

## CRIMINAL REFERENCE.

*Before Derbyshire C.J., Nasim Ali and Rau J.J.*

### EMPEROR

v.

### HEMENDRA PRASAD GHOSH.\*

1939  


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 May 22, 23;  
 June 7.

**Sedition**—*Ministers of a province, if can be said to form part of the Executive Government—Indian Penal Code (Act XLV of 1860), ss. 17, 124A—Government of India Act (25 & 26 Geo. V, c. 42), ss. 49, 50, 51, 53, 59.*

Under the Government of India Act, 1935, the Ministers of a province are not vested with any right to exercise executive authority nor are the officers subordinate to the Governor within the meaning of s. 49(I) of the Act. They are merely the Governor's advisers. The Ministers, therefore, are not "the Government" within the meaning of ss. 17 and 124A of the Indian Penal Code.

Although a Presidency Magistrate has, under s. 432 of the Code of Criminal Procedure, the power to refer, for the opinion of the High Court, any question of law which arises at the hearing of a case pending before him, it is undesirable to make a Reference in a case without placing the facts of the case. The more desirable course is to give judgment in the case subject to the decision of the High Court on such point and make a Reference under the second part of that section.

The expression of opinion by the High Court on a Reference according to the first part of s. 432 of the Code of Criminal Procedure is not a judgment or decree or final order within the meaning of s. 205(I) of the Government of India Act. Hence no certificate under that section was granted.

### CRIMINAL REVISION.

These were two References made by the Chief Presidency Magistrate and the Additional Chief Presidency Magistrate, Calcutta, in two cases under s. 124A of the Indian Penal Code against the same accused persons. The accused Hemendra Prasad Ghosh was the editor and the accused Shashi Bhusan Datta was the printer and publisher of a daily vernacular paper called "Dainik Basumati". In its

\*Criminal Reference, No. 2 of 1939, made by J. K. Biswas, Additional Chief Presidency Magistrate of Calcutta, dated Mar. 14, 1939 and Criminal Reference No. 3 of 1939, made by R. Gupta, Chief Presidency Magistrate of Calcutta, dated April 3, 1939.

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issues of the 12th November and 18th December, 1938, two articles were published under the headings "Káli Puja and Ramjân" and "No other way" respectively. According to the prosecution, they contained attacks on the ministry in Bengal amounting to sedition. Two cases were started in connection with the two articles, one before the Chief Presidency Magistrate and the other before the Additional Chief Presidency Magistrate, Calcutta, both of whom referred for the opinion of the High Court, points of law that arose in connection with the cases. The questions are set out in the judgment of His Lordship the Chief Justice. The learned Magistrates, however, had not passed judgments in the cases but had merely made the References for an expression of opinion on the points of law formulated by them.

*The Advocate-General, Sir Asoka Roy, and Anil Chandra Ray Chaudhuri* for the Crown. The phrase "Government established by law in British India" in s. 124A of the Indian Penal Code has the same meaning as "Government", which is defined in s. 17. *Kshiteeshchandra Ray Chaudhuri v. Emperor* (1). Although there have been various changes in nomenclature by the Adaptation Orders, ss. 17 and 124A have been left untouched, showing that the same meaning continues. The question, therefore, is whether the ministers are persons authorised by law to administer Executive Government in any part of British India. Section 49(1) of the Government of India Act lays down that the executive authority of a province shall be exercised by the Governor either directly or through officers subordinate to him. Section 50 lays down that there shall be a Council of Ministers to aid and advise the Governor. The use of the word "aid" in addition to the word "advise" is significant in this connection. Section 51 provides for the choice and summoning and dismissal of ministers and payment of salaries to them which are

(1) (1932) I. L. R. 59 Cal. 1197.

matters within the discretion of the Governor. Under s. 59(1), all executive action of the government of a province shall be expressed to be taken in the name of the Governor. In this, the name of a Governor is really utilised as representing the entire government. Section 59(3) makes it clear that the entire executive business is to be divided and allocated to the ministers. The different ministers have different portfolios. This allocation of business clearly shows that the ministers actively participate in the discharge of the executive administration of the province, even though their action is to be expressed in the name of the Governor. The position is made further clear by the issue of Instrument of Instructions to the Governor as provided for by s. 53. Clause VIII of the Instrument of Instructions to the Governor of Bengal has made it obligatory upon the Governor to follow the advice of the ministers except in cases of special responsibility. The whole scheme makes it perfectly clear that the Council of Ministers in a province are in charge of and exercise executive authority except in matters relating to the Governor's special responsibility. Therefore, they come within the definition of "Government" as contemplated by ss. 17 and 124A of the Indian Penal Code. *Dhirendra Nath Sen v. Emperor* (1). The recent decision of the Lahore High Court merely follows the Calcutta decision. Even if the ministers were not part of the executive government they should at least be considered as officers subordinate to the Governor to whom the task of carrying out the Government has been entrusted. See ss. 50 and 51 of the Act. It has been held that wholesale attack on public services may come within s. 124A of the Indian Penal Code. *Satya Ranjan Bakshi v. Emperor* (2); *Emperor v. Bal Gangadhar Tilak* (3).

*Narendra Kumar Basu, Satindra Nath Mukherjee, Suresh Chandra Taluqdar, Sukumar Dey, Sisir Kumar Basu, Pasupati Bhattacharjya and Phanindra*

(1) I. L. R. [1938] 2 Cal. 672.

(2) [1929] A. I. R. (Cal.) 277.

(3) (1916) 19 Bom. L. R. 211; 39 Ind. Cas. 807.

