PLD 1955 Federal Court 387

(Appellate Jurisdiction)

Present : Muhammad Munir, C. J., A. S. M. Akram, A. R. Cornelius, Muhammad Sharif and S. .A. Rahman, JJ

USIF PATEL and 2 others- Appellants

versus

THE CROWN- Respondent

Constitutional Criminal Appeal No. 1 of 1954, decided on 12th April, 1955.

(On appeal from the judgment and order of the Chief Court of Sind at Karachi, dated the 15th July, 1954, in Criminal Miscellaneous Applications Nos. 127, 129 and 131 of 1954).

Criminal Appeal No. 63 of 1954.

AGHA MUHAMMAD- Appellant

versus

THE CROWN- Respondent

Criminal Appeal No. 64 of 1954

and

SYED ALI SHAH, alias THIGRI SHAH- Appellant

versus

THE CROWN- Respondent '

(On appeal from the judgment and order of the Chief Court of Sind at Karachi, dated the 2nd August, 1954, in Revision Applications Nos. 158 and 167 of 1954).

(a) Government of India Act, 1935, Ss. 42, 102- Scope Ordinance issuing power subject to like restrictions as the power of Federal Legislature to make laws- Federal Legislature not empowered to make provisions as to the constitution of the Dominion- Governor- General not competent to issue ordinance on a constitutional matter- Emergency Powers Ordinance (IX of 1955) invalid.

An ordinance made under section 42, Government of India Act, 1935, has the like force of law as an Act passed by the Federal Legislature, but the power of making ordinances under this section is subject to, the like restrictions as the power of the Federal Legislature to make laws.

Under subsection (1) of section 8 Indian Independence Act; 1947, the power of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion could - be exercised only by the Constituent Assembly and that power could not be exercised by that Assembly _ when it functioned as ' the Federal Legislature within the limits

imposed upon it by the Government of India. Act, 1935. It is therefore not right to claim for the Federal Legislature the power of making provision as to the constitution of the Dominion.

Held, that the Governor-General. cannot issue an ordinance on a constitutional matter.

If the constitutional position were otherwise, the Governor-General. cold by an Ordinance repeal the whole of the Indian Independence Act and the Government of India Act and assume to himself all powers of legislation. A more incongruous position in a democratic constitution is difficult to conceive.

Any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is under the Constitution Acts precluded from exercising those powers.

The Emergency Powers Ordinance (IX of 1955), in so far as it validated certain laws of a constitutional nature which had become invalid by reason of want of assent by the Governor-General, was therefore itself invalid.

A Legislature cannot validate an invalid law if it does not possess the power to legislate on the. subject to which the invalid law relates, the principle governing validation being that validation, being itself legislation you cannot validate what you cannot legislate upon. Therefore if the Federal Legislature, in the absence of a provision expressly authorising it to do so, was incompetent to amend the Indian Independence Act or the Government of India Act, the Governor-General possessing no larger bowers than those of the Federal Legislature was equally incompetent to amend either of those Acts by an Ordinance. Under the Independence Act 'the authority competent to legislate on constitutional matters being, the Constituent Assembly, it is that Assembly alone which can amend those Acts.

Further that it is not possible to extend the scope of section 42, Government of India Act, 1935; by a Proclamation of Emergency under section 102 of that Act.

To assume that the words of section 102 of the Government of India Act had the effect of inventing the Federal Legislature with the power to legislate on constitutional matters is to overlook the broad schemes of both the Constitution Acts and the elementary principles of a Federal Constitution. The essence of a Federal Legislature is that it is not a sovereign Legislature, competent to make laws on all matters; in particular it cannot, unless. specifically empowered by the Constitution, legislate on 'matters which have been assigned by the Constitution to other bodies. Nor is it competent to remove the , limitations imposed by the constitution on its legislative powers.

Federation .of Pakistan v. Moulvi Tamizuddin Khan P L D 1955 F C 240 ref.

(b) Indian Independence (Amendment) Act, 1948-Invalid for want of assent of Governor-General-Assent purported to have been given on 27th March 1955, by S. 2 of Emergency Powers Ordinance, (IX of 1955), cannot have retrospective operation.

