Basudeva Vs. Rex

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Decided On : May-12-1949

Reported in : AIR1949All513; 1949CriLJ798

Judge : Wali Ullah, AG. C.J., ; Sankar Saran and ;Wanchoo, JJ.

Appellant : Basudeva

Respondent : Rex

Judgement :

Wanchoo, J.

1. This is an application by Shri Basudeva under Section 491, Criminal P. O. The applicant is the proprietor of firm styled 'Mahanand Ram Bajoria and Brothers' in Shahjahanpur which deals in kerosene oil. On 19th. December, 1948, the applicant was arrested and Ordered to be detained under the U. P. Prevention of Black-marketing (Temporary Powers) Act, XXII [93] of 1048. By the present application, the applicant contends that his-arrest and detention, under this Act, are illegal' and one of the grounds which has been urged is that the provisions of the Act which provide for-detention are ultra vires of the Provincial Legislature.

2. The impugned Act received the assent of-the Governor General on 11th April, 1948 under Section 76, Government of India Act, 1935, as adapted, and was promulgated on 14th April, 1948. The' Preamble of the Act is as follows:

Whereas it is expedient in the interest of maintenance of Public Order and supplies essential to the life-of the community to provide, during a limited period, for further powers to prevent black-marketing in the United Provinces.

The Act contains 20 sections. Of these, Section 8 (l) (i) Section 4 (1) and Section 8 are directly concerned with preventive detention. Section 3 (l) (i) reads-as follows:

If upon information received the Provincial Government is satisfied that any person habitually indulges in black-marketing, the Provincial Government may make one Cr more of the following Orders, namely.

(i) that such person be detained in such custody and' for such period not exceeding six months, as may be specified in the Order.

Section 4 (l) provides for the execution of the detention Order and need not be set out in. detail. Section 8 provides for communication to the person detained of the grounds on which the Order of detention has been made and for representation by such person to the Provincial Government. Then follow certain other provisions which provide for constitution of special Tribunals to consider the representation made by such person and report to the Provincial Government and final Orders by the Provincial Government in accordance with the report.

3. 'Black-marketing' has been defined in in Section 3 (a) of the Act as follows:

Black-marketing' includes, as respects any essential' commodity, disposing of or otherwise dealing in such commodity with a view to making gain, in any manner which may, directly or indirectly defeat or tend to defeat the provisions of the U. P. Control of Supplies (Temporary Powers) Act, 1947, or the Essential Supplies (Temporary Powers) Act, 1946, or of any order, made or deemed to have been made thereunder.

4. 'Essential commodity' means any commodity which has been defined as such in either of the two Acts referred to above.

5. Mr. Pathak, on behalf of the applicant,, urges that the provision, under this Act, for preventive detention is -ultra vires of the Provincial' Legislature. His argument

is that preventive detention is a specific subject in the Lists in Son. 7, Government of India Act, 1985, and unless power-has been conferred on the Provincial Legislature to detain a person for the purpose provided in the impugned Act, the part of the impugned Act- that deals with such detention must be ultra vires.

6. The scheme of the Government of India Act, 1936, is to distribute the legislative powers between the Provincial Legislature and the Dominion Legislature. Certain Lists have been provided in Schedule 7, which set out upon what subjects the Dominion Legislature can pass laws and upon what subjects the Provincial Legislature can do so and upon what subjects both the Legislatures have concurrent jurisdiction. Section 100(1) of the Act provides that with respect to any of the matters enumerated in List I in Schedule 7, the Dominion Legislature has and a Provincial Legislature has not the power to make laws. Under Section 100(8), it is provided that with respect to any of the matters enumerated in List II in the said Schedule, a Provincial Legislature has and the Dominion Legislature has cot the power to make laws. Section 100(2), provides that both the Dominion Legislature and the Provincial Legislature have powers to make laws with respect to any of the matters enumerated in List III. Section 104 deals with residuary powers of legislation and provides as follows:

104 (1). The Governor-General may by Public notification empower either the Dominion Legislature Cr a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Hats, in Schedule 7ito this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Dominion Cr of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

It is clear from this scheme of the Government of India Act, 1935, that the Provincial Legislature has unrestricted powers to make laws with respect to matters enumerated in List II of sch 7, and has also power with some restrictions which appear in other provisions of the Act with respect to matters enumerated in List Hi. It follows, therefore, that any law made by the Provincial Legislature must fall either within List 11 Cr List III to be intra vires of its powers. The question

whether any legislation falls within any item in either of the two lists has to be determined on a consideration of the operative provisions of the law. If the operative provisions are, in pith and substance, within any of the items enumerated in these two lists Cr the true nature and character of the law falls within any of the items in these two lists, the Provincial Legislature will have power to pass it, A number of cases were cited on behalf of the applicant in this connection. I do not think it necessary. to deal with those cases in detail because they are mostly concerned with the question whether a particular law falls within the powers of a Provincial Legislature Cr of the Dominion Legisla- ture, Certain tests have been evolved which determine whether a particular legislation falls within one list Cr the other. The latest of these cases is that of Prafulla Kumar Mukerjee and Ors. v. Bank of Commerce Ltd., Khulna 74 I. A. 23 : A.I.R. (34) 1947 P. C. 60. Their Lordships of the Privy Council, after saying that a legislation dealing with a subject in one List may touch upon a subject in another List, observed as follows:

Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'True nature and character', for the purpose of determining whether it is legislation with respect to matters in this list 0r in that.

Similarly in Gallagher v. Lynn 1937 A. c. p. 863 : 106 L. J. p. c. 161, Lord Atkin laid down the rule at page 870 as follows:

If on the view of the statute as a whole you find that the substance of the legislation is within the express powers then it is not invalidated if incidentally it aspects matters which are outside the authorised field. A legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.

Similarly, in Lethbridge Irrigation District Trustees v. Independent Order of Foresters and Attorney-General for Canada, 1940-2 ALL E. Rule 220 : 1940 A. C. 518), Viscount Caldecote, L, C. at p. 227, observed as follows:

By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Alberta Provincial Guaranteed Securities Interest Act, 1937. In other words, the Alberta Provincially Guaranteed Securities Proceedings Act, 1937, is an attempt to do by indirect means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of Sections 91 and 92, Reference may be made to the statement of the Earl of Halsbury, L. C, in delivering the decision of the Judicial Committee in Madden v. Nelson & Vet Sheppard By. (1899) A C. 626 : 68 L. J. P. C. 148. It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly.

7. It has been contended, on behalf of the Provincial Government, that these authorities have no bearing on the question in the present case, as it is not being urged on behalf of the applicant that the impugned provisions fall under any item of List I. The Advocate-General argues that the case of the Provincial Government is a very simple one, namely, that the impugned provisions of the United Provinces Act No. 22 of 1948 Come within item 1 of List II of Schedule 7, Government of India Act and are within the powers of the Provincial Legislature, It is further urged that-the impugned provisions are not being defended as coming within any other item of either List II or List III.

