
(1945) 10 BOM CK 0005

In the Bombay High Court

Case No : O.C.J. Appeal No. 30 of 1945 and Miscellaneous No. 127 of 1944

Lady Dinbai Petit

APPELLANT

Vs

M.S. Noronha

RESPONDENT

Date of Decision : 14-10-1945

Acts Referred:

Specific Relief Act, 1877 — Section 45

Citation : AIR 1946 Bom 407 : (1946) 48 BOMLR 255

Hon'ble Judges : Harilal Kania, J;Chagla, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Harilal Kania, Kt., Ag. C.J.

1. This is an appeal from the judgment of Mr. Justice Coyajee. The material relevant facts are these.
2. Under a trust deed dated January 17, 1931, the petitioners, who are trustees, held vacant land admeasuring about 85,000 square yards in the Tardeo locality in Bombay. In January, 1942, the Controller of Supplies asked for the use of the land for storage of motor vehicles. In that correspondence, on March 14, 1942, it was stated that the trustees should let the land to the Controller of Supplies. The rent was to be twelve annas per square yard per annum and the period of lease was twelve months with an option for a renewal for a further period as may be necessary. The Deputy Controller by his said letter asked the appellants to send the: draft terms and conditions of the proposed lease. In anticipation of the execution of the lease the land was occupied by the Controller of Supplies on March 24, 1942. On March 31, 1942, the Secretary to the Government of Bombay, Revenue Department, by order of the Governor of Bombay sent a memorandum to the Collector of Bombay. In that memorandum it was stated that the Government had decided that the old Petit Mills site at Tardeo should be requisitioned immediately under Rule 79 of the Defence of India Rules and the

Collector was requested to lease temporarily to the Supply Department so much of the land as was required by that department. In para 2 of the memorandum it was stated that the Government had also decided that proceedings for the acquisition of the said land under the Land Acquisition Act should be started simultaneously and the Collector was requested to send to Government the requisite proposals for its acquisition. Rule 79 of the Defence of India Rules there referred to was the old rule in place of which the present Rule 75A is substituted.

3. On receipt of this memorandum the Collector issued an order of requisition on the appellants. That is dated April 9, 1942. By their reply the executors of the late Sir Dinshaw Petit pointed out that under the orders of the Government of India the property had been given on lease and the necessary agreement had been concluded. They therefore expressed their inability to do anything under the order of the Collector. On May 4, 1942, the appellants' attorneys sent a draft of the agreement and on May 23, 1942, the Assistant Controller of Supplies intimated that the draft had been forwarded to the Government Solicitor for his approval and remarks. Nothing was done by any Government department for a long time, in spite of reminders sent by the appellants. On August 4, 1942, the Collector, purporting to act under the memorandum which he had received, called upon the trustees to put in their claim for rent or compensation in respect of the premises requisitioned. On October 30, 1942, an appointment for a joint survey was suggested. While the matters were at this stage, the Collector of Bombay gave a notice dated October 23, 1942, for acquisition of the property under Rule 75A of the Defence of India Rules. On December 3, 1942, the Controller of Supplies wrote to the appellants' attorneys that the Government of India had concluded an arrangement with the Government of Bombay under which the latter were to lease to the Supply Department such portion of the requisitioned property as was required by the Supply Department for the duration of the war or for a shorter period if necessary, on terms to be settled between the Controller of Supplies and the Government of Bombay. Nothing further was done in the matter.

4. On July 21, 1943, the Government of Bombay framed rules u/s 19(2) and (3) of the Defence of India Act for the appointment of an arbitrator to determine the amount of compensation to be paid to the owners of properties requisitioned by the Government. On July 1, 1944, the respondent, Mr. M. S. Noronha, was appointed the arbitrator by the Government. The appellants being aggrieved by the procedure adopted by the Government wrote to the respondent on August 15, 1944, intimating that they wanted to file a suit against the Government and for that purpose the necessary notice required u/s 80 of the CPC was being served. They requested the respondent to adjourn the proceedings or in any event to postpone the same for eight or ten days to enable them to take steps in the Court to stay the arbitration. By his letter dated August 18, 1944, the respondent declined to carry on correspondence and stated that as regards the stay of proceedings he could only take directions from the Government of Bombay and from no one else. The appellants then filed the present petition on

August 25, 1944, and made Mr. M.S. Noronha the only respondent. It is contended in the petition that Rule 75A of the Defence of India Rules, 1939, framed under the Defence of India Act, 1939, was ultra vires and illegal. It is further contended that the action of the Government in acquiring the property under that rule and dropping the idea of acquiring the same under the Land Acquisition Act was mala fide inasmuch as it was thereby intended to deprive the appellants of the fifteen per cent, compensation permitted under the Land Acquisition Act. The order of acquisition was challenged as ultra vires and it was contended that the respondent should be prevented from proceeding with the arbitration. The prayers are for a writ of certiorari, a writ of prohibition, and an order and injunction u/s 45 of the Specific Relief Act, 1877, against the respondent.

5. On the petition being filed Mr. Justice Coyajee on August 26, 1944, issued an order calling upon the respondent to show cause why the writs and order and injunction asked for should not be issued against him, and granted interim relief till the hearing of the rule nisi, It was further ordered that the rule nisi be served on the Governor-General of India-in-Council, and the Province of Bombay and the Collector of Bombay. Under Rule 584 of the Original Side Rules of our High Court, which is framed expressly under the Specific Relief Act, it is provided that the Court may in its discretion order any rule under Chapter VIII to be served on any party affected by the act to be done or foreborne. When the matter came for hearing before Mr. Justice Coyajee no application was made on behalf of the Governor-General of India-in-Council, the Province of Bombay or the Collector of Bombay to be made a party. The record does not show that they have been ordered to be made parties. At the commencement of the hearing before Coyajee J. the Advocate General who appeared for the Province of Bombay contended that the petition was misconceived and should be dismissed on that ground. It was contended that the High Court had no jurisdiction to issue a writ of prohibition and, therefore, that prayer was misconceived. As regards the writ of certiorari it appears to be conceded that the High Court had jurisdiction, but it was argued that by reason of Section 306(7) of the Government of India Act, 1935, no order could be made against the Province of Bombay or the Governor-General of India-in-Council, and therefore the petition in that respect was misconceived. As regards the writ of mandamus it was argued that the conditions set out in the provisos to Section 45 of the Specific Relief Act were cumulative and the appellants had to show that they were all fulfilled. In the present case it was not so shewn and therefore that relief could not be granted. All the respondents before us supported these contentions. The learned Judge accepted all these contentions and dismissed the petition on the preliminary objection. The appellants have appealed against that order.

6. Taking the writ of prohibition first, it is necessary to appreciate the true nature and effect of the writ. In Halsbury's Laws of England, Volume IX, p. 819, Article 1394, it is stated as follows:

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.

Article 1396 runs as follows:

With certain exceptions, the issue of the writ of prohibition, though not of course, is of right and not discretionary, and the superior court cannot refuse to enforce public order in the administration of the law by the denial of a grant of the writ. Smallness of the matter in dispute and delay on the part of the applicant are not in themselves ground for a refusal.

The relevant portion of Article 1397 is as follows:

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;...

