# IN Re BANWARILAL ROY†—AN ILLUMINATING JUDGMENT OF S.R. DAS ON QUO WARRANTO

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Mr. Justice S. R. Das was associated with the Supreme Court of India from its very inception on the 26th January, 1950. His judgments as a judge of the Supreme Court and later as Chief Justice of that Court, attracted attention throughout India and also of men of law across the seas.[1]

There are two judgments of Mr. Justice S.R. Das before his association with the Supreme Court which should engage the attention of lawyers as well as of citizens interested in the maintenance of civil liberties. One was a *quo Warranto* case in which he delivered a judgment as a judge of the Calcutta High Court in *In re Banwarilal Roy & Ors.*, on the 19th July 1944[2]. The Acting Chief Justice of the Calcutta High Court, Sir Toric Ameer Ali and S. R. Das, J. formed the Division Bench.

The judgment of Das J. in the *Banwarilal Roy* case is a landmark in Indian legal history as well as in the exposition of the law on the

† 48 C.W.N. 766. [This judgment is not reported in the other Indian legal journals. Ed.]

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1. On the eve of this retirement from the office of Chief Justice of India, I had the privilege of contributing an article in a leading paper on "S.R. Das's Classic Judgments". A number of distinguished lawyers and jurists appreciated some of the observations which I had made in that article. Specially interesting was the comment of Lord Denning who observed that the article paid proper tribute to a great lawyer and a great judge.

2. The other important judgment of S.R. Das, J., in the opinion of the present writer, though not on *quo warranto*, was delivered by him as the Chief Justice of East Punjab High Court in the well-known *Pratap* case. It is no use simply putting down freedom of speech or freedom of the press as one of the fundamental rights guaranteed in the Constitution. Such right becomes a living reality under certain conditions. It is a tribute to the Judiciary in India that there were judges in India who could strike down crude attempts on the part of the Executive to curb the freedom of the press. Chief Justice S.R. Das along with two other judges of the Punjab High Court declared that section 4(1)(d) of the Indian Press (Emergency Powers) Act (XXIII of 1931) could not be made use of for stifling legitimate comments or criticisms or for preventing the ventilation of genuinely felt grievances on the pretext that they inevitably gave rise to some resentment or disapprobation. "*Pratap*" v *The Crown* A.I.R. 1949 Punj. 305.

subject. In delineating for the first time the administrative jurisdiction of the High Court the judgment brings out the origin and extent of the Original Civil Jurisdiction of the High Court of Calcutta and its predecessor, the Supreme Court of Calcutta, in relation to the power to issue high prerogative writs.

I had the privilege of arguing the case on behalf of the petitioners who challenged a somewhat extraordinary order passed by the then Government of Bengal on June 9,1944 under Rule 51(F) of the Defence of India Rules superseding the Commissioners of Howrah Municipality for a period of one year. That order directed that Maulavi Hamid Hasan Nomani, who was a Deputy Magistrate serving that government, should exercise all the powers and duties which might be exercised and performed by or on behalf of the Commissioners of the Howrah Municipality. On the application of the petitioners the High Court issued a rule *nisi* calling upon Mr. Nomani to show cause why an information in the nature of *quo warranto* should not be exhibited against him "as to by what authority he is exercising and performing or claiming to exercise or perform the powers and duties which may be performed or exercised by the Chairman and the Commissioners of the Howrah Municipality." The Calcutta High Court made the rule *nisi* absolute by the judgment of the Division Bench.

The Howrah Municipality was the second largest municipality in Bengal and the order issued by the then Muslim League Government superseding the Howrah Municipality and appointing one of their own chosen men to perform all the duties of the Chairman and Commissioners was attacked as *mala fide* and also as *ultra vires*. Das, J. by his judgment struck down the order on the ground of bad faith and he held it to be a colourable use of power prompted by ulterior motives.

The *quo warranto* writ had become obsolete in England and an information in the nature of a *quo warranto* had taken the place of that writ. But for a long period in legal history it was a well known writ which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined. In the information also this scope of the writ continued without change. It also lay in cases of non-user, abuse, or long neglect of a franchise. An information in the nature of a *quo warranto* continued until 1938 when the Administration of Justice Act abolished the procedure for a simple injunction,[3] but again the substantive law of *quo*

3. The reported cases do not indicate that the new procedure has been employed This is probably attributable to the existence of different statutory procedure

*warranto* remains the same. The point that the writ was used to try the civil right to a public office was conceded by the counsel for the appellant, Sir Walter Monckton, before the Judicial Committee,[4] which heard the appeal from the judgment of the Calcutta High Court. Yet, elaborate arguments were advanced in the High Court as to whether such a writ could be issued.

