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to the provisions of the wajib-ul-arz, the defendants were incompetent to build the well. In my opinion the lower appellate Court ought not to have allowed the plaintiff to put forward a case in appeal which she had not set up in the Court of first instance. The consideration of any question having reference to the provisions of the wajib-ul-arz does not therefore arise in the appeal before us. As the learned Chief Justice has pointed out, the fact of an occupancy tenant being allowed to construct a well without the consent of the landlord would not, having regard to the provisions of section 44, impose on the landlord any "intolerable or enormous burden." The decree of the Court below is, in my opinion, right, and I agree in dismissing the appeal with costs.

Appeal dismissed.

FULL BENCH.

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May 27th.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* HORI.*

Act No. VIII of 1897 *(Reformatory Schools Act), section* 16 - *Rules of the Local Government framed under section* 8, *sub-section* (3) *of the Act — Order sending a boy of the Dalera caste to a Reformatory School — Jurisdiction of High Court to interfere with orders under section* 16 — *Interpretation of statutes.*

Held, that the High Court has power to interfere in appeal or revision with an order for detention in a reformatory school passed in subtitution for transportation or imprisonment when such order is made without jurisdiction and is not an order warranted by Act No. VIII of 1897.

Section 16 of Act No. VIII of 1897 only precludes the interference of a superior Court with the orignal Court's order so far as it (1) determines the age of a youthful offender or (2) directs the substitution of detention in a reformatory school for transportation or imprisonment, where such substitution is not made without jurisdiction and is not otherwise illegal, having regard to the provisions of the Act. *Queen-Empress* v *Himai* (1), and *Queen-Empress* v. *Gobinda* (2)

*Criminal Revision No. 117 of 1899.

(1) (1897) I. L. R., 20 All., 158. (2) (1897) I. L. R., 20 All., 159.

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overruled. *Queen-Empress* v. *Billar* (1), *Queen-Empress* v. *Kaidya Husain* (2), *Deputy Legal Remembrancer* v. *Ahmad Ali* (3), *Queen-Empress* v. *Ramalingam* (4), *Roop Lall Das* v. *Manook* (5), *Queen-Empress* v. *Partap Chunder Ghose* (6), *Ex parte Bradlaugh* (7) and *The Colonial Bank of Australasia* v. *Willan* (8), referred to.

In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company* v. *North British Railway Company* (9), referred to.

IN this case a boy named Hori, about the age of 12 years, had been convicted by a Magistrate of the first class of the offence of theft, under section 379 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment; but in view of the boy's age the Magistrate directed that, instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction to the Sessions Judge of Farrukhabad, who dismissed the appeal. An application was thereupon filed by the Local Government for revision of this order on the ground that "the order of detention in a reformatory school of a Dalera," to which caste the boy Hori was said to belong, "is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act."

The Government Advocate (Mr. *E. Chamier*) in support of the application.

Section 16 of the Reformatory Schools Act should be construed, if possible, in such a manner as to give effect to the intention of the Legislature. Construed literally, as in *Queen-Empress* v. *Himai* (10) and *Queen-Empress* v. *Gobinda* (11), this section would oust the jurisdiction of the High Court in every case in which detention in a reformatory had been substituted for transportation or imprisonment whether the Court passing the order had jurisdiction or not.

(1) (1897) I. L. R. 20 All., 160.
(2) (1899) 1 Bombay Law Reporter, 162.
(3) (1897) I. L. R., 25 Calc., 333.
(4) (1898) I. L. R., 21 Mad, 430.
(5) (1898) 2 Calc., Weekly Notes., 572.
(6) (1898) I. L. R., 25 Calc., 852.
(7) (1878) L. R., 3 Q. B. D., 509.
(8) (1874) L. R., 5 P. C., 417, at p. 442.
(9) (1881) L. R., 6 App. Cas., 114, at p. 122.
(10) (1887) I. L. R., 20 All., 158.
(11) (1897) I. L. R., 20 All., 159.

