SUPREME COURT.

G. N. BANERJI (APPLICANT)

v.

THE SUPERINTENDENT, INSEIN JAIL ANNEXE, INSEIN (RESPONDENT).*

†S.C. 1948

May 10.

[On appeal from the High Court.]

Directions in the nature of habeas corpus—*Nature and scope—Powers of Supreme Court—Public Property Protection Act, 1947—S. 7 (2), (3), (5)—"Officer" authorized to arrest without warrant—Whether Public Property Protection Committee is an officer—Nature of arrest—If power to arrest can be delegated—Arguments as to absurd consequences—How far applicable—Report by officer under s. 7 (2) condition precedent to action by President under s. 7 (3).*

The writ of *habeas corpus* is an ancient Common Law writ used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments. It enables the immediate determination of the right to the applicant's freedom. It is not a proceeding in a suit but a summary application by the person detained. The efforts of the Court are invariably directed to prevent evasion and delay. The exercise of this check, whole and unimpaired but shorn of antiquated technicalities, has been entrusted to the Supreme Court by the Constitution of the Union.

Liversidge v. *Sir John Anderson*, (1942) A.C. 206, *Greene* v. *Secretary of State for Home Affairs*, (1942) A.C. 284 at pp. 301—3 ; *Secretary of State for Home Affairs* v. *O'Brien*, (1923) A.C. 603 at p. 609, referred to.

Under s. 7 (2), Public Property Protection Act, 1947, by Notification 131, dated 31st December 1947, the Governor purported to authorize the Public Property Protection Committee to arrest without warrant, persons coming under s. 7 (2) of the Act suspected of having committed prejudicial acts. An order signed by the Chairman of the Committee was delivered to an Inspector of Police, who arrested applicant on 18th February 1948. On 1st March 1948 an order purporting to be under s. 7 (3) authenticated by a Deputy Secretary to Government, directed detention of applicant for six months from 18th February 1948. On an application for a writ of *habeas corpus*, *Held* : Authority under s. 7 (2) cannot be invested in a Committee and the Committee is not an officer who can arrest. The act of arrest is a physical act and a Committee of several persons cannot touch or arrest. The officer has to entertain a suspicion and a Committee cannot do so.

General Clauses Act, s. 2 (*44*), referred to.

Cecil Gray v. *The Cantonment Committee of Poona*, 34 Bom. 583 ; *Vishnomal* v. *Court of Wards*, (1928) Sind. 76 ; *Tewari* v. *Deputy Commissioner, Lucknow*, 14 Luck. 351 ; *Ismail Mohamed Hajee* v. *The King*, (1941 Ran. 536, distinguished.

* Criminal Misc. Application No. 5 of 1948.

† *Present* : SIR BA U, Chief Justice of the Union of Burma, E MAUNG, J., and KYAW MYINT, J., of the Supreme Court.

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Held further : The exercise of the power of arrest cannot be delegated. There is no provision in s. 7 (2) to have the arrest effected through another, as in ss. 56 and 65 of Criminal Procedure Code. Further this deprives the person affected of an opportunity to satisfy the officer concerned. The question of administrative inconvenience involved in requiring high officers to arrest personally cannot outweigh the liberty of the subject.

Barnard v. *Gorman*, (1941) A.C. 378 at pp. 383-4, relied on.

The duty of Judges is only to take the words as they stand, give its natural meaning and appropriate construction, but not cure loopholes in a statute.

Held also : The receipt of a report from the officer arresting is a condition to the exercise of the powers of the Governor under s. 7 (5). As there was no report in this case, the further order is invalid and not in accordance with law.

King-Emperor v. *Deshpande*, 73 I.A. 144, applied.

From the order it appears that U Thet Tin was satisfied and not the President. The Law contemplates that the President should be satisfied. Greater precision of language should be exercised in drafting documents of great importance involving interference with fundamental rights.

P. K. Basu for the applicant.

U Chan Htoon (Attorney-General for the Union of Burma) for the respondent.

The judgment of the Court was delivered by

E MAUNG, J.—This is an application for directions in the nature of *habeas corpus* made by one G. N. Banerji, who had been committed to custody in Insein Jail for a period of six months from the 18th February 1948, under the provisions of sub-section (5) read with sub-section (3) of section 7 of the Public Property Protection Act, 1947. The right which by the application it is sought to establish is the right of personal liberty guaranteed under Article 16 of the Constitution and it is said on behalf of the applicant that his incarceration in Insein Jail is one directed other than in due course of law and is accordingly illegal.

