

(1945) 03 BOM CK 0016

In the Bombay High Court

Case No : O.C.J. Miscellaneous No. 127 1944

Lady Dinbai Petit

APPELLANT

Vs

M.S. Noronha

RESPONDENT

Date of Decision : 27-03-1945

Acts Referred:

Defence of India Act, 1971 — Section 19
Government of India Act, 1935 — Section 205, 306
Specific Relief Act, 1877 — Section 45

Citation : AIR 1945 Bom 419 : (1945) 47 BOMLR 500

Hon'ble Judges : Coyajee, J

Bench : Single Bench

Judgement

Coyajee, J.—The petitioners are the trustees of a deed, of trust dated January 17, 1931, and as such owners of Immovable property situate at Tarde junction in Bombay. A considerable part of this piece of property was desired by the Controller of Supplies for a storage area for motor vehicles, spare parts, etc., and in the month of March, 1942, got possession of the portion of land under an agreement to lease. Subsequent to that and before the lease could be executed, the Collector of Bombay served an order on the petitioners on April 1, 1942, under Rule 79 of the Defence of India Rules under a certain (Notification of the same date whereby the piece of land Was requisitioned from the date of the said order. The petitioners pointed out that the property had been taken possession of by the Department of Supply, Central Government, under the agreement to lease. On May 4, 1942, the Controller of Supplies was addressed a letter by the petitioners forwarding the agreement to lease for his approval. On December 3, 1942, the petitioners received a letter from the Controller of Supplies informing them that the Collector of Bombay had served on April 1, 1942, on the petitioners a requisition order and the requisitioning authority would pay the petitioners as owners rent for the property payable by the requisitioning authority, namely, the Collector of Bombay The Controller further informed the petitioners that the Government of India had concluded with the Government of

Bombay in that behalf an arrangement whereby the Government of Bombay would lease to the Supply Department, Government of India, such portion of the requisitioned property as the Supply Department may require and that the factum of the requisition had put an end to all existing contracts, leases, etc. and that therefore the Government of India could not hold the land from and after the date of the requisition order on lease from the trustees. On October 28, 1942, the Collector of Bombay served the petitioners with a notice which after referring to his order of April 1, 1942, further intimated to the petitioners that the property had been acquired pursuant to the requisition under Rule 75A of the Defence of India Rules under which the property had been requisitioned. The Government thereafter invited the petitioners to file their claim for compensation for the acquisition of the said land by the Government and offered to pay Rs. 22,49,770 as compensation for the acquisition of the property plus Rs. 6,880 per month by way of rent from April 1, 1942, until the date of acquisition. The petitioners thereupon intimated the Collector of Bombay that the amount offered was entirely inadequate and requested that the matter should be referred to arbitration u/s 19 of the Defence of India Act and offered to receive the amount and accept the same under protest and without prejudice to all their rights and contentions. On May 20, 1944, the Government did pay and the petitioners did receive Rs. 22,49,770 which the petitioners say they have accepted under protest. On May 5, 1944, the petitioners' solicitors wrote to the Collector of Bombay reminding him about the arbitration to be held and the delay caused. Further correspondence ensued in which the petitioners from time to time reminded the Collector of Bombay about the inadequacy of compensation and enquiring what steps had been taken for referring the matter to arbitration. A further reminder was sent by the petitioners' solicitors on July 1, and it is important to note that on July 8 the petitioners' solicitors wrote that one assessor should be appointed by the Government and one by the petitioners to assist the arbitrator. The Government intimated the petitioners by their reply dated July 14 that they had appointed an expert to assist the arbitrator u/s 19(c) of the Defence of India Act.

2. The petitioners were thereafter intimated that the Government of Bombay had appointed Mr. Noronha, Chief Judge of the Small Causes Court, Bombay, as arbitrator under s. 19 of the Defence of India Act to assess compensation payable to the petitioners. The arbitrator fixed a date for proceeding with the arbitration. In the meanwhile the petitioners had applied to this Court under the reliefs asked for on this petition. The grounds on which reliefs are asked and which I shall refer to hereafter are numerous, but the main ground is that the appointment of the arbitrator is ultra vires the powers of the Government of Bombay. That in fact the requisitioning authority was the "Central Government and the acquisition was by the Government of Bombay. That the delegation of powers by the Central Government to the Provincial Government was ultra vires and that the acquisition was made for a collateral purpose, namely, to deprive the petitioners of their right, namely, the fifteen per cent, over and above the

compensation that they would be entitled to u/s 23(2) of the Land Acquisition Act. The petitioners say that the order dated April 1, 1942, is ultra vires the Government of India Act and the order of acquisition dated October 28, 1942, is ultra vires the Government of India Act. That even if it were not ultra vires, it is void not being bona fide, namely, the acquisition being one for a collateral purpose, and they further maintain that both the appointment of Mr. Noronha as an arbitrator and the reference to him are ultra vires the Defence of India Act and the Government of India Act.

3. In these circumstances the petitioners challenge the proceedings before the arbitrator on two main grounds, that the appointment of Mr. Noronha, the respondent, as arbitrator is ultra vires and that the respondent suffers from lack of jurisdiction which is patent on the face of the orders made and there is also further latent lack of jurisdiction which would be found on evidence being recorded to the effect that the object of the acquisition was really a collateral one and that the acquisition was therefore not bona fide.