The Indian Independence (Amendment) Act, 1948, passed by the Constituent Assembly did not have the assent of the Governor-General and was therefore inoperative on the authority f the Federation of Pakistan v. Maulvi Tamizuddin Khan P L D 1955 F C 240) The Governor-General purported to give assent to the Act on 27th March 1955, by section 2 of Emergency Powers Ordinance, 1955, by declaring that the Act shall be deemed to have received his assent on the date the Act was published in the official Gazette.

Held, that the Act not being one regulating procedure, the statute came into operation on the date that it was assented to, and, thus, it could not have retrospective operation. All

proceedings taken under that Act before assent were void unless they were subsequently validated by independent legislation.

(c) Sind Control of Goondas Act (XXVIII of 1952)

Ultra vires of Governor:

Held, that the Sind Control of Goondas Act (XXVIII'of 1952), was ultra vires. the Governor, having been enacted under section 92A Government of India Act, 1935, which section itself was invalid because it was inserted in the Government of India Act by the Governor-General's Order XIII of 1948 which too was ultra vires having been issued after 31st March 1948-the final date up- to which the Governor-General was authorised to issue Order under section 9, Indian Independence Act, 1947, the extension of the date 31st March 1948, to 31st March 1949, by Indian Independence (Amendment) Act, 1948 being also invalid by reason of want of assent to the latter Act .

Federation of Pakistan v. Maulvi Tamizuddin Khan P L D 1955 F C 240.

(d) Constituent Assembly- Dissolved by Governor-General Whether another representative body can be set up to exercise the powers of Constituent. Assembly.

Criminal Appeal No. 1 of 1954.

Fazlur Rahman Advocate, Federal Court, instructed by M. Siddiq, Attorney, for Appellants.

Jamil Hussain Rizvi, Advocate, Federal Court, instructed by S. Zahir Abbas, Attorney for Respondent.

Criminal Appeals Nos. 63 and 64 of 1954

Mahmud Ali, Advocate, Federal Court, instructed by M. Siddiq, Attorney, for Appellants.

Jamil Hussain Rizvi, Advocate, Federal Court instructed by S. Zahir Abbas, Attorney, for Respondent.

Under Order XLIX, rule 1 of the Federal Court Rules: Faiyaz Ali, Advocate-General, Pakistan.

Date of hearing: 12th April 1955.

JUDGMENT

MUHAHMMAD MUNIR, C. J.- This batch of appeals, Constitutional Criminal Appeal No. 1 of 1954 and Criminal Appeals Nos. 63 and 64 of 1954 by special leave, is being disposed , of by one order because the determination of the constitutional question which is common ' to them all is sufficient for their disposal.

The appellants in these appeals were proceeded against by the District Magistrate of Larkana under the Sind Control of Goondas Act (Governor's) Act XXVIII of 1952. They were declared to be goondas, directed to furnish heavy security, and for their failure to give security confined to prison. Against their detention in prison the petitioners in the first mentioned appeal made applications to the Chief Court of Sind under section 491 of the Code of Criminal Procedure, alleging that their imprisonment was wrongful and. praying that they be set at liberty. The petitioners in the other two appeals moved revisions under section 17 of

the aforesaid Act before the same Court. The Chief Court held that all the detentions were legal and rejected the applications.

The ground urged before the Chief Court on which their imprisonment was . alleged to be illegal was that the Governor's Act under which action had been taken against them was invalid because it was passed by the Governor in exercise of the powers which were conferred on him by a Proclamation issued by the Governor-General under section 92-A of the Government of India Act, 1935, which section had been inverted in the Government of India Act by an order of the Governor-General under section 9 of the Indian Independence Act. It was contended that this action of the Governor-General was ultra vires of the provisions of the aforesaid section 9. The contention was repelled by the Chief Court.

