
(1945) 08 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Miscellaneous No. 37 of 1945

Juggilal Kamlapat

APPELLANT

Vs

Collector of Bombay

RESPONDENT

Date of Decision : 09-08-1945

Acts Referred:

Specific Relief Act, 1877 — Section 45

Citation : (1945) 47 BOMLR 1070

Hon'ble Judges : Bhagwati, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Bhagwati, J.—The petitioners are a firm carrying on business at Bombay, Cawnpore, Calcutta and several other places. The partners of the petitioners' firm are three brothers, viz. Sir Padampat Singhanian, Lala Kailashpat Singhanian and Lala Lakshmipat Singhanian. In paras. 1 and 2 of their petition the petitioners set out the various businesses and industrial concerns in which they are interested and also set out the manner in which the partners of the petitioners' firm as well as the directors, managers, and representatives of one or more of the concerns of the petitioners in India are obliged to and do in fact come down to Bombay very frequently. They say that for the purpose of housing them as well as the offices of their several businesses they have rented since 1941 flat No. 4 on the third floor of the premises known as Ganga Bihar at Marine Drive in Bombay. The petitioners say that they have no other place in Bombay where they can have any accommodation for the aforesaid purposes and that the flat is indispensable to them for their business purposes and for the purposes of the residence of their representative and the other persons when they come down to Bombay. In para. 3 of their petition they also point out the activities of Sir Padampat Singhanian and Lala Kailashpat Singhanian, the partners of the petitioners' firm, and the manner in which they are obliged to come down to Bombay from time to time and put up at the flat whenever they happen to come

down to Bombay. After describing their multifarious activities and the needs as I have above described, the petition proceeds to state that in the beginning of January 1945 respondent No. 1 served an order No. CPWD/69 purporting to have been issued on behalf of the Central Government under Rule 75A of the Defence of India Rules read with the Notification of the Government of India Defence Co-ordination Department No. 1336/OR/1/42 dated April 25, 1942, where by the flat was requisitioned from the date of the order and the petitioners were directed to deliver possession of the flat to the Superintending Engineer, Western Circle, Central P. W. D., respondent No. 2, on February 16, 1945,

2. On receipt of the order a letter was addressed on behalf of Sir Padampat Singhanian, the partner of the petitioners' firm, by his advocate to the respondent contending in the first instance that the said order was not good in law and was null and void as the person in whose name the requisition order was issued was dead and gone long ago and that the fiat was actually in the name of J. K. Cotton Spinning and Weaving Mills, Ltd. Without prejudice to his contention Sir Padampat Singhanian wrote to say that the particular flat was required for their business purposes and for the purposes of residence of the various persons who came down to Bombay and the only accommodation available to the J.K. Directors was the flat in question. He pointed out that so far as Bombay was concerned, the J.K.S. had no other premises available to them for occupation except a cottage at Juhu known as "Kamla Cottage" which was in the sole occupation of Mr. N.C. Mehta, I.C.S., former Sugar Controller, but now in the employ of the J.K.S.. He stated that the flat was not vacant and was continually occupied and used by the J.K.S. Directors (one of the rooms being used for the office purposes) and that they had no other place of accommodation in Bombay. He pointed out that an inquiry regarding the fiat had been made by the Special Officer, Requisitioning, sometime in November 1944 and it was presumed that he was satisfied about the genuineness of his case that the flat was necessary for the residential accommodation of the directors. He further pointed out that there would be no dearth of vacant flats in Bombay, many of which would be available for Government purposes and that there was scarcely any necessity for the Government to deprive the genuine occupiers of their flats like him of the flats in their use and occupation. By his letter dated January 16, 1945, Sir Padampat Singhanian through his advocate corrected the misstatement which he had made in his earlier letter dated January 9, 1945, that the person in whose name the requisition order was issued was dead and gone long ago. He stated that the flat did not stand in the name of the J.K. Cotton Spinning and Weaving Mills, Ltd., but stood in the name of Seth Juggilal Kamlapat in which name the requisition order had been issued. Sir Padampat Singhanian through his advocate addressed a further letter dated January 19, 1945, to respondent No. 1, wherein he elucidated and added some further points for the consideration of respondent No. 1. He recounted therein the various qualifications and activities of his and those of Mr. Bharatia, Lala Kailashpat Singhanian, Lala Sohanlal Singhanian and other directors of the J.K. Industries. He stated that most of the concerns in which he

was concerned were doing genuine war work and reiterated his request for the cancellation of the requisition order. Respondent No. 1, however, replied, on February 5, 1945, that he had considered the representations which Sir Padampat Singhanian had made in his letters dated January 9, 1945, and January 19, 1945, and regretted to state that the requisition order could not be withdrawn. The petitioners' firm, therefore, by their attorneys' letter dated February 12, 1945, wrote a letter to the Adviser to His Excellency the Governor of Bombay putting on record the various facts and representations which they had made in the said letters dated January 9, 1945, and January 19, 1945, above referred to, and which they had addressed to respondent No. 1. After setting out therein with great elaboration the facts and representations above mentioned, the letter stated in para. 16 thereof that the said flat was entirely indispensable to them and to their business, that they were doing considerable war work through their various concerns therein mentioned, particularly the Eastern Chemical Co. and the Raymond Woollen Mills, Ltd., of Bombay, and J.K. Cotton Spinning and Weaving Mills, Ltd., that all the other concerns of Bombay as well as Cawnpore and Calcutta were mostly doing war work, that all the said work would suffer immensely and they would be put to immense loss if the said flat were not allowed to remain in their possession and they were prevented from locating their permanent manager and other representatives in Bombay and from themselves coming to Bombay. They added that if the said flat was not derequisitioned the Government alone would be responsible for the aforesaid consequences and they would have no alternative but to proceed further according to law. This letter also had not the desired effect. The Government were absolutely uninfluenced by the threat held out in para. 16 of that letter that the war work which the petitioners were doing would suffer immensely if the flat was not derequisitioned as asked for and a letter was addressed by the Under Secretary to the Government of Bombay, Revenue Department, to the petitioners' attorneys on February 16, 1945, whereby the petitioners were informed that Government saw no reason to interfere in the matter.

3. When these representations which the petitioners made to respondent No. 1 as well as to the Adviser to His Excellency the Governor of Bombay had not their desired effect, the petitioners filed this petition in this Court. In para. 7 of their petition the petitioners submitted that respondent No. 1 was not competent to issue the said order of requisition. They stated that Rule 75A of the Defence of India Rules appeared to have been framed by the Central Government in exercise of their powers u/s 2(2)(xxiv) of the Defence of India Act, that "requisition" was a distinct and separate category of legislative power and that "requisitioning" of property was not covered by or included in any entry in the three lists contained in schedule VII to the Government of India Act and that neither the Central Legislature nor the Provincial Legislature was competent to legislate in respect thereto and that therefore Rule 75A of the Defence of India Rules was ultra vires and bad. In para. 8 of their petition they stated that there was no provision for compensation made anywhere in the Defence of India Act

for requisition of Immovable property and that condition No. 4 of the said purported order had no application to the case of requisition of Immovable property. In para. 9 of their petition they further submitted that by the said order the said flat was moreover purported to be requisitioned for an indefinite term, which in any event it was not competent for respondent No. 1 to do. They further stated that the power to determine the said indefinite term was by the said order delegated to and vested in respondent No. 2 which delegation or vesting was illegal and unauthorised and that the whole order was, therefore vitiated and was illegal and void. They further submitted that for each of the reasons therein mentioned the said purported order issued by respondent No. 1 was without jurisdiction and was ultra vires, illegal and inoperative in law.

4. Without prejudice to their submission the petitioners further submitted in para. 11 of their petition that having regard to the facts mentioned above and having regard to Section 15 of the Defence of India Act, it was not competent for respondent No. 1 to issue the said requisition order when there were and still are many and numerous large bungalows in the occupation of various persons in Bombay who might not and in fact do not need the entire bungalow or bungalows and any one of which latter premises or a portion or portions thereof could well have been requisitioned by respondent No. 1 after due inquiries. The petitioners further submitted that the Government had put up and could still put up numerous sheds and quarters on very large pieces of land in possession of the Government wherein the officer or officers of the Central P.W.D. could be accommodated without the least inconvenience and the object of respondent No. 1 in requisitioning the said premises of the petitioners was not the efficient prosecution of the war as alleged in the order. They submitted that the order in question was not made bona fide for the purpose for which it purported to have been made. In para. 12 of their petition they also submitted that the order of respondent No. 1 was made without calling upon the petitioners for explanations and inquiries and as such it was also against the principles of natural justice and was passed by respondent No. 1 as a result of the denial of natural justice to the petitioners.

5. Based on those submissions of theirs contained in those paragraphs of this petition the petitioners submitted that this Court should issue a writ of certiorari calling for the records of the papers and proceedings or inquiry, if any, made by respondent No. 1 before he issued the said order to enable this Court to determine the legality of the said order and if necessary to quash the same. They also submitted that this Court should issue a writ of prohibition, it being necessary in the interest of justice and consonant with right and justice that respondent No. 1 should be prohibited from proceeding with or taking any steps to execute, enforce or carry into effect the said order passed by him in the manner threatened in the said order or in any other manner whatsoever. They also submitted that this Court should issue an order u/s 45 of the Specific Relief Act directing respondent No. 1 to forbear from exercising jurisdiction and from proceeding to execute or take any steps for the execution or enforcement of or

carrying into effect of the said order. Prayers (a), (b) and (c) of the petition were respectively in respect of the said reliefs by way of a writ of certiorari, a writ of prohibition and an order u/s 45 of the Specific Relief Act which they had submitted should be granted by the Court in their favour against the respondents.

6. This petition was filed by the petitioners on March 1, 1945. On March 2, 1945, they made an application before me for the granting of a rule nisi in terms of prayers (a), (b) and (c) of the petition which I granted on that day, giving the petitioners liberty to apply for an interim order on forty-eight hours' notice in that behalf if respondent No. 1 was going to take steps towards execution of the said requisition order in the meanwhile.