8. It seems to me, however, that it is useful to consider the entire scheme of the United Provinces Act No. XXII [23] of 1948 in Order to appreciate the setting in which these provisions with respect to detention have been put in. Eliminating these provisions aa to detention, the Act appears to me to provide for the maintenance of supplies essential to the life of the community and apparently falls under item 29 of List II, namely, production, supply and distribution of goods. A study of the three Lists shows that preventive detention is a subject by itself and has been specifically mentioned in Lists I and II. In List I, item 1, provision has been made for preventive detention for reasons of State connected with defence, external affairs or relations with Acceding States, even though, for example, external affairs is specifically mentioned in item 3, List I. Further there is provision for preventive detention for reasons connected with the maintenance of Public Order in item 1 of List II. It is obvious, therefore, that the Dominion Legislature may

provide for preventive detention for reasons mentioned in item l of List I and the Provincial Legislature may make similar provision for reasons connected with the maintenance of Public Order. If, therefore, preventive detention is desirable for any other reasons besides these four (three of which are enumerated in item 1, List I and one in item 1, List II) recourse must be had to the residuary power resting in the Governor-General under Section 104, Government of India Act, 1935. I am, therefore, of opinion that the proper test, in this case, is to separate these provisions with respect to detention from the rest of the Act which might otherwise have been properly enacted in view of the powers conferred under item 29 or List II on the Provincial Legislature and then to consider whether they are covered by the words 'Preventive detention for reasons connected with the maintenance of Public Order.

9. No doubt in the preamble to this Act, it has been said by the Legislature that it is expedient in the interest of maintenance of Public Order to make the provisions thereinafter mentioned. But this recital alone in the preamble will not meet the requirements of item l of List II, if the operative provisions relating to preventive detention do not fall within the words already quoted, What has, therefore, to be decided in the final analysis is whether the kind of preventive detention which has been provided by the impugned provisions is for reasons connected with the maintenance of Public Order.

10. The reason mentioned in this Act for detention is that the Provincial Government is satisfied that the person detained habitually indulges in blackmarketing, definition of which has already been set out above by me. Black-marketing, in brief, means trade in any essential commodity as defined in the Act with a view to making gain in a manner which may directly Cr indirectly defeat Cr tend to defeat the provisions of the two Acts, one of the Unit-ed Provinces Legislature, and the other of the Dominion Legislature, with respect to supplies. Prima facie, this kind of black-marketing does not appear to have anything to do with the maintenance of Public Order. Therefore, the detention of any person on the ground that he habitually indulges in black-marketing cannot be said to be for reasons connected with the maintenance of Public Order. In has been urged, on behalf of the Provincial Government, that Public Order is a very elastic expression

and that nothing is more likely to disturb Public Order than the breakdown of the machinery of production, supply Cr distribution of goods. To put the argument, in other words, the contention seems to be that black-marketing may lead to such a dislocation of the machinery for the supply Cr distribution of goods that it may eventually result in what are commonly called 'food riots'. So it is urged that provided there is some connection even though remote between black-marketing, as defined in this Act, and the maintenance of Public Order, the Court must hold that the detention is for reasons connected with the maintenance of Public Order and, therefore, falls within item l of List II. It seems to me that this connection which is being sought to be established between black-marketing and the maintenance of Public Order is very problematic and the eventuality which is envisaged, namely, food riots, may never come to pass. If that ia so, there is, in reality, no connection at all between black-marketing and the maintenance of Public Order. The connection, to my mind, which is envisaged in item 1 of List n must be direct and clear as between cause and effect and not remote and doubtful like the one urged, In the ultimate analysis, every activity of Government is directed towards maintenance of Public Order and if the connection were to be of this nature, there would have been no point is enumerating preventive detention in a particular item and in confining it to particular reasons. If this argument, on behalf of the Provincial Government, could be accepted, the Provincial Legislature may pass an Act for preventive detention in connection with any matter enumerated in Lists II and m. For example, item so of List II enumerates adulteration of food supplies and on this reasoning, it would be possible to provide for preventive detention of persons habitually committing adulteration of food supplies, because it may sometime, in some very remote contingency, lead to food - riots. Public Order implies absence of violence and an Orderly sate of affairs in which citizens can peacefully pursue their normal vocations in life. It seems to me that in that view of the expression 'Public Order', there is no clear and direct connection:between black-marketing, as defined in this Act, and Public Order. Nor can one infer reasonably that in case black-marketing is habitually indulged in by an individual, there is likelihood of the disturbance of Public Order in the sense indicated above. I am, therefore, of opinion that preventive detention is not covered by item 1, List II of the Seventh Schedule of the Government of India Act,

1935 and, therefore, that part of the Act which deals with preventive detention is ultra vires of the powers of the Provincial Legislature.

11. It has been urged, on behalf of the applicant, that in case the decision is in his favour, he is entitled to costs. The argument is that habeas corpus applications fall under two categories. If the matter with which they are concerned is a civil one, they are civil proceedings, while if the matter with which they are concerned is connected with a crime Cr likely commission of a crime, they are criminal proceedings. It is further urged that, in this case, the matter, namely, black-marketing is not connected with the commission of a crime Cr with the likely commission of a crime and, as such, these are civil proceedings in which costs should, normally, be awarded in view of Section 35, Civil P. C. This argument is met on behalf of the Provincial Government on the ground that proceedings under 8. 491, Criminal P. C, are criminal proceedings and as no provision as to costs has been made in that section, there can be no question of awarding any costs to any party in such proceedings.

12. The distinction between a civil and criminal habeas corpus application has been drawn on the basis of certain authorities in England. It is sufficient for present purposes to refer to only one of them, namely, ex parts, Amand B. v. Home Secretary and Minister of Defence of Royal Netherlands Government, 1948 A. C. 147 : 1942-2 ALL E. R; 881). At p. 160, Lord Wright observed as follows:

It is in reference to the. nature of that proceeding that it must be determined whether there was an Order made in a Criminal cause or matter. That was the matter of substantive law, The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter.

The distinction may be illustrated by two exam, pies. If a father makes an application for a writ of habeas corpus and wants that his son, who is in the custody of his maternal-uncle, may be set at liberty, the matter is of a civil nature. On the other hand, if a person, who is under Orders of extradition to a foreign country in con- nection with some offence which he is alleged to have committed

there, applies for a writ of habeas corpus , the matter is obviously criminal. Habeas corpus writ in England was a common law writ of a procedural nature. But the law in India on this subject is, in my opinion, somewhat different. There was, at one time, a controversy in this country whether the High Courts had the right to issue a common law writ of habeaB corpus . That controversy has been set at rest by the decision of their Lordships of the Privy Council in Matthen and Ors. v. District Magistrate of Trivandrum . Their Lordships agreed with the observations of the learned Chief Justice of the Madras High Court which were to this effect:

The High Courts Act of 1861 authorised the legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court, and Acts of the legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the legislature has taken away the power to issue the prerogative writ of habeas Corpus in matters contemplated by Section 491, Criminal P. C. of 1898.