Before this Court a fresh argument was advanced challenging the validity of section 82-A. It was pointed out that this action was taken after the expiry of the original date fixed by subsection (5) of section 9 of the Indian Independence Act, for the making of orders under it. The date on or before which orders under section 9 of the Indian Independence Act could be made by the Governor-General was 31st March, 1948, but this date was altered to 31st March 1949 by section 2 of the Indian Independence (Amendment) Act, 1948, passed by the Constituent Assembly. This Amendment Act, however, was never presented to the Governor-General for his assent. ,In Mr. Tamizuddin Khan's case this Court has taken the view that the Governor-General's assent to laws made by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act is indispensable and that no Act making any provision as to the Constitution of the Dominion can become law unless it receives the assent of the Governor-General. The question involved in the present case therefore is whether the Indian Independence (Amendment) Act, 1948, by which the date mentioned in subsection (5) of section 9 of the Indian Independence Act was altered to 31st March, 1949, was law when on the 19th July 1948, the Governor-General added section 92-A to the Government of India Act; 1935. On the authority of Mr. Tamizuddin Khan's case the answer to this question must be in the negative, with the result that the addition of section 92-A to the Government of India Act, 1935, being unauthorised, the Sind Goondas Act which was passed by the Governor of Sind in exercise of the authority derived by him from a Proclamation of the Governor-General under section 92A, must be held to be invalid and the proceedings taken thereunder void and inoperative.

To avoid the aforesaid result the learned Advocate-General of Pakistan relies on section 2 of . Ordinance IX of 1955, which was promulgated by the Governor-General on the 27th March 1955, after a Proclamation of Emergency under section 102 of the Government of India Act, 1935. That section of the Ordinance is in these terms :-

" Whereas none of the laws passed by the Constituent Assembly of Pakistan under the provisions of subsection (l) of section 8 of the Indian Independence Act, (10 and 11 Geo. VI, c. 30) hereafter in this section referred to as the said Act, received the assent of the Governor-General in accordance with subsection (3) of section 6 of the said Act, it is hereby declared and enacted that every law specified in column I of the ~ Schedule to this Ordinance shall be deemed to have received the assent of the Governor-General on the date specified in column 2 of that Schedule, being the date on which it- was published in the official Gazette and shall be deemed ` to have had legal force and effect from that date."

In the Schedule the date mentioned for the coming into force of the Indian Independence (Amendment) Act, 1948, is 19th March 1 148, and clause (a) to subsection (2) of section 2 .of the Ordinance .provides that the validity of any law to which subsection (1) of section 2 applies shall not be questioned in any Court.

It could not possibly be contended by the learned Advocate-General of Pakistan that clause-(a) can have the effect of divesting this Court of the jurisdiction conferred on it by section 205

of the Government of India Act to entertain, hear and determine an appeal if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Government of India Act or the 'Indian Independence Act or if - an appeal in a criminal matter is brought by special leave of this Court under the Privy Council (Abolition of Jurisdiction) Act, 1950. The two questions therefore- that have to be determined in these appeals are : (1) whether the Governor-General could. by au Ordinance validate the Indian Independence (Amendment) Act, 1948, and (2) whether the Governor-General can give assent to constitutional legislation by the Constituent Assembly with retrospective effect.

It is not disputed that the Amendment Act of 1948' was a constitutional provision. What is urged by the learned Advocate-General, however, is that the Ordinance was passed by the Governor-General in exercise of the powers given to him by section 42 of the Government of India Act read with the provisions of section 102 of that Act. The former section provides that the Government General's power of making Ordinances is subject to .the like restriction as the power of the Federal Legislature to make laws,' and that any Ordinance made under that section may be controlled or superseded by an Act of the Federal Legislature. Since the Governor-General's power to promulgate Ordinances is subject to the same restrictions as the power of the Federal Legislature to make laws; the true issue in the case is whether the Federal Legislature was competent to amend subsection (5) of section 9 of the Indian Independence Act which the Constituent Assembly amended by the Amendment Act of 1948.