The Court in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal lies against such absence or excess. Similarly, the fact that ... the party applying for prohibition has himself initiated the proceedings in the inferior court, is not material to the decision of the Court to grant or to refuse the writ...

Even when the information is laid by a stranger, it would seem that the only discretion which the superior court has to refuse a prohibition is, if it is in doubt in fact or law whether the inferior court is exceeding, its jurisdiction or is acting without jurisdiction.

7. I must point out that we are not concerned at this stage with the question whether in the present case a writ of prohibition should issue or not. We are concerned only with the question whether the High Court has jurisdiction to issue the writ of prohibition. According to the learned trial Judge it has no power to do so. I must also, point out that the disability found by the learned trial Judge is in the High Court itself and has nothing to do with the party against whom the writ is asked for. Bearing, clearly in mind this aspect of the question it is necessary next to turn to the statute and the Charter which confer jurisdiction on our High Court.

8. By 13 Geo. III, c. 63, Section 13, the Parliament provided for the creation of the Supreme Court at Calcutta. On March 26, 1774, a Charter was granted to the Supreme Court at Calcutta, and by Clause 4 of that Charter the jurisdiction so far exercised by the King's Bench Division in England was conferred on the Supreme Court at Calcutta. That is a general clause which sets out the nature of the jurisdiction to be exercised by the Supreme Court. Clause 21 provides for the powers of supervision over subordinate Courts and in that connection mentions the writs of mandamus, certiorari Procedendo, or error. In 1823, by 3 Geo. IV, c. 71, the Supreme Court of Bombay was established and cls. 5 and 55 of its

Charter correspond to cls. 4 and 21 of the Charter of the Supreme Court at Calcutta. The High Courts Act, 24 & 25 Vic. c. 104, while abolishing the Supreme Court by Section 8, maintains, by Section 9, the same jurisdiction in the Courts to be constituted under the Act. The wording of Section 9 shows that the jurisdiction could be limited by the Letters Patent issued to establish the Courts or by subsequent Acts of the Legislature, A perusal of the Letters Patents of 1862 and 1865 shows that no limit or restriction was put on the jurisdiction of the High Court. The argument that the jurisdiction has been restricted by Clause 55 as I shall show later on must be rejected. The question therefore is, has Section 45 of the Specific Relief Act restricted the jurisdiction of the High Court to issue a writ of prohibition? In my opinion it has not. Section 9 of the High Courts Act, 1861, provides that unless the powers which so far existed in the then existing Supreme Courts were taken away, all the powers of Supreme Courts continued in the High Courts established under the said Act. The result is that before the Government of India Act, 1915, under the High Courts Act and the Letters Patent granted to the Bombay High Court the jurisdiction of the Court, as found in Clause 5 of the original Charter of 1823, was in these terms:

... 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.

By the Government of India Act of 1915, Section 106(1) the High Courts are continued and their jurisdiction has also been continued as before. The same position continues under the Government of India Act of 1935, Section 223. Reading these provisions together it is clear that the High Court at present has the jurisdiction which was conferred on the Supreme Court by Clause 5 of the Charter of 1823.

9. The nature of the writ of prohibition is described by McCardie J. in *Turner v. Kingsbury Collieries, Ltd.* [1921] 3 K.B. 169 in these terms (p. 174):

Now the writ of prohibition is a judicial writ, issuing from a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested: ... If the jurisdiction of the judge of the inferior Court depends upon contested facts, it is his duty to decide upon the facts and his decision cannot be questioned on prohibition.

In *Clifford and Sullivan* [1931] 2 A.C. 570 the Lord Chancellor approved of the following passage in *Short and Mellor*, 2nd Ed. (1908) P 252, as regards the description of the writ of prohibition (p. 192):

[The writ is] " a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing it [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."

Bankes L. J. in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co.* [1924] 1 K.B. 171, further observed as follows (p. 193):

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 this in the books, commencing in quite early times.

At p. 204 Atkin L. J. in that connection observed as follows:

The matter comes; before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs 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 writs has been extended to control the proceedings of bodies which do not claim to be, and would not be recognised 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.

It appears therefore clear that the authority to issue such writs existed in the King's Bench Division and such writs have been granted against bodies acting judicially or performing quasi-judicial functions.

10. In India, the question of jurisdiction of the High Court to issue the writ of prohibition came to be considered directly by Panckridge J. in *In re National Carbon Company, Incorporated* ILR (1934) 61 Cal. 450. It was argued before him that Clause 21 of the Charter of the Calcutta Supreme Court (which corresponds with Clause 55 of the Charter of the Supreme Court of Bombay) restricted the jurisdiction given to that Court under Clause 4. The learned Judge rejected the contention. He held that the language of Clause 21 could not be used to control the plain language of Clause 4 and the High Court at Calcutta had jurisdiction to issue the writ of prohibition. In *Dorman Long & Co. Ltd. v. Jagadeeshchandra Mahindra* ILR (1934) Cal. 596 a division bench of the Calcutta High Court considered the argument in respect of the jurisdiction of the Court to issue writs of certiorari or prohibition and affirmed the jurisdiction of the Court to issue such writs. In *Indumati Debt Chan-dhurani v. Bengal Court of Wards* [1938] 1 Cal. 476 the two previous decisions of the Calcutta High Court were accepted as correct and the jurisdiction of the Court to issue such writs was affirmed again.

11. Mr. Justice Coyajee has not noticed any of these decisions in his judgment although we are told that they were cited at the bar. He has relied on *Mahomedally v. Jafferbhoy* (1925) 28 Bom. L.R. 264 for his conclusion that the Bombay High Court has no jurisdiction to issue the writ of prohibition. In that case the question arose in respect of taxing a bill of costs, of an order made on an election petition. The bill was to be taxed by Mr. Gillett, the Taxing Master of this High Court. It being considered that there was no express authority to tax the bill by Mr. Gillett, the Chief Judge of the Small Causes Court wrote to the Secretary to the Government of Bombay suggesting that the matter may be disposed of by a special resolution directing the Taxing Officer to attend to this bill as well as other such bills, so that the difficulty in the way of the Commissioners, the parties, and the Chief Judge of the Small Causes "Court in making and carrying out the orders of costs would be obviated. The Government, after consulting the Chief Justice about permitting Mr. Gillett to do the work, issued the following resolution:

The Governor-in-Council is pleased to appoint 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....

When Mr. Gillett proceeded to tax the bill an application was made u/s 45 of the Specific Relief Act to prevent him from doing so. In the course of his judgment Macleod C. J. considered the effect of the writ of mandamus and the writ of prohibition. It appears that no arguments were advanced about the difference in the nature and effect of the two writs. The two were treated as standing on the same footing. The Court held, as a fact, that Mr. Gillett, when taxing the bill, whether under the directions of a special resolution of the Government or at the request of the Government, was not a person holding a public office. In terms, that learned Chief Justice stated that that would be sufficient for the decision of that application. He further held that if Mr. Gillett was a person holding public office, it would be futile to contend that he had no jurisdiction to tax the bill. He compared the position with a decree passed by the High Court, dismissing a suit with costs, and an application being made by the unsuccessful plaintiff to prevent the Taxing Master from taxing the bill. The words of Section 50 of the Specific Relief Act were not noticed during the argument or in the judgment. That case, in my opinion, therefore, is not directly helpful to us. The observations were clearly obiter because the Court found as a fact that Mr. Gillett was not a person holding a public office and unless that condition was fulfilled Section 45 of the Specific Relief Act could not be brought into operation at all. In the absence of argument the learned Chief Justice's attention was not drawn to the distinction which exists in England between the nature of the two writs, and particularly in India by reason of Section 50. Apart from authority, I think that the jurisdiction of the King's Bench Division to issue the writ of prohibition is retained by Clause 5 of the Charter. In my opinion the authorities also support that view and the obiter dictum of Macleod C. J. in *Mahomedally v. Jafferbhoy* is insufficient to hold otherwise.