In India, therefore, one must start with the premise that the power of issuing writs of habeas corpus is conferred under the Criminal Procedure Code. Prima facie, the provisions of the Code of Criminal Procedure are for Courts of criminal jurisdiction, unless there is anything in the context to suggest that they apply to Courts of civil jurisdiction also. In this connection, reference was made to s 476, Criminal P. C. That section, however, clearly provides: 'When any Civil, Revenue Cr Criminal Court is... of opinion . . . .' It has been held in cases coming up in appeal under Section 476B, Criminal P, C. and in revisions from appellate Orders passed under that section that where the proceedings were initiated in a civil Cr revenue Court the proceedings under that section are of a civil nature: see In the matter of the petition of Bhup Kunwar and Anr. 26 ALL. 249 : 1 Cr. L. J. 78 and Salig Ram v. Ramji Lai and Ors. 38 ALL. 654 : 3 Cr. L, J. 400. The position, however, with respect to Section 491 is different. Thai section reads as follows:

(1) Any High Court may, whenever it thinks fit, direct : a) that any person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

Section 4 (j), Criminal P. C, defines a 'High Court' as follows: 'High Court means the highest Court of Criminal appeal Cr revision for any local area.' It cannot, therefore, be urged that when the expression 'High Court' is used in B. 491, Criminal P. C, it includes the civil side of the High Court as well. The definitions given in Section 4 apply to expressions defined in that section wherever used in the Code, unless a different intention appears from the subject or context. It cannot be said that any different intention appears from the subject or context in Section 491 and that the High Court mentioned in that section is any other than the highest Court of criminal appeal or revision for any local area. Therefore, one finds that under Section 491 power is conferred under the Criminal Procedure Code which deals with jurisdiction and procedure in Criminal matters and the Court on which the power is conferred is the highest Court of criminal appeal or revision. If, for example, the legislature had thought it fit to have two highest Courts of appeal in these provinces, one for criminal matters and another for civil matters, and the definition of 'High Court' was as mentioned in Section 4 (1) of the Code, it could never be argued that the matter coming up before the High Court under Section 491 was not one of criminal jurisdiction and the proceeding before it was not a Criminal proceeding. Therefore, the fact that the same Court happens to be the highest Court of criminal appeal Cr revision as well as the highest Court for civil appeal or revision cannot make any difference to the intention of the legislature in India to treat proceedings under Section 491 as if they were proceedings within the criminal jurisdiction of the High Court and, therefore, criminal proceedings. In England costs have been awarded in cases where it was held that the writ was issued in a civil matter. In The Queen v. Jones and Anr. (1894) 2 Q. B. 382 : 63 L.J.Q.B 656, costs were awarded in an application for the writ of habeas corpus as it was held that, in that particular case, the matter was not covered by Section 4 of the Supreme Court of Judicature Act, 1890. That section provided that:

Nothing in this Act shall alter the. practice in any Criminal cause or matter, or in bankruptcy, or in proceedings on the Crown Bide of the Queen's Bench Division.

The case related to compelling certain doctors in charge of an asylum to give up the custody of a Iunatio patient. That was obviously a civil matter and not a criminal cause Cr matter. It was also held that though the proceedings were taken on the Crown Bide of the Queen's Bench Division, the case did not belong exclusively to that side because formerly any of the superior Courts could grant prohibition. Therefore, it was held that costs Gould be awarded. But according to the definition of 'High Court' in Section 4 (j), habeas corpus applications in India cannot be made to any Court except the highest court of criminal appeal or revision and even though the matter dealt with may be civil in nature, as illustrated above, the proceeding is before a Criminal Court and is a criminal proceeding. It is well-settled that costs are not generally allowed in criminal proceedings except where specific provision has been made therefor as, for example, Sections 148 (8),844 (l) and 626 (5), Criminal P. C. There is no such specific provision in 8. 491, Criminal P. C, excepting that the High Court has been given power under Sub-section (a) to frame rules to regulate the procedure in cases under this section. I do not propose to express any opinion on the point whether under any rules framed under this sub-section, the High Court can pro. vide for payment of C03ts in habeas corpus applications. But even if it can, till such rules are framed, no costs can be allowed in habeas corpus applications as they are criminal proceedings. In this connection, I may refer to this case of Ramammal v. Vijayaraghavalu and Anr. 55 Mad. 1049 : A.I.R. (20) 1933 Mad. 102 : 34 Cr. L. 3. 82, F. B., in which it was held that the Court had no power to grant costs in proceedings under Section 491, Criminal P. C. I am not prepared to go to the same length as this case does for it may be that the High Court may have powers under the rules framed under Section 491 (2), Criminal P. C., to provide for costs. But as no such rules have been framed in this Court, no costs can be awarded at the present moment.

13. Another case to which reference may be made is that of Haitian Begam v. Jawad AH Shah : AIR1936 All65 , That was a case where there was a dispute between the father and the mother about the Custody of a child. The mother made an application under Section 491, Criminal P. C., on the allegation that the child was being detained by the father. That application was dismissed by Bennet J. Thereafter, the mother filed an appeal under the Letters Patent and the question

arose for determination whether an appeal could be filed in such cases. The answer to the question depended upon whether the Order of the learned single Judge was in the exercise of criminal jurisdiction or in the exercise of civil jurisdiction. If it was in the exercise of civil jurisdiction, an appeal would lie, but not otherwise. It was held that an Order under Section 491, Criminal P. C., was in the exercise of criminal jurisdiction and that no appeal lay. The same view has been taken in a later case of the Lahore High Court, Kishori Lal v. The Grown I. L. R. (1945) 26 Lah. B73, where also it was held that no Letters Patent appeal was competent as the learned single Judge acting under the provisions of B. 491, Criminal P. C, was exercising Criminal jurisdiction and not civil jurisdiction, No case has been cited of any High Court in India o of the Federal Court in which coats have been awarded in proceedings under Section 191, Criminal F, C The only exception is the case of Haidari Begum v. Jawad Ali Shah : AIR1935 All65 , referred to above in which costs were awarded of the proceedings before the Letters Patent Bench on the ground that those proceedings were not claimed to be Criminal by the appellant herself. This decision awarding costs appears to me, with all respect, of doubtful validity for if the Original proceedings were criminal proceedings, the appeal, even if misconceived, could hardly become a civil proceeding. However, the present is not a case of an appeal under the Letters Patent and, therefore, cannot come within the four corners of Haidari Begam's case : AIR1935 All55 . I am, therefore, of opinion that no costs can be awarded in a proceeding under 8. 491, Criminal P. C., as it is a criminal proceeding, unless it be that the rules framed by this Court under 8. 491 (2), can and do provide for such costs. As no such rules have so far been, framed,, no coats oan be allowed in this case.