The rule hardly requires any explanation, much less emphasis, that a Legislature cannot validate an invalid law if it ,does not possess the power to legislate on the, subject to which the invalid law relates, the principle governing validation ' being that validation being itself legislation you cannot validate what you cannot legislate upon. Therefore if the Federal Legislature, in the absence of a provision expressly authorising it to do so, was incompetent to amend the Indian E ' Independence Act or the Government of India Act, the Governor-General possessing no larger powers than those of the Federal Legislature was ,equally incompetent .to; amend either of those Acts by an Ordinance. Under the Independence Act the authority comp; tent to legislate on constitutional matters being the Constituent Assembly, it is that Assembly alone which can amend those Acts. The learned' Advocate General alleges that the Constituent Assembly has been dissolved and that therefore, validating powers cannot be exercised by that Assembly: In Mr. Tamizuddin Khan's case, we did not consider it necessary to decide the question whether the Constituent Assembly was lawfully dissolved but assuming that it was, the effect of the dissolution can certainly not be the transfer of its powers to the Governor-General. The Governor-General can give or withhold his assent to the legislation of the Constituent Assembly but he himself is not the Constituent Assembly and on its disappearance he can neither claim powers which he never possessed nor claim to succeed to the powers of that Assembly.

On the question whether the Federal Legislature was competent to make the law- sought to 'be validated there cannot be two opinions. Under section 102 of the Government of India Act the Federal Legislature on the Proclamation of Emergency has the power to mike laws with respect to any matter not enumerated in any of the lists in the Seventh Schedule to that Act. The learned Advocate-General appeared to suggest that the scope of that section was wide enough to include legislation, on constitutional matters. The suggestion is entirely erroneous and is the result not only of a misunderstanding of, the scope of section 102 and of the history of the legislation by, the ' Parliament by which the words "or to make laws, whether or not for a Province or any part thereof, with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act" were added to that section but also of a misconception of the effect of section 8 of the Indian Independence Act. '

During the second World War the Indian Legislature passed a law called the Defence of India Act empowering the Government of India to make rules on certain subjects. One of the rules made by that Government, Rule 75, empowered the Government to requisition property. In

exercise of these powers the Government requisitioned a motor car from a person residing within the jurisdiction of tile Bombay High Court. The owner, brought a suit against the Government on the ground that the subject of requisitioning property was not included in any of the three Lists to the Seventh Schedule to the Government of India Act, - and - that therefore in the absence of a public notification by the Governor- General empowering the Federal Legislature to make laws on the subject of requisitioning property, Rule 75 of the Defence of India Rules was ultra vires. The matter . went up to the Bombay' High Court which upheld this contention of the plaintiff and the Government appealed to the Federal Court from the judgment of the High Court. Two other similar cases came up, one before the High Court of Calcutta and the other before the High. Court of Madras, but both these Courts decided in favour of the Government holding that Rule 75 was intra vires the Federal Legislature. From one of these cases the plaintiff appealed to the Federal Court. These. two appeals had not been determined by the Federal Court when the Government of India moved the Government of . the United Kingdom to obtain from the Parliament legislation empowering the Federal Legislature to Legislate retrospectively on matters which were not within any of the three Lists. Such legislation was considered to be necessary not only for the purposes of the aforesaid three cases of which two were still pending in the Federal Court but also to meet those cases where the Federal Legislature might have legislated or might wish to legislate on a subject not specifically included in the three Lists. and as to which no public notification had been made by the Governor- General under section 104 of the Government of India Act. The result was the passing by Parliament of the India (Proclamations of Emergency) Act, 1946, (9 and 10 Geo- . 6, ch. 23), the most important- provisions of which were as follows :-

(1) In subsection (1) of section one hundred and two of the Government of India Act, 1935 (which enable the Central Legislature, where a Proclamation of Emergency is in force, to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List), after the words "enumerated in the Provincial Legislative List" there shall be inserted the words "or to make laws, whether or not for a Province or any part thereof, with respect to any , matter not enumerated in any of the Lists in the Seventh Schedule to this Act."

2. (1) Subject to the provisions of this section, this Act shall be deemed to have come into operation on the commencement of Part III of the Government of India Act, 1935.

