ultra, vires, as being in contravention of Section 65 of the Government of India Act, 1858, and that was the only question that was being considered. The argument was that Section 65 provided that there was to be the same remedy for the subject against the Government as there would have been against the East India Company and that it could not be affected by an Act of the Indian Legislature. Their Lordships after considering the relevant provisions of the Government of India Act held that Section 41 of Act of 1858 was ultra vires. Tile suit was a suit for damages for wrongful interference with the plaintiff's property in land and it was held that a suit for damages for wrongful interference with the plaintiff's property in land would have lain against the East India Company and therefore on the principle laid down in the case of the Peninsular & Oriental Steam Navigation Company, the cause of action was there and the suit was maintainable. This does not mean, as I will show hereafter, that the observations of Sir Barnes Peacock, which I have quoted

above, were in fact approved of by their Lordships of the Privy Council and adopted by them as argued by Mr. Seervai. Even otherwise if *Secretary of State for India in Council v. Moment* could be read as approving of the observations of Sir Barnes Peacock, even then Mr. Seervai's contention would not be acceptable to me, because it is pointed out that the authority namely the judgment in the case of *P. & O. S.N. Company. v. Secy. of State for India* has been shaken by the observations of the Privy Council in a much later case namely *R. Venkata Rao v. Secretary of State for India*[35] But I may, before I come to that, refer to the observations of the learned Chief Justice in the case of *Rao v. Advani*[36] the learned Chief Justice considered the argument on behalf of the Government of Bombay that the Government could not be brought before the Court and could not be sued in respect of any governmental or executive act and that Government could only be sued in respect of such acts as could be performed by an individual or by a trading corporation, and the contention evidently put forward and considered by the learned Chief Justice is whether when Government acts as a sovereign authority, its acts are outside the purview of municipal Courts and cannot be questioned in those Courts. This argument was described as a startling proposition. Thereafter the learned Chief Justice quoted from the judgment, I have referred to above, namely *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)*. He, thereafter, considered Section 176 of the Government of India Act, 1935, and traced the history of the different enactments and then came to the judgment of *P. & O. S.N. Company. v. Secretary of State for India* and quoted the passage

[34](1912) L.R. 40 I.A. 48 : S.C. 15 Bom. L.R. 27

[35](1936) L.R. 64 I.A. 55 : S.C. 39 Bom. L.R. 699

[36](1949) 51 Bom. L.R. 342

from the learned Chief Justice Peacock's judgment at page 13 of that judgment as follows:

> "...they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them....

But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie. On those observations it was argued by the Advocate General, for the Province of Bombay that the act was done in exercise of its sovereign powers which could not have been done by a private party or a private individual but only by an authority exercising sovereign power. The learned Chief Justice dealt with this position arising out of the judgment in the case of P. & O. S.N. Co. and observed as follows (p. 397):

> "...But when that case is clearly understood, it will be seen that although the learned Chief Justice makes a distinction between the class of acts which a private individual or a trading corporation can perform and those which can be performed by a sovereign power, what the case actually decides is that the particular case which was before the Court fell in the former category. The learned Chief Justice, with respect, was not called upon to decide that all acts falling in the latter category were exempt from the scrutiny of the Courts. In any case, the authority of this decision has been considerably shaken by the view expressed by the Privy Council recently in *R. Venkat Rao v. Secretary of State for India.*

In dealing with Section 32 of the Government of India Act as limiting the right to sue the Secretary of State for India in Council, their Lordships of the Privy Council say that they should not he taken to give their assent to that reason and the learned Chief Justice thereafter observed as follows (p. 397):

> "...They further go on to observe that as then advised they look upon that section as merely relating to parties and procedure, and if an action lay against Government that right could not be taken away merely because an identical right of action did not exist against the East India Co.; and in this connection they refer to Section 32 of the Government of India Act and also to the Peninsular case on which apparently the reasoning accepted by the Courts in India was based. Therefore it would not be too much to assume that if the Peninsular case laid down that the right of the subject to sue Government was limited by any consideration as to whether the East India Co. could or could not have been sued as a trading corporation, that was not the correct statement of the law.

