Salig Ram Vs. Emperor

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Court : Allahabad

Decided On : Nov-12-1942

Reported in : AIR1943All26

Appellant : Salig Ram

Respondent : Emperor

Judgement :
ORDER

1. This is (in application in revision by one Salig Ram who, along with 30 other persons was tried by a Special Magistrate for an offence punishable under Section 395, Penal Code. The offence that formed the subject of charge against the applicant was alleged to have boon committed on 14th August 1942. The trial was by a Special Magistrate in pursuance of the provisions of Section 10 of Ordinance No. 2 of 1942. The learned Magistrate acquitted one of the accused and convicted the remaining 30 accused. He sentenced Salig Ram to two years' rigorous imprisonment and to a fine of Rs. 50 and in default of payment of fine he ordered Salig Ram to undergo six months' rigorous imprisonment. Salig Ram appealed to the Sessions Judge who dismissed the appeal holding that no appeal lay to him in view of the provisions of Section 13 of the Ordinance. Salig Ram then filed the present application in revision in this Court. The decision of the Magistrate has been assailed by Mr. Pyare Lal Banerji on two grounds. He has firstly contended that the Ordinance is ultra vires the Governor-General. Secondly, he has argued that even if the Ordinance is valid, it cannot apply to offences committed before

20th August 1942--the date on which the Ordinance came into force in this Province. He has also argued that the decision of the Sessions Judge that no appeal lay to him is erroneous.

2. All the three Judges constituting the pre. sent Bench are of the opinion that there is no force in the contention that the Ordinance is ultra vires the Governor-General. Two of the Judges constituting the present Bench are further of the opinion that offences committed even before 20th August 1942 can be tried by Special Magistrates under the Ordinance, and that the decision of the Sessions Judge that no appeal lay to him is correct. This application in revision must, therefore, fail and is dismissed. The reasons for the decision will be announced on a later date. Mr. Das, who appears for Salig Ram prayed that a certificate be granted for appeal to the Federal Court in pursuance of the provisions of Section 205, Government of India Act, 1935. Having heard Mr. Pyare Lal Banerji at length on the first question mentioned above we are of the opinion that there is no substance in his argument. We, therefore, consider that no substantial question of law as to the interpretation of the Government of India Act or any Order in Council arises in the present case. Accordingly we refuse to give a certificate as prayed for.

[The reasons were then given by their Lordships on 12th November 1942.]

Iqbal Ahmad, C. J.

3. This is an application in revision by one Salig Ram who, along with 30 other persons, was tried by a Special Magistrate in accordance with the provisions of Ordinance No. 2 of 1942 with respect to an offence punishable under Section 395, Penal Code. The charge against the accused was that they on 14th August 1942, with a mob of about 3000 men attacked the Government Seed Store at Badshahpur in the district of Jaunpur and looted about 600 bags of grain. The Special Magistrate acquitted one of the accused and convicted the rest. He sentenced Salig Ram to two years' rigorous imprisonment and to a fine of Rs. 50 and ordered that, in default of payment of fine Salig Ram will undergo a further term of rigorous imprisonment for six months. Salig Ram appealed to the Special Judge who dismissed the appeal on the ground that, in view of the provisions of

Section 13 of the Ordinance, no appeal lay against the decision of the Special Magistrate. Salig Ram then preferred the present criminal revision in this Court and it was put for orders before me.

4. As it had come to my notice that numerous applications in revision involving some, if not all, of the questions raised in Salig Ram's application had been filed in this Court during the last few weeks, I considered it advisable to constitute a Full Bench for the decision of Salig Ram's revision and, accordingly, I referred the revision application to the present Bench. I adopted this course not because, in my opinion, the questions raised in Salig Ram's application were of unusual difficulty or complexity, but mainly because I considered it desirable that there should, once for all, be an authoritative pronouncement by this Court on the questions raised, and thus the possibility of the same points being debated and discussed before different benches of this Court be excluded, and speedy decision of cases under the ordinance may be assured. Mr. Pyare Lal Banerji, the learned Counsel for Salig Ram, has assailed the propriety of Salig Ram's conviction by the Special Magistrate on two grounds. Firstly, he has contended that the ordinance is ultra vires the Governor-General, and the trial and conviction of the applicant in pursuance of the provisions of the Ordinance was, as such, bad in law. In the alternative he has argued that, even if the Ordinance was validly promulgated, it could not apply to an offence committed before 20th August 1942, on which date the ordinance came into force in these provinces. He has also impugned the correctness of the decision of the special Judge that no appeal lay against the decision of the Special Magistrate. Mr. Banerji has argued the case at great length, and has said all that could be said on behalf of his client, but his contention has failed to carry conviction to my mind. In Schedule 9 of the present Government of India Act, 1935, (hereinafter referred to as the Constitution Act) such provisions of the previous Government of India Act, with certain amendments, are set out as are to continue in force until the establishment of the Federation. One of these provisions in Schedule 9 is Section 72 the relevant portion of which is as follows:

The Governor-General may, in oases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof,

and any ordinance so made shall 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....

5. That Ordinance No. 2 was promulgated by the Governor-General in exercise of the power vested in him by the provision just quoted is manifest from the Preamble to the ordinance which runs as follows:

Whereas an emergency has arisen which makes it necessary to provide for the setting up of special criminal Courts,

Now, therefore, in exercise of the powers conferred by Section 72, Government of India Act, as set out in Schedule 9, Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance.

6. Ordinance No. 2 was promulgated on 2nd January 1942, and, by Sub-section (2) of Section 1 the ordinance was to extent to the whole of British India. By Sub-section (3) of Section 1 it was, however, provided that the Ordinance

shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded.

7. As the Ordinance originally stood any disorder within the Province was not an emergency contemplated by it. On 19th August 1942, an amendment was, however, introduced in the Ordinance by the Special Criminal Courts (second Amendment) ordinance (No. 42 of 1942), and this amendment brought 'any disorder within the Province' within the purview of ordinance No. 2. Sub-section (3) of Section 1 of Ordinance No. 2 as amended by Ordinance No. 42 runs as follows :

It shall come into force in any province only if the Provincial Government, being satisfied of the existence of emergency arising from any disorder within the

Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded.

8. Ordinance No. 2 was promulgated with a view to provide for the setting up of 'Special Criminal Courts,' and the jurisdiction and power of such Courts and the procedure to be followed by them were prescribed by the Ordinance. The Ordinance contains provisions about appeals, 'special rule of evidence' and makes special provision regarding bail. In short, the Ordinance is a self-contained enactment and aimed at expeditious trial of offences coming within its perview. Section 26 of the Ordinance makes provision about 'exclusion' of interference by other Courts and runs as follows:

Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance and, save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under Section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court.

9. In order to appreciate the true purpose of the Ordinance one has to look at its historical background:

Legislation, 'to quote the high authority of Sir Henry Sumner Maine,' the enactments of a Legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities: vide Maine's Ancient Law, Edn. 2, page 29.

10. Such being the object of legislation, the ordinance in question stepped in to 'ameliorate' of save society from the disruption which threatened it. In fact the object of the ordinance, as indicated by the preamble itself, was to meet an 'emergency.' It will not be out of place to mention just a few of the acts committed

by the people which necessitated the amendment of Ordinance No. 2 by Ordinance No. 42. Telegraph wires had been cut, rails had been removed. These acts by themselves constituted grave offence because they had a tendency to paralyse the administration. But they were not all. They wore accompanied or followed by wholesale destruction of property, both public and private. Post offices, police stations, railway stations, in fact public buildings of almost all description came in for special attention at the hands of those who were out for mischief. Even schools and colleges, which must receive special consideration, were not spared. Attempts were made to dissuade the servants of the Crown from doing their duty. Arson and murder in some areas disfigured the normal life of society. These are matters of which I can take judicial notice. If authority is necessary there is the leading case in Probodh Chandra v. Emperor : AIR1933 Cal186 , which establishes the proposition that a Court can take judicial notice of a political movement prejudicial to the public safety or peace. During the period that such lawlessness prevailed in this part of the country, the Government of the United Provinces by notification No. 7661-C. X published in the extraordinary Gazette dated 20th August 1942, applied Ordinance No. 2 as amended to these provinces. The notification reads as follows:

Whereas the Governor of the United Provinces is satisfied that a state of emergency has arisen from disorder within the province. Now, therefore, in exercise of the powers conferred by Sub-section (3) of Section 1 of the Special Criminal Courts Ordinance, 1942 (Ordinance No. 2 of 1942), the Governor hereby declares that the said Ordinance shall come into force in the United Provinces with effect from the date of publication of this notification in the official Gazette.

