

(1947) 01 BOM CK 0001

In the Bombay High Court

Case No : O.C.J. Miscellaneous No. 162 of 1946

Shripad Amrit Dange

APPELLANT

Vs

Sir Harsiddhbhai V. Divatia

RESPONDENT

Date of Decision : 09-01-1947

Acts Referred:

Government of India Act, 1915 — Section 59(1)
Specific Relief Act, 1877 — Section 45

Citation : AIR 1948 Bom 20 : (1947) 49 BOMLR 468

Hon'ble Judges : Bhagwati, J

Bench : Single Bench

Judgement

Bhagwati, J.—At an election held in 1946 for the seat allotted to the Bombay City and Suburban Textile Unions Constituency in the Bombay Legislative Assembly, the petitioner was declared elected a member of the Bombay Legislative Assembly. Respondent No. 4 was one of the contesting candidates and he preferred an election petition on June 12, 1946, to His Excellency the Governor of Bombay praying inter alia that His Excellency the Governor be pleased to appoint Commissioners for the trial of the petition, for a declaration that the election of the petitioner was void and for a declaration that he the respondent No. 4 had been duly elected a member of the Bombay Legislative Assembly for the constituency. On receipt of the election petition a notification was issued from the Legal Department of the Government of Bombay, which after reciting that the election of the petitioner had been called in question by an election petition duly presented under Rule 110 of the Bombay Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936, proceeded to state:

Now, therefore, the Government of Bombay in pursuance of the provisions of paragraph 4 of Part III of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, is hereby pleased to appoint "the respondents Nos. 1, 2 and 3" as Commissioners for the trial of the said petition...In pursuance of Rule 116 of the Bombay Legislative Assembly Electoral (Elections & Election Petitions) Rules, 1936, the Government of Bombay is

pleased to appoint Bombay as the place where the inquiry into the said petition shall be held.

This notification was signed "By order of the Governor of Bombay, P.N. Moos, Secretary." The first respondent as the President of the Commission addressed to the petitioner and others on July 20, 1946, a notice calling upon the petitioner to file his written statement on or before August 6, 1946. A preliminary hearing of the election petition took place on August 21, 1946, when the advocate for the petitioner raised several preliminary objections to the hearing of the petition. Respondents Nos. 1, 2 and 3, however, on September 18, 1946, communicated to the petitioner their judgment dated September 12, 1946, overruling the said objections and directing that the petition be taken up for further hearing.

2. The petitioner thereupon filed this petition on September 28, 1946, contending that respondents Nos. 1, 2 and 3 had no authority or jurisdiction to entertain or hear the election petition inasmuch as there was no order or notification about their appointment by His Excellency the Governor exercising his individual judgment and that the notification under which respondents Nos. 1, 2 and 3 purported to act was not an appointment in accordance with Part III, paragraph 4, of the Order in Council of 1936. There was another ground also mentioned in the petition as to why respondents Nos. 1, 2 and 3 had no jurisdiction to proceed with the election petition, but the same was not pressed before me and I shall therefore not refer to the same. The petitioner under the circumstances submitted and prayed that this Court should issue a writ of certiorari and a writ of prohibition or in the alternative an order u/s 45 of the Specific Relief Act against respondents Nos. 1, 2 and 3.

3. The petition was submitted before me on September 28, 1946, when I accepted the same and issued a rule inter alia against respondents Nos. 1, 2 and 3 in terms of prayers (a) (b) and (c) of the petition. An affidavit was filed by the petitioner in support of his petition which did not carry the matters any further. It confirmed the statements contained in his petition, I refused to grant any interim order for stay of proceedings before respondents Nos. 1, 2 and 3. Respondents Nos. 1, 2 and 3, however, out of courtesy to the Court refused to proceed with the election petition pending the disposal of the rule which I had granted, and the petitioner was therefore relieved from the necessity of proceeding with the election petition pending the disposal of the rule.

4. In reply to the petition Krishnarao Ramrao Wazkar, the Secretary, Industrial Court, Bombay, made an affidavit on November 4, 1946. I do not know in what capacity Wazkar could file this affidavit, or could swear to anything on behalf of respondents Nos. 1, 2 and 3. Respondents Nos. 1, 2 and 3 were merely appointed Commissioners by the Government of Bombay to entertain the election petition filed by respondent No. 4. The notification had not appointed Wazkar as Secretary or any responsible officer of the Commission. He was merely the Secretary of the Industrial Court, Bombay, and the Industrial Court, Bombay, had nothing whatever to do with the Commission which was appointed

by the notification. Strictly speaking I would be entitled to brush aside this affidavit of Wazkar. No objection was, however, taken in this behalf by counsel for the petitioner. The only thing which was pointed out in the course of the arguments in connection with this was that the Commission appointed by the Government of Bombay, was not a Court and that this Court should, not merely because Wazkar had described himself as Secretary, Industrial Court, Bombay, treat the Commission as having anything to do with the Industrial Court, Bombay, or treat the Commission as a Court. I shall deal with this part of the argument while dealing with one of the preliminary objections which were urged against this petition, but will not rule out the affidavit of Wazkar altogether. I may, however, say that the affidavit of Wazkar does not carry the matter any further so far as respondents Nos. 1, 2 and 3 are concerned. It states that the present application is misconceived and that the petitioner is not entitled to the order he seeks to obtain in these proceedings. It also states that the petitioner has made out no case for the issue of a writ of prohibition and/or a writ of certiorari and/or an order u/s 45 of the Specific Relief Act. The rest of the contents of this affidavit are of no materiality whatever. None of the other respondents made any affidavit whatever in these proceedings.

5. When the rule reached hearing before me, a number of preliminary objections were sought to be raised by counsel for respondents Nos. 1, 2 and 3 and respondent No. 4. When I pointed out to them that none of these objections had been taken by them on any affidavit on the record before me, counsel for respondents Nos. 1, 2 and 3 submitted that all the objections which he was taking were covered within the general submission which was made in paragraph 2 of the affidavit of Wazkar, viz, "The present application is misconceived." Counsel for respondent No. 4 submitted that it was not necessary for his client to make any affidavit, that affidavits could only be made as regards facts and not contentions or submissions and that therefore the fact that no affidavit was filed on behalf of his client was not such as to prevent him from urging these preliminary objections. Even though this might serve respondent No. 4 as an excuse of a sort, no such excuse was available to respondents Nos. 1, 2 and 8, who in fact had produced before the Court the affidavit of Wazkar. I pointed out to counsel for respondents Nos. 1, 2 and 3 that if his clients made an affidavit or produced an affidavit of somebody on their behalf, it was incumbent on them to give particulars of their contention and submission that the application was misconceived. I strongly deprecate the practice of merely stating in an affidavit or pleading that; the suit or the application is misconceived without saying anything more. The plaintiff or the applicant is entitled to particulars from the defendant or the respondent as to why it is contended that the suit or the application is misconceived. No doubt in his pleadings or affidavit a party is not bound to disclose his evidence, but he is certainly bound to give sufficient particulars of his contentions when in the absence of such particulars the other side would either be taken by surprise or be embarrassed in the conduct of the proceedings. It would not do merely to say that the suit or the application was

misconceived. The party contending that must specify or particularise why he contends that the suit or the application is misconceived. If there are any facts which he relies upon for that purpose, those facts should be stated in his pleading or affidavit. If it is merely the position in law which he relies upon, he must set out with sufficient particulars the position in law on which he bases his ultimate submission that the suit or application is misconceived. On my pointing out to counsel for respondents Nos. 1, 2 and 3 this particular position, he applied for an amendment of the affidavit of Wazkar by pleading:

I respectfully submit that the order appointing the Election Tribunal cannot be challenged in this Honourable Court by reason of the provisions of the Government of India Act 1935. I further submit that this Honourable Court has no jurisdiction to direct the issue of a writ of certiorari or a writ of prohibition or to grant an order u/s 45 of the Specific Relief Act as the Tribunal is not a Court of inferior jurisdiction.

Counsel for respondent No. 4 had no obstacle in the way of any affidavit in his path. When asked by the Court to formulate his points of opposition, he handed in to the Court what he called "issues" wherein he raised various points, those which are important for the purpose of this judgment being:

1. The petition is not maintainable for non-joinder of v. S. Gaikwad a respondent to the Election Petition;
2. This Court has no jurisdiction to issue a writ of certiorari or of prohibition against the Election. Tribunal as it is not an inferior Court; and
3. This Court has no jurisdiction to inquire into the validity of order appointing the Tribunal.

He also put in issue the question as to the Commission having been validly appointed and having jurisdiction to hear the election petition. The last contention was, however, on the merits of the petition itself.

6. At the first hearing before me counsel for the petitioner was not in a position to prove the service of the petition and the rule on respondent No. 8, viz. Vithal Shripat Gaikwad. He therefore applied to me that the name of Gaikwad should be struck off from the record and I granted that application of his. Immediately on that being done, counsel for respondent No. 4 urged his preliminary objection that the petition was not maintainable for non-joinder of Gaikwad as a respondent to this petition. He contended that Gaikwad was a party to the election petition and that he was therefore a necessary party to this petition also. He referred in support of this contention of his to Rule 112 of the Bombay Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936 (which I will hereafter refer to as the Electoral Rules, 1936,) which says:

The petitioner may, if he so desires, in addition to calling in question the election of the returned candidate, claim a declaration that he himself has been duly elected, in which case he shall join as respondents to his petition all other

candidates who were nominated at the election.

He stated that his client respondent No. 4 having claimed in the election petition for a declaration that he himself had been duly elected, he had joined Gaikwad who was one of the candidates nominated at the election as a party to that election petition of his. He urged that in so far as the petitioner herein had made the other candidates who were nominated at the election and who had been made parties to the election petition party respondents herein, the petitioner was bound to join Gaikwad also as a party respondent to this petition of his and that this petition must fail in so far as Gaikwad who was thus according to him a necessary party to this petition was not made a party respondent in this petition.

