(1949) 01 BOM CK 0002

In the Bombay High Court

Case No : O.C.J. Appeal No. 65 of 1948

P.V. Rao — APPELLANT

Vs

Khushaldas S. Advani — RESPONDENT

Date of Decision : 04-01-1949

Acts Referred:

Bombay Land Requisition Ordinance, 1947 — Section 10, 3
Government of India Act, 1935 — Section 306(1)

Citation : AIR 1949 Bom 277 : (1949) 51 BOMLR 342

Hon'ble Judges : M.C. Chagla, C.J;Tendolkar, J

Bench : Division Bench

Judgement

M.C. Chagla, C.J.—This is an appeal from a judgment of Mr. Justice Bhagwati by which he ordered a writ of certiorari to issue against respondent No. 1, who is the Assistant Secretary to the Government of Bombay, Health and Local Government Department, the Province of Bombay, respondent No. 2, and Mr. Vartak, a Minister of the Government of Bombay, formerly in charge of the Health and Local Government Department, respondent No. 3. The material facts which led up to the order made by Mr. Justice Bhagwati may be briefly stated. One Abdul Hamid Ismail was, prior to January 29, 1948, the tenant of the first floor of a building known as "Paradise" at Warden Road, Bombay, the landlord of which was one Dr. M. v. Vakil. On January 29, 1948, Ismail assigned his tenancy to the petitioner and two others, the son and brother''s daughter''s son of the petitioner. All the three assignees were refugees from Sind. On February 4, 1948, the petitioner went into possession of the flat. On February 26, 1948, the Government of Bombay issued an order requisitioning the flat. The order was issued u/s 3 of the Bombay Land Requistioning Ordinance, V of 1947, which had come into force on December 4, 1947. The order purported to be issued by order of the Governor of Bombay and was signed by P.V. Rao as Secretary to the Government of Bombay, Health and Local Government Department. On the same day Mr. Rao wrote to Dr. Vakil informing him that Government had allotted the premises to Mrs. C. Dayaram. Mrs. C. Dayaram is also a refugee from Sind. On

February 27, 1948, the Government of Bombay, in exercise of the powers conferred upon them by Section 8 of the Ordinance, authorised Mr. A.J. Lalvani, an Inspector of the Health and Local Government Department, to take possession of the premises. On March 4, 1948, the petitioner filed a petition for a writ of certiorari and an order u/s 45 of the Specific Relief Act, 1877. On that petition an interim injunction was granted restraining the (government from obtaining post-session of the flat. Originally the petition was directed only against respondent No. 1, but by a subsequent amendment the Province of Bombay and Mr. Vartak were brought on the record of the petition and an order was sought against them also. It is on this petition that Mr. Justice Bhagwati made the order from which this appeal is preferred.

2. A writ of certiorari can only be issued against an-inferior Court or against a person or persons who are required by law to act judicially or quasi-judicially. It is a high prerogative writ and its purpose is to prevent a judicial or quasi-judicial body from acting in excess of the jurisdiction conferred upon it by law or to see that in exercising its jurisdiction the body acts in conformity with principles of natural justice. Such a writ can never lie to correct executive or administrative acts. An executive or an administrative act may be illegal or ultra vires and a subject may challenge it in a Court of law, but he cannot challenge it by a writ of certiorari. The very basis and foundation of the writ is that the act complained of must be a judicial or a quasi-judicial act. The right to obtain a writ of certiorari is a very important and valuable right that the subject enjoys. It is by means of this writ that the subject can compel the judicial or quasi-judicial body to act within the four corners of its jurisdiction, and, as has been said by Lord Justice Brett in The Queen v. Local Government Board (1882) 10 Q.B.D. 309 the Court should not be chary of exercising its jurisdiction to issue writs of certiorari and prohibition and that "wherever the legislaure entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

3. Therefore, what we have to consider is whether the order passed by Government on February 26, 1948, requisitioning the premises which were in possession of the petitioner was a judicial or a quasi-judicial order. In order to determine the nature of the power conferred upon Government by the Ordinance, it is necessary to consider its nature, scope and effect, and in order to do so we must consider the scheme of the Ordinance which confers those powers. The Ordinance is entitled "An Ordinance provided for the requisition of land, for the continuance of requisition of land", and for certain other purposes. Section 3 empowers the Provincial Government to requisition any land for any public purpose if in its opinion it is necessary or expedient to do so. "Land" is defined as including benefits to arise out of land and premises and all things attached to the earth or permanently fastened to the premises or things attached to the earth. It is not disputed that under this section the Government would,

have the power to requisition the premises in question. Section 4 deals with vacant premises. What are vacant premises is defined and an obligation is cast upon the landlord to give intimation if any premises become vacant, and a landlord is precluded from letting vacant premises without the permission of Government before giving such intimation and for a period of one month from the date on which such intimation is given. Sub-section (4) empowers the Government to requisition vacant premises. Section 6 provides for the payment of compensation in respect of premises requisitioned after an inquiry has been held. Section 9 confers power upon Government to take possession of requisitioned; premises. Section 10 empowers the Government, with a view to carry out the purposes of the Ordinance, to require by order any person to furnish to such authority as may be specified in that order such information in his possession as may be relevant or material. Section 11 deals with publication and service of orders.

4. Going back to Section 3, with which we are concerned, the Legislature has left it to the Provincial Government to decide whether it is necessary or expedient to requisition any land. The opinion of the Government on this question is conclusive. But it is not enough that the Government should be of the opinion that it is necessary or expedient to requisition any land. It can only exercise its power to requisition provided the land is being requisitioned for any public purpose. What is a public purpose is not left to the opinion of the Government. It is an objective fact which has to be determined by Government before it can exercise its power. The very exercise of the power is made conditional upon the land being acquired for a public purpose. It was attempted to be argued that whether the purpose for which the Government wants to requisition land is a public purpose or not was also left to the opinion of the Government, and it was suggested that the expression "to do so" following upon "in the opinion of the Provincial Government it is necessary or expedient" covered not only the requisitioning of land, but also for any public purpose. In my opinion, that is not a proper construction of the expression "to do so." "To do so" means to act in the manner following, and the act which is referred to is the act of requisitioning. For any public purpose does not describe the nature or character of the act, but describes the purposes for which the act is to be performed, and therefore "to do so" only refers to the act of requisitioning and not the purpose for which the land is to be requisitioned. It will therefore be seen that the Legislature has provided an important safeguard in favour of the subject and a powerful check on the power of Government by providing that Government can only exercise its discretion to requisition land provided in the first instance it comes to a decision that the land to be requisitioned is required for a public purpose. Therefore an order of requisition cannot be passed by Government merely going through a mental process as to whether it is necessary or expedient to requisition any particular land. Nor is it left to Government merely to form an opinion in such a manner and on such materials as they think proper. It is incumbent upon Government to decide objectively that the land is required for a public purpose.

The element of determination and decision indisputably enters in the order of requisition to be made u/s 3. Section 3 also circumscribes the jurisdiction of Government to make an order under that section, and the limits of Government''s jurisdiction are that it is only when land is required for a public purpose that Government is entitled to exercise its power to requisition land.

5. Various authorities and many learned Judges have attempted to draw the line which demarcates an executive order from a judicial or quasi-judicial order. I shall presently deal with some of the authorities, but before I do so I would like to state what in my opinion is the true definition of a judicial or quasi-judicial act as a result of a review of the authorities that were cited at the Bar. In the first place, a duty must be cast by the Legislature upon the person or persons who is empowered to act to determine or decide some fact or facts. There must also be some Us or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the pros and cons before he can come to a conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon, him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, in my opinion, the Court would come to the conclusion that there is a duty upon the authority not only to decide and determine but to decide and determine judicially. In the case before us it was open to the Legislature to have empowered the Government to affect the rights of the subject and to impose a liability upon him by a mere executive act of Government arrived at purely by subjective reasoning on the part of Government. The Legislature did not think fit to do so. It limited the power of Government and made it exercisable only upon the happening of a particular contingency, and that contingency was the existence of a public purpose. This, to my mind, clearly indicates an intention on the part of the Legislature not to subject the rights of citizens to executive orders to be issued by Government. The Legislature intended that Government could; only act within its limited jurisdiction, that jurisdiction being conditioned by land being required for a public purpose, and the Legislature equally intended that if the Government acted in excess of its jurisdiction, its action could be controlled and corrected by a writ of certiorari. There can be no doubt that there is a lis or dispute which the Provincial Government has to decide, the dispute being whether the subject should be deprived of his property or not. There are also two sides to the dispute. There is a proposal and opposition and there are pros and cons to be considered. The two sides are: The interest of the State which requires the property for a public purpose, and the rights of the subject who is being deprived of his property. It may be said that the Government cannot be

constituted a Judge in its own cause because Government would be asked to adjudicate between itself and the subject, and what a dispute and an adjudication requires is two parties and an adjudicator different from and independent of the two parties. In my opinion, there is no reason why the Provincial Government or an executive officer cannot be constituted a Judge to decide questions arising between the State and the subject. The role that the Government or the executive officer has got to play under these circumstances is a judicial role and as such the Government or the executive officer is different from the State whose rights it has to consider as against the rights of the subject. I should further add that if there was any doubt as to whether an act to be done by a competent authority was a ministerial act or a judicial or quasi-judicial act, I would always give the benefit of the doubt to the subject because I would assume that if the Legislature confers power upon an authority to affect rights or impose liability upon subjects, the Legislature would not ordinarily confer such power without making the power exercisable judicially or qucrn-judicially. I would not assume that the Legislature would permit the rights of subjects to be affected and liability being imposed upon them without giving an opportunity to the subject to be heard in support of his own rights. I would therefore require a clear indication on the part of the Legislature that it not only conferred a power upon a competent authority to affect the rights of others and impose liability upon them, but also that the power it gave was so wide that it could be exercised without the duty of any judicial or quasil-judicial determination. In the case before us, far from there being any such indication on the part of the Legislature, I find that the intention of the Legislature is clear from the fact to which I have already referred, viz. that a condition precedent is laid down which has to be satisfied before the authority can exercise its power, and the existence of that condition precedent is left not to the opinion of Government but has to be established as a fact. It is also significant to note that there is a further clear indication by the Legislature that there is a duty cast upon the Provincial Government to act judicially or quasi-judicially by the power conferred by it u/s 10 to obtain information from the person whose land is to be requisitioned. It may be suggested that this is merely an enabling section and casts no duty upon the Government or confers no right upon the subject. But in my opinion, this section must be read as having a compelling force and also as being a power coupled with a duty. We must read Section 10 along with Section 3, and when we find that in Section 3 public purpose is to be determined by Government and when we find in Section 10 that information may be obtained for the purposes of the Ordinance, I think it is open to the Court to come to the conclusion that there is a duty upon the Government to decide and a right given to the subject to have a decision and a decision which is a judicial decision arrived at after considering proper materials and evidence as provided by Section 10.

6. Turning to the authorities, we have the classical definition of Lord Justice Atkin in Rex v. Electricity Commissioners: London Electricity Joint Committee Co.

