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Court : Mumbai

Decided On : Feb-27-1931

Reported in : (1931)33BOMLR950

Judge : Viscount Dunedin, ;Thankerton, ;Russell, ;George Lowndes and ;Dinshah Mulla, JJ.

Appellant : Bhagat Singh

Respondent : Emperor

Disposition : Petition dismissed

Judgement :

Viscount Dunedin, J.

1. This case does not fall within the strict rule that has been again and again laid down that this Board does not and will not act as a tribunal of criminal appeal, because here the objection, if it were good, would go to the root of the jurisdiction. But it is subject to the ordinary criterion which is applied to all petitions for special leave to appeal, to wit, that leave will not be granted where upon the face of the application it is plain that on the merits it is bound to fail.

2. Now the only case that is made here is that Section 72 of the Government of India Act did not authorise the Governor General to make the order he did,

constituting a special tribunal for the trial of the offenders who, having been convicted, are now petitioners here. The 72nd section is as follows:--

72. The Governor General may, in cases of emergency, make and promulgate ordinances for the peace and good governments of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and maybe controlled or superseded by any such Act.

3. The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a, state of emergency exists. A state of emergency is something that does not permit of any exact definition:--It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that that someone must be the Governor General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor General. It is he alone who can promulgate the ordinance.

4. Yet, if the view urged by the petitioners is right, the judgment of the Governor General could be upset either (a) by this Board declaring that once the ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board--after a contentious and protracted enquiry--that no state of emergency existed, and that the ordinance with all that followed on it was illegal.

5. In fact, the contention is so completely without foundation on the face of it, that it would be idle to allow an appeal to argue about it.

6. It was next said that the ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor General is

also the judge of that. The power given by Section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.

7. It was urged that there was repugnancy between the ordinance as passed and the constitution of the High Court of Lahore, and that the terms of Section 84 (1) make void the ordinance because of such repugnancy. But, as soon as it is admitted, as counsel candidly did admit, that an Act might be passed by the Indian legislature under the powers of Section 65 in the same terms as the ordinance, the point as to repugnancy vanishes.

8. Their Lordships must add that, although the Governor General thought fit to expound the reasons which induced him to promulgate this ordinance, this was not in their Lordships' opinion in any way incumbent on him as a matter of law.

9. Their Lordships, for these reasons, have humbly advised His Majesty that this petition should be dismissed.