State vs Basdeo on 4 October, 1950

Equivalent citations: AIR1951ALL44, AIR 1951 ALLAHABAD 44

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Bench: Raghubar Dayal

JUDGMENT

Desai, J.

1. This is a reference by the District Magistrate of Shahjahanpur for enhancement of the sentence passed on Basudeo under Rule 81 (4), Defence of India Bales, read with Rule 9, U. P. Kerosene Control Order, 1942, and Section 353, Penal Code. Basudeo has been fined Rs. 500 for the offence of Rule 81 (4), Defence of India Bales, and Rs. 100 for the offence of Section 353, Penal Code. He was prosecuted along with his brother Mahanand, father Kedar Nath and Munim Shankar Lal, but Mahanand, Kedar Nath and Shankar Lal were acquitted by the Magistrate. Basudeo appealed from his conviction to the Sessions Judge, who on 16-7-1948 declined to interfere with either the conviction or the sentence. The reference of the learned District Magistrate is dated 11-5-1948.

2. In reply to the notice given by this Court for enhancement of the sentence Basudeo has appeared and challenged the legality of his conviction. There is practically no dispute about the facts and we were not addressed at all on the question of believing or not believing the evidence produced against Basudeo. I have gone through the prosecution evidence and see no justification for disbelieving it.

3. The case for the prosecution is as follows: There is a firm known as 'Mahanand Bajoria & Bros,' in Shahjahanpur. It deals in kerosene oil and holds an agency from the Standard Vacuum Kerosene Oil Importing Company. Basudeo, Mahanand and Kedar Nath are the proprietors of the firm. Under the U. P. Kerosene Control Order, 1942, made by the Governor in exercise of the power conferred upon him by Rule 81 (2), Defence of India Rules, no person can sell, store for sale or carry oh business in kerosene in U. P. except under a license granted under the order by the District Magistrate. The Mahanand Bajoria firm was given a licence under the order by the District Magistrate. The terms are printed on the licence itself. According to them, the licensee must maintain a stock register showing correctly the opening stock, the quantity received from the Oil Company, the quantity sold, delivered or other-wise disposed of, and the closing stock at the end of each day. It is stated in the licence that if the licensee contravened any of the conditions of the licence he would be liable to imprisonment for three years and a fine. Rule 9 of the Control Order is to the effect that "if any" person holding a license granted under this Order contravenes any of the conditions of the license" he shall "be liable under Rule 81, Defence of India Rules to a fine of Rs. 1000 and imprisonment for three years."

Rule 10 entitles a person authorised by the District Magistrate to enter upon and inspect any premises in which he has reason to believe that the purchase, sale or storage for sale of kerosene is taking place contrary to the pro-visions of the Order. A supply inspector of Shahjahanpur had reason to believe that the firm was carrying on the business in kerosene oil contrary to the provisions of the order and being authorised by the District Magistrate under Rule 10 of the Order went to inspect godowns of the firm on 20-9-1946. At that time Basudeo was present in the shop. He saw the stock register of the big godown which showed a closing balance of 601/2 tins against the actual stock of 62 tins. The small godown which was open at the time of the inspector's arrival had been hurriedly locked by Basudeo. When the inspector asked him to open it, he refused pleading that his father had prohibited him from letting any one go inside it. The inspector told him that if he was not allowed to go inside he would seal the godown, whereupon Basudeo told him that he would go and consult his father at home and would probably bring him to the shop and went away on a cycle. He returned within half an hour and told the inspector that his father had told him that it was the order of the Standard Vacuum Kerosene Oil Importing Company not to let any one go inside the godown and that the inspector could find out from Qaim Ali, who was the previous agent of the Company, that such an order existed. The inspector, who had taken possession of the stock registers, left them in the charge of his peon and went to inquire from Qaim Ali. Qaim Ali told him that the Company had issued no such order. During his absence Basudeo took away the registers from the custody of the peon and went away on a cycle. So when the inspector returned to the shop he found Basudeo absent. Thereupon he sealed the small godown. There is also a chaukidar's hut and he found it empty. He then made a report about the matter at the police station. Next morning when he went to inspect the seals of the godowns he found the chaukidar's hut locked and was told that some kerosene tins had been brought by Basudeo from his house and stored in it. He demanded the key from the chaukidar, who replied that it was not with him but with his master. The inspector sealed the hut. He made a report about all the facts to the District Supply Officer on which an enquiry by the police was ordered. When the small godown was opened in the presence of witnesses it was found to have 175 tins of kerosene oil in excess. The stock register showed several incorrect entries.

4. As Mahanand, Kedar Nath and Shankar Lal have been acquitted we are not concerned with their defence. Basudeo admitted that the licence issued under the Control Order is in the-names of his brothers, that he is the owner, that the actual stock in the godowns did not tally with the closing stock shown in the stock registers and that the stock register contained obviously incorrect entries. For the excess of 1761/2 tins he stated only this that the tank had been emptied on the day of inspection, that he had no means of measuring the oil and that he used to receive oil from the Company in bulk and only on few occasions in tins. He promised to file, but did not file, a written statement. He denied having snatched away the stock register from the inspector's peon and pleaded malice on the part of the inspector and Qaim Ali. He examined in defence two witnesses, Hardwari Lal and Prem Narain ; both, stated that Basudeo works at the shop and that Kedar Nath and Mahanand do not work there at all.

5. It was contended that the Control Order itself is void because the Defence of India Rules are void. The Defence of India Rules were made by the Central Government in exercise of the powers conferred upon it by Section 2, Defence of India Act. Section 2 (1) reads as follows :

> "The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India,-the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community." Sub-section (2) of Section 2 is to the effect that "Without prejudice to the generality of the powers-conferred by Sub-section (1), the rules may provide for or may empower any authority to make orders providing for all or any of the 85 matters enumerated in the sub-section."

Sub-section (3) is to the effect that "any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules, or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both;"

> The contention of Mr. Pathak is that the Indian, Legislature had no power to enact Section 2 conferring the powers upon the Central Government to make rules and to provide for punishment for the contravention of the rules or orders made thereunder.

6. The Defence of India Act and Rules were passed and made in 1939 and expired long time ago. The validity of Section 2 of the Act has been questioned in the past but has always been upheld by all the Courts. In the beginning the validity was questioned not on the ground that the conferment of the powers upon the Central Government amounts to delegated legislation which is ultra vires of the Indian Legislature but on the ground that the subject-matter of the Act itself was beyond the jurisdiction of She Indian Legislature; see Niharendu Dutt v. Emperor, 43 Cr. L. J. 504 : (A. I. R. (29) 1942 P. C. 22), Bimal Protiva Debi v. Emperor, 43 Cr. L. J. 793 : (A. I. R. (29) 1942 Cal. 464) and Baldev Mitter v. Emperor, A. I. R. (31) 1944 Lah. 142: (45 Cr. L. J. 711 F.B.). The challenge failed and the Act was held to be intra vires of the Legislature. In at least three cases which went before the Judicial Committee, namely Srinivas Mall v. Emperor, 1947 A.L.J. 497 : (A. I. R. (34) 1947 P. C. 135), Yusaf Alli v. Rex, A.I.R. (36) 1949 P. C. 264 : (50 Cr. L. J. 889) and Gokulchand Dwarkadas v. The King, 1948 A.L.J. 170: (A.I.R. (35) 1948 P. C. 82 : 49 Cr. L. J. 261) the validity of Section 2 of the Act was not questioned at all. There must have been thousands of prosecutions for contravention of the Defence of India Rules and Orders made thereunder. But this is probably the first occasion on which a conviction for a contravention of an Order issued under the Defence of India. Rules is challenged on the ground that the Indian Legislature had no power to authorise the Central Government to make a rule for punishment of the contravention of the rules made in exercise of the power conferred under Section 2 of the Act and orders made under the rules. The validity of Section 2 on the ground of its being delegated legislation came to fee challenged at a late stage but on every occasion the challenge failed. In Meer Singh v. Emperor, 1941 A.L.J. 352 : (A.I.R. (28) 1941 ALL. 321 : 42 Cr. L. J. 839) it was contended that the Defence of India Rules are ultra vires because Indian Legislature had no power to divest itself of the legislative authority and that its conferring the powers upon the Central Government under Section 2 amounted to its divesting itself of legislative authority. The contention was overruled by a Bench of this Court. The validity of Section 2 was upheld by Madeley J. in Gopal Narain v. Emperor, A.I.R. (30) 1943 Oudh 227 : (44 Cr. L. J. 318), the Federal Court in Emperor v. Sibnath Banerjee, A.I.R. (30) 1943 P. C. 75 : (45 Cr. L. J. 341), a Full

Bench of Bombay High Court in Haveliram v. Maharaja of Morvi, A. I. R. (32) 1945 Bom. 88 : (I. L. R. (1944) Bom 487 F.B.), a Full Bench of the Lahore High Court in Harkishan Das v. Emperor, A. I. R. (31) 1944 Lah. 33 : (45 Cr. L. J. 580 F. B.), a Full Bench of this Court in H. N. Nolan v. Emperor, A. I. R. (31) 1944 ALL. 118: (45 Cr. L. J. 655 F.B.), and a Division Bench of Lahore High Court in Rup Lal v. Emperor A. I. R. (32) 1945 Lah. 158: (47 Cr. L. J. 44). In the face of these authorities it should not be necessary to enter into the Question once more, but out of deference to the argument of Mr. Pathak which we have heard at length and on account of the; fact that the validity of Sub-section (3) has been challenged for the first time on this occasion, I go into the question of legislative powers in detail.

7. The British Parliament is supreme or omnipotent. It is said in Blackstone's Commentaries, vol. I, pp. 160-161 :

> " The power and jurisdiction of Parliament, says--Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds. .... It can, in short, do everything that is not naturally impossible."

Keith writes on p. 16 of his 'Constitutional. Law' Edn. 7:

> "The sovereignty or omnipotence of Parliament means that Parliament is the supreme power in the State, in the sense that it can make or unmake any law; that the Courts will obey its legislation; nor is there any power in the State capable of overriding, curtailing, or prescribing its authority."