4. The petition before it came up for hearing; was presented to me when a rule was issued on August 26, 1944, and the rule was served under. 584 of the High Court Rules on the Province of Bombay as well as the Central Government. The petition is resisted by the Advocate General who appears for the Province of Bombay on the ground that the requisitioning authority and the acquiring authority were the same, namely, the Province of Bombay through the Collector of Bombay, that the proceedings are intra vires the powers of the Government under the Defence of India Act and the Government of India Act, 1945, and they deny that the acquisition is for any collateral purpose as alleged by the petitioners.

5. The petition after setting out the grievance of the petitioners points out that the power to appoint an arbitrator is vested in the Central Government and not in the Provincial Government and also the rule making power to frame rules contemplated by Sub-section(2) and (3) of Section 19 of the Defence of India Act are the powers that can be exercised by the Central Government only, that the delegation of such powers as regards the appointment of the arbitrator and as regards the delegation of powers to frame rules are ultra vires the Government of India. Further, they maintain that in these circumstances the petitioners are entitled to come to Court on these allegations for the issue; of a writ of certiorari against the respondent or a writ of prohibition against the respondent and the respondent may be directed by an order and injunction of this Court u/s 45 of the Specific Relief Act to forbear the further exercise of jurisdiction as an arbitrator. The petitioners have served the Government of Bombay with a notice u/s 80 of the CPC dated August 17, 1944, in which all these grounds in detail are set out and they say further that they propose to file a suit for a declaration that Rule 75A of the Defence of India Rules is illegal and invalid, for a further declaration that the order of the Collector of Bombay dated October 28, 1942, is ultra vires, illegal and not effective, for a further declaration that the possession

is illegal, wrongful and unjustified and amounts to wrongful occupation of the petitioners' property, for an order handing over possession of the property to the petitioners, for fixing of the sum at Rs., 20,000 per month as compensation for wrongful use and occupation and for an injunction against the defendants to the suit from proceeding with the arbitration u/s 19 of the Defence of India Act. They further say that the facts stated in that notice constitute the petitioners' cause of action and that they may take such further steps to stop the arbitration proceedings as they may be advised.

6. It is presumably in pursuance of the advice referred to in the penultimate paragraph of the notice u/s 80 of the CPC that the petitioners have approached this Court for the reliefs asked for on this petition.

7. On the petition and the affidavits being read to the Court the Advocate General has raised and argued a preliminary point to the effect that" the petition is misconceived and therefore should be dismissed. The Advocate General argued this point on the footing that even if there was a patent lack of jurisdiction on the face of the proceedings before the arbitrator and without admitting the same, the Court will not entertain the petition and grant any of the reliefs asked for. The Advocate General points out that the Government is directly and substantially concerned and would be directly and substantially affected by any order made. That any order made for the writ of mandamus or for the writ of prohibition would offend against and contravene the provisions of Section 45 of the Specific Relief Act, Sub-clause (f). That the writ of certiorari will also not lie as the power of the High Court to issue such a writ is not challenged but that it is statutorily limited and. will not be issued so as to affect the Government. A further point has been made namely that the issue of any of the writs asked for would not be either an adequate or a complete remedy, because the grievance of the petitioners is that the Government have wrongfully acquired and wrongfully taken possession of the property and have already served the Government with a notice u/s 80 of the CPC in connection, with the contemplated suit and that all the reliefs asked for would really be embraced in the suit and the suit is the only remedy and proper remedy in the circumstances of the case. It is further contended that in that suit if necessary the plaintiffs can ask for an injunction against the defendants restraining them as parties to the suit from proceeding with the arbitration and that the suit is the only proceeding whereby there could be complete adjudication on all points raised by the petitioners. It is further argued that u/s 19 of the Defence of India Act if the petitioners have a grievance then an appeal, does lie to the High Court itself against any award that the arbitrator may make and that in this case there is no question of appeal being limited by the quantum of compensation awarded. The learned Advocate General has further argued and emphasised that if the acquisition is void, the award would be a nullity and would not injure the petitioners, and that in any event on the facts of the case as the reference is only for the purposes of determining whether the petitioners are entitled to anything more than Rs. 22,49,770 received by them, the award if made could only be made in favour of the

petitioners. In other words there can be no injury to the petitioners by the arbitration proceedings and therefore no case is made out for interference by the Court by granting any of the extraordinary reliefs asked for on the petition.

8. Mr. Munshi on behalf of the petitioners has maintained that the very basis of the petition is that the compensation is inadequate, and that, u/s 19 (e) of the Defence of India Act the arbitrator in making the award shall have regard to Sub-section (1) of Section 23 of the Land Acquisition Act, 1894, and under Sub-clause (g) nothing in law for the time being in force shall apply to arbitration under this section. Mr. Munshi therefore emphasised the point that, the arbitrator would not be entitled to grant the fifteen per cent, over and above the compensation awarded u/s 23(2) of the Land Acquisition Act which the petitioners would be entitled to if the properties were acquired by the Government in the normal course of proceedings under the Land Acquisition Act, and that the Government are attempting to deprive the petitioners of the above-said statutory fifteen per cent, by this method of requisitioning and acquiring property under Emergency Legislation which is necessarily legislation of a temporary nature. This is an argument which would, apply to every instance in which there is acquisition under the Defence of India Act. Mr. Munshi argued that the petition is not misconceived, that any order made under the petition would be really against the respondent far staying the arbitration and would not be against the Government. Mr. Munshi says that he is asking for relief only against Mr. Noronha, the respondent,, and no one else. He further says that an injunction in the suit that could be filed would not go against Mr. Noronha and that in these circumstances the petition is in order and not misconceived.