It would not be inappropriate here to state shortly the history, nature and scope of directions in the nature of *habeas corpus* and for such a statement it

would be difficult to better the account given by such an eminent jurist as Lord Wright in *Greene* v. *Secretary of State for Home Affairs* (1):

"The writ of *habeas corpus* is an ancient common law writ, which from about the end of the sixteenth century or the earlier years of the seventeenth century came to be used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments, in particular those by order of the executive. The history of this great remedial writ is succinctly but lucidly and accurately described in Sir William Holdsworth's History of English Law, vol. ix, 2nd ed., pp. 112 to 124. I am merely concerned here with limited aspects. The common law adapted the old writ *habeas corpus ad suscipiendum et recipiendum* to the purpose of securing the subject's right to immunity from arbitrary arrest and imprisonment save by due process at law. In its earlier use, the writ had been from old days one of the procedural or mesne process writs. The right to freedom which the writ was directed to vindicate was said to be secured by the famous words of Magna Carta, a translation of which was embodied in the Petition of Right of 1628, s. 3: 'And where also by the statute called 'The Great Charter of the Liberties of England' it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his Free Customs, or be outlawed or exiled, or in any manner destroyed but by the lawful judgment of his Peers or by the Law of the land.' This provision was reiterated in the Petition of Right because of the refusal of the Court of King's Bench to grant the writ in *Darnel*'s case (1627 3 St. Tr. 1), where the return that the arrest was *per speciale mandatum domini regis* was held to be good return, which meant that a lawful cause of imprisonment was shown. We are told, no doubt with good reason, that the judges were influenced by the opinion that some degree of prerogative power was necessary to unable the Crown to deal with emergencies. The decision and arguments are analysed by Sir William Holdsworth, op. cit., vol. vi; 2nd ed., p. 34 and *seq.*, But the Petition of Right declared such a cause of imprisonment to be unlawful. In the same way it was enacted, in the Act of 1640 abolishing the Star Chamber, that any person committed or imprisoned by order of

(1) (1942) A.C. 284 at pp. 301—3.

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the Star Chamber or similar bodies should have his *habeas corpus*.

It is clear that the writ of *habeas corpus* deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a *prima facie* case that he is unlawfully detained. He cannot get it as he would get an original writ for initiating an action, but if he shows a *prima facie* case he is entitled to it as of right. The first question, therefore, in any *habeas corpus* proceeding is whether a *prima facie* case is shown by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient. A person unlawfully detained is entitled as of course to obtain a writ of trespass, but an action of trespass or false imprisonment does not by itself secure the immediate or speedy release of the plaintiff, if he is still detained when he commences his action. As Littledale J. said in *Leonard Watson*'s case (9 A & E, 731, 795), 'A party imprisoned has two modes of proceeding, either by action for false imprisonment or by application for a *habeas corpus*. In an action for false imprisonment the defendant must prove his justification, if any and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to an *habeas corpus* no such minuteness of detail is necessary, nor in any instance that I can find has it been considered necessary to support the return by affidavit.' The incalculable value of *habeas corpus* is that it enables the immediate determination of the right to the applicant's freedom. On this aspect I may refer to the discussion by Lord Halsbury L.C. in *Cox* v. *Hakes* (15 App. Cas. 506, 514). He said: 'In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such determination that if favourable to liberty it was without appeal and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a

suit but was a summary application by the person detained. No other party to that proceeding was necessarily before or represented before the judge except the person detaining and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it, *festinum remedium*.' When in the *Habeas Corpus* Act, 1816, the court was given power, if it sees fit, in the cases to which the Act applies, to inquire into the truth of the facts set out in the return, it was to be in a summary way, by affidavit or affirmation (s. 3). The efforts of the courts aided by the Legislature by means of the Acts of 1679 and 1816, have invariably been directed to prevent evasion and delay in the proceedings such as the *alias* and *pluries* writ or the cruder course of removing the person detained out of the jurisdiction and to make them effective in the shortest possible time. I have adverted to these features of the *Habeas Corpus* Act because I shall later have to deal with some questions of the procedure.

I have emphasized the use of the writ to secure freedom from arbitrary or unlawful arrest by the government, but besides these public occasions it was employed in connection with private arrests and detainments so that the writ applies to indefinitely wider and more various exigencies, indeed to any case whatever in which the liberty of the subject is unlawfully interfered with."

