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Jan. 11,12,15, 19.

BASANTA CHANDRA GHOSE

v.

KING EMPEROR.

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

*Restriction and Detention Ordinance (III of 1944), cls. 3, 10 (3), 11—Defence of India Act, 1939, s. 2 (1)—Government of India Act, 1935, ss. 59 (2), 93, Sch. VII, List I, entry No. 1—Ordinance authorising detention of person likely to act in manner prejudicial to efficient prosecution of war—Validity—Order of detention—Presumption of validity—Onus of proof—Effect of proclamation under s. 93—Fresh order on same materials—Order on person already under detention—*Habeas corpus *proceedings—Valid order of detention during pendency of proceedings—Duty of Court.*

Ordinance No. III of 1944 is not invalid in so far as it purports to authorize detention on the ground that the detenue is likely to act in a manner prejudicial to the efficient prosecution of the war.

Clause 11 of the said Ordinance does not affect permanently any of the provisions of the Evidence Act and is not invalid in so far as it precludes certain matters being adduced in evidence during the currency of the Ordinance.

It is open to a detenue to show that an order which purports to have been made by the Governor was not in fact made by the Governor or that it was a fraudulent exercise of his power. The burden of substantiating these pleas lies, however, on the detenue, for once the order is proved or admitted, it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Governor was complied with.

Liversidge v. *Anderson* (1) and *Greene* v. *Secretary of State* (2) referred to.

The mere fact that the detenue challenges the factum or the *bona fides* of the order or the fact that the officers of government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the government to adduce evidence in support of the order.

There is nothing in the proclamation under s. 93 of the Government of India Act, 1935, to exclude the application of the provisions of s. 59 (2) of the Act or clause 10 (3) of Ordinance III of 1944 with regard to proof of orders. The proclamation suspends only so much of s. 59 as requires "consultation with ministers".

Where an earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves,

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especially in cases in which the sufficiency of the grounds is not examinable by the courts.

An order of detention can be passed against a person who is already under detention.

In an application for *habeas corpus*, if at any time before the court directs the release of the detenue, a valid order directing his detention is produced, the court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question in such cases is not whether the later order validates the earlier detention, but whether in the face of the later valid order the court can direct the release of the petitioner.

APPEAL from the High Court of Judicature at Patna. Criminal Appeal No. XII of 1944. The material facts are set out in the judgment.

Jan. 11, 12, 15. *B. C. De* (*S. C. Ghose* with him) for the appellant. Ordinance No. III of 1944 is *ultra vires* as " efficient prosecution of the war " is not one of the subjects mentioned in Sch. VII of the Constitution Act in respect of which the Indian Legislature has power to make laws. In entry No. 1 of List I the expression " reasons of State connected with defence " cannot include efficient prosecution of the war, for the war is not for defence alone. Conquest of Burma, for instance, is not defence of India. The Ordinance itself does not say that it is for the defence of India. The Legislature has used different expressions. They cannot be held to mean the same. In England provision is made both for " efficient prosecution of any war in which His Majesty may be engaged " and " defence of the realm ". In India provision is made only for the latter. If some of the grounds alleged for detention are shown to be invalid the order of detention must be set aside : *Keshav Talpade's* case (1). Clause 11 of Ordinance No. III contravenes s. 65 of the Evidence Act. The Governor-General cannot repeal the provisions of the Evidence Act by an Ordinance. The effect of cl. 11 of the Ordinance will continue even after the expiry of the Ordinance.

S. C. Ghose continuing. The direction of this Court in its order of the 23rd May, 1944 was to decide the case on the basis of the order then under consideration. The subsequent order for detention should not

(1) [1943] F.C.R. 49.