9. On these contentions I have decided to try the preliminary point raised by the Advocate General and answer that question before hearing the petition on merits.

10. The petition asks for reliefs I have set out above against the respondent. As I have stated, the Government of Bombay and the Government of India have been made parties to these proceedings under Rule 584 of the High "Court Rules, and that rule says that any rule under ch. viii of the Specific Relief Act may in the discretion of the Court be served on "any party affected by the act to be done or forborne". The rule runs parallel to the new Order XXVIA of the Code of Civil Procedure, although it, does not fall thereunder. It is contended by the Advocate General that Government of India and Government of Bombay are parties to these proceedings and! they are the substantial parties that would be affected because they would be bound by any order made In fact it is argued that if they were not bound by any order made, then the order itself Would be infructuous. That these proceedings are really against the Province of Bombay being the other party to the proceedings. That in all proceedings for such a relief the other party is a necessary party and! as such necessary party is called upon to show cause although the petition in its inception may not cite such a party, and that is why the Court is entitled under Rule 584 to have the rule served on the parties affected thereby, and the Government are now here to show cause against the

petitioners. It is submitted by the Advocate General that the order would not merely be against the respondent because the rule is directed against the Province of Bombay, and the process if any would be against the Province of Bombay and they are therefore as much parties to the proceedings as the tribunal, namely, the arbitrator who is the respondent.

11. For the purposes of considering the question arising on the preliminary point the Advocate General has first drawn my attention to Section 45 of the Specific Relief Act. It has been held that the conditions set out in Clauses (a) to (e) of Section 45 are cumulative, so that no order can be made Under this section unless they are all satisfied, and the Advocate General argued first that these conditions are not satisfied, and, secondly, argued that even if satisfied, any process issued would offend against Sub-clause (f) of Section 45 of the Specific Relief Act. The learned Advocate General began his argument by pointing out that under Rule 75(3) of the Defence of India Act where a notice of acquisition is served on the owner of the property, then at the beginning of the date on which the notice is served the property shall vest in the Government free from incumbrance, and that on such notice being served the period of requisition shall end. In other words on the service of the notice the vesting of the property in the Government is complete. On the other hand u/s 16 of the Land Acquisition Act land only vests in the Crown free from all incumbrances after an award is made u/s 11 of the Act, and not until then. It is therefore contended¹ that any order made must therefore fall u/s 45 of the Specific Relief Act and offend against Sub-clause (f) of the said section.

12. I may first say that it has been argued by the Advocate General that Section 45 of the Specific Relief Act embraces both the writs, namely, Writ of mandamus as well as writ of prohibition, and this proposition is disputed! strenuously by Mr. Munshi although Mr. Munshi has conceded in his argument that if Section 45 embraces the writ of prohibition then the petitioners would fail if the Government were party to the proceedings. The Advocate General maintained that neither the writ of mandamus nor the writ of prohibition in these circumstances would go in the light of the provisions of Section 45, and for that he has relied upon a decision of a division bench of this High Court in the case of *Mahomedalli v. jafferbhoy* (1925) 28 Bom. L.R. 264. Two propositions were laid down in that appeal, one that conditions (a) to (e) of the proviso to Section 45 are cumulative so that no order can be made under this section unless they are all satisfied, and that proceedings under this section are in substitution of proceedings for both the writ of mandamus and the writ of prohibition according to English practice. At p. 269 this proposition is laid down and discussed by Macleod C. J. who first describes the Writ of mandamus, then describes what is the writ of prohibition and then proceeds to discuss the principles by which Courts will be guided in such matters. The learned Chief Justice arrived at the conclusion that in the circumstances of that case the writ of prohibition did not lie as they come within Section 45 and said as follows (p. 271):

In effect we are asked to make an order preventing the Governor from ascertaining in a manner which seems to him proper the amount of costs payable by the losing party in an electoral inquiry, which is forbidden by proviso (f) to Section 45.

There also the prohibition asked for was against Mr. Gillett, the Taxing Master of the High Court, and the injury described was the payment of the bill when taxed, and the learned Chief Justice held that that was not the kind of injury contemplated by proviso (e) to Section 45. This judgment has been relied upon by the Advocate General for the purpose of showing that any order made for the issue of writ of prohibition would come within the ambit of Section 45 and would be in contravention of proviso (f) to Section 45." Mr. Munshi has strenuously attempted to show that Section 45 only refers to a writ of mandamus, and he based his argument on the fact that by Section 50 of the Specific Relief Act it is laid down that "neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus." Mr. Munshi further says in connection with the writ of prohibition that if it had been intended by the Legislature to deprive the High Court of the power to issue the writ of prohibition, then that would have been set out in Section 50 in terms. One has to read Section 50 and Section 45 together. Section 45 itself talks of any specific act to be done or forborne 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.