14. Holding, therefore, that the provisions of Act (xxn [22] of 1948), relating to preventive detention and matters connected therewith are ultra vires of the Provincial Legislature, I would Order the release of the applicant under Section 491, Criminal P. C.

15. The case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, and I would give a certificate accordingly under Section 205(1) of the Act.

Sankar Saran, J.

16. I have seen the judgment of my brother Wanchoo and I am in general agreement with him. The main question for consideration in the case is whether the arrest and detention of the applicant under the United Provinces Prevention of Black Marketing (Temporary Powers) Act (xxii [22] of 1948), is illegal and whether the provisions of this Act which relate to detention are ultra vires of the Provincial Legislature. Schedule 7, Government of India Act, 1935, provides certain lists of subjects which are allotted to the Dominion and the Provincial Legislatures. In fact, there are three lists. List I refers to the Federal Legislative List, List II refers to the Provincial Legislative List and List ill refers to the Concurrent Legislative List. These lists are fairly exhaustive, but provision has also been made regarding residuary matters which are not specifically mentioned in them. Section 104, Constitution Act authorizes the Governor-General to empower either the Dominion or the Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists in Schedule 7.

17. In Lists I and n provision has been made for preventive detention. List I deals with preventive detention for reasons of State connected with defence, external affairs Cr relations with Acceding States. List II deals with preventive detention for reasons connected with the maintenance of Public Order.

18. It has to be seen whether the provision regarding preventive detention in U. P. Act XXII [22] of 1948 is intra vires of the Provincial Legislature. The preamble of this Act runs as follows:

Whereas it ia expedient in the interest of maintenance of Public Order and supplies essential to the life of the community to provide, during a limited period, for further powers to prevent Black-marketing in the United Provinces.

19. In the definition of black-marketing there is no reference to Public Order. There is reference only to making gain either directly Cr indirectly to defeat Cr tend to defeat two provisions, viz,, the United Provinces Control of Supplies (Temporary Powers) Act, 1947, Cr the Essential Sup. plies (Temporary Powers) Act, 1946.

20. The question that falls to be decided is whether there is anything in the impugned Act to indicate that Public Order was likely to be disturbed by any one engaging himself in Black. marketing. Preventive detention for Black-marketing is not mentioned in List II Cr Hi of Schedule 7, and the Governor-General has not authorized the Provincial Legislature to enact a law Ordering preventive detention of those who are engaged in Black-marketing. According to Mr. Pathak, learned Counsel for the applicant, this enactment is a fraud on the Constitution for while it introduces the phrase 'Public Order' in the preamble, there is no reference to it in the operative part of the Act. This is like poaching into forbidden land by the back door.

21. It seems to me that there is hardly any connection between Black. marketing and Public Order. To say that a wide-spread practice of Black-marketing may cause so much dissatisfaction that it may lead to food riots or to some sort of revolutionary Activity is to stretch a point beyond all reasonable limits, The obvious reply to such an argument is that the cause and effect are so very distantly connected that one might doubt if it can reasonably be suggested that there is even a remote connection. For, otherwise, almost any enactment may have a connection with Public Order, e. g., non-observance of the rules of the road may Create chaosin the streets and lead to general disturbance. Like, wise a man travelling without a ticket may be detained because the practice of travelling without tickets might lead to conflicts between the Public and the railway authorities and result in Public disorder.

22. In examining a statute, the actual operation and the intent of the statute must be looked into to see whether it is within the competence of the legislature that enacts it. Mere professed object Such as is contained in the preamble 13 not the test by which it must be judged. In Order to determine the operation of a statute, it is necessary to examine its 'pith and substance' for that is the real test. The professed object may be different from its operative portion. If it appears that a certain part of a statute encroaches upon a prohibited field, in that case the statute is valid only for that part which does not encroach upon the prohibited field. In case the encroachment is such that a valid part cannot be separated from the prohibited part then the whole statute is invalid.

23. In this connection a passage from the judgment of Maurice Gwyer C. J. reported in Subramanyan Chettiar v. Mitttuswami Goundan , which has met with the approval of their Lordships of the Privy Council in Prafulla Kumar Mukherjeev.Bankof Commerce Ltd., Khulna, 74 I. A. 23 : A.I.R. (34) 1947 P. C. 60), is the latest pronouncement on the subject:

It must inevitably happen from time to time that legislation though purporting to deal with a Subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be bo closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance Cr its true nature and character foe the purpose of determining whether it is legislation with respect to matters in this list Cr in that.

24. In an Australian case, Bank of New South Wales & others v. Commonwealth and Ors. reported in (1948) 76 0. L. It. l, Latham 0, J. expressed himself as follows:

It is a practice in some countries to introduce statutes with a statement of the objects of the legislature in making an enactment and an explanation of its general character. Sash a statement is useful for the information of legislators and of the Public. Where, however, a Parliament, as in the case of the Commonwealth Parliament, has only limited powers the declaration of Parliament that a law is enacted for the purpose of securing the stated objects cannot bring an enactment within power if its operative provisions have no real connection with a subject with respect to which the Parliament has power to make laws. Such a declaration is entitled to respectful consideration, but it cannot be decisive upon a question of validity, ...Each provision must be considered in the context of the Act, independently of any such statement of objects though such a statement may suggest a connection between the legislation and a relevant subject-matter.

25. The phrase 'pith and substance' was considered in the Australian case : 1948-76 C, L. Rule 1), in considerable detail and nearly all the important cases on the

subject were discussed. To test 'the validity of a legislation it is the duty of the Court to determine what is the actual operation of the law in creating, changing, regulating Cr abolishing rights, duties powers or privileges and then to consider whether that which the enactment does fall in substance within the relevant authorized subject-matter . . . or whether it ia really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power.'

26. Finally I would respectfully incorporate in this judgment a passage from the judgment of Gwyer C. J., In re G. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act 1938 A.I.R. (26) 1989 P, C. 1 : I. L. R. (1939) Ear. (F.c.) 6, wherein his Lordships laid down the principles of interpretation of the Constitution, He says:

I conceive that a broad and liberal spirit should Inspire those whose duty it 1b to interpret it (constitution) ; but I do not imply by this that they are free to stretch Cr pervert the language of the enactment in the interests of any legal Cr constitutional theory, even for the purpose of supplying omissions Cr of correcting supposed errors, A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law ....

27. For the reasons mentioned above, I would hold that the provision regarding preventive detention in the United Provinces Prevention of Black-marketing (Temporary Powers) Act (XXII [22] of 1948) is ultra vires of the Provincial Legislature. Accordingly I would Order the release of the applicant under E. 491, Criminal P. C.

28. With regard to the question of costs, I am in agreement with my brother Wanchoo and have nothing to add.

Wall Ullah, Ag. C.J.