(2) Where, before the passing of this Act, a High Court in British India has given a judgment or made a final order in any civil proceedings involving a question as to the validity of any law, ordinance, order, bye- law, rule or regulation passed or made in India, any party to the proceedings may, at any time within ninety days from the passing of this Act, apply-

(a) where an appeal from the judgment or order has been decided by the Federal Court to the Federal Court ; and

(b) in any other case, to the High Court, for a review of the proceedings in the light of the provisions of this Act, and the Court to which the application is made shall review the proceedings accordingly and make such order, if any, varying or reversing the judgment or order previously given or made, as may be necessary to give effect to the provisions of this Act."

It is clear from the terms of this enactment that the words on which the learned Advocate- General places reliance were added to section 102 of the Government of, India Act to meet not only a specific contingency but also certain possible contingencies. The object of adding these words to that section was to empower the Federal Legislature to make laws on subjects on which previously it could acquire authority to legislate only by a public notification of the Governor- General under section 104 of that Act. There were two

objections to the adequacy of the machinery provided in section 104 where the Federal Legislature needed power to legislate on a residual subject, namely, a subject which was not covered by any of the items in the three lists in the Seventh Schedule to the Act. In the first place if the Governor-General made a public notification assigning a residual subject to the Provincial Legislature, it remained there until the Federal Legislature acquired power to legislate on it on the Proclamation of Emergency and in the second, even if such power could be given to the Federal Legislature it could not legislate on it retrospectively because the Governor-General by a mere notification could not .confer on the Federal Legislature the power to legislate with retrospective effect. It was for the purpose of avoiding these inconveniences that the Parliament ,passed the Proclamation of Emergency Act, '1946, so that on the proclamation of an emergency under section 102 of the Government of India Act the Federal Legislature might be in a position at once to legislate on residual matters. The circumstance that sections 108 and 110 of the Government of India Act, 1935, have been omitted in the adaptations of that Act by Order XXII of 1947 has no relevancy. These two sections imposed certain restrictions on the legislative powers of the Federal Legislature and the Provincial Legislatures and because on Pakistan becoming an Independent Dominion all restrictions on the Legislature of the. Dominion had to be removed, the, sections which were restrictions on the competency of the Legislature had to be deleted from the Act. Most of the matters mentioned in these sections are now for the Constituent Assembly to legislate upon when it functions as the Legislature of the Dominion under subsection (1) of section 8 of the Indian Independence Act. When the Constituent Assembly functions as the Federal Legislature it necessarily functions under certain restrictions though it is always competent to remove these restrictions by making a law under subsection (1) of section 8 of the Indian Independence Act. The omission of these sections proceeded on the same principle as led to the omission of sections 45 and 93 of. the Government of India Act, 1935, which gave to the Governor-General and the Governors of Provinces certain powers in cases of emergency to assume to themselves the powers vested in or exercisable by other constitutional bodies or authorities and to exercise .those powers in their discretion. While exercising- these powers the Governor-General and the Governors were responsible, through the Secretary of State, to the Government in London and ultimately to the Parliament but because with the conferment of the status of an Independent Dominion on Pakistan the Parliament and the, Government in London renounced their responsibility for the Government of the country, both these sections had to be omitted on the adaptations of the Government of India Act.

To assume that the words added by the Indian (Proclamations of Emergency) Act, 1946, to section 102 of the Government of India Act had the effect of investing the Federal Legislature with the power to, legislate on constitutional matters is to overlook the broad schemes of both the Constitution Acts and the elementary principles of a Federal Constitution. The essence of a Federal Legislature is that it is not a sovereign legislature, competent to make laws on all matters; in particular it cannot, unless specifically empowered by the Constitution, legislate on matters which have been assigned by the Constitution to other bodies. Nor is competent to remove the limitations imposed by the constitution on its legislative powers. The judgment of this Court in Tamizuddin Khan's case attempted to put this position beyond doubt, as will appear from the observations at pages 41-43; 65, and 186-188. My own conclusion on this part of the case t stated in the form of the mathematical equation that the Federal Legislature is the Constituent Assembly plus the fetters to which it is subject under the Government of. India Act, 1935. If that judgment wag not understood as clearly lying down that the powers of the Legislature. of the Dominion' for the purpose of making provision as to the constitution of the Dominion Were exercisable in the first instance by the Constituent Assembly and that that Assembly when functioning as the Federal Legislature under Proviso. (e) to subsection (2) of. section 8 was to be deemed to have imposed limitations on its powers as the Legislature of the Dominion, the time and labour expended on that judgment have been merely wasted. So that we may now be understood more clearly, let me repeat that the power of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion could under subsection (1) of section 8 of the Indian Independence Act be