According to Dr. C. K. Allen "It is an axiom of Modern English law that the scope of legislation is legally unlimited;" see 'Law in the Making,' 1927, p. 262.

8. Dicey writes in his 'Law of the Constitution,' Edn. 9, at p. 39, that "Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

It is said to be a fundamental principle with English lawyers that "Parliament can do every thing but make a woman a man, and a man a, woman." But one constitutionalist (Sir Ivor Jennings, the Law and the Constitution, Edn. 3, p. 149) writes that the Parliament can do even this. Of course, it cannot turn a woman into a man or a man into a woman but can pass a law to the effect that a woman will be deemed to be a man and a man will be deemed to be a woman. Historically the doctrine of the supremacy of Parliament is comparatively recent, resulting from the alliance between the 17th Century common lawyers and Parliament; it is not derived from any statute or formal constitutional enactment, but it is supported by case-law of the 19th Century and has scarcely been questioned by the Courts since the 17th. (See Dr. Wade's Introduction to Dicey's 'Law of the Constitution" p. XI). The Parliament can overthrow even international law. In Benoari Lull's case, (A. I. R. (30) 1943 F. C. 36: 45 Cr. L. J. 1), Varadachariar C. J. observed at p. 52 that:

> "on account of the absolute sovereignty of Parliament, no question of the constitutional invalidity of any Parliamentary enactment can ever be raised in a, Court of law,"

As observed by Dr. Alien at p. 265 "Parliament represents the body of the realm" and any enactment by the Parliament would be deemed to be an enactment by the people so that it cannot be questioned by themselves. The only controls on the British Parliament are what are known as the external and the internal controls. The external control consists in the possibility or certainty that the subjects or a large number of them will disobey or resist the laws and the internal control "arises from the inherent character of Parliament itself, as reflecting the moral and intellectual stage of development of the community at large, and the impossibility of its passing measures radically opposed to its own sense of fitness, and therefore ultimately to the sense of fitness of the electorate whom it represents."

See Keith's 'Constitutional Law' at p. 19. In the words of Dr. Alien in 'Law in the Making/ p. 265, "the real and actual, though not the legal, restraint upon legislation is the public opinion of the country at large."

Dr. Schwartz states in his 'American Administrative Law,' 1950, p. 23, that "In Great Britain, excessive delegations of Parliamentary powers are political concerns; in the United States, they are primarily judicial."

A Court has absolutely no jurisdiction over a sovereign Parliament. If it goes Wrong the remedy lies in the hands of the people.

9. A non-sovereign Parliament, like the Indian Legislature, does not enjoy the absolute immunity of a sovereign Parliament like the British Parliament. It is said that the difference lies in the fact that in England there is no written constitution while in India there is a written constitution in the form of the various Government of India Acts passed by the British Parliament. The correct reason, however, is that the British Parliament has absolutely no limits to its powers; what it does is deemed to be an act of the people themselves. The Indian Legislature, on the other hand, derives its powers from the Constitution Acts and must work within the scope of the Acts. It is the creation of the Government of India Acts and its powers are mentioned in the Acts. It would act illegally if it exceeded those powers. So is it that an Act of the Indian Legislature is examinable in a Court of law ? But what a Court can flee is only this, has the Legislature exceeded the powers given to it under the constitution or not?; it cannot enter into the question of reasonableness, justification or propriety of any enactment. In this respect the Indian Legislature differs from administrative bodies and corporations. The essence of the doctrine that all subordinate legislation is subject to the doctrine of ultra vires is, according to Dr. Alien in his 'Law and Orders,' 1947, p. 61:

> "Any person affected by delegated powers has the right to complain if they exceed their character, and it is then for the Courts to decide, as a matter of law, whether the impeached order falls within the terms of authority, which is usually a section of a statute."

10. In this case we are concerned with the Government of India Act, 1935. Under Section 100 of it the Indian Legislature has power to make laws with respect to certain matters, has no powers with respect to certain other matters and has power to make laws with respect to remaining matters jointly with Provincial Legislatures. There are certain restrictions on the Indian Legislature's powers but we are not concerned with them and admittedly the .Defence of India Act has not been enacted in opposition to those restrictions. The Act is alleged to be ultra vires on the ground that the Indian Legislature instead of exercising its power to make laws conferred upon it by Section 100 of the Constitution Act, has delegated the power to the Central Government and authorised it to make laws. Thus it is the provision of Section 100 which is said to have been violated by the Indian Legislature and not that of any other. If the enactment of the Act does not involve any violation of the provision of Section 100 it follows that it is not ultra vires. The Act was enacted after a state of emergency had been proclaimed by the Governor-General. One effect of the proclamation of emergency was that the Indian Legislature was invested also with the Provincial Legislatures' powers to make laws. In 1946 the British Parliament passed India (Proclamation of Emergency) Act amending Section 102(1), Government of India Act. The effect of the amendment was to invest the Indian Legislature with the power to make laws with respect to any matter whether enumerated in any of the Lists in Schedule 7 or not. This Amendment Act was made with retrospective effect and covered the enactment of the Defence of India Act. Thus the enactment was within the competence of Indian Legislature. The Defence of India Act was enacted as a special measure "to ensure the public safety and interest and the defence of British India and the trial of certain offences." It was not, and could not be, contended that it was not within the competence of the Indian Legislature to make laws with respect to the "public safety and interest and the defence of British India." Just as 34 and 35 Vic. C. 28 which enacted that the Parliament of Canada may from time to time make provision for "the administration, peace, order and good government of any territory" was declared by the Judicial Committee : Riel v. Reg., (1885) 10 A.C. 675 at p. 678 : (55 L. J. P. C. 28) to "authorise the utmost discretion of enactment for the attainment of the objects pointed to", so also the Indian Legislature had utmost discretion in the matter of providing for "the public safety etc." If it was competent to make laws with respect to "the public safety etc.", the Defence of India Act can be impugned, if at all only on the ground that it has instead of itself making laws, delegated its power of making them to the Central Government. I am unable to construe the provision of Section 2 of the Act as delegation of the power to make laws with respect to "the public safety etc." to the Central Government. The Act contains other provisions also. The Legislature has certainly not told the Central Government to make laws with respect to "the public safety etc."; what it has done is to make a law conferring certain powers upon the Central Government. The law conferring the powers is itself the law which the Legislature has thought fit to enact in order to ensure "the public safety etc." If the conferment or delegation of powers upon some authority was thought by the Legislature to be necessary in order to carry out its object in making laws with respect to the matters, it had full power to do so. If the Legislature were making laws with respect to, say, "currency, coinage and legal tender," it could not enact an Act doing nothing but conferring powers upon some authority to make rules with respect to "currency, coinage and legal tender" and then claim to have itself made laws with respect to those matters. That would certainly amount to creating another legislative body or to its effacing itself or abdicating. The enactment of Section 2 of the Act stands on a different footing. Though the Indian Legislature, purporting to make laws with respect to "the public safety etc.", has conferred power upon the Central Government to make rules in respect of "the public safety etc.",

this conferment of power itself was thought by it to be necessary to secure the end. Conferring power upon some authority to make laws in respect of "currency, coinage and legal tender" cannot be said to be making laws with respect to those matters; but when one is concerned with making laws with respect to "the public safety etc." mere conferment of powers to make rules with respect to "the public safety etc." can be said to be making laws with respect to "the public safety etc." Roche v. Kronheimer, 29 C. L. R. 329 decided that "a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of Parliament is a law with respect to that subject";

per Owen-Dixon J. in Victorian Stevedoring and General Contracting Co. Proprietary Ltd. v. Dignan, 46 C. L. R. 73 at p. 101. Evatt J. stated in Victorian Stevedoring and General Contracting Go. Proprietary Ltd. v. Dignan, (46 C. L. R. 73) at p. 119 that "every grant by the Commonwealth Parliament of authority to make rules and regulations whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself."

The Indian Legislature was faced with a serious emergency; the matter was most urgent and prompt action was necessary. It could not at once make laws to ensure the public safety, etc., because in the first place it was not cognizant of all the circumstances prevailing throughout the country and secondly, it had not sufficient time. The emergency justified its conferring the powers to make rules upon the Central Government. It is not for a Court to go into the question of reasonableness or propriety of any enactment of even a non-sovereign Legislature. How to legislate is the sole concern of the Legislature; a Court has nothing to do with the means with which the Legislature hopes to secure its end. In Meer Singh's case, (1941 A.L.J. 352 : A.I.R. (28) 1941 ALL. 321: 42 Cr.L.J. 839), Braund J. observed that:

> "When a Legislature has been given an unfettered power to make laws on certain matters, that power includes the right to create the laws in question by any means which in its wisdom as a Legislature, it thinks proper, provided that it does not efface itself altogether."

He observed at p. 359 that :

> "No question of 'delegation' really arises, because the Legislature has, in fact, delegated nothing, but has itself exercised its own right to achieve its end by a means which was all the time within its power. It is the method alone which is in question."

In Hodge v. Reg., (1883) 9 A. C. 117: (153 L.J.P.C. 1) it is stated at p. 132 that ;

> "How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for Courts of law, to decide."

Similarly, in the case of The Queen v. Burah, 5 I.A. 178: (4 Cal. 172 P.C.), Lord Selborne dealt with the Court's powers in the following words at p. 193 :

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted, If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Willoughby writes in his 'Constitution of the United States,' vol. I, Edn. 2, at p. 47 that:

> "If, however, the State law, whose constitutionality is questioned, is with reference to a matter admittedly within the province of the States, and the question is simply whether that power has been properly exercised, there is held to be a strong presumption that act is constitutional.... If, however, it is a question, for example, whether the police powers, admittedly belonging to the States, have been constitutionally exercised, the presumption is that they have been so exercised."

The Indian Legislature was limited in its legislative powers only by the terms of the Government of India Act by which it was constituted. The Indian Legislature was not competent to abdicate its powers of legislation. But this is not because it was bound to perform all its legislative powers nor because the doctrine of separation of powers prevents it from granting authority to other bodies to make laws but "because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the Constitution:" (Per Evatt J. in Victorian, Stevedoring and General Contracting Co. Proprietary, Ltd. v. Dignan, 46 C. L. R. 73) at p. 121.