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have been considered. Once a return has been filed, the Court must decide the application on the basis of that return: cf. *Keshav Talpade's* case (1). Further, no order under the Ordinance can be made against a person who is already under detention. The words appearing in the preamble are "to place under detention." Again, there was no seal of the Governor in the order. A warrant which does not bear the seal is void: *Alter Caufman* v. *Government of Bombay* (2). The order is also open to the objection that the Chief Secretary had no power to authenticate on behalf of the Governor as a proclamation under s. 93 of the Constitution Act was at that time in force in Bihar. Section 59 (2) of the Constitution Act and cl. 10 (3) of the Ordinance cease to operate when a notification under s. 93 is made. Once an order for detention has been cancelled, no fresh order can be made on the same materials: *Budd's* case(3). A detention under an invalid order cannot be validated and continued by another order: *Kamla Kant Azad* v. *King Emperor* (4). The cancellation and the fresh order are not in fact made *bona fide*. The presumption of *bona fides* is not an irrebuttable one: *Liversidge's* case (5); *Greene's* case (6) and *Rex.* v. *Carr-Briant* (7). The Government has not adduced any evidence to show that the assertions made by the appellant in his affidavit are not true even though all the facts and circumstances were known to the officers of the government. The appellant was not allowed to examine the Chief Secretary. (Counsel referred to the facts and circumstances bearing on the question of *bona fides*.) The High Court is wrong in presuming that fresh materials might have been placed before the Governor for the second order. The Superintendent of Hazaribagh Jail had no legal power to detain the appellant as there was no warrant or writ as contemplated by s. 383, Criminal Procedure Code. There is no provision in India giving to detention orders the force of warrants. With regard to cl. 11 (2) of the Ordinance,

(1) [1943] F.C.R. 49.
(2) (1894) I.L.R. 18 Bom. 636.
(3) [1942] 2 K.B. 14; 1942, 1 All. E.R. 373.
(4) (1944) I.L.R. 23 Pat. 252.
(5) [1942] A.C. 206.
(6) [1942] A.C. 284.
(7) [1943] 1 K.B. 607.

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it is wholly *ultra vires*. A law prohibiting the production of the primary evidence of innocence cannot be for "the peace, order and good government of India" within s. 72 of the Ninth Schedule of the Constitution Act cf. : *Chester* v. *Bateson* (1).

Sir Brojendra Mitter, Advocate-General of India, (*H. K. Bose* with him) and *Mahabir Prasad, Advocate-General of Bihar,* (*R. J. Bahadur* with him) for the respondent were not called upon.

Cur. adv. vult.

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

SPENS C. J.—This is an appeal by a detenue against an order of the High Court at Patna dismissing his application under s. 491 of the Criminal Procedure Code. The appellant was arrested on the 27th March 1942 under an order dated 19th March 1942 purporting to be made by the Governor of Bihar in exercise of the powers conferred by rule 26 of the Defence of India Rules. The application under s. 491 was filed on 28th April 1943. For one reason or another, the hearing of the application was delayed till February 1944 and in the meanwhile, Ordinance III of 1944 was promulgated on the 15th January 1944. The application was dismissed by the High Court ; but, on appeal, this Court held that the new Ordinance (Ordinance No. III of 1944) did not take away the power of the High Court to deal with the matter and accordingly remitted the case to the High Court with a direction that the petition be restored to the file and disposed of in due course of law. The order of this Court was passed on the 23rd May 1944. On the 3rd July 1944, the Governor of Bihar passed two orders, Nos. 3928-C and 3929-C. By the first, he cancelled the order of detention dated 19th March 1942 and by the second, he directed the detention of the appellant on the ground that it was necessary so to do "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war"

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When the application again came on for hearing before the High Court, reliance was placed by the Advocate-General of Bihar on the order of the 3rd July 1944 and he contended that it was unnecessary in the circumstances to enquire into the validity of the order of 19th March 1942. Objection was taken on behalf of the detenue to this course and the validity of the orders of the 19th March 1942 and 3rd July 1944 was questioned on various grounds. These contentions were discussed at considerable length by the learned Judges of the High Court and they held that the objections were untenable; the petition was accordingly dismissed. Hence this appeal.