29. This is an application under Section 491, Criminal P. C, praying that the petitioner Shri Basudeva be Ordered to be released from detention which he is under-going under the U. P. Prevention of Black-marketing (Temporary Powers) Act (XX [32] of 1948). It appears that the petitioner is the proprietor of a firm styled Mahanand Ram Bajoria and Bros, of Shahjahanpur which deals in kerosene oil,

On 7th December 1948, an Order of detention under Sub-section (l) of Section 3, U. P, Prevention of Black-marketing (Temporary Powers) Act, 1948, appears to have been passed by the Provincial Government authorising the arrest of the petitioner and his detention in jail for a period of six months. Subsequently, the petitioner appears to have been arrested on 20th December 1948, and he is being detained in the District Jail at Shahjahanpur under the aforementioned Order of detention.

30. At the hearing of this application, the petitioner has been represented by Mr. G. S. Pathak, Advocate, and Mr. P. L. Banerji, Advocate-General of the United Provinces, has appeared on behalf of the Provincial Government. The learned Counsel for the petitioner has contended that the arrest and detention of the petitioner under the Order of detention passed by the Provincial Government are illegal inasmuch as the provisions of Section 3 (l) (i) of this Act which authorised detention are ultra vires of the Provincial Legislature. The main question to be determined, therefore, is whether the provisions of B. 8 (1) (i), U. P. Prevention of Black-marketing (Temporary Powers) Act (xxn [32] of 1948), which will hereinafter be referred to as the impugned Act, are beyond the powers of the Provincial Legislature of the United Provinces which enacted it.

31. In Order to appreciate the grounds on which the provisions of S. a (l) (i) of the impugned Act are called in question, a brief reference to some of the provisions of the Government of India Act, 1935, appears to be necessary. In chap. I of part v. Constitution Act, we find Section 99 (l). It gives power to the Dominion Legislature to make laws for the whole Cr any port of the Dominion and to the Provincial Legislature to make laws for the province Cr any part thereof. Then follows Rs. 100 which deals with the subject-matter of Dominion and Provincial laws. It runs thus:

(1) Notwithstanding anything in the next succeeding sub-sections, the Dominion Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sen, 7 to this Act (hereinafter called the 'Federal Legislative List.')

(2) Notwithstanding anything in the next succeeding sub-section, the Dominion Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to an; o{ the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List.')

(3) Subject to the two preceding sub-sections the Provincial Legislature has, and the Dominion Legislature has not, power to make laws for a Province or any part thereof with reject to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List.')

(4) The Dominion Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province Cr any part thereof.

32. Section 104(1) deals with residual powers of legislation. It reads thus:

The Governor-General may by Public notification empower either the Dominion Legislature Cr a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in Sch, 1 to this Act, including a law imposing a tax not mentioned in any such list and the executive authority of the Dominion Cr of the Province, as the case may be, shall extend to the administration of any law so made unless the Governor-General otherwise directs.

33. The relevant items of Lists I and n to which reference may now be made are : l) item 1 of List I which, inter alia, provides: 'Preventive detention for reasons of State connected with defence, external affairs Cr relations with Acceding States,' (ii) Item 1 of List II which, inter alia, comprises 'preventive detention for reasons connected with the maintenance of Public Order; persons subjected to such detention,' and (iii) Item 39 of List II which, inter alia, deals with 'production, supply and distribution of goods . . . .'

34. It is clear that the Provincial Legislature is quite competent to enact laws dealing with 'preventive detention for reasons connected with maintenance of Public Order.' Further it is clear that the Provincial Legislature is fully competent to enact laws concerning 'production, supply and distribution of goods' (item 29 of

List ii). It may be noted in passing, as would appear from item 1 of List I, that the Central Legislature can enact laws relating to preventive detention connected with three distinct matters viz., (a) defence, (b) external affairs and (o) relations with Acceding States, whereas the Provincial Legislature can enact measures relating to only one type of detention i. e., preventive detention for reasons connected with the maintenance of Public Order. Item 29 of List II which is concerned with 'production, supply and distribution of goods' contains no reference whatsoever to preventive detention of any kind. The crucial question to be determined, therefore, is whether the preventive detention provided for in Section 3 (l) (i) of the impugned Act is preventive detention for reasons connected with the maintenance of Public Order.

35. At this stage, it would be helpful to consider the scheme and the main provisions of the impugned Act. The professed object of the Act is 'to provide, during a limited period, for further powers to prevent black-marketing.' The preamble of the Act reads thus:

Whereas it is expedient in the interest of maintenance of Public Order and supplies essential to the life of the community to provide, during a limited period, for further powers to prevent Black-marketing in the United Provinces: It is hereby enacted as follows.

36. Section 2 (a) defines black-marketing:

Black-marketing 'includes, as respects any essential commodity, disposing of Cr otherwise dealing in such commodity with a view to making gain, in any manner which may, directly Cr indirectly, defeat Cr tend to defeat the provisions of the United Provinces Control of Supplies (Temporary Powers) Act, 1947, Cr the Essential Supplies (Temporary Powers) Act, 1946, Cr of any Order made Cr deemed to have been made thereunder.

2, (b) Essential commodity'1 means any essential commodity, as defined in C1. (a) of Section 2, U. P. Control of Supplies (Temporary Powers) Act, 1947, Cr in C1. (a) 2, Essential Supplies (Temporary Powers) Act.

37. Section 3 (l) provides:

If upon information received the Provincial Government is satisfied that any parson habitually indulges in black-marketing, the Provincial Government may make one Cr more of the following Orders, namely:

(i) that such person be detained in such custody and for such period not exceeding six months, as may be specified in the Order.

38. Section 4 deals with the execution of the Order of detention passed under Clause (i) of sub-8. (l) of Section 3. Section 8 provides for grounds of the Order under Section 3 to be disclosed to the person affected by the Order. Then there are provisions dealing with the constitution of Special Tribunals and other connected matters, With which we are not concerned in the present case. Lastly reference may be made to Section 18 (1) which provides:

No Order made in exercise o(any power conferred by Cr under this Act shall, except as provided in the Act, be called in question in any Court.

39. It will be noted that the preamble of the impugned Act no doubt makes a reference to the maintenance of Public Order, but, in the body of the Act, nowhere else do we find any reference to the maintenance of Public Order. Prevention of 'black-marketing' was undoubtedly the professed object of the impugned Act. The definition of 'black-marketing' in Section 2 (a), in terms, gives no indication whatsoever as to whether it has any connection with the maintenance of Public Order. The U. P. Control of Supplies Act, 1947, deals with control of supplies the subject-matter of item 29 of List II. It appears to have nothing to do with the maintenance of Public Order. Similarly, the Essential Supplies (Temporary Powers) Act (24 of 1946) deals with powers to control production, supply and distribution of certain commodities. In itself, it bas nothing to do with the maintenance of Public Order. 'Black-marketing' which, inter alia, may defeat, Cr tend to defeat, the provisions of the two Acts mentioned above, would appear to be not a matter concerning the maintenance of Public Order. As noted above, the sole reference to 'maintenance of Public Order,' in the impugned Act, is confined to the 'preambe.' It is, however, well settled that where the enacting part is explicit

and unambiguous the preamble of a statute cannot be resorted to, to control, qualify of restrict it, but where the enacting part is ambiguous, the preamble can be referred to, to explain and elucidate it. Reference may be made to the case, of Powell v. Remption Park Race Course Co. (1899)A.C. 143 at p. 157 : 68 L, J. Q. B, 392, where Lord Halsbury said;

Two propositions are quita dear one that a preamble may afford useful light as to what a statute Intends to reach and another that, if an enactment is itself dear and unambiguous, no preamble can qualify or out the enactment. This rule has been applied to Indian Statutes by the Privy Council as well aa by High Courts in India.