(1920), Ex parte [1924] I.K.B. 171: Wherever any body of persons have any legal authority to determine questions affecting the rights of others and have the duty to act judicially, and act in excess of the legal authority, they are subject to the controlling jurisdiction of the King''s Bench Division exercised in these writs. The difficulty of course that always arises is to decide in which cases there is a duty cast upon a body of persons to act judicially. That duty exists when the determination to be arrived at by the body is a judicial or quasi-judicial determination, and Chief Justice May in The Queen v. Corporation of Dublin (1878) L.R. 2 Ir. 371 defines a judicial act as an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others. This definition was described as one of the best definitions by Lord Atkinson in Frame United Breweries Co. v. Bath. Justices [1926] A.C. 586 There is another Irish Judge whose dictum is also both weighty and appropriate, and that is Chief Baron Palles, and the dictum appears in Reg. (Wexford County Council) v. Local Government Board [1902] 2 Ir. R. 349 :

I have always thought that to erect a tribunal into a ''Court'' or ''jurisdiction,'' so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the rights affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial.

In this case the determination of the Provincial Government binds the subject because it is left to the opinion of the Government whether it is expedient or necessary to requisition any land and that determination is made dependent upon the happening of a contingency, viz. the existence of a public purpose. Lord Justice Moulton in Rex v. Woodhouse [1906] 2 K.B. 501 expresses the opinion that there must be the exercise of some right or duty to decide in order to provide scope for the writ of certiorari at common law. Lord Justice Scrutton in Rex v. The London County Council: The Entertainments Protection Association, Ex parte [1931] 2 K.B. 215 considers the meaning of the Court to which a writ of certiorari can be issued (p. 233):

It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari.

The Advocate General has relied on a decision reported in Cooper v. Wilson [1937] 2 K.B. 309. The question that the Court was considering was whether the Watch Committee had acted properly in dismissing a sergeant in the Liverpool Police Force. He was dismissed by the Chief Constable. He appealed from the decision of the Chief Constable to the Watch Committee and the Watch Committee dismissed the appeal. Now in his judgment Lord Justice Scott was not considering the distinction between a judicial or quasi-judicial act and a ministerial act, but what he was considering was the distinction between a judicial act and a quasi-judicial act, and this distinction was necessary to consider because what the learned Lord Justice had to decide was. whether the procedure followed by the Watch Committee was a proper procedure, or not, and Lord Justice Scott at p. 340 accepts the Report of the Ministers'' Powers Committee as definition of the words "judicial" and "quasi-judicial." According to this report a true judicial decision presupposes an existing dispute between two or more parties, and that involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties-to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision involves requisities (1) and (2), does not necessarily involve (3), and never involves (4). I do not see how requisites (1) and (2) would not be present in the decision to be arrived at by Government before they requisition any land u/s 3. There would be the case of the State and the case of the subject to be presented and heard by Government, and as the question to be determined would be both a question of fact and a question of law, the Government would have to consider both evidence and the legal aspect of the matter, because public purpose is a mixed question of law and fact. (See the decision of the Privy Council in Hamabai Framji Petit v. Secretary of State for India, and Moosa Hajee Hassan v. Secretary of State for India ILR (1915) Bom. 279 17 Bom. L.R. 100 where they adopted the definition of Mr. Justice Batchelor, viz. an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.)

7. The Advocate General has relied on a decision of Mr. Justice Kania, as he then was, reported in Kaikhushru Sorabji Vs. Commissioner of Police, . The order that the learned Judge was considering was an order made under Rule 17(i)(a), (ii)(a) of the Defence of India Rules. That rule provided that the Director General of Posts and Telegraph, or any person authorised by him, may by an order direct that any subscriber''s telephone connection to any exchange shall be cut off for

such period as may be specified. With respect to the learned Judge, it is clear that this rule did not require any authority to determine any fact before the order could be made, and therefore clearly, as the learned Judge held, the order was not a quasi-judicial order. But reliance is placed on the following observations in the judgment of Mr. Justice Kania (p. 720):

It appears to me that unless the authority invested with the power to pass an order had to act judicially, i.e. to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise. The two sides cannot include himself as he is the deciding authority.

It is urged that in this case also the Province of Bombay is the deciding authority and therefore it cannot be considered as the side in opposition to the subject. But, as I have already pointed out, the conflict is between the subject and the State and there is no reason why Government or a Government official cannot be constituted a quasi-judicial tribunal to determine that conflict. The learned Judge makes the position more clear in the subsequent part of his judgment. This is what he says (p. 720):

In the present case, in my opinion, the act of the respondent in making the order is not quasi-judicial. He has not to consider a proposition and opposition. He has not to weigh different facts and/or law and decide whether the order should be made or not.

Therefore, what is really required is that there should be a proposition and opposition and also that the deciding authority should have to weigh facts and law. In the case before us there is definitely a proposition and an opposition and the Government has to weigh facts and law before coming to the conclusion that the land should be requisitioned. Reliance is also placed on the case of Franklin v. Minister of Town and Country Planning (1947) 176 L.T. 312. By Section 1 of the New Towns Act, 1946, the Minister of Town and Country. Planning was empowered to make an order designating an area as the site of a proposed new town, if he was satisfied that it was expedient to do so. By para. 3 of schedule I of the Act, if. any objection was duly made to the proposed order, the Minister before: making the order had to cause a public local inquiry to be held with respect thereto. The question arose whether the order to be made by the Minister was a quasi-judicial order and whether the Minister was bound to hear both sides and to establish that he had no bias in favour of a particular scheme., The Court, held that there was no Us and that the Minister was a Judge in the matter in which he was himself interested from the public point of view. It seems to me that obviously the order to be made by the Minister was not a quasi-judicial order, because the only condition which had to be satisfied before the order could be made was that the Minister had to be satisfied that it was expedient. No objective fact had to be determined. This, case went to the House of Lords and in their judgment reported in [1948] A.C. 87 the House of Lords affirmed the decision of the Court of Appeal. Reference was, also made by the Advocate General to Rex v. Archbishop of Canterbury [1944] 2 K.B. 282. There was a vacancy in, a Benefice and the patron made a presentation, and under the law the Bishop''s approval had to be obtained. The Bishop refused to give his approval and. the patron appealed to the Archbishop for the review of the Bishop''s decision. The Archbishop without hearing the patron upheld the decision of the Bishop. The patron applied for a writ of certiorari. The writ was refused on the ground that the Archbishop like the Bishop before him was not exercising a function analogous to that of a person hearing a lis inter partes and that he was not under an obligation to act in a quasi-judicial manner. Now, the decision of this case really turned on the special provisions of the Benefices Measure of 1931. The Court of Appeal pointed out that the function that the Bishop had to discharge in approving a clerk was a personal, intimate and. delicate one, and the task of the Archbishop was equally so. The Court of Appeal was at pains to point out that all that had to be considered was whether the clerk presented was suitable to discharge his duties and that no question arose of depriving a person of his right of property or limiting his right to exercise it. Reference was also made to the case of Hutton v. Attorney General [1927] 1 Ch. 427 In that case the question arose with regard to the compulsory acquisition of land for military purposes under the Defence Act of 1842. Two requisites had to be satisfied. One was a certificate to be issued by the Lord Lieutenants or two Deputy Lieutenants of the County or riding in which the land was situated that the taking of the land was necessary or expedient, and a warrant to be issued by the treasury. The Court held that the granting of a certificate by the Lord Lieutenants or the Deputy Lieutenants was not a judicial but merely an administrative act. In the first place, it must be borne in mind that whether the taking of the land is necessary or expedient is purely a subjective fact. In the second place, as Mr. Justice Tomlin pointed out in his judgment at p. 438, the Defence Act of 1842 provides for judicial officers wherever judicial functions had to be performed, and finally the issuing of a warrant authorising the taking of the land and the certificate deciding that it was necessary or expedient to do so were two separate acts to be performed by two separate authorities. In this connection the case of R. v. Boycott [1939] 2 A.E.R. 626 might be considered. In that case the question arose whether a boy aged 11, attending a County Council school, was mentally defective. A certificate was issued by the Local Education Authority certifying the boy as an imbecile. The certificate was signed by two doctors, one of whom had never examined the boy. Lord Chief Justice Hewart and Justices Humphreys and Singleton issued a writ of certiorari holding that in issuing a certificate the Local Authority was doing a quasi-judicial act. Section 31 of the Mental Deficiency Act imposed a duty upon the Local Education Authority to ascertain that children were incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes, and the Court held that the act of ascertaining was a quasi-judicial act and in doing so the authority had to perform judicial functions. These authorities, in my opinion, clearly bear out and in no way go counter to the proposition I have set out earlier in my judgment. Therefore I come to the conclusion that the order of requisition issued by the Province of Bombay was a quasi-judicial act which can be subjected to the corrective writ of certiorari. It would be perhaps interesting to note that Government have subsequently taken to themselves wider powers under a subsequent legislation that has been passed with regard to requisition of land. Now, it is no longer necessary that the land should be requisitioned for a public purpose. It can be requisitioned for any purpose. This means that before Government can requisition land they have no longer to determine as an objective fact the purpose for which land has got to be requisitioned. Not only the necessity and expediency is left to their discretion, but it seems even the purpose for which land is to be requisitioned.

8. The next question that arises is whether, if the act complained of is a quasi-judicial act, the High Court has jurisdiction to issue a writ of certiorari against the respondents or any -of them. We might briefly deal with the case of respondents Nos. 1 and 3. A writ of certiorari can only be directed against the authority which has to perform judicial functions and upon which is cast a duty to act judicially and not to act in excess of its jurisdiction. Now, u/s 3 of the Ordinance, it is the Provincial Government which is empowered by order in writing to requisition any land. It is neither Mr. P.V. Rao nor Mr. Vartak, the Minister, who is so empowered, and the impugned order itself makes it clear that it is issued by the order of the Governor of Bombay as every act of the Provincial Government has to be u/s 59 of the Government of India Act. Therefore, if the writ of certiorari can lie at all, it can only be against the Province of Bombay, which is respondent No. 2. The learned Judge, with respect, was therefore clearly in error in issuing a writ against respondents Nos. 1 and 3. The petition of the petitioner is misconceived against those two respondents and must fail.

9. Although in the order as drawn up, only the writ of certiorari has been ordered to be issued against the three respondents, in his judgment the learned Judge has come to the conclusion that the writ of prohibition should also be issued against all the three respondents and also an order should be made u/s 45 of the Specific Relief Act against respondents Nos. 1 and 3. The position with regard to the writ of prohibition stands on the same footing as the writ of certiorari and need not be discussed further. With regard to the order u/s 45, an order u/s 45 can only be made provided the doing or forbearing of any specific act is clearly incumbent on the person in his public character to do or to forbear. With respect to the learned Judge, it is difficult to understand how it is incumbent upon Mr. P.V. Rao or upon Mr. Vartak from forbearing from enforcing or taking or continuing to take any proceedings for enforcing the requisition order passed by the Province of Bombay. The Court must find within the terms of the Ordinance itself that some specific act has to be done or forborne by a public officer. I find no indication whatever in the Ordinance of any such provision which compels Mr. Rao or Mr. Vartak to do or forbear from doing any specific act. Therefore the order u/s 45 against respondents Nos. 1 and 3 is clearly unsustainable.