It is submitted that section 16 of the Act can, without doing violence to its language, be construed as barring interference in two matters only, *i.e.*, a finding as to the age of the offender and the lawful exercise by a lower Court of its discretion in substituting detention in a reformatory for transportation or imprisonment. Various illegal orders in cases under the Act have been set aside by the Calcutta, Bombay, and Madras High Courts—see *Deputy Legal Remembrancer* v. *Ahmad Ali* (1), *Queen-Empress* v. *Ramalingam* (2), and *Imperatrix* v. *Bhan Singh*, decided by Parsons and Ranade, J. J. (unreported).

An order passed by a Magistrate without jurisdiction or in violation of the rules made by the Local Government not being justified by the Act is not protected by section 16.

Similarly orders purporting to have been passed under section 143, Code of Criminal Procedure, but not warranted thereby have been held to be liable to revision, notwithstanding the terms of section 435 (3) of the same Code—*Queen-Empress* v. *Partab Chandar Ghose* (3).

STRACHEY, C. J.—The object of this application by the Local Government is to obtain a reconsideration of the decisions of this Court in *Queen-Empress* v. *Himai* (4), and *Queen-Empress* v. *Gobinda* (5), in which it was held that by reason of section 16 of the Reformatory Schools Act (VIII of 1897), this Court is in no case competent to interfere in appeal or revision with an order for detention in a reformatory school passed in substitution for transportation or imprisonment, even though the order is made without jurisdiction or is otherwise illegal. In the present case, a Magistrate of the first class convicted the accused, Hori, a boy about 12 years old, of theft under section 379 of the Penal Code, and sentenced him to six months' rigorous imprisonment, but in view of the boy's age directed that instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction

(1) (1897) I. L. R., 25 Calc., 338.
(2) (1898) I. L. R., 21 Mad., 480.
(3) (1898) I. L. R., 25 Calc., 852.
(4) (1897) I. L. R., 20 All., 158.
(5) (1897) I.L. R., 20 All., 159.

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to the Sessions Judge of Farrukhabad, who dismissed the appeal. The present application by the Local Government is for revision of the orders of the Courts below on the ground that "the order of detention in a reformatory school of a Dalera is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act." The rule referred to is rule 4 of the rules made by the Local Government and published at pages 167, 168 of the *North-Western Provinces and Oudh Government Gazette*, Part VI, 3rd July, 1897. It provides that "no boy belonging to any of the undermentioned tribes, whether such tribe has or has not been formally proclaimed in these Provinces under the Criminal Tribes Act, 1871, should be sent to a reformatory school." Among the tribes mentioned are the Daleras, to which tribe the accused is said to belong. The rule was made under section 8, sub-section (3) of the Reformatory Schools Act, 1897, which authorizes the Local Government to make rules for defining what youthful offenders should be sent to reformatory schools, having regard to the nature of their offences or other considerations; and sub-section (1) shows that the power given to certain Courts to direct youthful offenders to be sent to and detained in reformatory schools instead of undergoing their sentences is subject to any rules so made. If therefore the accused Hori was a Dalera, the order of the Magistrate directing that instead of undergoing his sentence he should be sent to a reformatory school was illegal. There is on the record no evidence that the accused is a Dalera. He did not before either of the Courts below state that he was one, and the fact does not appear to have been discovered by the Local Government until after the decision of the Sessions Judge. In a petition to this Court, acknowledging notice of the present application, the accused prays that he may be released from the reformatory school "because I am a Dalera by caste, and none of my caste fellows is here." Assuming that he is a Dalera, the question is whether this Court is competent in revision to alter or reverse the illegal order for his detention in a reformatory school, having regard to section 16 of the Reformatory Schools

Act, and to the decision in *Queen-Empress* v. *Gobinda*, (1) which is exactly in point.

Section 16 is as follows:—"Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorize any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender, or the substitution of an order for detention in a reformatory school for transportation or imprisonment."