40. Mr. Pathak, the learned Counsel for the petitioner, has strongly contended that the pro-visions of the impugned Act relating to preventive detention, particularly those contained in Section 3 (1) (i) are ultra vires the Provincial Legislature. learned Counsel has argued that preventive detention for reasons connected with the maintenance of Public Order alone is comprised in Item 1 of List 2, Constitution Act and therefore the Provincial Legislature has no power to enact a measure relating to preventive detention for the purpose of preventing black-marketing. The contention of the learned Counsel, there, fore, is that the part of the impugned Act which deals with such detention is ultra vires. In this connection, learned Counsel has invited our attention to Item 3 of List 1 and has argued that 'external affairs' are dealt with under item 3, but 'preventive detention connected with external affairs is dealt with separately under Item 1, The scheme of the various items of the Lists, therefore, according to the contention of the learned Counsel, is that 'preventive detention' connected with any matter on which Legislation is permissible is dealt with separately from that particular topic. By parity of reasoning, so contends the learned Counsel, Item 29 of List 2 which deals with 'production, supply and distribution of goods' cannot be considered to include by implication the subject of 'preventive detention' for reasons connected with 'production, supply and distribution of goods.' learned Counsel has contended that there is a sharp distinction between 'maintenance of Public Order' and 'maintenance of essential supplies.' (In this connection, learned Counsel has drawn our attention to certain provisions of the Defence of India Act. He has also contended that the expression 'Public Order' U3ed in the Defence of India Act,

must have been used in the same sense in which it occurs in the Constitution Act.)

41. The learned Advocate-General, in the course of his arguments, on behalf of the Provincial Government, has made it clear that be does not rely on any other item in List 2 for maintaining the validity of the provisions of Section 3 of the impugned Act. In other words, he has conceded that the Provincial Legislature has power to legislate regarding 'preventive detention' only for reasons connected with the maintenance of Public Order. Further, the learned Advocate. General has contended that the expression 'public Order' is in itself a very elastic and comprehensive expression. His contention is that at the present moment nothing ia likely to disturb the Public Order more than the breakdown of the machinery of production, supply and distribution of goods. The learned Advocate-General has greatly emphasised the fact that the preamble of the impugned Act, as already mentioned, makes a reference to the maintenance of Public Order, coupled with the maintenance of supplies essential to the life of the community. In effect, his contention has been that the impugned Act is meant to serve a double purpose, (i) the maintenance of Public Order and (ii) the maintenance of supplies essential to the life of the community. Again, the learned Advocate. General has contended strenuously that legislation which aims at preserving the supply of commodities essential to the life of the community is in reality legislation connected with the maintenance of Public Order. According to him, the expression 'reasons connected with' implies that there may be some connection even though it may be a remote one. The question, however, remains whether 'preventive detention' in connection with 'black-marketing' can be said to be 'preventive detention,' for reasons connected with the maintenance of Public Order. It seems to me to be fairly obvious that 'black-marketing,' as defined in the Act, has directly nothing to do with the maintenance of Public Order. There is hardly, if at all, any real connection between 'black-marketing' and the maintenance Public Order. It follows that the detention of any person for the reason that he habitually indulges in black-marketing cannot be said to be detention for reasons connected with the maintenance of Public Order. The argument of the Advocate. General that if there is some connection, however remote, between black-marketing and the maintenance of Public Order, the Court must hold that the detention is for reasons connected with the maintenance of Public Order, does not appeal to me in the

least. It seems to me that the expression 'for reasons connected with' must mean a real and genuine connection and not the fanciful, Cr highly problematic, connection between the maintenance of Public Order on the one hand and the subject of legislation viz., black- marketing, in connection with which preventive detention is provided for, on the other.

42. The connection which is envisaged here must be, to my mind direct and clear connection such as exists between cause and effect and not a fanciful Cr highly problematical connection like the one which has been urged by the learned Advocate-General. It seems to me that the entire scheme of the two Lists, List 1 and List 2, of Schedule 7, Constitution Act will be seriously disturbed if a fanciful or far-fetched Cr too remote a connection '.be considered to be enough to satisfy the requirements of the expression 'connected with.' 'Connected with' must, therefore, be considered to imply a substantial or direct connection. If this argument of the learned Advocate-General were to be accepted, the position, to my mind, would be this that the Provincial Legislature would be competent to pass an Act providing for preventive detention in connection with almost any matter enumerated in Lists 2 and 3 of Scb. 7, Constitution Act, e. g., by reason of item 80 of List 2 which deals with 'Adulteration of food-stuffs and other goods' it would be open to the Provincial Legislature to enact a measure providing for preventive detention of persons habitually committing adulteration of food stuffs, for, in some very remote contingency, adulteration of food-stuffs may possibly lead to food riots. It follows, therefore, that it cannot be reasonably held that black-marketing, even if it be indulged in habitually, has any connection with the disturbance of Public Order. I am, therefore, clearly of the opinion that between black-marketing on the one hand and maintenance of Public Order on the other, there is no connection such as is contemplated by Item l of List 2. It follows that preventive detention in connection with black-marketing is not provided for in item 1, List a of Schedule 7, Constitution Act.

43. The provisions of the impugned Act, some of which have been set out in an earlier part of this judgment, are not concerned with the question of the maintenance of Public Order, They do not even make a reference to the matter of the maintenance of Public Order. The rule is that in Order to ascertain whether an

enactment is a law with respect to a given subject, you must determine whether, in its pith and substance, and according to its real nature and character, it deals with that subject. It is true that the preamble of the impugned Act has made a reference to the maintenance of Public Order, but in Order to determine the constitutional validity of a statute one has to look at the true nature and character of the legislation what the law actually enacts and not what the Legislature desires or hopes to attain by means of the particular enactment. Certain teats have been evolved by the Judicial Committee of the Privy Council for determining whether a particular statute falls within one list Cr the other. Reference may be made in this connection to the case of Prafulla Kumar Mukherjee and Ors. v. Bank of Commerce, Khulna and the Advocate General of Bengal 74 1. A. 28 : A.I.R. (34) 1917 P. C. 60), where the question was whether the Bengal Money-lenders Act, 1940, wag 'money-lending' (a Provincial subject) or promissory notes or 'banking' (a Federal subject). It was held that the Act deals 'inpith and substance' with money-lenders and money-lending and was as such not void' either in whole Cr in part as being ultra vires the Provincial Legislature. The Judicial Committee have approved of the views expressed by Sir Maurice Gwyer C. J. in the case of Subramanyan Chettiar v. Muttuswami Goundan where it was observed:

It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance Cr Us true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that.