7. Respondent No. 1 filed an affidavit on April 2, 1945, contending in the first instance that the petition was misconceived and incompetent and that the same should be dismissed with costs. Without prejudice to his said contentions he stated in para. 3 of his affidavit that according to his information and the investigations made by the Government officers before the requisition order was made, and after receiving the representations made on behalf of the petitioners, he was informed that the said flat was on occasions used by the petitioners' representatives visiting Bombay and not by any person regularly resident in Bombay. He stated that his information was that the petitioners' representatives visiting Bombay who were making use of the said flat could make other arrangements for their casual stay in Bombay and that the petitioners were the owners of a large bungalow at Juhu. He stated that it was pointed out to him that it should not be difficult for the petitioners to obtain accommodation in the said bungalow at Juhu whenever they or their representatives happened to come to Bombay for the purposes of their business. Without prejudice to the above, respondent No. 1 stated in para. 4 of his affidavit that he had been informed by his Special Requisition Officer, Mr. Gupte, that quite recently the petitioners had purchased for themselves a palatial bungalow at Warden Road completely furnished and had secured possession thereof and submitted that in view of this purchase the whole of the petitioners' complaint as contained in the petition and in the representations made by them to the Government of Bombay fell to the ground. Respondent No. 1 stated in para. 7 of his affidavit that the action complained of was taken by him after fully considering the facts placed before him and that the order for requisition was served on the petitioners for the purpose mentioned in the said requisition order, viz. for the efficient prosecution of the war. In para. 8 of his affidavit he denied that explanations were not called for from the petitioners' representatives who were in the said flat in Bombay or that inquiries were not made from them and from other quarters. He stated that the inquiries prior to the making of these orders were departmental inquiries and the facts placed before him were fully considered by him before any requisition order was made by him. He also stated that far from taking any precipitate action against the petitioners in respect of this flat both the Government of Bombay and himself had considered the petitioners' representations from every point of view.

8. An affidavit in rejoinder was filed on April 6, 1945, by Sadanand Motiram Nevgi, the representative of the petitioners. He stated that as the representative of the petitioners he had been regularly staying in the said flat, that respondent No. 1 had merely relied upon information supplied to him by other persons and investigations made by other Government officers, which information was not firsthand and was incorrect and misleading. He stated that respondent No. X did not appear to know that the petitioners had several concerns not only in Bombay but as nearly as forty concerns in Cawnpore and other places and the representatives of the said concerns were coming to Bombay from time to time so that the flat in question remained completely occupied throughout the year. He stated that there was no accommodation at all available for housing the representatives of the other various concerns when they came down to Bombay from time to time as also for locating the offices of the said various concerns. As regards the bungalow referred to as having been purchased at Warden Road, he denied that it was a palatial bungalow as was sought to be made out. It could only accommodate the director in charge and another director of the said concern but the remaining partners of the petitioners and the managers, representatives and managing and other directors of the petitioners' numerous concerns could not be accommodated in the said bungalow. The flat in question was still required for the purpose of accommodating them. He further denied that any explanations were ever called for from the petitioners or their representatives. He stated that none of them was asked to answer any of the allegations made against them, that all the inquiries were ex parte inquiries without giving any opportunity to the petitioners to challenge the veracity thereof, and that respondent No. 1 had acted against the principles of natural justice in not giving an opportunity to the petitioners to answer the said inquiries.

9. These are the respective contentions of the parties in the petition and the affidavits which they have made in these proceedings. No evidence was led by Mr. M.P. Amin in support of his various allegations of fact even though the same were controverted by respondent No. 1; and he relied solely upon the points of law which arose in the petition in order to obtain the reliefs which the petitioners had prayed for in their petition. I, therefore, take it that the whole superstructure which the petitioners have based on their multifarious business activities and the requirements of their representatives and the various directors and managers of their various concerns in Bombay and elsewhere in India who require to come down to Bombay and occupy the premises in question was merely put forward in order to make out a case as if respondent No. 1 had in the matter of the issue of the requisition order in question acted in flagrant disregard of the provisions of Section 15 of the Defence of India Act, 1939, and that the requisition order in question was therefore illegal, void and inoperative in law. The absence of any evidence led by the petitioners in that behalf, in spite of the said allegations having been contravened by respondent No. 1, leads me to the conclusion that there was absolutely no substance in that contention of the petitioners, that the said allegations had been trotted out by the petitioners merely with a view to

exaggerate their needs and requirements and it was not thought worth their while by the petitioners to lead any evidence in support of the same in view of what had been pointed out by respondent No. 1 that besides the said flat in Bombay which was sought to be requisitioned by him, the petitioners had a bungalow at Juhu named Kamala Cottage and a palatial bungalow situate at Warden Road where they could easily and with convenience house all their partners and the representatives and directors and managers of the various industries in which they were concerned whenever they happened to come down to Bombay. The only purpose of the petitioners in putting forward these various allegations was to show to the authorities concerned as well as to the Court the importance of their business connections, the magnitude of their business and the war work which they alleged they had been doing in the course of their management of the said various businesses of theirs. All these allegations and representations had no effect on the Government, they had also no effect on the Court in the matter of the appreciation of their contention as regards respondent No. 1 having acted in contravention of the provisions of 8. 15 of the Defence of India Act in the absence of any evidence led by them in support of the same. In the result, I hold that the petitioners have failed to substantiate their contention that the requisition order in question was passed by respondent No. 1 in flagrant disregard of the provisions of Section 15 of the Defence of India Act and was therefore illegal, void and inoperative in law.

10. Equally baseless was the other contention of the petitioners that the order made by respondent No. 1 was made by him without calling upon the petitioners for explanations and inquiries and as such was against the principles of natural justice and was passed by him with the denial of natural justice to the petitioners. Even though the said allegations had been controverted by respondent No. 1 the petitioners did not lead any evidence on the point. In the result I hold that the petitioners have also failed to establish this contention of theirs.

11. Having disposed of the two contentions which required evidence to be led by the petitioners in support of the allegations in that behalf before they could ever substantiate the same, I shall now proceed to consider the contentions which the petitioners have raised in their petition which involved consideration of points of law.

12. The petitioners contended first that the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules was ultra vires the Central Legislature. This contention I have already dealt with in extenso in my judgment in Tan Bug Taim Vs. Collector of Bombay, and for the reasons stated therein I am of opinion that the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules with respect to the requisition of Immovable property without a public notification by the Governor General u/s 104 of the Government of India Act was ultra vires the Central Legislature. I may state here that in this petition also we are only

concerned with the requisition of Immovable property by respondent No. 1.

13. The petitioners further contended that no provision for compensation was made anywhere in the Defence of India Act for requisition of Immovable property and that condition No. 4 of the purported order had no application to the case of requisition of Immovable property. This contention was not seriously pressed by Mr. M.P. Amin for the petitioners. I may, however, point out in this connection that condition No. 4 of the requisition order in question says:

Such compensation as may be settled by agreement shall be paid to the owner of the property and, in the event of failure to reach agreement, such compensation as may be determined under the provisions of the Defence of India Act, 1939, or the rules thereunder.

This is in accordance with the terms of Section 19 of the Defence of India Act which enacts the provisions for compensation to be paid in accordance with certain principles for compulsory acquisition of Immovable property, etc. I see nothing in the terms of Rule 75A of the Defence of India Rules or Section 19 of the Defence of India Act which goes to support the contention of the petitioners that no provision has been made therein for compensation in respect of the requisition of Immovable property nor do I see any force in the contention of the petitioners that condition No. 4 of the requisition order in question has no application to the case of requisition of Immovable property. If the requisition of Immovable property was validly made, there is due provision for awarding the compensation to the owner of that property by the Government in the event of a requisition of such property being made from the owner thereof. I, therefore, reject this contention of the petitioners.

14. The petitioners further contended that the requisition order in question purported to requisition the Immovable property for an indefinite term which it was not competent for respondent No. 1 to do. In support of this contention of the petitioners Mr. M.P. Amin urged that according to the first condition therein mentioned the property was to continue in requisition during the period of the present war and six months thereafter. He urged that that period was an indefinite period and therefore the requisition order being vague and indefinite was not a valid order but was illegal and inoperative in law. If the argument of Mr. M.P. Amin was to be accepted, the requisition order in question should have stated that the requisition was to continue for a determinate period, say four months, six months, eight months and so on. The requisitioning authority should have either by a sort of foresight or prevision determined within itself what was going to be the period of the duration of the present war and ought to have stated that period as the period of requisition or should have resorted to approximations in that behalf and stated the approximate period so arrived at as the duration of the present war, but should not have had resort to the expression which according to Mr. M.P. Amin was vague in so far as it said that the requisition order was to be for the period of the present war and six months thereafter. He contended that his clients were not in a position to know what was

the period during which this requisition order was going to be in operation. They could not know whether it was for two months or two years or for any indefinite period beyond the same. How could they therefore make any arrangements for housing their various representatives, directors and managers of the various industries in which they had been interested as also the offices of those various concerns with any degree of certainty? This argument of Mr. M.P. Amin has only got to be stated in order to be discarded. It was not within the bounds of human possibility for any party howsoever shrewd, intelligent or invested with commonsense and foresight it may be to predict what was going to be the duration of the present war. The Court is certainly not going, to expect that any party before it was going to hazard any such prediction and if it was not humanly possible to do so state with definiteness any period of requisition when the requisition of the property itself was going to be made for the efficient prosecution of the war which would mean for the duration of the war and as stated in the order for a period of six months thereafter. Nothing more need be said in order to demonstrate the absurdity of this contention urged on behalf of the petitioners. The period of the present war though indefinite in duration was definite in itself in so far as the petitioners were given in as clear terms as it could be an indication of the period for which their property was sought to be requisitioned by respondent No. 1, viz. the duration of the present war. The user of this term was as definite as the user of the expression "the life time of A" which is used when settling or bequeathing a remainder in favour of B.B could not be heard to say that the lifetime of A which was the period prescribed as the one which was to come to an end before the remainder would vest in possession in his favour was a term which was vague or indefinite. It was as clear and definite as it could be, having regard to the fact that the period of the lifetime of an individual is indeterminate, though that life is of necessity going to come to an end sometime or other. The present war also was going to come to an end and is going to end sometime or other though the period of duration of the present war might be indeterminate. The user of the term "during the present war" could therefore not render that expression vague or indefinite as contended by the petitioners. It is as clear and definite as it could be. In my opinion therefore there is no substance whatever in this contention of the petitioners.