12. It appears to have been argued before the trial Court that as Section 45 deals with the forbearing of an act also, that section fully covered both the writs of mandamus and prohibition. Therefore, in respect of both these writs, in the absence of the conditions mentioned in the section being fulfilled, the Court had no jurisdiction to issue either writ. The learned trial Judge has not noticed that Section 45 does not in terms deal with either writ. Section 50 of the Specific Relief Act expressly provides as follows:

Neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus.

It should be noticed that while Section 50 forms part of Chapter VIII of the Specific Relief Act, in that section there is no reference to Section 45 at all. The learned trial Judge construed Section 50 as taking away the right of the Court to issue the writ of mandamus and read Section 45 as enlarging the meaning of the word " mandamus " so as to include the writ of prohibition also. With respect, in my opinion, that is not the correct way to approach the question of jurisdiction of the Court. The jurisdiction of the Court, as I have pointed out, is found in Clause 5 of the Charter. The next question to be considered by the Court is whether that jurisdiction has been curtailed or taken away, and if so, how and to what extent. The writ of prohibition and the writ of mandamus are two independent writs, to be issued under different circumstances. They are distinct, separate privileges. The writ of prohibition is limited to prevention of exercise of jurisdiction by a body performing judicial or quasi judicial functions. It has nothing to do with executive acts which may also be controlled by the writ of mandamus. It must be recognised that the Legislature is aware of the distinction between the writ of mandamus and the writ of prohibition, and there was nothing to prevent them from taking away the jurisdiction in respect of the writ of prohibition, if they were so minded, unless the conditions provided in Section 45 of the Specific Relief Act were fulfilled. The jurisdiction of the superior Courts cannot be impliedly taken away by some words found in a section of an Act of the Legislature. It has to be taken away, if at all, by express words. This is particularly so when the Legislature had deliberately provided in Section 50 that the writ of mandamus (only) could not be issued thereafter. This rule of construction is recognised by the highest judicial authority. In Halsbury's Laws of England, Vol. IX, Article 1455, p. 861, in dealing with the writ of certiorari it is stated as follows:

It is enacted by various statutes that proceedings under them shall not be removed by the writ of certiorari. Certiorari is said to be " taken away " by such statutes. 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.

In *Attorney-General v. De Keysets Royal Hotel* [1920] A C. 508 this question was considered. Lord Dunedin dealt with the contention in these terms (p. 526):

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.

It was held that to take away the prerogative there must be a statute which must expressly take away the prerogative, and the statute must cover the whole ground which was covered by the prerogative. Unless both these conditions were fulfilled the prerogative right could not be considered as taken away absolutely by a subsequent statute. In *Besant v. Advocate General of Madras* ILR (1919) Mad. 146: 21 Bom. L.R. 867. their Lordships of the Privy Council dealt with the contention that the right to issue the writ; of certiorari was taken away. Lord Phillimore in delivering judgment observed as follows (p. 159):

As to certiorari it was contended on behalf of the respondent in the High Court, that there is no power in the High Court to issue a writ of certiorari, or alternatively that the provisions of Section 22 forbid recourse to this writ in cases which come under the Press Act.

"As to the first point it would seem that at any rate the three High Courts of Calcutta, Madras and Bombay, possessed the power of issuing this writ. [See *In re The Justices of the Supreme Court of Judicature at Bombay* (1829) 1 Kna, 149; and *Nundo Lal Base v. The Corporation for the Towrt, of Calcutta* ILR (1885) Cal. 275

" Supposing that this power once existed, has it been taken away by the two Codes of Procedure ? No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of Section 435 of the Criminal Procedure Code and Section 115 of the CPC of 1908 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases, their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extra-ordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away.

The writs of certiorari and prohibition are complementary of each other and those observations apply equally to the jurisdiction to issue writs of prohibition.

13. On behalf of the respondent it was contended that the whole field of the writ of prohibition was covered by Clause 55 of the Charter and" therefore the general words of Clause 5 conferring jurisdiction on the Court were cut down. The maxim " Express enactment shuts the door to further implications" was relied upon in this connection. Counsel referred to Clause 23 of the Letters Patent also in this connection. In my opinion this argument is unsound. Clause 55 of the Charter in terms deals with the right of supervision of the Supreme Court over the Justices and other Magistrates appointed for the town and island of Bombay and the factories subordinate thereto. In respect of these judicial officers express power was given by the words used at the end of that clause. That portion runs as follows:

.. .to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorised 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.

14. In my opinion this contention is based on two errors. The first is that Clause 55 deals in terms only with the Justices and other Magistrates appointed for the town and island of Bombay and the factories subordinate thereto. It does not deal with all authorities discharging judicial and quasi-judicial functions. The second error is that in terms it does not purport to limit or restrict the jurisdiction which existed otherwise in the Supreme Court. It affirms the power to issue the writs mentioned therein in respect of the Courts there set out. On the construction of the Charter it is now clear that Clause 5 describes the nature of the jurisdiction which is vested in the Court. The later clauses deal with the territorial jurisdiction, jurisdiction over persons, and jurisdiction over matters. Those clauses have nothing to do with the nature of the jurisdiction of the Supreme Court. Clause 23 is a clause of that type and deals with the persons over whom the Court has jurisdiction. The effect of the concluding words used in Clause 55 came to be considered in 48 CWN 18 (Privy Council) their Lordships considered the effect of the general clause giving jurisdiction to the Court, and at p. 164 while dealing with the clause corresponding to Clause 55 of the Bombay Charter they observed as follows:-

The terms of this clause make it difficult to think that Courts other than those mentioned were intended to be regarded as inferior courts for this purpose.

They affirmed the principle laid down in *Besant's* case about the jurisdiction to issue the writ of certiorari. It is therefore clear that the words used in Clause 55 of the Charter did not control the general words used in Clause 5 of the Charter, and the jurisdiction to issue the writ of prohibition accepted to be vested in the King's Bench Division remains in the Bombay High Court.