11. By two other notifications Nos. 7662-C. X. J and 7663-C. X. published in the same Gazette all Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges who had exercised powers as such for two years were made Special Judges, and all stipendiary Magistrates of first class who had exercised first class powers for two years became Special Magistrates under the ordinance, and the offences to be tried by them were specified in the notifications. It would appear from Section 72 as set out in Schedule 9, Constitution Act, that the power vested in the Governor-General to make and promulgate ordinances is subject to

the restrictions to which the power of the Indian Legislature (i. e. Federal Legislature) to make laws is subject. The validity of the ordinance is primarily assailed by Mr. Banerji on the ground that the matters dealt with by the ordinance are enumerated in Items 1 and 2 of the Provincial Legislative List, and, as such, in view of the provisions of Section 100, Constitution Act, the Federal Legislature has not the power to make laws with respect to those matters. Item 1, Provincial Legislative List, enumerates, amongst other matters, 'constitution and organization of . all Courts, except the Federal Court, and fees taken therein' and the matters dealt with by Item 2 are: 'jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in rent and revenue Courts.' It is urged that as the Ordinance in question provides for the setting up of certain special Courts and defines the jurisdiction and power of such Courts it falls within the ambit of items 1 and 2, Provincial Legislative List, with respect to which the Federal Legislature has not the power to make laws. Section 100 runs as follows:

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

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List 3 in the said schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a province or any part thereof, with respect to any of the matters enumerated in List 2 in the said schedule (hereinafter called the 'Provincial Legislative List').

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

12. If the matters dealt with by the Ordinance were enumerated only in the Provincial Legislative List and did not fall within the Federal or the Concurrent Legislative List, the argument of Mr. Banerji might have had some force, but as it is, it lacks even plausibility. The subject-matter of the Ordinance, to my mind, falls within Item 2, Concurrent Legislative List, which runs as follows :

Criminal procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

13. Chapter 2 of Part 2, Criminal P. C., deals with 'the Constitution of Criminal Courts and Offices' and Chap. 3 of that part specifies the 'powers' of such Courts. The Ordinance, as already pointed out, makes provision for the setting up of 'special criminal Courts' and defines the powers of such Courts, and as such, deals with certain 'matters included in the Code of Criminal Procedure' within the meaning of Item 2 of the Concurrent Legislative List. Now with respect to the matters enumerated in the Concurrent List both the Federal and the Provincial Legislature have power to make laws subject to the conditions specified in Sub-section (2) of Section 100. It is, to my mind, therefore, perfectly clear that the Indian Legislature had power to make laws with respect to the. matters covered by the Ordinance. It follows that the Governor-General was competent to promulgate the ordinance. It is conceded that the Provincial Legislature has not enacted any law similar to the Ordinance. It cannot, therefore, be argued that the Ordinance constitutes an encroachment on an 'occupied field.' The words used in Items 1 and 2 of the Provincial Legislative List are no doubt words of wide import, but the generality of those words is restricted and controlled not only by Item 2 of the Concurrent Legislative List, but also by the words 'with respect to any of the matters in this list' that find a place in Item 2 of the Provincial List.

14. Item 2 of the Provincial List corresponds to item 53 of the Federal and to item 15 of the Concurrent Legislative Lists. The power to make laws as regards 'jurisdiction and power of all Courts except the Federal Court' given by these items exclusively to the Provincial or the Federal Legislature or concurrently to those Legislatures, as the ease may be, is only 'with respect to any of the matters' specified in the particular List. It follows that Item 2 of the Provincial List confers

upon the Provincial Legislature the exclusive right to enact laws defining jurisdiction and power of all Courts only with respect to the matters specified in the Provincial List. 'Criminal law, including all matters included in the Indian Penal Code' is, however, a matter enumerated in the Concurrent and not in the Provincial Legislative List. The power to make laws dealing with jurisdiction and power of Courts as regards 'criminal law or matters included in the Indian Penal Code' is not, therefore, within the exclusive competence of the Provincial Legislature. Item 1 of the Concurrent Legislative List is as follows:

Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II....

15. Both the Federal and the Provincial Legislatures have, therefore, concurrent jurisdiction to make laws regarding matters specified in this item, i. e., to enact penal laws excluding 'offences against laws with respect to any of the matters' in the Federal or the Provincial Legislative Lists. Item 15 of the Concurrent List empowers both the Federal and the Provincial Legislatures to make laws relating to 'jurisdiction and power of all Courts, except the Federal Court, with respect to any of the matters' in that List. It follows that both the Federal and the Provincial Legislatures have concurrent authority to make laws defining jurisdiction and powers of Courts that have to administer the criminal or the penal law enacted or promulgated in conformity with Item 1 of the Concurrent List. The ordinance in question, defining as it does the jurisdiction and power of the special criminal Courts constituted by it to try offences that are included in the Penal Code falls, therefore, within Item 15 of the Concurrent and not under Item 2 of the Provincial List. The argument that only the Provincial Legislature has exclusive jurisdiction to enact laws dealing with jurisdiction and power of criminal Courts cannot, therefore, receive my assent, and it must be held that similar power is also concurrently vested in the Federal Legislature. The Ordinance to the extent that it defines the jurisdiction and power of the special criminal Courts contemplated by it is therefore intra vires the Governor-General.

16. The words 'constitution and organization of all Courts' that find a place in Item 1 of the Provincial List are, no doubt, very general and, if there was nothing in any of the other lists to cut down or abridge their scope, the constitution and organization of special criminal Courts would come within their purview. But, as already indicated, 'the constitution of criminal Courts' is a matter included in the Criminal Procedure Code and the constitution of such Courts is therefore a matter that specifically comes under item 2 of the Concurrent List. In determining the scope of the various items in the three Legislative Lists appended to the Constitution Act, the cardinal fact that the Parliament intended to establish mutually exclusive jurisdictions with a view to avoid all clash between the Federal and the Provincial Legislatures must be kept in view. In other words, the items in the Legislative Lists should be so construed as to avoid and discourage overlapping. Effect was given to this principle by the Federal Court in C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act In the matter of C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act . It was held in that case that

a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning. Restricting the literal meaning of the words defining the powers of the Federal Legislature in order to afford scope for powers which are given exclusively to the Provincial Legislature is not to ignore the non-obstante clause, still less to bring into existence, as it were, a non-obstante clause in favour of the Provinces; for if the two legislative powers are read together in this manner there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them.

17. To the same effect is the decision of their Lordships of the Privy Council in Paquet v. Corporation of Pilots for the Harbour of Quebec ('20) 7 A.I.R. 1920 P.C. 202. In that case their Lordships are reported to have observed as follows:

After the quasi-federal distribution of legislative powers which was effected by the British North America Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion

Parliament. Navigation and shipping form the tenth class of the subjects enumerated and exclusively belonging to the Dominion in Section 91 of the Act.... It is of course true that the class of subjects designated as property and civil rights' in Section 92 and there given exclusively to the province would be trenched if that section were to be interpreted by itself. But the language of Section 92 has to be read along with that of Section 91, and the generality of the wording of Section 92 has to be interpreted as restricted by the specific language of Section 91, in accordance with the well-established principle that subjects which in one aspect may come under Section 92 may in another aspect that is made dominant be brought within Section 91.

18. I have accordingly no hesitation in holding that the generality of the words used in Item 1 of the Provincial List must yield to Item 2 of the Concurrent List that empowers both the Federal and the Provincial Legislatures to make laws for 'the constitution of criminal Courts.' There is therefore no escape from the conclusion that the ordinance deals with matters about which the Indian Legislature was competent to legislate, and, as such, the ordinance is not ultra vires the Governor-General.