The section is not well drawn; but apart from obvious verbal criticisms its object is clear enough. It does not exclude the exercise of appellate or revisional jurisdiction under the Code in all cases where a subordinate Court has ordered an offender to be detained in a reformatory school. The exclusion is limited to two specified matters, in regard to which the Legislature considered the Court trying a youthful offender better placed for arriving at a sound conclusion than an appellate or revisional Court could be. The first of these is the age of the youthful offender, a finding on which is, under section 11, a necessary condition precedent to every order for detention in a reformatory school, which might often be difficult to determine, and in determining which a subordinate Court which saw the offender would have a considerable advantage over a superior Court which did not. The second is "the substitution of an order for detention in a reformatory school for transportation or imprisonment." These words are no doubt very general, and, if read with absolute literalness, would protect the most illegal orders substituting detention for imprisonment from any sort of interference. So to read them would, I think, defeat the plain intention of the Legislature. It appears to me that they only refer to the propriety or suitableness of such a substitution in the particular case, having regard to all the circumstances. They do not include the legality of the substitution directed or the competency of the Court or Magistrate to direct it. The Legislature may well have thought that, upon the question whether a particular

(1) (1897) I. L. R., 20 All., 159.

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offender would benefit by detention in a reformatory school, or whether under the circumstances imprisonment would be more suitable, as well as upon the question of age, the Court having the youthful offender before it, and observing his appearance and demeanour would be more likely to be right than a superior Court not having that advantage. But there the advantage ends. Upon questions as to which the subordinate Court has no advantage at all by reason of personal observation or otherwise, and especially upon questions of jurisdiction or law arising upon the construction of Act VIII of 1897, there could be no more reason than in any other class of cases for making its orders final. Section 16 cannot have been intended to enable the most junior Magistrate in the country to make at pleasure orders substituting detention in a reformatory school for imprisonment in any case whatever, for prisoners of any age, or class, or of either sex, for any period of time in absolute disregard of the Act, without possibility of correction. If this view is right, the words in section 16 protecting from appellate or revisional interference the substitution of an order for detention in a reformatory school for transportation or imprisonment must not be read with absolute literalness. The substituted orders to which the section refers are orders made under section 8, section 9, or section 10, not orders made outside the Act and wholly unauthorized by it. If the order is an order for substitution within the meaning of those sections, then section 16 applies, and it cannot be altered or reversed in appeal or revision. If it is not an order for substitution within the meaning of those sections, then section 16 does not apply, and it may be altered or reversed like any other illegal order. I do not think that this construction does violence to the terms of section 16. It cannot be said that the section is unambiguous, and in such a case we are at liberty to put on it a construction in accordance with the intention of the Legislature. "The more literal construction," said Lord Selborne in *Caledonian Railway Company* v. *North British Railway Company* (1), "ought not to prevail if it is opposed

(1) (1881) L. R., 6 App. Cas., 114, at p. 122.

to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

The decisions in *Queen-Empress* v. *Himai* and *Queen-Empress* v. *Gobinda* are based upon the literal construction of section 16 without reference to the object with the Legislature in passing Act VIII of 1897 had in view. They interpret the section as prohibiting interference in appeal or revision with any order whatever of a subordinate Court substituting detention in a reformatory school for transportation or imprisonment, even if the order is passed without jurisdiction or violates every provision of the Act. The following are some of the consequences which such a construction involves. A Magistrate having no power whatever to make any order under the Act, directs that a youthful offender, instead of undergoing his sentence of imprisonment, shall be sent to a reformatory school. His order, being the substitution of an order for detention in a reformatory school for imprisonment, cannot be set aside. A Magistrate orders an adult offender or a girl, who cannot legally be sent to a reformatory school at all, to be detained there instead of undergoing his or her sentence of imprisonment for a period of ten years, being more than the maximum period allowed by section 8. The illegal order cannot be interfered with. A Magistrate in violation of the rules made by the Local Government and having the force of law under section 8, substitutes detention in a reformatory school for transportation in the case of an offender convicted of murder, or substitutes detention for imprisonment in the case of an offender belonging to a criminal tribe, or convicted of an unnatural offence, "or whose antecedents afford reasonable grounds for assuming habitual immorality." Effect must be given to the illegal order, and the provisions and policy of the whole Act defeated in order to comply with the letter of section 16. In such cases there would be no remedy. The Local Government