13. The Advocate General has proceeded to amplify his argument by saying that proviso (a) to Section 45 of the Specific Relief Act is not complied with because the contemplated proceedings in the arbitration cannot and do not injure the petitioners. The acquisition is complete, the property is vested in the Government and the Government have taken possession of it. The award would be an award as regards compensation to be paid. It is admitted by Mr. Munshi that the gravamen of the complaint is that the compensation offered and paid and received under protest is entirely inadequate and that the petitioners applied for arbitration to obtain more. Therefore any award made first of all cannot be an award against the petitioners in the sense of reducing the amount already offered and paid. On this subject the Advocate General has referred me to the observations of Beaumont C.J. in the case of *Ramdas v. Atlas Mills Co.* (1930) 33 Bom. L.R. 19 where it was held that to entitle a person to relief by way of injunction he must show that he has suffered a legal wrong, that the obtaining of an entirely wrong award from an arbitrator does not inflict a legal wrong upon the person against whom the award is made and does not entitle such person to

recover damages. Inasmuch as the doing of the act does not give rise to a claim for damages, the Court has no jurisdiction to restrain the committal of the act by injunction. The learned Chief Justice observed as follows (p. 23):

In my opinion, the general principle is clear that a plaintiff is not entitled to come to this Court and to ask for an injunction against the commission of an act which inflicts no legal wrong upon him. the Court has laid it down that where an action has been brought impeaching the agreement on equitable grounds, the Court could restrain the defendant from proceeding to arbitration pending the determination of the question in suit.

And the learned Chief Justice concluded by saying as follows (p. 25)

I am disposed to think that where in an action the validity or existence of the contract is challenged on any ground, the Court has jurisdiction to restrain arbitration proceedings under the agreement until that question has been determined.

The Advocate General has further referred me to Halsbury's Laws of England, Vol. I, p. 631, where it is set out that the Court will pot, as a rule, restrain an arbitrator from proceeding with a reference on the ground that the award will be inoperative ; but where the submission itself is impeached, an injunction may be granted to restrain the arbitrator from proceeding until the question of the validity of the submission has been determined. I am also referred to Russell on Arbitration, 13th edn., p. 654. In the circumstances it is contended that no injury to the petitioners is disclosed as contemplated by proviso (a) to Section 45. Similar observations are made by Macleod C.J. in the case referred to above, namely, Mahomedalli v. Jafferbhai, and the learned Chief Justice observed as follows (p. 270):

No doubt the obligation to pay the costs would cause an injury to the person who had to pay them, but that would not be the kind of injury which is included within proviso (a), "In my opinion, therefore, the petitioners are not in a position to show any injury to them as contemplated by Section 45, proviso (a), of the Specific Relief Act, because as observed by Beaumont C.J. in Ramdas v. Atlas Mills Co. (p. 23):

There are a great many acts, which may inflict annoyance and occasion costs and expense, which, in the popular sense of the word, are a nuisance to another person but which do not amount to a nuisance in" the legal sense of the word, and give rise to no cause of action, are, in fact, *damnum sine injuria*.

14. It is also contended that the conditions of proviso (b) are not complied with, because the forbearing is not clearly incumbent on the arbitrator because the question of jurisdiction or lack of jurisdiction must be clear on the face of the position and in the circumstances it cannot be argued that it is incumbent on the arbitrator to forbear from proceeding. I need not dilate on this point as I am of the opinion that certain other conditions of the other provisos to the section are

not complied with. It is also contended that proviso (c) is not complied with inasmuch as in fact the arbitration was invited by the petitioners, they pressed by repeated reminders for the appointment of the arbitrator and for the appointment of assessors and that" therefore it is not consonant with right and justice to ask the arbitrator to forbear. As I am of the opinion that provisions (a), (d) and (e) are not complied with, it is not necessary to come to a finding on this point.

15. As regards provisos (d) and (e), it is argued on behalf of the Government of Bombay that the petitioners have other specific and adequate legal remedy. First of all it is contended that Section 19 of the Defence of India Act under which this arbitration is proceeding does under Sub-clause (f) allow an appeal to the petitioners and that the appeal lies to this High Court and it is contended that where an appeal lies prohibition will not lie. The question of jurisdiction itself can be taken before the arbitrator and that -question can be further pursued in appeal. On this I am referred to two decisions, one of them being the case of *Turner v. Kingsbury Collieries, Ltd.* [1921] 3 K.B. 169 It was held in that case that a writ of prohibition will not lie to a County Court Judge when sitting and adjudicating under the provisions of the Workmen's Compensation Act, 1906, one of the grounds being that the Act itself provides one remedy and one remedy only for an error in an award of a County Court Judge when sitting and adjudicating under that Act, namely, by appeal to the Court of Appeal. At page 174 Mr. Justice Mc-Cardie observed that the question there was whether the society can select at their option either an appeal to the Court of Appeal or Prohibition from a King's1 Bench Judge or a Divisional Court where excess of jurisdiction is alleged. The learned Judge quotes Short and Mellor (p. 256) where it has been laid down that "it may be stated broadly that where an appeal lies prohibition does not." The learned Judge observed that there is no absolute technical obstacle to the co-existence of both prohibition and appeal, and again quoted Short and Mellor's Crown Office Practice, 2nd ed., p. 251, as saying (p. 175):

Seeing that all appeals from inferior Courts lie really to the same ultimate Court of Appeal, it is probable that the Courts will be unwilling to grant prohibition in any matters which can be corrected on appeal.