10. With regard to the Province of Bombay, it has been argued by the Advocate General that the Provincial Government cannot be brought before the Court and

cannot be sued in respect of any governmental or executive act. It is contended that Government can only be sued in respect of such acts as can be performed by an individual or by a trading corporation. But when Government acts as a sovereign authority, its acts are outside the purview of Municipal Courts and cannot be questioned in those Courts. This is rather a startling proposition. According to the Advocate General, the Courts of law in India cannot compel Government to justify its acts as being "within the law and cannot give any protection to the subject if Government affects his rights or imposes a liability upon him contrary to the provisions of the law. If such a proposition were sound, it would completely undermine the position of the judiciary and deprive the subject of the one sure and certain protection he has in an independent judiciary against the illegal and unjustifiable encroachments of the executive. Fortunately, as I shall point out, the proposition put forward by the Advocate General is wholly untenable and entirely contrary to the basic principles of British jurisprudence. The Privy Council in Eshugbayi Eleko v. Government of Nigeria (Officer Administering [1931] A.C. 662 were considering the executive acts of the Governor of Nigeria who issued an order against an appellant to leave a specified area, and upon his failing to comply, ordered his deportation to another place in the Colony, and Lord Atkin at p. 670 used words which are in keeping "with the highest traditions of British Judges and British justice:

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive.

11. The submission of the Advocate General is based on Section 176 of the Government of India Act. That section is procedural and provides how the Dominion of India and the Provincial Government may sue or be sued. The Provincial Government has to be sued in the name of the Province, and the Dominion of India and the Provincial Government may sue or be sued in relation to their respective affairs in the like cases as the Secretary of State for India in Council might have sued or been sued if the Government of India Act of 1935 had not been passed. It is necessary to trace the history of this section. By 3 & 4 Will. IV, c. 85, the East India Co. was made a trustee for the Crown in respect of all the property which it possessed in India, and with regard to all the debts and liabilities of the Company they were charged upon the revenues of India. When the Indian territories were transferred to the Crown, the Act of 1858 21 & 22 Vic 106 was passed and Section 65 of that Act provided that the Secretary of State for India in Council should and might sue and be sued as a body corporate and that all persons might have and take the same remedies and proceedings legally and equitably against the Secretary of State for India in Council as they could have done against the East India Co., and that the property and effects thereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes should be subject and liable to the same judgments and

executions as they would, while vested in the Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company. Therefore, in all those cases in which the East India Co. could be sued by the subject, the Secretary of State for India in Council was substituted and the action had to be filed not against the Company but against the Secretary of State for India in Council as a body corporate. Section 32 of the Government of India Act of 1915 continued the same provision. Sub-section (1) provided that the Secretary of State for India in Council may sue and be sued in the name of the Secretary of State for India in Council as a body corporate, and Sub-section (2) provided that every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Co. if the Government of India Act of 1858 and this Act had not been passed. And when we come to the Act of 1935 we find that the Dominion of India and, the different Provinces were constituted juristic persons as it were for the purposes of suing and being sued just as the Secretary of State for India in Council was under the earlier legislation. Therefore one might say that the Province of Bombay is in direct line of succession to the East India Co. The Advocate General''s contention is that the East India Co. performed two separate and different functions: (1) as a trading corporation, and (2) as a governing body exercising sovereign authority; and the Advocate General''s submission is that it is only with regard to the acts that fall in the first category that the East India Co. could be sued. In respect of this proposition reliance is placed on the well-known case of P. & O.S.N. Co. v. Secretary of State for Indian (1861) 5 B.H.C.R. 1 There the Supreme Court of Calcutta, Peacock C.J., Jackson and Wells J.J., held that the Secretary of State in Council of India was liable for damages occasioned by negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable. Reliance is placed not so much on the decision of the case as on certain observations in the judgment of Chief Justice Peacock. At p. 13 the learned Chief Justice says:

...they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

Again at p. 14 :

But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.

On the strength of these observations it is urged that no action can lie against the Province of Bombay in respect of an act which is done in the exercise of its sovereign powers. It is said that the act of requisition cannot be done by a private individual but it can only be done by an authority which is exercising a sovereign power. Now, it is to be noted that Peacock C.J. made it clear in his judgment that the East India Co. was not a sovereign body and it did not have1 any attributes of sovereignty. If the learned Chief Justice was referring to sovereign acts as acts of State, then with very great respect the observations are correct and must be accepted. An act of State is different fundamentally from an act of a sovereign authority. An act of State operates extra-territorially. Its legal title is not any municipal law but the overriding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in municipal Courts. In this case the Province of Bombay is justifying its requisition order under the Ordinance which is a municipal law, and therefore it cannot claim as a sovereign authority to be exempt from a municipal Court and cannot claim immunity from having to justify its act in a municipal Court. As I shall presently point out, the position with regard to the East India Co. was the same. The East India Co. could have been sued in all cases except in respect of those which it did not seek to justify on grounds of municipal law. In the case to, which I have already referred, Eshugbayi Eleko v. Government of Nigeria (Officer Administering [1931] A.C. 662 Lord Justice Atkin in the judgment of the Privy Council at p. 671 says :

A suggestion was made by one of the learned Judges that the order in this case was an act of State. This phrase is capable of being misunderstood as applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the Act.

As far back as 1859, in the case of The Secretary of State in Council of India v. Kamachee Boye Sahaba (1859) 7 M.I.A. 476 the Privy Council held that the municipal Court had no jurisdiction to inquire into the propriety of the act of the East India Co. seizing the State of Tanjore as the delegate of the British Government, and at p. 529 their Lordships observed :

The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

At p. 531 their Lordships distinguish between an act of State and one which is not an act of State:

The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor ? If it were the latter, the defence set up, of course, has no foundation.

It is therefore only an act not effecting to justify itself on grounds of municipal law which is immune from the scrutiny of a municipal Court. The Privy Council again in Forester v. Secretary of State (1872) L.R.IndAp 10 distinguished the Tanjore case from the case they had before them where the seizure of lands was under colour of title, and they held that when possession is taken by Government under colour of a legal title, it does not constitute an act of State. The subject claimed a right to be entitled to the lands in derogation of the title of Government, and the Privy Council held that that claim, like any other claim arising between the Government and its subjects, would prima facie be cognizable by the Municipal Courts of India. A similar question had to be considered by this High Court in Jehangir v. Secretary of State for India (1903) 6 Bom. L.R. 131 The plaintiff had filed this suit claiming damages for defamatory statements contained in a resolution issued by Government. One of the contentions raised was that the power to censure or reprimand a Government servant was an act of State and therefore not cognizable by the Court, and Mr. Justice Batty at p. 139 says that though the appointment or dismissal of a certain class of officers is among the functions of a Government, and is not exercisable by private individuals as such, it is a power which is exercisable only in pursuance of an authority conferred and regulated by municipal law and deriving its justification therefrom, and subject to limitations thereby imposed. At p. 140 the learned Judge observes:

An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and interstatal duties and rights.... In dealing with its own subjects therefore a Government must defend itsaction as justified by positive law, and cannot rely on a plea of political expediency which would only justify action in relation to foreign matters to which the law of the land does not extend.

And further on the learned Judge quotes with approval the statement in Stephen''s Criminal Law that as between the Sovereign and his subjects there can be no such thing as an act of State. Although Mr. Justice Batty and Mr. Justice Jacob differed on the question as to whether the suit was maintainable against the Secretary of State for defamation and the case was referred to Mr. Justice Chandavarkar as the third Judge, both the other two Judges did not differ from Mr. Justice Batty with regard to the principles which he enunciated as to the liability of the Secretary of State to be sued in municipal Courts. There is a judgment of the Madras High Court which has enunciated the same principle, in The Secretary of State for India in Council v. Hari Bhanji ILR [1882] Mad. 273. The headnote correctly sets out in substance what the learned Chief Justice Sir Charles Turner stated in his judgment:

The acts of state of which the municipal Courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law.

Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil Courts.

At p. 279 the learned Chief Justice says:

...the decided cases show that in the class of acts which are competent to the Government and not to any private person, a distinction taken is between those which lie outside the province of municipal law and those which fall within that law, and that it is of the former only that in this country the municipal Courts in British India cannot take cognizance.

Therefore it is clear that the only slender foundation for the contention of the Advocate General is the remarks of the learned Chief Justice in the Peninsular case. But when that case is clearly understood, it will be seen that although the learned Chief Justice makes a distinction between the class of acts which a private individual or a trading corporation can perform and those which can be performed by a sovereign power, what the case actually decides is that the particular case which was before the Court fell in the former category. The learned Chief Justice, with respect, was not called upon to decide that all acts falling in the latter category were exempt from the scrutiny of the Courts. In any case, the authority of this decision has been considerably shaken by the view expressed by the Privy Council recently in (1936) L.R. 64 I.A. 55 (Privy Council) The appellant in that case sued the Secretary of State for India in Council for damages for wrongful dismissal. The Courts in India relied on Section 32 of the Government of India Act as limiting the right of the appellant to sue the Secretary of State for India in Council in those identical cases where a suit would have lain against the East India Co. Their Lordships of the Privy Council say that they should not be taken to give their assent to that reason. They further go on to observe that as then advised they look upon that section as merely relating to parties and procedure, and if an action lay against Government that right could not be taken away merely because an identical right of action did not exist against the East India Co.; and in this connection they refer to Section 32 of the

Government of India Act and also to the Peninsular case on which apparently the reasoning accepted by the Courts in India was based. Therefore it would not be too much to assume that if the Peninsular case laid down that the right of the subject to sue Government was limited by any consideration as to whether the East India Co. could or could not have been sued as a trading corporation, that was not the correct statement of the law.