Dr. Wade writes at p. LIV of his Introduction to Dicey's book with respect to a Colonial or Dominial Legislature:

> "It is fully competent for a Legislature of a self-governing State in the British Empire to enact what laws it chooses, including the delegation of its law-making powers to subordinate authorities. It may not, however, abdicate its functions, except by an express power of constitutional amendment."

11. The only difference between the British Parliament and the Indian Legislature is that the powers of the Indian Legislature are limited by the Government of India Act. When an Act of the Indian Legislature is attacked before a Court, the Court has simply to see whether that Act was within the scope or mandate of the Indian Legislature and has to uphold it if it was. It follows that the powers of the Indian Legislature within its mandate are as plenary and full as those of the British Parliament. Provided that it has power to make laws with respect to the particular matter, it can make any laws which the British Parliament can. Once it acts within its scope, the difference between it and the British Parliament disappears. Once upon a time, it was thought that the Indian Legislature is a delegate of the British Parliament and subject to the maxim, delegatus non potest delegare. In, Burah's case, (5 I. A. 178 : 4 Cal. 172 P. C.) the Judicial Committee decided that the Indian Legislature is not a delegate. I have already quoted the passage laying down that its powers are as large and of the same nature as those of the Parliament itself, when acting within the limits set by the Government of India Act. Sir Robert Collier said in Powell v. Appollo Candle Co. Ltd., (1885) 10 A. C. 282 at p. 290 : (54 L. J. P. C. 7):

> "It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

In the case of Hodge, (1883-9 A. C. 117 : 153 L. J. p. c. 1) it is laid down at p. 132:

> "They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament."

Owen-Dixon J. observed in Victorian Stavedoring and General Contracting Co. Proprietary Ltd. v. Dignan, (46 C. L. R. 73) with reference to the maxim delegatus non potest-delegare that:

> "No similar doctrine has existed in respect of British Colonial Legislatures whether erected in virtue of the prerogative or by Imperial Statute."

Dr. Alien writes in his 'Law and Orders' p. 104 that English Courts have never expressly decided whether the maxim delegatus non potest delegare applies to subordinate legislation and that Burah's case, (5 I. A. 178 : 4 cal. 172 P. C.) is not really relevant to the general question. In Burah's case, (5 I. A. 178 : 4 Cal. 172 P. C.) the doctrine was -not applied to the Indian. Legislature because the Indian Legislature was held to be not a delegate at all. What is sufficient for our purposes is that the doctrine does not apply; it does not matter whether it does not apply because the Indian Legislature is not a delegate or because the doctrine is not applicable to a subordinate Legislature

even if held to be a delegate. In the matter of legislating for "the public safety etc." it had all the powers of the Parliament and could make any law that the Parliament could. The Parliament had enacted Emergency Powers (Defence) Act and the Defence of India Act is actually modelled on it. If the Emergency Powers (Defence) Act is not ultra vires on the ground of excessive delegation of legislative authority, the Defence of India Act also is not ultra vires on that ground. In Le Mesurier v. Connor, 42 C. L. R. 481 Isaacs J. said at p. 501:

> "True it is that the Parliament possesses none but the powers granted by the Constitution, but the manner in which it is expected, and in my opinion entitled, to exercise them in the absence of express restriction is as a British Parliament usually exercises powers, and in accordance with precedent and an unbroken line of development, which means in a manner discretionary with Parliament itself."

The Australian National Security Act, 1939-40 is similar to Defence of India Act. Section 5 (1) of it reads thus:

> "The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the territories of Commonwealth . . . and for prescribing all matters which... are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged or for carrying out or giving effect to this Act."

The High Court of Australia held that the Act Was not ultra vires of the Commonwealth Legislature on the ground of illegal delegation. Owen-Dixon repelled the argument that there was such a width or uncertainty of the subject-matter handed over to the Governor-General that the Act should not be said to be a law with respect to the naval and military defence of the Commonwealth or with respect to any other head of Legislative power, in these words:

> "This suggestion cannot be sustained. The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which it must exercise. Section 5 is clearly directed to the prosecution of the war and is a valid exercise of the defence power. (Wishart v. fraser, 64 C. L. R. 470 at p. 484). Sir Ivor Jennings writes at p. 141 that a Dominion or Colonial Legislature is 'sovereign within its powers,' i. e., in respect of certain subjects it can pass any sort of laws. In Baxter v. Ah Way, 8 C. L. E. 626, there is an observation of Higgins J., to the effect that Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agency, any machinery that in its wisdom it thinks fit, for the peace, order and good government of the Commonwealth. Dr. Wade states in his introduction to the 'Law of Constitution" by Dicey (p. 55) that, the powers of a Dominion or Colonial Legislature are plenary powers, subject only to expressed reservations of limitations, which are binding."

12. It was vehemently argued that delegated legislation is bad or ultra vires. The most recent and authoritative view is of our Federal Court in Jatindra Nath v. Province of Bihar, A. I. R. (36) 1949 F. C. 175 : (50 Cr. L. J. 897). Kania C. J. observed at p. 178: "It is not and cannot be disputed that delegated legislation will be ultra vires." The crucial question is, what is delegated legislation? If a Legislature, while legislating in respect of a certain matter, confers powers to make rules in respect of that matter on some authority, it cannot be said to be delegating legislative powers. If what the Legislature does amounts to law in respect of that matter, it cannot at the same time amount to delegated legislation. One act cannot at the same time be an act of making laws and an act of delegating the power to make laws, because the two are contradictory in terms. Dr. Schwartz writes in 'American Administrative Law' p. 20:

> "The authority transferred was, in Justice Homes' felicitous phrase, softened by a quasi and the Courts were thus 'able to grant the fact of delegated legislation and still to deny the name.' This result is well put in Professor Cushman's syllogism --
>
> Major premise: Legislative power cannot be constitutionally delegated by Congress.
>
> Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.
>
> Conclusion: Therefore the powers thus delegated are not legislative powers."

With great respect to the learned writer, I do not consider it a syllogism to say that the conferment of powers is not delegated legislation. When an authority makes rules in exercise of, the powers conferred upon it by the Legislature the Act is the real authority behind the rules and the Legislature retains control' over the' authority and the rules. So long as it retains control, it cannot be said that it has delegated the power. In Powell's case, (1885-10 A. C. 282: 54 L. J. P. C. 7), Sir Robert Collier observed at p. 291 :

> "The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him."

In Hodge's case, (1883-9 A. C. 117 : 153 L. J. P. C. 1) their Lordships observed at p. 132 :

> "It retains its power intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands."

In Burah's case, (5 I. A. 178 : 4 Cal. 172 P. C.) their Lordships stated at p. 195 :

> "It is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately,

> under and by virtue of this Act (XXII [22] of 1869) itself."

In Haveli Ram's case, (A. I. R. (32) 1945 Bom. 88 : I. L. R. (1944) Bom. 487 F. B.) Stone C. J. repelled the contention that Central Legislature had effaced itself or abdicated its functions, by observing that it had the power to recall or repeal at any time the power it had devolved upon the Central Government or the Provincial Government. The learned Chief Justice was referring to Section 2 (1), Defence of India Act itself. Kania J. as he then was, observed at p. 107 :

> "The powers of the Central Legislature to recall and repeal any of the provisions still exist, and if it considers that the powers are abused in certain respects by the Central or the Provincial Government, the remedy is still in the hands of the Central Legislature, but not Courts."

I have already referred to the observation of Braund J. in Meer Singh's case, (1941 A. L. J. 352 : A. I. R. (28) 1941 ALL. 321 : 42 Cr. L. J. 839). When the Governor-General, in exercise of the power vested in him under Para. 72 of Schedule 9, Government of India Act, made an Ordinance which was to come into effect in any one province only on the Provincial Government's being satisfied of the existence of an emergency and issuing a notification about it in the official Gazette, it was held by the Judicial Committee that the Governor-General's conferring the power upon the Provincial Government was not delegated legislation at all: see Benoari Lal's case, (A.I.R. (30) 1943 F. C. 36 : 45 Cr. L. J. 1). Their Lordships treated it as "conditional legislation". Another instance of conditional legislation is the Canada Temperance Act, 1878, passed by the Parliament of Canada. The manner in which it was to come into force in any county or city was mentioned in itself; at least 1/4th of the electors of the county or city had to make an application to the Governor praying that the Act be enforced in the county or city; on such an application the Governor had to take votes of all the electors of the county or city and the Act was to be enforced or not according to the wishes of the majority. It was contended that the Parliament had delegated its legislative powers to the electors of counties and cities, but Sir Montegue E. Smith observed that there was no delegation of any legislative powers at all, and that "conditional legislation of this kind is in many eases 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." (Russell v. Reg, (1882) 7 A. C. 829 at p. 835 : (51 L. J. P. C. 77)).

13. Sir Ivor Jennings says that "the practice of delegating legislative power is one of respectable antiquity": (The Law of the Constitution, Edn. 3, p. 274). Lord Thring, Parliamentary counsel, in his 'Practical Legislation' published in 1877 wrote that "the adoption of the system of confining the attention of Parliament to material provisions only, and leaving details to be settled departmentally, is probably the only mode in which parliamentary government can, as respects its legislative functions, be satisfactorily carried on": (cited in "Law and Orders" at p. 28). The reasons for the subordinate or so-called delegated legislation are described in Law and Orders, page 114, Kieth's 'Constitutional Law', p. 217 and "Constitutional Law" by Wade and Phillips, Edn. 3, p. 291. In Hodge's case, (1884-9 A. C. 117 : 53 L. J. P. C. 1) their Lordships stated at page 132:

> "It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail."