Of the writ of ***habeas corpus ad subjiciendum***, Lord Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien* (1) says :

"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

The exercise of this check, whole and unimpaired in extent but shorn of antiquated technicalities in

(1) (1923) A.C. 603 at p. 609.

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procedure, has by the Constitution of the Union been entrusted to this Court.

The facts essential for the determination of this application lie within a narrow compass and are not in dispute. The applicant G. N. Banerji, an advocate of the High Court, was at a time prior to the 23rd December 1946 a District Supplies Officer at Mergui. On the 23rd December 1946 he relinquished his appointment and handed over his duties to his successor and thereafter resumed his practice at the Bar. On the 16th February 1948 an order for his detention under section 7 (2) of the Public Property Protection Act, 1947, was made by U Chan Tha, Chairman of the Public Property Protection Committee. This order of detention was for a period of 15 days from the date his arrest was effected. This order, it appears, was delivered to one U Mya, an Inspector of Police in the Criminal Investigation Department of the Government of the Union of Burma and the police officer, purporting to act under the order, arrested the applicant on the 18th February 1948. Thereafter the applicant was detained at the Kyauktada Police Station, Rangoon, till the 1st March 1948 when, on the authority of another order purporting to be under sub-sections (3) and (5) of section 7 of the Public Property Protection Act and authenticated by U Thet Tin, Deputy Secretary to the Government of the Union of Burma, the applicant was removed to the Insein Jail and detained therein. This order of the 1st March 1948 directed the detention of the applicant for a period of six months from the 18th February 1948, the date of his arrest.

The relevant provisions of the Public Property Protection Act, 1947, read as follows :

"7 (2) Any officer authorized in this behalf by general or special order by the Governor may arrest without warrant any

person whom he suspects of having committed, whether before or after the commencement of this Act, or of committing any prejudicial act.

(3) Any officer who makes an arrest in pursuance of sub-section (1) or sub-section (2) shall forthwith report the fact of such arrest to the Governor, and pending the receipt of the orders of the Governor, he may, by an order in writing, commit any person so arrested to such custody as the Governor may, by general or special order, specify :

Provided—

(i) that no person shall be detained in custody under this sub-section for a period exceeding fifteen days without the order of the Governor ;

(ii) that no person shall be detained in custody under this sub-section for a period exceeding six months.

(4) * * * *

(5) On receipt of any report made under the provisions of sub-section (3) the Governor may, in addition to making such orders subject to the second proviso to sub-section (3) as may appear to be necessary for the temporary custody of any person arrested under this section, make, in exercise of any powers conferred upon the Governor by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the Governor in the circumstances of the case to be reasonable or necessary."

It is not necessary to consider whether the word "suspects" in section 7 (2) of the Act imports an arbitrary or irrational state of suspicion and therefore excludes a justiciable issue. Neither is it necessary in this case to consider whether it is open to the Court to examine the reasonableness of such suspicion and for that purpose to discuss the applicability of *Liversidge* v. *Sir John Anderson* (1), *Greene* v. *The Secretary of State for Home Affairs* (2) and *Rex* v. *Secretary of State for Home Affairs* (3).

The learned counsel for the applicant contends that under section 7 (2) of the Public Property

(1) (1942) A.C. 206. (2) (1942) A.C. 284 at pp. 301—3.
(3) (1942) 2 K.B. 14.

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Protection Act, the Governor (now the President of the Union) is empowered to invest the authority to arrest without warrant to an officer only and not to an amorphous body like the Public Property Protection Committee and that accordingly Notification No. 131 of the 31st December 1947, Commerce and Supply Department, Legislation Branch, purporting to authorize the Public Property Protection Committee to effect the arrest without a warrant of persons coming within section 7 (2) of the Act is *ultra vires* of the Governor of Burma (now the President of the Union of Burma).