12. The next contention put forward by the Advocate General is that there is a complete immunity given to the Governor against being brought before a Court of law, and in asking for a writ against the Provincial Government the petitioner is in effect violating that immunity. It is submitted in the first instance that this Court being the King''s Court the Crown cannot be made subject to its writ. This submission is wholly erroneous because the Governor is not the Crown; he is merely the agent of the Crown in the Province of Bombay; and the English Courts have never recognised the principle that a Governor of a Colony or a dependency cannot be sued in English Courts. Numerous cases are to be found in the books where Governors of Colonies have been successfully sued in Courts in England. Therefore, if the Governor has an immunity at all, that immunity must be found expressly in some statute or legislation. For that purpose reliance is placed on Section 306 of the Government of India Act. Under this section, no proceedings whatever shall lie and no process whatsoever be issued from any Court in India against the Governor of a Province, whether in a personal capacity or otherwise. It is argued that the Provincial Government is really the Governor because u/s 49 the executive authority of a Province is exercised on behalf of His Majesty by the Governor, and according to the Advocate General the Provincial Government and the Governor are interchangeable terms. Therefore, according to him, if immunity is given to the Governor, the same immunity is given to the Provincial Government. In my opinion, the Provincial Government means, under the constitution, the Governor and his Ministers. Before the Independence Act, the Governor had his individual judgment and his discretion and in certain matters he was entitled to act contrary to the advice given by the Ministers or even without taking their advice. Under the Independence Act the Governor has become a constitutional Governor and all his acts must now be taken with the aid and advice of his Ministers. But even so, I agree that the Governor does constitute an important part of the machinery which administers the Province and which is described by the expression "Provincial Government." But, in my opinion, it is a mistake to read Section 306 as giving an immunity not only to the Governor but to the Provincial Government also. These are two different concepts, and the immunity to the Governor is not an absolute immunity but it is a personal immunity although it extends both to his private and public acts. The second part of the section extends that immunity to the Governor even after he has relinquished his office, and he cannot be sued in respect of anything done or omitted to be done by him during his term of office in performance or purported performance of the duty thereof except with the sanction of the Governor General. It cannot be said that after the Governor has left office he continues to

be the Provincial Government. But the immunity given to the Governor personally is continued even after he ceases to hold the position as the Governor. This itself clearly shows the distinction between the Governor as such and the Provincial Government. But the proviso to Section 306 makes the position perfectly clear. Strictly it is not a proviso; it is merely a clarification; and what it lays down is that nothing in Section 306 shall be construed as restricting the right of any person to bring against the Dominion or a Province such proceedings as are mentioned in Chapter III of Part 7 of the Act. Therefore, if a Province could be sued under Chapter III of Part 7 of the Act, the suit could not be defeated merely because the Governor constitutes a part of the Provincial Government. When we turn to Chapter III of Part 7 we find that one of the sections in that Chapter is Section 176. Therefore, in all those cases in which the Secretary of State for India in Council could have been sued, the Provincial Government can also be sued notwithstanding the fact that the Provincial Government includes the Governor of the Province. The Advocate General has argued that the proviso to Section 306 refers to suits against the Province of Bombay within the meaning of Section 176, and although a suit may be filed against the Province of Bombay in those cases in which a suit could have been filed against the Secretary of State for India in Council, a writ cannot be issued against the Province. A distinction is sought to be made between suits and the issuing of a high prerogative writ like the writ of certiorari. Now in the first place Section 176 does not speak of suits at all. It merely speaks of the Provincial Government suing or being sued, and in my opinion it would be wholly wrong to construe the expression "sue or be sued" in a narrow technical sense as referring only to those proceedings in a Court of law which can be initiated by the filing of a plaint. "To sue" in this context can only mean to claim a civil right in a Court of law by any legal procedure by which that civil right can be established. A writ of certiorari can only be obtained by means of petition and not by means of filing a plaint. But what the petitioner is doing is claiming his civil right by means of this particular procedure which is the only procedure open to him in order to obtain the writ of certiorari. Mr. Justice Tyabji in Vajeram v. Purshottumdas (1905) 7 Bom. L.R. 138 construed the expression "suing" as occurring in Section 43 of the CPC of 1882, corresponding to Order II, Rule 2, of the present Code, as making a legal claim or taking legal proceedings against any person. In that learned Judge''s opinion it did not necessarily mean to file a suit by means of a plaint such as is referred to in the Civil Procedure Code. In In re The Waterloo Life, &c. Assurance Company (No. 1)(1862) 31 Beav. 586 the question that arose was whether filing a petition amounted to suing, and the Court held that it did. The company was incapable of suing by Section 210 of the Companies Act and the Court took the view that that in capacity also applied to the presentation of a petition.

13. It is interesting to note that the corresponding section in the Government of India Act, 1915, Section 110, gave immunity not only to the Governor but to the members of the Executive Council and also subsequently by an amendment to

the Ministers, but that immunity only extended as far as the original civil or criminal jurisdiction was concerned. It is significant to note that there was no proviso to Section 110 corresponding to the proviso to Section 306, and the reason for it is obvious, because under the Government of India Act of 1915 the juristic person to be sued was not the Province but the Secretary of State for India in Council. Therefore, in my opinion, if a writ of certiorari can lie against the Province of Bombay, there is nothing in Section 306 which debars the Court from issuing such a writ.

14. It is then argued that apart from Section 306 the High Court has no jurisdiction to issue a writ against the Province of Bombay. The jurisdiction that the High Court has is to be found in Section 223 of the Government of India Act, and that jurisdiction is the same as it was immediately before the establishment of the Domnion, and before the Independence Act it was the same as it was at the time the Government of India Act, 1935, was enacted. Therefore, we have to go back to Section 106 of the Government of India Act, 1915, and there again we find that the jurisdiction conferred upon the High Court was the same as was vested in it at the commencement of that Act. In order to find out what that jurisdiction was, we have to turn to the High Courts Act of 1861, and Section 9 of that Act confers upon the High Courts established by that Act all the jurisdiction and power and authority which was vested in any of the Courts in the Presidency which was abolished by the High Courts Act. The Court that was abolished by the High Courts Act in Bombay was the Supreme Court to which the High Court succeeded. Therefore, in order to determine what the jurisdiction of the High Court is, we have really to ascertain what was the jurisdiction of the Supreme Court. Now, the Supreme Court was established in Bombay in 1823 by 4 Geo. IV, c. 71. That Act provided that it shall be lawful for His Majesty to establish a Supreme Court of Judicature at Bombay with full power to exercise such jurisdiction and to be invested with such power and authorities, privileges and immunities and subject to the same limitations, restrictions and control within the said town of Bombay and territories dependent upon the Government of Bombay as the said Supreme Court of Judicature at Fort William in Bengal is invested with or subject to within the said Fort William or within the Kingdoms or the Provinces of Bihar and Orissa. That Act further provided that the Governor and Council at Bombay, and the Governor General of Fort William aforesaid shall enjoy the same exemption, and no other, from the authority of the Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor General and Council at Fort William aforesaid from the ''jurisdiction of the Supreme Court of Judicature there already by law established. Therefore, the jurisdiction which was to be conferred upon the Supreme Court was to be identical with that of the Supreme Court at Calcutta and the Governor of Bombay was to enjoy the same immunity as the Governor General enjoyed at Fort William. Now, the Supreme Court at Fort William was established under the Act of 1772, 13 Geo. III, c. 63. Pursuant to this Act, Letters Patent establishing the Supreme Court were issued in 1774. It is a historical fact that here was a conflict

between the Judges of the Supreme Court and the executive Government, and in order to avoid any future conflict the Act of 1780 exempted the Governor General and Council of Bengal from the jurisdiction of the Supreme Court. It also exempted any person or persons who acted under the orders of the Governor General and Council. But it provided that where an order or orders of the Governor General and Council extended to any British subject or subjects, the Court shall have and retain full and complete jurisdiction. Now, when we turn to the Charter of the Supreme Court, we find that under Clause 25 immunity is given to the person of the Governor of Bombay and his Council. But we do not find the proviso which entitled British subjects to question the orders of the Governor. An interesting argument was advanced before us by the Advocate General as to whether the proviso only applied to the acts done by persons under the authority of the Governor or also applied to the acts of the Governor himself, and also whether the right that the British subjects had under that proviso would now apply to all Indian subjects because the distinction between European British subjects and Indian British subjects no longer prevails. It is unnecessary to decide what the correct position is, because, in my opinion, the immunity given to the Governor under the various provisions to which I have referred is a personal immunity no, higher than the immunity to be found u/s 306 of the Government of India Act. The real jurisdiction of the High Court to issue a writ is to be found in Clause 5 of the Letters Patent establishing the Supreme Court, and that jurisdiction is similar to the jurisdiction exercisable by the Judges of the King''s Bench Division. Therefore, if we find that a writ of certiorari could be issued by the King''s Bench Division against the East India Co., such a writ could also be issued by the Supreme Court, and if the Supreme Court could issue it, the High Court today has the same jurisdiction to issue such a writ. There is nothing whatever to suggest that the King''s Bench Division in proper cases could not have issued a writ against the East India Co. On the contrary, there are cases which go to show that writs of mandamus were actually issued by the English Courts against the East India Co. See The King y. Directions of the East India Co. (1815) 4 M. & Sec 279 where the writ of mandamus was issued against the East India Co., and again The King v. Directors of the East India Co. (1833) 4 B. & Ad. 530 where also a writ of mandamus was issued against the East India Co., and an interesting case reported in Ex parte Sir Charles Napier (1852) 21 L.J.Q.B. 332 where a writ of mandamus was asked for against the East India Co, at the instance of Sir Charles Napier in respect of his salary.

15. There is one further argument of the Advocate General to which I would like to refer. He relies on the meaning of "the Province of Bombay" as given in the General Clauses Act. Before the Independence Act the meaning given to "the Provincial Government" under the General Clauses Act was "in a Governor''s Province, the Governor acting or not acting in his discretion and exercising or not exercising his individual judgment according to the provision in that behalf made by and under the said Act." After India became independent, the India Adaptation of Existing Indian Laws'' Order, 1947, was passed, and the following

definition for "Provincial Government" was substituted: "As respects anything done or to be done after the establishment of the Dominion of India shall mean in the Governor''s Province the Governor." It is therefore argued by the Advocate General that when Section 3 of the Requisition Ordinance speaks of Provincial Government, it means the Governor, and the Governor is exempt from being sued u/s 306. In my opinion, the expression "Governor" used in the General Clauses Act as equivalent to "Provincial Government" does not refer to the Governor in his personal or individual capacity, but to the constitutional Governor who is the head of the Provincial executive and in whose name all the executive authority of the Province is exercised. As I have already considered earlier, the exemption u/s 306 does not apply to the Governor in the sense in which this expression is used in the General Clauses Act.

16. I would now like to consider three decisions of the Madras High Court and one decision of the Calcutta High Court, on which strong reliance has been placed by the Advocate General for the proposition that a writ of certiorari does not lie against the Provincial Government. The first is Venkataratnam v. Secretary of State for India ILR (1929) Mad. 979. In this case a writ of certiorari was applied for against the Minister of Public Health. The Madras High Court was considering the provisions of the Government of India Act of 1915. They took the view that u/s 110 of the Government of India Act the original jurisdiction of the High Court was ousted as against the Governor and the Ministers. They also took the view that the jurisdiction of the Madras High Court was the same as the jurisdiction of the Supreme Court at Calcutta. By the Act of 1780 the Supreme Court had no jurisdiction to proceed against the Governor. The Court did not consider the distinction between suing the Governor or a Minister personally and suing the Province of Bombay as a juristic body in respect of those matters for which the East India Co. could have been sued. We in the case before us are more concerned to consider the effect of the proviso to Section 306 and Section 176 of the Government of India Act. The next case is Thyagarajan v. Government of Madras [1940] Mad. 204. In that case Sir Lionel Leach, Chief Justice, and Mr. Justice Khuni Raman refused to issue a writ against the Provincial Government of Madras holding that no differentiation could be made between the Governor and the Provincial Government, and the Governor was exempt u/s 306 of the Government of India Act. With very great respect to the learned Judges who decided that case, they completely overlooked the existence of the proviso to Section 306. Then there is a recent decision of the Madras High Court reported in Kandaswami v. Province of Madras [1948] Mad. 283. That Court came to the same conclusion, as in Thyagarajan v. Government of Madras, that a writ did not lie against the Province of Madras. Although the proviso to Section 306 was cited before the Court, it was conceded by counsel for the petitioner that it had no application. It is difficult to understand why that proviso had no application. Dealing with the proviso, the learned Chief Justice says (p. 292):

The proviso to Sub-section (1) of Section 306 contemplates that the protection which is given enures to the Governor''s acts in relation to his Provincial

Government, since express reservation is made that nothing in the sub-section shall restrict the right of any person to bring against a province such proceedings as are mentioned in Chapter III of Part VII of the Constitution Act. There would be no need for such reservation if the protection given by the sub-section did not enure to the acts of a Governor in relation to his Provincial Government.