15. The last contention urged by the petitioners in this connection was that the power to determine the said indefinite term, viz. "the duration of the present war and six months thereafter" is by the order delegated to and vested in respondent No. 2 which delegation or vesting is illegal and unauthorised and the whole order is therefore vitiated and is therefore illegal and void. There are no merits in this contention of the petitioners also. This is a term which has been provided in the requisition order in question which would enable the requisitioning authority to determine the period of requisitioning earlier than the expiration of the period of the present war and six months thereafter. It is a provision for the benefit of the petitioners themselves, so that they may not be deprived of the use and possession of their property which was sought to be requisitioned beyond what

was necessitated by the needs of the situation, viz. the efficient prosecution of the war. If by any chance the theatre of war shifted from Bombay to any other place in this country or the exigencies of the situation required that the various officers or members of fighting forces who were housed in the properties which had been the subject-matter of requisition needed those properties no more by reason of their having been transferred to other theatres of war or for any other reason which was considered sufficient by the authorities in that behalf, possession of the Immovable property which has been so requisitioned should be restored by the authorities to the owner of that property. One could not convert the beneficial provision of this sort into an oppressive provision or an. illegal provision in the manner it is sought to be done by the petitioners. In its very nature the power of requisitioning Immovable property is drastic. It deprives the owner of the Immovable property of the use and possession thereof by him. It causes not a little inconvenience to the owner of the Immovable property and therefore if the requisitioning authority in the order itself which was served on the owner of the Immovable property stated that if the needs of the situation warranted it, he would restore the property to the possession of the owner, the owner could have nothing to complain about the same. The Immovable property in question was being requisitioned by the respondent for the use of the officer of the P.W.D. That officer might not require it for the period of the war and six months thereafter and might relinquish possession of the property which has been so requisitioned even before the expiration of that period., If that were done, the last persons to ever complain about the restoration of such possession to them of the Immovable property in question should be the petitioners themselves. I do not see my way to accept this contention of the petitioners also. Under the circumstances mentioned above, but for the fact that I have come to the conclusion that the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules with respect to the requisitioning of Immovable property without a public notification by the "Governor General u/s 104 of the Government of India Act is ultra vires the Central Legislature, I would have dismissed this petition of the petitioners. My finding, however, on that point leads me to the consideration whether on that finding the petitioners are entitled to any of the reliefs prayed for by them in the petition.

16. In regard to the reliefs which the petitioners are entitled to, one has got to consider what are the actual reliefs that have been prayed for by them. In prayer (a) of their petition the petitioners ask for an issue of a writ of certiorari against the respondents calling for the records, if any, of the proceedings before respondent No. 1 wherein respondent No. 1 purported to pass the order complained of and after looking into the same quash the same. In prayer (b) of their petition the petitioners asked for an issue of a writ of prohibition against the respondents prohibiting them from proceeding with or continuing to proceed with the execution or enforcement of or carrying into effect the order in a manner threatened in the order or in any other manner whatsoever and from passing any further order or taking any further steps therein to the prejudice of the

petitioners. In prayer (c) of their petition the petitioners asked for an order u/s 45 of the Specific Relief Act, 1877, directing the respondents to forbear from further exercising any jurisdiction or doing any act or further taking or commencing or continuing to take or commence any proceedings in enforcement or execution of the order complained of.

16. It is significant to observe that the petitioners are entitled to none of these reliefs against respondent No. 2 and it has been so conceded by Mr. M.P. Amin for the petitioners.

17. As regards respondent No. 1, therefore, it remains to consider what are the reliefs which the petitioners are entitled to against him. If one has regard to the averments in the petition in that behalf commencing with paragraph 13 of the petition, one finds that all these remedies and prayers are sought for by the petitioners as simultaneous and not in the alternative. The petitioners have really got three strings to the bow. They first of all ask for a writ of certiorari. If one has due regard to the fact that the submission in respect of the same is the first of the submissions set out by them in the petition and the prayer in respect of the same is the first prayer, viz. prayer (a) of the petition, not being, however, satisfied with the submission and the asking for a relief by way of a writ of certiorari-which if granted would certainly render it absolutely unnecessary that a writ of prohibition should also be issued by the Court against respondent No. 1-the second submission in the order in which it has been made in the petition is in respect of the writ of prohibition and it has been followed up by the second relief which they have prayed for, viz. prayer (b) of the petition. The relief by way of a writ of prohibition is not stated by them either in the averments in the petition or in the body of the prayers as in the alternative to a writ of certiorari. The submission in respect of an order u/s 45 of the Specific Relief Act is the third submission in the petition following after the submission for the writ of prohibition and the prayer in that behalf is also the third prayer, viz. prayer (c) which again is not asked for in the alternative. It would appear, therefore, that the petitioners want all the three prayers, viz. prayers (a), (b) and (c) of the petition not saying what they would prefer to have and what they would be prepared to forego in certain events. I asked Mr. M.P. Amin in the course of his arguments what it is really that his clients were asking for. Did they want a writ of certiorari if the Court considered that the case for the issue of the writ of certiorari was substantiated by them? His answer was in the affirmative. I then asked him if in spite of the issue of the writ of certiorari his clients also wanted a writ of prohibition to issue against the respondents. He was not quite sure of his position there. At one time it seemed as if he conceded that if the Court issued a writ of certiorari it was no use issuing a writ of prohibition, but at another time he stated that his clients would desire that a writ of prohibition also should issue against respondent No. 1 for sake of greater caution, I for myself do not understand why the Court should make any orders for the sake of greater caution at the instance of a litigant before it. If an order requires to be passed under the circumstances of a particular case, the Court should feel no hesitation

in passing the same. But it is certainly not the business of the Court to pass orders at the instance of parties who want these orders to be passed merely for the sake of greater caution. I then asked Mr. M.P. Amin whether if a writ of certiorari was issued against the respondents his clients wanted an order u/s 45 of the Specific Relief Act as prayed for in prayer (c) of their petition. I asked this question to him particularly because if I granted prayer (a) of the petition and issued a writ of certiorari against respondent No. 1 calling for the papers and proceedings before him and quashed the order as asked for in that prayer, there was nothing left for me to do by way of directing respondent No. 1 to forbear from doing any act as asked for in prayer (c) of the petition. If the order was quashed, there was nothing which respondent No. 1 could execute or take steps for executing. Even though this was the position and the petitioners could not make up their minds whether they wanted to press the one relief or the other, being naturally in doubt whether they would succeed in convincing the Court that they should be granted one relief or the other even in the event of the Court holding that the requisition order in question was illegal, void and inoperative in law on one or more of the grounds mentioned in the petition, their counsel was not in a position to tell the Court, as I think he should have, that he asked for the reliefs in the alternative the one to the other. I should have thought there was no objection to his doing so. He could have and should have stated to the Court that his clients asked for the relief by way of a writ of certiorari against the respondents as prayed for in prayer (a) of the petition in the first instance, for the relief by way of a writ of prohibition as prayed for in prayer (b) of the petition in the alternative, and for a relief by way of an order u/s 45 of the Specific Relief Act as prayed for in prayer (c) of the petition in the further alternative ; but for some reason which I have not been able to probe, he would not and did not say so. I shall, therefore, deal with all these reliefs which are the subject-matters of prayers (a), (b) and (c) of the petition respectively in the order in which they have been mentioned therein.

18. It will be convenient to deal with the writ of certiorari and the writ of prohibition together. The nature of the writ of certiorari is thus described in Halsbury's Laws of England, Hallsham Edition, Vol. IX, p. 838, para. 1420:

The writ of certiorari issues out of a superior court, and is directed to the judge or other officer of an inferior court of record. It requires that the record of the proceedings in some cause or matter depending before such inferior court shall be transmitted into the superior court to be there dealt with, in order to insure that the applicant for the writ may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. The object of the writ, particularly in civil proceedings, is to give relief from some inconvenience or error supposed, in the particular case, to arise from a matter being disposed of before an inferior court less capable than the High Court of rendering complete and effectual justice.

The jurisdiction to issue a writ of certiorari has been extended to judicial bodies

and we find at p. 852, para. 1443:

The writ can also be issued to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter entrusted with judicial functions.

It is further stated at p. 855, para. 1449:

Certiorari lies only in respect of judicial, as distinguished from administrative, acts. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ.

19. The writ of prohibition is thus defined in Halsbury's Laws of England, Hailsham edition, Vol. IX, p. 819, para. 1394:

The writ of prohibition is a prerogative writ, issuing out of the High Court of Justice, and directed to an ecclesiastical or inferior temporal court, which forbids such Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

At p. 820, para. 1397, it is stated when the writ of prohibition lies:

Prohibition lies not only for excess of or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law; it does not, however, lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of proceedings.

It is further stated at p. 833, para. 1411:

Although prohibition does not lie against a body which is not and does not claim to be a Court or judicial tribunal in any legal sense, the High Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. Prohibition will not issue against the ministerial or executive acts of the Government; but wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in exercise of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ, and the High Court will exercise as widely as possible the power of controlling such bodies, if those bodies attempt to exceed their legal authority. A proceeding may be a judicial proceeding subject to prohibition, even though it is subject to confirmation or approval and the approval has to be that of the Houses of Parliament.

20. The nature and the scope of the two writs, viz. the writ of certiorari and the writ of prohibition have been the subject-matter of judicial pronouncements. In *Rex v. Woodhouse* [1906] 2 K.B. 501 Fletcher Moulton L. J. observed (p. 534):

The writ of certiorari is a very ancient remedy, and is the ordinary process by

which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to "judicial acts", but the cases by which this limitation is supposed to be established shew that the phrase "judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed "judicial". For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts?. Other instances could be given, but these suffice to shew that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a court, nor would its act be ordinarily termed "judicial acts." The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

Vaughan Williams L.J. in the same case observed (p. 512):

In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173 seems to be an authority for this view; for he says, as appears on p. 179 of the report, that "an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour; it is to be, not arbitrary, vague, and fanciful, but legal and regular".

In connection with these writs of certiorari and prohibition the observations of Bankes L.J. in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co.* (1920), *Ex parte* [1924] 1 K.B. 171 are very important to bear in mind (p. 192):

It has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances. A study of the decisions of the Courts in relation to writs of prohibition illustrates how true this is. In the case of *Clifford and O'Sullivan* [1921] 2 A.C. 570, the Lord Chancellor quotes with approval the description of a writ of prohibition given in *Short and Mellor*, 2nd edn., (1908), p. 252, as "a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior [Court] from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word "Court". As Statutory

bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of that in the books, commencing in quite early times. In the case of *Rex v. Inhabitants in Glamorganshire* (1700) 1 L R 580, the Court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament, and if under pretence of such an Act they proceeded to encroach jurisdiction to themselves greater than the Act warrants the Court could send a certiorari to them to have their proceedings returned to the Court, to the end that the Court might see that they keep themselves within their jurisdiction, and if they exceed it to restrain them. These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. There is the dictum of Brett L.J., as he then was, in *Reg. v. Local Government Board* (1882) 10 Q.B.D. 309, where he says (p. 321): "my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." There is the dictum of Lord Sumner in *Clifford and O'Sullivan* [1921] 2 A.C. 570, where he says (p. 589): It is agreed also that, old as the procedure by writ of prohibition is, and few are the older, there is not to be found in all the very numerous instance of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all." Lastly there is the dictum of Fletcher Moulton L. J. in *Rex v. Woodkouse* [1906] 2 K.B. 501, where he is discussing what, in his opinion, constitutes a judicial act.