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could, of course, under section 14, order any youthful offender to be discharged from a reformatory school. But as the Government has not, under Act VIII of 1897, the power which it possessed under section II of the repealed Act V of 1876, to order a youthful offender discharged before the expiration of his sentence to undergo the residue of it, such a discharge would not restore the operation of the sentence; and the Government would thus be in the dilemma of allowing an illegal order for detention to be carried out or allowing the offender to escape all punishment. Again, section 16 itself clearly shows that the legality of an order for detention in a reformatory school may in some cases be questioned, and the order set aside in appeal or revision. For instance, if without first passing any sentence of transportation or imprisonment a Court or Magistrate makes an order for detention, that order, not being in substitution for transportation or imprisonment, is not protected by the section: *Queen-Empress* v. *Billar* (1), *Queen-Empress* v. *Kaidya Husain* (2). Can the Legislature have intended that a superior Court should be competent to set aside an illegal order for detention where the illegality merely consisted in an omission by the Magistrate to formally record a sentence of imprisonment which he intended immediately to supersede, but that it should not be competent to interfere where the Magistrate, having gone through that form, proceeded to order detention without having received authority under the Act to pass such orders, or ordered the detention of an adult, a girl, or any other person wholly outside the scope of the Act, or of a youthful offender for a term far in excess of the maximum allowed by the Act? In other words, was it intended that the mere formal record of a sentence of imprisonment for which detention is substituted should absolutely protect from interference every sort of illegality in the order, while in the absence of such formal record the appellate and revisional jurisdiction under the Code might be freely exercised? Again, if the literal construction of the second part of section 16 is adopted, the earlier part protecting

(1) (1897) I. L. R., 20 All., 160. (2) (1899) 1 Bombay Law Reporter, 162.

"any order passed with respect to the age of a youthful offender" is superfluous. These words refer to the finding as to age required by section 11 before any youthful offender can be sent to a reformatory school under the previous sections, but that finding is not an independent and substantive order: it is only a necessary preliminary to any substitution of retention for imprisonment; and if every such substitution, legal or illegal, is protected, the preliminary finding is, of course, protected as part of it, and requires no separate protection. Further, there is nothing in section 16 which takes away the power of a superior Court to set aside in appeal or revision the conviction and consequently the sentence of imprisonment in substitution of which the order for detention in a reformatory school was made. In such a case the order for detention would necessarily become inoperative. If the superior Court maintained the conviction, but altered the sentence to one, such as whipping, for which detention in a reformatory school could not, under the Act, be substituted, the same result would follow. This shows that section 16 cannot be read with absolute literalness, for in such cases the substituted order for detention is undoubtedly altered or reversed.

Section 16 does not appear to have been discussed by any of the other High Courts in any reported case. In practice those Courts do not act on the view that they have no power to alter or reverse in appeal or revision an illegal order substituting detention in a reformatory school for transportation or imprisonment. Thus in *Deputy Legal Remembrancer* v. *Ahmad Ali* (1), the Calcutta High Court in revision set aside as contrary to law an order of a Magistrate substituting detention in a reformatory school for two years for a sentence of imprisonment, the main grounds being that the least period for which the detention could be ordered under section 8 of the Act was three years, and that there was no clear finding as to the age of the offender as required by section 11. In *Queen-Empress* v. *Ramalingam* (2), the Madras High Court in revision altered an order of a Magistrate

(1) (1897) I. L. R., 25 Calc., 333. (2) (1898) I. L. R., 21 Mad., 430.