Two constitutional points were urged before us. The first was to the effect that Ordinance No. III of 1944 was *ultra vires* the Governor-General in so far as it purported to authorise detention on the ground that the detenue was likely to act in a manner prejudicial to the efficient prosecution of the war. It was contended that legislation relating to the prosecution of war was not within the ambit of any of the Lists in Schedule VII to the Constitution Act and that, therefore, neither the Indian Legislature nor the Ordinance-making authority was competent to legislate in respect of that topic. It was recognised that "preventive detention for reasons of State connected with defence" was a subject specified in entry No. 1 in List I but it was urged that it could not be assumed that the prosecution of the war was necessarily a matter of defence and that the war may in certain circumstances be a war of aggression or conquest. We are of the opinion that there is no force in this contention. The reference to "the efficient prosecution of the war" in the Ordinance as well as in the order of detention must be understood in the light of the circumstances in which the Ordinance came to be passed. The language of cl. 3 of the Ordinance is only a repetition of the language of s. 2 (i) of the Defence of India Act and that Act begins by referring to the proclamation of the Governor-General under s. 102 of the Constitution Act to the effect that the security of India is threatened by the war. Events of which the

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Court is entitled to take judicial notice were happening in 1942, 1943 and 1944 with reference to which it could clearly be postulated that the efficient prosecution of the war was necessary for the defence of India.

It was next contended that cl. 11 of the Ordinance was invalid in so far as it precluded certain matters being adduced in evidence. It was said that this was in effect an attempt to repeal *pro tanto* certain provisions of the Evidence Act and it was not within the power of the Governor-General to do so by an Ordinance. This contention is misconceived. It was admitted that it was within the power of the Governor-General to enact such a provision to be in force during the time that the Ordinance itself was in force. What was contended was that he had no power to affect the provisions of the Evidence Act permanently. Clause 11 of the Ordinance does not purport to do so. Its words are general. The utmost that could be said is that if the prohibition enacted by it were sought to be enforced after the expiry of the Ordinance, a question might arise as to whether the prohibition would then remain in force. But that is no ground for holding that the clause is invalid even in so far as it prohibits certain things being done during the currency of the Ordinance. Objection was also taken to the validity of sub-clause (2) of cl. 11. It was contended on the authority of *Chester* v. *Bateson*(1) that such a provision could not be said to be for the peace and good government of British India and could not, therefore, be held to be authorised by s.72 of the Ninth Schedule to the Constitution Act. It is unnecessary for the decision of this case to deal with this question even if it were open to the Court to examine the correctness of the decision of the Governor-General as to the requirements of any particular situation.

With the leave of the Court, a number of contentions relating to other aspects of the case were urged before us. As we are of the opinion that there is no substance in any of these contentions, they may be briefly dealt with. It was broadly maintained that neither the order of 19th March 1942 nor the order of

(1) [1920] 1 K.B. 829.

3rd July 1944 was a *bona fide* exercise of the power entrusted to the Governor and that they were passed for other ulterior ends unconnected with the maintenance of public order or the efficient prosecution of the war. It was urged that as the detenue challenged the *bona fides* of the order and as the reasons and circumstances relating thereto were wholly within the knowledge of the officers of government, it was incumbent upon the Crown to examine these officers to establish the *bona fide* character of the order and that as they have not been examined the Court must draw the inference that the order was not made in the *bona fide* exercise of the power. It was even contended that after the proclamation under s. 93 of the Constitution Act, the Crown was no longer entitled to rely on s. 59 (2) of that Act and cl. 10 (3) of Ordinance III of 1944 and that the order of the 3rd July 1944 should, therefore, be formally proved. A complaint was also made that the High Court acted improperly in dismissing the application of the detenue to summon Mr. Houlton, the Chief Secretary to the Government of Bihar, who had signed the orders of the 3rd July 1944. This line of argument is in our opinion untenable. It was no doubt open to the detenue to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the power. The observations in *Liversidge* v. *Anderson* (1) and *Greene* v. *Secretary of State for Home Affairs* (2) establish that the burden of substantiating these pleas lies on the detenue. In the words of Viscount Maugham, once the order is proved or admitted "it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State (here, the Governor) was complied with". As regards proof of the orders, we find nothing in the proclamation under s. 93 to exclude the application of s. 59 (2) of the Constitution Act or cl. 10 (3) of the Ordinance. The proclamation suspends only so much of s. 59 as requires "consultation with the ministers".