19. The conclusion that Ordinance No. 2 comes within the purview of Item 2 of the Concurrent List may be supported by another process of reasoning. The Constitution Act contains provisions similar to Section 72 of the Ninth Schedule as regards the power of the Governor-General after the Federation has materialized. By Section 12(1)(a), Constitution Act 'the prevention of any grave menace to the peace or tranquillity of India or any part thereof' is the special responsibility of the Governor-General and he has, by Sub-section (2) of Section 12, to exercise his individual judgment in the exercise of his functions in this respect. Section 43 of the Act gives power to the Governor-General to promulgate ordinances 'for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment.' Identical special responsibility has been cast on the Governor of a Province with regard to the prevention of any grave menace to the peace or tranquillity of a Province by Section 52(1), and similar power to promulgate ordinances has been conferred on the Governor of a Province by

Section 89(1), Constitution Act.

20. It is therefore manifest that while Governors of Provinces have, from the commencement of part 3, Constitution Act, the power to promulgate ordinances to avert grave menace to the peace or tranquillity of the Provinces, the Governor-General has and, after the Federation has come into being, shall have identical powers of promulgating ordinances for preventing any grave menace to the peace or tranquillity of the whole of India. It follows that the Governor of a province has concurrent jurisdiction with the Governor-General to promulgate ordinances of the nature just referred to. One of the surest ways to preserve the peace of a Province or of India, is to penalize the commission of certain acts by such an ordinance. If I am right in this assumption the Governor cannot have exclusive but must have concurrent jurisdiction with the Governor-General to constitute Courts for enforcing the penal provisions contained in such an ordinance, otherwise one will be faced with this anomaly that, while the Governor-General has the right to promulgate an ordinance of the description referred to above, he has not the power to constitute Courts in the various provinces for the enforcement thereof. This anomaly can be avoided only by putting the interpretation that I have put on Items 1 and 2 of the Provincial and Item 2 of the Concurrent Legislative Lists, and by holding that the power to constitute Courts to enforce the laws enumerated in Item 2 of the Concurrent List and to define the jurisdiction and power of such Courts falls within the Concurrent and not within the Provincial List.

21. The validity of the ordinance was challenged by Mr. Banerji yet on another ground. He argued that, as the power of the Governor-General to promulgate ordinances is, by Section 72, limited to 'cases of emergency,' the Governor-General was not competent to promulgate the ordinance in question unless an emergency existed. In this connexion he emphasized the fact that though the ordinance was promulgated on 2nd January 1942, it was not put in operation in any part of British India till 19th or 20th August 1942, and he urged that this was proof positive of the absence of an emergency at the time of the promulgation of the Ordinance. The short answer to this contention, to my mind, is that the Governor-General is the sole and final judge as to the existence or absence of an emergency and accordingly, the validity of an Ordinance, which is otherwise intra

vires the Governor-General, cannot be called into question on the ground that no emergency as a matter of fact existed. This was the view taken by their Lordships of the Privy Council in Bhagat Singh v. Emperor . It was held in that case that the power vested in the Governor-General by Section 72 is an absolute power and he is the sole judge of the emergency calling for the promulgation of an ordinance and also the fact whether it would be conducive to the peace and good government in British India or not. Their Lordships further held that it was not necessary that the Governor-General should state the reasons which induced him to promulgate an ordinance.

22. The last argument of Mr. Banerji on this part of the case was based on the fact that, even though the Ordinance was promulgated by the Governor-General on 2nd January 1942, it was put in force in these provinces by the Governor and not by the Governor-General, and this was done on 20th August 1942. He urged that, unlike other ordinances that came into force immediately after their promulgation, life was not given to this ordinance till 20th August and the person who gave life to it was the Governor and, therefore, the real living part of the ordinance was the result of the action of the Provincial Government. He, therefore, contended that the ordinance was for all practical purposes promulgated and enforced by the Governor and not by the Governor-General. In this connection he drew our attention to the fact that, by Sub-section (3) of Section 1 of the Ordinance, the application of the ordinance was made dependent on the Provincial Government being satisfied of the existence of an emergency, and maintained that under the guise of promulgating the ordinance the Governor-General had delegated the determination of the question of emergency to the Provincial Government. He contended that such delegation of the power vested in the Governor-General by Section 72 was not permissible. In my judgment, there is no substance in this contention. If the ordinance was validly promulgated on 2nd January its validity could not be questioned on the ground that its enforcement was deferred and was made dependent on any specified set of facts. The power to promulgate an ordinance necessarily carries with it the power to specify the conditions necessary for its enforcement. The view that I take is in consonance with the decision of their Lordships of the Privy Council in Charles Russell v. Queen (1882) 7 A. C. 829. In that case their Lordships made the following observations:

It was in the first place contended, though not very strongly relied on, by the appellant's counsel, that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Ritchie C. J. on this objection. If authority on the point were necessary, it will be found in Reg. v. Burah (1878) 3 A. C. 889, lately before this Board.

23. For the reasons given above, I hold that Ordinance 2 is -intra vires the Governor-General. I now proceed to deal with the argument of Mr. Banerji that as the ordinance came into force in these provinces on 20th August, it could have no application to offences committed before that date and, Salig Ram could not, therefore, be tried under the ordinance. He argued that, as there was nothing in the language of the ordinance to give it retrospective effect, the only offences which could be tried in accordance with its provisions were those committed after the ordinance came into force. He maintained that the ordinance dealt not only with 'procedure' but also took away the right of an accused to apply for bail and to appeal against his conviction, and therefore, in the absence of express language to the contrary, the ordinance was to be taken as intended to apply to a state of facts coming into existence after it was put into force. It is a fundamental rule of law that

no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction, and the same rule

involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary:vide Reg. v. Ipswich Union (1877) 2 Q. B. D. 269, Bourke v. Nutt (1894) (1984) 1 Q.B. 725 and Ward v. British Oak Insurance Co. Limited (1932) 1 K.B. 392. As there is nothing in the language of the ordinance to make it retrospective, it must be taken to have prospective and not retrospective effect. To this extent the argument of Mr. Banerji must be accepted. The question, however, remains whether an offence committed before the ordinance came into force can be tried in accordance therewith, if the trial commences on or after the date on which the ordinance was put into operation. By Section 10 of the Ordinance a Special Magistrate is enjoined to try such offences or classes of offences, or such cases or classes of cases (other than offences or cases involving offences punishable under the Indian Penal Code with death), as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct.

24. Similar provision as regards the trial of offences by special Judges is contained in Section 5 of the ordinance. The marginal notes to Sections 5 and 10 show that these sections deal with the 'jurisdiction' of special Judges and Magistrates to try certain classes of offences or cases. The dominant object of these sections is, therefore, to define the jurisdiction of the special Judges and Magistrates relating to the trial of offences or cases that they are, in pursuance of the provisions of those sections, directed to try. It is manifest that the 'general or special order in writing' referred to in those sections directing special Judges or Magistrates to try certain offences or cases could be issued, by the authorities mentioned in those sections, only after 20th August when the ordinance was put in force in these provinces and not before that date, It necessarily follows that a special Judge or Magistrate could initiate the trial of an offence only after 20th August and not before that date. To put the matter in another way. As the issue of a direction in writing is a condition precedent to the taking cognizance of offences or cases by a special Judge or Magistrate, and as such direction could be issued only after 20th August a special Judge or Magistrate could not try a case in accordance with the ordinance before 20th August. There can, therefore, be no question of giving Sections 5 and 10 retrospective effect.

25. It is, however, urged that offences committed before 20th August do not come within the purview of the ordinance, and, as such, cannot be tried in accordance therewith. With this argument I am unable to agree. The ordinance prescribes the procedure for trial of offences and not for the commission of offences. In other words, it regulates trials irrespective of the fact as to when the offence, that is the subject of the trial, was committed. To apply the ordinance to a trial that commences after 20th August is to give the ordinance a prospective and not a retrospective effect. Part G, Criminal P. C., deals with 'Proceedings in Prosecutions.' The heading of Chap. 15 in that part is 'Of the jurisdiction of the Criminal Courts in Inquiries and trials.' Subheading B in Chap. 15 makes provisions about 'Conditions requisite for Initiation of Proceedings' and Section 190 is under this subheading. By Sub-section (1) of Section 190 a Magistrate can take cognizance of an offence only

(a) Upon receiving a complaint of facts which constitute such offence, or (b) upon a report in writing of such facts made by any police officer, or (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

26. It is clear that the judicial proceeding before a Magistrate begins only after he has taken cognizance of an offence, and such judicial proceeding must, in my opinion, be regulated by the law in force at the time that the proceeding was initiated. It was conceded by Mr. Banerji that the adjective law recognises no vested right. It follows that a judicial proceeding in a Court of law must be governed by the procedure in force at the time that such proceeding commenced, and not by the procedure in force at the time when the 'cause of action' or the offence that culminated in the civil or criminal trial, as the case may be, arose or was committed. It may be noted in this connexion that the provisions of the Code of Criminal Procedure are, subject to the limitations and conditions prescribed by Section 27 of the Ordinance, applicable to proceedings under the Ordinance.