During the arguments Mr. Seervai attempted to say that inasmuch as the P. & O. S.N. Co. case was approved by the Privy Council in *Secretary of State for India v. Moment,* therefore this Court was bound to follow the reasoning in that judgment of the P. & O. S.N. Co. case. But altogether apart from that, as pointed out by the learned Chief Justice in the case of *Rao v. Advani,* their Lordships of the Privy Council have in *R. Venkata Rao v. Secretary of State for India* made observations which do not justify the position in law as indicated by Mr. Seervai in relying upon P. & O. S.N. Co. case and *Secretary of State for India v. Moment.* The Province of Bombay appealed from that judgment and the decision of the Supreme Court is reported in *Province of Bombay v. Khushaldas Advani*[37] At page 19 Mr. Justice Mahajan considered a further argument on behalf of the Attorney General and held that a writ of certiorari lies against the Government of Bombay. The learned Judge observed that Section 306 read with Section 176 of the Government of India Act, 1935, expressly preserves the right to sue in all cases where such a right could be exercised as against the East India Company. The argument was that this was confined only to suits and not to a writ of certiorari on the ground that there was no power to issue a command to the sovereign power. The answer given was that the Provincial Government is not a sovereign power and that the Government of India Act expressly says that there is a right to sue the

Province and therefore the writ fell within the word "sue" used in Section 176 of the Government of India Act, and that if there was any immunity, the immunity is granted to the Governor and not to the Province.

54. In these circumstances, if my reasoning as regards the running of the writ beyond the territory of Uttar Pradesh is wrong, then in my opinion the suit is maintainable against the State of Uttar Pradesh and the State of Bombay. There is no doubt in my mind that both the State of Uttar Pradesh and the State of Bombay through the Chief Secretary did direct the execution of the writ. It is perfectly true that in the plaint the word "authorization" has not been expressly used and pleaded. The plaint, however, makes it quite clear that it was under the direction of the two States that defendant No. 3 carried out the orders, and in my view it would be straining the position to say that there was a direction and yet no authorization. In those circumstances, if I had answered the issue on the validity of the writ otherwise it would necessarily follow that I would hold that the States of Uttar Pradesh and Bombay are liable. There is no doubt that the Governments both of Uttar Pradesh and of Bombay acted in the implementation of the warrant and thereby authorized and directed an act which would be illegal, but for my finding otherwise as above.

55. The Advocate General of Uttar Pradesh relied for a complete defence to the action on Section 1 of the Judicial Officers Protection Act being Act XVIII of 1850 and relied upon that Act for complete immunity from action as far as defendants Nos. 1 and 2 were concerned and incidentally said that it would also apply to defendant No. 3. According to his argument the Legislative Assembly was acting judicially and was a person within the meaning of the Act. Section 1 of the Judicial Officers Protection Act XVIII of 1850 runs as follows:

> "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the

[37](1950) 53 Bom. L.R. I. S.C

> limits of his jurisdiction : Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

It was argued that the Legislature was in law a person and a person acting judicially, and if it was a person acting judicially and believed that it had jurisdiction and that belief was entertained bona fide, then every one executing the orders of that body would be protected. Pandit Mishra relied upon H passage in May at p. 91 referring to the origin of the power of contempt which, it is observed, is judicial in its nature, is to be found naturally in the medieval conception of Parliament as primarily a Court of justice, namely the "High Court of Parliament". But the

learned author May also traced how those functions were gradually dropped by the High Court of Parliament and the power to punish only for contempt and nothing else was retained to be exercised to safeguard the dignity of the House. Section 3, Sub-clause (42), of the General Clauses Act was relied upon which runs as follows:

> '"person' shall include any company or association or body of individuals, whether incorporated or not.