7. Counsel for the petitioner, however, pointed out that the petitioner herein had no concern at all with the other candidates who were nominated at the election and who had been made party respondents to the election petition, that no rights of Gaikwad were sought to be affected by this petition of the petitioner, and that not only was Gaikwad not a necessary party to this petition but the other respondents who were candidates nominated at the election were also not necessary parties to this petition. He submitted that merely because for sake of greater caution he had impleaded respondents Nos. 3 to 7 and 9 as party respondents in this petition of his, it was not at all necessary for him to have joined Gaikwad the original respondent No. 8, as a party respondent herein. I am of opinion that this objection of counsel for respondent No. 4 is frivolous. The scope of this petition is merely to declare that the Commissioners appointed by the Government of Bombay are not validly appointed, that they have no jurisdiction to entertain the election petition and that a writ of certiorari or prohibition or an order u/s 45 of the Specific Relief Act should be issued against them. If the petitioner succeeds in this petition of his, and the order is granted as prayed for by him, the only result would be that the Commissioners who are appointed to try the election petition would cease to function. That would not affect any rights of the candidates who were nominated at the election and who had failed at the election. If, on the other hand, the petition was dismissed, the proceedings would go on before the Commissioners, the election petition would be heard and finally disposed of and even then they being defeated candidates there would be no consequence which would affect their status in one manner or the other. Their rights, if any, with regard to the election petition to which they were made respondents would not be affected in the slightest degree. In my opinion, therefore, whatever be the result of this petition before me, Gaikwad is not affected at all and he is not a necessary party to this petition. The ground of objection, which has been urged by counsel for respondent No. 4, would be valid only if Gaikwad was a necessary party to this petition. No application has been made before me to implead him as a party respondent on the ground of his being a proper party to this petition and I decline to consider that aspect of the question as it is absolutely unnecessary for me to do so. I therefore overrule this objection of counsel for respondent No. 4.

8. The next preliminary objection which was urged by both counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 was a more serious one and that was that the Commissioners appointed by the Government of Bombay, viz. respondents Nos. 1, 2 and 3, were not an inferior Court but were a superior Court or a Special or Independent Court and that this Court had no jurisdiction to issue a writ of certiorari against the Commissioners who were not an inferior Court. In this connection my attention was drawn to a decision of the Privy Council in *Goonesinha v. De Kretser*, [1945] AIR P.C. 83 where it was held that:

A Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a superior Court issue the writ directed to another superior Court. Considering that the election Court under the Ceylon (States Council Elections) Order in Council, 1931, is held before a Judge of the Supreme Court of Ceylon from whose decision there is no appeal the election Court is a superior or independent tribunal and, therefore, the Supreme Court cannot issue a writ of certiorari to the election Court.

In that case a by-election was held for the return of a member of the Ceylon State Council for the Electorate of Colombo North and a petition was presented to the Supreme Court of Ceylon under the Ceylon (States Council Elections) Order in Council, 1931, asking that the election might be declared void and alleging general intimidation, treating and undue influence. The election Judge found the charges as to undue influence proved and ordered that notice should be given to the appellant to show cause why he should not be reported to His Excellency the Governor as having been guilty of a corrupt practice. On the hearing of that notice the appellant wanted to call certain witnesses with the object of proving that he was not guilty of the offence specified in the notice, and the learned Judge refused to hear the witnesses on the ground that he could not be asked to reverse the findings which he had already made on the trial of the petition. He thereupon reported the appellant. The appellant then moved the Supreme Court for a mandate in the nature of a writ of certiorari to bring up what was called the order by which he was reported, or the report, and have it quashed. The Chief Justice of Ceylon refused to issue the mandate, holding that the Election Court in Ceylon was a Superior Court to which no writ in the nature of certiorari would lie. Against that refusal the Supreme Court gave the appellant leave to appeal to His Majesty in Council. Their Lordships of the Privy Council confirmed the decision of the Chief Justice of Ceylon. After setting out the relevant provisions of the Order in Council, 1931, they stated that the election petition was a proceeding in the Supreme Court, that cognisance of election petitions is a special jurisdiction conferred upon the Supreme Court by the Order in Council, and that a Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. After coming to this conclusion, their Lordships further proceeded to observe (p. 84):

Nor will a Superior Court issue the writ directed to another Superior Court and if the Election Judge is to be regarded as a special or independent tribunal his

Court would, in their Lordships' opinion, be a Superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction.

Even though their Lordships of the Privy Council expressed their opinion that a Superior Court would not issue a writ directed to another Superior Court, the ratio decidendi of their judgment was that the cognisance of these petitions was an extension of or addition to the ordinary jurisdiction of the Supreme Court and consequently a writ of certiorari would not and could not issue to bring up an order made by a Judge of that Court. As regards the status of the Court which was thus constituted under the Order in Council, 1981, their Lordships did consider it to be a superior Court and regarded it as a special or independent tribunal, particularly because it was held before a Judge of the Supreme Court from whose decision there was no appeal. In regard to this proposition they also relied upon the case of *The Queen v. Justices of Central Criminal Court* (1883) 11 Q.B.D. 479 where it was held that mandamus would not lie to the Judges and Justices of the Central Criminal Court. In that case the constitution of the Central Criminal Court was set out at length in the judgment of Pollock B. and it was pointed out by him that the Court which was sitting to try the prisoner in that case was sitting as a superior Court, of at least as high authority as justices of assize sitting under a commission of oyer and terminer and goal delivery on circuit. Manisty J. concurred in the opinion expressed by Pollock B. He referred to the judgment of Willes J. in *Ex parte Fernandez* (1861) 10 C.B. (N.S.) 3 where it was laid down (p. 49):

For this purpose they are as much branches of the Superior Courts, having all the power which could be exercised by those Courts themselves at the trial, as are the chief or other justices of those Courts sitting at nisi prius in London or Middlesex and the ease of a Judge at nisi prius in town furnishes an apt illustration of the power of a justice of assize at the trial of a cause.

and held that that equally applied to the Judges and justices of the Central Criminal Court. This decision, therefore, was based on the reasoning that the Court which was being considered there was of the same status and had all the same powers as the Court which was approached for the purpose of the issue of the writ of certiorari. If the Court which was approached for the issue of the writ was a superior Court, the other Court against whom the writ of certiorari was sought to be issued was also a superior Court enjoying the same status and the same powers. This was really the ratio adopted by their Lordships of the Privy Council in *Goonesinha v. De Kretser*. The status and the powers enjoyed by the Court in question were the determinative factors in coming to the conclusion whether the Court was a superior Court or was a special or independent tribunal. This was the very position which obtained in the case of the Court which took

cognisance of the election petition under the Ceylon (States Council Elections) Order in Council, 1931. Even in the conclusion which their Lordships came to with regard to the status and powers of the Court taking cognisance of election petitions and as to the election Judge being regarded as a special or independent tribunal, their Lordships were influenced by the fact that it was a Judge of the Supreme Court himself who was the election Judge and there was no appeal from his decision. Coupled with this are the ultimate observations of their Lordships that the true view was that cognisance of these petitions was an extension of, or addition to, the ordinary jurisdiction of the Supreme Court. I cannot see my way to dissociate my mind from these remarks of their Lordships of the Privy Council which according to them were the real ratio decidendi in the case before them. Having regard to all the circumstances disclosed in that case I am of opinion that even though their Lordships did state that the election Judge was to be regarded as a special or independent tribunal under those circumstances, they treated the election Judge as a superior Court, a Court as superior as the one from which the writ of certiorari was sought to be obtained particularly because the cognisance of the petition by that Court was an extension of, or addition to, the ordinary jurisdiction of the Supreme Court.

9. Counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 drew my attention in connection with this argument to the constitution of the Commission herein. The Commission was appointed under the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, which hereafter I will refer to as the Order in Council, 1936, Part III, paragraph 4:

Unless the Governor, exercising his individual judgment, dismisses a petition for noncompliance with the prescribed requirements, he shall, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are or have been, or are eligible to be appointed, judges of a High Court, and shall appoint one of them to be the President.

Paragraph 8, Sub-paragraph (3), further provides:

The report shall be signed by all the Commissioners and the Commissioners shall forthwith forward their report to the Governor, who on receipt thereof shall issue orders in accordance with the report and publish the report in the Government Gazette of the Province, and the orders of the Governor shall be final.

The Electoral Rules, 1936, contain in Chapter III thereof provisions as regards the presentation of election petition, deposit of security, inquiry by Commissioners, place of inquiry, withdrawal of petition, and cognate matters. These are really provisions as regards the manner in which the election petition has to be filed and the manner in which the inquiry is to be conducted by the Commissioners when appointed. They do not carry the matter any further. It was sought to be argued from these provisions of the Order in Council, 1936, that the persons who were to be appointed Commissioners were persons who are, or have been, or are eligible to be appointed Judges of a High Court, and therefore,

the status of the Commissioners was that of a superior Court, that there was no appeal from their decision and that the only thing which followed upon their report was the issue by the Governor of the orders in accordance with the report, which orders were again to be final. This, counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 submitted, constituted the Commissioners a superior Court within the dictum of their Lordships of the Privy Council in *Goonesinha v. Be Kretser*. I do not accept that submission. First of all there is no regular Court or tribunal which is established under the terms of the Order in Council, 1936. Whenever an election petition is filed which requires the decision of doubts and disputes as to the validity of election and disqualifications for corrupt practices, the Governor, exercising his individual judgment, appoints three persons as Commissioners to report to him the result of their inquiry. The Commissioners in order to enjoy the confidence of the public have got to be persons who are or have been or are eligible to be appointed Judges of a High Court, They may, well within the strict terms of paragraph 4 of part III of the Order in Council, 1936, be all persons who are eligible to be appointed Judges of a High Court and not one of them may be one who is or has been a Judge of a High Court. They are not a permanently appointed Court or tribunal for the purpose of deciding all election petitions. They are appointed on each election petition being received by the Governor and enjoy the status of Commissioners appointed for the purpose of holding an inquiry and making a report. They are not persons who come within the dictum of their Lordships of the Privy Council in *Goonesinha v. De Kretser*. By no stretch of imagination can it be stated that the cognisance of these petitions by them is an extension of or addition to the ordinary jurisdiction of the High Court, nor can it be stated that the inquiry is held before a Judge of the High Court from whose decision there is no appeal. As I pointed out before, none of these three Commissioners need be or have been a Judge of the High Court. If that is so, the status of the Superior Court is certainly not enjoyed by the Commissioners, nor do they enjoy the status of a special or independent tribunal within the dictum of their Lordships of the Privy Council above referred to. They are merely Commissioners for the purpose of holding an inquiry and making a report to the Governor; and I am of opinion that it would be stretching the point too much in favour of respondents Nos. 1, 2 and 3 and respondent No. 4 to come to the conclusion that they are even a Court. They are, if properly and duly appointed by the Governor in the exercise of his individual judgment, a body of persons having legal authority to determine questions affecting rights of subjects and having a duty to act judicially, and therefore persons amenable to the jurisdiction of the High Court which has power to issue the high prerogative writ of certiorari as I have already held in my judgment in *Juggilal Kamlatpat Vs. Collector of Bombay*, The words "Court" and "judicial act" have had an extended meaning applied to them (p. 1088):

...the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect the rights of others,... it must exercise some right or duty to decide, and...the act should be done by it upon

consideration of facts and circumstance and imposing liability or affecting the rights of others... the phrase "judicial act" must be taken in a very wide sense including many acts that would not ordinarily be termed judicial... the procedure of certiorari applies in many cases in which the bodies whose acts are criticised would not ordinarily be called Courts nor the acts ordinarily be termed judicial acts.