27. The law aims at both prevention and punishment of offences and a person by committing an offence, far from acquiring any vested right, renders himself liable to the penalties prescribed by the law. The offender must submit himself to the

machinery of justice as it exists on the day he stands his trial. That machinery is furnished by the Court which administers justice, and by the law of procedure which regulates the conduct of the Court and prescribes the method for the administration of justice. The law of procedure does no more than lay down the conditions and made which are to govern and regulate the judicial proceedings of a Court trying a civil or a criminal action. A Court of law is bound to conform to the procedure which it is enjoined to follow by the law in force at the time that it takes cognizance of a civil or criminal proceeding. The procedure to be followed in the trial of an offender must, therefore, be in accordance with the law of procedure in force on the date of the inception of the trial. The conclusion is, therefore, irresistible that trials commencing after 20th August are governed by the Ordinance irrespective of the date of the commission of offences which are the subject of those trials. The view that I take is in consonance with the decision of the Madras High Court in Shrinivasachari v. Queen ('83) 6 Mad. 336 and the Full Bench decision of six Judges of this Court in Fateh Chand v. Muhammad Bakhsh ('94) 16 ALL. 259. The Full Bench in the course of its judgment made the following observations:

There was much confusion in the argument in this case between a right of action and a right to have an action conducted in a particular way. The former is a vested right, the latter is merely a question of procedure in which no litigant or intending litigant, has any vested right whatever.

28. Great reliance was placed by Mr. Banerji on the Privy Council decision reported in Colonial Sugar Refining Co. Ltd. v. Irving (1905) 1905 A. C. 369. It was held in that case that:

Although the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the Order in Council of 30th June 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, Section 39, Sub-section (2), and the only appeal therefrom now lies to the High Court of Australia, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards, was not taken away.

29. Their Lordships in that case are reported to have observed as follows:

As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

30. This case has been followed in a number of judicial decisions in this country, but these decisions, in my opinion, have absolutely no application to the case before me. These decisions are authority for the proposition that the institution of judicial proceedings, either civil or criminal, carries with it the implication that all appeals provided for by the law of procedure governing such proceedings are preserved, and the amendment or repeal of that law of procedure, during the pendency of such proceedings, cannot destroy or take away the right of appeal. In other words, a right of appeal that a suitor has in a pending action cannot be taken away by a repealing enactment unless the right of appeal is expressly taken away by giving that enactment a retrospective effect. The question which awaits consideration before us, however, is essentially different from the question that formed the subject of decision in the pronouncements just referred to. The present is not a case where during the pendency of a trial started under some law, another law stepped in to take away some vested right, to wit, the right of appeal. On the

other hand, the question for decision, as already stated, is whether the trial of an offence committed before 20th August can be held in accordance with the provisions of the Ordinance. If the answer to this question is, as is in my judgment, it should be, in the affirmative, the right of appeal will be governed by the Ordinance. If the trial of Salig Ram with respect to the offence alleged to have been committed by him on 14th August had commenced before 20th August the trial would have been in conformity with the provisions of the Code of Criminal Procedure. In that case the Ordinance in question could not have adversely affected the right of appeal that Salig Ram would have had under the Code, but Salig Ram, as stated before, was tried under the Ordinance and the right of appeal must therefore be searched within the four corners of the Ordinance.

31. The commission of an offence does not give a right of appeal to the offender. The date of the commission of the offence is, therefore, wholly irrelevant to the determination of the question whether an offender has or has not a right of appeal. The right of appeal is the creation of a statute and it must therefore be governed by the statute in conformity with which a particular offender is tried. The cases relied upon by Mr. Banerji have, therefore, no bearing upon the question before me. Mr. Banerji also made reference to the fact that the Ordinance curtailed the right of an accused person to apply for bail and contended that, in view of the drastic provisions contained in the Ordinance in this and other respects, the Ordinance could not apply to offences committed before its enforcement. I confess my inability to appreciate his argument. Chapter 39, Criminal P. C., contains provisions about bail being granted to an accused person either by a police officer or by a Court in the circumstances specified therein. The Ordinance has not in any way affected the provisions of the Code as regards bail being given by a police officer. It has, however, by Section 24-A considerably modified the provisions of the Code in respect of bail being granted by a Court. This fact, again, to my mind, cannot entitle an accused person to insist that his petitions for bail be decided in accordance with the law in force on the date of the commission of offence by him. The reason for this is not far to seek. The provisions regarding bail are essentially a part of the law of procedure, and, as such, must be regulated by the law under which a particular trial is held. The commission of an offence does not ipso facto carry with it a right of bail. Such a right is dependent on the provisions contained in

a statute and to the statute alone can we look for any right which the offender claims.

32. Mr. Banerji's contention that, in view of their drastic character, the application of the provisions of the Ordinance should not be extended to offences committed before it, is something unknown to law. The Judges can only interpret and apply a statute. They have no right to sit in judgment upon its wisdom or propriety. Before concluding my judgment on this part of the case I must notice certain other points that were raised by Mr. Banerji. He contended that legal proceedings against an alleged offender in fact commence from the moment that the police takes cognizance of the case and not when the case reaches the Court. He accordingly submitted that an offender has a right to be tried in accordance with the procedure in force on the date of the com-mission of the offence. The short answer to this contention is that the Ordinance ideals not with the procedure to be followed by a police officer in the investigation of a crime, but prescribes the procedure for judicial proceedings before the special Courts constituted by it. The procedure followed by a police officer can by no stretch of reasoning be characterized as judicial proceeding and, accordingly, the decisive date about the application of the provisions of the Ordinance must be the date of the commencement of the trial of an offender and not the date of the commission of the offence. Reliance was also placed on Section 6(1), Emergency Powers (Defence) Act, 1989, 2 and 3 Geo. Chap. 62. The marginal note to Section 6 is 'Hearing of proceedings in camera' and Sub-clause (1) of that section inter alia provides:

If, as respects any proceedings before a Court (whether instituted before or after the commencement of this Act), the Court is satisfied that it is expedient, in the interests of the public safety or the defence of the realm so to do, the Court (a) may give directions that, throughout...the proceedings, such persons or classes of persons as the Court may determine shall be excluded....

33. It was contended that, if it was intended to give the Ordinance a retrospective effect, words identical with or similar to the words in the brackets in the above quotation would have been used in Section 10 of the Ordinance. The argument, in my view, is devoid of all substance. Section 6, English Act, was intended to have

retrospective effect and, therefore, the words in brackets were used in Section 6. The Ordinance, on the other hand, as I have already shown, was intended to govern judicial proceedings initiated after the date that it came into force and not the judicial proceedings pending on the date of its enforcement.

34. Lastly reference was made by Mr. Banerji to the Penalties (Enhancement) Ordinance (No. 3 of 1942) which was also promulgated by the Governor-General on 2nd January 1942. I again confess my inability to appreciate the argument based on Ordinance No. 3. Ordinance No. 3 prima facie deals with substantive and not with adjective law and it may, therefore, be contended that that Ordinance cannot apply to offences committed before the date on which it was enforced. This, however, cannot affect the question that we have to consider in the present case. Apart from this, the question whether ordinance No. 3 has or has not a retrospective effect is not the question before us and I, therefore, decline to express any opinion on the point. It may, however, be noted that the punishment imposed on Salig Ram by the Special Magistrate was not in excess of the punishment that could be awarded under Section 395, Penal Code. For the reasons given above, I have no hesitation in holding that offences committed before 20th August could be tried in accordance with the provisions of the Ordinance, provided the trial commenced after that date.