14. The question, how much power can be conferred by a Legislature on an authority is differently answered by different constitutionalists and Judges. In respect of the British Parliament's conferring powers upon the Council to make rules, Dr. Alien writes in "Law in the Making", p. 296, that "the statute defines the strategy and leaves to the Council the management of tactics." Dr. Schwartz is of the opinion that the delegation of power must be a limited one; "the enabling legislation must, ... contain a framework within which the executive action must operate," (see p. 22), or in the words of Cardozo, J. in A. L. A. Schechter Poultry Corp v. United States, 295 U. S. 495, the grant of authority must be "canalized within banks that keep it from overflowing." According to Prof. Hart, quoted by Dr. Schwartz on p. 24, "an ideal statute steers a middle course between the Soylla of attempting to anticipate every possible situation and the Charybdis of embodying no policy at all except that contained in any empty formula."

In order to canalise the powers of the grantee it is not necessary to give minute or detailed instructions. To say that the grantee would act in a particular manner if "the public convenience, interest or necessity" justified it may be sufficient to canalise his powers:

> 'Though the applicable standards in a statute .... are phrased in general terms, that does not mean that they are so vague as not effectively to canalize the administrative discretion. The statutory language is not to be read in a vacuum; a general standard may be given specific form and content when looked at in the light of the statutory scheme and background." (Dr. Schwartz, at p. 25).
>
> General standards for the guidance of the grantee are sufficient. Even the criterion "public interest" may be a sufficient standard to guide determinations. Giving too many instructions may defeat the object behind the conferment of powers. Dr. Schwartz cites the instance of Intestate Commerce Act which resembles rather a regulative code ; hardly, a Congressional session concludes which has not passed some amendment of a minor or a major nature in the Act. In the case of Hari Kishan Das, (A. I. R. (31) 1944 Lah. 33 : 45 Cr. L. J. 580 F. B.) Mohammad Munir, J. stated at p. 46 :
>
> "It has always been a moot question to what extent the Legislature can delegate its functions of law-making to the executive or any other authority. In the case of constitution of the British model the legislative power of the Legislature involves, as part of its content, the power to confer law-making powers upon authorities other than the Legislature itself and an increase in the extent of such power cannot of itself invalidate the grant unless "the grant amounts to an abdication of the functions of Legislature."

There is also the oft-cited passage:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (Per Taft C. J. in Hampton & Co. v. United States, 276 U. S. 394 quoted by Owen Dixon, J. in the Victorian Stevedoring case, (46 C. L. R. 78) at p. 93).

This distinction is a true one and has to be made in all cases where such a question is raised. According to Mahajan J. (Jatindra Nath's case, A. I. R. (36) 1949. F. C. 175 at p. 184 : 50 Cr. L. J. 897) this distinction is a true one and must be observed in every case. Owen Dixon J. further quotes Prof. Hart as saying that, "the fundamental limitation has to do with the scope of discretion that may be delegated," and that the distinction between constitutional delegation and unconstitutional delegation is "essentially the quantitative one of the scope of the discretion." Prof. Hart says at another place that :

"Nor is there any reason why the policy should be express where the statute read as a whole, or the character and the scope of the subject enable the Courts to see when the administrative authority has substantially exceeded its powers." (See Dr. Schwartz at p. 24).

There is no natural division between rules which lay down basic or salient principles and rules which involve administrative discretion, or carry out the policy of the law. Given a certain rule it cannot be said that it is a rule involving a basic or salient principle which must be enacted by the Legislature itself and not one involving a matter of detail or administrative discretion which may be left to be framed by an authority. Therefore it is impossible for any Court to say that a particular rule is one that should have been enacted by the Legislature itself. In my opinion the real distinction between constitutional legislation and unconstitutional legislation is that the former is an exercise of the power of legislation conferred under the Constitution Act or mandate, and the latter is the evasion of the exercise of this power by delegating it to an authority. The Phrase "delegated legislation," if all delegated Legislation is ultra, vires, should be understood to mean the latter kind of legislation. In Jatindra Nath's case, (A.I.R. (36) 1949 F. C. 175: 50 Cr. L. J. 897) the proviso to Section 3 (1), Bihar Maintenance Public Order Act, 1947, was ruled out as ultra vires because it was held by the Federal Court to be delegation by the Provincial Legislature to the Provincial Government of a duty which, under the constitution, had to be performed by itself. Similarly the Initiative and Referendum Act was ruled out as ultra vires by the Judicial Committee on In re Initiative and Referendum Act, 1919 A. C. 935: (A.I.R. (16) 1919 P. C. 145) because by that Act the Legislature was held to have abdicated its functions and created another legislative body. The objection against the conferment of wide powers upon the Central Government under Section 2 (1), Defence of India Act, is more psychological than logical. Mr. Pathak is affected by the fact that the Central Government has been given authority to make rules about a

> wide range of subjects; if the authority had been given in various statutes to make rules about these various subjects, it would probably not have suggested itself to anybody that the provisions were outside the power of the Legislature. (Per Allsop J. in Meer Singh's case, (1941 A. L. J. 352 at p. 355: A.I.R. (28) 1941 ALL. 321: 42 Cr. L. J. 839). The case of Hari Kishen Das, (A. I. R. (31) 1944 Lah. 33: 45 Cr. L. J. 680 F.B.) dealt with the power of making rules in respect of the matter mentioned in Clause (x) of Section 2 (2) of the Act. Harries C. J. observed at p. 88:
>
> "The power to make rules on this matter is circumscribed and strictly limited. In short the Legislature has laid down the principles to guide and direct the rule making authority and to limit its powers and the scope of the rules which it may make. ...Such authority must act within the strict limits imposed on its power by the section and in accordance with the principles and directions therein contained."
>
> "The emergency type of delegated legislation is very wide and can leave'a lot of discretion to the executive authority;" (Per Kania J. in Haveli Ram's case, (A.I.R. (32) 1945 Bom. 88 at p. 96 : I.L.R. (1944) Bom. 487 F.B.).

15. It is in the United States of America that the delegated legislation is most strongly objected to. It is because of the separation of powers into three water-tight compartments--the executive, the legislative and the judiciary --forming the basic constitutional doctrine. The doctrine is not expressly provided for in the Federal Constitution but is implicit in the constitutional framework. The first section of the first article of the Constitution is: "All legislative powers herein granted shall be vested in a congress of the United States." The first section of the second article is : "The executive power shall be vested in a president." The first section of the third article is :

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Court may from time to time ordain."

These provisions have been interpreted to mean that "each and all of the Federal organs of government possess only those powers granted them by the Constitution, and that the powers not granted may not by them be delegated to other and different organs;" (Willoughby's p. 1618).

The maxim 'delegatus non potest delegare' is the leading corollary in the United States of this doctrine of separation of powers. Cooly writes in his 'Principles of Constitutional Law' Edn. 3, p. 111, with reference to legislative power that:

> "This high prerogative has been entrusted to its own wisdom, judgment and patriotism, and not to those of other persons, and it will act ultra vires if it undertakes to delegate the trust, instead of executing it."

The people of United States have delegated the powers to the three departments and those delegates must themselves execute the powers and cannot transfer them to one another. The constitutions of India, Australia and Canada are different; the separation of powers does not form the basic doctrine

of their constitutions. The Indian Legislature, while enacting the Defence of India Act, did not act as a delegate from the people of India or of England, and as already explained, the doctrine that a delegate cannot delegate does not govern its conduct. But even in the United States the separation of powers is not complete and delegation of powers by congress to the executive and administrative authorities has taken place. The rule now it that, "Congress may not delegate its powers unless it is convenient to do so;" (Sir Cecil Carr in 'Concerning English Administrative Law,' p. 16, as quoted by Dr. Schwartz at p. 19). Elihu Root concluded in 1916 that:

> "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight;" (Dr. Sohwartz, p. 20).
>
> Delegation of power, limited by standards, is now valid. The discretion conferred must not be so wide that it is impossible to discern its limits. Delegation must not be so indefinite as to amount to an abdication of the legislative functions. As remarked by Dr. Schwartz, the constitutional doctrine against delegation has in practice only prevented excessive delegations to the executive but not militated against the grant of wide powers of delegated legislation. When this is the state in the United States, the Legislatures in India, Australia and Canada naturally possess greater freedom. The Indian Constitution is not akin to the American Constitution ; it is akin to the Australian and Canadian constitutions. Kania J. remarked in Haveli Ram's case (A. I. R. (32) 1945 Bom. 88 : I. L. R. (1944) Bom. 487 F. B.) (p. 107) that the Canadian and Australian Legislatures are held by the Judicial Committee of the Privy Council to be more similar to the Indian Legislature than the American Constitution and that the decisions relating to Canadian and Australian constitutions may be more usefully followed. In Har Kishen Das's case (A. I. R. (31) 1944 Lah. 33 : 45 Cr. L. J. 580 F. B.), Mohd. Munir J. pointed out that the executive in the United States is not responsible to the Legislature and the head of the executive enjoys certain powers which the executive in the British system does not, and that, consequently, stronger case has to be made out to defend the grant of powers by the Legislature in the United States than in Great Britain. In Benoari Lal's case (A. I. R. (30) 1943 P. C. 36 : 45 Cr. L. J. 1) also it was remarked that owing to the co-operation between the Legislature and the executive there is leas objection in England to the grant of powers by the Parliament to the Government.

16. The Indian Legislature has been in the habit of conferring large rule-making powers upon the Government. The existence of the practice is a factor in support of its validity. In Burah's case (5 I. A. 178 : 4 Cal. 172 P. C.), their Lordships observed at p. 195 :

> "The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

In Hodge's case (1883-9 A. C. 117 : 53 L. J. P. C. 1), their Lordships remarked on abundance of precedents for the Legislature's trusting discretionary authority to others. Similar reliance was placed in Russell v. Reg, (1882) 7 A. C. 829 at p. 859 : (51 L. J. P. C. 77); vide observations of Sir Montague E. Smith quoted above. When the practice is relied upon it is not with a view to apply some principle of limitation or of estoppel; it is with a view to showing that had the practice been invalid it would not have gone on uninterrupted and the British Parliament would have taken action long ago to check it.