exercised only by the Constituent Assembly and that that power could not be exercised by that Assembly when it functioned as the Federal Legislature within the limits imposed upon it by the Government of India Act, 1935. It is therefore not right to claim for the Federal Legislature the power of making provision as to the constitution of the Dominion a - claim which is specifically negatived by subsection (1) of section 8 of the Indian Independence Act. If the constitutional position were otherwise, the Governor- General could by an Ordinance repeal the whole of the Indian Independence Act and the Government of India Act and assume to himself all powers of legislation A more incongruous position in a democratic constitution is difficult to conceive, particularly when the Legislature itself which can control the Governor- General's action, is alleged to have been dissolved.

This Court held in Mr. Tamizuddin Khan's case 'that the Constituent Assembly was not a sovereign body. But that did not mean that if the Assembly was not a sovereign body the Governor- General was. We took pains to explain at length in that case that the position of the Governor- General in Pakistan is that of a constitutional Head of the State, namely, a position very similar to that occupied by the King in the United Kingdom. That position which was supported by Mr. Diplock is now being repudiated by the learned Advocate General and on the ground of emergency every kind of power is being claimed for the Head of the, State. Let its say clearly if we omitted to say, so in the previous case that under, the Constitution Acts . the Governor- General is possessed of no more powers than those that are given to him by those Acts. One of these powers is to promulgate Ordinances in cases of emergency but the limits within which and the checks subject to which he can exercise that power ' are clearly laid down in section 42 itself. On principle the power of the Governor-General to legislate by Ordinance is always subject to the control of the Federal Legislature - and he cannot remove these controls merely by asserting that no Federal Legislature in law or in fact is an existence. No such position is contemplated by the Indian Independence Act, or the Government of Indian Act, 1935. Any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor- General' is under the Constitution Acts precluded from exercising those powers. The sooner this position is realised the better. And if any one read anything to the contrary in the previous judgment of this Court, all that I can say is that we were grievously misunderstood. If the position created by the judgment in the present case. is that past constitutional legislations cannot be validated by the Governor- General but only by the Legislature, it is for the Law Department of the Government to ponder over the resultant situation and to advise the Government accordingly. The seriousness of the implications of our judgment in the previous case should have been immediately realised and prompt steps taken to validate the invalid legislation.

The learned Advocate- General of Pakistan appeared to concede that - so far as the validation part of section 2 of the Ordinance is concerned, it. is ultra vires inasmuch as it seeks to validate a constitutional provision, namely, the Amendment Act of 1948, but he contends that since the Governor- General gave his assent to the Amendment Act by the Ordinance, the assent would - act retrospectively and make the Act valid law from the date of its passing. The law relating to "commencement" is contained in section 36 of the- Interpretation Act, 1889, which applies to this case by reason of subsection (2) of section 2 of the Provisional Constitution Order. That section. is as follows:-

36. "Commencement".- (1) In this Act, and in every Act passed either before or after the commencement of this Act, the expression "commencement"; when - used with reference to an Act, shall mean the time at which the Act comes into operation:

(2) Where an Act passed after the commencement of this Act, or any Order- in- Council, warrant, scheme, letters patent, rules, regulations, or bye- laws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

The rule enacted in subsection (2) of section 36 of the Interpretation Act merely provides that if an Act is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day. The Word "Act" in this subsection; however, means an assented Act because unless assented to it is not an, Act at all. The learned Advocate-General relies on the following passage at page .355 of Craies on Statute Law, Fifth Edition

"It is sometimes specially enacted that a statute is to come into operation on some day prior to the day on which it receives the royal 'assent. Thus, in Jamieson v. Attorney Gen. ((1883) A1- cock & Nap. 37) it was held that 11 Geo. 4 and 1 Will. 4, c. 49, section 1, which enacted that certain duties should be levied from 15th March, 1830, but did not receive the royal assent until 16th July, 1830, operated from 15th March."