35. It remains to consider whether the Special Judge was right in holding that no appeal lay to him against the decision of the Special Magistrate. Sub-clause (1) of Section 13 of the Ordinance provides that:

Where a Special Magistrate passes a sentence of transportation or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge....

36. In the present case, as stated at the inception of this judgment, Salig Ram was sentenced by the Special Magistrate to two years' rigorous imprisonment and a fine of Rs. 50 and, in default of payment of fine, was ordered to undergo rigorous imprisonment for a further period of six months. It is urged that, as the cumulative sentence of imprisonment exceeded two years, an appeal lay to the Special Judge. I find it impossible to accede to this contention. By Section 12(1) of the Ordinance a Special Magistrate is empowered to 'pass any sentence authorized

by law, except a sentence of death or of transportation or imprisonment exceeding seven years.' Sentences of imprisonment and fine are both 'authorized by law.' A Special Magistrate can, therefore, pass a sentence or imprisonment as well as of fine, Section 24(1) of the Ordinance prescribes the mode by which the fine imposed by a Special Magistrate may be realized. Section 13, however, deals only with 'a sentence of transportation or imprisonment' and is silent about fine. I, therefore, conclude that the Ordinance draws a sharp distinction between a substantive sentence of transportation or imprisonment as distinguished from an order directing a convicted person to undergo imprisonment in default of payment of fine. In determining the right of appeal given to an accused person by Section 13 only the substantive sentence of imprisonment can, therefore, be taken into account.

37. If the Ordinance had intended to give a right of appeal in cases in which a Special Magistrate coupled a sentence of fine with a sentence of imprisonment, I would have expected this intention to have been expressed in clear terms. To accept the argument of Mr. Banerji will be to hold that even if a Special Magistrate passes a substantive sentence of imprisonment for a short period, say for three months, but also imposes a fine and directs imprisonment in default of payment of such fine, his decision will be appealable. This, in my judgment, will violate the clear provisions of the statute in the matter of appeals. I must, therefore, hold that the Special Judge was distinctly right in the view which he took. If he had entertained an appeal against the decision of the Special Magistrate, he would have done violence to the plain provisions of the Ordinance.

38. Before parting with this case, I must deal with the argument that was advanced about the scope of Section 26 of the Ordinance. It was contended that by that section the revisional jurisdiction of this Court was barred only in cases in which the Special Magistrate or the Special Judge had conformed strictly to the provisions of the Ordinance. In other words, it was contended that the slightest possible departure by a Special Judge or Magistrate from the provisions of the Ordinance permits and justifies the exercise of its revisional jurisdiction by this Court. I find myself unable to share this view. The words of Section 26 are very wide, and in my judgment, completely bar the revisional jurisdiction of this Court in

cases tried and decided by Special Magistrates or Special Judges. As to whether the appellate and revisional jurisdiction of this Court should have been so nullified is a question with which I am, of course, not concerned. I must, however, note in passing that the Ordinance is an emergency measure and aims at speedy punishment of offences committed in abnormal times and this, probably, accounts for the finality which attaches to the decisions of Special Magistrates and Special Judges, except to the extent indicated by the Ordinance itself. For the reasons given above, I would, as already ordered by this Court on 27th October 1942, dismiss this application.

Collister, J.

39. I agree that all the points arising in this revision must be decided against the applicant. As regards the validity of Ordinance 2, made and promulgated by the Governor-General on 2nd January 1942, I have nothing useful to add. The other two questions which require our consideration depend for their decision mainly, if not entirely, on the construction to be placed on the relevant sections of the Ordinance. The first of these questions is whether offences committed before 20th August 1942, which had not yet gone to trial, are or are not triable under the Ordinance. Section 10 of the Ordinance provides:

A Special Magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may by general or special order in writing direct.

40. Mr. P.L. Banerji on behalf of the applicant contends that the provisions of this section were only intended to apply to the trial of offences committed on or after 20th August 1942, on which date the Ordinance was put into force in the United Provinces by Notification No. 7661-C. X., published in an extraordinary Gazette of that date. He pleads that if this section were intended to apply to offences already committed, such intention would have, been expressly stated. In my opinion it would be more correct to put the matter conversely; I think that, if the intention had

been to exclude from the operation of the section the trial of offences already committed, there would have been an express provision to that effect. The expression 'such offences ... as the Provincial Government ... may by general or special order in writing direct' is wide enough in its scope to embrace the trial of offences already committed as well as offences thereafter to be committed. From the moment when the ordinance was made applicable to the United Provinces, all such offences were caught by the machinery thereunder provided. I agree with Mr. Banerji that Section 10 is not retrospective; it pro-vides prospectively for the trial by Special Magistrates, appointed under Section 9 of such offences as the Provincial Government may direct. But the governing word in Section 10 is 'try,' not 'offences.' The section -- which confers jurisdiction on the special Magistrates to try the aforesaid offences -- is certainly prospective in its operation, but its operation is concerned with the trial of offences, not with their commission. In my judgment there is nothing in the language of Section 10, which can be construed as excluding from trial under the Ordinance offences committed before 20th August 1942 of which the trial had not yet begun.

41. In connexion with this part of the case learned Counsel founds an argument on the right of an accused person to apply to the Court for bail, and to reinforce his argument he invokes the analogy of a right of appeal. He pleads that, although the provisions relating to appeal are contained, under the ordinary law, in a procedural code, that is to say the Code of Criminal Procedure, the right of appeal--as apart from the procedure by which such right is exercised --is by no means a mere procedural matter, it is a substantive right, created by statute and only divestible by an express statutory provision. In other words, it is a right which vests in a convicted person under the law for the time being in force and of which he cannot be divested by a subsequent enactment abrogating such right of appeal unless the later enactment is expressly retrospective in its operation. Relying on this proposition--which is perfectly sound, so far as it goes, learned Counsel pleads that a person who was accused of having committed an offence prior to 20th August 1942 will retain by parity of reasoning his right to apply to the Court for bail. Therefore, the argument goes, it cannot have been the intention that Section 10 should apply to offences committed before the Ordinance was put into force. In my opinion the plea is not well founded. I doubt very much whether the right to move

the Court for bail can be held to stand in principle on the same footing as the right to prefer an appeal; but assuming the contrary in favour of the applicant, the plea will still fail. When once it has been found--as I have found--that offences already committed are triable under the Ordinance, it follows logically and inevitably that from the inception of the trial all the provisions of the Ordinance --including the provisions relating to bail and including also Section 26, which ousts the jurisdiction of this Court--will apply.

42. In the course of the arguments, mention was made of ordinance No. 3. This ordinance was made and promulgated by the Governor-General on the same date as Ordinance No. 2 and it provides for enhanced sentences in certain cases. The suggestion is that a person who, prior to the enforcement of Ordinance No. 3 committed an offence for which a certain maximum sentence is provided in the Penal Code cannot legally be awarded a higher sentence, as provided by the Ordinance, which came into force after the commission of the offence. In other words, the person convicted has a sort of vested right in the matter of sentence. It is said that this analogy will exactly apply to applications for bail. But even if the analogy were otherwise applicable, it will not assist the applicant if my reasoning in the matter of bail is sound. If, prior to 20th August 1942, a person committed an offence after calculating the maximum sentence to which he would be liable on conviction under the law then prevailing and if he now finds that a higher sentence is being imposed upon him, he may feel aggrieved that his calculation has miscarried by operation of that Ordinance. But we are not concerned in this revision with any such grievance; we are concerned with the proper interpretation of Ordinance No. 2. The decision on this part of the applicant's case depends entirely on the construction of Section 10 of this Ordinance. If, as I hold, offences committed prior to 20th August 1942 are triable under the extraordinary law enacted by the Ordinance, all its provisions will apply, and analogies based on the ordinary law are irrelevant. In my opinion a person accused of an offence committed before the aforesaid date, who has not yet been brought to trial, is only entitled to apply to the Court for bail as provided by the Ordinance, and the jurisdiction of the High Court is excluded by the provisions of Section 26. Arguments based on the right to bail are therefore of no assistance to the applicant. The last plea taken is that the learned Judge erred in holding that no

appeal lay to his Court. Assuming for the sake of argument that this Court has jurisdiction to entertain the plea, I am of opinion that it falls on merits. The applicant was sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 50 and in default to undergo a further term of six months rigorous imprisonment. Section 13(1) provides :

Where a Special Magistrate passes a sentence of transportation or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge having jurisdiction in the area....