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substituting detention in a reformatory school for imprisonment so as to make the period of detention in accordance with the rules made by the Local Government under the Act. In an unreported case in the Bombay High Court (*Imperatrix* v. *Bhan Singh*, Criminal Reference No. 43 of 1897, decided on the 17th June 1897), Mr. Justice Parsons and Mr. Justice Ranade set aside the Magistrate's order as illegal under Act VIII of 1897, on the ground that it did not appear from the record that the accused was under the age of 15 years. There is some analogy to section 16 of Act VIII of 1897 in section 435 (3) of the Code of Criminal Procedure, which provides that orders made under sections 143 and 144 are not proceedings the record of which the High Court may call for and examine for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. It has been held that where an order, though purporting to be made under section 143 or 144, is not authorized by them and is clearly made without jurisdiction, the prohibition does not apply and the High Court can interfere. The reason is that what the Legislature intended to protect from interference in revision was orders legally passed under the sections in question, not any illegal order which a Magistrate might profess to pass under them. "If this were not so Magistrates might by affecting to act under section 144, when the case was not within that section, oust the jurisdiction of this Court to interfere:"—*Roop Lall Das* v. *Manook* (1), and see *Queen-Empress* v. *Partab Chander Ghose* (2), and the cases there cited. It is on similar grounds that sections in special Acts of Parliament expressly providing that convictions, orders or other proceedings "shall not be removed into the High Court by certiorari or otherwise," have been construed as not depriving the High Court of power to issue a certiorari where the order has been passed without jurisdiction. Thus in *ex parte Bradlaugh* (3), the Act provided in

(1) (1898) 2. Calc., Weekly Notes, 572. (2) (1898) I. L R., 25 Calc., 852.
(3) (1878) L. R., 3 Q. B. D., 509.

the most general terms that no information, conviction or other proceeding before or by any of the said Magistrates shall be quashed, or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench. It was, however, held that a section in an Act of Parliament taking away the certiorari did not apply in the case of total absence of jurisdiction. Mellor, J., said :—"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleased without question." See also *The Colonial Bank of Australasia* v. *Willan* (1). "The prohibition obviously applied only to cases which have been entrusted to the lower jurisdiction" : Maxwell on Statutes, p. 180. So here I think that section 16 of the Reformatory Schools Act, 1897, does not apply where there was an absence of jurisdiction, and that the consequence of holding it to apply where the order substituting detention for transportation or imprisonment is illegal, would be that a Magistrate could make any such illegal order he pleased without question.

Even if I am wrong in this view, still section 16 in terms refers only to the interference of the superior Courts under the Code of Criminal Procedure, and the High Court could alter or reverse any such illegal order in the exercise of its powers of superintendence under section 15 of the High Courts Act, 1861, which is in no way touched. That provision is not referred to in the judgments in *Queen-Empress* v. *Himai*, and *Queen-Empress* v. *Gobinda*. But for the reasons which I have given, I think that under the Code, as well as under the High Courts Act, this Court is competent to interfere in such a case, and that the decisions to the contrary are wrong and must be overruled. Before passing any order upon the present application we must ask the Sessions Judge for a finding as to whether the accused Hori is a Dalera as alleged both by the accused himself and by the Local Govern-

(1) (1874) L. R., 5 P. C., 417, at p. 442.

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ment. The application will be disposed of after the receipt of the finding.

KNOX, J.—I fully concur with the learned Chief Justice that the policy and object of the Legislature in enacting section 16 of the Reformatory Schools Act, 1897, was to exclude the interference of Courts, whether by way of appeal, or by way of revision with (1) any finding by the trying Magistrate under section 11 of the Act, which states what such Magistrate considers the age of a youthful offender before him to be, and (2) any order passed under section 8 of the Act, whereby, instead of undergoing a sentence of transportation or imprisonment, such youthful offender is directed to be sent to a reformatory school. The probability is that, as pointed out by the learned Chief Justice in determining these two matters, the Legislature considered the trying Magistrate to have such advantage over a Court of appeal or revision that any interference would be inexpedient. So far we are bound to promote in the fullest manner the policy and object of the Legislature. We are told in the preamble that the object, or one of the objects, of the Act was to make further provision for dealing with youthful offenders, but not with all youthful offenders. The youthful offenders intended were only those boys who had been convicted of any offence punishable with transportation or imprisonment, and who at the time of conviction might be under the age of 15 years. The Legislature further intended and provided that, even in the case of such offenders, all such should not be sent to a reformatory school, but only such of them, whom, by rules made for this purpose, having regard to the nature of their offence or other considerations, the Local Government might consider fit subjects for detention in a reformatory. It was not the intention or policy of the Legislature that any boy whom the Local Government did not, by rule made for the purpose, consider fit should be taken out of the ordinary jurisdiction of Courts of appeal or of revision. The power of superior Courts to question the finding of guilty or not guilty was not removed, and was never intended to be removed, by