And the remarks which I earlier quoted from *Rex v. Woodhouse* are quoted in extenso. The observations of Atkin L.J. in the same case also deserve to be quoted in this connection (pp. 204, 205, 206):

Both writs [i.e. certiorari and prohibition] are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. I

can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction?. [There is] long line of authority which has extended the writs in question to bodies other than those who possess legal authority to try cases, and pass judgments in the strictest sense.

21. These authorities go to show that there is no difference in principle between the writ of certiorari and the writ of prohibition except that the latter may be invoked at an earlier stage. They also go to show that whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. This jurisdiction to issue writs of certiorari and prohibition was invested in the Supreme Court of Judicature at Bombay by Clause (5) of the Charter which stated:

And it is our further will and pleasure, That the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Bombay, and the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto and all the territories which now are or hereafter may be subject to, or dependent upon, the Government of Bombay, aforesaid, and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit.

22. The conditions precedent therefore for the High Court exercising its jurisdiction to issue the writs of certiorari and prohibition according to the authorities would appear" to be that there should be a body of persons

- (1) having legal authority,
- (2) to determine questions affecting rights of subjects, and
- (3) having a duty to act judicially, and
- (4) they should act in excess of their legal authority.

If these conditions were fulfilled, that body of persons are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

23. Let us, however, consider whether the Court would have jurisdiction to issue these writs, only if the body of persons or to use another expression, the tribunal or officer acted in excess of their legal authority. I have already referred to the observations of Lord Sumner in *Clifford and O'Sullivan* [1921] 2 A.C. 570,

quoted by Bankes L.J. in *Rex v. Electricity Commissioner* [1924] 1 K.B. 171, viz. "It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all," which would go to show that the Court might not have in the event of the tribunal or officer acting without authority or jurisdiction at all any jurisdiction to issue a writ of prohibition against him. As I have understood the observations of the learned Judges in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co. (1920)*, *Ex parte*, there is no difference in principle between the writs of certiorari and prohibition. These observations of Lord Sumner would apply with equal force to the question of issuing a writ of certiorari also. Even though a literal interpretation of the remarks of Atkin L.J. (p. 204) in *Rex v. Electricity Commissioners* and the observations of Lord Sumner above referred to might lead one to the conclusion that the Court would have jurisdiction to issue a writ of certiorari and a writ of prohibition only in the event of the tribunal or officer acting in excess of his legal authority, there is really no warrant for limiting the Court's jurisdiction to issue writs of certiorari and prohibition in this manner. The absence of any authority whatever to act in a particular manner is certainly much worse than mere excess of legal authority, and it is inconceivable that even though the Courts would have the jurisdiction to issue a writ of certiorari or a writ of prohibition in cases where the tribunal or officer is acting in excess of the legal authority invested in him, the Courts would be helpless where the tribunal or officer concerned was seeking to exercise an authority or jurisdiction which was not at all vested in him. In these remarks of mine I am supported by a passage from Ryde's *Law and Practice of Rating*, 6th edn., p. 702, which is quoted by Lokur J. in *Muljee Sicka and Co. Vs. The Municipal Commissioner of Bombay*, :

If the Court of quarter sessions refuses to exercise jurisdiction when it has it, the King's Bench will by mandamus compel that Court to hear and determine the appeal. And if the quarter sessions exercise powers in excess of their jurisdiction, or where they have none, the King's Bench will bring up the proceedings by a writ of certiorari and quash them; for "there is inherent in the Court of King's Bench authority to bring before it by writ of certiorari, save where the writ is taken away by statutory enactment or charter, the proceedings of any Court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction, or informality or defect apparent on the face of the proceedings." If the sessions have jurisdiction to hear an appeal and do so, but decide wrongly, the King's Bench will not interfere either by mandamus or certiorari.

and by the remarks of Lokur J. himself again at p. 990, where he observes:

Thus, there are two conditions to be fulfilled before a writ can be issued, namely, that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the

legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong.

This passage from Ryde's Law and Practice of Rating and these remarks of Lokur J. go to show that the Court could exercise jurisdiction to issue the writs of certiorari and of prohibition or mandamus even though the tribunal or officer had no jurisdiction at all to act in the matter. Besides the passage from Halsbury's Laws of England, Hailsham Edition, Vol. IX, at p. 820, para. 1397, quoted above, there is also a passage in the same volume at p. 878, para. 1481:

Although the writ is not of course it will nevertheless be granted *ex debito justitiae*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; and this is the case even though certiorari is taken away by statute, and although there is an alternative remedy. The writ will never be granted to remove an, erroneous order at the instance of the party in whose favour the error was made.

Moreover, in this very connection Mr. M.M. Jhaveri who argued the point in *Vazir Bashir v. Collector of Bombay dants* should be given by the plaintiff. It was contended that the rule under which that order had been made by the Registrar was invalid and the petitioners asked for a writ of prohibition to be issued against the respondents who were the defendants in the action in which such order was made by the Registrar, to prohibit the enforcement of that order made by the Registrar. Wills J. observed, after a discussion of the validity of the rule under which the order was made by the Registrar (p. 514):

On that broad ground we are of opinion that the making of the rule in question is not an exercise of the power to make rules of practice given by the statute, that the rule is, therefore, invalid, and the application for a prohibition must be granted.

This was an instance where a writ of prohibition was issued by the Court to prohibit enforcement of an order which was made by the Registrar of the Court acting under the rule which was invalid and which therefore gave him absolutely no authority or jurisdiction to make the order in question. I am therefore of opinion that the Court would have jurisdiction to issue the writs of certiorari and of prohibition not only in those cases where the tribunal or officer acted in excess of their legal authority but also in those cases where the tribunal or officer acted without authority or jurisdiction at all.

24. I have therefore got to consider whether respondent No. 1 herein in the matter of the issue of the requisition order in question had (1) legal authority, (2) to determine questions affecting the rights of subjects, (3) had the duty to act judicially and (4) acted in excess of the legal authority vested in him or

without authority or jurisdiction at all. It was contended by Sir Jamshedji Kanga that respondent No. 1 was not performing any judicial act but was performing what he called merely a ministerial act or at best an executive or an administrative act when he issued the requisition order in question. It was, on the other hand, contended by Mr. M.P. Amin that having regard to the provisions of Section 15 of the Defence of India Act, Rule 75A of the Defence of India Rules and the inquiries made and the explanations asked for by respondent No. 1 from the petitioners or their representatives before he passed the requisition order in question as shown in the affidavit of respondent No. 1 himself dated April 2, 1945, respondent No. 1 was doing a judicial act and not a merely ministerial or an executive or an administrative act and was therefore amenable to the jurisdiction of the Court in the matter of the issue of the writs of certiorari and of prohibition.

25. Before I proceed to consider whether the act of respondent No. 1 in the matter of the issue of the requisition order was a judicial act or not, I shall first of all dispose of the minor points which arise in this connection. There is no doubt that respondent No. 1 was invested with legal authority in the matter of the exercise of the powers which he did by reason of the provisions of Section 2(4) of the Defence of India Act and the Notification of the Government of India, Defence Co-ordination Department, No. 1236/OR/1/42, dated April 25, 1942. He had therefore legal authority to act as he did. The next question is whether he had the legal authority to determine questions affecting the rights of subjects. As to that also there cannot be any doubt, because under the terms of the notification dated April 25, 1942, he had power to determine questions affecting the proprietary rights of the subjects whose properties he sought to requisition in exercise of such powers. I am answering this question without laying any stress on the word "determine" used in this connection. The word "determine" may involve a judicial determination of a question. That consideration, however, I will advert to when I consider whether respondent No. 1 was doing a judicial act when he was issuing the requisition order in question. The third question is whether respondent No. 1 had the duty to act judicially. That also will be examined by me when I consider the provisions of Section 15 of the Defence of India Act and Rule 75A of the Defence of India Rules in this connection, at the time of determining whether the act of respondent No. 1 in executing the requisition order in question was a judicial act. The last question is whether respondent No. 1 acted in excess of his legal authority, or without authority, or jurisdiction at all. If I came to the conclusion that he had authority to act in the matter of the requisition of Immovable property, but in the matter of such requisition he acted in excess of that authority, the first part of this condition would be fulfilled. If, on the other hand, I came to the conclusion that, by reason of the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules with respect to the requisition of Immovable property being ultra vires the Central Legislature respondent No. 1 had no authority or jurisdiction at all to issue the order for requisition of Immovable

property, the second part of this condition would be fulfilled. In either event this condition would be fulfilled and the Court would have jurisdiction to issue a writ of certiorari or a writ of prohibition against him.

26. I shall now proceed to consider the question whether the act which respondent No. 1 was doing in the matter of the issue of the requisition order in question was a judicial act.

27. The word "Judicial Act" has been defined in Stroude's Judicial Dictionary, 2nd edition, (Supplement) as under:

Judicial Act-It is established that the Writ of Certiorari does not lie to remove an Order merely Ministerial, e.g., a Warrant; but it lies to remove and adjudicate upon the validity of acts Judicial.

In this connection the term "Judicial" does not necessarily mean acts of a Judge, or Legal Tribunal, sitting for the determination of matters of law; but, for the purpose of this question, a "Judicial" act seems to be, an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." (per May C.J. *The Queen v. Corporation of Dublin* (1878) L.R. 371, vindicated by Palles C.B., and Fitz-Gibbon, L.J., in *Reg. (Wexford Council) v. Local Govt. Board* [1902] 2 Rul 373 the latter saying that there is no complete antithesis to "Judicial" except "Non-Judicial", though of other words "Ministerial" is as good as any).