Referring to the case where a statute comes into .force on' some day prior to the day on which it receives the Royal assent the learned author cites the case of R. v. Middlessex Justices (1831) 2 B & Ad. 818. and proceeds to make the following comment:-

"It is stated in Dwarris, p. 544, and also in Maxwell, 9th ed., p. 410, on the authority of Burn v. Carvalho (1834) 1 A & E 883. that where a particular day is named for its commencement, but the Royal assent is not given till a later day, the Act would come into operation only on the later day. This rule is not borne out by the case cited, which merely decides that as the language of 3 and 4 Will. 4, c. 42, section 30, is prospective only', it cannot apply to any proceeding which took place before the Act was passed. The Court said that the language of section 3P was very different from a question arising under section 21, the language of which was sufficiently comprehensive to include all actions brought by executors and administrators whether before or after the passing of the Act. In Freeman v. Moyes (1834) 1 A & E 338, a different decision was come to as to section 31 of the same Act, the language of that section not being in its terms prospective."

The aforesaid discussion relating to commencement has this essential feature that in all the cases in which the question arose the Statute itself had stated a' particular date of its coming into operation. That discussion is therefore irrelevant to the present case because the Amendment Act of 1948 did not itself contain any provision relating to the date of. its commencement. The law on this point is thus stated in paragraph 661 at page 510 of Halsbury's Laws of England, 2nd Edition, Vol. 31. "The expression `commencement' used with reference to a statute means the time at which the statute comes into operation which, where no other time is provided, is the commencement of the day upon which it receives the Royal assent," and in footnote (g) at the same page it is stated: "In the case of Burn v. Carvalho (1835) 1 Ad. .& El. 883, 896, Ex. Ch. 42 Digest 686, 1000., it was pointed out that the Civil Procedure Act, 1883 (3 and 4 Will. 4, c. 42), section 44, provided that it should commence and take effect on 1st June 1833, although it did not receive the Royal Assent until 14th August following. It is apprehended that the Act would be without statutory force until the later of the two dates, when it might have a retrospective operation, a result quite permissible in Acts regulating procedure Re Athlumney.v. Ex parte Wilson (1898) 2 Q B 547; 42 Digest 702, 1191.". The latter part of the observation in the footnote is not applicable to the present situation because ' here the Amendment Act was not a procedural law and it did not enact that it shall come into force on a particular date. The only effect, in a case like the present, of giving assent later to - an Act passed by the legislature can be that the statute comes into operation on the date that it is assented to and not before such date, all proceedings taken under that Act before assent .being void unless they are subsequently validated by independent legislation.

For these reasons we are of the opinion that since the Amendment Act of 1948 was not presented to the Governor-General for his assent, it did not have the effect of extending the

date from 31st March, 1948, to 31st March, 1949, and that since section 92A was added to the Government of India Act, 1935, after the 31st March, 1948, it never became a valid provision of that Act. Thus the Governor-General had no authority to act under section 92A and the Governor derived no power to legislate from a Proclamation under that section. Accordingly the Sind Goonda Act was ultra vires and no action under it could be taken against the appellants. That being so the detention of the appellants in jail is illegal.

The ~ Ordinance recites that. the Governor-General had some other powers which enabled him not only to validate certain laws, but also temporarily to abolish the Federal Legislature, to amend the provisions to the Government of India Act, 1935, relating to Provinces and the High Courts and to make the future Constitution. In the arguments before us, however, the learned Advocate-General did not rely on any such powers, his entire argument having been confined to the powers of the Governor-General to promulgate Ordinances under section 42.

For these reasons we `accept the appeal and order the appellants to be set at liberty.