17. The views of constitutionalists and American Courts are not at all binding on the Indian Legislature; as a matter of fact, the views of Indian Courts also are not binding. I have already stated that how it should legislate is a matter solely for its concern and it is not open to a Court to throw out an enactment, which is within its scope, on the ground that it is unreasonable, unnecessary or improper, or confers too much power upon some authority. The views of constitutionalists about what rule-making power should be retained by the Legislature and what rule-making power may be conferred upon some authority are only by way of counsel which the Legislature is at all times competent to ignore. When the Legislature is not bound, it is impossible for a Court to throw out its enactment on the ground that it was against the views of constitutionalists and Courts. When Benaori Lal's case (A. I. R. (30) 1943 P. C. 36: 45 Cr. L. J. 1) was reversed on appeal by the Judicial Committee, Mr. G. G. Phillips while expressing sympathy for the views of the Federal Court observed at 61 Law Quarterly Review, p. 124:

> "Constitutional principles are, however, only guides to the Legislature and not principles of law. What the Legislature has enacted must under the British and also the Indian Constitutions be enforced by the Courts. The recent tendency to deprive the ordinary Courts of jurisdiction would perhaps be reversed if the Legislature realized that no tribunal will so faithfully or literally enforce the will of Parliament as will a British Court of law."

During the argument Mr. Chaturvedi urged that it was ,open to a Court to reject an Act as ultra, vires, though it was within the scope of the Legislature, merely on the ground that it involved what is commonly known as delegated legislation. I deny any such power in any Indian Court. Its power to reject an Act as ultra vires arises only out of the Legislature's exceeding the authority given to it under the Constitution Act. Unless the Court can point its finger to a particular provision of Constitution Act which is violated by the Legislature through the enactment, it cannot rule out the enactment as ultra vires.

18. The result of all this discussion is that I find Section 2, Defence of India Act, intra vires. Mr. Pathak directed special attack against the provision of Sub-section (3); he argued that whatever might be said about the validity or otherwise of Sub-section (2), Sub-section (3) was certainly ultra vires because the Legislature could not confer the power of creating offences upon any one:

> "In America, it seems clear that the power to impose penalties cannot be conferred upon administrative officials. Any penalties for the violation of administrative rules and regulations must be fixed by the Legislature itself." (See Dr. Schwartz, p. 31)."

In United States v. Maid, 116 Fed. Rep. 650 cited by Willoughby on p. 1647 "to make an act a criminal offence is essentially an exercise of legislative power, which cannot be delegated." In United States v. Eaton, 144 U. S. 677 : 36 L. E. 59, under an Act the Commissioner of Internal Revenue was authorised to make all needful regulations; the Act contained no provision for punishment of breaches of such regulations. The Commissioner made regulations one of which was broken by Eaton. It was held by the Supreme Court that he could not be convicted. Section 18 of the Act laid down that if any dealer omitted or refused to do any of the things "required by law" in the carrying on or conducting of his business he would be liable to a penalty. The Supreme Court decided that Eaton's failure to maintain certain registers in compliance with the regulations did not amount to his failing or omit ting to do a thing "required by law" in the carrying on or conducting of, his business. The regulations were necessary and binding, but it does not follow that a thing required was a thing so "required by law" as to o make the neglect to do the thing a criminal offence. That case is of no assistance to us engaged in deciding whether it was open to the Indian Legislature, while conferring upon the Government the power to make rules, to confer upon it the power to provide punishment for infringement of those rules. In that case the Congress did not invest the Internal Revenue Commissioner with the power to provide that an infringement of the regulations made by him would be punished in such and such a manner. The position in England is different; there are examples of delegation by Parliament of the power to impose penalties. The best example of such a delegation is Section 1(2), Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. VI, C. 62). The London Traffic Act, 1924, also stipulated that the regulations made under it may provide for imposing fine for breaches up to a certain stated maximum. As the power of the Indian Legislature has been found to be exactly the same as that of the British Parliament, it follows that Section 2 (3), Defence of India Act, is intra vires. The Indian Legislature has in numerous Acts conferred power upon authorities to provide in the regulations for punishment for their breaches. We were given a list of no less than 28 Acts enacted by the Indian Legislature in which such a power was conferred. In Hedge's case (1883-9 A. C. 117 : 153 L. J. P. C. 1) the conferment of such a power by the Legislature of Ontario, which has certainly not greater power in this respect than the Indian Legislature, was upheld by the Judicial Committee. The Legislature en-acted the Liquor License Act conferring power upon License Commissioners of Toronto to make regulations to impose penalties for their infraction. Hodge was convicted for infraction of one of the regulations and the Judicial Committee upheld his conviction. Their Lordships laid down that the Legislature of Ontario had acted within the powers conferred on it by the Imperial or Constitution Act of 1867 by conferring the power upon the License Commissioners, and observed that if the bye-laws or resolutions by the License Commissioners were warranted power to enforce them seemed necessary and equally lawful. Their Lordships further observed that if the Provincial Legislature had authority to impose imprisonment, it had power to delegate similar authority to the License Commissioners. It is impossible to distinguish that case from the instant one.

19. Under Section 212, Government of India Act, the law declared by the Federal Court is binding on all Courts. In the case of Har Kishan Das, (A.I.R. (31) 1944 Lah. 33 : 45 Cr. L. J. 580 F.B.), Muhammad Munir J. observed at p. 45 :

> "By reason of Section 212, Government of India Act, the law declared, by the Federal Court so far as applicable has to be followed by us and in the two decisions of the

> Federal Court relied on by the learned Advocate General the law declared by the Federal Court is that Section 2, Defence of India Act, is not ultra vires the Indian Legislature. It is contended by Mr. Sikri that the precise point urged before us was not taken before the Federal Court in those cases and that consequently there is no adjudication by the Federal Court on the point in question. This is correct; but that does not mean that the Federal Court did not declare Section 2 to be intra vires. In our opinion the declaration by the Federal Court that Section 2 is intra vires is binding on us and precludes us from considering the point raised."

In neither of the two cases was it contended that the enactment of Section 2, Defence of India Act, was invalid. What was contended there is that the whole Act was ultra vires of the Indian Legislature because the subject-matter of it was not included in any of the lists. It was not declared in either of them that the enactment of Section 2 was intra vires. I may concede that if the validity of Section 2 had been impugned on one ground and the Federal Court had, after repelling it, declared that the section was intra vires, the declaration would bind all Courts and would prevent them from entertaining an objection against the validity on any other ground which was never raised before, and adjudicated upon by, the Federal Court. But the law that was declared by the Federal Court is that the Defence of India Rules was not ultra vires on the ground of being outside the scope of the Indian Legislature. I do not wish to pursue the matter further because I am resting my decision on the higher ground, namely, that Section 2 was within the scope of the Legislature.

20. Mr. Pathak contended that a firm is an entity distinct from the partners, that the firm was the holder of the licence and not the partners owning it and that the firm could be prosecuted for infringement of its conditions and not the partners. As a corollary he further contended that even if the partners were liable for the misdeeds of the firm, they could not be punished with imprisonment, though the offence is punishable with imprisonment, for the simple reason that the firm could not be punished with imprisonment. If any "person" contravened an order made under Rule 81, Defence of India Rules, he was liable to be punished with imprisonment or fine or both. The licence was admittedly granted to the firm. It was the firm that was bound by the terms of the licence and could be guilty of contravening them. Only the firm could contravene an order made under Rule 81 whereas the prosecution for the contravention is to be of the "person" contravening the Order. If the firm could come within the meaning of the word 'person' it follows that the firm would be liable to be prosecuted under Rule 81 (4). I am not taking into consideration the language of Rule 9,. Kerosene Control Order, because that rule is-redundant and was probably framed only as a reminder and not as imposing penalties by its-own force. The offence is really one of Rule 81 (4), Defence of India Rules, and not of Rule 9, Kerosene Control Order. Section 3(39), General Clauses Act, defines 'person' as including "any company or association or body of individuals,, whether incorporated or not." A firm is defined in the Indian Partnership Act, vide Section 4, to-mean the persons who have entered into-partnership with one another taken collectively. Partnership is "the relation between persons who have agreed to share the profits-of a business." Thus a firm means the persons-who have entered into a particular contract, namely, that of sharing the profits of a business, taken collectively. A firm would, therefore, come within the definition of person' in the General Clauses Act. The definition is subject to there being nothing repugnant in the subject or context. In English law a corporation is not included in the definition of 'person' who is to be

indicated for an offence punishable with imprisonment. See Halsbury's Laws of England, vol. 9, p. 14, Para. 5. Since a corporation cannot be sent to jail it naturally follows that when the word 'person' occurs in the definition of an offence punishable with imprisonment, it cannot include a corporation. But a firm is not a, corporation and the word 'person' may include-a firm, though it cannot include a corporation, when occurring in the definition of such an offence. Further the offence of Rule 81 (4) is not exclusively punishable with imprisonment ; therefore it cannot be said that word 'person' in that rule does not include a firm.

21. I hold that the firm Mahanand Bajoria committed an offence punishable under Rule 81 (4). What is meant by the firm is Basdeo and his brother and father who have entered into a contract of partnership. Thus Basdeo and his brother and father committed the offence and could be prosecuted. There is, therefore, nothing illegal in Basdeo's being convicted. His father and brother may be fortunate in being acquitted but their acquittal cannot at all affect, his liability for the offence. There is no law that when an offence is committed by a firm either all, or none, of the partners must be prosecuted.

22. A partnership is different from a corporation and does not form a collective whole-distinct from the individuals composing it. It is stated in Lindley's Partnership, Edn. 9, page 23 :

> "The rights and liabilities of a partnership are the rights and liabilities of the partners and are enforceable by and against them individually."

In Re Swarnath Bhatia, 49 Cr. L. J. 570 : (A. I. R. (35) 1948 Mad. 427), Govinda Menon J., said at p. 571 :

> "A partnership is not a corporate body because it has no existence separate from its members. Apart from the partners the partnership has no legal existence (Sections 24 and 25, Partnership Act)."