In my opinion the Commissioners even though they be appointed by the Governor exercising his individual judgment in the exercise of the power given to him in Part III, paragraph 4, of the Order in Council, 1986, are not a superior Court or a Special or Independent tribunal within the meaning of that term in either *The Queen v. The Justices of Central Criminal Court* or *Goonesinha v. De Kretser*, but are a Court merely in the extended sense of the term as laid down by me in *Juggilal Kamlapat v. The Collector of Bombay* and are therefore amenable to the high prerogative writ of certiorari which this Court undoubtedly has the power to issue in proper cases. I therefore overrule this objection of respondents Nos. 1, 2 and 3 and respondent No. 4.

10. The next preliminary objection which was urged by counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 was that if respondents Nos. 1, 2 and 3 were not a validly appointed body they were not a body of persons in existence against whom a writ of certiorari could issue. They relied in this connection upon a passage in Halsbury's Laws of England, Vol. IX, p. 854, ¶1445:

Certiorari will not be granted where, if the writ were subsequently quashed, the inferior Court could not be ordered by a writ of procedendo to resume the proceedings. Thus, where an unauthorised person has assumed the office of coroner, and has conducted what purported to be an inquest, certiorari will not be granted to bring up the inquisition, for the proceedings are not merely voidable, but wholly void. And so also, where the proceedings in an inferior Court have become null and void by the operation of a statute, certiorari will not be granted.

They contended that if respondents Nos. 1, 2 and 3 were not validly appointed, they could not be treated as any Court or tribunal in existence, that whatever they might do would be of no materiality or consequence and would be treated as wholly void, with the result that the petitioner would be safe in ignoring whatever respondents Nos. 1, 2 and 3 did. Whatever decision respondents Nos. 1, 2 and 3 would arrive at in the election petition would therefore not affect the petitioner at all, and he would suffer no harm or injury to his rights by reason of any such decision of respondents Nos. 1, 2 and 3. They relied upon the decision in *In the Matter of Daws* (1838) 8 Ad. & E. 936 where an inquest was held on a person deceased, in the coroner's absence, by C.A., his clerk, who signed the inquisition, "C.A., Coroner." The father of the deceased eight months after the inquest applied to have the inquisition brought up by certiorari to be quashed and for a new inquest to be held. The Court refused to interfere, stating that the proceeding as it stood was a mere nullity and there was no case for interference

by the Court so far as public justice was concerned. The statement in the passage from Halsbury's Laws of England quoted above is based on this decision in *In the Matter of Daws*. It has, however, to be observed that here was a case where C.A., clerk of the coroner, had no right to act as the coroner at all and usurped the function of the coroner. The inquest which was held by him was thus an inquest by a person who was not the coroner duly authorised to hold an inquest. Whatever the rights of the petitioner were, were therefore not at all affected by any action of C.A., who signed the inquisition as coroner. Lord Denman C.J. in his judgment observed that if the petitioner wanted to take any further proceeding and had a right to do so, he could certainly not be prevented by an act of a person calling himself the coroner, but really a stranger, and the decision of the case was reached on the footing that there was nothing to prevent an indictment against the accused parties if there was sufficient cause. This decision, therefore, lays down that where a person has usurped an office which does not belong to him and purports to act in exercise of that office, his acts are a nullity and do not affect the rights of other persons sought to be affected thereby. The ratio of this decision would be of some avail if the result of the inquiry held by respondents Nos. 1, 2 and 3 was only going to be a report which would have no further consequences beyond putting on record their opinion. According to the provisions of Part III of the Order in Council, 1936, however, the report on its being made by respondents Nos. 1, 2 and 3 would result in orders being issued by the Governor in accordance with the report and the orders of the Governor would be final, thus causing an irreparable injury to the interest of the petitioner which would not be capable of being redressed in any manner whatsoever. It is not a case merely of persons standing in the position of usurpers of an office, but respondents Nos. 1, 2 and 3 here are persons who have been appointed Commissioners by the Government of Bombay, the only difficulty being whether they have been appointed in accordance with the provisions of law. They cannot, by any stretch of imagination, be called usurpers of the office of Commissioners and whatever be the defect in their appointment, they would certainly be, in the exercise of their office as Commissioners, acting judicially, having legal authority to determine questions affecting the rights of the petitioner.

11. It was also urged that there was no difference in principle between a writ of certiorari and a writ of prohibition and in the decided cases on the writ of prohibition it was laid down, as stated in Halsbury's Laws of England, Vol. IX, p. 830, ¶ 1407, Note (e):

A writ of prohibition cannot be granted directed to persons who, without lawful authority, purport to act as a Court.

Reliance was placed in support of this proposition on the case of *Clifford and O'Sullivan*, [1921] 2 A.C. 570 where it was held that prohibition did not lie, first, because the officers constituting the military Court did not claim to act as a judicial tribunal in any legal sense, and, secondly, because they were functi

officio. The ratio of this decision is to be found in the speech of Viscount Cave, at p. 583, where it is stated:

It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of the writ against a body which has no statutory or common law authority to do either, and which claims no such authority. In the present case the body which it is sought to prohibit, though called a military Court, neither possesses nor claims any such authority. Its legal position has been sufficiently defined in the above observations with regard to the right of appeal, and it is plain that it is in law not a Court or judicial tribunal of any kind. Nor does it claim to hold any such position. In the affidavit of Mr. Skinner, the solicitor for the appellants, upon which the application for a writ of prohibition was founded, the deponent, referring to the officers before whom the appellants had been charged, says: "the said officers did not purport to act under any commission from His Majesty to try prisoners, or under any statutory or common law authority or as a Court Martial. They purported to act merely as officers carrying out instructions from Major-General Strickland, the General Officer Commanding at Cork;" and this statement correctly describes the position of the officers in question as defined both by the appellants and by the respondents, and makes it plain that those officers did not purport to act as a Court in any legal sense. If so, however wide a view may be taken of the power of Courts to grant prohibition, prohibition will not lie in this case.

In this case the officers did not claim to act as a Court at all, and there was, therefore, no question of the issue of a writ of prohibition against them. The proposition was, therefore, correctly laid down that prohibition does not lie against a body which though called a Court is not and does not claim to be a Court or judicial tribunal in any legal sense. This ratio, however, would not apply to the case before me. Respondents Nos. 1, 2 and 3, though not strictly a Court, are a body of persons having legal authority to determine questions affecting rights of the petitioner and having a duty to act judicially and therefore a Court within the extended meaning of the term as laid down in *Juggilal Kamlatpat v. Collector of Bombay* and their report is one which the Governor is bound to adopt, having regard to the provisions of Part III, paragraph 8(3), of the Order in Council, 1936. It cannot, therefore, be stated that they are persons who without lawful authority purport to act as a Court or are a pretended Court against whom a writ of certiorari or a writ of prohibition would not lie. My attention was further drawn to the case of *Lady Dinbai Petit v. Noronha* (1945) 48 Bom. L.R. 255 and the observations of Kania J. there at p. 266:

A party who seeks to obtain an order u/s 45 cannot do so on the allegation that the statute which enjoins the doing or forbearing of the act is itself illegal or ultra vires. The wording of the second proviso clearly shows that the deciding authority against whom the order is sought must, for the discussion, be assumed

to be legally clothed with authority. If the legal existence of the authority or the fact that in law he is authorised to act is disputed, the fulfilment of this condition is out of question.

This discussion was in connection with the relief which the petitioner there sought u/s 45 of the Specific Relief Act, and it was held that the petitioner could not challenge that the statute which enjoins the doing or forbearing which was complained about was itself illegal or ultra vires. That was the very foundation of the jurisdiction and if the statute itself was challenged as illegal or ultra vires, there was no basis at all for the application. This case is, however, different from the present one before me. The Order in Council, 1936, under which the appointment of respondents Nos. 1, 2 and 3 is made is not challenged as illegal or ultra vires. What is challenged is the appointment of respondents Nos. 1, 2 and 3 in exercise of the powers vested in the Governor under Part III, paragraph 4, of that Order. The challenging of the appointment as not being in conformity with the provisions of law is not the same as the challenging of the legality of the Order in Council, 1936, under which the appointment has been made. In my opinion, therefore, these observations of Kania J. in *Lady Dinbai Petit v. Noronha* (at p. 266) do not affect the position in this case.

12. It was further urged that the petitioner had another remedy available to him in the shape of an information in the nature of a quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. (vide Halsbury's Laws of England, Vol. IX, p. 804, ¶ 1373). I am not, however, concerned with the question whether the information in the nature of a quo warranto was a remedy available to the petitioner. I am only concerned with the question whether the petitioner under the circumstances of the case before me is entitled to the issue of a writ of certiorari or prohibition or an order u/s 45 of the Specific Relief Act. I, therefore, decline to go any further into this aspect of the question.

13. It was further urged that as in the case of arbitrators who have no jurisdiction, so in this case the proceeding should be treated as of no materiality or consequence, and as the Court does not issue an injunction restraining the arbitrators from proceeding with the arbitration, so also in this case the Court should not interfere by way of issue of a writ of certiorari or prohibition. If the arbitrators had no jurisdiction to enter upon the reference, the proceedings before them would be null and void and the award, if any, published by them would also be a nullity. In that event if no harm would be done to the petitioner, the Court would not interfere by issuing an injunction against the arbitrators. All this argument, however, ignores the fact that on the report of the Commissioners, respondents Nos. 1, 2 and 3, being made to the Governor, the Governor is by virtue of the provisions of Part III, paragraph 4, of the Order in Council, 1936, bound to issue orders in accordance with the report and publish the report in the Government Gazette, and the orders of the Governor are to be

final. It would not be legitimate to expect any petitioner aggrieved by the proceedings which are going on before the Commissioners to wait until after the Commissioners made their report, because by that time it would be too late for him to do anything in order to protect his interests. The proper time for the petitioner to come before the Court, if he can do so, is before the Commissioners proceed further with the inquiry which has been committed to their charge and seek to restrain them from proceeding further with the same or get the same quashed by the issue of a writ of certiorari. The analogy of the arbitration proceedings which would result in an award which would be a nullity is not an apt analogy and does not preclude the petitioner from maintaining this petition if he can otherwise do so.

14. It was further urged by counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 that as stated in Halsbury's Laws of England, Vol. IX, p. 854, ? 1446:

The writ can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice; for proceedings will not be removed into the superior Court unless they are capable of being determined there.

Under Section 223 of the Government of India Act the jurisdiction of the existing High Courts was preserved subject inter alia to the provisions of any Order in Council made under the said or any other Act. u/s "291 of the Act His Majesty in Council was empowered from time to time to make provision with respect to inter alia...