(1) [1942] A. C. 206. (2) [1942] A.C. 284.

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The mere fact that the detenue challenges the factum or the *bona fides* of the order or the fact that the officers of government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the government to adduce evidence in support of the order. In *Greene's* case (1), Goddard L. J. (as he then was) referred to the possible ignorance of the detenue as to the reasons for his internment and said that that would not shift the burden of proof, because "it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe" that it was necessary to detain the person. Reference was made to *Rex* v. *Carr-Briant* (2) as to the extent of the proof required to rebut the presumption in such cases; but as no proof whatever is forthcoming in this case, no question of quantum of proof arises. The detenue no doubt made some sweeping assertions in his affidavits but no materials or sources of information with reference to which these assertions were made were discolsed in the affidavits. No value can, therefore, be attached to these assertions. Even these affidavits did not assert that the orders of the 3rd July 1944 were not in fact made by the Governor. As regards the detenue's application to summon Mr. Houlton, it was certainly within the discretion of the learned Judges of the High Court to dismiss it, if they considered that it was only an attempt to fish for information that might be turned to some account by the detenue. To permit such a device would practically be to allow the rule as to the onus of proof to be circumvented.

It was next contended that the very fact of the cancellation of the order of 19th March 1942 by the order of the 3rd July 1944 and the passing of a fresh order of detention on the 3rd of July 1944 showed *mala fides*. It was said that the orders of the 3rd July 1944 were passed pending the further hearing before the High Court, in order to burke an enquiry into the circumstances connected with the order of March 1942. We are unable to draw any such inference from the sequence of these orders. Reports of the decision

(1) [1942] A.C. 284. (2) L.R. [1943] 1 K.B. 607.

of this Court and of the High Courts show that during 1943 and 1944 different views were held in different quarters as to the formalities necessary for a valid order of detention and as to the authority entitled to pass such an order. If in view of possible defects of this kind in connection with the order of 19th March 1942 a fresh order of detention was passed in July 1944 so as to avoid any argument based on such defects, such a course will not justify any inference of fraud or abuse of power.

It was next argued as a matter of law that once the order of 19th March 1942 had been cancelled, there was no power to pass a fresh order of detention except on fresh materials and it was contended that the learned Judges of the High Court were not justified in presuming that fresh materials must have existed when the order of July 1944 was made. The first step in this argument seems to us unwarranted. The observations of the Court of Appeal in *R.* v. *Home Secretary, Ex parte Budd* (1) show that in this broad form the proposition is untenable. It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds. But where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention. The decision of the Patna High Court in *Kamla Kant Azad* v. *King Emperor* (2) cannot be understood as laying down any such proposition as a general proposition of law. The learned Judges seem to have drawn an inference of fact from the circumstances of the case that the order then in question was not one made in the *bona fide* exercise of the Governor's powers.

(1) [1942] 2 K.B. 14; 1942, 1 All E.R. 373.
(2) (1944) I. L.R. 23 Pat. 252.

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It was finally contended that as the previous order of this Court directed an enquiry into the validity of the detention under the order of the 19th March 1942, the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of the 3rd July 1944. This contention proceeds on a misapprehension of the nature of *habeas corpus* proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.

The appeal fails and is dismissed.

Appeal dismissed.

Agent for the Appellant: *Gurudayal Sahay.*

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

Agent for the Province of Bihar: *S. P. Varma.*

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

Government of India Act, 1935, s. 270—Indian Penal Code—(Act XLV of 1860), ss. 408, 409—Prosecution for criminal misappropriation—Previous sanction of Government, whether necessary—Proceedings instituted without sanction—Sanction obtained subsequently—Validity of proceedings.

The offence under s. 408 or s. 409 of the Indian Penal Code is not one in respect of which the protection of s. 270 of the Constitution Act can be claimed.

Hori Ram Singh v. *The Crown* [1939] F.C.R. 159 followed.