One more observation before we conclude. During the course of arguments in Mr. Tamiz-ud-Din Khan's case a question arose whether, if the Constituent Assembly was dissolved or ceased to function, what would be the consequent constitutional position ? The statement that Mr. Diplock made in reply to the questions on this subject is reproduced below :-

"Mr. Diplock : My Lords, it is important to note that in the proclamation of the Governor-General he has: said that the election will be held as early as possible. Having taken the first step to avert the disaster by dissolving the existing Constituent Assembly, election will be held as early as possible. It was his intention, and I am instructed to inform Your Lordships that it is still his intention to provide for the immediate election of fresh representatives to the Constituent Assembly by the Provincial Legislative Assemblies which was the method by which, Your Lordships would recall, the original members of the Constituent Assembly were elected. One hopes it would so act to provide as speedily as possible for direct elections. But nothing has been done by the existing Constituent Assembly to provide - an election law or for the delimitation of constituencies for the election of the Central Legislature and such a provision for direct election would from the practical point of view take a minimum of 12 months or probably more.

Chief Justice : And for indirect elections ? '
Mr. Diplock : Indirect election could be done within a Period of a week or two. There are the Provincial Assemblies, They have got to be called together to select their representatives. Having regard to the fact about the practical difficulties for holding direct election, it may delay the matter.

In view of the delay as to the direct election, Governor General is anxious to adopt quickest measure to have immediately an Assembly which could be as nearly perfectly representative of the people as could be obtained at the present moment through indirect election.
Chief Justice : So you agree that there is immediate need for a legislature.
Mr. Diplock : Because the Governor-General has to act by proclamation. He is acting on the advice of his ministers but without the "assistance of the representatives of the people. .
Chief Justice : Will the Proclamation have the force of law ?
Mr. Diplock : The Governor-General's intention is to get into operation as quickly as possible an Assembly which is as nearly representative of the wishes of the people as can be obtained immediately. That is a matter which will necessarily be within the Governor-General's discretion.
Mr. Justice Rahman : Have you been formally instructed to this effect to inform us ?

Mr. Diplock : Yes, My Lord, I have been instructed to tell Your Lordships that it was the intention of the Governor General while making this proclamation. and still is his intention to summon a fresh Constituent Assembly elected so far as the Provinces which have got Legislative Assemblies by members- of those Assemblies.

As I said to Your Lordships it was the Governor- General's intention at the time that the Proclamation was made that steps for the re- constitution of the Constituent Assembly should be taken at once. It may be that he took the view at that stage on the advice which was given to him that it was within his powers under the Constitution to take the step which he has taken under the Proclamation. I am only saying that it is not for us to say that we are right it is for Your Lordships to decide whether it was right. In those circumstances, he thought it right, an immediate application having been made to the Sind Chief Court, to wait unless the necessity became compelling to wait until the Court had said whether his interpretation of the law was right or not. My Lords, he took the view and I think whichever view is right as to construction whether he is entitled to do under the Act, as I submit he is, or whether he is not entitled to do that- relying on the maxim salus Populi suprema lex. He took the view that so far as possible, although representative institutions are necessarily abrogated while he waited for the decision of the Court, it was undesirable that in addition the abrogation of representative institutions which had already happened when the Constituent Assembly itself become unrepresentative, that it was undesirable to abrogate that other essential feature of &the democratic Constitution the rule of force to prevent the matter coming before the Courts. My Lords, it may be, indeed it would have been his duty, had circumstances so necessitated, to take those steps without regard to the writ which had been issued, because salus populi suprema lex : to go as far as that fortunately it has not been necessary at present to do

As things stand at present it was his intention in October last to set up a new Constituent Assembly. That is action which he would have taken immediately after the 24th of October had this litigation not started and that is his intention still. I hope Your Lordships will not press me to say anything more than I can necessarily say about the matter.

It might have been expected that, conformably with the attitude taken before us by responsible counsel for the Crown the first concern of the Government would have been to bring in to existence another representative body to exercise the power of constituent Assembly so that all invalid legislation could have been immediately validated by the new body Such a course would have been consistent with constitutional practice in relation to such a situation as has arisen. Events, however, show that other counsels have since prevailed. The Ordinance contains no reference to elections, and all that the learned Advocate- General can say is that they are intended to be held.
Appeals allowed