15. The next question is in respect of the writ of certiorari. The learned trial Judge has accepted the position that the power to issue such writ exists in the High Court. He came to the conclusion that the petition in that connection was misconceived for two reasons: (1) that the Governor General of India in Council and the Province of Bombay and the Collector of Bombay, although not in terms, are in fact parties to these proceedings; and (2) that u/s 306(1) of the Government of India Act, 1935, the High Court had no jurisdiction to issue an order of the kind against them. On the first question I have already pointed out that when granting the interim injunction the learned Judge had not directed that these persons should be made parties. After the service of the rule, when those parties appeared, they did not apply to be made parties. Now the position may be considered from two points. Under the High Court Rules in respect of the writs of prohibition and certiorari there is no obligation to serve the rule on any party

except the respondent. Because in the present case an order u/s 45 of the Specific Relief Act was asked for it appears that a direction was given to serve the rule on the other parties. On the service of the rule the parties are not bound to appear. They are not named as respondents and no Court can make an order against them. The order made on the rule will not be binding on them. If the appellants sought to make the order binding on them it was their duty to make them parties to the application. Service of the rule is only an intimation that an application is being made by the applicant to the Court against a party named therein as a respondent for the reliefs mentioned therein and the order which the Court may make in that connection may affect (although it may not be binding on them) the parties on whom the rule is served. If they so desire they may attend and put forward their views before the Court. All this however does not make them parties. Mr. Taraporewala has recognised that position. On mere service of the rule, without making those persons parties, it cannot be considered that in law they became parties and were bound by the decision. As I have pointed out, when the notice of motion came for hearing the three parties on whom the rule was served did appear and put forth their views; but, neither they nor the appellants asked that they be made parties, and the Court has not ordered and made them parties. Under these circumstances, in my opinion, in law, they are not parties to the notice of motion. Such a situation is not unknown in law. In *Rex v. Speyer*; *Rex v. Cassel* [1916] 1 K.B. 595 the question of issuing a notice on an officer came to be considered. It was held that an information in the nature of a quo warranto will lie at the instance of a private relator against a member of the Privy Council whose appointment was alleged to be invalid. It was contended that neither the Crown nor the King were subject to the jurisdiction of the Court. The King's Court cannot order the King to do a thing. That argument was disposed of by Lord Reading C. J. in these terms (p. 610):

We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the "Sovereign we can have no power," But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made.

It was observed that the Courts having been established by the King it was respectful -and proper to assume that once the law was declared by a competent judicial authority it will be followed by the Crown. To the same effect there are

observations in *Ponnam-bala Desikar v. H. R. E. Board, Madras* [1941] Mad. 807. In that case it was contended that as the order was sought to be made against the Board of Commissioners for Hindu Religious .Endowments, Madras, it was an order against the Governor General of India-in-Council or the Government of the Province and the Court had no jurisdiction to do so. I am not concerned with the discussion in that case which relates to Section 306(1) of the Government of India Act. I only desire to point out that the jurisdiction of the Court to issue an order against an individual was treated as distinct from an order against the Governor General of India-in-Council or the Province.

16. Mr. Taraporewala had to admit that on mere service of the rule the others did not become parties. It was suggested that if on service the parties appeared, they should be treated as parties. In my opinion that argument is unsound. On the service of the rule the parties have the option to appear or not to appear. Their position cannot be changed merely from the fact that they appeared. After they appear they can only put forward their views; but unless they are made parties, the proceedings cannot be binding on them. I do not think therefore that from the fact that these parties appeared at the hearing of the notice of motion before Mr. Justice Coyajee they became parties to the proceedings. In the present case again it is not open to these parties to contend that they are parties, because when, called upon to disclose documents, by their letter of January 8, 1945, in terms they stated that they were not parties to the proceedings and therefore were not liable to disclose documents. Although they are not parties, as observed by Lord Reading C. J. in *Rex v. Speyer*, *Rex v. Cassel*, there is no reason to believe that the Government will not respect the order passed by the Court. In Halsbury's Laws of England, Vol. IX, Article 1413, it is, stated that an application for a writ of prohibition may be made against a party or the Judge to be prohibited. That shows that an application to restrain the Judge alone is permitted. In the present case the petitioners have adopted that course and asked for relief against the respondent alone, who has to perform the judicial functions.. In my opinion, therefore, the assumption of the trial Judge that on the present petition the Governor General of India-in-Council, the Province of Bombay and the Collector of Bombay were parties to the petition is not justified. So far they have not been, made parties and are not parties to the petition.

17. The second point is still more material. On the construction of Section 306(1) of the. Government of India Act, the learned Judge held that the High Court has no jurisdiction to issue any of the writs against the Governor General or the Province of Bombay. This finding is not called for at all at this stage. The petitioners have not asked for any of the writs against any of these parties. Even if they are made parties to. these proceedings, the prayer still continues to be for the issue of the writs and order only against the respondent Mr. Noronha. In the absence of any such prayers it is not necessary to discuss the question whether this Court has jurisdiction to issue the writs of certiorari and prohibition against those parties, who appeared before-the trial Court and also before us. By this

conclusion I should not be understood to. be in agreement with the reasoning of the learned trial Judge on the interpretation of Section 306(1) of the Government of India Act. It is not necessary to decide that point and I pronounce no opinion for or against the conclusion of the learned Judge in that respect. Under the circumstances I think the learned Judge was in error in holding that the petition in asking for a writ of certiorari against the respondent Mr. Noronha was misconceived and did not lie.

18. That leaves the question of an order u/s 45. Mr. Munshi pointed out that the nature of this writ, as authorised to be issued in England, is different from what can. be issued by the Court u/s 45 of the Specific Relief Act. It was pointed out that in England the writ can be issued even if there was other legal remedy. (See Halsbury's Laws of England, Vol. IX, Article 1269, note (p).) In connection with this relief it must be considered whether the five conditions found in the provisos, which are admittedly cumulative, have been fulfilled. The first condition is that the person against whom the writ is sought must be holding a public office. Proceeding on the footing; that Mr. Noronha is the only party on this notice of motion, the question whether he was holding a public office in the matter of determining the payment of compensation to the petitioners, appears to have been raised before the trial Court. It appears-that after some argument this point was conceded by the respondent. Whether the respondent was holding a public office within the meaning of the section is a mixed question of fact and law and under the circumstances it is not open to the respondent in the appeal at this stage to dispute the point.

19. The first condition as found in proviso (a) is that the application should be made, by some person whose property, franchise or personal right would be injured by the doing or forbearing to do the act in respect of which the order is asked for. Mr. Munshi's contention is this: He says that if the arbitrator is permitted to proceed with the adjudication the petitioners will lose the fifteen per cent, compensation which may be awarded to them if the land was acquired under the Land Acquisition Act. Against this it was contended that this dispute is not in respect of the act of the respondent. For that discussion the position that he has been properly appointed must be accepted-It is on that assumption that he is holding a public office and his action is sought to-be restrained u/s 45 of the Specific Relief Act. It was further contended on behalf of the respondent that if the respondent is not validly appointed his award will be: void and the appellants cannot be considered injured within the meaning of the first proviso. In this connection strong reliance was placed on *Ramdas v. Atlas Mills Co.* (1930) 33 Bom. L.R. 19. In that case it was observed that if the arbitration is itself completely invalid and without any jurisdiction it is not right for the Court to grant an injunction. On behalf of the petitioners, the contention in rejoinder was this: Reading Sections 32, 33, 45,, and 46 of the Indian Arbitration Act (X of 1940) in the matter of arbitration under a statute to which the Crown is a party the Arbitration Act applies and the right to make: the application u/s 33 of the Indian Arbitration Act to stop the arbitrator from, proceeding on the ground that