43. The section must be strictly construed according to its own language and no analogy based on the provisions of any other enactment will assist the applicant. The clear and unambiguous meaning of the section, as it appears to me, is that an appeal will only lie where the Special Magistrate has passed a substantive sentence of imprisonment exceeding two years. In the present case the period of imprisonment awarded is not in excess of two years. The section does not mention a sentence of fine, and the alternative award of six months rigorous imprisonment in default of payment of the fine cannot be said to be a sentence of imprisonment passed by the Court. In my opinion, the Judge was right in holding that no appeal lay to him. In my judgment, this application in revision is without force.

Bajpai, J.

44. Salig Ram is the applicant before this Court. He was tried for an offence under Section 395, Penal Code, by Syed Iftikhar Hussain, a Magistrate of the first class, who has been invested by the Provincial Government with the powers of a Special Magistrate under Ordinance No. 2 of 1942. Salig Ram was convicted and sentenced to rigorous imprisonment for two years and to a fine of Rs. 50 and in default of the payment of fine to a further period of six months' rigorous imprisonment. Salig Ram appealed and his appeal was dismissed by the Additional Sessions Judge of Benares at Jaunpur on the ground that no appeal lay. Three points were taken on behalf of the applicant, (1) that the Ordinance was ultra vires of the Governor-General, (2) that even if the Ordinance was not ultra vires it had no application to offences committed before 20th August 1942 when

the Ordinance came into force, (3) that the learned Additional Sessions Judge was wrong in holding that no appeal lay to him against the conviction recorded by the Special Magistrate. The contention of the applicant is that this conviction and sentence mentioned above is illegal and that we should interfere in our revisional jurisdiction. It is necessary to say something about the history of ordinance No. 2 of 1942. On 2nd January 1942, the Governor-General made and promulgated the Ordinance in exercise of the powers conferred by Section 72, Government of India Act as set out in Schedule 9, Government of India Act, 1935. The preamble says that whereas an emergency has arisen which makes it necessary to provide for the setting up of Special Criminal Courts an Ordinance is made and promulgated:

(1) This Ordinance may be called the Special Criminal Courts Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force in any province only if the Provincial Government, being satisfied of the existence of an emergency arising from (any disorder within the province or from) a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the province, and shall cease to be in force when such notification is rescinded.

45. The words within brackets were inserted by the Special Criminal Courts (Second Amendment) Ordinance, 1942 (Ordinance No. 42 of 1942) which came into force on 19th August 1942. Thus it was only on 19th August 1942 that it was realized by the Governor-General for the first time that a state of emergency could arise or has arisen in India by reason of internal disorder and the Provincial Governments should be given authority to declare that the Special Criminal Courts Ordinance should come into force in any particular province. By a notification published in the U. P. Gazette, Extraordinary, dated 20th August 1942, Confidential Department, dated Lucknow 20th August 1942 No. 7661-C. X., the Governor of the United Provinces came to the conclusion that whereas he was satisfied that a state of emergency had arisen from disorder within the province, therefore in exercise of the powers conferred by Sub-section (3) of Section 1 of the Special Criminal Courts Ordinance, 1942 (Ordinance No. 2 of 1942), 'the Governor

hereby declares that the said ordinance shall come into force in the United Provinces with effect from the date of publication of this notification in the official Gazette.' By another notification, the Governor of the United Provinces under Section 4 of the Special Criminal Courts Ordinance, 1942, appointed all Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges, as had already exercised or may hereafter have exercised powers as such for not less than two years, to be Special Judges. Under Section 5 the Governor directed that the Special Judges aforesaid shall try certain offences specified in the notification. Under Section 9 the Governor invested all stipendiary Magistrates of the first class in the United Provinces, who had already exercised or who may hereafter have exercised, such powers for not less than two years, with the powers of a Special Magistrate under the said ordinance to be exercised throughout the district to which they might for the time being be attached. And under Section 10 the Special Magistrates aforesaid were directed to try cases in which one or more persons was or were accused of certain offences specified in the notification.

46. The offence in question in the present case is said to have been committed on 14th August 1942. A first information report of the offence was made the very same day and the accused was arrested on 15th August 1942. The charge sheet was submitted by the police on 30th August 1942 and the trial commenced on 31st August 1942. The first contention on behalf of the applicant is that the Special Criminal Courts Ordinance No. 2 of 1942 is ultra vires of the Governor-General. My Lord, the Chief Justice, has given his reasons at length for holding that there is no force in this contention. As I am in general agreement with his views, I do not consider it necessary to burden my judgment with my own reasons. I, however, find that I am not in agreement either with him or with my brother Collister on the other two points raised by the applicant and I shall therefore state my reasons with all respect to my learned brethern in detail.

47. At the very outset, I wish to point out that the High Court has certain powers of revision over all criminal Courts within its jurisdiction under its Letters Patent as also by the Code of Criminal Procedure. Under Section 27 of the Ordinance the provisions of the Code of Criminal Procedure and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not

inconsistent with the provisions of the ordinance, have been made applicable to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this ordinance. The Code of Criminal Procedure, therefore, has not been abrogated in its entirety but only in so far as its provisions may be inconsistent with the provisions of the ordinance. Section 26 deals with the topic of exclusion of interference of other Courts, and therein it is stated that no Court shall have authority to revise any proceedings of any Court constituted under this ordinance save as provided in the ordinance. The High Court under Section 435, Criminal P.C., can call for and examine the record of any proceeding before any inferior criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and under Section 439, Criminal P.C., the High Court can pass appropriate orders. The object of conferring these powers on the High Court is to give it a supervisory jurisdiction in order to correct miscarriage of justice arising out of misconception of law and thus prevent undeserved hardship to individuals.

48. I venture to suggest that if Special Magistrates and Special Judges are criminal Courts inferior to us, then we can call for and examine the record of their proceedings for the purpose of satisfying ourselves as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by them--but subject to this that we can look at the correctness, legality or propriety of the finding, sentence or order with reference to the ordinance only. If there has been no violation of any of the provisions of the ordinance, then, however wrong or improper the sentence or order of the Special Magistrate or the Special Judge might otherwise be this Court would be powerless to interfere. As I read the section the jurisdiction of other Courts which ordinarily would have jurisdiction either under the Criminal Procedure Code or any other law is ousted only if the proceedings are valid under the ordinance and it could not have been the intention of the Legislature nor has it been so expressed--that the Special Criminal Courts have been given an unfettered jurisdiction to act even in violation of the provisions of the ordinance or to pass orders under the colour of the ordinance when they have no such power.

49. I have assumed that the Special Magistrates and Special Judges are inferior criminal Courts qua the High Court. It is true that Special Judges and Special Magistrates are under the direct control of the Provincial Government inasmuch as they have been appointed and invested with certain powers by the Provincial Government, but they are still Courts contemplated by Section 6, Criminal P. C., which speaks of Courts constituted even under any law other than the Criminal Procedure Code, and a restricted power of revision has been reserved by Section 26 of the Ordinance and again in a restricted form the Code of Criminal Procedure has been made applicable. I hold the view that if, for instance, a Special Magistrate takes cognizance of an offence which under the Notification he is not authorized to take cognizance of, the High Court's right of interference is not excluded. Similarly, where he offends against the provisions of the Ordinance in any other respect the High Court can revise his order. The Court must be a Court constituted under the Ordinance and the proceedings must be valid proceedings under the Ordinance before the jurisdiction of the High Court can be ousted.