On the consideration of these propositions the learned Judge concluded by saying that the point at issue there can be dealt with rapidly, powerfully and with substantial finality by the Court of Appeal, and taking all the arguments into consideration he dismissed the application for a writ of prohibition. The fact that the Court of Appeal is the same, namely, the High Court and the highest Court does seem to weigh in the consideration of this proposition In the other case of *Mahomed Abdul Coder V. Kaufman*¹ the Judicial Committee of the Privy Council also refused to interfere on similar grounds. There the contention was that the application for a writ of prohibition was misconceived inasmuch as there was a right of appeal¹ from the conviction and therefore prohibition did not lie. Lord

Phillimore merely observed that in the circumstances they were not convinced that prohibition lay in the circumstances of the case. It is further contended by the Advocate General that Section 30(a) and 30(c) of the Indian Arbitration Act are made applicable to these proceedings under the rules made, and that if Section 30, Sub-section (a) and (c) are made applicable, it would involve a question of jurisdiction also.

16. Alternatively it has been argued by the Advocate General that a suit provides the only adequate remedy in the circumstances of the case. The petition discloses identically what is disclosed in the notice served by the) petitioners u/s 80 of the Code of Civil Procedure, that they want in that suit a declaration of title to possession and compensation for the use, and occupation. It completely covers all reliefs asked for by the petitioners. What is more is that the petitioners in that suit can ask for an injunction. It was strenuously argued by Mr. Munshi that the respondent Mr. Noronha could not possibly be made a party to that suit and therefore there cannot be any injunction against him from proceeding with the arbitration. I am afraid this argument cannot stand examination. It is obvious that in that suit the Government would be made a party and a party to the arbitration who is a party to the suit can be restrained by an injunction under certain circumstances of the case as is done by this Court in proper cases, and once that is done the arbitration proceedings would be stayed by restraining the party to the suit from proceeding therewith. This class of cases is contemplated by Beaumont C.J. in the case of *Ramdas v. Atlas Mills Co.* in his observations at p. 25. The Advocate General has referred me to two cases, *Howell v. Addison* [1943] 1 A.E.R. 29 and *Carltona Limited v. Commissioner of Works* [1943] 2 A.E.R. 560. In the sectoral of these cases the sole question) before the Court related to the validity of the order of the Commissioner of Works in requisitioning the premises. These two cases show that under Emergency Legislation the proper manner of redressing the grievance is by a regular suit and asking for an injunction in the suit. There are now a series of cases in England under Emergency Legislation, but these cases show that this is the proper proceeding and not by a writ of prohibition or by a writ of certiorari, and if the latter were the proper proceedings, one would have found precedents of that kind reported in recent English decisions. The Advocate General has on this point referred me to *The Queen v. Charity Commissioners for England and Wales* [1897] 1 Q.B. 407, where it was held that writ of mandamus ought not to issue on the ground that the applicants had alternative convenient and effectual remedies namely, by proceedings to have the question decided under the Charitable Trusts Act. It is true, as pointed out by Mr. Munshi, that here the remedy provided was a specific remedy under a distinct and specific act. The next case is *Rex v. Dymock Vicar and Churchwardens* [1915] 1 K.B. 147. This was a rule nisi to show cause why a writ of mandamus should not issue commanding the Churchwardens to restore the applicant to the office of the Sexton of the Church on the ground that the office of Sexton was a freehold office. There Mr. Justice Darling, afterwards Lord Darling, observed, as follows (p. 153):

There is another ground on which the application fails, namely, that mandamus is not the only remedy open to the applicant. If he is entitled to the office of Sexton as a freehold for life he can bring an action to recover fees.

In *The Queen v. Registrar of Joint Stock Co.* (1888) 21 Q.B.D. 131 an application was made for a mandamus to compel the Registrar of Joint Stock Companies to file a contract which he had refused to file on the ground that it was insufficiently stamped, it was held that the proper mode of questioning the legality of the Registrar's refusal was by obtaining the opinion of the Commissioners of Inland Revenue and appealing from their decision to the High Court under the appropriate sections of the Stamp Act, and therefore as there was another appropriate remedy, a mandamus must be refused. It is true that a mandamus was granted in the case of *Rex v. Christ's Hospital Governors*, Dunn, Ex, parte [1917] 1 K.B. 19. In that case the Endowed Schools Act provided that a certain number of the Council of Almoners should be appointed by the governors on the recommendation of the Lord Mayor and Aldermen of the City of London. The governors who claimed, discretion as to appointing a person¹ so recommended refused to appoint a person recommended by the Lord Mayor and Aldermen. It was held that the word "recommendation" in Clause 19 was to be construed as a nomination upon which the governors were bound to act and that in the circumstances mandamus was the proper remedy to compel the governors to perform the duty of appointing the person recommended. In this case on the face of it is obviously a case of mandamus and as observed by Darling J. (p. 23):

I do not think that either of the processes suggested here as alternative remedies is equally convenient, beneficial, and effectual. This matter was properly brought before the Court on an application for mandamus, and the Rule must be made absolute.

This shows the class of cases in which such writs were issued and the circumstances in which they are issued.

17. In considering the provisos (d) and (e), I am of the opinion that the proper remedy and the only adequate remedy in the circumstances of the case as far as the writ of prohibition is concerned would be a regular suit. It was strenuously argued by Mr. Munshi that as a matter of fact he is only asking for an order against the respondent restraining him from proceeding with the arbitration and he wants to have the arbitration stopped and nothing more, and therefore the only adequate remedy and the only proper remedy he is entitled to is the writ of prohibition. I am afraid the Court is not entitled to wrench the relief asked for from the context of the petition. The Court has to see what is the substance of the complaint made and what is the real remedy. It is not for a party to come to Court and say : I shall reserve the real and substantial relief for a different set of proceedings although this is my real grievance, but for the purposes of bringing the matter within Section 45 of the Specific Relief Act I shall limit my application on this particular point. In fact the mere stopping of the arbitration proceedings cannot solve the difficulties and palliate the grievances of the petitioners, for the

parties would be left in the same position as they are now save and except that the annoyance, costs and expenses of proceeding with the arbitration would be removed and which would be removed equally effectively by an injunction as indicated above.