The Judicial Committee went on to observe:

Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found.

44. Again, reference may be made to the case of Gallegher v. Lynn (1937) A. C. 863 : 106 L, J. P. C, 161 where Lord Atkin at p. 870 is reported to have observed thus:

It is well established that you are to look at the ' true nature and character of the legislation.' Russel v. The Queen (1882) 7 A. C. 829 : 51 L. J. P. C. 77, 'the pith and substance of the legislation, ' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside -the authorized field. The Legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field

45. To the same effect is the view expressed by Lefrey in Canada's Federal System (1918 Edn.) p. 210, where it is stated with reference to the decision of the Privy Council in Russell v. The Queen (1881) 7 A. C. 829 at pp. 838-40 : 61 L. J. P. C. 77:

The true nature and character of the legislation in the particular instance under discussion its grounds and design, and the primary matter dealt with its object and scope must always be determined In Order to ascertain the class of subjects to which it really be-longs and any merely incidental effect it may have over other matters does not alter the character of the law.

46. Reference may also be made here to the case of Bank of New South Wales and Ors. v. Commonwealth (1948) 76, c. L. B, 1, where, after an elaborate discussion about the principle of 'pith and substance' of a statute, the same principles have been reiterated. Again, I may refer to the case of Attorney-General for On-taria v. Reciprocal Insurers and Ors. (1934) A. C. 838 : 93 L. J, p. c. 137 where the Judicial Committee of the Privy Council have observed thus:

The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the ' true nature and character' of the

enactment: Citizens' Insurance Co. v. Parsons (1881) 7 A. C. 96 : 51 L.J.P.C. 11); its ' pith and substance': Union Colliery Co. v. Bryden (1899) A. C. 580 : 68 L. J. P. C. 118; and it Is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject-matters mentioned in Sections 91 and 92 the legislation falls; and for this purpose the legislation must be ' scrutinised in its entirety.

47. These principles have been fully recognised by High Courts in India.

48. Judged in the light of the tests indicated in the authorities referred to above, to my mind, it is quite plain that 'in its pith and substance' the impugned Act is an enactment dealing with the subjects mentioned in item 29 of List II, viz., production, supply and distribution of goods. The enacting provisions of the impugned Act have no connection with the question of the maintenance of Public Order. It follows, therefore, that the provisions contained in Section 3 (l) (i) and the connected provisions relating to preventive detention of a person who habitually indulges in black-marketing are not concerned with preventive detention for reasons connected with the maintenance of Public Order. I am, therefore, of opinion that these provisions are ultra vires the powers of the Provincial Legislature.

49. The next point which may be briefly dealt with is this: If the part of the impugned Act dealing with preventive detention be declared to be ultra vires, would the rest of the Act remain valid and continue in force To deter-mine whether the rest of the Act would continue to be valid, the test has been laid down by the Judicial Committee of the Privy Council. In the case of Attorney-General for Alberta v. Attorney-General for Canada and Anr. (1947) A. C. 503 at p. 518, Viscount Simon delivering the judgment of their Lordships of the Privy Council observed;

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive Cross it has sometimes been put whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting

the part that is ultra vires at all.

Looking at the impugned Act as a whole, it is clear to my mind that its intent and purpose was to provide for powers to prevent black-market- ing and to assure proper distribution of essential commodities. Such an enactment was perfectly within the competence of the Provincial Legislature as it comes within the scope of item 39 of List II. If the provisions relating to preventive detention as contained in Section 3 (i) (i) and some of the connected sections are separated from the rest of the Act, it seems to me that what would remain can certainly survive, independently of the provisions held to be invalid. In my view, therefore, the remaining provisions of the Act after striking out those relating to preventive detention are valid and can remain in force.

50. In the end, the learned Counsel for the petitioner has contended that if the case is decided in favour of the petitioner, he is entitled to costs of these proceedings. The contention of the learned Counsel is that proceedings started by an application under S- 491, Criminal P. C., are proceedings in the exercise of civil jurisdiction. It is said that the proceedings being of a civil nature, provisions of the Civil Procedure Code and therefore of Section 85 of the Code will apply. learned Counsel has invited our attention to some English decisions and, in particular, to the case of Ex parte Amand; B, v. Home Secretary and Minister of Defence of Royal Netherlands Government, (1943) A. C. 147 : 1942.2 All E.R. 381) and has contended, on the strength of those decisions, that a clear distinction is drawn, in England between criminal and civil ' habeas corpus ' proceedings. He has contended that proceedings for a writ of habeas corpus can be either civil or criminal. learned Counsel has also invited our attention to Halsbury's Laws of England, Hailsham Edn,, vol. 9, p. 702, para, 1201, in support of his contention. There can be no doubt whatsoever that in England habeas corpus proceedings are of two kinds, (i) civil and (ii) criminal. On the other hand, so far aa Indian law is concerned, all doubt on the point is set at rest and the position is fully olarified by the decision of their Lordships of the Privy Council in G. P. Mathen and Ors. v. District Magistrate, Trivandrum and Anr. . It has been held that the whole of the law relating to habeas corpus is confined to the provisions of Section 491, Criminal Procedure Code. The nature of the proceedings under Section 491, Criminal P. C,

is of vital importance in determining the question of costs. Section 491, Criminal P. C., provides that the High Court may, inter alia, whenever it thinks fit, exercise certain powers and direct that a person illegally Cr improperly detained in Public Cr private custody within the limits of its appellate criminal jurisdiction be set at liberty. The expression 'High Court' is denned in Section 4 (j), Criminal P. C., as the highest Court of criminal appeal Cr revision for any local area. It seems to follow, therefore, that it is in the exercise of criminal jurisdiction that the High Court entertains an application under Section 491, Criminal P. C. Reference may be made to the case of Mt. Haidari Begum v. Jawad Ali : AIR1935 All55 decided by a learned single Judge of this Court. In this case a Mohammadan lady who had been divorced by her husband applied to the High Court under Section 491, Criminal P. C., praying that her minor son aged four years, who was with her husband, might be brought before the Court and be delivered to her by her husband because under the Mohammadan law the mother was entitled to the guardianship of the child under seven years of age. It was held that the applicant should seek her remedy under the Guardian and Wards Act by an application to the District Judge. In the course of his judgment the learned Judge had occasion to consider the question whether the proceedings before him were of a civil Cr criminal nature and whether a Letters Patent appeal under Section 10, Letters Patent was permissible. The learned Judge held that the Orders passed on an application under Section 491, Criminal P. C, were Orders passed in the exercise of criminal jurisdiction. Consequently, it was held that permission could not be granted for a Letters Patent appeal, In the Letters Patent appeal in the same case, it was held that an appeal under 3, 10, Letters Patent, was not maintainable from an Order passed under Section 491, Criminal P. C., inasmuch as proceedings under Section 491,'Criminal P. C, were proceedings before the' High Court' and the expression 'High Court' is defined by Section 4 (j) to mean the 'highest Court of criminal appeal Cr revision for any local area'. In effect, therefore, it was held that the proceedings were of a criminal nature. With regard to the question of costs, it was held that though no question of coats could-arise in the Original proceedings, yet costs may be awarded in proceedings in the nature of an appeal which purports to have been filed under Section 10, Letters Patent. The appeal was dismissed and costs were accordingly awarded to the successful respondent.