The learned Attorney-General claims that the provisions of section 2 (*44*) of the General Clauses Act and *Cecil Gray* v. *The Cantonment Committee of Poona* (1), *Vishnomal* v. *Court of Wards* (2), *Tewari* v. *Deputy Commissioner, Lucknow* (3) and *Ismail Mohamed Hajee* v. *The King* (4 are clear authorities for the view that the word "officer" may embrace a committee. We find it impossible to accept this contention. The General Clauses Act was enacted, as is clear from section 1 thereof, to advance brevity in drafting and certainty in interpretation of "all Acts, Regulations and Ordinances forming part of the law of Burma, whenever and by whatever authority they were passed or made." Section 2 provides definitions of words and is prefaced by the qualification "unless there is anything repugnant in the subject or context"; and in section 2 (*44*) the word "person" is defined as including *inter alia* a body of individuals whether incorporated or not. The learned Attorney-General's contention is that because an officer is defined judicially as a person employed to exercise to some extent and in certain circumstances the delegated

(1) 34 Bom. 583.
(2) (1928) Sind 76.
(3) 14 Luck. 351.
(4) (1941) Ran. 536.

functions of the Government, the term "officer" may embrace a committee which is a body of individuals not incorporated. This argument involves a fallacy. It does not follow that because the word "person" is to be deemed to include a body corporate or a body of individuals not incorporated, in the interpretation of Acts and other statutory enactments, the same extended definition is to be applied in the interpretation of the word "person" in contexts other than in such Acts and enactments. Moreover, this argument overlooks the overriding qualification "unless there is anything repugnant in the subject or context." What under section 7 (2) of the Act the Governor (now the President of the Union) is empowered to authorize is "to arrest without a warrant" and an arrest, as is clear from section 46 of the Code of Criminal Procedure, is a physical act; the person making the arrest is required actually to touch or to confine the body of the person to be arrested, unless there is submission to the custody by word or action. How would it be possible for a body incorporate, which has only a notional existence as a legal entity, to effect an arrest? How would a committee composed of several individuals exercise the physical act or arrest? Would all the members of the committee have to attend and each actually touch or confine the body of the person to be arrested?

To say that all the members of the committee except one may delegate their functions to the remaining member would not be an answer to the difficulty. The committee has to entertain a suspicion as a preliminary to arrest and the entertainment of suspicion cannot possibly be delegated to one member of the committee by the rest thereof.

The decision in *Ismail Mohamed Hajee* v. *The King* (1) is not relevant to the present case. The other

(1) (1941) Ran. 536.

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decisions relied upon by the learned Attorney-General are in different collocations and cannot possibly be said to be *in pari materia* with the present case. Moreover, these decisions are of doubtful validity in view of the provisions of sections 57 and 58 of the Municipal Act and sections 272 and 273 of the Cantonment Act.

The learned counsel for the applicant goes further. He says, and rightly we think, that even if the Governor (now the President of the Union) was competent to authorize the committee under section 7 (2) of the Public Property Protection Act to arrest his client without a warrant under sub-section (3), the exercise of the power of arrest could not have been delegated, as was done in this case, to a police officer. The learned Attorney-General contends that the maxim "*Delegatus non potest delegare*" is controlled by the maxim "*Qui facit per alium facit per se*" in respect of all functions which are purely ministerial and not involving the exercise of any judicial or discretionary powers. He claims that a person who has been directed to effect an arrest on behalf of another who himself could have arrested the person concerned, is merely doing a purely ministerial act. No authority is cited for this proposition and our researches have not disclosed any in support thereof.

In fact, both on general principles and on the analogy of statutes *in pari materia* it is clear that, unless empowered by legislation in that behalf, a person who may effect an arrest is not entitled to delegate that function to another. Article 16 of the Constitution requires every interference with the personal liberty of a citizen to be justified by law. What section 7 (2) of the Public Property Protection Act justifies is arrest without warrant by the officer authorized thereunder. That officer is not vested with the power to issue a

warrant of arrest; and an officer who can arrest without a warrant but may not or does not issue a warrant of arrest requires legislative sanction similar to that in sections 56 and 65 of the Code of Criminal Procedure to have the arrest effected through another person. There is no such legislative sanction in relation to an officer acting under section 7 (2) of the Public Property Protection Act.

Practical considerations also support the view that the exercise of the power of arrest is one which, save by legislative sanction, should not be delegated. The right to personal liberty is a fundamental human right under the Constitution and every person arrested on suspicion has a right, then and there, to give an explanation which may have the effect of removing a misunderstanding, if any, that resulted in suspicion being engendered in the mind of the officer entitled to effect his arrest. To regard the act of arrest as a purely ministerial one would lead to the situation that when the person arrested offers to the police officer arresting him an explanation which might be sufficient to explain away the suspicious circumstances existing against him, the police officer can merely say: "That has nothing to do with me; come and remain in detention for 15 days." This is a preposterous situation.