18. Mr. Munshi has stated that a general right to sue is not a specific remedy nor is it equally speedy. Taking the proposition as a whole, I cannot agree with this argument. I have already indicated! that the remedy by a suit is the only adequate remedy in the circumstances of this case wherein all the questions could be completely and finally adjudicated upon, and as I have indicated above, although the respondent cannot be made a defendant to the suit, an injunction against the party would be as speedy and effective as the writ of prohibition under the present petition. Mr. Munshi has further argued that the appeal provided for u/s 19 is a qualified appeal inasmuch as only in a certain class of cases the parties would be entitled to appeal. But it is obvious that under the rules made there is a right of appeal as far as the petitioners are concerned whose claim is well beyond the figure fixed to enable the parties to appeal. Moreover the appeal lies to this High Court. In these circumstances I am of the opinion that as far as writ of prohibition¹ is concerned, the preliminary objection raised by the Advocate General prevails and that prohibition does fall u/s 45 of the Specific Relief Act. That further the petitioners have not complied with the provisos (a), (d), and (e) to Section 45 of the Specific Relief Act. Moreover I am of the opinion that the Governments, namely the Central-"Government and the Provincial Government, would be affected by an order made under this section and that such an order would offend against proviso (f) to Section 45 of the Specific Relief Act.

19. The other question now remaining is of some importance, and that is whether the petitioners are entitled to a writ of certiorari in the circumstances of the case. It has been argued by Mr. Munshi that the writ of certiorari is a prerogative writ which survives to the original jurisdiction of the High Court as successor to the Supreme Court and is not affected by Section 45 of the Specific Relief Act which, according to him, deals with mandamus only. It is argued that it is a fit and proper writ to be issued against the arbitrator who on the face of the proceedings is attempting to act without jurisdiction. It is conceded that on a proper case being made out an arbitrator does come under the powers of the Court for the purposes of issuing a writ of certiorari. The writ of certiorari 1st described in Halsbury's Laws of England, Vol. IX, p. 838, as follows:

The Writ of Certiorari issues out of a superior Court and is directed to the Judge or other officer of an inferior¹ 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 a more sure and speedy justice. It may be had either in 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 power of the High Court to issue this writ of certiorari is not disputed and in *Muljee Sicka and Co. Vs. The Municipal Commissioner of Bombay*, the High Court of Bombay has stressed how the High Court has inherited such of the powers of the Supreme Court as were handed down to the High Court by different statutes, and I need not set out here the history of the survival of the right of the High Court to issue a writ of certiorari. The writ of certiorari can be issued and is issued by the High Court in proper cases. The history of this has been traced with great care in the case of *Venkataratnam v. Secretary of State for India* I.L.R (1929) Mad. 979 and the existence of the power of the High Court to issue such a writ is now placed beyond the pale of any controversy. The question before me is whether the right of the High Court is in any manner limited by any statute and if so how. The issue of such a writ is resisted by the Advocate General on two grounds. The first ground is that the writ of certiorari cannot be issued in this case as it would involve the Province of Bombay and: the Government of India and would therefore be in contravention of the provisions of Section 306 of the Government of India Act, 1935. The first part of the section lays down:

No proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any Court in India against the Governor-General or against the Governor of a Province, or against the "Secretary of State whether in a personal capacity or otherwise, and except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any Court in. India against any person who has been the Governor-General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof : Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province or the Secretary of State such proceedings as are mentioned in Chapter 3 of Part VII of this Act.

To consider this question first of all I have got to see whether the Province of Bombay or the Central Government are parties to these proceedings, and even if they are, whether the Court's powers to issue writ of certiorari are limited by this section. In my opinion it cannot be denied that the rule has been issued against the Province, of Bombay and the Advocate General is here to show cause on behalf of the Province of Bombay, and any order made or process issued must necessarily not only affect but be against what is called the Province of Bombay, in other words the Governor of Bombay acting u/s 49 of the Constitution Act, because the executive authority under that section is exercised by the Governor either directly or through officers subordinate to him. In these circumstances does Section 306 limit the power of the Court to issue such a writ? Before considering the question I would first refer to the case of *Venkataratnam v. Secretary of state for India*, referred to above. It was held in that case that

subject to a statutory exception in respect of the acts or orders of the Governor-General in Council and of the Governor-in-Council done or made by them in their public capacity, High Courts in India possess the same jurisdiction to issue writs of certiorari as the Court of King's Bench in England. It was; held in that case that u/s 106(1) of the Government of India Act, 1915, the High Court of Madras has only such powers and authority as were vested in it at the commencement of the Act and that the High Court of Madras has no jurisdiction to issue writs of certiorari against the Governor of Madras u/s 106(1) of the Government of India Act, 1915. This was because the power was limited u/s 110 of the same Act which laid down that the Governor and each member of his Executive Council shall not be subject to the "Original Jurisdiction" in respect of anything counselled or ordered or done by any of them in their public capacity inasmuch as the writ of certiorari is issued in the exercise of original jurisdiction of the High Court within the meaning of that expression u/s 110 ; consequently a writ of certiorari cannot be issued by the High Court in these circumstances. In other words it was clear that on the construction of Section 110 of the Government of India Act, 1915, the High Court of Madras came to the conclusion that that section contained an exemption in. favour of the Governor and therefore the powers of the High Court which were otherwise unimpaired in respect of the issue of the writ of certiorari were curtailed to that extent by Statute. After reviewing the several sections of different Statutes and considering what is the power of the High Court to issue a writ of certiorari, Mr. Justice Venkatasubba Rao observed as follows (p. 1000):