We had discovered only one case in India which was decided in the year 1895 by a single judge of the Calcutta High Court on the Original Side, Mr. Justice Sale. That case is reported under the heading "*In the matter of W. Corkhill and another.*"[5] There are some observations in that judgment to the effect that the High Court has jurisdiction by a proceeding in the nature of a *quo warranto* to restrain a person who has not been duly elected from exercising the functions of a duly elected Commissioner. But the rule *nisi* which was obtained was discharged in that case and the petitioner Mr. Ranjani Mohan Chatterjee was directed to pay the costs to Capt. Corkhill.

A distinguished American author says that *quo warranto* is the name of a writ by which the Government commences an action to recover an office or franchise from the person or corporation possessing it. The warrant commands the sheriff to summon the defendant to appear before the court to which it is returnable, to show by what authority he claims the office or franchise. It is the remedy or proceeding whereby the State inquires into the legality of the claim which a party asserts to an office or franchise, and to oust him from its enjoyment if the claim be not well founded, or to have the same declared forfeited, and to recover it, if, having once been rightfully possessed and enjoyed, it has become forfeited for misuser or non-user.

Mr. Justice Das made a historical survey of the law on the subject and came to the conclusion that a writ of *quo warranto* or the modern form thereof, i.e. an information in the nature of *quo warranto*, which lies against a person claiming or usurping an office, franchise or liberty for the purpose of enquiring by what authority he supported his claim, also lies where there is in substance a usurpation, although the name of the office may not have been assumed by the respondent and even on the footing that the respondent, in the position he has assumed,

for challenging the right to act as a member of a local authority. *Cf.* De Smith, *Judicial Review of Administrative Action*, (1959) 353-'6.

4. sub nom, *Hamid Hasan Nomani* v. *Banwarilal Roy and ors.* L.R. 73 I.A. 120 : A.I.R. 1947 P.C. 90 : 51 C.W.N. 716.

5. I.L.R. 22 Cal. 717 (1895).

is claiming a new office. The fact that the office of the respondent is not a substantive office and is terminable at the will of the appointing authority is immaterial as is the fact that the applicant has other remedies, e.g., a suit or a right to defy the order and put its legality in issue in consequential proceedings. Nor is compensation an adequate remedy for ouster from office.

Das, J. held that the Calcutta High Court had jurisdiction to issue prerogative writs other than *mandamus* and *habeas corpus* such as *certiorari*, prohibition, *quo warranto* and error. An important point which was urged was whether a writ of *quo warranto* could be issued against Mr. Nomani as he was going to function in Howrah outside the Ordinary Original Civil Jurisdiction of the Calcutta High Court. Mr. Justice Das held that the jurisdiction of the Calcutta High Court extended to all servants of the East India Company and European British Subjects throughout the Presidency of Bengal.

After a review of the relevant provisions of the Indian High Courts Act of 1861, the Letters Patent of 1865, the Regulating Act of 1773, the Charter of 1774, the Act of Settlement 1781 and the Government of India Act 1858, Mr. Justice Das came to the conclusion that all servants of the Crown were amenable to the jurisdiction of the Supreme Court after 1858 in the same way and to the same extent as the servants of the East India Compay were before 1858. The said jurisdiction had been inherited by the High Court under the Indian High Courts Act of 1861 and it was preserved by the Government of India Act of 1915 and 1935. Accordingly, all Government servants throughout the Presidency and at any rate those appointed in India were in the same position *vis-a-vis* the High Court as the servants of the East India Company were *vis-a-vis* the Supreme Court and were personally amenable to its jurisdiction.

The final conclusion of the learned judge with which Ameer Ali, C.J. concurred was that a writ, or information in the nature of *quo warranto* did lie against the Deputy Magistrate, although not resident in Calcutta, in respect of his appointment to perform the duties of the Chairman and Commissioners of a Municipality situated outside Calcutta on the ground that he was in the position of a "servant of the Company" and he had trespassed into or usurped a public office.