there is no valid reference at all exists. Therefore, to be free from harassment by an arbitration, in respect of which the arbitrator has no jurisdiction, is recognised a wrong in respect of which the legal remedy is provided by Section 33. It was argued that by reason of the rules framed by the Government of Bombay the right to proceed u/s 33 is taken away in respect of the adjudication to be made; by the arbitrator u/s 19 of the Defence of India Act. It is therefore contended, that there was an injury to the right of the petitioners and the condition was fulfilled.. As against *Ramdas v. Atlas Mills, Co.* Mr. Murishi pointed out that in *Kitts v. Moore* [1895] 1 Q. B. 253 an injunction was asked for to stay arbitration proceedings, and Lord Lindley in delivering judgment stated that there was no single case which in any way curtailed; the power of the Court to stop an arbitration founded upon an agreement which was. impeached. In that case the suit was filed in respect of the partnership disputes between the parties and the defendant was the other partner. The attempt was to stay the arbitration proceedings which were started by the defendant on the ground that there was no jurisdiction because the arbitration itself was impeached. In the same. way in *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q. B. D. 30 there was a dispute between two companies as regards their respective liabilities in respect of an accident which had taken place due to the alleged negligence of a signal man at the. junction line. The application was for an interim stay to restrain the defendants from, proceeding with the arbitration. The argument on the other side was that the matter was outside the agreement to refer, and the arbitration would be futile and vexatious. The Court refused the injunction. In all those cases however it is material to remember that the action was in respect of the main dealing between the parties in connection with which the disputes had arisen, and the same were attempted to be decided by arbitration. None of those cases show that a substantive suit solely for the purpose of questioning the jurisdiction of the arbitrator was filed and the Court had granted an injunction. *Sissons v. Oates* (1894) 10 T. L.R. 392 suggests the filing of such a suit, but the report is very short and it is possible that only relevant facts in respect of the application were reported. Apart from that our attention has not been drawn to any case in which a substantive suit was filed only in respect of the challenged arbitration and the only relief asked was a stay of those proceedings by a permanent injunction. In the present case two things are wanting: First, the petition, so far as the respondent is concerned, is not in respect of the original transaction of acquisition. The relief is asked on the footing that the respondent has no jurisdiction to proceed. The parties to the original transaction are not parties to the petition. The other difficulty is that the arbitrator alone is the party respondent. In all the cases which are referred to in the judgment of the learned trial Judge and which were cited before us, the respondent was the defendant in the substantive suit, and not the arbitrator. Having regard to the structure of this petition I think there is considerable doubt about the soundness of the argument of the petitioners. The contention that they will lose the fifteen per cent, compensation if the land is acquired under Rule 75A and thus be injured in respect of their property, does not appear to be sound. .If the arbitrator has

jurisdiction and the acquisition is valid, no question of any injury to property arises; if the arbitrator has no jurisdiction, the award would be a nullity and cannot affect the petitioners' right to receive compensation which they are entitled to receive under the ordinary law. As, however, in my opinion the question of issue of an order u/s 45 is capable of being fully disposed of on the ground that the condition found in proviso (2) is not fulfilled, I do not propose to deal with this proviso more in detail.

20. The second condition is that such doing or forbearing is under any law for the time being in force clearly incumbent on such person in his public character. This contention was urged before the trial Court, but the learned Judge thought that as conditions (I), (4) and (5) were not fulfilled it was not necessary to decide this point. In my opinion the present petition cannot fulfil the second condition. According to this condition it must be obligatory on the person against whom the order is sought to do or forbear from doing the act in question under any law for the time being in force. That assumes the acceptance by the petitioners of the validity of the law under which the respondent has to act. In the present case if the first premise, viz. the appointment of the respondent as arbitrator, is accepted as valid, there can be no dispute about his doing or forbearing to do something which it is incumbent upon him to do or forbear. So far he has done nothing. He has only been nominated by the Government of Bombay to act u/s 19(c) to determine the amount of compensation. On the other hand if his appointment is not authorised by law, he is not the holder of a public office at all. i Therefore it appears clear that on the allegations found in the petition itself the petition cannot fulfil the second condition of Section 45 of the Specific Relief Act. A party who seeks to obtain an order u/s 45 cannot do so on the allegation that the statute which enjoins the doing or forbearing of the act is itself illegal or ultra vires. The wording of the second proviso clearly shows that the deciding authority against whom the order is sought must, for the discussion, be assumed to be legally clothed with authority. If the legal existence of the authority or the fact -that in law he is authorised to act is disputed, the fulfilment of this condition is out of question. As these conditions are cumulative, the application for an order u/s 45 as claimed in the petition cannot be granted.

21. The learned Judge held that conditions (d) and (e) were also not fulfilled. In his opinion a suit against the Government was the proper remedy which would effectively dispose of the disputes between the parties. Against that however it should be remembered that no suit can be filed against Government until the expiry of sixty days after a notice, as provided by Section 80 of the Civil Procedure Code, is given. In the interval, if the right of the party is likely to be seriously and irretrievably injured, I do not think the remedy of a suit can be considered the only remedy. Mr. Munshi urged that the remedy of a suit is not a specific or adequate remedy as mentioned in the fourth condition. That view appears to be based on the observations of Greaves J. in *In re Manick Chand Mahata v. The Corporation of Calcutta and the Calcutta Improvement Trust* ILR (1921) Cal. 916, Against that, however, I should point out that in *The Queen v.*

Charity Commissioners "for England and Wales [1897] 1 Q. B. 407 it was held that when ordinary suit and the remedy of injunction can be had as a matter of discretion the Court must not issue the writ of mandamus. To the same effect there are observations in *Rex v. Dymock (Vicar and Churchwardens)* [1915] 1 K.B. 147. In view of my conclusion in respect of the second condition I do not propose to discuss the question of the fulfilment of conditions (d) and (e). I only observe that for the argument of the appellants that the specific remedy mentioned in the fourth proviso means a special remedy separately provided by an Act of the Legislature, there appears no justification. It is true that the alternative remedy must be equally adequate and efficacious. But there is no reason why on that ground the remedy provided by an ordinary suit should be considered excluded. In my opinion the conclusion of the learned trial Judge in respect of the order u/s 45 is correct.

Chagla, J.

22. I agree.

23. The first question that arises is whether the High Court has the power to issue the writ of prohibition. The writ of prohibition is a prerogative writ which is issued by a superior Court to inferior Courts forbidding such Courts to continue proceedings therein in excess of their jurisdiction or in contravention of the laws of the land. Although the writ is not issued of course, it is of right and not discretionary. The object of the writ is to compel Courts to keep within the limits laid down by the statute and the Court by issuing the writ keeps the inferior Courts within those limits. At first this writ was issued only to subordinate Courts, but with the development of this particular writ and statutory bodies being set up which began to exercise judicial functions and legal jurisdiction the writ was also issued to bodies exercising judicial or quasi-judicial functions. The definition of Lord Justice Atkin in *Rex v. Electricity Commissioners: London Electricity joint Committee Co.* (1920), *Ex parte* [1924] 1. K. B. 171, has now become a locus classicus (p. 205):-

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.