(g) corrupt practices and other offences at or in connection with such elections; and

(h) the decision of doubts and disputes arising out of, or in connection with, such elections;

Under the terms of the Order in Council, 1936, Part III, para. 2, it was laid down that no election shall be called in question except by an election petition presented in accordance with the provisions of that Part of the Order, and the jurisdiction of the High Court to entertain any election petition was thus ousted. It was, therefore, contended that the High Court had no jurisdiction, to entertain the election petition and therefore no writ could be issued for removing the proceedings into the High Court because they were not capable of being determined there. I had a similar argument addressed to me in *Manibhai Patel v. Arbuthnot* (1946) 49 Bom. L.R. 454 and I have given my reasons there as to why I do not accept this argument. I shall not elaborately set out those reasons here, but shall only content myself with saying that respondents Nos. 1, 2 and 8, the Commissioners, appointed to try the election petition, are not an inferior Court within the strict sense of the term but are a body of persons having legal authority to determine questions affecting rights of subjects and having a duty to act judicially and are within the extended definition of the term "Court" as laid down in *Juggilal Kamlatpat Vs. Collector of Bombay*, and that this Court has in

proper cases jurisdiction to issue a writ of certiorari against them. Under the circumstances, I overrule the above preliminary objections which were urged by counsel for respondents Nos. 1, 2 and 8 and respondent No. 4.

15. The last and the most important preliminary objection which was urged by counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 was that the act challenged being an act of the Governor of Bombay, it could not be challenged in a Court of law by reason of the provisions of the Government of India Act. It was urged that u/s 291 of the Government of India Act, His Majesty in Council was from time to time to make provision with regard to the matters therein mentioned in so far as provision with respect thereto was not made by the Act, being inter alia (g) corrupt practices and other offences at or in connection with elections, and (h) the decision of doubts and disputes arising out of, or in connection with, elections. An Order in Council was passed by His Majesty in 1936 in pursuance of this power u/s 291 of the Government of India Act and under Part III, paragraph 4, of that Order, the Governor exercising his individual judgment was to appoint as Commissioners for the trial of the election petition three persons with certain qualifications therein mentioned. This was an act to be performed by the Governor exercising his individual judgment and under the terms of Section 54 of the Government of India Act, the Governor was, in so far as he was by or under the Act required to act in his discretion or to exercise his individual judgment, to be under the general control of and was to comply with such particular directions, if any, as may from time to time be given to him by the Governor General in his discretion, but the validity of anything done by the Governor was not to be called in question on the ground that it was done otherwise than in accordance with the provisions of the section. It was therefore contended that the act of the Governor could not be challenged in a Court of law and the present petition could not be maintained. Counsel for the petitioners did not challenge this position at all. It was conceded that if the act complained of was an act of the Governor himself, it could not be challenged at all by the petitioner. It was, however, contended that it was not an act of the Governor exercising his individual judgment as provided in Part III, para. 4, of the Order in Council, 1936, but it was on the face of the notification itself an act of the Government of Bombay, which was contrary to the provisions of law and could therefore be challenged by the petitioner. This preliminary objection therefore was urged without having any regard to the position actually taken up by the petitioner both in his petition and in the course of the arguments and was taken, if at all, with a view to have a preliminary discussion on the question which really was to be argued on the merits of the petition. The real grievance of the petitioner was that the Commissioners were appointed not by the Governor exercising his individual judgment but were appointed by the Government of Bombay which was not the same as the Governor exercising his individual judgment as provided by Part III, para. 4, of the Order in Council, 1936, I therefore pointed out to counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 that it was hardly fair to treat this as a preliminary objection, and even

though I heard them for some time I ultimately ruled that it was not really a preliminary objection but the arguments should proceed on the merits.

16. The real question which therefore falls to be determined by me is whether the order of appointment of respondents Nos. 1, 2 and 3 as Commissioners to try the election petition, published on July 3, 1946, is an order in accordance with law. I have already set out the terms of that order in the earlier part of my judgment. After reciting that the election petition was duly presented under the Electoral Rules 1936, by respondent No. 4, it proceeds to say that the Government of Bombay in pursuance of the provisions of paragraph 4 of Part III of the Order in Council, 1936, is pleased to appoint respondents Nos. 1, 2 and 3 as Commissioners for the trial of the petition, to appoint respondent No. 1 to be the President of the Commission so constituted, and to appoint Bombay as the place where the inquiry into the petition shall be held. This Order is signed "By order of the Governor of Bombay, P.N. Moos. Secretary." It is contended by the petitioner that under the provisions of Part III, para. 4, of the Order in Council, 1936, the appointment of the Commissioners and the appointment of one of them as the President was to be made by the Governor exercising his individual judgment, and that the order of appointment is bad in so far as it says that such appointment is made by the Government of Bombay. It is contended that the Government of Bombay is not the same as the Governor exercising his individual judgment and the order of appointment is therefore bad. On the other hand, it is contended by counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 that the words "Government of Bombay" mean the Governor exercising his individual judgment and therefore the order is a proper and valid order of appointment of the Commissioners. It is also contended that the words at the foot of the order "By order of the Governor of Bombay" comply with all the necessary requirements of law and that the order of appointment is therefore not liable to be challenged.

17. The Government of India Act contains in Part II thereof provisions as regards the Governors' Provinces. After setting out in chap. I the Provinces, it sets out in chap. II provisions as regards the Provincial executive. Section 48 deals with the appointment of the Governor, and Section 49 lays down that the executive authority of the Province shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him. The sections beginning with Section 50 contain provisions with regard to the administration of Provincial Affairs, and Section 50 provides for a Council of Ministers. It lays down that:

-(1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this subsection shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.

This shows that the Council of Ministers is there to aid and advise the Governor in the exercise of all his functions except where he is to exercise those functions in his discretion. Even when he is to exercise those functions exercising his individual judgment, he can be advised by his Council of Ministers, but he is not prevented from exercising his individual judgment in such matters where such individual judgment might conflict with the advice given to him by his Council of Ministers. This position is laid down in Clause (9) of the Instrument of Instructions to the Governors, which says:

In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by the said Act to exercise in his discretion, Our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise in his individual judgment; in any of which cases Our Governor shall, notwithstanding his Ministers' advice, act in exercise of the powers by the said Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own."

Section 50(3) lays down that:

If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment.

These provisions show that except in those cases where he is to exercise his functions in his discretion the Governor shall be guided by the advice of his Council of Ministers, but even there he is not bound to follow the advice if it conflicts with his individual judgment in those cases where he is to exercise those functions exercising his individual judgment.

18. At this stage it would be worthwhile noting what is the position of the Ministers vis a vis the Governor as it is laid down in decided cases. The first case on the point is *In re S.S. Batliwala*, A.I.R [1938] . Mad. 758 where it was held:

There is no provision in the Act which requires the Governor to consult his Ministers before performing executive acts. The Instrument of Instructions implies that he should consult his Ministers; for without consulting them, he would not be able to be guided by their advice; but he is not legally required to do so. The remedy for any unconstitutional act on the part of the Governor is not

legal action but constitutional action-the resignation of the Ministers if they consider that the unconstitutional act of the Governor is of sufficient importance to warrant their resignation, and a request that the Governor be recalled.

The second case on the point is *Emperor v. Hemendra Prasad Ghosh*. [1939] 2 Cal. 411 The question there arose whether the ministers were the Government within the meaning of Section 17 and Section 124A of the Indian Penal Code. Section 17 of the Indian Penal Code provides that "The word "Government" denotes the person or persons authorised by law to administer executive government in any part of British India." There was a reference to the High Court for an expression of opinion on the points of law formulated by the Magistrates, viz (p. 415):

(a) Whether the Hon^{ble} Ministers of Bengal are subordinate officers to H.E. the Governor within the meaning of Section 49 of the Government of India Act, 1935 ?

(b) Whether the Council of Ministers should be considered as Government established by law ? and

(1) Whether the ministry of a province can be said to form a part of the executive government of that province in the sense implied by Section 17 of the Indian Penal Code ?

After setting out the relevant provisions of the Government of India Act and the Instrument of Instructions, the learned Judges there proceeded to observe (p. 416):

There is no specific provision in the Government of India Act, nor in any other Statute or Act, which we are aware of, vesting the ministry with executive functions. On the other hand, such functions "shall" in the words of Section 49 of the Act, "be exercised by the Governor either directly or through officers subordinate to him." The use of the word "aid" in Section 50 does not, in our view, vest the ministers with any right to exercise executive authority, since such a construction would be contrary to the clear provision in Section 49, nor can the Rules for the transaction of the business of the Government of Bengal made u/s 59(3) of the Act override or alter, in law, the same clear provisions. Again, the Instrument of Instructions, which cannot be and does not purport to be in contradiction of the Act, clearly contemplates the Governor exercising the powers conferred upon him (save where in certain instances specified he acts alone) "guided by the advice of his ministers." The Instrument of Instructions contemplates the Governor, and not the ministers, exercising executive authority.

The position appears to be that, unless the ministry can be held to consist of officers subordinate to the Governor within the meaning of Section 40(1) of the Act, it cannot exercise executive functions.

In our view, ministers chosen from the elected representatives of the people of the province for the purpose of carrying into effect, if possible and within

prescribed limits, their wishes, and acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor within the meaning of Section 49 of the Government of India Act, 1935. It follows, therefore, that, although in popular language, the ministers may be referred to as "the Government" they are not "the Government" within the meaning of Sections 17 and 124A of the Indian Penal Code. Whatever may happen in practice, the ministers are, in law, the Governor's advisers.

For these reasons we are of the opinion that the answer to all the three questions put to us is "no".

This is really the position of the ministers and it leaves unaffected the position of the Governor as the executive head of the Province. Section 54 then lays down that:

In so far as the Governor of a Province is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by, the Governor-General in his discretion, but the validity of anything done by a Governor shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this section. The last section to be noted in this connection is Section 59 which provides:

(1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

The relevant provisions of the Government of India Act quoted above go to show that the Governor exercises functions in three capacities:

- (1) Ordinarily under the advice of his ministers,
- (2) exercising his individual judgment, and
- (3) in the exercise of his discretion.

