applies, the words of the section in our view require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained. Unless this view is strictly observed, the protection intended by the section would be liable to become in practice seriously reduced.

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Appeal dismissed.

Agent for the Appellant: *Ranjit Singh Narula.*

Agent for the Governor-General in Council: *K. Y. Bhandarkar.*

Agent for the Respondent: *Tarachand Brijmohanlal.*

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Jan. 16, 19.

[SIR PATRICK SPENS C. J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Drugs Control Order, 1943, cls. 9 (a), 13 (d), 16—Contravention of cls. 9 (a) and 13 (d)—Prosecution without previous sanction—Sanction obtained before examination of witnesses—Legality of proceedings—Form of sanction.

Clause 16 of the Drugs Control Order, 1943, provides that no prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government. A prosecution for contravening cls. 9 (a) and 13 (d) of the Order was instituted without previous sanction, but sanction was obtained before the commencement of the examination of the witnesses and the accused was convicted :—

Held, that the prosecution was completely null and void as it was initiated without the requisite sanction; that it was not possible to sever the proceedings prior to the date on which sanction was obtained from those on and after that date; and, as proceedings were not started *ab initio* after sanction was obtained, the whole proceedings were null and void.

Held also, that a sanction given by the Provincial Government under clause 16 could not be held to be invalid merely because it was not expressed to be given by the Governor.

APPEAL from the High Court of Judicature at Calcutta. Criminal Appeal No. XVI of 1944. The necessary facts are set out in the judgment.

1945. Jan. 16. *Mahabir Prasad* (*Samarendra Mukherjee* and *R. J. Bahadur* with him) for the appellant. Under cl. 16 of the Drugs Control Order previous sanction of the Provincial Government is necessary for instituting prosecutions. The conviction in this case is bad on two

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grounds: (1) the sanction does not comply with ss. 49 and 59 of the Constitution Act under which all executive acts must be expressed to be in the name of the Governor. Granting of sanction is an executive act. The sanction in the case is not expressed to be given in the name of the Governor: *Sibnath Banerjee's* case (1); (2) Clause 16 requires previous sanction. Sanction was not obtained in this case before the institution of the prosecution. The police challan was treated as a complaint and the case was taken cognisance of on the 2nd May. The case was posted for evidence on the 16th. Sanction was produced only on the 24th. Want of previous sanction entirely vitiates the whole trial.

Sir Brojendra Mitter, Advocate-General of India (*H. K. Bose* with him) for the respondent. Since sanction was obtained on the 24th May the trial is not invalid. Nothing was done before that date. Where a Magistrate, finding that sanction has not been obtained, adjourns the case for producing the sanction and proceeds with the case only after the sanction is produced, there is nothing illegal. If anything has been done before the date on which sanction was given, that may be treated as void and ignored, but this cannot affect the validity of the subsequent preceedings where the proceedings are severable. The prosecution can be deemed to have been instituted on the 24th when sanction was given. As regards the form of sanction, *Sibnath Banerjee's* case(1) only lays down that the provisions of the particular statute must be complied with. Clause 16 requires only sanction of the "Provincial Government" and that has been complied with. Moreover, granting of sanction is not strictly an executive Act. It is a quasi-judicial act.

Mahabir Prasad replied.

Cur. adv. vult.

Jan. 19. The judgment of the Court was delivered by

SPENS C. J.—The appellant in this case was charged with two offences alleged to have been committed on the 20th April, 1944, contravening the provisions of

(1) [1944] F. C. R. 1.

cls. 9(a) and 13(d) of the Drugs Control Order, 1943. He was convicted on the 29th June, 1944, and sentenced to a term of four months' rigorous imprisonment and a fine of Rs. 1,000, or in default to a further term of four months' rigorous imprisonment. Against this conviction he appealed to the High Court of Judicature at Fort William in Bengal, and on the 13th November, 1944, his appeal was dismissed, although the sentence of imprisonment was reduced from four months to one month. A certificate under s. 205 of the Government of India Act, 1935, was granted and hence the appeal to this Court.

The Drugs Control Order, 1943, provides by cl. 16 as follows :—

" No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government...."

In purported compliance with the provisions of cl. 16, the Provincial Government of Bengal made an order sanctioning the prosecution of the appellant by a document dated the 23rd May 1944, in the following terms :—

" Whereas it appears from a report of the Deputy Commissioner of Police, Enforcement Department, Calcutta that . . . Basudev Agarwalla, son of Anandaram Agarwalla, . . . of 185, Harrison Road, Calcutta, c/o Messrs. Umashankar & Co., Ltd., sold on 20th April 1944, 6×1 c.c. ampoules of Emetine Hydrochloride containing 1 gr. each to Babu H. N. Roy, Sub-Inspector of Excise employed on drugs control work for Rs. 13 in contravention of cl. 9 of the Drugs Control Order 1943, the Provincial Government, in exercise of the power conferred by cl. 16 of the said Order sanction the prosecution of the aforesaid . . . . Basudev Agarwalla under sub-r. (4) of r. 81 of the Defence of India Rules.