With respect, as I have already pointed out, the proviso to Section 306 is not a proviso in the ordinary sense of the term. It is enacted only for greater caution and it is a warning given to Courts not to restrict the right of the subject to sue the Provincial Government by reason of any immunity given to the Governor by Section 306, Sub-section (1). The learned Chief Justice has also not considered the effect of Section 176, and whether a writ could not have lain against the East India Co. and if so whether a writ could not equally well lie against the Provincial Government. Now turning to the Calcutta case in In re Banwarilal Roy (1944) 48 C.W.N. 766 A Mr. Amir Ali Ag. C.J. and Das J. held that the High Court had no jurisdiction to issue a writ of certiorari against the Province of Bengal. Mr. Justice Das delivered the leading judgment and he took the view that to accede to the application for issue of a writ of certiorari against the Government of Bengal would inevitably mean issuing process against the Governor, for he is at least a part of the Government of Bengal. This learned Judge also did not consider the effect of the proviso to Section 306. Further, he was considerably influenced by the fact that the Charter of the Supreme Court of Fort William of 1774 contained Clause 13 which set out the various proceedings which the Court at Calcutta was empowered to hear, and according to the learned Judge a writ of certiorari was not one of such proceedings, and according to him the High Court of Madras had the same jurisdiction that was conferred upon the Supreme Court at Fort William. But with respect the learned Judge did not attach sufficient importance to Clause 4 of that Charter which conferred upon that Supreme Court the same jurisdiction as the King''s Bench Division had in England. I would, therefore, with very great respect, not follow the Madras High Court and the Calcutta High Court in the view they have taken with regard to the jurisdiction of the High Court to issue a writ of certiorari against the respective Provincial Governments. The judgment of Coyajee J. in Lady Dinbai Petit Vs. M.S. Noronha, to the same effect must also be held to have not been correctly decided.

17. Coming now to the merits of the case, I am afraid there is very little that can be said in favour of Government. No attempt whatever was made by counsel for Government to establish before Mr. Justice Bhagwati that the premises in suit were requisitioned for any public purpose. As I have pointed out earlier, the jurisdiction of the Government to requisition any land is conditioned by the land being required for a public purpose. If Government requisitions land for a purpose which is not a public purpose, it would be acting in excess of its jurisdiction. All that the record shows is that Government wanted to deprive one refugee from Sind of the premises of which he was in possession in order to give them to another refugee. Now, the housing of refugees may certainly be a public purpose, but it cannot be said that if you choose one refugee as against another

without any ostensible cause, that by itself would constitute public purpose for which a land can be requisitioned. I do not quite agree with Mr. Justice Bhagwati when he suggests that if Government wishes to secure a house for an individual it would not necessarily constitute public purpose. The purpose for which land has to be requisitioned must involve some benefit to the community as a whole. But there may be cases where securing a house for an individual may itself confer a benefit upon the community. Each case, therefore, must be determined upon its own facts and circumstances. In this case I am satisfied that Government have not requisitioned the premises for any public purpose and therefore the requisition order made by them is in excess of their jurisdiction.

18. Mr. Justice Bhagwati has also taken the view that the order is bad because it was served on the two other assignees in whose favour along with the petitioner the assignment of the tenancy was made. Section 11 of the Ordinance provides that every order made u/s 3 shall be served, if it is an order affecting an individual person, on the person in the manner provided. Sub-section (2) provides that when a question arises where a person was duly informed of an order made under the Ordinance, compliance with the requirements of Sub-section (1) would be conclusive proof that he was so informed, but failure to comply with the said requirements shall not preclude proof by other means that he was so informed or affect the validity of the order. Therefore, it is clear that the validity of the order u/s 3 does not depend upon its service upon all1 the persons affected by that order. The most that could be said would be that a particular order would not be effective against any person unless it was served upon him. The order has been served upon the petitioner and therefore it is not competent to him to say that the order is not valid or is not enforceable as against him. With respect, therefore, I do not agree with Mr. Justice Bhagwati when he holds that the order was not in accordance with law because it was not served upon the other two assignees. Mr. Justice Bhagwati has also taken the view that the order was bad because it was not addressed to the petitioner and his co-assignees. With respect, I do not agree with that view. Section 3 of the Ordinance does not require that the requisitioning order should be addressed to any person.

19. The Advocate General has made a grievance of the fact that Mr. Justice Bhagwati, after he allowed the petitioner to amend the petition by bringing respondents Nos. 2 and 3 on the record, did not make the petitioner to pay all the costs of the petition up to the date of the amendment. The learned Judge only awarded Rs. 120 as costs to respondent No. 1. It is very rarely that the Court of Appeal interferes with an order of costs made by the trial Court which is purely discretionary, and in this case we see no special grounds why we should interfere with the order.

20. The result, therefore, will be that the judgment of the learned Judge will be affirmed as against appellant No. 2 and the appeal will be dismissed. With regard to appellants Nos. 1 and 3, the order of the learned Judge will be set aside and

the appeal allowed.

21. As regards the costs of the petition, the costs will be paid by the Province of Bombay and not by all the respondents, as directed by the learned trial Judge. As far as the costs of the appeal are concerned, the respondents have substantially succeeded and therefore the appellant must pay the costs of the appeal. Costs will be taxed on the basis of a long cause scale, with two counsel certified. Certificate u/s 205 of the Government of India Act to issue.

Tendolkar, J.

22. I have had the benefit of perusing the judgment of my Lord the Chief Justice with which I am in agreement. I shall not therefore restate the facts giving rise to this appeal, nor deal with the minor points involved in its decision, but will restrict my judgment to the main questions of law that arise for determination. They are: (1) Whether the act of requisition u/s 3 of the Bombay Land Requisition Ordinance, (Ordinance V of 1947) is a quasi-judicial act, and (2) whether a writ of certiorari lies against the Province.

23. The question as to what is a quasi-judicial act, as distinguished from a ministerial, administrative or executive act, has been the subject of numerous decisions both in Great Britain and in India; and I will attempt to review them in brief in an endeavour to extract a ratio-from them for the determination of this usually difficult and vexed question. The observations of May C.J. in The Queen v. Corporation of Dublin (1878) 2 L.R. Ir. 371 appear to me to be the foundation of many subsequent decisions. In that case the Dublin Corporation levied a borough rate as the borough fund was found to be insufficient for the legitimate purposes of the Corporation. This state of affairs had arisen by reason of illegal payments having been made out of the borough fund. It was held upon a writ of certiorari that the rate was illegal and that all orders and resolutions of the Corporation imposing it and the precepts to levy it should be quashed. May C.J. observed (p. 376):?

It is established that the writ of certiorari does not lit; to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term ''judicial'' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others.

24. These observations of May C.J. were approved, subject to the proviso, that the statute which confers the power does not indicate a contrary intention, by Palles C.B. in Reg. (Wexford Co. Council) v. Local Govt. Board [1902] L.R. 2 Ir. 349 where the Chief Baron stated (p. 373):?

...I have no hesitation in saying that I have always considered, and still consider, the principle of law to be as stated by the Chief Justice, assuming that there is nothing in the statute constituting the particular tribunal or investing it with the particular power which indicates a contrary intention. I have always thought that to erect a tribunal into a ''Court'' or ''jurisdiction,'' so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If. the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds,, although it is based on an erroneous view of the facts or law, then the power authorising it is judicial.

25. The observations of May C.J. were quoted by Lord Atkinson in Frome United Breweries Co. v. Bath Justices [1926] A.C. 586 as "one of the best definitions of a judicial act as distinguished from an administrative act". The dicta appear also to have been approved by Lord Greene M.R. in Rex v. Archbishop of Canterbury : Ex parte Morant [1944] 1 K.B. 282 where the Master of the Rolls observes as follows (p. 291):?

The second way in which the case was presented did not depend on the existence of a contest or lis. It was said: Here is a piece of legislation with statutory force which may deprive the owner of property, to wit, the patron,, of some of his rights, in respect of that property, and wherever a person or body of persons is given power to deprive a person of, or to affect, his rights, there is a statutory obligation, to act in a quasi-judicial manner with all the consequences which that implies. In support of that proposition a number of well-known authorities were cited relating to such matters as closing orders, clearance orders, and things of that kind, with the principles of which we are all very familiar, but, in my opinion, none of those authorities is of any assistance in this case. The question we have to decide is not some general or abstract question of principle, but the construction of a particular piece of legislation dealing with a very special subject-matter.

26. Leaving then the cases in which the dicta of May C.J. were specifically approved, we next have in order of date the case of Rex v. Woodhouse [1906] 2 K.B. 501 where Fletcher-Moulton L.J. observed as follows (p. 535):?

...the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed ''judicial acts.'' The true view of the limitation would seem to be that the term ''judicial act'' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

It seems to me that the word "right" is here used as synonymous with "duty", for obviously there can be no duty to decide without a right to do so. But I do not think that the learned Law Lord intended to lay down that if there was a right to decide, without a corresponding duty, the act was judicial. Many ministerial acts involve the exercise of a right to decide as opposed to a duty to decide.

27. The next case in order of date is Rex v. Electricity Commissioners: London Electricity Joint Committee Co. (1920), Ex parte [1924] 1 K.B. 171 where Lord Atkin L.J. formulated the test for determining what is a quasi-judicial act, as follows (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.

Here again we get the legal authority to determine coupled with a duty. The emphasis to my mind is on "the duty to act judicially."

28. The next case is Rex v. The London County Council, etc [1931] 2 K.B. 215. where Scrutton L.J. stated as follows (p. 233):?

There has been a great, deal of discussion and a large number of cases extending the meaning of ''Court.'' It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari;

The words "after hearing evidence" occurring in this passage do not to my mind mean anything more than "upon consideration of facts and circumstances" as May C.J. puts it, and do not necessarily involve the power to examine witnesses or to compel production of documents. As Lord Loreburn observed in Board of Education v. Rice [1911] A.C. 179 : "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." It is also material to note the emphasis on "the duty to decide between a proposal and an opposition." The words used are "has to" which clearly imply a duty. In the same case (Rex v. London County Council) Lord Slesser L.J. at p. 243 quotes with approval the dicta of Atkin L.J. in Rex v. The Electricity Commissioners, and proceeds to apply them to the facts of the case.