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*Nath Mukherji* for the accused. The Government of India Act, which has created "Ministers" and "Council of Ministers" has, by its provisions in ss. 49, 50, 59, cls. (1) and (4), clearly indicated that the ministers are only to aid and advise the Governor, in whom alone rests the executive authority. The Instrument of Instructions referred to by the learned Advocate-General does not and really cannot enlarge the scope of the authority of the ministers beyond what is given to them by the Act itself. The whole scheme of the Act shows that the ministers, who are selected from the elected members of the Assembly, are not subordinate officers of the Governor. By s. 110 of the previous Government of India Act of 1919, immunity was given to a minister appointed under that Act for action taken by him, whereas in s. 306 of the present Act, there is no mention of a minister. The reason is that the ministers under the present Act have no executive function and hence no immunity is needed. A consideration of several provisions of the General Clauses Act as modified by the Adaptation Orders shows that "Government" in the provinces means the Governor only. See s. 3, cls. (21) and (43a). By s. 4A, the amended definition of government is applicable to all "Indian laws" which term by s. 3(27a) includes any law passed by any competent legislature in India. Section 17 of the Indian Penal Code must be taken to have been modified to that extent by the Order in Council.

*Cur. adv. vult.*

The judgment of the Court was delivered by—

DERBYSHIRE C. J. The two articles out of which these two References arise are alleged to be attacks upon the Council of Ministers in Bengal and it is complained that they are seditious and in breach of s. 124A of the Indian Penal Code which provides :—

Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, His Majesty

or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

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Section 17 of the Indian Penal Code provides :—

The word "Government" denotes the person or persons authorised by law to administer executive government in any part of British India.

The questions asked are :—

Under case No. 2 of 1939 :—

(a) Whether the Hon'ble Ministers of Bengal are subordinate officers to H. E. the Governor within the meaning of s. 49 of the Government of India Act, 1935 ?

(b) Whether the Council of Ministers should be considered as Government established by law ?

Under Case No. 3 of 1939 :—

(1) Whether the ministry of a province can be said to form a part of the executive government of that province in the sense implied by s. 17 of the Indian Penal Code ?

The Reference is under the first part of s. 432 of the Code of Criminal Procedure and asks us specific questions but does not enable us to deal completely and finally with the matter.

The Government of India Act, 1935, defines the rights and duties of ministers and their relation to the Government of a province. Section 49(1) of the Act provides that :—

"the executive authority" (which is the same thing in our opinion as legal authority to administer executive government of a province) "shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him".

Section 59 (1) provides :—

All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

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## Section 50 (1) provides :—

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

## Section 51 (1) provides :—

The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure.

## Sub-section (4) of s. 51 provides :—

The question whether any, and if so, what advice was tendered by ministers to the Governor shall not be inquired into in any court.

## Sub-section (5) of s. 51 provides :—

The functions of the Governor under this section with respect to the choosing and summoning and the dismissal of ministers, and with respect to the determination of their salaries, shall be exercised by him in his discretion.

Section 53 provides that the Instrument of Instructions which it is proposed that His Majesty shall issue to the Governor shall be laid before Parliament previous to issue.

In paragraph VIII of the Instrument of Instructions issued to the Governor of Bengal it is stated :—

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

## Section 59 (3) provides :—

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

There is no specific provision in the Government of India Act, nor in any other Statute or Act, which we are aware of, vesting the ministry with executive functions. On the other hand, such functions "shall" in the words of s. 49 of the Act, "be exercised by the Governor either directly or through officers subordinate to him". The use of the word "aid" in s. 50 does not, in our view, vest the ministers with

any right to exercise executive authority, since such a construction would be contrary to the clear provision in s. 49, nor can the Rules for the transaction of the business of the Government of Bengal made under s. 59(3) of the Act override or alter, in law, the same clear provisions. Again, the Instrument of Instructions, which cannot be and does not purport to be in contradiction of the Act, clearly contemplates the Governor exercising the powers conferred upon him (save where in certain instances specified he acts alone) "guided by the advice of his ministers". The Instrument of Instructions contemplates the Governor, and not the ministers, exercising executive authority.

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The position appears to be that, unless the ministry can be held to consist of officers subordinate to the Governor within the meaning of s. 49(1) of the Act, it cannot exercise executive functions.

In our view, ministers chosen from the elected representatives of the people of the province for the purpose of carrying into effect, if possible and within prescribed limits, their wishes, and acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor within the meaning of s. 49 of the Government of India Act, 1935. It follows, therefore, that, although in popular language, the ministers may be referred to as "the Government" they are not "the Government" within the meaning of ss. 17 and 124A of the Indian Penal Code. Whatever may happen in practice, the ministers are, in law, the Governor's advisers.

For these reasons we are of the opinion that the answers to all the three questions put to us is "No".

Although the Presidency Magistrates have, under s. 432 of the Code of Criminal Procedure, the power to refer for the opinion of the High Court any question of law which arises at the hearing of any case pending before them, it may be undesirable—and in our view in this case it was undesirable—to

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make the Reference in the form it came before us. It has involved giving a decision on law, divorced to some extent from the facts. It may be that when the learned Magistrates have dealt with these charges according to law, the same matters may come before this Court on appeal. The more desirable course is for the Magistrates to use the second part of s. 432 of the Code of Criminal Procedure which provides that he may give judgment in any such case subject to the decision of the High Court on such Reference. By adopting this course duplicity of hearing in both Courts would probably be avoided and all the facts would be before this Court once for all.

Section 205(1) of the Government of India Act, 1935, provides:—

An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

In our opinion, this case involves a substantial question of law as to the interpretation of the Government of India Act, 1935. But at the same time we are of the opinion that the decision we have given is an opinion and not a judgment or decree or final order of the Court. It may be that hereafter the same matter will come before us again after it has been dealt with by the Presidency Magistrate.

Accordingly, we give no certificate.

*Questions answered but form of Reference disapproved.*

A. C. R. C.