(Sd.) S. Banerjee,
Secretary to Government of Bengal."

It was argued before us that the sanction in the above form did not comply with the provisions of ss. 49 and 59 of the Government of India Act, 1935. It was suggested that under those sections the sanction must

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be expressed to be given by the Governor and that it was improper that the Provincial Government should have purported to sanction the prosecution. This argument was apparently based on what were assumed to have been the views of the majority of this Court in *Sibnath Banerjee's* case(1). But as pointed out in that case where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. In this case the provisions of cl. 16 expressly authorise the previous sanction of the Provincial Government, and accordingly in our judgment no valid objection can be taken to the form of the sanction purported to be given in this case.

It was then argued that on the facts of this case the prosecution had been instituted prior to the giving of the sanction in question and that accordingly having regard to the very definite provisions of cl. 16, the proceedings and conviction must be null and void.

From the Order Sheet of the Chief Presidency Magistrate's Record it appears that the appellant was produced before the Chief Presidency Magistrate on the 2nd May, 1944, and a challan under rules 81(4) and 121, D.I.R., filed on that day. Thereupon the Chief Presidency Magistrate made an order transferring the case to another Magistrate. Later, on the same day the appellant was brought before that Magistrate who adjourned the case to the 16th May, 1944, for evidence and made an order directing that the appellant should give bail in Rs. 200 to appear on the 16th May. On the 16th May it was noted on the Order Sheet that sanction had not been received. None the less the Magistrate made further orders directing that the case be adjourned to the 24th May for evidence, that the prosecution witnesses be summoned for that day and for bail as before. Against the entry of the 24th May, 1944, a note appears in the margin of the record "sanction filed", and the entry

(1) [1944] F. C. R. 1.

proceeds to record that three prosecution witnesses were examined and a further adjournment ordered. Thereafter the case is recorded as proceeding in the usual way up to conviction and sentence on the 29th June, 1944.

From this it is clear that the sanction was not filed until the 24th May, 1944, but that in the meantime from the 2nd May onwards, the prosecution had been put in motion and various steps taken by the Magistrates. It would appear that when the absence of sanction was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution.

In the High Court also it appears to have been considered that this point raised little more than a mere technical objection and that, as the more material part of the prosecution proceedings did not take place until after the sanction had been received, it was possible to ignore the fact that the proceedings had been instituted without such a sanction. In this Court too we were asked to treat the matter on much the same lines, being invited to hold that whilst, no doubt, all that had been done in the matter prior to the 24th May was without jurisdiction that could be severed from the subsequent proceedings and the latter be regarded as separate and fresh proceedings properly sanctioned. In this connection we were also referred to ss. 196 and 197 of the Code of Criminal Procedure and cases decided in connection with such sections. But having regard to the difference in the wording of the sections in question as compared with the wording of cl. 16 of the Drugs Control Order, 1943, we were unable to get any material assistance from such cases.

In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of

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each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.

In our judgment the words of cl. 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced *ab initio*. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly instituted without the previous sanction required by cl. 16, and it is not possible to sever the proceedings prior to the 24th May from those occurring on and after this date. Consequently, as, when the sanction was obtained, no new start was made, the whole proceedings in this case are null and void.

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The appeal must accordingly be allowed and we direct the case to be remitted to the High Court, and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

Appeal allowed.

Agent for the Appellant: *N. R. Bose.*
Agent for the Respondent: *B. Banerji.*

BISWANATH KHEMKA

v.

THE KING EMPEROR.

1945

April 4, 9.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Government of India Act, 1935, s. 256—Appointment of Magistrate of a Province as Additional Presidency Magistrate—Consultation with Chief Presidency Magistrate, whether necessary—Omission to consult—Validity of appointment.

Section 256 of the Government of India Act, 1935, does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not, at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the district in which the person concerned is working at the time when the recommendation is made, or the Chief Presidency Magistrate if the person concerned is at that time working under him.

The direction laid down in s. 256 is directory and not mandatory, and non-compliance with it would not render an appointment otherwise regularly and validly made, ineffective or inoperative.

APPEAL from the High Court of Judicature at Calcutta. Criminal Appeal No. I of 1945.

The material facts of the case are set out in the judgment.

1945. April 4. *B. Banerji* and *N. K. Sen* for the respondent raised a preliminary objection. The appeal is