The true view would seem to be that the term "Judicial Act" is used in contrast with purely Ministerial Acts. To these latter the process of Certiorari does not apply, e.g., to the issue of a Warrant to enforce a Rate, even though the Rate is one which could itself be questioned by Certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for the writ of Certiorari at Common Law. (per Moulton, L.J., *Rex v. Woodhouse* [1906] 2 K.B. 501

This definition in Stroude's Judicial Dictionary has been taken from the remarks of May C.J. in *The Queen v. Corporation of Dublin* (1878) L.R. 371:

It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts.

These remarks of May C.J. were quoted with approval in *Reg. (Wexford Co. Council) v. Local Govt. Board* [1902] 2 Rule 349, where after quoting the same

Palles C.B. remarked (p. 373):

?I have always considered, and still consider, the principle of law to be as stated by the Chief Justice, assuming that there is nothing in the statute constituting the particular tribunal or investing it with the particular power which indicates a contrary intention. I have always thought that to erect a tribunal into a "Court" or "jurisdiction" so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is Imposed, or the rights affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial. It may be proper to state that, of course, the correlative proposition is not universally true. A judicial act by an inferior Court does not always bind even the parties to it. To do so it must be within jurisdiction, and, therefore, if the determination be as to the limits of its jurisdiction and be erroneous, so that the act is in excess of jurisdiction, it will not bind.

The remarks of FitzGibbon L.J. at p. 381 of the report are also to the same effect. FitzGibbon L.J., however, added (p. 383):

In opposition to the word "judicial" the word "ministerial" has been adopted as the test-word to describe acts which are not the subject of certiorari. Mr. Ronan, for the Local Government Board, prefers "administrative". The truth is that neither of these words is adequate as a descriptive term. A number of words would be required to describe all the acts, whether of judicial or non-judicial bodies, which cannot be controlled by certiorari. "Ministerial", "Administrative", "executive", "discretionary", "final", "conclusive", are all terms applicable in different cases to describe such acts. I think that we must always ascertain affirmatively, before granting a certiorari, that the act to be reviewed is a judicial exercise, or assumed exercise, of a limited jurisdiction ; and I can find no one word that will adequately describe all the acts which are not judicial, in the sense required, except the contradictory "non-judicial." Of other words, "ministerial" is as good as any; its use is sanctioned, and its meaning has been elucidated by authority. As so elucidated, "judicial" and "ministerial" conveniently describe the acts which are, and the acts which are not, subject to control by certiorari.

These authorities go to show that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect the rights of others, that it must exercise some right or duty to decide and that

the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others. It is on the strength of these authorities that it was held by Fletcher Moulton L.J. in *Rex v. Woodhouse* [1906] 2 K.B. 501 that the phrase "judicial act" must be taken in a very wide sense including many acts that would not ordinarily be termed judicial and that the procedure of certiorari applies in many cases in which the bodies whose acts are criticised would not ordinarily be called Courts nor the acts ordinarily be termed judicial acts. The position was summarized in this sentence (p. 535):

In short, there must be the exercise of some right or duty to decide in order to provide scope for the writ of certiorari at common law.

There are observations on this point, to be found also in later cases. In the decision of the House of Lords in *Frame United Breweries Co. v. Bath Justices* [1926] A.C. 586, Lord Atkinson observed (p. 602):

One of the best distinctions of a judicial act as distinguished from an administrative act is that given by the late May C.J. in the Irish case of *The Queen v. Corporation of Dublin* (878) L.R. 2.

His Lordship quoted the passage from the judgment of May C.J. hereinbefore referred to and observed (p. 602):

This definition was apparently approved of by Palles C.B. in *In re Local Government Board, Ex parte Kingstown Commrs* (1885) 16 L.R.150. and also in *Reg (Monaghan County Council) v. Local Government Board* 34 L.T. 196.

In *Rex V. The London County Council: The Entertainments Protection Association, Ex parte* [1931] 2 K.B. 215 Scrutton L.J. observed (p. 233):

The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. There has been a great deal of discussion and a large number of cases extending the meaning of "Court". It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising; after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *Rex v. Electricity Commissioners; London Electricity Joint Committee Co.* (1920), *Ex parte* [1924] 1 K.B. 171 and *Rex v. Minister of Health: Davie, Ex parte* [1929] 1 K.B. 619. When the question is, on what terms and conditions shall a licence be granted, and when the Committee proceeds to require that notice of the

proposal shall be given, and to hear the applicant and his opponents, and to take evidence, the proceeding seems to me to be exactly that of a tribunal which the King's Bench Division, by the writ of certiorari, restrains within its jurisdiction.

Slessor L.J. also observed in that case (p. 243):

Atkin L.J. (as he then was) in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co.* (1920), *Ex parte* [1935] 1 K.B. 249, lays down four conditions under which a rule for a certiorari may issue. He says: "Wherever any body of persons" (first) "having legal authority" (secondly) "to determine questions affecting rights of subjects, and" (thirdly) "having the duty to act judicially," (fourthly) "act in excess of their legal authority",?the subdivisions are my own?"they are subject to the controlling jurisdiction of the King's Bench Division exercised in, these writs."

This decision lays down what are the main processes which go to form an act of a tribunal or competent authority a judicial act. The tribunal or competent authority should decide on the materials before it between a proposal and an opposition even though the mode in which the materials are collected and placed before it or the process adopted by it in connection with the decision on those materials as between a proposal and opposition may not strictly conform to what is ordinarily adopted in the regular Courts of law. In *Errington v. Minister of Health* [1935] 1 K.B. 249, Greer L.J. at p. 266 quoted with approval the views of Lord Loreburn L.C. in *Board of Education v. Rice* [1911] A.C. 179, which in their turn had been approved by both Lord Haldane in *Local Government Board v. Arlidge* [1915] A.C. 120 and by Lord Parmoor in *ibid.*, p. 141:

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think: best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In the same case Roche L.J. observed (p. 280):

It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a Court or by a Board, or any body of persons, it is necessary and essential in the words of Lord Loreburn in *Board of Education v. Rice* [1911] A.C. 179, which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard.

This case lays down that the function exercised by the tribunal or competent authority may be exercised by it in a quasi-judicial manner and not a strictly judicial way as a Court of law would do. It is, however, incumbent on the tribunal or competent authority to act in good faith and fairly listen to both the sides, i.e. adjudicate upon the materials before it as between a proposal and an opposition within the meaning of those words used in *Rex v. The London County Council* [1931] 2 K.B. 215, though it is not bound to treat such a question as though it were a trial, though it has no power to administer an oath and need not examine witnesses and though it can obtain information in any way it thinks best giving a fair opportunity, however, always to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. In this connection the remarks of Scott L.J. in *Cooper v. Wilson* [1937] 2 K.B. 309 are very important as laying down the distinction between judicial and quasi-judicial functions (p. 340):

In the Report of the Ministers' Powers Committee (Command Paper 4060 of 1932), p. 75 (S. III., para. 3) an attempt was made to define the words "judicial" and "quasi-judicial": "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:—(1.) The presentation (not necessarily orally) of their case by the parties to the dispute; (2.) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3.) if the dispute between them is a question of law, the submission of legal argument by the parties ; and (4.) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1.) and (2.), but does not necessarily involve (3.), and never involves (4.). The place of (4.) is in fact taken by administrative action, the character of which is determined by the Minister's free choice." Broadly speaking I think the above definitions there given are correct, but I

would make an addition, and that is that on such issues as were tried before the Watch Committee on August 29 the quasi-judicial approaches in point of degree very near to the judicial. This does not of course mean that because the Watch Committee was then exercising nearly judicial functions, it was tied to ordinary judicial procedure. The principles both of its duties and of its freedom are explained in the oft-cited passage in Lord Loreburn's opinion in *Board of Education v. Rice* [1911] A.C. 179, which was quoted by Viscount Haldane L. C. in *Local Government Board v. Arlidge* [1915] A.C. 120, and need not be requoted.

These are the general principles which afford a guide to the determination of the question whether an act which is done by a tribunal or competent authority is a judicial act or an executive, administrative, or a ministerial act. The result of these authorities is that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, that it should act in exercise of some right or duty to decide, that the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others, that it decides on the materials before it as between a proposal and an opposition, even though it is not bound to treat as though it was a trial, though it has no power to administer oath and need not examine witnesses and though it can obtain information in any way it thinks best always giving a fair opportunity to those parties in controversy for correcting or contradicting statements prejudicial to their view.

28. I may also in this connection refer to a judgment of Das J. in *In re Banwarilal Roy* (1944) 48 C.W.N. 766. Das J. discussed this question of what was a judicial act as distinguished from an executive act at p. 800 (col. 2) of that judgment. After having discussed the various authorities which I have referred to earlier, beginning with the case of *The Queen v. Corporation of Dublin* (1878) L.R. 376, where the oft-quoted remarks of May C.J. are to be found, and ending with the case of *Rex v. The London County Council &c* [1931] 2 K.B. 215. he observed (p. 800, col. 2):

The duty of "acting" judicially or "proceeding" judicially implies, to my mind, something more than mere application of the mind by the authority on the materials before him. If he does not apply his mind at all or does the act for a collateral purpose, it will be a bad act in all cases. If the doing of the act is left entirely to the discretion of the authority as a purely subjective matter as said in *Liversidge v. Sir John Anderson* [1942] A.C. 206 or if the official act is "discretionary and in some respects facultative" as their Lordships of the Judicial Committee put it in 23 CWN 986 (Privy Council), it is purely an administrative or executive act. In such a case the authority alone has to form his own opinion, in good faith of course on the materials before him. A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies "a proposal and an opposition" and a decision on the issue. It vaguely connotes "hearing evidence and opposition" as Scrutton,

L.J., expressed it. The degree of formality of the procedure as to receiving or hearing evidence may be more or less according to the requirements of the particular statute, but there is an indefinable yet an appreciable difference between the method of doing an administrative or executive act and a judicial or quasi-judicial act.

Das J. ultimately observed (p. 802, col. 2):

Whether an act is a judicial or quasi-judicial act or a purely executive act will depend on the terms of the particular Rule, the nature, scope and effect of the particular power in exercise of which the act may be done read with the provisions of Section 15 of the Act.

This really seems to me to be the crux of the question. In order to decide whether an act is a judicial act so as to invoke the jurisdiction of issuing writs of certiorari or prohibition which is vested in the High Court, regard must also be had to the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which an act may be done read with the provisions of Section 15 of the Defence of India Act.