At pp. 204 and 206 of that report Lord Justice Atkin points out the difference between the writ of certiorari and the writ of prohibition. He says that both writs are of great antiquity and the only difference is that the writ of prohibition restrains the tribunal from proceeding further in excess of jurisdiction and the writ of 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. The learned Lord Justice further observes that he could see no difference in principle between certiorari and prohibition, except that the latter might be invoked at an earlier stage.

24. In my opinion this High Court has inherited the jurisdiction to issue the writ of prohibition conferred upon the Supreme Court by Clause 5 of its Charter. Clause 5 invested the Chief Justice and the Puisne Judges, severally and respectively, of the -Supreme Court with such jurisdiction and authority as the Justices of the Court of King's Bench had and would lawfully exercise, within that part of Great Britain called England, as far as circumstances would admit. Now it is clear that this clause defines the nature of the authority that the Judges of the Supreme Court had. It does not deal with the territorial extent of that authority. Whereas Clause 5 relates merely to the nature of the authority which the Judges of the Supreme Court were to possess, the subsequent clauses in the Charter of the Supreme Court lay down and provide who were the persons who were to be subject to that authority. Clause 55 of the Charter refers to certain writs, namely, the writs of Mandamus, Certiorari Procedendo, or Error; and it has been contended that the absence in this clause of any mention of the writ of prohibition goes to suggest that the Supreme Court did not have the jurisdiction to issue the writ of prohibition, Now Clause 55 deals with the jurisdiction that the Supreme Court had to issue writs to the particular Courts mentioned in that clause and to the Justices and other Magistrates also mentioned in that clause. It is not possible to read Clause 55 as controlling and limiting the nature of the authority conferred upon the Judges of the Supreme Court by Clause 5 of the Charter. Clause 5 is wide and unlimited in its extent; and if the Judges of the King's Bench Division had a particular jurisdiction and had a particular authority, then that jurisdiction and that authority was conferred upon the Judges of the Supreme Court by Clause 5 of the Charter. The principle of construction I am suggesting cannot now be doubted or disputed in view of the recent decision of the Privy Council in 48 CWN 18 (Privy Council) .

25. The next piece of legislation which one might look at is the High Courts Act of 1861. By Section 8 of that Act the Supreme Court was abolished, and by Section 9 of that Act the new High Court which was established was to have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the Presidency abolished under that Act at the time of the abolition of the Courts mentioned in that clause. This jurisdiction was conferred subject to two provisos: one was that the Letters Patent to be issued to the High Courts pursuant to this Act might provide differently with regard to the jurisdiction of the Judges on any particular matter or second the Governor-General of India in Council might legislate so as to affect the jurisdiction of the Judges of the High Courts. When we turn to the Letters Patent which were issued pursuant to this Act, we find that Section 9 of the High Courts Act is recited in the Letters Patent and there is nothing in the Letters Patent themselves to suggest that the jurisdiction that the Judges of the Supreme Court had under Clause 5 of the Charter of the Supreme Court was in any way affected by the Letters Patent. Then we come to the Government of India Act of 1915, and Section 106. of that Act provides that the High Court shall have all the jurisdiction, powers and authority as were vested in them at the commencement

of the Act; and Section 223 of the Government of India Act of 1935 also says that the jurisdiction of the High Courts shall be the same as it was before that Act came into force. It is clear, therefore, that unless we find some Act of the Indian Legislature which has taken away from the High Courts the jurisdiction to issue a writ of prohibition which the Supreme Court had and which the High Courts inherited by various Acts of Parliament to which I have drawn attention, that power and that jurisdiction must still continue. It is also clear that the jurisdiction of the High Courts cannot be taken away by implication. I might draw attention to the well-known legal maxim that it is the office of a good Judge to enlarge his jurisdiction. In this case we are not seeking to enlarge our jurisdiction, but we have been asked to restrict and curtail the jurisdiction which we inherited from the Supreme Court. Maxwell on the Interpretation of Statutes, 8th edn., at p. 115, points out that a strong leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the Superior Courts, and Maxwell points out that this feeling owed its origin to the pecuniary interests of the Judges in former times when their emoluments depended mainly on fees. Fortunately the Judges are not now open to that charge and the desire to extend the jurisdiction of the Court must depend upon more creditable motives than they were in the past.

26. It has been suggested that Section 45 of the Specific Relief Act has taken away the jurisdiction of the Court to issue the writ of prohibition. The argument is that Section 45 is a comprehensive section which deals both with the writ of mandamus and the writ of prohibition. It is pointed out that in England the writ of mandamus can only be issued for the purpose of directing a public servant to do a specific act and not asking; him to forbear from doing any particular act, and from that it is sought to be inferred that when the Legislature enacted Section 45 it comprehensively dealt with both the writs, the writ of mandamus and the writ of prohibition. Now, in the first place, it must be noticed that Section 45 does not refer to either of the two writs and it is only when we turn to Section 50 that the Legislature refers only to the writ of mandamus and it provides by that section that neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus. Now I take it that the Legislature knew the distinction between the writ of mandamus and the writ of prohibition, and when the Legislature expressly took away the jurisdiction of the High Court to issue the writ of mandamus and did not refer to the writ of prohibition at all it is clear to my mind that it was not the object of the Legislature to deprive the High Court of that jurisdiction. When the Legislature was in express terms dealing with a particular writ-and it must have been patent to the draftsman of the Act that another writ could also be issued by the High Court and the High Court had jurisdiction to issue that writ and it was not thought proper to refer in Section 50 to the other writ at all, the only natural conclusion that one can arrive at is that the Legislature did not intend to interfere with the jurisdiction of the High Court to issue the writ of prohibition. That the jurisdiction of the High Court cannot be taken away by implication has been made clear by the Privy Council in *Besant's*

case. In that case the Magistrate had required security from Mrs. Besant in connection with the newspaper published by her in India called " New India " and a writ of certiorari was applied for against the Magistrate. It was sought to be argued that the writ of certiorari could, not be issued and the High Court had no longer jurisdiction to issue the writ in view of Section 115 of the CPC and Section 435 of the Criminal Procedure Code. It was suggested that these two sections gave powers of revision to the High Court in civil and criminal matters and, therefore, the need for a writ of certiorari had disappeared and the Privy Council rejected that argument; and their Lordships observed as follows (p. 159):-

Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases, their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away.

It also seems to be curious that whereas the High Court should have the jurisdiction to issue the writ of certiorari, it should not have a similar jurisdiction to issue the cognate writ of prohibition. As I have already pointed out, these two writs are complementary and co-related to each other. It is beyond doubt or dispute now that the High Court has the power to issue the writ of certiorari. The case I have just referred, Mrs. Besant's case, laid that down and Parlakimedi's case also decided to the same effect; and our own High Court in *Muljee Sicka and Co. Vs. The Municipal Commissioner of Bombay, and Raghunath Keshav v. Poona Municipality* (1943) 46 Bom. L.R. 675 has also come to the conclusion that the power of the High Court to issue the writ of certiorari remains unimpaired.