On this footing it was argued that the Assembly was an assembly of persons and, therefore, a person within the, Act acting judicially and in the exercise of a judicial duty. Articles 170, 171 and 189 were also referred to show that the Assembly acts as a body and that in exercising this right as a body it acted in performance of that right as a Court of Record, that the procedure is assimilated to the procedure of a Court of law by issuing of a notice, hearing the party and allowing the party to show cause and thereafter convicting and punishing. It is contended that the rules which need not be referred to in detail also indicate that there was a judicial act, for example, Rule 44, proviso to 49, Rule 61 and Rule 65, that the powers so exercised were similar to the powers exercised, by the House of Commons hi securing attendance and punishment. It was argued that even if Section 1 of the Judicial Officers Protection Act were not there, on the analogy of the practice and procedure of the House of Commons, the position would be the same. It is contended that the Assembly acted in the discharge of their duty under the Rules and passed a resolution and a warrant was issued thereupon, and that whether or not this judicial person, acted within jurisdiction, the protection under the Act is complete, because there is no question in construing this section of enquiring into the competence of the Assembly over the subject-matter, the only grievance made by the plaintiff being that the warrant was executed outside the State, and even if that were so and established, the section would apply and the parties would be entirely covered, by the immunity granted by the Act and that the proviso gives entire protection despite any lack of jurisdiction. It is stated that this on the record is seen from exh. No. 5 that a Note was prepared for by the Advocate General of Uttar Pradesh and another to the Legal Remembrancer were submitted. In these events it is submitted that in good faith, they were acting with competence, the resolution was passed and the writ was issued, that due care and caution is covered by the obtaining of the opinion of the Advocate General and that Section 3, Sub-clause (42), of the General Clause Act applies and therefore no proof is necessary in the absence of any evidence, which can be if necessary rebutted. It is pointed out that the preamble of the Act which is an Act of 1850 gives an indication that it is for the greater protection of Magistrates and others acting judicially. The learned Advocate General traced the position that prevailed prior to the passing of the Judicial Officers Protection Act and referred me to the Constables Protection Act of 1750, 24 Geo. II, Chap. 14, and Halsbury Statutes Vol. XVIII, p. 10. He also referred to the Justices Protection Act of 1848 and 12 Vic. Chap. 44 and the Public Authorities Protection Act of 1853, 56 and 57 Vic. Chap. 51. As far as the position of the law in India is concerned, prior to the Judicial Officers Protection Act the position was as set out in the case of *John Calder v. Robert Craigie Halket*[38] and it was pointed out that the case laid down that

21 Geo. III Chap. 70, Section 24, protecting Provincial Magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction, and only gives them an exemption from liability when acting bona fide in cases in which they have mistakenly acted without jurisdiction. It is argued that it was to cure this position that arose prior to the passing of the Act, the protection came only if they were acting within jurisdiction, and therefore a further protection was given by the passing of the Judicial Officers Protection Act, that the protection given was absolute when acting within its jurisdiction and there was no question any more of good faith and in connection with acts beyond jurisdiction, there is a complete protection provided the act was performed in good faith and in the belief he had jurisdiction, and therefore it was argued that the only reasonable deduction, from this position is that the Act pointedly gives a further protection namely for acts done de hors jurisdiction of the Court and that the liability would only attach if the action were wholly beyond jurisdiction and malicious. The protection, it is argued, was given to the officers, was necessary and necessary if the order was by a body beyond its jurisdiction, otherwise there was no need to pass such a legislation at all. I have placed this argument in a short compass although the learned Advocate General has carefully analyzed the different positions and argued it at considerable length and I have placed it shortly because the answer to that position appears to me to lie in the Act. itself.