29. Having regard to the principles enunciated above, can it be said that the act of the respondent in issuing the requisition order in question was a judicial act? There is no doubt that the respondent was constituted a tribunal or competent authority for determining whether the rights of the subject to his property should be affected by the issue of the requisition order. The question, however, to be determined is whether in the matter of the issue of the requisition order in question he was exercising some right or duty to decide or was exercising judicial function in the sense that he had to decide on materials before him as between a proposal and an opposition. He had certainly no power to administer an oath and therefore need not examine any witnesses. He could also obtain information in any way he thought best, giving, however, fair opportunity to those who were the parties concerned and whose rights of property were sought to be affected by him by the terms of the requisition order in question to correct or contradict any relevant statements prejudicial to their view. Even though his functions in this behalf were not strictly judicial but what have been described as quasi-judicial by reason of what I have described above, was he really exercising that quasi-judicial function by way of deciding on the materials before him as between a proposal and an opposition, the last being an essential ingredient for converting the act which was being done by him into a judicial act within the extended meaning of the term. Under Rule 75A(5) of the Defence of India Rules, he had the power with a view to requisitioning any property under Sub-rule (1) or determining the compensation payable under Sub-rule (4) to require any person to furnish to him such information in his possession relating to the property, and had also under Sub-rule (5-a) powers to enter any premises and inspect such premises and property therein for the purpose of determining whether, and if so in what manner, an order under this rule should be made in relation to such premises or property. This was the power evidently given to the respondent for

the purpose of gathering all requisite materials in order to enable him to determine from the point of view of the Government whether a requisition order should have been made by him in respect of a particular property. This was also the power given to him to gather all requisite materials which would enable him to determine from the point of view of the subject, viz. the owner of the property, whether within the terms of Section 15 of the Defence of India Act the proposed action of his in requisitioning the property would interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India. In the matter of the gathering of these materials he was empowered not only to question any person or persons concerned with the property but also to enter upon the premises and inspect the same, and satisfy himself as to the pros and cons of the proposed order of requisition. It was only after he satisfied himself on the materials gathered by him in the manner aforesaid that he was to act in the matter of the requisition of the property, having particular regard to the mandatory provisions of Section 15 of the Defence of India Act that his act was to interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes there in mentioned. The determination of this question involved a proposal to requisition the property from the point of view of the Government. It also involved an opposition to the proposal to requisition the property from the point of view of the subject whose property was sought to be requisitioned. The respondent had before him the materials which he had gathered by reason of the inquiries which he instituted and by reason of the inquiries on the premises which he made, though such materials might have been gathered by him in any way he thought best; the duty was laid down upon him under the terms of Rule 75A of the Defence of India Rules and Section 15 of the Defence of India Act to act in the exercise of a right or duty to decide; and in the matter of the issue of the requisition order on those materials and under those circumstances he was certainly exercising a judicial function in the sense that he was deciding on the materials before him as between a proposal and an opposition, with the result that the act which he was doing in the matter of the issue of the requisition order in question was a judicial act within the meaning of the extended sense of the term. I am supported in this conclusion of mine by the statements made by respondent No. 1 himself in his affidavit in reply dated April 2, 1945. In para. 3 of his affidavit respondent No. 1 stated:

According to my information and to the investigations made by the Government Officers before the requisition order was made, and after receiving the representations made on behalf of the petitioners, I was informed that?.

In para. 7 of his affidavit respondent No. 1 stated:

The action complained of was taken by me after fully considering the facts placed before me, and the order for requisition was served on the petitioners for the purpose mentioned in the said requisition order, viz. for the efficient prosecution

of the war.

In para. 8 of his affidavit respondent No. 1 further stated:

It is not true that explanations were not called for from the petitioners' representatives who were in the said flat in Bombay or that inquiries were not made from them and from other quarters. The inquiries prior to the making of these orders are departmental inquiries, and the facts placed before me are fully considered by me before any requisition order is made by me.

These statements contained in the affidavit of respondent No. 1 go to show that he exercised, as I have already described above, in the matter of the issue of the requisition order in question, a judicial function in the sense that he decided upon the materials before him as between a proposal and an opposition, and that therefore he performed what was a judicial act within the extended definition of that term.

30. If respondent No. 1 was, as I have already held above, doing a judicial act in the matter of the issue of the requisition order in question, all the conditions which would be requisite before the Court would exercise the controlling jurisdiction by issuing the writ of certiorari or the writ of prohibition would be satisfied. He was a tribunal or officer having legal authority to determine questions affecting the rights of subjects and having authority to act judicially, and would be acting in excess of his legal authority or without any authority or jurisdiction at all, with the result that it would be competent to the Court to issue a writ of certiorari or a writ of prohibition against him.

31. An interesting argument was, however, advanced by Sir Jamshedji Kanga that by the enactment of Section 45 of the Specific Relief Act the Indian Legislature had abolished the writ of prohibition. He relied in this connection on the observations of Sir Norman Macleod in *Mohomedalli v. Jafferbhoy* (1925) 28 Bom. L.R. 284, where the learned Chief Justice observed at p. 269 that proceedings under this section (i.e. Section 45 of the Specific Relief Act) are in substitution for proceedings by writ of mandamus and writ of prohibition according to English practice. He also relied upon the observations of Coyajee J. in *Lady Dinbai Petit Vs. M.S. Noronha*, where the learned Judge after referring to the observations of Macleod C.J. in *Mahomeddli v. Jafferbhoy*, hereinbefore referred to, referred also to Section 50 of the Specific Relief Act and stated (p. 505):

One has to read Section 50 and Section 45 together. Section 45 itself talks of any specific act to be done or forbore and the proviso (b) talks of such doing or forbearing. Therefore, in my opinion, the word mandamus used in Section 50 is to be construed with reference to the context in Section 45, and reading these together it appears that the word mandamus is used in a broad sense. I am not only fortified in that view by the decision of the Division Bench of this High Court cited above, but in the absence of any other authority cited on the subject, I am bound by the decision in that case and I do respectfully agree with the reasoning

set out therein. In these circumstances in my opinion Section 45 must be read both in connection with a writ of mandamus as well as for a writ of prohibition.

Relying upon these observations of Macleod C.J. and Coyajee J. in the respective cases which I have referred to above, Sir Jamshedji contended that the writ of prohibition was abolished by the enactment of Section 45 of the Specific Relief Act by the Indian Legislature.

32. Mr. M.P. Amin, on the other hand, contended that the observations of Sir Norman Macleod in *Mohomedalli v. Jafferbhoy* were obiter, that the attention of Coyajee J. was not drawn in the arguments addressed to him in *Lady Dinbai Petit v. Noronha* to the fact that these observations of Sir Norman Macleod were obiter and his attention was also not drawn to the relevant provisions of the Supreme Court Charter, that the reading of Sections 50 and 45 of the Specific Relief Act which was adopted by Coyajee J. was wrong and was entirely contrary to the well-known principle that the writ of certiorari and so also the writ of prohibition could only be taken away by express negative words, that Section 50 of the Specific Relief Act only referred to the writ of mandamus and not to the writ of prohibition, and that therefore even though some of the provisions contained in the writ of prohibition were incorporated by the Legislature in Section 45 of the Specific Relief Act, the writ of prohibition was not abolished by the enactment of Section 45 of the Specific Relief Act by the Indian Legislature.

33. It is necessary, therefore, for me to consider how far the writ of prohibition has been abolished by the Indian Legislature by enacting Section 45 of the Specific Relief Act. There is no doubt that all the provisions of the writ of mandamus have been incorporated by the Legislature in the provisions of Section 45 of the Specific Relief Act. The Legislature has moreover by the terms of Section 50 of the Specific Relief Act laid down in clear terms that neither the High Court nor any Judge thereof shall thereafter issue any writ of mandamus. These are express negative words which do take away the jurisdiction and power of the High Court to issue a writ of mandamus. There is no doubt also that some of the provisions of the writ of prohibition have been enacted by the Indian Legislature in Section 45 of the Specific Relief Act. The forbearing to do a specific act which is clearly incumbent on the person holding a public office, or corporation or inferior Court of Judicature and which would be the subject-matter of an order u/s 45 of the Specific Relief Act would no doubt be comprised within the writ of prohibition; but it cannot be contended and it has not been contended before me that there are certain aspects of the writ of prohibition which do not find their place in Section 45 of the Specific Relief Act. Could it be therefore urged that in those cases where some of the aspects of the writ of prohibition are comprised within Section 45 of the Specific Relief Act one has only got to look to the provisions of that section, that the writ of prohibition is abolished pro tanto by the enactment of those provisions in Section 45 of the Specific Relief Act, and that the jurisdiction to issue a writ of prohibition would survive only in respect of those provisions which have not been enacted in Section 45 of the Specific Relief

Act? It was urged by Sir Jamshedji that in these cases where the Crown had consented to a statutory enactment of the provisions with regard to any prerogative and the imposition of limitations on the prerogative power in that manner the prerogative would to that extent be deemed to have been merged in the particular statutory provision. He relied upon the observations of Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel* [1920] A.C. 508 (p. 526):

Now the view which I think prevailed in *Petition of Right, In re* [1915] 3 K.B. 649 was that the prerogative gives a right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1842 and 1939 you find a code for the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side ; and then, as there was no direct mention of the prerogative in the statutes, you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned no one doubts. Instances are given by the Master of the Rolls in the cases of *Wheaton v. Maple & Co.* [1893] 3 Ch. 48 and *Coomber v. Justices of Berks* (1883) 9 A. C. 61 and there are many others. None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative"?

The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

It may be, however, noted in this connection that the remarks of Lord Dunedin have reference to those cases where the whole ground of something which could be done by the prerogative is covered by the statute. It is in those cases only that the statute rules and the prerogative is curtailed. Where, however, as in the case before us, it is only certain provisions of the writ of prohibition that are enacted in Section 45 of the Specific Relief Act, the ratio of this decision of Lord Dunedin does not apply and there is no warrant for holding that even though the Crown assented to the enactment of Section 45 of the Specific Relief Act, it assented to the prerogative being curtailed merely by reason of the fact that certain only of those provisions were being enacted in Section 45 of the Specific Relief Act. Mr. G.N. Joshi, who appeared with Sir Jamshedji for the respondent, pointed out to me in this connection a decision of the Court of the Judicial Commissioner, W.I.S.A., in *Bhadwa Taluka v. Crown* [1944] F.L.J. 20. That was a

case where the Court was concerned with the provisions of Section 2 of the Government of India Act, 1935. Davies J.C. there observed (p. 24):

When legislation receives the Royal Assent, it is now the accepted convention that the Royal prerogative merges in the provisions of the statute, and where those provisions * are succinct, no further exercise of the prerogative will be attempted. The statute has become the touchstone for the future acts of the Sovereign and those acts will invariably conform with the statute's provisions. Having regard therefore to the wording of the proviso to Section 2(1) of the Government of India Act and the very clear directions and Statements of policy therein contained, it is I think useless to argue that these attaching orders ought to be accepted as instances of the exercise of the prerogative as regards the functions of the Crown in its relations with the Indian States. In so far as the persons, who are to exercise those functions are concerned, the prerogative has been merged in the statute, and if orders are promulgated outside the statute's provisions, those orders are illegal and ultra vires.