27. The learned Judge felt bound by the decision of the Court of Appeal of our Court in *Mahomedalli v. Jafferbhoy* (1925) 28 Bom. L.R. 264. In that case Sir Norman Macleod, Chief Justice, observed (p. 269):

Proceedings under this section "[namely, Section 45 of the Specific Relief Act] are in substitution for proceedings by writ of mandamus and writ of prohibition according to English practice.

Now, with great respect to the learned Chief Justice, he was not called upon in that case to make that observation. That observation was not necessary for the decision of the case. All that he had to decide, which he did decide, was that the Taxing Master, Mr. Gillett, against whom an order was sought u/s 45 was not a person holding a public office. His decision was that Mr. Gillett was acting in his capacity as a private individual in taxing the particular bill of costs which he had been asked to do by the Government of Bombay, Against this obiter we have, on the other hand,, a clear and emphatic decision of the Calcutta High Court in the judgment of Mr. Justice Panckridge in *In re National Carbon Company, Incorporated* ILR (1934) Cal. 450 where he held that the High Court had the power to issue a writ of prohibition. As it happened in. that particular case, he refused to issue that writ on merits. A divisional bench of the Calcutta High Court

consisting of Mr. Justice Lort-Williams and Mr. Justice Jack in *Dorman Long and Co., Ltd. v. Jagadeeshehandra Mahindra* ILR (1934) Cal. 596 accepted the same position and decided that the High Court had the power to issue both a writ of certiorari and a writ of prohibition; and in *Indumati Debi Chaudhurani v. Bengal Court of Wards* [1938] 1 Cal. 476. Mr. Justice Panckridge, following his own decision in *In re National Carbon Company*,, actually issued the writ of prohibition. With respect to the learned Judge below, I prefer to follow the decisions of the Calcutta High Court on this point rather than place my reliance on a pure obiter of Sir Norman Macleod, Chief Justice. Apart from authorities, it is clear to my mind, looking at the Charter of the Supreme Court and at the various Parliamentary enactments, that the jurisdiction that the Supreme Court possessed of issuing writs of prohibition within the ordinary original jurisdiction of that Court is still preserved in the High Court and we have the same power and authority which the Supreme Court enjoyed.

28. The next question is whether if the writ of certiorari or the writ of prohibition were to be issued, would it offend against Section 306 of the Government of India Act of 1935 ? Now in this case the Province of Bombay and the Governor-General in Council were " brought before the Court under Rule 584 of the High Court Rules. Neither of them was made a party and it is important to note that in the petition no relief was sought either against the Province of Bombay or against the Governor-General in Council. It is clear, therefore, that if an order is made against the respondent, the Chief Judge of the -Court of Small Causes at Bombay, that order could not possibly bind either the Province of Bombay or the Governor-General in Council. Halsbury's Laws of England,, Vol. TX, p. 836, points out that the application for a writ of prohibition might be made against the party, or the Judge to be prohibited, or both. And in this particular case the petitioners have chosen to take out the rule only against the Judge and not against the party. I fail to see then how merely because of the fact that the Province of Bombay and the Governor-General in Council have been brought before the Court under r 584 of the High Court Rules, they automatically become parties to the rule which has been issued only against the Chief Judge of the Small Causes Court. In view of this Section 306 of the Government of India Act of 1935 can have no application because what Mr. Taraporewala wanted to contend and argue was that u/s 306 the Province of Bombay and the Governor-General in Council were exempted from having any writ of prohibition issued against them. I wish to make this perfectly clear that it was not suggested by the Advocate General before Mr. Justice Coyajee nor has it been suggested by Mr. Taraporewala before us that his clients, the Province of Bombay and the Governor-General in Council, claimed any exemption u/s 306 of the Government of India Act from being served under Rule 584 of the High Court Rules. If such an exemption had been claimed, I should have thought it necessary to consider the terms of that section. I agree with the learned Chief Justice that I should not be taken to accept, with respect, the observations of the learned Judge below as to the construction of Section 306 of the Government of India Act.

29. I should like to draw attention to the observations of Lord Reading in *Rex v. Speyer*: *Rex v. Cassel* [1916] 1 K. B. 595. In that case the appointment of a member of the Privy Council was: challenged as invalid on the information of a private relator, and the argument that was presented to the Court was that such an order could not be made because it would be tantamount to making an order against the King or the Crown, and the Court being, the King's Court, no order could be made upon the King. Even so Lord Reading refused to accede to that argument; and after making it clear that the order was not upon the King, he continued (p. 610):

This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown.

The parties here whom Mr. Taraporewala represents is not the Crown but it is the Government, and fortunately these Courts are not Government Courts. If the King is expected to respect the decision of the Courts, much more so are we entitled to expect that Government would respect the decision of the Court, and therefore if an order is made against the respondent, although it would not bind the Government in the strict sense of the term, it would be proper to assume that Government would carry it.

30. The third question that arises is whether an order should be made u/s 45 of the Specific Relief Act. As pointed out by the learned Chief Justice, the conditions laid down under the various sub-clauses in that section are cumulative, and before the Court could make an order every one of those conditions would have to be satisfied. The first condition which finds its place in Sub-clause (a) is that an application for such an order should be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing of the specific act. Now the question is whether the giving of an award by the arbitrator Mr. Noronha who, on the petitioners' own contention, is acting without jurisdiction and whose award would be a nullity would injure the property of the petitioners. It is argued by Mr. Munshi that he has been deprived of the right of getting fifteen per cent, which he would have got if the proceedings were under the Land Acquisition Act. But that argument, I am afraid, is not tenable because if the arbitrator has jurisdiction, then Mr. Munshi cannot get fifteen per cent, under the Land Acquisition Act. If the arbitrator has no jurisdiction and if his award is a nullity, then Mr. Munshi can ignore the award as the acquisition is bad and the reference following upon it is bad. It has been held by a divisional bench of our Court in *Ramdas v. Atlas Milk Co.* (1930) 33 Bom. L.R. 19 that the giving of an award without jurisdiction does not inflict any legal wrong upon the person against whom the award is made; and in that case Sir John Beaumont, Chief Justice, came to the conclusion that no perpetual injunction can be granted against a party from proceeding with an arbitration which was invalid and which was without jurisdiction. He considered various English cases, and the only