section 16, whether the person found guilty or not guilty were a youthful offender as understood by the Act or not a youthful offender. All that was excepted was the order with respect to age and the order of detention substituted. Where a Court found an offender to be at the time of conviction 18 years and still passed an order of detention substituted for imprisonment, we are, I hold, entitled to find that the offender is not a youthful offender, and therefore one to whom the order of detention substituted for imprisonment was never intended to apply, could not apply, and was null and void. So also if the offender in such case be a girl, or, in these Provinces, a Dalera, this Court is entitled to exercise its ordinary power of appeal or revision. It is necessary first to have a determination whether the accused is or is not a Dalera, and I accordingly concur in the order proposed.

BANERJI, J.—I am of the same opinion as the learned Chief Justice, but out of respect for the learned Judges from whose judgments we are differing, I deem it proper to state briefly my views on the question before us. That question is, whether section 16 of Act No. VIII of 1897 precludes this Court from altering or reversing in appeal or revision an order for detention in a reformatory school passed in substitution for an order for transportation or imprisonment, however illegal that order may be. It seems to me that the interpretation put on the provisions of that section in *Queen-Empress* v. *Himai* (1), and *Queen-Empress* v. *Gobinda* (2) is somewhat too narrow, and, as pointed out by the learned Chief Justice, calculated to defeat the intention of the Legislature. According to well known canons of construction, an Act of the Legislature should be so interpreted as consistently with the language used by it to give effect to its intention. I do not think we should be justified in assuming that in placing upon the powers of a Court of appeal or revision the restriction which section 16 imposes, the Legislature intended to create or overlooked the anomalies referred to by the learned Chief Justice,

(1) (1897) I. L. R., 20 All., 158. (2) (1897) I. L. R., 20 All., p. 159.

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which must be the inevitable result of the strict and literal interpretation placed upon that section in the two rulings mentioned above. In my opinion the order referred to in section 16, which a Court or Magistrate has no authority to alter or reverse in appeal or revision, must be an order which the officer who made it was competent to make, and which he made in compliance with the provisions of Act No. VIII of 1897. Where a Court or Magistrate has jurisdiction to make an order for detention in a reformatory school in substitution for an order of transportation or imprisonment, and in the exercise of that jurisdiction the Court or Magistrate has made an order for detention in consonance with the provisions of section 8, 9 or 10, such order is not open to interference in appeal or revision and is final. But where the order passed is not one justified by the Act and transgresses the provisions of the Act or the rules framed by the Local Government under the Act, section 16 does not protect it from interference in appeal or revision. The protection afforded by the section only extends to the lawful exercise of the discretion vested in a Court or Magistrate to substitute in certain cases an order of detention in a reformatory school for an order of transportation or imprisonment. There cannot be any doubt that the order of conviction is open to appeal or revision. If the conviction be set aside, the order of detention must of necessity fall to the ground. But if section 16 be considered to bar interference with an order of detention in any case, that order will stand good, although the conviction no longer subsists. Such a result could not certainly have been intended by the Legislature in enacting section 16. I agree with the learned Chief Justice in making the order proposed by him.

BY THE COURT.—Let the record be sent down to the Sessions Judge for a finding as to whether the accused Hori is a Dalera.

[Subsequently, on the return by the Sessions Judge of a finding that Hori was a Dalera, the order under discussion was set aside.]