Kaveeshvar A, J.C. also observed there (p. 26):

It has been held in several decided cases that if the field of the prerogative is covered by statute, the prerogative ceases to exist. (See Attorney-General v. De Keyser's Royal Hotel [1920] A.C. 508, 526 and The North Charterland Exploration Company (1910) Ltd. v. The King [1931] 1 Ch. 169 But only that which has been specifically laid down will be excluded from the exercise of the prerogative. By the Government of India Act of 1935, the prerogative of the Crown was circumscribed. Sub-section 1 of Section 2 includes all the rights formerly enjoyed. Section 2(2) states this position. These rights were then redistributed. The proviso to Section 2(1) makes full provision for the channel through which the powers are to be exercised. Firstly the powers are to be exercised by His Majesty and if not exercised by His Majesty only by the Crown Representative or by persons acting under his authority.

These observations also, in my opinion, do not lead respondent No. 1 any further. In so far as those observations go to show that the prerogative is merged in the statute where the whole ground of something which could be done by the prerogative is covered by the statute as laid down by Attorney-General v. De Keyset's Royal Hotel [1920] A.C. 508 I have no quarrel with the same. If, however, they go beyond what has been observed by Lord Dunedin and if they mean to lay down that even in those cases where a part of these provisions are enacted within a statute the prerogative is pro tanto merged in the statute, I respectfully differ from the same. In those cases where only a part of the provisions of a particular prerogative writ are embodied in the enactment of a statute, the prerogative is not merged pro tanto in the statute but continues to exist in its full glory, the only thing which is done by the statute being that in the cases covered by the statute the subject or the applicant would have a concurrent or alternative remedy also under the statute apart from his right to invoke the jurisdiction of the Court to issue a prerogative writ in his favour. In

this connection I may also refer to the enactment of Section 115 of the CPC and the effect if any that has on the jurisdiction of the Court to issue the writ of certiorari. As has been already observed the writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction, and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. Section 115 of the CPC deals with the powers of revision of the High Court, and enacts that

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears?

- (a) to have exercise a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

Could it be urged that the power of the High Court to issue a writ of certiorari to the inferior Courts is circumscribed by the enactment of the provisions of Section 115 of the Civil Procedure Code, or that the writ of certiorari in so far as it can issue in exercise of the powers similar to the revisional powers of the High Court therein enacted is pro tanto merged in Section 115 of the Civil Procedure Code? I shall only refer in this connection to the decision of our Appeal Court in *Muljee Sicka and Co. Vs. The Municipal Commissioner of Bombay*, , where, after tracing the history of the High Court since the establishment of the Supreme Court of Judicature in 1883 and after dealing with the relevant provisions of the Government of India Act and also Section 115 of the Civil Procedure Code, Lokur J. at p. 989, quoted with approval the passage from Halsbury's Laws of England, 2nd edn., Vol. IX, p. 861, para. 1455:

Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior court, nor by a proviso that "no other Court shall intermeddle" with regard to certain matters as to which jurisdiction is conferred on the inferior court.

and came to the conclusion that if the power to issue a writ of certiorari is vested in the High Court, then it is not, and could not be, taken away by Section 219 of the City of Bombay Municipal Act, 1888, which provided that the decision of the Chief Judge upon any appeal u/s 217 against any such value or tax shall be final. He quoted a passage from the judgment of their Lordships of the Privy Council in *Rex V. Nat Bell liquors, Ltd* [1922] 2 A.C. 128. (pp. 159-160):

Long before Jervis's Acts statutes had been passed which created an inferior

Court, and declared its decisions to be "final" and "without appeal", and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari.

This decision lays down that the jurisdiction to issue a writ of certiorari can only be taken away by express negative words and that it cannot be taken away by the enactment of certain of the provisions therein in a statute by the Legislature. In that case the enactment of certain provisions of the writ of certiorari in Section 115 of the CPC was not considered by the Court as in any manner whatsoever affecting the jurisdiction of the High Court to issue the writ of certiorari. Both the jurisdictions, viz. the power of the High Court to issue the writ of certiorari as also the power of the High Court to exercise revisional jurisdiction conferred on it by Section 115 of the CPC could be exercised side by side and one without any encroachment on the scope of the other. In those cases the subject or the applicant has two remedies open to him, the one to invoke the jurisdiction of the High Court to issue the prerogative writ of certiorari and the other to invoke the revisional powers of the High Court in exercise of the powers vested in it u/s 115 of the Civil Procedure Code. The passage in Halsbury's Laws of England, 2nd edn., Vol. IX, p. 878, para. 1481, also lends support to this conclusion of mine:

Although the writ is not of course it will nevertheless be granted *ex debito justitiae*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; and this is the case even though certiorari is taken away by statute, and although there is an alternative remedy. The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made.

The fact that in those cases which are covered by Section 115 of the CPC the subject or the applicant has an alternative remedy of invoking the revisional powers of the High Court cannot take away the jurisdiction of the Court to issue the prerogative writ of certiorari in proper cases even though the same might be covered within the four corners of Section 115 of the Civil Procedure Code. Both these are treated as alternative remedies and the subject is entitled to have resort to either the one or the other. Similarly the enactment of some of the provisions of the writ of prohibition u/s 45 of the Specific Relief Act also would not take away the right of the subject or applicant to invoke the jurisdiction of the Court to issue the writ of prohibition even in those cases which are covered within the four corners of the provisions of Section 45 of the Specific Relief Act. The subject or the applicant would be entitled to both the remedies as alternative remedies and would be entitled to invoke the jurisdiction of the High Court to grant him the one or the other of these two remedies.

34. An argument was advanced at one time by Sir Jamshedji that even though by Clause (5) of the Supreme Court Charter the Supreme Court was invested with the jurisdiction similar to the jurisdiction of the King's Bench in England including therein the jurisdiction to issue the prerogative writs which were then being issued by the King's Bench in England, this jurisdiction was curtailed by the enactment of Clause (55) of the Charter which runs as under:

And to the end that the Court of Request and the Court of Quarter Sessions, erected and established at Bombay aforesaid, and the Justices and other Magistrates appointed for the Town and Island of Bombay, and the Factories subordinate thereto, may better answer the ends of their respective institutions, and act conformably to law and justice, it is our further will and pleasure, and We do hereby further grant, ordain, and establish. That all and every the said Courts and Magistrates shall be subject to the order and control of the said Supreme Court of Judicature at Bombay, in such sort, manner, and form, as the inferior Courts and Magistrates of and in that part of Great Britain called England, are by law subject to the order and control of our Court of King's Bench; to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorized to award and issue a writ or writs of Mandamus, Certiorari Procedendo, or Error, to be prepared in manner abovementioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.

He urged that the writ of prohibition was not at all mentioned in Clause (55) of the Charter and that therefore the Court should construe Clauses (5) and (55) as meaning that the jurisdiction to issue a writ of prohibition was not vested in the Supreme Court under the terms of the Charter. This argument was, however, fallacious. Clause (55) did not purport to nor could it limit or control the generality of the powers which were invested in the Supreme Court under Clause (5) of the Charter. Clause (55) of the Charter dealt only with the powers which were vested in the Supreme Court to control the Courts of Request and Courts of Quarter Sessions, etc., and it was in that connection only that the writ or writs of Mandamus, Certiorari, Procedendo, or Error were mentioned therein. The mention of these writs did not curtail the general jurisdiction which was invested in the Supreme Court and was a jurisdiction similar to the jurisdiction of the King's Bench in England including the jurisdiction to issue all the writs including the writ of prohibition which was exercised by the Court of King's Bench in England. If authority be needed in this behalf, it is to be found in the decision of our Appeal Court in *Raghunath Keshav v. Poona Municipality* (1943) 46 Bom. L.R. 675 (p. 677):

The powers conferred by Clause 55 related only to Courts subordinate to the High Court, whereas the wider powers conferred by Clause 5 apply not merely to Courts subordinate to the High Court, but also to any tribunals which perform any kind of judicial function.

This argument of Sir Jamshedji, therefore, has no substance in it.

35. It therefore remains for me to consider, having regard to the considerations above referred to how far I am bound by the observations of Sir Norman Macleod in *Mahomedalli v. Jafferbhoy* (1925) 28 Bom. L.R. 264 and by the observations of Coyajee J. in *Lady Dinbai Petit Vs. M.S. Noronha*, , that the proceedings u/s 45 of the Specific Relief Act are in substitution of proceedings by writ of mandamus and writ of prohibition according to English practice. As regards the decision of Sir Norman Macleod in *Mahomedalli v. Jafferbhoy* the Court was concerned therein with an application u/s 45 of the Specific Relief Act. In that case the Government of Bombay had passed a resolution appointing the Taxing Officer of the High Court, Bombay, to tax the petitioner's bill of costs in Bombay Election Petition No. 11 of 1924 and to sanction the payment to him of a remuneration of Rs. 15 per hour or part of an hour while employed in taxing the bill, such remuneration being payable by the petitioner. The Taxing Officer had under the terms of that resolution proceeded with the taxation notwithstanding the respondent's protest. Before the allocatur was issued the respondent filed the application under a. 45 of the Specific Relief Act for an order directing the Taxing Officer, Mr. E.W. Gillett, not to proceed with the taxing of the bill and not to issue the allocatur. Shah J., before whom the application came to be heard, was of opinion that the conditions of Section 45 of the Specific Relief Act were fulfilled and ordered the Taxing Officer not to proceed further with the bill or to issue the allocatur. The petitioner appealed, and on the hearing of the appeal Sir Norman Macleod held that even though Mr. Gillett in his capacity of Taxing Officer of the High Court may be said to be a person holding a public office and as such his duty was to tax the bills of costs in proceedings in the High Court under the orders issued by Judges of the High Court, he was certainly not acting as a person holding a public office when he was taxing the bill whether under the directions of a special resolution of the Government or at the request of the Governor. He was acting in his capacity as a private individual with a special knowledge with regard to the taxation of bills of costs according to the High Court Rules. The learned Chief Justice, therefore, held that proviso (b) to Section 45 of the Specific Relief Act did not apply and that the application u/s 45 of the Specific Relief Act failed because the conditions under headings (a) to (e) of the provisos were cumulative and no order under the section could be passed unless they were satisfied. This was enough to dispose of the case. The learned Chief Justice, however, proceeded to make general observations on the writs of mandamus and writs of prohibition according to English practice and proceeded to observe that the proceedings u/s 45 of the Specific Relief Act were in substitution for those proceedings. With great respect to the learned Chief Justice these remarks of his were obiter. The point as to whether the writ of prohibition was abolished by the enactment of Section 45 of the Specific Relief Act or was merged therein did not arise for consideration before him, nor were all the points of view which were urged before me by learned Counsel appearing on both the sides here urged before the Appeal Court in *Mahomedalli v. jafferbhoy* (1925) 28 Bom. L.R. 264 I therefore feel that I am not bound to follow the observations of Sir Norman Macleod. I shall now deal with the observations