50. I am very loath to hold, in the absence of clear and express language, that the highest Court in the Province is powerless in the matter of criminal justice administered by other Courts in the Province--Courts which under every other law not rendered entirely ineffective even for the purpose of the Ordinance are inferior to the High Court. The whole object of conferring revisional jurisdiction on the High Court is to make it a guardian of administration of criminal justice by other Courts within its jurisdiction, and so long as criminal offences are tried by any Court, ordinary or special, the High Court automatically gets jurisdiction to supervise their proceedings find if this jurisdiction is to be taken away, express words are necessary in a statute even in a state of emergency, and I do not find such express words of far-reaching import in Section 26, more particularly when Section 27 preserves in a restricted form the application of ordinary law. It may be assumed that it is open to the Governor-General to make an Ordinance declaring martial law when all ordinarily constituted Courts will cease to function. It may be that in the exercise of the power of making Ordinance it is open to the Governor-General to abrogate all law and the functions of ordinary Courts and allow martial law to be administered in an area and thereby exclude the rovisional jurisdiction of the High Court. It may be that it is also open to the Governor-General by making

an Ordinance to allow ordinary Courts to administer criminal law and to take away from the High Court its revisional jurisdiction, but both such Ordinances must contain express words and this responsibility must be taken by the Legislature, but short of this I am not prepared to hold that the powers conferred on the High Court by the Letters Patent and the Criminal Procedure Code have been rendered nugatory.

51. With these preliminary observations, I proceed to consider question 2. It is contended broadly on behalf of the Crown that nobody has a vested right in procedure and by the Ordinance nothing has been done except to regulate and alter the procedure heretofore prevalent in connexion with certain offences. This principle may be accepted, but the application of the principle presents great difficulties when questions arise as to what is a matter of mere procedure and what is a matter of substantive right -- difficulties which have engaged the attention of eminent Judges in England and in India. Mere procedure can of course be altered, and it cannot be argued that a person who has obtained a cause of action prior to an enactment regulating procedure has a right to say that his action must be tried according to the law prevalent before the new enactment, but if an action has been instituted before the enactment of any law the action will ordinarily be regulated by the old law and it is the old law which will govern appeals, etc. Besides this, an appeal, although it is a creation of statute and although no one can say that he has a common law right of his grievance being redressed by one Court, is nonetheless a matter of right if once the statute has created the right. A statute ordinarily speaks from the date from which it is specified in the Act to come into operation or from the date when it receives assent where such assent is necessary and is prospective in its operation unless it in clear terms, says that it will have retrospective effect or when such an intention can be unhesitatingly gathered, and it is only then that vested rights might be impaired, otherwise vested rights would not be affected.

52. The right of appeal, as I said before, is a right, similarly, the right in a criminal case to obtain bail or to apply for habeas corpus to the High Court, and if these rights have been taken away by the Ordinance then the language must be explicit or the intention must be inevitable. In (1905) A. C. 369, their Lordships of the Privy

Council were considering the effect of the Judiciary Act of 1903, and Lord Macnaghten, while delivering the judgment, observed as follows:

As regards the general principles applicable to the case there was no controversy, on the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

53. This authority has been quoted in numerous subsequent cases in England and in India and leaves no room for doubt that the right of appeal is a right and not merely a procedural thing. In Ram Singha v. Shankar Dayal : AIR1928 All437 a Full Bench of this Court speaks of appeal as a right and says:

A right of appeal in a suit is governed by the law prevailing at the date of the institution of the suit, and not by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal.

54. In re Vasudeva Samiar ('29) 16 A.I.R. 1929 Mad. 381 a Full Bench of that Court held:.that the institution of the suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career, unless the Legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect.

55. In Kirpa Singh v. Rasalldar Ajaipal Singh ('28) 15 A.I.R. 1928 Lah. 627, a Full Bench of the Lahore High Court held as follows:

It is now authoritatively settled that the right of appeal is not a mere matter of procedure, but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. If according to the law in force at the time when the action was started in the Court of first instance the ultimate decision of such Court was appealable, the right to prefer or prosecute an appeal there from is not affected by subsequent change of the law abolishing the appeal or modifying its forum unless it is so provided expressly in the amending statute or follows by necessary implication from its terms.

56. It further held:

Statutes should be interpreted, if possible, so as to respect vested rights and in the absence of anything in an enactment to show that it is to have retrospective operation it cannot be so construed as to have the effect of altering the law applicable to a claim in the litigation at the time when the Act is passed.

In Delhi Cloth & General Mills v. Income-tax Commissioner their Lordships observed that in Colonial Sugar Refining Ci. Ltd. v. Irving (1905) A. C. 369 it was authoritatively stated that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships then observed:

Provisions which, if applied retrospectively would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights.

57. It is clear that this is all the more so where an order which was not final is made final by a new Act. I need not labour this point any further. I therefore pass on to the next question whether any action was pending between Salig Ram, the accused, on the one hand, and the Crown on the other, when Ordinance No. 2 of 1942, promulgated by the Governor-General was made applicable to these provinces by means of notification made by the Governor. The notification, as I said before, was made on 20th August 1942. The offence was committed on 14th

August 1942 and a first information report was made the very same day. The accused was arrested on 15th August 1942 and the police started with the investigation as provided in the Criminal Procedure Code. In a civil suit an action starts not with the accrual of the cause of action but the institution of a plaint or some similar proceeding and it is reasonable and logical to say that in a criminal case the action starts with the filing of a complaint or with the making of a report, and when, as in the present case, the accused is arrested and the machinery of law in the shape of a police investigation is started, the action has commenced, and it is not necessary that the trial with all its formalities should have commenced before a Court. Even if there were some doubt in this matter, the doubt must be solved in favour of the subject and not in favour of the Crown according to all canons of criminal jurisprudence. By the special Ordinance, many vested rights which I have enumerated before were taken away --the right of appeal, the unrestricted powers of the High Court in matters of revision, the right to move superior tribunals in the matter of bail, the right to apply in habeas corpus to the High Court.

58. Apart from this, I cannot but take notice of the fact that by the sister Ordinance NO. 3 of 1942, which was also made and promulgated by the Governor-General in exercise of the powers conferred by Section 72, Government of India Act, as set out in Schedule 9, Government of India Act, 1935, on 2nd January 1942, penalties provided by law for the punishment of certain offences were enhanced, and although this Ordinance No. 3 of 1942 did not make an innocent action criminal and punishable as a crime, it undoubtedly aggravated the crime and enhanced the punishment. By Section 23 of Ordinance No. 2 of 1942, a special rule of evidence inconsistent with the Evidence Act of 1872 was enacted. Section 24 enacted a special rule of procedure for the recovery of fines inconsistent with Section 38C, Criminal P. C. Section 24A enacted a special provision regarding bail, and Section 25 fettered to a certain extent the right of an accused in connexion with legal practitioners. These far-reaching consequences affecting rights were brought into existence by Ordinance No. 2 and Ordinance No. 3 of 1942 passed both on 2nd January 1942. I now naturally pass on the question whether there is anything in Ordinance No. 2 of 1942 which in express terms makes the Ordinance applicable retrospectively or if such an intention can be necessarily gathered, and I shall

confine my discussion to the case of Special Magistrates only for which provision is made in Section 10 of the Ordinance and the same is applicable in the case of Special Judges for which provision is made in Section 5 of the Ordinance. Section 10 says that

a Special Magistrate shall try such offences or classes of offences , ... as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct.

59. The argument on behalf of the Crown is that the moment a Special Magistrate is directed by the proper authority to try an offence, the Special Magistrate needs must try it under the Ordinance. This may be so, but the question is whether the authority concerned has the power to make such a direction under the Ordinance. If what I have said in an earlier portion of my judgment is correct, the action in the case of the present accused had commenced before 20th August 1942, and unless the authority was competent to direct the trial of this particular offence by the Special Magistrate the trial would be vitiated. If there is absence of power in the directing authority there is absence of special jurisdiction in the Magistrate or the Judge and even if the Magistrate or the Judge purports to act like a Special Magistrate or a Special Judge he remains for all purposes an ordinary Magistrate and an ordinary Judge under the Criminal Procedure Code and there is no difficulty in holding that all the powers of the High Court under Sections 435 and 439, Criminal P. C., remain intact, unfettered by any provision of the Ordinance. The trial and conviction by a Special Magistrate or a Special Judge under the Ordinance can only be protected and that too if they do not violate any of the provisions of the Ordinance if the Special Magistrate or the Special Judge assumes a valid jurisdiction under the Ordinance, but, if for some reason, the assumption of jurisdiction is unjustified then the Special Magistrate or the Special Judge is only functioning as an ordinary Court under the Criminal Procedure Code and no provision of the Ordinance comes into play and a fortiori the alleged bar to the revisional jurisdiction of the High Court under Section 26 does not come into play.