In those cases where he is to act under the advice of his ministers, the Instrument of Instructions lays down that he shall be guided thereby. Such is the position also with regard to those cases where he exercises his functions

exercising his individual judgment; but with this proviso that where the advice given to him by his ministers in the latter class of cases is inconsistent with or conflicts with his individual judgment, he is entitled to disregard the same. The Governor is not bound at all to consult or seek the advice of his ministers in those cases where he exercises his functions in the exercise of his discretion, so that except in those cases where he exercises his functions in the exercise of his discretion, the other matters which crop up in due course of administration of the provincial affairs go to his ministers. u/s 59(4) of the Government of India Act the rules which the Governor makes u/s 59(3) are also to include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor. It is to be noted that in those cases where the special responsibilities of the Governor are involved he has in the exercise of his functions to exercise his individual judgment as to the action to be taken. In effect all the matters which arise in the course of the administration of the provincial affairs, except those which involve the exercise of his discretion by the Governor, pass through the Ministers and the ministers are in all those matters competent to advise the Governor, the Governor being entitled to disregard such advice only in those cases where such advice is inconsistent with or is in conflict with his own individual judgment in cases where he has to exercise his functions exercising his individual judgment. It is, however, to be noted that in all these cases including those where the Governor exercises his functions exercising his individual judgment, the executive action which is taken is the action of the Government of the Province. The orders made and other instruments executed are part of the executive action of the Government of the Province, though by virtue of Section 59(1) all executive action of the Government of the Province shall be expressed to be taken in the name of the Governor. The orders and other instrument made and executed have to be made and executed in the name of the Governor and have to be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Whatever the executive action may be, whether it is the action taken by the Governor in the exercise of his discretion, or is an action of the Governor exercising his individual judgment, or is an ordinary action in the administration of the provincial affairs, where the Governor has to be guided by the advice of his ministers, the action is the executive action of the Government of the Province, and all orders and other instruments made and executed are to be made and executed in the name of the Governor. The authentication is a mere matter of promulgation to the public of the orders and other instruments as made and executed. The authentication

invests these orders and other instruments so made and executed with authenticity, so that the public to whom the same are promulgated may know that these are the orders or instruments which have been made or executed by the Government of the Province, and the effect of the authentication is thus laid down that the validity of the order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Nonetheless with the proper authentication at the foot thereof the orders and instruments made or executed are orders and instruments made or executed by the Government of the Province and they constitute the executive action of the Government of the Province,

19. As already pointed out before, His Majesty in Council issued an Order in Council styled "The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936" in exercise of the powers reserved to him u/s 291 of the Government of India Act, and in that Order in Part III, paragraph 4, it was specifically laid down:

Unless the Governor, exercising his individual judgment, dismisses a petition for noncompliance with the prescribed requirements, he shall, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are or have been, or are eligible to be appointed, Judges of a High Court, and shall appoint one of them to be the President.

Arguing on the above provisions of the Government of India Act and the Order in Council, 1936, it is contended by the petitioner that in the appointment of the Commissioners, respondents Nos. 1, 2 and 3, the Governor was to exercise his function exercising his individual judgment, that the notification appointing the Commissioners should have been an order made in the name of the Governor, and that in so far as it contravenes the provisions of Section 59(2) of the Government of India Act it is not valid in law. It is contended that the words "Government of Bombay" cannot be read as the "Governor of Bombay," the words "Government of Bombay" and the "Governor of Bombay" not being interchangeable. It is further contended that the provisions of Section 59(1) of the Government of India Act are mandatory and it would not avail respondents Nos. 1, 2 and 3 to urge that the "Government of Bombay" in any event includes the "Governor of Bombay." It is, on the other hand, contended by respondents Nos. 1, 2 and 3 that by virtue of Section 3(43a) and Section 4A of the General Clauses Act X of 1897 "The Government of Bombay" means "The Governor of Bombay" exercising his individual judgment, that the words "Government of Bombay" and "Governor of Bombay" are interchangeable, and that there is therefore no flaw or legal defect in the order of appointment of the Commissioners. It is also contended that in any event the provisions of the Government of India Act not being applicable as such to election petitions, they having been excluded from the operation of Section 291 thereof, the provisions of Section 59(1) even though they may be considered mandatory do not come in the way of respondents Nos. 1, 2 and 3 and respondent No. 4.

20. I shall now consider how far the provisions of the General Clauses Act X of 1897 are applicable to the present case. The General Clauses Act X of 1897 had certain amendments incorporated therein by the Government of India (Adaptation of Indian Laws) Order, 1937, which was necessitated by the enactment of the Government of India Act of 1935, in order to adapt the existing Indian laws and to bring the provisions thereof in conformity with the provisions of the Government of India Act, 1935. His Majesty in Council passed the Adaptation of Indian Laws Order, 1937, on March 18, 1937. The provisions of the General Clauses Act X of 1897, Section 3(27a), Section 3(43a) and Section 4A which I have got to consider in this connection were incorporated in the General Clauses Act X of 1897 by this Order in Council, 1937. Section 8(43a) provided that "Provincial Government" as respects anything done or to be done after the commencement of Part III of the Government of India Act, 1935, shall mean-

(a) 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.

This definition of "Provincial Government" was made applicable by Section 4A of the General Clauses Act also, unless there was anything repugnant in the subject or context, to all Indian laws. The words "Indian Law" were defined by Section 3(27a) to include any law, ordinance, order, byelaw, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British India. It was argued that by reason of these amendments incorporated in the General Clauses Act, the words "Provincial Government" were made interchangeable with the words "Governor exercising his individual judgment," and the notification in question before me being an order made by a competent authority in British India could be treated as Indian Law within the definition thereof in Section 3(27a), and was therefore a valid one. Even though the definition of "Indian Law" contained in Section 8(27a) of the General Clauses Act is an inclusive definition, I am not inclined to accept the notification in question as "an order made by a competent authority" comprised within the definition of "Indian Law." If one refers to Section 311 of the Government of India Act which is the interpretation section, one finds there the definition of "existing Indian law" given as under:

"Existing Indian law" means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

This definition is in terms adopted in the definition of "Indian Law" incorporated in the General Clauses Act by the Order in Council, 1937, in Section 3(27a) thereof, and it can be read only in that light. It is not possible to read the Order as a mere executive order divorced from the context. "Law, ordinance, order, bye-law, rule, or regulation" are of the nature of legislative provisions, which are

described in those various terms, the difference in terminology being the result of the difference between the authorities promulgating the same. The law in the strict sense of the term is promulgated by the Legislature, the Ordinance by the Governor General or the Governor as the case may be, the Orders by a competent authority in British India in this behalf which may be even the British Parliament [as is shown in the judgment of Venkatasubba Rao J. at p. 997 in *Venkataratnam v. Secretary of State for India* (1929) ILR 53 Mad. 979:

Is this to be confined as contended for by the applicant, to an authority situated in British India ? I see no reason to limit it in that way. The word "authority" according to Webster's Dictionary may mean a body exercising power. Substituting those words, the section reads thus-" In any enactment made by anybody exercising power in British India."

The British Parliament being such a body, the enactment in question answers this description.]

and the bye-law by a statutory authority competent in that behalf. The words "rules and regulations" again are thus defined in Section 3, Sub-sections (46) and (47):

"Regulation" shall mean a Regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, or the Government of India Act, or u/s 95 or Section 96 of the Government of India Act, 1935.

"Rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment.

This is the sense in which these words "Law, ordinance, order, bye-law, rule, or regulation" have been used by the Legislature in enacting Section 3(27a) of the General Clauses Act, and it is not competent to respondents Nos. 1, 2 and 3 and respondent No. 4 to urge that the word "order" in this context is used in any other meaning than a legislative order. An executive order of the type we have got in the notification in question appointing respondents Nos. 1, 2 and 3 as Commissioners is certainly not included in the definition of the words "Indian Law," If this is the position, there is no question of the definition of "Provincial Government" contained in Section 3(43a) of the General Clauses Act applying to the notification in question, and the words "Provincial Government" or the "Government of Bombay" being treated as synonymous with or even interchangeable with the words "Governor exercising his individual judgment."

21. When the above position was pointed out to counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 they fell back upon another line of argument which was that the Order in Council, 1936, was certainly included within the term "order" as interpreted by me above and that therefore the definition of the words "Provincial Government" contained in Section 3(43a) of the General Clauses Act did apply to the same by virtue of the provisions of Section 4A and Section

3(27a) of the General Clauses Act. They urged that that being so, the words "Provincial Government," as defined in Section 3(43a), should be treated as synonymous with or interchangeable with the words "Governor exercising his individual judgment", that the notification in question which contained the words "Government of Bombay" should be read in the light of this definition contained in Section 3(43a) of the General Clauses Act and the words "Government of Bombay" occurring therein should be read as "the Governor exercising his individual judgment," thus bringing the notification in question in conformity with the provisions of Section 59(1) of the Government of India Act. On this part of the argument it was contended by counsel for the petitioner that by the very terms of Part I, paragraph 2, of the Order in Council, 1936, the Interpretation Act, 1889, was to apply for the interpretation of this order as it applied for the interpretation of the Act of Parliament and that the application of the General Clauses Act X of 1897 was therefore eschewed. No doubt the terms of Part I, para. 2, if they stood by themselves, would support this contention of counsel for the petitioner. One has, however, to look to the provisions of the Government of India (Adaptation of Acts of Parliament) Order, 1937, which was also passed by His Majesty in Council on March, 18, 1937, simultaneously with the Government of India (Adaptation of Indian Laws) Order, 1937, mentioned above. In Schedule II to that Order there is a reference to the Interpretation Act of 1889 (52 & 53 Vic. c. 63), and Section 18 of that Act which was relied upon by counsel for the petitioner has been substituted by Section 18(a), sub.-s. (2) whereof states:

(2) This section applies for the interpretation of the Government of India (Adaptation of Acts of Parliament) Order, 1937, but it does not apply for the interpretation of the Government of India Act, 1935, or the Government of Burma Act, 1935, nor, save as aforesaid, for the interpretation of any Order in Council made under either of those Acts, notwithstanding that that Order may provide generally that this Act shall apply for the interpretation thereof as it applies for the interpretation of an Act of Parliament.

This provision in effect nullifies Part I, paragraph 2, of the Order in Council, 1936, and leaves the Order in Council, 1936, open to interpretation in the light of the provisions of the General Clauses Act X of 1897, provided of course the Order in Council, 1936, were comprised within the definition of "Indian law" laid down in Section 3(27a) of the General Clauses Act. As, in my opinion, the words "Indian law" as defined in Section 3(27a) of the General Clauses Act are capable of including within their terms the Order in Council, 1936, I do not accept the contention of counsel for the petitioner that the General Clauses Act does not apply to the Order in Council, 1936. I am accordingly of opinion that the General Clauses Act does apply to the interpretation of the words "Provincial Government" or "Government of Bombay" appearing in the Order in Council, 1936;

22. This leaves, however, open the question as to how far the defect which is pointed out in the notification in question is cured even by the General Clauses

Act and the definition of "Provincial Government" contained in Section 3(43a) thereof. The scope of the General Clauses Act is to provide the meanings and definitions of terms occurring in various legislative enactments, viz. Indian laws, comprised within the inclusive definition thereof contained in Section 3(27a), viz. any law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British India. It means that wherever the words "Provincial Government" or the words "Government of Bombay" occur in any law, ordinance, order, byelaw, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British India, it has got to be taken as meaning the Governor acting or not acting in his discretion or exercising or not exercising his individual judgment according to the provisions made by and under the Government of India Act, 1935. As I have already stated, the notification in question appointing respondents Nos. 1, 2 and 3 as Commissioners does not fall within the inclusive definition of the words "Indian Law." It is an executive act, and the terms thereof do not fall to be determined or interpreted by reference to the definition of "Provincial Government" contained in Section 3(43a) of the General Clauses Act. That notification which constitutes the executive act of the Government of the Province, i.e. the Government of Bombay, is not comprised in the words "Indian law," and Section 3(43a) of the General Clauses Act does not apply to that notification.