I am, therefore, constrained to hold that our jurisdiction is excluded The restrictive Provisions, which drive us to this conclusion, are mere relics of the past, dating back to the discord of the Supreme Court and Governor General's Council.... In the words of Kernan J...the continuance of these exceptions is both unnecessary and useless. These remarks apply with greater force at the present day, having regard to the new constitution. In England, as shown by the numerous cases cited at the Bar, prerogative writs lie to the Government in its various departments, I see no reason for retaining the restrictive provisions in regard to the High Courts in India. It is, however, our duty to give effect to the law as we find it. I must, therefore, refuse to make the rule nisi absolute." Madhavan Nair J., now a Member of the Privy Council Board, observed as follows (p. 1022):

It will thus be seen that the Governor acting with Ministers is entitled to claim exemption from the jurisdiction of the High Court for acts counselled or ordered by them in their public capacity both u/s 106(1) and section 110(a) of the Government of India Act. It is needless to speculate as to why the Legislature has provided this double safeguard for the local Government... but I do not think it is necessary to embark on this inquiry, however interesting it is ; we are familiar with legislation " by. way of abundant caution";. probably, section 110 was enacted to make sure that the wholesale repeals and amendments effected by the Government of India Act did not interfere with this safeguard which is a

relic of antiquity.

And he concluded by saying (p. 1023):

As I have held that this Court has no jurisdiction to issue a writ of certiorari against the local Government, this question does not arise for consideration. I may add that this question in the present case depends on the proper construction of Section 306, which corresponds to Section 110 of the Government of India Act, 1915, and in terms Section 306 does in, my opinion exempt the Governor of a Province and therefore the Province of Bombay, because the Governor acts u/s 49 as the Executive Authority of the Province and therefore from all proceedings or process as set out in that section except as regards the proceedings under the proviso to Section 306, and set out in Chap. 3, Part VII, of that Act. This position is fortified by a very recent decision of the Calcutta High Court in *In re Banawarilal Roy* (1944) 48 C.W.N. 766, where the acting Chief Justice and Mr. Justice Das in a very lengthy judgment considered the circumstances under which different writs may be issued. In that judgment they have traced the powers of the High Court to issue the different writs. Mr. Justice Das in a very exhaustive judgment considers the different powers of the High Court under which different writs may be issued and traces the history of the powers of the High Court to issue different writs under different circumstances. Mr. Justice Das in paragraph 37 of the judgment traces the instances of the issue of writ of certiorari and then refers to the judgment in *Venkataratnam v. Secretary of State for India*, and explains the nature of the writ of certiorari as explained by their Lordships of the Privy Council in 48 CWN 18 (Privy Council) *infra* (p. 799):

The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because, in its original Latin form,, it required that the King should "be certified" of the proceedings to be investigated, and the object is to secure, by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior "courts" in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior courts, and in particular the court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India.

Then in para. 46 at p. 802 he considers what was the application in so far as the application prayed for a writ of certiorari and which according to Das J. "is primarily directed against the added respondent, Province of Bengal." I am

emphasising this to show how the High Court of Calcutta referred to the Province of Bengal as a party to the proceedings. Then the learned Judge goes on to consider the Government of India Act, 1915, in connection with writ of certiorari and considered what was the meaning of the Province of Bengal, and considering the question of exemption under a. 306, at page 803 the learned Judge; says:

Further section 306 of the present Act prohibits all proceedings and issue of all processes whatever against the Governor, The learned Counsel for the Petitioners contended that his clients grievance was not against the Governor but against the Government of Bengal and that they were entitled to proceed against the Government of Bengal and this Court had power to issue its process against the Government.

The learned Judge considered the implication of that and came to the conclusion (p. 803):

The only section authorising a suit or proceedings is section 176 and that authorises the use of the name of the Province only in respect of certain suits and proceedings in which the present proceedings cannot be included.

He remarks (p. 803):

We have seen that this High Court has no jurisdiction to entertain any proceeding whatever or issue any process whatever against the Governor. To accede to this application for issue of a writ of Certiorari against the Government of Bengal will inevitably mean issuing process against the Governor, for he is at least a part of the Government of Bengal.

The learned Judge then considers the case of Venkatratnam v. Secretary of State for India, and comes to the conclusion that (p. 804):

...the impugned order being one affecting the Municipality of Howrah which is outside the Original Jurisdiction of this Court, this Court cannot in view of the decision in Partl-kimedi's case, issue a certiorari to correct that order, even though the Government of Bengal may happen to be located in Calcutta.

And then concludes by saying (p. 804):

In my judgment the application, in so far as it seeks a writ of Certiorari against the Province of Bengal, is not for the several reasons stated above maintainable.