of Coyajee J. in *Lady Dinbai Petit Vs. M.S. Noronha*, . In connection with that case before Coyajee J.. I may observe that the attention of the Court was not drawn either to the provisions of Clauses (5) and (55) of the Supreme Court Charter nor the decision of the Appeal Court in *Muljee Sicka and Co. Vs. The Municipal Commissioner of Bombay*, where the provisions of Section 115 of the CPC in relation to the jurisdiction of the Court to issue the writ of certiorari were discussed by the Appeal Court, and it was laid down that the writ of certiorari could only be taken away by express negative words. The attention of Coyajee J. seems to have been drawn only to the provisions of the Specific Relief Act and the decision of Sir Norman Macleod in *Mahomedalli v. jafferbhoy* (1925) 28 Bom. L.R. 264. It was not also pointed out to him that the observations of Sir Norman Macleod in that case were obiter, with the result that in the passage from his judgment which I have quoted above the learned Judge felt himself bound by what he considered to be the decision of Sir Norman Macleod in that case. In the absence of any of these provisions having been brought to the notice of the learned Judge, he only went on what he thought was the proper construction of Sections 45 and 50 of the Specific Relief Act and proceeded to observe that reading those sections together it appeared to him that the word mandamus was used in a broad sense and that in his opinion Section 45 must be read both in connection with the writ of mandamus as well as a writ of prohibition. Having regard, however, to the fact that the various provisions which I have referred to and the various authorities which I have discussed in this connection were not brought to the notice of the Court and having regard also to the fact that the learned Judge felt himself bound by the obiter of Sir Norman Madeod in *MahomedaUi v. Jafferbhoy*, I feel that the decision arrived at by Coyajee J. in this behalf, even though it be that of a Court of coordinate jurisdiction, is covered by my observations in *Rodrigues*, *In Re: Peregrino Rodrigues*, and I do not feel bound to follow the same. I may also quote in this connection the remarks of Beaumont C.J. in *Punamchand Velraj v. Bombay Cloth Market Company, Limited* (1942) 45 Bom. L.R. 240 (p. 241):

Generally speaking, a Judge ought to follow a decision of a Court of co-ordinate jurisdiction as to the construction of an Act of the Legislature, but Judges are not entitled to legislate, or to bind their successors to a construction of an Act, which the language plainly does not justify.

I feel that the language of Section 50 of the Specific Relief Act plainly does not justify the conclusion which Coyajee J. has arrived at in *Lady Dinbai Petit v. Noronka* and with great respect to the learned Judge I do not agree with the same.

36. That the writ of prohibition has not been abolished by Section 45 of the Specific Relief Act has also been adjudicated upon by the Calcutta High Court. In *In re National Carbon Company Incorporated* I.L.R.(1934) Cal. 450 Panckridge J. was concerned with an application for the issue of a writ of prohibition. It was argued before him that the Court had no power to issue a writ of prohibition and

at p. 459 he stated that in his opinion this power of issuing a writ of prohibition existed. He quoted Clause (4) of the Charter of the Supreme Court of Calcutta (of 1774) which is identical in terms with Clause (5) of the Charter of the Supreme Court of Bombay, and proceeded to observe (p. 459):

Undoubtedly, among the powers of the Court of King's Bench at the date of the Charter was that of issuing writs of prohibition. It is admitted that all the powers of the Supreme Court have been inherited by the High Court, except such as have been specifically taken away by statute.

He then dealt with the argument that to issue a writ of prohibition was never among the powers of the Supreme Court and that Clause (21) of the Charter had the effect of cutting down and curtailing the powers apparently conferred by Clause (4). It may be noted that Clause (21) of the Charter there corresponds with Clause (55) of the Charter of the Supreme Court of Bombay. He dealt with the argument that there was no mention there of any authority to issue a writ of prohibition and also that there was no record of such a writ ever having in fact issued from the Supreme Court or the High Court. Nonetheless, he came to the conclusion that he could not accept that argument (p. 460):

As has been pointed out by learned commentators, including Sir Fitzjames Stephen, the draftsmanship of the Charter is open to criticism, and it may be that there is here an instance of omission through oversight. In any case, I do not think that the language of Clause 21 can be used to control the language of Clause 4 in the manner suggested. It would need far more direct language to convince me that it was intended by Clause 21 to exclude, from the powers of the Court of King's Bench conferred on the new Court by Clause 4, the power to issue a writ of prohibition.

Further on (p. 461):

The principle has been many times affirmed that when a person, or body of persons, is clothed with power to determine questions, and decide issues affecting the rights of the private citizen or the public, the King's Bench Division will interfere by prohibition or certiorari to prevent the illegal exercise of such power.

This power of issuing a writ of prohibition was recognised by the Appeal Court in Calcutta in *Dorman Long & Co., Ltd. v. Jagadishchandra Mahindra* ILR (1934) Cal. 596, where it was held that (headnote):

In extraordinary situations in which justice cannot otherwise be done, the High Court has discretionary power to issue writs of certiorari or prohibition or orders u/s 45 of the Specific Relief Act, wherever any person or body of persons, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority or refuse to act or act illegally. Before issuing such writs or orders the court must be sure that they will be effective.

An application for issue of a writ of prohibition again came before McNair J. in *In re Ramjidas Mahadiram* ILR (1935) Cal. 1011 where he observed (p. 1027):

The relief sought is by a writ of certiorari or prohibition which is issued by the Court under the power and authority conferred on it by the Charter.

I have already referred to those powers and it was recently decided in *In re National Carbon Company, Incorporated* ILR (1934) Cal. 450 that those powers include the power in a proper case to issue a writ of prohibition.

There is a later decision of the Calcutta High Court in *In re Banvarilal Roy* (1944) 48 C.W.N. 766. In that case Das J. traced in great detail the history of the exercise by the High Courts in India of the powers to issue the various prerogative writs, and in para. 39 of his judgment he dealt with the instance in which a writ of prohibition had been issued by the Calcutta High Court and he referred to the cases of *In re National Carbon Company, Incorporated* I.L.R. (1934) Cal. 450 and *Dorman Long & Co.'s case* ILR (1934) Cal. 596 which I have referred to. He also noted an instance where in *Indumati Debi Chaudhurani v. Bengal Court of Wards* (1938) 1 Cal. 475: 42 C.W.N. 230 Panckridge J. actually issued the writ of prohibition on the Court of Wards prohibiting them from acting upon their order whereby they declared the petitioner as a disqualified proprietor and taking possession of her properties situate outside Calcutta. These decisions of the Calcutta High Court confirm the petitioners would be entitled to an order against the respondent u/s 45 of the Specific Relief Act do not abolish the writ of prohibition either wholly or in part.

37. Under the circumstances I have come to the conclusion that having regard to my finding that the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules with respect to the requisition of Immovable property without a public notification by the Governor General u/s 104 of the Government of India Act was ultra vires the Central Legislature and the consequent finding that the requisition order in question issued by the respondent was illegal, void and inoperative in law, the petitioners would be entitled to the issue of a writ of certiorari or prohibition against the respondent. As regards the question whether the petitioners would be entitled to an order against the respondent u/s 45 of the Specific Relief Act under the circumstances aforesaid I have already dealt with the same in my judgment in *Tan Bug Taim Vs. Collector of Bombay*, . I accordingly hold that the petitioners would be entitled to maintain this petition against the respondent to obtain an order against him u/s 45 of the Specific Relief Act as prayed for in prayer (c) of the petition.

38. In the result, I do make an order against respondent No. 1 in terms of prayer (a) of the petition. In view of my granting the petitioners the prayer (a) of their petition, I do not consider it necessary to make any order under prayer (b) and prayer (c) of their petition. I may, however, observe that if any other Court came to the conclusion that the petitioners are not entitled to the relief prayed for in prayer (a) of the petition, I would certainly grant the petitioners the prayer (c) of

their petition, which as I have held above, they are entitled to under the circumstances set out above.

39. As regards the costs of the petition, I may state that the petitioners came to the Court with two main grounds in support of their petition, the one being that the requisition order in question was illegal, void and inoperative in law by reason of the enactment of Section 2(2)(xxiv) of the Defence of India Act and Rule 75A of the Defence of India Rules being ultra vires the Central Legislature and the other being that the requisition order in question was illegal, void and inoperative in law by reason of its being in contravention of the provisions of Section 15 of the Defence of India Act. Both these counts were equally important in their minds. As a matter of fact I feel constrained to observe that the second ground was trotted out with greater prominence all throughout by the petitioners than the first one. I have already held against the petitioners on the second ground. I may also observe in this connection that the petitioners filed this petition against respondent No. 2 against whom they had no cause of action whatever and in respect of whom Mr. M.P. Amin for the petitioners conceded that he could not sustain the petition at all. Under the circumstances, I feel that the ends of justice will be met if I order that each party should bear and pay his own respective costs of this petition.

40. Accordingly, there will be an order in favour of the petitioners in terms of prayer (a) of the petition and that the requisition order in question will be quashed. There will be no order as to the costs of the petition.

41. Mr. G.N. Joshi asks for a certificate u/s 205(1) of the Government of India Act that the case involves a substantial question of law as to the interpretation of the Government of India Act. I accordingly grant that certificate.