The conclusions of Das, J. were summarised by Sir John Beaumont who delivered the judgment of the Privy Council[6] as

6. A.I.R. 1947 P.C. at 91.

follows :

"(1) By virtue of the Regulating Act of 1773, the Charter of 1774, and the Act of Settlement of 1781, the Supreme Court of Calcutta possessed Original Civil Jurisdiction of a territorial nature over all persons within the town of Calcutta, and a personal jurisdiction over certain classes of persons, including British subjects and servants of the East India Company, outside such territorial limits, but within what may be roughly called the Presidency of Bengal, but such personal jurisdiction was confined by the Act of 1781 to actions for wrongs and trespass. (2) The appellant in taking possession of the office and property of the Howrah Municipality under an order which the High Court held to be invalid was guilty of an act of trespass. (3) After the passing of the Government of India Act, 1858, the servants of the East India Company must be taken to mean and include, for the purpose of determining jurisdiction of the Supreme Court, the servants of Government. (4) The jurisdiction of the Supreme Court included the right to grant an information in the nature of *quo warranto* against persons falling within its territorial or personal jurisdiction. (5) Under the High Courts Act, 1861, and the amended Letters Patent of 1865, the High Court inherited from the Supreme Court on its abolition its Original Jurisdiction both territorial and personal over (inter alias) British subjects and servants of Government. (6) That accordingly the rule should be made absolute against the appellant."

The counsel for the appellant contended before the Privy Council that the Municipality of Howrah was outside the local limits of the High Court's jurisdiction and the appellant was not resident within those limits and, therefore, the High Court was without jurisdiction to issue a writ in this case. The Judicial Committee adopted a very technical view and held that the personal jurisdiction of the Supreme Court was not inherited by the High Court.

The old Supreme Court had a special personal jurisdiction transcending the limit of its local jurisdiction in the case of servants of the East India Company. There was good deal of force in the observations of Das, J. that the High Court has succeeded to that special personal jurisdiction and that the servants of the Government

were for purposes of this jurisdiction to be treated as if they were the servants of the East India Company. This jurisdiction thus enabled the High Court to issue a writ of *quo warranto* even in the case of an office outside its local limits on the ground that the claimant to the office was a servant of the Government. The Judicial Committee relying upon its judgment in *Parlakimedi* case[7] held that the power to grant an information in the nature of *quo warranto* arose in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, and that such jurisdiction was confined to the town of Calcutta and that it could not be issued to Government servants outside those limits although they had usurped an office.

The framers of the Indian Republican Constitution have deliberately conferred very wide powers on the High Courts by Article 226 and such writs can now be issued to any person or officer functioning within or outside the Ordinary Original Civil Jurisdiction of the High Court. But Das, J. in his judgment had laid down certain propositions summarising the general principles of law as to investigation by court into power or authority, exercised by a person or body of persons, specially conferred upon them:

"(a) When power is given by statute to a person or body of persons to do any act, it has to be first ascertained, on a construction of the statute, whether there is any condition precedent to the exercise of the power.

(b) The words of the statute prescribing the condition precedent have then to be examined to ascertain whether the use of those words indicate that the legislature intended to secure some measure of protection for the public by providing that condition. If there be such indication, then the court has power to examine the facts to ascertain whether the condition has been fulfilled and whether power has been properly and validly exercised on the facts of the case.

(c) If the language which prescribes the condition precedent indicates that the legislature intended to give unfettered discretion to the person on whom the power is conferred, i.e., to leave the matter entirely to his judgment or opinion, then if that person, in good faith, exercises the power, the court has no power to interpose its own judgment or opinion or interfere with the exercise of the power.

(d) If, in the last-mentioned case, the person exercises the power in bad faith or for a collateral purpose, it is an abuse of the power and a fraud upon the statute and is not really an exercise of

7. L.R. 71 I.A. 129;

the power at all and the court can interfere with such colourable exercise of the power.

(e) Sec. 16(1)[8] of the Defence of India Act is a statutory recognition and embodiment of the above general principles of law and nothing more.

(f) What is protected by sec. 16 (1) is an order made in exercise of the power and not one made in abuse of the power.

(g) When the issue is raised that any particular order has been made in bad faith or for a collateral purpose and therefore not "made in exercise of the power," the court is bound to enquire into the fact."[9]

The judgment of Das, J. was quoted with approval by the Supreme Court of India in the case of *Province of Bombay* v. *K.S. Advani & Ors.*[10] and that judgment is still looked upon as the *locus classicus* on the question as to whether an impugned act is an administrative act or a quasi-judicial act.

8. Sec. 16(1). No order made in exercise of any power conferred by or under the Act shall be called in question in any Court.
9. 48 C.W.N. at 781-82.
10. [1950] S.C.R. 621.