Harish Chandra, J., with whom my learned brother agreed, observed in Mohammad Ahmad v. Rex, Cri. Revn. No. 1157 of 1948 decided on 22-3-1949, that a firm is not a body corporate and that the presumption permitted to be drawn under Rule 122, Defence of India Rules, cannot be drawn when the offence is committed by a firm. It is stated in Pollock and Mulla's Indian Partnership Act, 1950, p. 310 :

> "A firm is distinct from its members.....'In Scotland" in particular 'a firm is a legal person distinct from the partners of whom it is composed.'...,.....For English jurisprudence the firm is only a compendious name for certain persons who carry on business,..... For the purpose of determining legal rights there is no such thing as a firm known to the law and this is so likewise in India though the practical significance of the collective term receives a new emphasis in the present Act. It is true that under the Code of Civil Procedure ..:.....actions may be brought by and against partners in the name of the firm, and even between firms and their members; but this is only a matter of procedure. As a firm is not a legal entity there cannot be a partnership of

> firms, but when two firms combine the legal effect is that the individuals in the two firms become partners."

Sir John Beaumont delivering the judgment of the Judicial Committee in Bhagwanji Morarji Goculdasv. Alembic Chemical Works Co. Ltd., 1949 A. L. J. 214 : (A. I. R. (35) 1948 P. C. 100) said at p. 216:

> "It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland than with that of England."

This does not mean that the partners are not liable for an offence committed by a firm. In Purshottam Lal v. W. T. Henley's Telegraph Works Ltd., A. I. R. (20) 1933 ALL. 523 : (55 ALL. 719), Niamatulla J. (Rachhpal Singh agreeing) observed at p. 524 :

> "When the firm is arrayed as a defendant, all the partners should be deemed to be in the array of the defendants in their capacity as partners."

> "Persons engaged in an illegal business, whether partners or not, and whether incorporated or not are liable to be punished criminally." (Lindley, p. 147).

> "Although partners may be prosecuted in respect of criminal offences, the fact that they are partners has little, if any, effect on their position from a criminal point of view." (Lindley p. 341).

23. C and D were partners of a trading firm. A clerk of D smuggled goods without paying the customs duty. C was tried for the offence and convicted. Then D was prosecuted and he argued that the act of smuggling was one for which only one penalty could be imposed and that since C had already been punished for that act he could not be punished again and that the result of C's appeal should be awaited. His argument was overruled as the Act said that every person "who shall be concerned in the unshipping of goods . . . . shall be liable." All persons who were concerned in the illegal transaction were held liable; consequently both C and D were liable and each of them was punished. See R. v. Dean, (1843) 12 M. & W. p. 39 : (13 L. J. Ex. 33). In Swarnath's case, (49 Cr. L. J. 570 : A. I. R. (35) 1948 Mad. 427) he was one of the partners of a firm, a servant of which infringed an order of the Textile Commissioner, and he was convicted even though he was not present at the time of the infringement and did not know anything about it. Govinda Menon J. observed at p. 571:

> "Partnership as such has no existence apart from the individuals constituting the firm. This is an undisputed fact. Therefore, every partner who fails without lawful excuse to secure compliance with such order shall be deemed to have contravened the provisions of the order. There can be no doubt that the Madras Cotton Cloth and Apparel (Export) Control Order was one promulgated under the Defence of India Rules and if there had been a contravention of the terms of a licence granted under

> that Order, by the export of more than 10,000 yards, every partner of the firm which has exported these goods shall be deemed to have 'contravened the provisions of the Order. The burden, according to Rule 123-A, of proving that circumstances exculpating him exist, is on such partner."

Swarnath pleaded complete absence of mens rea and relied upon Sri Niwas Mal v. Emperor, A. I. R. (34) 1947 P. C. 135 : (1947 A. L. J. 497), but Govinda Menon J. refused to apply the rule laid down by the Judicial Committee to the case before him. He stressed the fact that the criminal act of exporting goods in excess of the permit was done knowingly and with a new perception that it was prohibited by the rules and applied Rule 5, Defence of India Rules, under which any member of the partnership failing to secure compliance with the provisions of the Order would be deemed to have contravened the order. He distinguished the case of Sri Niwas Mall, (1947 P. C. 135: 1947 A. L. J. 497) because no question of partnership arose, there.

24. In Mohammad Ahmad's case, (Cri. Revn. No. 1157 of 1948, D/- 22-3-1949) a firm consisting. of M and B partners exported mustard oil in contravention of an order. M, B and a servant of the firm were convicted for contravening the order and the conviction of M was set aside because he was not carrying on the business of the firm and had no knowledge of the export; "the learned Judges relied upon the case of Sri Niwas Mall, (A. I. R. (34) 1947 P. C. 135 : 1947 A. L. J. 497) and acquitted M because he has no mens rea. I do not wish to enter into the question whether Mohammad Ahmad's case (Cri. Revn. No. 1157 of 1948, D/- 22-3-1949) was correctly decided or Swar Nath's (49 Cr. L. J. 570 : A. I. R. (35) 1948 Mad. 427); it is enough to distinguish Mohammad Ahmad's case (Cri. Revn. No. 1157 of 1948, D/- 22-3-1949) on the ground that there is ample evidence in the instance case to prove mens rea in Basdeo. He himself has accepted the entire liability for the offence. He stated that he is the only partner who does the business and even led evidence to prove that the other partners do not even go to the shop. Then his conduct at the time of the visit of the Supply Inspector proves beyond any shadow of doubt that he had a guilty mind, knew very well that the offence was being committed and attempted to throw dust in the Inspector's eyes so that the commission of the offence might not be detected. He not only admitted the facts constituting the offence but also failed to give any explanation. It is impossible for him to claim the benefit of want of mens rea which was successfully claimed by Mohammad Ahmad.

25. Defence of India Rules contain a special provision to deal with offences committed by corporations; see Rule 122. They contain no provision to deal with offences committed by firms. This is because a corporation has a distinct personality; it is that personality only that can be prosecuted. Whereas in the case of a firm all the partners are liable to be prosecuted as constituting the firm. If the partners were to be treated as a different entity and not liable to be prosecuted for misdeeds committed by the firm there would have been a provision similar to that of Rule 122. In English law also there is no provision dealing with offences committed by firms; obviously because the partners themselves are liable.

26. I find that Basdeo and his father and brother who had entered into a particular contract, committed the offence of not maintaining a stock register showing correctly certain facts and that Basdeo at least was certainly liable to be punished because he had the guilty mind.

27. The offence committed is a very serious offence and the Magistrate grievously erred in not realising its seriousness and in not inflicting adequate punishment. The offence is an anti-social offence. The appellant went out of his way to commit it. He was actuated by greed. It is true that the offence committed by him is not of black-marketing or profiteering, but it is quite wrong to say that it is a mere offence of not maintaining correct stock register and that it is a "technical offence." I do not know what the Magistrate understands by "technical offence" but the present offence came within both the letter and the spirit of the law. The inaccuracies in the stock register were not trivial or bona fide; it is obvious that Basdeo was making false entries in the register with a view to selling kerosene oil in the black market. He expected a better price in the black market than in the open market where he would have to sell at a fixed price. He saved some kerosene tins from the stock in order to sell them in the black market. It seems that he made bogus entries of disposal in the stock register but did not remove the tins from the godowns with the result that the Supply Inspector found an excess number of tins. They are clearly the tins that Basdeo intended to sell in the black market at more than the control price. The offence, far from being a technical one, is a very serious offence, almost as serious as that of actual black-marketing. Such an offence deserves to be dealt with ruthlessly. It was pre-planned. When a man plans an offence he naturally weighs the anticipated profit with the risk involved in committing it and commits it only on finding that the anticipated profit is more than the risk. It follows that when he is punished, the punishment mush exceed the anticipated profit. Otherwise it would amount to "Head I win, tail you lose." The punishment must be deterrent. It must make not only the actual offender but also others who are similarly placed, think twice before planning to commit a similar offence ; otherwise it would not serve the purpose. The infliction of a fine of Rs. 500 for such an offence could not be deterrent. It was, on the other hand, an encouragement to commit such other offences. Basdeo's behaviour towards the Supply Inspector was most reprehensible and he was not entitled to any sympathy. It is to be regretted that even after the reference by the learned District Magistrate the Trial Magistrate has not seen his error and made a futile attempt to justify the unjustifiable. When he was called upon to give his comments on the reference, he was not called upon to criticise the reference. He was only given an opportunity to state what he had to say by way of explanation, taking the reference as correct in law. If he did not agree with the learned District Magistrate his duty was to remain silent; he had no authority to sit in judgment over the reference. Even though some time has elapsed since the conviction, having regard to the necessity of taking a serious view of the offence, I consider that a sentence of imprisonment coupled with a heavy fine must be imposed.

28. As regards the offence of Section 353, Penal Code, I find the evidence conflicting and not sufficiently clear. The peon's evidence does not make out this offence. The Inspector's evidence about what he was told by the peon cannot take the place of the peon's evidence. The peon might have been won over by the appellant. But even if the Court were satisfied about it, it would not be justified in replacing the actual evidence given by him by the evidence which it thinks should have been given by him. The conviction under Section 353 should, therefore, be quashed.

Raghubar Dayal, J.

29. I agree with the order proposed by my learned brother and desire to express my views on the few points of law raised in the case.

30. Three points were urged by Mr. Pathak for the opposite party. One is that the conviction under Section 353, Penal Code, is not made out from the evidence on the record. The other is that the licence under the U. P. Kerosene Control Order was issued to the firm Mahanand Ram Bajoria and that, therefore, in view of Para. 9, U. P. Kerosene Control Order, the firm alone would be deemed to have contravened the provisions of the Order and to have committed the offence under Rule 81 (4), Defence of India Rules, and that the partners constituting the firm would not be liable for the contravention of the terms of the order. Lastly, it was urged that Section 2, Sub-section (1), Defence of India Act (XXXV [35] of 1939), was ultra vires of the Central Legislature in so far as it delegated the power of making laws to the Central Government. It further contended that even if Section 2, Sub-section (1) of the Act was not ultra vires of the Central Legislature, Section 2, Sub-section (3) was ultra vires of the Central Legislature because it delegated to other authorities the power to create offences and punishments therefor, which power was an essential legislative power and could not have been delegated.