60. The words in Section 10 are 'shall try such offences or classes of offences.' The Crown wants me to read that these words necessarily imply the reading of certain other words, namely 'whether committed before or after the coming into operation of the Ordinance.' Words should not be read into a statute ordinarily unless the context or the scheme of the Act warrant the addition of the words. The emergency which necessitated the constitution of special Courts in the Province was brought about by a state of disorder within the Province, and to my Wind acts and disorder which brought about the emergency are outside the scope of the Ordinance and the Ordinance must apply only to offences which were committed after the passing of the Ordinance, otherwise the result will be that the very acts which brought about the emergency would be caught by the Act which was passed because of those acts and the very first illegal act which along with certain other acts created the emergency would be triable under the Ordinance and not merely those acts which came into existence after the state of emergency. In other words, cause, effect and remedy should be kept distinct and not merged into one in an Ordinance like this. I may make this point a little more explicit. A number of acts convinced the Governor-General on 19th August 1942 that a state of emergency had arisen in India because of internal disorder and on 20th August 1942 the Governor of this Province was similarly convinced--and of these conditions the Governor-General and the Governor alone are the sole arbiters and the Governor therefore issued a notification in exercise of the powers conferred by Sub-section (3) of Section 1, Special Criminal Courts Ordinance, 1942, and to my mind the inference is obvious that henceforward people are warned that if they commit certain act of disorder they will be tried in a different manner and drastic punishments will be meted out to them. The Act, therefore, does not in express terms say that the Special Magistrate shall try offences whether committed before the passing of the Act or committed after the passing of the Act, and the necessary implication, to my mind, is that the offences committed before the Act are outside the scope of the Ordinance. If the Ordinance was intended to apply to offences committed before the notification, there was nothing easier than to say so, as was done in 2 and 3 Geo. VI, chap. 62, Emergency Powers of Defence Act of 1939, where the Act was made applicable to proceedings instituted before or after the commencement of the Act in express terms. There is the authority of the highest

Court in England as to the principles of construction in matters like these. In Bourke v. Nutt (1894) 1 Q. B. 725, Lopes L. J. observed as follows:

It is well recognized principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended.

This principle of, construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions.

61. The learned Judge was dealing with the Bankruptcy Act where the words were 'where a debtor is adjudged bankrupt.' It was urged before him that the words 'where a debtor is adjudged bankrupt' were equivalent to the words 'where a debtor is an adjudicated bankrupt,' but the argument was repelled by the observation that if the Legislature so meant why they did not use that form. His Lordship said:

It seems to me highly improbable that the Legislature when passing a new Bankruptcy Act creating great changes in the law, and attaching wider and graver disabilities to bankruptcy, would impose new and penal consequences on bankruptcies already existing.

62. Davey L. J. at p. 740 said as follows:

The question therefore seems to me to turn on the proper construction to be put on the words 'Where a man is adjudged bankrupt at the commencement of Section 32, Bankruptcy Act, 1883'. Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt, and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning 'where a man is an adjudicated bankrupt.' The answer seems to me to be that those are not the words before us, and that the words we

have to construe are grammatically different. I think the words 'is adjudged' are the verb, whereas in the paraphrase suggested the word 'adjudicated' would be an adjective.

63. I again wish to repeat that the words are not 'offence whether committed before or after the passing of the Act,' and the scheme of the Act -- I have discussed that when I was considering the question about the creation of the emergency -- suggests that the statute was to operate only in cases and on facts which come into existence after the statute was passed. The principle of law laid down by Lord Coleridge C. J. and Denman J. in Reg. v. Griffiths (1891) 2 Q. B. 145 also supports my view. Lord Coleridge C. J. observed:

The question raised in this case is no doubt very capable of argument on both sides; but on the whole I think it is safer to hold that Section 26, Bankruptcy Act, 1890, is not retrospective in its operation and that where a person is accused of an offence created by that Act, as applied to Debtors Act, 1869, all the ingredients of the offence must have taken place before 1st January 1891, upon which date the Act of 1890 came into operation. I think that the words in Section 26 'shall have effect' must mean 'shall have effect from 1st January 1891'.... That conclusion is supported by the view that to give a retrospective effect to the statute would be to deprive the defendant of a defence upon which, at the time the acts complained of were committed, he was entitled to rely. It seems to me a very strong thing to hold that a defence which was open to a man at the time he did the acts complained of has been taken away by the retrospective operation of a subsequent statute.

64. In connexion with the present case, it might be said, regard being had to the sister Ordinance No. 3 of 1942, that a defence was open to the accused that he could not be sentenced to a term longer than that provided by the Penal Code in respect to the offences which he had committed, and looking at ordinance No. 2 of 1942 itself he could say that he was entitled to appeal and to apply for bail or habeas corpus under the Criminal Procedure Code and all these rights which are in the nature of defences could not be taken away by the retrospective operation of ordinance No. 2. I have, therefore, in respectful disagreement with the opinion of my Lord the Chief Justice and my brother Collister, come to the conclusion that

the offences committed before 20th August 1942 could not be directed to be tried by the Special Magistrate.

65. The third contention on behalf of the applicant is that the learned Additional Sessions Judge was in error in holding that no appeal lay to him against the conviction recorded by the Special Magistrate. This is of course, on the assumption that the Special Magistrate could try the present accused of the offence with which he was charged. In this connexion I need not repeat what I have already said that under the provisions of Sections 435 and 439, Criminal P. C., this Court has the power to revise the orders of Special Judges and Special Magistrates where they have acted in violation not merely of any rule enunciated in the Penal Code or the Criminal Procedure Code, but where they have erred in construing or interpreting a particular provision of the Ordinance and have acted contrary to its provision. The right of appeal has been given to an accused under the Ordinance by Section 13 which reads as follows:

Where a Special Magistrate passes a sentence of transportation or imprisonment for a term exceeding two years an appeal shall lie to the Special Judge having jurisdiction in the area or, if there is no Special Judge for the area, to the High Court in a presidency town and elsewhere to the Court of Session.

66. The Additional Sessions Judge before whom the appeal came up for hearing in the present case was a Special Judge, and the question that I have got to decide is whether the Special Magistrate passed a sentence of transportation or of rigorous imprisonment for a term exceeding two years. Salig Ram has been convicted by the Special Magistrate under Section 395, Penal Code, and sentenced to a term of rigorous imprisonment for two years and a fine of Rs. 50 and in default of the payment of fine to a further term of rigorous imprisonment for six months. The question is whether the Special Magistrate in the present case has passed an appealable sentence. Am I stretching the language of Section 13 at all, or in any event, am I stretching it to an extent to which a subject is not entitled as against the Crown in matters of penal law, when I say that Section 13 can be read as follows after omitting unnecessary words:

Where a Special Magistrate passes a sentence which is in excess of a sentence of rigorous imprisonment of two years.

67. If I am right in this connexion then, to my mind, it is obvious that the learned Special Magistrate did pass a heavier sentence than the sentence of rigorous imprisonment for two years. The sentence of fine is also a sentence, and the combination of the two sentences, namely, a sentence of fine of Rs. 50 and a sentence of rigorous imprisonment for two years, is a sentence in excess of what the Special Magistrate was competent to pass, if he intended, the sentence to be a non-appealable sentence. The matter becomes all the more obvious when we find that in default of the payment of fine--the accused has a right not to -- (and in any event there is the possibility of not being able to) pay the fine, and in that case he needs must suffer rigorous imprisonment for another six months. The Special Judge was, therefore, in error in holding that the sentence passed by the Special Magistrate was a non-appealable sentence, and I would, therefore, have in my re visional jurisdiction not ousted but reserved by Section 26 of the Ordinance, sent back the appeal to the Special Judge for disposal on the merits and according to law, for I hold the view that even under the Ordinance the High Court has the power to revise the orders of the special Courts when they act in contravention of the provisions of the Ordinance itself.

68. As already ordered on 27th October 1942, the application is dismissed.