23. What then is the true position with regard to the notification in question ? The words "Government of Bombay" used there do not mean the Governor acting or not acting in his discretion and exercising or not exercising his individual judgment according to the provisions in that behalf made by and under the Government of India Act, 1935, as provided in Section 3(43a) of the General Clauses Act. Part III, paragraph 4, of the Order in Council, 1936, provides that the Governor exercising his individual judgment shall appoint the Commissioners. This provision is mandatory. The appointment has got to be made by the Governor exercising his individual judgment. It may, in accordance with the relevant provisions of the Government of India Act dealing with the administration of Provincial Affairs, be made by the Governor with the advice of his Ministers, though when he is exercising this function exercising his individual judgment he would not be necessarily bound by such advice. The function would be exercised by him as the executive head of the province, though exercising his individual judgment. It would be, in terms of Section 59(2) of the Government of India Act, an executive action of the Government of the province, i.e. the Government of Bombay. Even though it is thus the executive action of the Government of the province, i.e. the Government of Bombay, it shall be expressed to be taken in the name of the Governor. It is the action that has to be expressed to be taken in the name of the Governor and not the promulgation or the authentication thereof. The action consists of the appointment of the Commissioners, respondents Nos. 1, 2 and 3, to inquire into the election petition. The action, consisting of the appointment, has got to be expressed to be taken in

the name of the Governor and the appointment has also to be made in the name of the Governor. The order of appointment thus should be made in the name of the Governor, and should be authenticated in such manner as may be specified in the rules to be made by the Governor. It is in evidence before me that in accordance with the provisions of Section 59(2) of the Government of India Act the Governor has made a rule which has been gazetted in the Bombay Government Gazette, Part I, p. 1080, dated April 16, 1937, Rule 158, which says that:

All orders or instruments made or executed by order or on behalf of the Government of Bombay shall be expressed to be made by or by order of the Governor of Bombay.

That is Rule 12 of the rules of business as they were shown to me in print by counsel for respondents Nos. 1, 2 and 3. This executive action of the Government of Bombay consisting of an order made appointing respondents Nos. 1, 2 and 8 as Commissioners in the matter of the election petition "shall be expressed to be taken in the name of the Governor" and the rules of business provide that it shall be expressed to be made by or by order of the Governor of Bombay. What is it that requires to be expressed to be made by or by order of the Governor of Bombay ? Not the promulgation of the order, nor the authentication of the order, but the making of the order, which is the executive action of the Government of the province, i.e. the Government of Bombay. Do we find any such thing in the notification in question ? The notification in question no doubt contains at the foot of it the signature "By order of the Governor of Bombay. P.N. Moos, Secretary." That, if at all, is a promulgation of the order and the authentication thereof. It certainly is not the making of the order. The order as made was the order of appointment of respondents Nos. 1, 2 and 3 as the Commissioners. That executive action of the Government of the province, i.e. the Government of Bombay, was not expressed to be taken in the name of the Governor. If words have any effect, it was expressed to be taken in the name of the Government of Bombay, an action which was in direct contravention of the mandatory provisions of Section 59(1) of the Government of India Act.

24. It was urged that the Government of Bombay included the Governor of Bombay, and that therefore instead of using the words "Governor of Bombay" merely, the words which were used were inclusive of the Governor of Bombay and whoever else may be comprised within the description of the Government of Bombay. If that was so, it did not lie in the mouth of the petitioner to complain about an expression which certainly included the Governor of Bombay though it comprised within its description some other persons also. It was also urged that in the notification itself, the provision of paragraph 4 of Part III of the Order in Council, 1936, was referred to and that could only mean an appointment by the Governor exercising his individual judgment. It was urged that u/s 114 of the Indian Evidence Act, 1872, there was a presumption that judicial and official acts had been regularly performed and that the Court should therefore presume that

the appointment had been made by the Governor exercising his individual judgment as provided in paragraph 4 of Part III of the Order in Council, 1936. One is only amused at the attempts which counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 had to make to wriggle out of the mandatory provisions of Section 59(i) of the Government of India Act. If these provisions require that the executive action of the Government of the province shall be expressed to be taken in the name of the Governor, there is no manner in which those provisions can be deemed to be satisfied except by strict and literal compliance therewith. Even the user of an all comprehensive term like the "Government of Bombay," which may be argued to comprise within its description the Governor of Bombay, cannot cure the defect. A reference to Section 114 of the Indian Evidence Act also is not of any avail to the respondents. There is no question here that the official act has not been regularly performed. The executive action which is taken is not disputed to be an executive action of the Government of the province, i.e. the Government of Bombay. It is not for a moment contended that all the necessary procedure and the formalities which have to be gone through before the order could be made were not in fact gone through, or that there was any lack of bona fides in the matter. Though at one time it was sought to be suggested that the Congress Ministry, which came into power on April 3, 1946, and was by reason of party politics interested in respondent No. 4, who was put forward as a Congress candidate at the election, might have appointed the Commissioners themselves without the Governor exercising his individual judgment in the matter of the appointment, I scotched at the initial stage all such attempts at dragging party politics in the arguments before the Court. I told counsel for the petitioner that the Court had nothing to do with the disputes between the Communist party and the Congress party, and that the Court was also not concerned with the status or ideology of the respective candidates, the petitioner and respondent No. 4. The Court was only concerned with the legal aspect of the question. It was also not suggested that the Commissioners, who were appointed, had anything whatever to do with any party politics or with the Congress Ministry, who were supposed to have had a hand in their appointment. For ought I know the Governor himself exercising his individual judgment did appoint the Commissioners. There is nothing which the Court has to consider except the pure legal aspect of the question, viz. whether the order of appointment is a valid order, having regard to the provisions of Section 59(1) of the Government of India Act. I am no doubt aware that the objection which the petitioner has taken is a highly technical one. Yet I am of opinion that if the objection is a good one, having regard to the provisions of Section 59(1) of the Government of India Act, he is entitled to a decision in his favour. I do not think that the mere recital of the provisions of Part III, paragraph 4, of the Order in Council, 1936, cures the defect in the order which I have pointed out above. Neither the inclusive term "Government of Bombay" nor the recital of these provisions in the order of appointment therefore avails respondents Nos. 1, 2 and 3 or respondent No. 4.

25. Apart from the above contentions of counsel for respondents Nos. 1, 2 and 3 and respondent No. 4, they also urged that by virtue of provisions of Section 291 of the Government of India Act matters regarding election petitions were outside the scope of the Government of India Act, to be dealt with specifically by His Majesty by issuing Orders in Council in that behalf and that therefore whatever was done under the provisions of Section 291 of the Government of India Act and the Order in Council, 1936, issued by His Majesty in Council thereunder, was outside the purview of the Government of India Act and therefore Section 59(1) of the Government of India Act. This argument, however, ignores the fact that once the Order in Council is issued by His Majesty it lays down what is in effect the exercise of an executive function by the executive head of the Government of the province, viz. the Governor, That function is not exercised by the Governor in any other capacity except in his capacity as the executive head of the province, and once the Order in Council, 1936, was passed by His Majesty, it invested the Governor, though exercising his individual judgment, with the power and authority *inter alia* to appoint Commissioners to investigate into election petitions, all within the exercise of the functions by him as the executive head of the Government of the province. Merely because the election petitions were by reason of the terms of Section 291 of the Government of India Act excluded for the time being from the purview of the Government of India Act and were provided therein to be dealt with by His Majesty by passing Orders in Council in that behalf, the functions to be exercised by the Governor in connection with those matters when they were laid down as such by the Order in Council passed by His Majesty were not divested of their character of being executive functions exercised by the Governor, though exercising his individual judgment, yet in his capacity as the executive head of the Government of the province. Once the Order in Council, 1936, was passed by His Majesty, the provisions of the relevant sections of the Government of India Act, particularly Section 59(1) thereof, became applicable to the functions exercised by the Governor though exercising his individual judgment under the terms thereof. This contention of counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 also therefore fails.

26. When all these objections and points of view above mentioned were pointed out to counsel for respondents Nos. 1, 2 and 3 in the course of the arguments, he was ultimately driven to the argument that the words "By order of the Governor of Bombay," appearing at the foot of the notification in question, formed the operative part of the order and what had preceded, viz. the statement as regards the appointment of the Commissioners by the Government of Bombay was merely a narration of the events that had happened and whatever was stated in that part of the notification was thus to be treated as of no materiality or consequence. The acceptance of this argument of counsel for respondents Nos. 1, 2 and 3 would come to this, that the executive action taken by the Government of the province, i.e. the Government of Bombay, was, though it should have been expressed to be taken in the name of the Governor and the order made in the name of the Governor, to be culled not from the main body of

the notification but from the words "by order of the Government of Bombay," appearing at the foot of the notification. I am unable to accept this argument of counsel for respondents Nos. 1, 2 and 3. It reduces the position to an absurdity. It suggests that the main body of the notification has got to be treated as naught and the words " By order of the Governor of Bombay "have to be treated and read as if that formed the executive action of the Government of the Province, i.e. the Government of Bombay, and was, therefore, in accordance with the provisions of Section 59(1) of the Government of India Act, expressed to be taken in the name of the Governor. As I have already discussed before, the executive action of the Government of the Province, i.e. the Government of Bombay, which must be expressed to be taken in the name of the Governor, is not the mere appendage of the words "By order of the Governor "at the foot of the notification. That action is the passing of the order which is contained in the body of the notification itself and the defect which is to be noticed in the body of the notification cannot be cured by the words "By order of the Governor of Bombay" occurring at the foot of the notification.