31. The first contention need not detain us long. The statement of Shri Krishna, the peon who is said to have been assaulted by the accused opposite party, is to the effect that Basdeo requested him to give the registers, and after taking them went away, and that when he wanted to take back the registers some other persons caught hold of him and Basdeo ran away. This statement is insufficient to establish that the accused assaulted him. His further cross-examination makes the matter more clear. There he stated that he had placed the registers on a cot and that the accused took away the registers. The statement of Mohammad Umar that Basdeo snatched away the registers from the hands of the peon cannot be preferred to the statement of the main person, namely Shri Krishna. I, therefore, agree with the contention that the offence under Section 353, Penal Code, has not been made out against the accused.

32. The firm Mahanand Ram Bajoria is a person for the purposes of Rule 81 (4), Defence of India Rules. Rule 3, Defence of India Rules, provides that the General Clauses Act, 1897, shall apply to the interpretation of these rules as it applies to the interpretation of a Central Act. Section 3, Sub-section (39), General Clauses Act, provides that 'person' shall include any company or association or body of individuals, whether incorporated or not. Section 4, Indian Partnership Act (IX [9] of 1932) is :

> " 'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.
>
> Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm" and the name under which their business is carried on is called the 'firm name' ".

It follows that partners are called collectively a firm. 'Firm' is a short form of referring to all the partners who have entered into partnership with one another and, therefore, just refers to those persons taken as a whole. 'Firm', therefore, refers to a body of individuals and comes within the meaning of the word 'person'. There is nothing in the subject or context of Rule 81 (4), Defence of India Rules, which may be repugnant to this interpretation. In fact, this interpretation is not

disputed.

33. The licence under the U. P. Kerosene Control Order, 1942, was issued to the Firm Mahanand Ram Bajoria. The firm, therefore, was the licensee and holder of the licence. Paragraph 8 of the Control Order required the holder of the licence to comply with any direction that might be issued to him in regard to the purchase, sale, storage or distribution of kerosene, and Para. 9 is :

> "If any person holding a licence granted under this Order contravenes any of the conditions of the licence his licence may be cancelled or suspended by the District Magistrate. He shall also be liable under Rule 81, Defence of India Rules, to a fine of Rs. 1000 and imprisonment for three years, and the Court convicting him may order that the property in respect of which the offence has been committed shall also be forfeited to His Majesty."

There is no doubt that the licensee in not complying with any direction which may be issued to him in pursuance of Para. 8 will contravene the provisions of the U. P. Kerosene Control Order which was issued by the Government in exercise of the powers conferred by Rule 81 (2), Defence of India Rules, and will, therefore, be liable for punishment under Rule 81 (4), Defence of India Rules. The provisions of Para. 9 provide two additional penalties and a limit for one kind of penalty which was provided in Rule 81 (4), Defence of India Rules. The additional penalties relate to the forfeiture of the property in respect of which the offence had been committed and to the administrative measure of cancelling or suspending the licence. It limited the penalty of fine to Rs. 1000/- only. Rule 81 (4), Defence of India Rules, did not limit the amount of fine which could be inflicted under it. It is clear that the offence which was committed by the firm would be an offence under Rule 81 (4), Defence of India Rules, read with Para. 9, U. P. Kerosene Control Order.

34. The main question for determination, however, is whether the firm as such would be the guilty person or the guilty persons would be the partners constituting the firm. We are not concerned in this case with the question of the liability of such partners who might not have had any intention to commit the offence or any knowledge of the likelihood of the commission of the offence. Basdeo, opposite party, stated that the licence was in the names of his brothers and that he was the owner. His answers, to the other questions indicate that he worked at the shop. Hardwari Lal, defence witness, deposed that Basdeo accused worked at the oil tank situate at the railway station. The other defence witness, Prem Narain, also deposed that whenever he went to the tank he found Basdeo there. The conduct of Basdeo on the day the Inspector inspected the shop also shows that he used to work at the shop and must have known of the wrong practices of the firm and must have been a party to them.

35. The fact that firm comes within the definition of the word 'person' as defined in the General Clauses Act does not necessarily mean that the firm is a legal entity distinct from the persons who have entered into the partnership. It is a short way of referring to all the partners. It is not a juristic person in the sense in which a corporation is. In Wharton's Law Lexicon it is stated in connection with the word "corporation" :

> "The distinction between corporations and trading partnerships is, that in the first the law sees only the body corporate and knows not the individuals, who are not liable for the contracts of the corporation in their private capacity, their share in the capital only being at stake : but in the latter the law looks, not to the partnership, but to the individual members of it, who are therefore answerable for the debts of the firm to the full extent of their assets,"

In Seodoyal Khemka v. Joharmull Manmull, 50 Cal. 549 at p. 558 : (A. I. R. (11) 1924 Cal. 74), it was observed :

> "A partnership under Section 289 is a relationship which subsists between persons; but a firm is not a person; it is not an entity; it is merely a collective name for the individuals who are members of the partnership. It is-neither a legal entity, nor is it a person. In Scotland! the position is different, because in Scotland a firm is a legal person (vide Partnership Act, 1890, 53, & 54 Vict C. 39, Section 4, Sub-section (2) and the Note set out in Appendix I of the late Lord Lindley's Book on Partnership, 6th Edn. 775)."

In Purshottam Lal v. Henley's Telegraph Works, Ltd., A. I. R. (20) 1933 ALL. 523 : (55 ALL. 719), it was observed :

> "The name of the firm is only a compendious description of the partners in reference to the common interest which they possess in a certain concern. When the firm is arrayed as a defendant, all the partners should be deemed to be in the array of the defendants in their capacity as partners."

It should follow, therefore, that when the firm is mentioned as a licensee in the licence issued to it, the licensee really is the body of partners who were collectively referred to by the name of the firm. It would then follow that the partners, who were called collectively firm Mahanand Ram Bajoria, were the licensees, were bound to carry out the orders issued under the Control Order and would be guilty on account of non-compliance with those orders under Rule 81 (4), Defence of India Rules, read with para. 9, U. P. Kerosene Control Order.

36. Mr. Pathak's contention really is that the view which prevailed in the Indian Courts about the firm being not an independent entity and about its being just a compendious description of the partners is wrong in view of the decision of the Privy Council in Bhagwanji Morarji v. Alembic Chemical Works, Ltd., 1948 A. L. J. 214 : (A. I. R. (35) 1948 P. C. 100). Reliance is placed on these observations of their Lordships of the Judicial Committee :

> "It is true that the Indian Partnership Act goes further than' the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it ; the law in India in that respect being more in accordance with the law of Scotland than with that of England."

It is argued that firm possesses a personality distinct from the persons constituting it, and therefore is no more just a compendious description of the partners, but is a separate entity and a separate juristic person. Strength is sought from the fact that the law of Scotland makes a firm a legal person. I do not agree.,

37. Section 4, Partnership Act, 1890, 53 & 54 Vict. C. 39, is :

> "4 (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.
>
> (2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief pro rata from the firm and its other members."

It would appear, therefore, that the provisions of Sub-section (1), which correspond to those of the second para, of Section 4, Indian Partnership Act, were not by themselves sufficient to make a firm a legal person and that it was therefore necessary to provide in Sub-section (2) that in Scotland a firm is legal person distinct from the partners. No similar provision exists in the Indian Partnership Act.

38. These observations of their Lordships of the Judicial Committee do not go to the extent of showing that a firm is a different entity from its partners. In fact, the entire observations, which include the observations quoted above, indicate that a firm is not held to be an entity apart from the persons constituting it. They are :

> "Before the Board it was argued-that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession. The agreement of 7th December 1907, was made between the company and four named individuals, and when all of those four individuals had ceased to be members of the firm there was no privity between the company and the firm as it then existed."

It appears that their Lordships repelled the argument that a firm is an entity apart from the persons constituting if.

39. In the Indian Sale of Goods and the Indian Partnership Acts (2nd Edn.), Pollock and Mulla, at p. 300 under the heading "History of Partnership Law", it is observed :

> "The present Act repeals (Section 73) and supersedes Ch. XI of the Contract Act. It makes considerable changes in definition and arrangement, gives effect (but short of making the firm a legal person) to the mercantile view of a firm's continuity and adds provisions for voluntary registration of firms. It nearly doubles the length of the repealed chapter, but the law thus expanded in statement is not much altered in substance."

The aforesaid Privy Council case has been noticed at p. 310, and it is observed :

> "For the purpose of determining legal rights there is no such thing as a firm known to the law and this is so likewise in India though the practical significance of the collective terms receives a new emphasis in the present Act."

40. It will thus appear that though for various purposes a firm has been given a personality, the firm has not been recognised as a juristic person.

41. In this connection reference may be made to the observations in 'Jurisprudence' by Salmond, Edn. 6. At p. 279 it is said:

> "Although all fictitious or legal personality involves personification, the converse is not proved. Personification in itself is a mere metaphor, not a legal fiction. Legal personality is a definite legal conception; personification, as such, is a mere artifice of speech devised for compendious expression."

And again at p. 280 :

> "So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognises no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of Judges, a pulic meeting, the community itself, as being itself a person instead of merely a group or society of persons. But legal personality is not reached until the law recognises, over and above the associated individuals, a fictitious being which in a manner represents them, but is not identical with them."

42. Mr. Pathak has referred to the various sections of the Indian Partnership Act to show that a partner has been considered to be distinct from a firm. There cannot be any dispute about it. An individual partner is distinct from the firm, which denotes all the partners collectively. It, however, does not follow as contended that the firm is an entity apart from the persons constituting it. It is not necessary to discuss those sections. No section says the firm is a legal person. The sections speak of the rights and liabilities of a partner with reference to the firm, that is, with reference to all the partners. Most of the sections have their counterparts in the Partnership Act of 1890, 53 & 54 Vict.