It is next contended by the learned Attorney-General that section 7 of the Public Property Protection Act should be interpreted in such a manner as to make for the smooth working of the executive machinery provided therein. He says that a high Government official such as the Chairman of the Public Property Protection Committee or a Deputy Commissioner, who normally would be the persons authorized by the President of the Union to arrest a person without a warrant, cannot be expected to effect an arrest in

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person, and that the Legislature obviously intended that such high Government officials must have the power to delegate the exercise of actual arrest. Any other interpretation of the Act, he contends, would make the Act unworkable or at least would result in administrative inconvenience. To the argument based on administrative convenience we cannot do better than adopt the words of a learned Law Lord in England and say with him: "The liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other."

Arguments drawn from absurd consequences are no doubt forceful but in this case we can see no justification for implementing by forced judicial construction the power of delegation. In *Barnard* v. *Gorman* (1) Viscount Simon, the Lord Chancellor, said:

"The question is a very serious one, for, on the one hand, it is rightly stressed that the liberty of the subject is involved, and if an innocent man is detained under official authority his personal freedom is for the time being interfered with, even though he may be treated with all consideration and may, in fact, have suffered little from being in temporary custody. On the other hand, if officers of customs cannot detain a man who is coming off a ship and whom they suspect on reasonable grounds of endeavouring to defraud the customs, but must either let him go and rely on a subsequent summons being effectually served on him, or, if not, must arrest him at their own risk, the working of our customs law is likely to be seriously impeded, and the question would arise whether it did not require to be amended. Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds against the revenue. If, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to

(1) (1941) A.C. 378 at pp. 383-4.

the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context."

The learned counsel for the applicant contends that under section 7 (3) of the Act it is for the officer who makes the arrest to report the fact of the arrest to the President of the Union and that sub-section (5) makes the receipt of the report of such officer a condition precedent to action by the President directing the detention of the person arrested for a period not exceeding six months but exceeding 15 days. That appears to be so. The learned counsel then claims that in this case there was no report by the officer who made the arrest and that therefore the order of detention of the 1st March 1948 is invalid and not in accordance with law. We can see no answer to this contention.

The learned counsel for the applicant sought to develop an argument in support of the application based on Article 24 of the Constitution. It is not necessary, in view of the conclusions we have arrived at in this case, to pursue this argument further and we are relieved from attempting to resolve the antinomy that faced Lord Shaw of Dunfermline in *The King* v. *Halliday* (1) between a preventive detention and imprisonment as also between preventive justice and executive action.

To sum up, our conclusions are that authority under section 7 (2) of the Public Property Protection Act, 1947, cannot be invested in the Public Property Protection Committee, that U Chan Tha had no authority to act either individually or on behalf of the Committee, that the police officer who actually effected the arrest was not authorized in law to arrest the

(1) (1917) A.C. 260.

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applicant, that his detention under the preliminary warrant under the hand of U Chan Tha was unlawful, and that there not having been a report to the President by the officer effecting the arrest (in fact, there is in this case no officer who could have legally made such a report) the final order of detention of the 1st March 1948 is invalid.

This, in our opinion, is a stronger case for interference than that which went before the Privy Council in *King-Emperor* v. *Deshpande* (1).

In view of the findings arrived at by us on matters of substance, what follows is a matter of minor detail. Still, as the liberty of a citizen is in issue, we consider it right to draw attention to matters even of detail. The warrant directing the detention of the applicant for a period of six months reads as follows :

"Being satisfied that G. N. Banerjee Ex. Supply Officer Mergui son of late Mr. Bannerjee has committed a prejudicial act, I, U Thet Tin, Ministry of Commerce, Supply and Transport, by order of the President of the Union hereby direct that G. N. Bannerjee be detained in Insein Jail for a period of six months with effect from the 18-2-48."

From this order it would appear as if it was U Thet Tin who was satisfied that G. N. Banerji had committed a prejudicial act. That is not what the law requires. The law contemplates that the President should be satisfied. It is to be hoped that in drafting documents of grave importance involving interference with fundamental rights of the citizen greater precision in the use of language would be exercised.

In the result we direct that G. N. Banerji, who is now in detention in Insein Jail under an order of the 1st March 1948 of the Government of the Union of Burma, Ministry of Commerce, Supply and Transport,

(1) 73 I.A. 144.

being Order No. 49/PPP48, be forthwith released and that this order of the Court be forthwith communicated to the Superintendent of the Jail, Insein Jail Annexe, Insein.

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