29. We next have the case of Cooper v. Wilson [1937] 2 K.B. 309 where Scott L.J. states as follows (p. 340):

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

This was an action for a declaration that the plaintiff who was an ex-sergeant in the police force had not been validly dismissed. The dismissal was challenged on the ground that the procedure followed was contrary to natural justice. In this connection Scott L.J. considered the distinction between a judicial and a quasi-judicial act, and not, be it noted, between a quasi-judicial and a ministerial act. The tests laid down were sufficient for the purposes of the case in which there admittedly were two parties and a fact to be determined; but I do not think that these observations were intended to formulate precise conditions which an act must satisfy before it can be dealt with by a writ of certiorari.

30. Lastly, we have the case of R. v. Boycott AIR [1939] 626. The facts of this case are material. Under the Mental Deficiency Act, 1913, it was one of the duties of the local education authority to make arrangements for ascertaining what children were "defective." The Act further provided that in case of doubt the matter should be determined by the Board of Education. A lad of eleven was examined by Dr, Boycott, the certifying medical officer, who made a report that the lad was an imbecile and not educable at a special school. On the same day a certificate was issued under the Act to the same effect under the signatures of Dr. Boycott and Dr. Hyslop Thomson, described as the School Medical Officer, who it was admitted had never seen the lad. A few days later, a clerk of the Education Committee addressed a letter to the clerk of the Mental Deficiency Act, forwarding a copy of the report and requesting further action thereon. The report, the certificate, and the letter were all sought to be quashed by a writ of certiorari at the instance of the lad''s father, who had the lad examined by his own doctor who held him not to be an imbecile, an opinion which was subsequently endorsed by a specialist. It was contended on behalf of the respondents that the three documents were exemplifications of administrative acts and not quasi-judicial acts. The contention was overruled. Hewart L.C.J.

accepted the tests of a quasi-judicial act laid down by Lord Atkin L.J. and proceeded to observe as follows (p. 631):?

In my opinion, on the facts of this case, this certificate of October 5, 1938, created in the way in which we know that it was created, purported to be and to look like the decision of a quasi-judicial authority, and I think that similar considerations apply to the two documents one also dated October 5, and the other dated October 10, which it is contended (and I think rightly contended) ought to be regarded as part and parcel of one and the same transaction. I think that these three documents do come within the range of the jurisdiction of this Court in certiorari.

It is to be noted that in this case there was no lis inter partes.

31. A review of these cases leads me to the conclusion that the observations of Palles C.B. in Reg. (Wexford County Council) v. Local Government Board lay down what I consider to be a fundamental principle which is not in any way modified by any subsequent decisions. That principle is that if the power to do an act imposing liability or affecting a right of any person is subject to a condition precedent which requires determination, as opposed to a condition which is capable of physical demonstration, the power to do that act must be judicially exercised, unless the statute conferring the power indicates a contrary intention. In determining whether there is a contrary intention the provisions of the statute have got to be carefully scrutinised. Where the power to do an act is not subject to a condition precedent, in order to constitute a judicial or quasi-judicial act there must be (1) the authority to impose a liability or affect the right of any person, (2) the existence of a contest or Us as exemplified by a proposal and an opposition, and (3) a duty to decide judicially upon consideration of facts and circumstances. The second of these conditions has sometimes been loosely expressed by saying that there must be two parties. The word "parties" is to my mind here used as meaning "sides" and not necessarily "juristic persons", for there are in the law reports several cases where writs have been issued in connection with licenses to run a wine shop, or a cinema, or closing orders, clearance orders and things of that kind in respect of which there are no two parties.

32. Coming next to Indian cases, in In re Banwarilal Roy (1944) 48 C.W.N. 766 Das J., after referring to English decisions and particularly to the observations of Atkin L.J., proceeds to observe as follows (p. 800):?

The real test appears to me to be the third condition which imposes on the authority the duty to ''act'' judicially. The duty of ''acting'' judicially or ''proceeding'' judicially implies, to my mind, something more than mere application of the mind by the authority on the materials before him. If he does not apply his mind at all or does the act "for a collateral purpose, it will be a bad act in all cases. If the doing of the act is left entirely to the discretion of the authority as a purely subjective matter as said in Liversidge''s case, or if the official act is ''discretionary and in some respects facultative'' as their Lordships of the Judicial Committee put it in Beasant?s case, it is purely an administrative or executive act. In such a case the authority alone has to form his own opinion, in good faith of course, on the materials before him. A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies "a proposal and an opposition" and a decision on the issue. It vaguely connotes "hearing evidence and opposition" as Scrutton L.J. expressed it. The degree of formality of the procedure as to receiving or hearing evidence may be more or less according to the requirements of the particular statute, but there is an undefinable yet an appreciable difference between the method of doing an administrative or executive act and a judicial or quasi-judicial act.

33. All these decisions were reviewed in an exhaustive judgment by my learned brother Bhagwati J. in Juggilal Kamlapat Vs. Collector of Bombay, . That was a case in which a flat had been requisitioned by the Provincial Government under Rule 75A of the Defence of India Rules. The learned Judge held that that was a quasi-judicial act. After pointing out that certain sub-rules of Rule 75A conferred upon the Provincial Government power to gather materials which would enable them to determine whether to requisition the premises or not, the learned Judge mainly relied upon what he described as the "mandatory provisions" of Section 15 of the Defence of India Act in order to hold that there was a duty to decide judicially. Section 15 of the Defence of India Act is in these terms:?

Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India.

To my mind this section merely embodies a fundamental and well-recognised principle of British jurisprudence; and with respect to the learned Judge it seems to me impossible to find in that principle a duty to decide judicially. The principle is quite consistent with the discharge of executive, administrative or ministerial functions. It may, however, be that the learned Judge in that case came to the right conclusion because it is quite possible to read Rule 75AC2) as conferring a power to requisition, which is subject to a condition precedent; and within the ratio which I have attempted to set out above, the act of requisition would be a quasi-judicial act. It is not necessary to decide it in the present case.

34. We next have a decision of Kania J. (as he then was) in Kaikhushru Sorabji Vs. Commissioner of Police, . In that case, an order passed under the Defence of India Rules requiring that a particular telephone connection be cut off was sought to be quashed by a writ of certiorari. Rule 17(i)(a), (ii)(a), which conferred the power on the requisite authority did not make the exercise of that power subject to any condition precedent. Reliance was placed on behalf of the petitioner on Section 15 of the Defence of India Act and upon the judgment of Bhawgati J. in

Juggilal Kamlapat v. Collector of Bombay. As the judgment was then the subject matter of an appeal to the Federal Court?which incidentally was subsequently abandoned?the learned Judge expressed no opinion on that judgment; but negatived the contention that a duty to act judicially was to be found in Section 15 of the Defence of India Act, for if it was, every act under the Defence of India Rules would necessarily be a quasi-judicial act. The learned Judge further observed as follows (p. 720):?

It appears to me that unless the authority invested with the power to pass an order had to act judicially, i.e., to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise. The two sides cannot include himself as he is the deciding authority.

This passage has been strongly relied upon by the Advocate General as laying down two propositions, viz., that in order to constitute a quasi-judicial act there must be (1) two parties and (2) the deciding authority cannot be one of; these parties. With great respect to the learned Judge, I do not think that when the learned Judge refers to "two sides" the learned Judge could have intended to mean two parties in the sense necessarily of two juristic persons. All that he could have meant was two sides, as exemplified by a proposal and an opposition. That to my mind appears clearly from a subsequent passage in the same judgment where the learned Judge says (p. 720):-

In the present case, in my opinion,, the act of the respondent in making the order is not quasi-judicial. He has not to consider a proposition and opposition. He has not to weigh different facts and/or law and decide whether the order should be made or not.

If that be the correct interpretation, I do not think that any question arises of the deciding authority being one of the parties. Again, with respect, assuming that the existence of two juristic persons was requisite, I do not see why the legislature cannot confer upon one of such parties the power to decide judicially as between himself and the other. When he exercises such powers he ceases to be a party and must act judicially.

35. Applying the ratio I have attempted to set out to the act of requisition under the Ordinance, the first section we have to construe is Section 3. It is in these terms :

If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by an order in writing requisition any land for any public purpose.

As I read this section, while the necessity or expediency of requisitioning is a matter for the opinion of the Provincial Government, the existence of a public purpose is a condition precedent to the exercise of the power to requisition. The words "to do so" refer to the nature of the act, viz. "to requisition", and not to the purpose for which the act is done. If it were not intended that a public purpose should exist before the power to requisition can be exercised, the words "for any public purpose" would be redundant, or in any event the words would have been, as they now are, in Section 5 of the Bombay Land Requisition Act, 1948, "for any purpose." Whether a public purpose exists is a matter to be determined and not a fact of mere physical observation, for quite obviously the existence or otherwise of a public purpose is a mixed question of fact and law. The act of requisition is, therefore, a quasi-judicial act, unless the Ordinance indicates an intention to the contrary. Apart from the words of Section 3 the Advocate-General has not relied on any other provisions of the Ordinance as indicating a contrary intention. On the other hand, provisions of Sections 10 and 12 have been relied upon by Sir Jamshedji Kanga as indicating that the intention was that it should be a quasi-judicial act. I am not persuaded that it is so. Section 10(1) of the Ordinance provides that the Provincial Government "may" obtain certain informati6n "with a view to carrying out the purposes of the Ordinance." Sir Jamshedji contends that the word "may" in this section should be understood as meaning "must" and it casts an obligation on the Provincial Government to hold an enquiry. Maxwell in his Interpretation of Statutes (9th Ed.), p. 246, considers when "may" means "must" :?

Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may" or "shall", if they think fit, or, "shall have power," or that "it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have?to say the least?a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases, the authorised person is invested with a discretion, and then those expressions seem divested of that compulsory force, and probably that is the prima facie meaning.

Therefore, "may" will mean "must" only if the Provincial Government is not invested with a discretion. That is really begging the whole question.

36. Section 12 confers upon the Provincial Government authority to empower any person to enter upon and into premises for certain purposes. In my opinion the provisions of both these sections are by themselves quite consistent with the performance of an executive as well as a quasi-judicial act, and the Ordinance contains no indication that the act of requisitioning u/s 3 shall be a purely ministerial act. I therefore hold that the act of requisitioning u/s 3 of the Ordinance is a quasi-judicial Act and can be questioned by a writ of certiorari.

37. Regarding the second question of law involved in this appeal the argument that no writ of certiorari or prohibition lies against the Provincial Government has been advanced by the Advocate General under three heads: (1) Any act of the Provincial Government is an act of State being the act of a sovereign and cannot be questioned in the sovereign''s own Courts. (2) High Courts never had

jurisdiction to entertain a writ against the Provincial Government, and (3) there is immunity conferred by law on the Governor and therefore on the Provincial Government.