English case to which his attention was drawn and in fact to which our attention was drawn was the case of *Sissotls v. Oates* (1894) 10 T. L.R. 392 where the English Court granted an injunction against the party in a suit where the only substantive relief was the restraining of the other party from proceeding with the reference. But this particular case seems to be of rather doubtful validity on this particular point because, as pointed out by Sir John Beaumont, the report of the case is extremely short and the question of jurisdiction was not considered by the Court at all. It is also not reported in the authorised series. The only report one finds is in the *Times Law Reports*. The other" point urged by Mr. Munshi is that apart from injury to property, his personal right would be injured under Sub-clause (a) of Section 45 if the arbitrator proceeded with the reference. As I read it, the personal right in this sub-clause is a right which must be personal to the petitioner-something which is individual to him and not a general legal right which every subject enjoys under the law of the land. Mr. Munshi's contention is that he has a personal right not to have his dispute decided by this particular arbitrator. I do not think that that is a personal right which Section 45, Sub-clause (a), contemplates. I frankly confess that the question is not one free from difficulty; and fortunately it is not necessary for us to decide the question as the matter is much simpler when we come to Sub-clause (b) Sub-clause (b) of Section 45 requires that the doing or forbearing must be clearly incumbent on the person in his public character against; whom the order is sought. In England, as I have already pointed out, where the writ of mandamus is only issued for the purpose of doing something which is incumbent on the public officer no difficulty arises; but we have here also the right in the applicant to ask the public officer to forbear from doing something which is incumbent upon him in his public character by the law for the time being in force from forbearing, I agree with Mr. Munshi that it is not necessary that the law or the statute should specifically lay down that the public officer should forbear from doing something before the application of this sub-clause can be attracted. Now to my mind it is essential that there must be in the law for the time being in force some duty cast upon the public officer. If he does not do the duty, then the Court can call upon him to do it. If he does it improperly or unauthorisedly, the Court can call upon him to forbear from doing it in that particular manner. Now in this case it is not suggested that the arbitrator is discharging his duty improperly or arbitrarily. Mr. Munshi wants the Court to ask the arbitrator not to proceed with the reference when the Defence of India Act and the Rules made thereunder make it incumbent upon him to proceed with the reference. Mr., Munshi really wants the Court to ask him to forbear from proceeding with the reference on the assumption that the very foundation of his authority does not exist, namely, that the acquisition made by Government is illegal and ultra vires. If the very foundation of the authority of the arbitrator does not exist, then there is neither the doing nor the forbearing of any yet incumbent upon him. In this connection Mr. Munshi relied on a decision of Mr. Justice Tyabji in *In re Tarabai* (1905) 7 Bom. L.R. 161. That decision, to my mind, far from assisting Mr. Munshi, illustrates the very principle I was attempting to lay down. In that case the

Commissioner of Police at Bombay, acting u/s 28 of the Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them, and intimating that failure to comply with the notice would render them liable to punishment u/s 129 of the Act. The applicants applied to the High Court, u/s 45 of the Specific Relief Act, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect. It was sought to be argued before Mr. Justice Tyabji, who heard the application, that there was no specific provision in any Act that the Commissioner of Police should cancel any notice that might be given by him. The learned Judge negatived that contention pointing out that if the Policy Commissioner had to give notice in the manner laid down in the Act and if he failed to do so, it was open to the Court to direct him to cancel that notice. But what has got to be remembered is that the authority of the Commissioner of Police to issue the notice u/s 129 of the Bombay Police Act was not challenged in that case; on the contrary the very basis of the application u/s 45 of the Specific Relief Act was that the Police Commissioner was clothed with that authority to issue the notice u/s 26 of the Bombay Police Act, and being so clothed he was not exercising that authority properly.

31. I should also like to consider Sub-clause (d) of Section 45 of the Specific Relief Act because it had been very fully and elaborately argued at the bar. That sub-clause provides that an order u/s 45 would only be made provided the applicant has no other specific and adequate legal remedy. Now what is the interpretation to be put upon the words "no other specific and adequate legal remedy"? The authorities clearly show that an alternative legal remedy must be as convenient, as beneficial and as effectual as the one which the applicant can obtain u/s 45 of the Specific Relief Act before the Court would refuse the application. It is also clear that the remedy must be *remedium juris*-some specific legal remedy for a legal right. It is not enough that the party may have some other right which is not a legal right which the Court can enforce. For instance, in *In the matter of G.A. Natesan and K.B. Ramanathan* ILR (1916) Mad. 125, where a resolution of the Syndicate of the Madras University was challenged as *ultra vires*, it was suggested that the applicant could go to the Senate to set the matter aright and the Court rejected that argument pointing out that that was not a *remedium juris*-a legal right which the Court could enforce. At p. 165 Mr. Justice Kumaraswami Sastriyar considers the various alternative remedies which were suggested at the bar, namely, (1) a petition to the Government direct, (2) a motion in the Senate to annul the decision of the Syndicate complained of or to rescind or modify the original resolution, or (3) an action to set aside the resolution if it were *ultra vires*; and with regard to the first two remedies, the learned Judge's opinion was that they were not *remedium juris*.

32. The other important and interesting question which arises in this appeal is whether the right of a suit is a specific remedy contemplated by Section 45, Sub-clause (d), of the Specific Relief Act. Mr. Munshi has strenuously contended that

the specific remedy must be a remedy given by a statute and not merely a remedy by way of a suit. I see no reason to restrict the meaning of the expression " specific and adequate legal remedy " to merely a remedy given by a statute and not an ordinary right of suit. The question which the Court has to consider in every case is whether the alternative remedy, whether it be a right of suit or a specific remedy given by a statute, is as convenient, as beneficial and as effectual as the remedy which the Court can grant u/s 45 of the Specific Relief Act, I do not think it is possible to urge that the right of suit is not a specific and adequate legal remedy as contemplated by Section 45 of the Specific Relief Act. In the three English decisions to which our attention has been drawn- *The Queen v. Charity Commissioners for England and Wales* [1897] 1 Q.B. 407, 414, *Reg. v. Leicester Union* [1899] 2 Q.B. 632, and *Rex v. Dymock (Vicar and Churchwardens)* [1915] 1 K. B. 147e right of a suit was considered as an alternative remedy to the writ of mandamus. With respect to the learned Judge of the Calcutta High Court, I do not think that the opinion given by Mr. Justice Greaves in *In re Manick Chand Mahata v. The Corporation of Calcutta and the Calcutta Improvement Tntst* ILR (1921 CAL 916, that the mere right of suit is not the specific remedy contemplated by Sub-clause (d) of Section 45 of the Specific Relief Act is the correct view. As I was saying, the "Court may refuse to make an order u/s 45 of the Specific Relief Act if it was satisfied that the applicant could obtain the same relief in the same convenient and efficacious manner by filing a suit. In this particular case I have no doubt that the right of suit was not as convenient and effectual a remedy was the application u/s 45 of the Specific Relief Act, because if the applicant wanted to sue the Government he had to give notice of sixty days u/s 80 of the Civil Procedure Code.

33. Inasmuch as the applicant has failed to comply with one of the conditions attached to Section 45 of the Specific Relief Act, namely, the one which finds a place in Sub-clause (6), I agree with the learned Chief Justice that as far as the order u/s 45 is concerned, the applicant is not entitled to that order. With regard to the writs of prohibition and certiorari, the Court has jurisdiction to issue both the writs. There is no impediment in the way of the applicant as far as Section 306 of the Government of India Act is concerned, and it would be for the learned Judge below" to decide on merits whether either of these two writs should be issued against the respondent.

34. The result is that the appeal to the extent mentioned in the judgments is allowed. The order of the trial Court both as to the maintainability of the petition and in respect of the payment of costs to all parties is set aside. The petition is remanded to the trial Court for disposal on merits.

35. The learned Judge held in favour of the respondent on the question of mandamus. That part of the decision is confirmed by us, but on different grounds. Having considered all the relevant factors on the question of costs we think that the respondent should pay to the appellants two-thirds of the costs of the hearing of the petition before the trial Court. The respondent, the Governor

General of India in Council the Province of Bombay and the Collector of Bombay must pay the costs of the appeal. Costs to be taxed on the long cause scale on the original side.