C. 39. It has already been indicated that in England a firm is not a legal entity.

43. In view of all these considerations, I am of opinion that a firm is not an entity distinct from the partners, that it just refers to all the partners collectively and that the licence issued to the firm was, in the eye of law, a licence issued to all the partners and that all the partners would be required to comply with the directions given by the District Magistrate in pursuance of Para. 8 of the Control Order, and that all the partners would be guilty of contravening the orders, if they be not complied with, without legal excuse, subject of course to the view on the question whether their liability would be dependent on their intention to commit or on their knowledge of the likely commission of the offence and about which I have not expressed myself in this case as it was not necessary.

44. The contention that Section 2, Sub-section (1), Defence of India Act, was ultra, vires of the Central Legislature in so far as it delegated the power of making laws to the Central Government has been repelled in severval cases. The question was first discussed in Meer Singh v. Emperor, 1941 A. L. J. 352 : (A. I. R. (28) 1941 ALL. 321 : 42 Cr.L.J. 839). It was there contended that the Legislature had no power to divest itself of its legislative authorities and that by passing this Act it in effect did so. Braund and Allsop JJ. did not agree with the contention and held that the Defence of India Act was not ultra vires of the Central Legislature. In H. N. Nolan v. Emperor, A.I.R. (31) 1944 ALL. 118 : (45 Cr.L.J. 655 F.B.), the judgment of the Full Bench was delivered by Iqbal Ahmad G. J., who observed at p. 119 :

> "Lastly, the validity of the Defence of India Act itself was assailed and it was contended that Section 2 of the Act was ultra vires of the Central Legislature. The decision of the Federal Court in Keshav Talpade v. Emperor, A.I.R. (30) 1943 F.C. 1: (I.L.R. (1943) Kar. (F.C.) 26: 44 Cr. L. J. 558), furnished a complete answer to this contention. It was urged in this connection that the Central Legislature by enacting Section 2 delegated its power of legislation to the Central Government and this was not permissible. A similar contention was advanced and was overruled by this Court in Meer Singh v. Emperor, 1941 A L. J. 352 : (A. I. R. (28) 1941 All. 321 : 42 Cr, L. J. 889) and this decision appears to have been approved by the Federal Court in Keshav Talpade v. Emperor, A. I. R. (30) 1943 F. C. 1 : (I. L. R. (1943) Kar. (F. C.) 26 : 44 Cr. L. J. 558).
>
> It follows, therefore, that the Full Bench of this Court held that Section 2 was not ultra vires of the Central Legislature on the ground that the Central Legislature by enacting it delegated its power of legislation to the Central Government. We are bound by this Full Bench decision. It, therefore, does not appear to be necessary to discuss this point at length. It may, however, be mentioned that a similar view was expressed by a Full Bench of the Lahore High Court in Harkishan Das v. Emperor, A. I. R. (31) 1944 Lah. 33 : (45 Cr.L.J. 580 F. B.) and in Haveliram v. Maharaja of Morvi, A. I. R. (32) 1945 Bom. 88 : (I.L.R. (1944) Bom. 487 F. B.).

45. Mr. Pathak further contends that even if Section 2, Sub-section (1), Defence of India Act, be within the jurisdiction of the Central Legislature to enact, Sub-section (3) of Section 2, Defence of

India Act, was certainly invalid as it delegated the power of creating offences and the penalties therefor to the Central Government. He contends that the power to create offences and penalties therefor is an essential legislative power and, therefore, it could not be delegated to the Central Government. Reliance is placed on the observations of Mahajan J. at p. 184 in Jatindra Nath v. Province of Bihar, A. I. R. (36) 1949 F. C. 175 : (50 Cr. L. J. 497) and also on the American law. I do not agree with the contention.

46. Section 2, Sub-section (1). Government of India Act, is the main section under which the various-Defence of India Rules were enacted. Subsection (2) merely enumerated the various matters which could be covered by the rules or, for which rules could be made. Sub-section (3) is-also similar to Sub-section (2). It is not independent, of Sub-section (1). The relevant portion of Sub-section (3) is:

> "The rules made under Sub-section (1) may further --
>
> (ii) provide that any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules, or any order issued under any such provisions, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both."

Section 2, Sub-section (1) is very wide and places no restrictions on the nature of the rules which could be framed. The only restriction is that those rules should be such as appear to the Central Government to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the community. It would mean that any rule which is relevant for such purposes could be made by the Central Government if it considered it necessary or expedient to make-that rule. If the Central Government considered that the contravention, etc., of the rules framed by it be made punishable, it could make rules providing for that. The rules creating offences and penalties therefor would be rules which would fall under Sub-section (1), Section 2, Defence of India Act. Sub-section (3), like Sub-section (2) of Section 2 simply specifies that rules could be made with respect to those matters as well.

47. I am further of opinion that power to create offences for the non-compliance of certain rules should be deemed to be included in the power to frame those rules. To frame rules which could be disobeyed by the persons concerned with impunity is worse than to frame no rules at all. There must be sanctions behind the rules which are made for the purposes of compliance by others to secure certain ends.

48. In this connexion reference may be made to the case of Hodge v. Reg, (1883) 9 A. C. 117: (153 L. J. P. C. 1). Section 3, chap. III of the Revised Statutes of Ontorio, 1877, provided for the appointment of a Board of Licence Commissioners and Section 4 of the Act authorised the Licence Commissioners to pass a resolution or resolutions for regulating and determining matters specified in that section, and Section 5 provided:.

> "In and by any such resolution of a Board of Licence. Commissioners the said Board may impose penalties, for the infraction thereof."

In pursuance of the provisions of these sections the Licence Commissioners made certain regulations which provided for the conviction and punishment of the person guilty of any infraction of any of the provisions of the resolution. Hodge happened to contravene the provisions of the resolution and was convicted. It was contended before their Lordships of the Judicial Committee that the Ontorio Legislature was not competent to delegate these powers to the Licence Commissioners or any other person. The contention was repelled. Their Lordships finally observed at p. 132 :

> "Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful."

In this case it will be noticed that the power to create offences and provide penalties therefor was given by the local Legislature to the Licence Commissioners and was held to be valid. It follows, therefore, that when Section 2 (1), Defence of India Act, is valid, Sub-section (3), Clause (ii) of Section 2, Defence of India Act, must be held to be valid.

49. I may now discuss the question as put forward by Mr. Pathak. His contention is that the power of creating offences and providing penalties therefor is an essential legislative power and, therefore, cannot be conferred by the Legislature on any other authority. There is no doubt that the power to create offences and provide penalties therefor is a legislative power. The question, however, is whether it is such a legislative power which cannot be conferred by the Legislature on any other authority. It does not appear to be such a power in view of the case Hodge v. Reg. (1883) 9 A. C. 117: (153 L. J. P. C. 1), already referred to. Certain legislative powers which are sometimes described as unessential legislative powers can be delegated or conferred on other authorities, if the main enactment lays down the principles and considerations which should guide the exercise of the delegated or conferred power. It is not necessary to refer to cases on this point.

50. The American law on this point is, however, different and is summed up thus at p. 31 of American Administrative Law by Bernard Schwartz :

> "In America, it seems clear that the power to impose penalties cannot be conferred upon administrative officials. Any penalties for the violation of administrative rules and regulation must be fixed by the Legislature itself. An attempt to authorise the administrative body itself to provide penalties for the breaches 'of its rules would be beyond the power of the Legislature."

This view is not consistent with what has been held in Hodge v. Reg, 1883-9 A.V. 117: (153 L.J.P.C. 1) mentioned above. Even if the American view be accepted to be the correct law for application in this country, I am of opinion that the provisions of Section 2, Sub-section (3), Clause (ii), Defence of India. Act, cannot be said to be invalid. Even in America it has been held that the Legislature can lay

down policies and establish, standards and leave it to other authorities to fill in the details. The Legislature can, therefore, lay down the principles which should govern, the creation of offences and the limits of the penalties for those offences and leave it to the other authorities to specify what acts would be offences and what penalties could be inflicted for those offences. It is true that Section 2, Sub-section (3), Clause (ii), Defence of India Act, does not lay down that the contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules shall be punishable in such and such a manner, and thus does not create offences and penalties, but it does lay down what can, be created offences and within what limits the penalties for those offences can be created by the Central Government. The Central Government cannot create any other conduct in connection with the rules framed by it an offence and cannot provide for penalties which go beyond the limits mentioned there. What the Central Government does by framing rules in this connection is simply to specify what would be offences and what would be the punishment for any particular offence. It may not be desirable that disobedience of all rules be punished in equal degree and, therefore, a discretion is given to the Central Government to provide suitable punishment for the contravention of particular rules. Similar discretion is given to the Central Government-to provide as to what would be an offence.

51. The matter may be looked at in a different manner. If the provisions of Section 2 Sub-section (3) were that the contravention of, or any attempt to contravene, and any abetment of, or attempt: to abet, the contravention of any of the provisions of the rules would be punishable with imprisonment for a term which might extend to seven years or with fine or with both and then there was a proviso that the General Government might provide that such acts or some of them with respect to certain rules would not be offences or that certain of these acts would be punishable with a lesser amount of punishment, it seems difficult to think that it would be contended that such provisos were ultra vires of the Central Legislature. By the main provisions the Legislature creates the offences and penalties therefor. The provisos would be in the interests of the public as they tend to provide for the reduction of the rigour of the main provision. It would not be in the interests of the accused to urge that those provisos were ultra vires of the Legislature and it would not be open to the authority deriving power under that section to say that the section which gives it the power was ultra vires of the Legislature. What would have been achieved by this hypothetical form of enactment is achieved by the present Section 2, Sub-section (3), Clause (ii) when it indicates as to what can be made offences and also indicates the limits of the penalties to be imposed.

52. I am, therefore, of opinion that Section 2, Sub-section (3), Clause. (ii), Defence of India Act, is not ultra, vires of the Central Legislature.

53. By the Court.--We maintain the conviction of Basdeo under Rule 81 (4), Defence of India Rules, quash his conviction and sentence under Section 353, Penal Code, accept this reference and enhance the sentence passed under Rule 81 (4) to rigorous imprisonment for six months and a fine of Rs. 500, or in default to further rigorous imprisonment for three months. The excess fine, if realised, shall be refunded.