56. For the purpose of approaching the Act one must realize the correct position of the Assembly, namely whether it was acting in the exercise of its duties as a judicial body. The question is whether the Act has application to a Legislature acting in a contempt proceeding. The Act is entitled "Judicial Officers Protection Act" and it says it is an Act for the protection of judicial officers. The immunity prescribed under Section 1 is exceedingly wide and the reason for that is set out in numerous authorities which I need not refer to, namely that complete immunity should be extended to all judicial officers, so that they may act fearlessly, impartially and with a sense of security and as pointed out in more than one judgment, if there is an abuse of such judicial power by any one, the remedy lies in the executive preventing him from exorcising such powers any more. In my opinion when the House of Parliament exercised the power to punish, it does not act and function as a Court of law although it exercises the powers and uses the process of a Court of law. The House of Parliament long ceased to act as a judicial body and only retained this power to punish in the interests of the dignity of the House and nothing more. Therefore the question is whether having the same powers conferred on it under

[38](1839) 2 M.I.A. 293

Article 194(3), the House of Legislature in India can be taken to be acting as a judicial body and even if it be argued and conceded that the English House of Commons in such a proceeding acts as a Court only the powers of that body are conferred upon the Houses of Legislature in India. It may be pointed out that it follows from this that under the Act it has no judicial duty to perform at all.

57. First of all it may be pointed out, that the General Clauses Act, Section 3(42), cannot be relied upon as indicated in the heading of the section itself. This is an Act for the protection of officers who have judicial duties to discharge and the word "person" must be construed ejusdem generis with the words "Judge, Magistrate, Justice of the Peace, Collector," and it must be construed in the light of the scheme of the Act itself. The word "person", appearing in any enactment, has to be construed in the manner laid down in the leading judgment of Lord Blackburn in the case of the *Pharmaceutical Society v. London and Provincial Supply Assoc*[39] As appearing in Stroud's Judicial. 'Dictionary the word "person" may very well include both a natural person, a human being, and an artificial person, e.g. a corporation. Lord Blackburn observed that (p. 741):

> "...I think that in an Act of Parliament, unless there be something to the contrary, probably (I would not like to pledge myself to that) it ought to be held to include both. I have equally no doubt that in common talk in the language of men, not speaking technically, a 'person' does not include an artificial person-that is to say, a corporation.... It is plain that in common speech 'person' would mean a natural person. In technical language it may mean the other, but which meaning it has in any particular Act must depend on the context and the subject-matter. I do not think that the presumption that it includes an artificial person, a corporation, if the presumption does arise, is at all strong. Circumstances, and indeed very slight circumstances, in the context might shew which way the word is to be construed in an Act of Parliament;... And I am quite clear about this, that whenever you can see the object of the Act requires that 'person' shall have the more extended sense or the less extended sense, whichever of those the object of the Act shews that it requires, then you should apply the word in that sense and construe the Act accordingly.

Applying this test it is quite clear that the primary object of passing the Judicial Officers Protection Act was to grant officers discharging a judicial duty the immunity prescribed by Section 1, and it follows that looking to the scheme of the Act the words "other persons" must be construed ejusdem generis with the words immediately preceding that phrase, "Judge, Magistrates, Justice of the Peace and Collector", and applying the test to my mind it is quite clear that a restricted meaning must be given to the word "person" and not an extended meaning as contended for on behalf of the defendants. In fact it is argued and with considerable force on behalf of the plaintiff that a Legislature could not possibly be included within it, because the Act was passed in 1850 and the Legislature had no such power until 1950. It cannot be maintained that it was incumbent on the House to act in the discharge of their judicial duty to embark upon this and in my opinion the word "person" must be construed in this statute as it ?stood in 1897.

58. It must further be remembered that as pointed out by me above, the Assembly was

[39](1840) 49 L.J. Q.B. 736

acting under a power equivalent to the power of a Court of law and there could be no judicial

approach as understood when we talk of a judicial officer or a judicial body. As observed by Chief Justice Kania in the case of *Province of Bombay v. Khushaldas Advani*[40] the observations being at pp. 6 and 7:

> "...It seems to me that the true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognized principles of approach are required to be followed. In my opinion the conditions laid down by Slesser L.J. in his judgment correctly bring out the distinction between a judicial or quasi-judicial decision on the one hand and a ministerial decision on the other.