27. Lastly, my attention was drawn by counsel for the petitioner to various orders and notifications published in the Bombay Government Gazette in regard to the functions exercised by the Governor exercising his individual judgment, all of which contained the words "The Governor of Bombay is pleased to do "this that or the other. There were also notifications published in the Bombay Government Gazette which contained the words "The Government of Bombay is pleased to do" this that or the other, though in those cases it was not urged that the functions exercised did involve the exercise by the Governor of his discretion or his individual judgment. No doubt the publication of these notifications in the Bombay Government Gazette is not by itself any way conclusive against respondents Nos. 1, 2 and 3 or respondent No. 4. Even if there were irregularities committed by those in charge of the particular departments of the Government in the framing of the notifications and publication thereof, they cannot carry the matter any further. If at all, it only goes to show that in a very large number of cases beginning from 1937 up to 1946, those who were responsible for the framing of the notifications have used, in cases where the Governor was to exercise his functions in the exercise of his discretion or exercising his individual judgment, the words "Governor of Bombay is pleased to do" this that or the other. When asked by me counsel for respondents Nos. 1, 2 and 3 and respondent No. 4 had no explanation to give as to how the notifications which were referred to above by counsel for the petitioner happened to contain the words above stated; the only answer which they could make was that the ways of the Government, as those of Providence, are inscrutable; and that in my opinion is hardly any answer at all. I am not, however, basing my conclusions on the fact of these words being used by the framers of the various notifications published in the Bombay Government Gazette to which my attention has been drawn by counsel for the petitioner. I am basing my conclusion on the purely legal aspect of the matter which I have already discussed above. "

28. After I had reserved judgment in this petition on December 11, 1946, I came to learn that a similar though not identical point had been argued before our Appeal Court in *Emperor v. J.K. Gas Plant & Co., Ltd.* (1946) 49 Bom L.B. 352 It had been there urged that even though the provisions of a particular statute be mandatory there was a further aspect of the question which fell to be determined by the Court, viz. whether the provisions were directory or imperative. If they were construed as directory, the disobedience of the provisions would not invalidate or nullify the order, which consequence would follow only if the provisions were construed by the Court as imperative. This aspect of the question had not been at all argued before me in the full and elaborate arguments addressed by counsel on behalf of the petitioner as well as respondents Nos, 1, 2 and 3 and respondent No. 4. I therefore had the petition set down for further argument before me.

29. I have now had the benefit of arguments addressed to me by counsel on this aspect of the question. Before I come to consider whether the provisions of Section 59(7) of the Government of India Act, which I have already observed before, are mandatory, are directory or imperative, it is necessary to consider what are the principles that have been laid down as affording a guide on this question of construction. The leading case on the point is that of *The Liverpool Borough Bank v. Turner.* (1860) 2 De G.F. & J. 502 In that case Lord Campbell L.C. observed (p. 507):

No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

These observations were followed by Lord Penzance in *Howard v. Bodington.* (1877) 2 P.D. 203 I shall quote the relevant passage from the judgment of Lord Penzance in full as it affords a true guide on this question of construction. Lord Penance there observed (p. 210):

Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the Courts at Westminster, I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done ? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not

strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong ? Mr. Jeune was good enough to refer me to Sir Benson Maxwell's book "On the Interpretation of Statutes," and to quote a number of cases from it (Ch. xii, sec. 3, pp. 380-345). Since the matter was argued I have been very carefully through those cases, but upon reading them all the conclusion at which I am constrained to arrive is that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *The Liverpool Borough Bank v. Turner*. Lord Campbell was then sitting as Lord Chancellor. In an appeal from the Vice Chancellor, and in giving judgment, his Lordship said this:-" No universal rule can be laid down...whole scope of the statute to be construed."..

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

What you have therefore got to do is to look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and then to decide whether the matter is what is called imperative or only directory. The position is thus summarised in Beal's *Cardinal Rules of Legal Interpretation*, 3rd edition, at p. 490:

The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative.

In general the provisions of statutes creating public duties are directory, and those conferring private rights are imperative.

In the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.

30. The distinction which is there drawn between provisions of statutes creating public duties and those conferring private rights and the necessity of weighing the consequences of holding a statute to be directory or imperative have been adopted as the criteria by their Lordships of the Privy Council in *Montreal Street*

Railway Company v. Normandin [1917] A.C. 170 where their Lordships have laid down (pp. 174-175):

The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

This position is more clearly and elaborately set out in Maxwell on the Interpretation of Statutes, 8th edn.; at pp. 321 and 322:

It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

and at p. 326:

On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not effect the validity of the act done in disregard of them.

31. These then are the principles which should guide the Courts in this question of construction. The whole scope and object of the statute under consideration should be regarded. It should be considered whether the command to do a thing in a particular manner does not imply a prohibition to do it in any other. Even though nullification would be the natural and usual consequence of disobedience, the question should in the main be governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons without promoting the real aim and object of the enactment, such an intention should not be attributed to the Legislature. The last consideration is particularly of importance in cases where a public duty is imposed and the statute requires that it shall be performed in a certain manner as distinguished from cases where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with.

32. I have to consider the provisions of Section 59(2) of the Government of India Act and come to the conclusion whether they are directory or imperative, having regard to the principles enunciated above. The Government of India Act is a constitution Act and as stated earlier in my judgment in Part III thereof enacts provisions as regards "The Governor's provinces." After setting out in chap. I what are the Provinces, it proceeds in chap. II to enact provisions as regards "The Provincial Executive." Section 59(1) of the Act is a provision contained in this chap. II. After referring to the appointment of the Governor in Section 48 and laying down in Section 49 that the executive authority of the province shall be exercised by the Governor, it proceeds to enact provisions as regards Administration of Provincial Affairs and demarcates the functions to be performed by the Council of Ministers. Even though the Council of Ministers is set up, it is merely an advisory body and emphasis is laid on special responsibilities of the Governor and the Governor is in particular respects to be under the superintendence of the Governor General. Provisions are made for Instruments of Instructions, the Advocate General for the Province, Police Rules, Crimes of violence intended to overthrow Government and non-disclosure of sources of certain information. The last provision is as regards the conduct of business of the Provincial Government contained in Section 59. The object of that section is to lay down how the business of the Provincial Government shall be conducted as between the Governor, the Ministers and Secretaries to Government. The sole responsibility for carrying out the administration of the province rests upon the

Governor, he is to make rules for the more convenient transaction of the business of the Provincial Government, and even though he is to consult his Ministers with regard to the making of the rules and other matters therein mentioned, he is to act in his discretion in respect thereof. This provision, if at all, emphasises the position of the Governor as the executive head of the Province and the purpose of the enactment of Section 59(1) is that all the executive action of the Government of the Province is prescribed as having "to be expressed to be taken in the name of the Governor." The very scope and object of this enactment is to enact how the Government of the Province is to be carried on and all the provisions with regard to the same contained in chap. II are equally important. It would not be legitimate to characterise some provisions of chap. II as imperative and others as merely directory. All the provisions are of equal importance as laying down the functions of the various members of the Government of the Province and the manner in which those functions are to be exercised. Section 59, which relates to the conduct of business of the Government, is not merely procedural, it is not a mere matter of form, but it is one of substance. It emphasises, as I have observed earlier, the position of the Governor as the executive head of the Province and lays down that in whatever mode the functions are exercised by the Governor, all the functions are exercised by him as the executive head of the Province, his action is the executive action of the Government of the Province, and that action has got to be expressed to be taken in the name of the Governor. In my opinion, apart from the scope and object of the enactment, there is here an implied prohibition not to express the executive action of the Government of the Province as taken in any other manner except in the name of the Governor. There are no grounds of convenience and justice which would militate against this construction, and adopting this construction would, in my opinion, not involve any general inconvenience or injustice to innocent persons, without promoting the real aim and object of the enactment. In a sense all Government actions may be characterised as the discharge of a public duty. That however is no argument for upholding the contention that the provision in question should be construed as merely directory. If that contention was upheld, one can run a coach and four through all the provisions contained in chap. II above and leave the obedience of the relevant provisions to the sweet will or caprice of those in charge of the administration of Provincial Affairs. It is also idle to contend that the words "Governor" and "Government of the Province" are interchangeable and the use of the one expression or the other does not make any substantial difference to the position. If that contention was correct, it would render the enactment of Section 59(1) nugatory and would in effect abrogate that provision. In my opinion the provisions of Section 59(2) are imperative and disobedience of the same would nullify or invalidate any order or proceeding which contravenes the same.

33. It was urged by counsel for respondent No. 4 that his client was an innocent person who had no control over those exercising the public duty and that

therefore the provision enacted in Section 59(2) should be construed by the Court as directory and not imperative. Apart from my findings that the provision enacted in Section 59(2) is imperative, having regard to the scope and object of the Act and that there is an implied prohibition against disobedience thereof, as I have observed earlier, even considering the exercise of the function as a discharge of a public duty, I am not impressed with this argument of counsel for respondent No. 4 inasmuch as the same reasoning would be applicable to the case of the petitioner also, he having a vested right as an elected member of the Bombay Legislative Assembly which is sought to be challenged by the election petition and he also being likely to suffer inconvenience by reason of his having to face the enquiry before a tribunal not properly appointed in accordance with the strict provisions of law. This argument therefore does not avail respondent No. 4.

34. It was lastly urged that our Appeal Court has held in *Emperor v. J.K. Gas Plant & Co., Ltd.* (1946) 49 Bom. L.R. 352 above referred to, that an analogous provision contained in Schedule IX, Section 40, of the Government of India Act is merely directory and not imperative, that I am bound by that judgment, that I should also hold that the provisions of Section 59(7) of the Government of India Act are merely directory and not imperative and that therefore the notification in question appointing respondents Nos. 1, 2 and 3 as Commissioners is not void and of no legal effect. In order to appreciate this contention, it is necessary to set out what were the provisions of the Government of India Act which came to be considered by the Appeal Court. They are contained in the ninth schedule to the Act which specified the provisions of the Government of India Act continued in force with amendments until the establishment of the Federation. Sections 36 to 43 therein specified refer to the Governor General's Executive Council and Section 40 provides that:

(1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a secretary to the Government of India, or otherwise as the Governor-General in Council may direct, and, when so signed, shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council.

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his Executive Council, and every order made or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor-General in Council.

These provisions, it was contended, are analogous to those contained in Section 59(2) of the Government of India Act and afford a guide to the construction of the latter, whether they are directory only and not imperative. My attention was drawn by counsel for respondents Nos, 1, 2 and 3 and respondent No. 4 to certain passages from the judgments of the learned Chief Justice and Lokur J. with reference to the construction of those provisions and I was invited to hold,

as it was held by the learned Chief Justice and Lokur J., that the provisions of Section 59(2) of the Government of India Act were directory only and not imperative. In his judgment the learned Chief Justice observed (p. 372):

The provisions with regard to the Governor-General in Council are contained in Sections 36 to 43 (both inclusive) of the IX Schedule to the Government of India Act, 1935, and the gravamen of Mr. Setalvad's attack is that this group of sections which is headed "Governor-General's Executive Council" are mandatory in terms and provide inter alia an inflexible method of procedure for regulating the business transacted by the Governor-General in his Executive Council. An examination of the scheme of these sections is therefore necessary. Section 36 provides that the members of the Governor-General's Executive Council shall be appointed by His Majesty by warrant under the Royal Sign Manual, and further provides that the members of the Council shall be such as His Majesty thinks fit to appoint and the remaining sub-sections of this section have regard to qualification of the members. Section 37 provides for the position of the Commander-in-Chief in the Council, Section 38 for the appointment of a Vice-President, Section 39, the places at which the Council is to assemble and for the quorum, and then comes Section 40 upon which the whole attack depends.