38. Dealing with the first ground, such a plea was, so far as I am aware, raised for the first time in 1859 in the case of The Secretary of State for India v. Kamachee Boye Saheba (1859) 7 M.I.A. 476 In that case upon the death without issue of the Raja of Tanjore, who was a sovereign in treaty relations with the East India Company, the directors of the Company declared the raj to have lapsed to the British Government; and with the concurrence of the Central Government the Government of Madras appointed one Mr. Forbes Special Commissioner for the purpose of dealing with the questions arising out of the extinction of the raj. Mr. Forbes took possession of both the public and the private property of the Raja and proceeded to prepare lists of the properties with a view to selling the same. The widow of the Raja filed a bill in the Supreme Court of Madras against the East India Company and the Court granted an injunction restraining Mr. Forbes from proceeding with the sale. The East India Company insisted that the seizing of the property was an act of State and that the Supreme Court could not inquire into it. Lord Kingsdown delivering the judgment of their Lordships of the Privy Council quoted with approval the observations of Tindal C.J. in Gibson v. East India Company (1839) 5 Bing. N.C. 262 which are as follows (p. 273):?

It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the affairs of India) power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India.

and proceeded to observe (p. 531):

That acts done in the execution of these Sovereign powers were not subject to the control of the Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of The Nabob of Arcot v. The East India Company, in the Court of Chancery, in the year 1793; and The East India Co. x. Sued Ally (1827) 7 M.I.A. 555 before the Privy Council in 1827.

39. His Lordship further stated (p. 531):?

The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

40. These observations of their Lordships lay down the true test as to what, acts of a Sovereign cannot be questioned in his Courts. They are Acts of State strictly so called?"acts not affecting to justify themselves on grounds of municipal law,"? but where the act is done under colour of legal title, it may be questioned in the Municipal Courts.

41. We next have in 1861 a ''judgment of the Supreme Court at Calcutta in P. & O.S.N. Co. v. Secretary of State for India (1861) 5 B.H.C.R. 1. This was a suit against the Secretary of State for damages caused by the negligence of the servants of Government. Sir Barnes Peacock C.J. held that such a suit was competent. At p. 9 the learned Chief Justice observed as follows:?

In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of The Bank of Bengal v The United Company (Bignell, Rep., p. 120), which was cited in the argument, that the fact of the Company''s having been invested with powers usually called sovereign powers did not constitute them sovereigns.

There are, however, certain passages in the Judgment which have given rise to a good deal of misapprehension and on which many subsequent decisions of the Indian Courts have been based, e.g. the learned Chief Justice observed at p. 13 as follows:?

There is a great and clear distinction between acts done in the exercise of what arc-usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

Then at p. 14 it is observed as follows:?

But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.

These passages have been understood to mean that while the East India Company could be sued in respect of its commercial dealings, it could not be sued in respect of any acts done by it in discharge of rights of sovereignty delegated to them. While the former proposition is indisputable, the latter is only partially true. In respect of Acts of State strictly so called the Company is no doubt not liable; but the immunity does not extend to acts done under colour of legal title, although they may be acts in discharge of governmental functions in exercise of the rights of sovereignty delegated to the Company. This fact has been overlooked in interpreting these passages in the judgment; and in my opinion no useful purpose will be served by referring to several decisions of the

Indian Courts in which this has been done.

42. In Forester v. Secretary of State for India in Council 1871 72 L.R.IndAp 10 the facts were that upon the death of Begum Sumroo, a jaidadar under the Scindia, Government resumed her lands. The resumption was challenged by one Dyce Sombre, who claimed under the Begum''s will. Dealing with the defence that the act of resumption was an act of State Lord Hatherley L.C. quoted with approval the observations of Lord Kingsdown, and proceeded to observe as follows (p. 17):?

The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would prima facie be cognizable by the municipal Courts of India.

43. We next have a decision of this Court in Jehangir v. Secretary of State for India (1903) 6 Bom. L.R. 131 This was a suit by a dismissed servant of the Government for damages for defamatory language used in the resolution of dismissal. Batty and Jacob JJ. agreed that the suit was maintainable, but differed as to the liability of the Secretary of State for tortious acts of his servants. The matter was referred to Chandavarkar, J. who held that the Secretary of State was not so liable; but the learned Judge expressed no opinion as to the maintainability of the suit. Batty, J. stated (p. 139):

For it appeared to my learned colleague as well as to myself, that though the appointment or dismissal of a certain class of officers is among the functions of a Government, and is not exercisable by private individuals as such, it is a power which is exercisable only in pursuance of an authority conferred and regulated by Municipal law and deriving its justification therefrom, and subject to limitations thereby imposed. It is a power not infrequently conferred on some personae designatae by the Legislature. No doubt if the donee of the power acts within the powers conferred or is vested with final and exclusive discretion, the Courts cannot interfere with the exercise of that power or substitute its own discretion for that of the authority so empowered. Yet the power is none the less one which must be exercised in conformity with the law and subject to all conditions and limitations which may have been imposed by the law, and if those conditions be not fulfilled or if those limitations be exceeded, the jurisdiction of the Courts is not ousted.

At p. 140 the learned Judge observed as follows:

An Act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrible by law, but which must rest for its jurisdiction on considerations of external politics and interestatal duties and rights.

44. The same view was taken by the Madras High Court in the The Secretary of State for India v. Hari Bhanji ILR (1882) Mad. 273 This case related to the levy of a duty under a Tariff Act which was questioned. It was contended on behalf of the Secretary of State that the levy was an act of State, but that contention was negatived. Turner C.J. observed as follows (p. 279):

Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which arc regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify themselves by any canon of municipal law....

Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be the acts of state of which municipal courts are not authorised to take cognizance.

Lastly, we have a comparatively recent decision of their Lordships of the Privy Council in Eshugbayi Eleko v. Government of Nigeria (Officer Administering [1931] A.C. 662 The Governor of Nigeria, purporting to act under the Deposed Chiefs Removal Ordinance, ordered the deposed chief to leave a specified area. As the order was not obeyed, the Governor made an order of deportation under which the chief was arrested. The chief obtained a rule nisi for a writ of habeas corpus, and one of the pleas of the Governor of Nigeria was that it was an Act of State and it could not be questioned in a municipal Court. Dealing with this aspect of the case Lord Atkin L.J. observed as follows (p. 671):?

A suggestion was made by one of the learned judges that the order in this case was an act of state. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not, owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.

A review of these authorities makes it plain that the acts of the Provincial Government which are purported to be done under the provisions of any municipal law are liable to be questioned in municipal Courts. In the present case the act of requisition is such an act and is therefore liable to be questioned in

Court.

45. I next turn to the second branch of the argument, viz. that this Court never had jurisdiction to issue writs against the Provincial Government. By the Indian Independence Act, 1947, two independent dominions were set up in India as from August 15, 1947, viz. India and Pakistan. Section 223 of the Government of India Act, 1935, which deals with the jurisdiction of the High Courts was amended so as to provide inter alia that the jurisdiction of any existing High Court "shall be the same as immediately before the establishment of the dominion." That jurisdiction was to be found in Section 223 as it stood before the amendment, which provides that the jurisdiction "shall be the same as immediately before the commencement of Part III of this Act." Part III was brought into force from April 1, 1937, by the Government of India (Commencement etc.) Order, 1936. Jurisdiction before that date was to be found in Section 106(1) of the Government of India Act, 1915, which inter alia provides that the High Courts shall have "all such jurisdiction, powers and authority as are vested in these Courts respectively at the commencement of this Act." Those were to be found in Section 9 of the High Courts Act, 1861, (24 & 25 Vic. c. 104). That section provided that the High Court shall have such jurisdiction as Her Majesty may by a Letters Patent grant and subject to these and to the legislative powers of the Governor-General of India in Council "the High Court to be established in each presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of the abolition of such last mentioned Courts." The Courts abolished were of course the Supreme Courts. The Letters Patent of 1862 constituting the Bombay High Court, which was revoked by the Letters Patent of 1865, left the jurisdiction of the High Court which it inherited from the Supreme Court unaltered. The Supreme Court was established under the Letters Patent of 1823, which itself was issued under the authority conferred by 4 Geo. IV, c. 71. Clause VII of the said Act says that it shall be lawful for His Majesty to establish a Supreme Court at Bombay

To be invested with such powers and Authorities, Privileges and Immunities, for the better Administration of the same, and subject to the same Limitations, Restrictions and Control, within the said Town and Island of Bombay, and the Limits thereof, and the Territories subordinate thereto, and within the Territories which now are or hereafter may be subject to or dependent upon the said Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereon.

Under Clause V of the Letters Patent the Supreme Court was

To have such jurisdiction and authority as our justices of our Courts of King''s Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit.

Tapping in his Law and Practice of High Prerogative Writs and Mandamus at p. 122 states that the writ lay against the Board of Directors of the East India Company and this is supported by two cases there relied upon, viz. The King v. Directors of East India Co. (1833) 4 B. & Ad. 530 and The King v. Directors of East India Co. (1815) 4 M. & Sec 279 After the governance of India was taken over from the Company by the Crown in 1858 by 21 & 22 Vic. c. 106, Section 65 of the Act provided that the Secretary of State for India can sue and be sued in respect of debts, liabilities, etc. for which the East India Company could have been sued. The word "sued" in this context means, as I shall point out later, "be proceeded against according to law." This liability of the Secretary of State to sue or be sued was subsequently embodied in Section 32 of the Government of India Act, 1915, and Sub-sections (1) and (2) thereof are as; follows:?

32. (1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.

The Provincial Government is only a successor to the Secretary of State in Council in the provincial sphere and therefore the Court had and has jurisdiction to issue writs against it unless immunity has been legally conferred upon it.

46. That brings me to the last branch of the argument which rests upon the immunity from legal process conferred upon the Governor by Section 306(1) of the Government of India Act, 1935. The relevant part of that section is,

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, whether in a personal capacity or otherwise.

The question for decision is what is the true meaning of the words "in a personal capacity or otherwise." To my mind "personal capacity" means private capacity as an individual, and "otherwise" means public capacity but again as an individual. That the immunity is conferred on the individual is borne out by the later part of this sub-section, which I have not set out above, which confers immunity on persons who have been Governors etc. in the past. No proceedings will lie against them except with the sanction of the Governor-General.

47. The contention of the Advocate General is that the Governor is the Provincial Government, or, at any rate, the Governor is included in the Provincial Government; and, therefore, the protection given by this sub-section extends to the Provincial Government. It is true that u/s 49 of the Government of India Act, the executive authority of the Province is exercised on behalf of His Majesty by the Governor; but it is a mistake to suppose that he alone constitutes the "Provincial Government." Section 20 requires that there shall be a council of ministers, the requirement being obligatory, to aid and advise the Governor in

the exercise of his functions. The provisions contained in that section relating to the Governor''s power to act in his discretion or in his individual judgment were deleted with effect from the date on which the Indian Independence Act came into force, with the result that the Governor has now to act on the advice of his ministers, the real power resting with the ministers and not with the Governor. The Provincial Government, therefore, is the Governor acting on the advice of his ministers. It is the Governor as an individual, whether in his private capacity or his public capacity, who is protected u/s 306(1) and not the Provincial Government.

48. Strong support to this interpretation of Section 306(1) is to be found in the language employed in the proviso to the section. That proviso, is :

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Dominion, or a Province, such proceedings as are mentioned in Chapter III of Part VII of this Act.