Mr. Munshi in this connection has cited before me the case of Ponnambala Desikar v. H. R.E. Board, Madras [1941] Mad. 807. In the light of what I have stated above this case is entirely distinguishable, although Section 306 of the Government of India Act, 1926, was relied upon as a bar to the application. That argument was rejected because as Leach C.J. pointed out as follows (p. 813):

In the first place, the petitioner does not ask for the issue of a writ against the Government, but against the Board, which is no part of the Government. In the second place, if the Board had abused its powers, the High Court had power to

quash the Board's orders on which the notification is based and, if the basis of the notification is illegal, the notification is illegal.

There was no question there of Section 306 being a bar to those proceedings and the argument advanced was not accepted. So that in my opinion the right to issue the writ which this Court does possess is barred by Section 306 of the Government of India Act. It was held in the case of *Dinshaw Shroff v. Commissioner of Income Tax* (1942) 45 Bom. L.R. 31 that in the circumstances of that case it was also barred by Section 226 of the same Act.

20. Lastly I may refer to the recent decision of the Privy Council in 48 CWN 18 (Privy Council) . *infra* In this case their Lordships of the Privy Council traced the powers of the High Court to issue writ of certiorari and held that

As the estate of Parlakimedi lay in the north of the Province, and the appellants and the respondent were not subject to the Original Jurisdiction of the High Court the High Court had no jurisdiction to issue a Writ of Certiorari in such a case as this and that the power to issue Certiorari still remains in the High Courts of Calcutta, Madras and Bombay in the exercise of their local jurisdiction.

The reason for referring to this case is that their Lordships distinctly indicated that the respondent being outside the original jurisdiction no such writ could be issued. This case has a bearing on the present case for this reason, that the writ could not be issued as the appellant and respondent No. 2 were out of jurisdiction although the Board itself was within jurisdiction. These remarks show how the writ would affect the other respondents who were out of jurisdiction and therefore the Court will not issue a writ of this nature. This further shows that the other respondents were looked upon as parties who were entitled to show cause before any writ could be issued against them. In modern practice the application for a rule is made against the party and the Court but it is the party and very rarely the Court that shows cause against the rule (*Vide Halsbury, Vol. IX, p. 836, and Short and Mellor's Crown Practice, p. 83.*)

21. Much as this High Court would desire to see its prerogative of issuing this writ unimpaired and would not lightly accept any curtailment of this prerogative unless satisfied that in law it has been curtailed, it is clear to me on a proper construction of Section 306 of the Government of India Act, 1935, and on the authorities discussed above that the right of issuing a writ of certiorari is statutorily limited, and as observed by the learned Judges of the Madras High Court quoted by me above, this Court must accept the law as it finds it, and therefore I must hold that this Court has no jurisdiction to issued a writ of certiorari against the Local Government, namely the Province of Bombay.

22. I would only add one thing more and that is in connection with the second ground advanced. It has been laid down in *Halsbury's Laws of England, Vol. IX, p. 879, para, 1482*, that even where grounds are made out upon which the Court might grant the writ, it will not do so where no benefit could arise from granting it, and where the proceedings in the Court below are not merely violable, but

absolutely void, as where an unauthorised person has purported to act in a judicial capacity. In the light of what I have stated above it does seem to me that if the contentions of the petitioners are to prevail, the proceedings according to the petitioners are entirely void and no benefit could be derived by the issue of such a writ. On the other hand, as I have indicated above, the only adequate remedy for the ills complained of by the petitioners is a regular suit which may not only remove all the grievances they have set out on this petition, but it would also effectively and speedily stop further proceedings before the arbitrator by obtaining an injunction against the parties to the suit restraining them from proceeding with the arbitration pending the hearing and disposal of the main question involved in the suit.

23. As I have now decided that the petition is misconceived, it is not necessary for me to consider the petition on merits, and I, therefore, dismiss the petition with costs. The parties will be entitled to costs as taxed on the long cause scale, there being two sets of costs. Mr. Coltman says that the rule was really against Mr. Noronha and there is no reason why two sets of solicitors and two counsel should appear for the other parties. As I have indicated in my judgment it is not the Court that shows cause but it is really the parties who show cause and they are parties to these proceedings. Furthermore if the petition had been pursued and heard on merits, it is clear to me that the Central Government would have been substantially concerned in meeting the points raised.

24. In these circumstances the proper order would be that there will be two sets of solicitors' costs and two briefs for counsel allowed for each party, namely, the Central Government and the Province of Bombay.

25. Mr. Coltman at this stage applies for the issue of a certificate u/s 205 of the Government of India Act, 1935. The Advocate General says that this is not a fit case for the issue of a certificate on the ground that there is a similar judgment of the Calcutta High Court, and this case does not involve a substantial question of law as to the interpretation of the Government of India Act. I am afraid I cannot accept this contention on the section. The very basis of my judgment is that Section 306 of the Government of India Act exempts the Province of Bombay and the Central Government from any process as contemplated by Section 306. It therefore necessarily involves an interpretation of the Act. Section 205 says that an appeal shall lie to the Federal Court when the case involves a substantial question of law as to the interpretation of the Act. In the circumstances if the Court is of opinion that a substantial question of law as regards the interpretation of the Government of India Act is involved, then the parties are entitled to a certificate. I, therefore, grant a certificate u/s 205 of the Government of India Act, 1935.