The learned Chief Justice then quoted Section 40 mentioned above and proceeded to observe (p. 373):

Section 41 lays down the procedure which is to be followed in cases of a difference of opinion within the Council, including a provision that a dissentient majority may require the fact of such dissent to be reported to the Secretary of State. Section 42 makes provision as to what is to happen, if the Governor General is absent from a meeting of the Council, and Section 43 gives certain powers to the Governor-General when he is absent from the Council.

In my judgment Sub-section 40(1) is a procedural section. It is not even concerned with such important matters as the personnel of the Council, or with what is to happen in the event of disagreement, or with the methods by which conclusions are to be arrived at. It concerns only, with the manner in which orders and other proceedings when made or have taken place are to be expressed, that is to say, to be represented in language, so that the order may be promulgated, in the sense of being published. To do this, two formalities are required. The orders are to be expressed to be made by the Governor General in Council and they are to be signed by a Secretary to the Government of India "or otherwise as the Governor General in Council may direct." When so signed, the orders and other proceedings "shall not be called in question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council." So it is clear that the signature of the Secretary is a formality of an evidential character. There is in my opinion no scope in this sub-section for a construction which would vitiate an order actually made by the Governor-General in Council, but which was not expressed to be made according to the letter of the sub-section. In the events which had happened at the material dates, the

Governor-General in Council was the Central Government and in my judgment the defect, if defect it be, of describing these notifications as being made by the "Central Government" is one of form only and not of substance; it is an irregularity and not a nullity, since it is not and could not be suggested that the notifications were not in fact made by the Governor General in Council.

Lokur J. observed with reference to the said provisions that (pp. 383, 384):

Although the sub-section says that the orders "shall" be expressed to be made by the Governor-General in Council, we do not think it to be so mandatory as to invalidate the orders, if it is not strictly complied with.

In *In re Lord Thurlow* [1895] 1 Q.B. 724 Lopes, L.J. observed (p. 781): "It is clear that the word "shall" is not always used in a mandatory sense. There is abundance of authority to the contrary in cases where it has been held to be directory only."

As explained in Stroude's Judicial Dictionary,

"Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to

a The time or formality of completing any Public act, not being a step in a litigation, or accusation,...or the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements."...

"Similarly, the provision in Sub-section (1) of Section 40 of the ninth schedule to the Government of India Act, 1935,-regarding the mode of expressing an order made by the Governor-General in Council is directory, and there is no further provision that if that mode is not adopted, the order itself is void.

The learned Chief Justice based his conclusions on the scope and object of the provisions and was of opinion that all the provisions there related to the functioning of the Executive Council of the Governor General, and Section 40 which laid down how the business of the Governor-General in Council was to be conducted was merely a procedural one. The provisions which the learned Chief Justice had to construe were of a transitory nature, consisting of the provisions of the Government of India Act, 1915, continued in force with amendments until the establishment of the Federation. The provisions, which I have however to consider, are of quite a different character. They relate to the Administration of the Provincial Affairs, with a demarcation of functions of the various members of the Government of the Province. It may be noted that provincial autonomy was introduced by the Government of India Act of 1935 and chap. II of Part III of the Act enacted provisions as to how the provincial autonomy was to function. What was enacted was thus not merely procedural but was of substance and the provisions of Schedule IX to the Government of India Act which are of a transitory nature do not furnish any parallel to the same. It is also significant to

note in this connection how the provisions in Schedule IX, Section 40, have come to be divided in Section 59 of the Government of India Act. Section 59(1) is separated and enacted as a separate sub-section, with the view, as I stated before, of emphasising the position of the Governor as the executive head of the Government of the Province and is not merely a formal or procedural but a substantive measure and spells out an implied provision against the executive action being expressed to be taken in any other manner except in the name of the Governor. This is an essential point of distinction between the provisions of Schedule IX and the provisions of Part III, Chapter II, of the Government of India Act, and I am of opinion that the construction of the former affords no guide to the construction of the latter. Lokur J. further based his conclusions mainly on the passage which he quoted from Stroude's Judicial Dictionary and the absence of a provision that if the prescribed mode was not adopted the order itself was void—a position which with great respect to the learned Judge is not warranted by the passages from Beal on Cardinal Rules of Legal Interpretation and Maxwell on the Interpretation of Statutes, quoted by me above. Both the learned Judges were moreover considering the orders which were passed by the Central Government under the Defence of India Rules, which specifically made applicable the General Clauses Act, 1897, to the interpretation thereof. Their judgments were therefore mainly influenced by that consideration and the definition of "Central Government" to be found in Section 3(8ab) of the General Clauses Act whereas I have already held, earlier that the General Clauses Act has no application at all to the notification in question before me. It would be useful in this connection to refer to the observations of the learned Chief Justice where he says (p. 872):

By Rule 81(2) of the Defence of India Rules

"the Central Government, or the Provincial Government, so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide:" and then are set out in a number of sub-paragraphs the various matters in respect of which an order for the purposes aforesaid may be made by the Central Government. By Rule 3(1), the General Clauses Act, 1897, is made to apply to the interpretation of the Defence of India Rules. Turning to the definition section of that Act, Section 3, it will be found that in Sub-clause 8(ab)" Central Government" in relation to anything done after the commencement of Part III of the Government of India Act, 1935, mean "the Federal Government" which by Sub-clause 18(a) shall:

in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, but before the establishment of the Federation, mean as respects matters with respect to which the Governor-General is by and under the provisions of the said Act for the time being in force required to act in his discretion, the Governor General, and as respects other matters, the Governor General in Council...

In the events which had happened at the material dates, the Governor-General in Council was the Central Government and in my judgment the defect, if defect it be, of describing these notifications as being made by the "Central Government" is one of form only and not of substance; it is an irregularity and not a nullity, since it is not and could not be suggested that the notifications were in fact made by the Governor General in Council.

and the observations of Lokur J. where he says (p. 888):

Sub-rule (2) of Rule 81 of the Defence of India Rules empowers the Central Government to make such orders, and the orders are expressed to have been made by the Central Government. What that means is to be ascertained by reference to the General Clauses Act, 1897. With regard to such orders, Central Government is equivalent to Governor-General in Council, and if the Orders be expressed to be made by the Central Government, the departure from the strict letter of Sub-section (1) of Section 40 cannot be regarded as fatal to the validity of the orders.

and (p. 384):

The orders really contain two parts; the first part is the preamble, and the second part is the Order itself; the former is procedural and the latter operative. There are numerous authorities to show that in matters of procedure mandatory words are construed as directory (*Krishnasami Pannikondar v. Muthukrishna Pannikondar*. I.L.R.1900-01 Mad. 364 In this case both the Orders closely follow the wording of Sub-rule (2) of Rule 81 of the Defence of India Rules, which confers on "the Central Government" the power to make these Orders, and their validity cannot be assailed on the ground that they are not expressed to have been made by the Governor-General in Council.

These considerations do not arise on the construction of the notification in question before me. Even though the observations of the learned Chief Justice and Lokur J. being the observations of the learned Judges of the Appeal Court are of great persuasive efficacy, I do not feel constrained to follow the same having regard to the points of distinction above mentioned. The provisions which would really have been important from this point of view are those contained in part II, chap. II, of the Government of India Act, which enact provisions as regards the Federal Executive and contain in Section 17 an exact parallel to the provisions contained in Section 59, the former relating to the conduct of business of the Federal Government and the latter relating to the conduct of business of the Provincial Government. If those provisions had been construed by the Appeal Court, I should have been bound to follow the decision of the Appeal Court howsoever contrary thereto my personal opinion might have been. But, as I have pointed out above, the provisions contained in Schedule IX do not afford any parallel and I do not feel that there is any compelling reason why I should depart from the view which I have already taken of the imperative character of the provisions contained in Section 59(1) of the Government of India Act.

35. I have devoted very anxious thought to this question. What counsel for the petitioner has been relying upon is a pure technicality. I have tried my level best to see if by any possible means one could wriggle out of the imperative provisions of Section 59(1) of the Government of India Act. There is not the slightest aspersion which can be cast against the honesty, integrity or the status of respondents Nos. 1, 2 and 3, who have been appointed Commissioners in the matter of the election petition. No better choice also could have been made by the Governor exercising his individual judgment in the matter of the appointment of the Commissioners. Even so, I am constrained to observe that the provisions of Section 59(i) of the Government of India Act are contravened in the notification of the appointment of respondents Nos. 1, 2 and 3 as Commissioners, and even though I would ordinarily be loath to allow an objection of this highly technical nature, I see no way of deciding this point in favour of respondents Nos. 1, 2 and 3 or respondent No. 4. The petitioner is, therefore, entitled to an order in his favour that the notification for the appointment of respondents Nos. 1, 2 and 3 as Commissioners, Ex. A to the petition, is bad as contravening the imperative provisions of Section 59(1) of the Government of India Act and that respondents Nos. 1, 2 and 3 have no jurisdiction to entertain the election petition of respondent No. 4.

36. Under the circumstances I do order that a writ of certiorari do issue against respondents Nos. 1, 2 and 3 calling for the records and proceedings relating to the petition before them and that the proceedings be quashed.

37. As regards costs, it has to be observed that respondents Nos. 1, 2 and 3 have, contrary to all expectations, taken up a contentious attitude in the matter of this petition. Really speaking respondents Nos. 1, 2 and 3 were not concerned with whether their appointment as Commissioners was a valid appointment or not. They ought to have submitted to the orders of the Court and offered to be guided by whatever decision the Court would arrive at on the hearing of the petition. They, however, for reasons best known to themselves, not only appeared by counsel but took up a highly contentious attitude trying to substantiate their appointment by arguing the various points which I have dealt with above and by submitting for my consideration the various preliminary objections which I have dealt with in my judgment. If respondents Nos. 1, 2 and 3 had taken up a non-contentious attitude of the nature I have indicated above, I should certainly not have made any order of costs against them. In so far, however, as they were advised to take up a contentious attitude in the matter of this petition, I do order that they do pay the petitioner's costs of this petition. Respondent No. 4 is certainly liable to and shall pay the petitioner's costs of this petition.