51. Next, I may refer to the case of District Magistrate, Trivandrum v. K. C. Mammen Mappillai and Ors. A.I.R. (26) 1939 Mad. 120 : 40 cr. L, J. 320 decided by a Fall Bench of five learned Judges o the Madras High Court where it was held:

By Acts of the legislature lawfully passed in 1875 and subsequent years, the legislature has taken away the power to issue the prerogative writ ot habeas corpus in matters contemplated by Section 491, Criminal F. C. Hence, the High Court or any Judge of it cannot issue the Common law writ of habeas corpus in any of the cases covered by Section 491, Criminal P. C.

From the decision of the Madras High Court, an appeal was filed in the Privy Council. The decision of their Lordships of the Privy Council is reported in Matthen v. District Magistrate, Trivandrum , their Lordships approved of the decision of the Pull Bench to the effect that the legislature bad taken away the power to issue the prerogative writ of habeas corpus in matters contemplated by Section 491, Criminal P.C.

52. Next, I may refer to the case of Kishori Lai v. The Grown I. L. R. (1945) 26 Lah. 573, decided by two learned Judges of the Lahore High Court. It related to an appeal under Clause 10, Letters Patent from an Order of a learned angle Judge rejecting an application under Section 491, Criminal P. C., for a with in the nature of habeas corpus . It was held that no Letters Patent appeal was competent as the single Judge acting under the provisions of Section 491, Criminal P, C, was exercising a criminal jurisdiction and not a civil jurisdiction. It was further held that the High Courts in India are not competent to issue prerogative writ of habeas corpus and their powers are entirely contained in Section 491 and 491 A, Criminal P. C., and, therefore, there being no appeal competent from the Order of a single Judge, the petitioner could not go under the law to every Judge in spite of a refusal by any one Judge.

53. From the decisions briefly noticed above, it seems to me quite clear that the proceedings under Section 491, Criminal P. C, are of a criminal nature. In consequence, it has been held that no Letters Patent appeal lies against the Order of a single Judge passed in these proceedings. The distinction between Civil and Criminal habeas corpus proceedings, as it exists in England, is not at all helpful to

us. If the proceedings are criminal in their nature, it seems to follow that the general rule regarding the award of costs in a criminal matter should be observed. Generally speaking, costs are not awarded in the absence of specific provisions to the contrary. In the Code of Criminal Procedure, there are certain sections which no doubt provide for costs, e. g., 148 (3), 344 (l) and 526 (5) of the Code. There ia, however, no such specific provision regarding costs in Section 491, Criminal P. C. Sectional (2), Criminal P.C., however, gives power to the High Court to frame rules for regulating the procedure in cases under this section. Some of the High Courts in India have made such provisions. so far as the Allahabad High Court is concerned, no rules have been framed under Sub-section (2) of section 491, Criminal P. C. The position, therefore, is that there is no specific provision in the section nor has any rule been framed which may throw any light on the question of costs in these proceedings. There is no decision of this Court on the question whether costs can be awarded in these proceedings, In the case of Ramammai v. Vijayaraghavalu and Anr. 65 Mad. 1049, I (A.I.R. (20) 1933 Mad 102:34. Cr. L J. 32 F. B.) however, a Full Bench of the Madras High Court has held that the High Court has no power to award coats in proceedings under 8. 491, Cr. P. C, as there is no provision for coats contained in Criminal P. C.

54. I may mention in passing that the Bombay High Court has framed rules under Section 491 (2), Criminal P. C. which permit the award of costs. Reference may be made to the case of In re, Jagerdeo Ramsumer Teware, A.I.R. (12) 1925 Bom. 139 at p. 143 : 26 Cr. L. J. 468. As the Allahabad High Court has framed no such rules, the question does not arise whether in case rules were framed valid provisions could be made for the award of costs in proceedings under Section 491, Criminal P. C.

55. The principle that in the absence of specific statutory provisions, no costs can be awarded in the proceedings for habeas corpus in connection with a criminal matter, is well recognised even in England. Halsbury's Laws of England, Hailsham Edition, vol. 9, pags 727, paragraph 1240, foot note makes the position clear. In civil cases the costs of a successful applicant for a writ of habeas corpus were some, times awarded, but in criminal cases, the Courts formerly had no power to award costs on habeas corpus . In recent times, however, the Court has power,

under Section 60, Supreme Court of Judicature (Consolidation) Act, 1925 (16 and 16 Geo. v, 0, 49), to award costs to the successful party on an application for a writ of habeas corpus .

56. Decisions of the Federal Court of India in Keshav Talpade v. Emperor Emperor v. Keshav Talpade and Basanta Chandra Ghose v. Emperor as also in the case of Basanta Chandra Ghosa v. Emperor and the case of Birpal Singh v. Emperor , show that no Order with regard to costs was passed in appeals against detention Orders under the Defence of India Rules. The learned Advocate-General has contended that whenever the State claims to detain a citizen and a proceeding results therefrom in the nature of proceeding under Section 491, Criminal P. C., it must be considered to be a proceeding of a criminal nature. Such a proceeding, according to the learned Advocate-General, is very different from cases in the ecclesiastical jurisdiction Cr cases under the Guardian and Wards Act. Lastly the learned Advocate-General has brought to our notice the decision of the Federal Court in case No. 6 of 1948, Rexv. AbdulMajid A.I. R. (86) 1949 P. C. 103 where the Federal Court, while dismissing the appeal, passed no Order as to costs of the appeal.

57. On a full and anxious consideration of the whole matter, I have arrived at the conclusion that no Order as to costs can be passed in these proceedings.

58. In the result, therefore, in my judgment, the provisions of U. P. Act xxll [22] of 1948 relating to preventive detention are ultra vires the Provincial Legislature. I would, therefore, direct the release of the petitioner forthwith under Section 491, Criminal P. C. I would make no Order as to costs. Further, as the case satisfies the requirements of Section 205(1), Government of India Act, I would grant a certificate of its fitness for appeal to the Federal Court.

59. In our judgment, provisions of the U. P. Act XXII [22] of 1948 relating to preventive detention are ultra vires the Provincial Legislature. The Order of detention of the petitioner Basudeva is, therefore, contrary to law and under B. 491, Criminal P. C., we direct the release of the petitioner forthwith, but make no Order as to costs.

60. Further, as the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, we grant a certificate of its fitness for appeal to the Federal Court under Section 205(1) of the Act.