59. In my opinion the Act is specifically meant for protection of persons discharging a judicial, duty as such because the section itself talks of any act done or ordered to be done in the discharge of his judicial duty which would be the normal duty discharged by that person. In these circumstances, in my opinion even if the House was exercising a power vested in it and conferred by the Constitution the Act has no application to such a body.

60. I have held that the Judicial Officers Protection Act has no applicability to the House and therefore there is no immunity under the Act to officers carrying out the arrest and detention of the plaintiff. Even otherwise that protection would only come into operation in the event of my holding that the writ did not run and was not current outside the territories of Uttar Pradesh. Therefore as far as the Speaker is concerned, I have assigned reasons above why there is complete immunity. As regards the Commissioner of Police the question does not arise on my holding that the writ did run, and if it did run, then every officer of the Government was entitled to aid in implementing the same. In any event there is a complete protection as regards defendant No. 3, under Section 161 of the Bombay City Police Act, as the action, whatever it was, was purported to be done and was done in his capacity as the Commissioner of Police.

61. In connection with liability of the Government of Bombay it was argued by Mr. Seervai that the letter was by the Chief Secretary of the Government of Bombay and was not addressed as for and on behalf of the Government of Bombay and therefore the Government of Bombay would not in any event be liable unless the direction was given for and on behalf of the Government of Bombay. I have already indicated above in my judgment that there is sufficient averment to show that there was direction and the circumstances indicate that there was an action taken under the direction of the Government and therefore to my mind this technical point namely that the letter was not for and on behalf of the Government of Bombay is not sufficient to discharge any liability that may arise in the event of the very first question I have dealt with not being sustainable.

63. I wish to make it quite clear and counsel have agreed that no allegation of mala fides against

any of the defendants has been pressed in the sense of dishonesty of purpose and the only point argued was lack, of due care and caution and lack of authority.

[40](1950) 53 Bom. L.R. 1 S.C

64. On my findings the suit must stand dismissed. In dismissing the suit I must give directions as regards costs of the suit. The normal rule must not be departed from that costs must follow the event. Therefore the defendants will get the general costs of the suit to be taxed by the Taxing Master. Some time was taken up on the issues as regards the maintainability of the suit on the question of tort. On my decision on that question the plaintiff has succeeded. He has also succeeded in repelling the issue on the question as to the maintainability of the suit under the Judicial Officers Protection Act. On these two issues the plaintiff must get costs. The Taxing Master will, therefore, give general costs of the suit to the defendants, ascertain, what in his opinion amounts to costs on the other two issues in favor of the plaintiff and award such costs to the plaintiff which costs will be set off against the general costs awarded to the defendants.

65. The only point now remaining is whether the defendants should be allowed separate sets of costs. Mr. Seervai has said that allegations have been made of mala fides. This is an action in civil wrong and the defendants are entitled to appear by separate sets of counsel. As far as solicitors are concerned they are the same. So the only question before me is whether separate sets of counsel should be allowed or not. Mr. Palkhivala has argued that apart from a general allegation of mala fides no separate allegations have been made against the different parties which allegations they would have to individually meet and which might lead to conflicting defenses. He has drawn my attention to Sir Dinshaw Mulla's comment on this question that separate costs should not be allowed to defendants if the defense is common to all or the interests are the same. On an appraisal of the arguments of the defense it is clear to my mind that apart from very minor points, the defendants have an identical defense and that was entirely on arguments where their interests were exactly the same. Although heavy costs have been incurred in this matter, unless the Court comes to the conclusion that the nature of the action is such that each defendant should be entitled separately to defend separate costs should not be given. In these circumstances I am allowing the general costs to the defendants, but I cannot say that in a matter of this kind the same counsel could not have possibly conducted the defense. I, therefore, allow costs to the defendants on one set of counsel.

Suit dismissed.