Ordinarily the function of a proviso is to save something from the operation of the substantive section. If proceedings against the Dominion or a Province were covered by the section, the proviso would have stated that nothing in the section "shall restrict" the right of any person to bring proceedings against the Dominion or a Province etc. and not "shall be construed as restricting". The choice of the latter phraseology by the Legislature indicates that the Legislature did not consider that the Dominion or the Provinces were included in the immunity conferred by the sub-section; but it provided against the possibility of such a construction being put upon the sub-section by any one. In other words, the proviso does not serve the normal purpose which a proviso is intended to serve, but it is inserted ex majori cautela.

49. A subsidiary contention of the Advocate General has been that the act of requisition u/s 3 of the Ordinance is the act of the Governor, for the words "Provincial Government" in that section mean the Provincial Governor by virtue of Clause (a) of Sub-section (43a) of the General Clauses Act 1897, as amended by the India (Adaptation of Indian Laws) Order, 1947. This argument cannot help the Advocate General, because if the immunity is to the Governor in his individual capacity private or public, it cannot extend to the acts of the Provincial Government.

50. Assuming, however, that the construction I have put upon Section 306(1,) is erroneous and that the Dominion and the Province is included in the protection given by that sub-section, the next question to consider is whether a writ of certiorari falls within the proviso which would then be a real proviso in respect of the immunity conferred by Sub-section (1). The proviso preserves the right to bring against the dominion or the Province such proceedings as are mentioned in Chapter III of Part VII. That Chapter is headed "Property, Contracts, Liabilities and Suits" and the relevant section is Section 176, Sub-section (1), which is as follows:?

The Dominion may sue or be sued by the name of the Dominion of India and a Provincial Government?1 may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Dominion Legislature or a Provincial Legislature enacted by virtue of powers conferred on the Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued'' if this Act had not been passed.

I read the section as being in two parts. The first part provides for the names in which the Dominion and the Provincial Governments may sue or be sued and constitutes the Dominion of India and the Provinces juristic persons for that purpose. The latter part provides the extent to which they can sue or be sued and that is the same extent to which the Secretary of State in Council might have sued or been sued prior to the Act.

51. The first contention of the Advocate General with regard to this section is that the word "sue" must be restricted to suits instituted by filing plaints, and does not include any other legal process. That argument to my mind is untenable. Wharton in his Law Lexicon gives the meaning of "sue" to be "prosecute by law; to claim a civil right by means of legal procedure." In Vejeram v. Purshottumdas (1904) 7 BOM.L.R. 138 [Tyabji J. interpreted the word "sue" appearing in Section 43 of the Civil Procedure Code. The learned Judge stated (p. 141):

Now the dictionaries tell us that to sue means to make a legal claim or to take legal proceedings against any person. It does not necessarily mean to file a suit by means of a plaint such as is referred to in the Civil Procedure Code. Taking any legal proceedings in matters of any kind would be to sue.

I have therefore no hesitation in holding that the word "sue" in Section 176 has the same wide meaning and includes a petition for writs.

52. The second argument of the Advocate General is that in any event no writs lay against the Secretary of State in Council. As I have pointed out earlier while dealing with the argument on the jurisdiction of this Court to issue such writ, the Court had such jurisdiction unless immunity from jurisdiction was to be found in some enactment. It would be useful to trace the history of immunity from process of Court in India. In 1781 as a result of dissentions between the Judges of the Supreme Court and the Governor-General and the Council of Bengal, the East India Company Act (21 Geo. Ill, c. 70) was passed. Section 1 enacted that the Governor-General and the Council of Bengal shall not be subject to the jurisdiction of the Supreme Court "for or by reason of any act or order or any other matter or thing whatsoever counselled, ordered, or done by them in their public capacity only acting as Governor-General and Council." Section 2 conferred similar immunity on all persons for acts done by order of the Governor. Section 3 contained a proviso which is in these terms :

Provided always, that with respect to such order or orders of the said Governor General and council as do or shall extend to any British subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if this Act had never been made.

Section 4 provides that despite such immunity proceedings would lie in the King''s Bench Division of England. The Charter Act of 1823 4 Geo. V 71 Section VII, which authorised the establishment of the Supreme Court at Bombay by a Letters Patent contained the following proviso :?

Provided always, that the Governor and Council at Bombay, and the Governor General at Fort William aforesaid, shall enjoy the same Exemption and no other, from the Authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor General and Council at Fort William aforesaid for the time being, from the jurisdiction of the Supreme Court of Judicature there already by law established.

The Letters Patent of 1823 conferred upon the Governor freedom from arrest and imprisonment and also enacted that the Governor and any of the Council shall not be subject to the jurisdiction of the Court, but the proviso contained in Section 3 of the Act of 1781 was not repeated. However, since the Letters Patent was issued under the authority of the Charter Act of 1823 which clearly provided that the Governor and Council shall enjoy "the same exemption and no other" as enjoyed by the Governor-General and Council of Bengal from the jurisdiction of the Supreme Court of Bengal the proviso contained in Section 3 of the Act of 1781 continued to have full force. This immunity was preserved throughout the Government of India Acts and was found in Section 110 of the Act of 1915, prior to the Act of 1935.

53. It is not necessary to consider precisely the extent of this immunity, for, in my opinion, the immunity was conferred throughout on the Governor-General and Council and not on the East India Company, who was subject to the jurisdiction of the Courts up to 1858. After 1858 although the immunity continued, the Secretary of State could sue and be sued in place and stead of the East India Company. There is to my mind no warrant for the proposition that the Secretary of State was immune from the jurisdiction of the High Court to issue writs. This contention of the Advocate General must also therefore fail.

54. The Advocate General has strongly relied on certain decisions of the Madras High Court and a decision of the Calcutta High Court in which it has been held that a writ of certiorari does not lie against a province. The respect in which we hold our sister High Courts had led me carefully to consider those judgments and I will proceed to state shortly my reasons for coming to a contrary conclusion.

55. The case of Venkataratnam v. Secretary of State for India ILR (1929) Mad. 979 was decided under the Government of India Act, 1915. This was a petition for the issue of a writ of certiorari to the Honourable the Minister of Public Health. (See judgment of Madhavan Nair J. at p. 1001). It was held that no writ

lay. Venkatasubba Rao J. based his judgment on two grounds: (1) that u/s 106(1) of the Government of Act, 1915, there was no jurisdiction to issue a writ against the Governor of Madras and equally none against the Governor acting with the Ministers, and (2) that the exemption contained in Section 110 of the Government of India Act, 1915, applied to the Governor acting with the Ministers. Now Section 110 in terms included the ministers within the scope of the immunity, and if I may say so with respect, the decision was no doubt right on that ground alone. But the learned Judge at p. 996 after referring to the provisions of the Statute of 1780 observed as follows:

The Governor is thus individually not amenable for acts done in his official capacity. As granting the writ against ''the Governor acting with Ministers'' involves the exercise of jurisdiction, against the Governor himself, it follows, that we must even as against that body, refuse to issue certiorari.

While the former proposition is unexceptional, with respect, I am unable to agree with the latter. The learned Judge himself in a later passage in the judgment states (p. 1000):?

Reading the section strictly, the Governor is exempted, so are the Members and the Ministers. But this exemption does not extend to ''the Governor in Council'' or the ''Governor acting with Ministers.

With that statement I am in entire agreement, but I respectfully disagree when the learned Judge proceeds to observe (p. 1000):

We must construe the section reasonably. If each of these individuals enjoy immunity in respect of his public acts, it stands to reason that they should likewise be exempt when acting jointly.

In my opinion, a statute ousting the jurisdiction of the Superior Courts must be strictly construed. I may further point out that there was no proviso to Section 110 of the Act of 1915 corresponding to the proviso to Section 306(1) of the Act of 1935.

56. We next have the case of Thyagarajan v. Government of Madras [1940] Mad. 204 It was decided under the Government of India Act, 1935. Here the petition was for a writ of certiorari against the Provincial Government and on that ground the case of Venkataratnam v. Secretary of State for India was sought to be distinguished in argument. At page 207 Leach C.J. held that no writ lay. He stated that:?

The position under the Government of India Act, 1935, is not here different from the position under the Government of India Act, 1915....

With respect this ignores altogther the proviso to Section 306(1) which was not considered at all in this case. The learned Chief Justice then proceeded to observe (p. 209):?

Section 59 requires all executive action of the Government of a Province to be taken in the name of the Governor and the order in question, being an executive order lawfully passed and lawfully issued in the name of the Governor and therefore his order, the Court has no power to interfere with it.

With these observations again I must express my respectful disagreement. Section 59 to my mind merely provides that all executive acts "shall be expressed to be taken in the name of the Governor." It does not make them the acts of the Governor.

57. The latest decision of the Madras High Court is that of Kandaswami v. Province of Madras [1948] Mad. 283 in which the same view was taken as in the case last cited. It appears from the judgment of the learned Chief Justice at p. 292 that it was not even suggested in argument that the proviso to Section 306(1) had to be considered before deciding the matter.

58. There is a decision of the Calcutta High Court in In re Banwarilal Roy (1944) 48 C.W.N. 766 in which that High Court took the same view as the Madras High Court. Das J. delivered an exhaustive and learned judgment in the course of which after dealing with the history of the jurisdiction of the High Court at p. 806 he observed as follows:?

This takes us further back to the Regulating Act, the Charter of 1774 and the Act of Settlement, under which only such suit or action could be brought against the United Company as were mentioned in Clause 13 of that Charter. There is no suggestion that except in such suit or action the Supreme Court had any other jurisdiction powers or authority over the Company as such or could issue any prerogative writ against the Company as such.

With respect to the learned Judge he appears to have overlooked Clause 5 of the Charter which conferred upon the Supreme Court the same jurisdiction as "our justices of our Courts of King''s Bench have and may lawfully exercise" in England. This led the learned Judge to hold that Section 176(1) of the Government of India Act, 1935, does not apply to writs, an opinion with which I must express my respectful dissent. Dealing with Section 306(1) of the Government of India Act, 1935, the learned Judge stated on the same page:?

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. It is illogical to hold that although this Court has no jurisdiction whatever over the Governor by himself, this Court has jurisdiction over him when he is associated with his Ministers.

In expressing this opinion the learned Judge quoted with approval the decision in Venkatratnam v. Secretary of State for India. For reasons already set out I am unable to share this view, as I am firmly of the opinion that any provision ousting the jurisdiction of Superior Courts must be strictly construed.

59. Lastly, there is a judgment of my learned brother Coyajee J. in Lady Dinbai Petit Vs. M.S. Noronha, . The learned Judge there followed the decisions of the

Madras and Calcutta High Courts and it appears from the report that no arguments were placed before the learned Judge regarding the proviso to Section 306(1) of the Government of India Act, 1935. The case went to the Appeal Court and is reported in 48 Bom. L.R. 255 A Division Bench consisting of Kania and Chagla JJ. (as they then were) held that the Province was not a party to the proceedings and the question as to whether a writ lies against a Province did not arise for determination; but both the learned Judges stated that they should not be understood to be in agreement with the reasoning of the learned trial Judge on the interpretation of Section 306(1), (See pages 264 and 270 of the report).

60. I have, therefore, come to the conclusion that a writ of certiorari lies against a Province and I agree with the order proposed by my Lord the Chief Justice for the disposal of this appeal.

