Equivalent Citations
1950 AIR ALL 11 . 1949 SCC ONLINE ALL 21 . 1950 ILR ALL 845 . 1950 CRI LJ 269 .

Sir Gulab Singh v. District Magistrate Of Dehra Dun

Allahabad High Court (Jun 24, 1949)

CASE NO.

Criminal Miscellaneous Case No. 2190 of 1948

ADVOCATES

G.S Pathak for the applicant

The Advocate General (P.L Banerji) for the opposite-party.

JUDGES

Wali-Ullah

A.C.J

Sapru

Bind Basni Prasad, JJ.

SUMMARY

Factual and Procedural Background

This opinion concerns an application under section 491 of the Criminal Procedure Code filed by Sir Gulab Singh, the ex-Maharaja of Rewa State, challenging his detention under the *Bengal* State Prisoners *Regulation* , 1818, as adapted by the *Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947. The Rewa State had acceded to the Indian Union in August 1947. On 20 May 1948, the Governor General issued an order directing that Sir Gulab Singh be placed under personal restraint at Dehra Dun pursuant to the adapted *Regulation* . The applicant contended that his detention was illegal, primarily attacking the validity of the Adaptation Order made by the Governor General on 26 August 1947, which introduced provisions relating to the detention of persons connected with relations with acceding States. The case proceeded under the jurisdictional framework of section 491 of the Criminal Procedure Code, which excludes the court's power to interfere with detentions under the *Bengal* State Prisoners *Regulation* .

Legal Issues Presented

1. Whether the *Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947, promulgated

by the Governor General under section 9 of the Indian Independence Act, 1947, was ultra vires (beyond) the powers conferred on him.

2. Whether the Governor General had the authority to adapt existing Indian laws, specifically the *Regulation* of 1818, to include reasons connected with relations with acceding States.

3. Whether the adaptation made was a necessary adaptation under section 18(3) of the Indian Independence Act or an improper legislative enactment.

4. Whether the detention under the adapted *Regulation* constitutes preventive detention consistent with the Government of India Act, 1935, or amounts to arbitrary detention.

5. Whether the omission of references to the Crown's functions in Indian States by the earlier Adaptation Order of 14 August 1947 precluded the Governor General from reintroducing such references in the 26 August 1947 Adaptation Order.

6. Whether the expression "reasons of State connected with relations with Acceding States" is meaningful, certain, and valid as a basis for detention.

7. Whether the court has jurisdiction under section 491 of the Criminal Procedure Code to entertain the habeas corpus application given the statutory exclusion for detentions under the *Bengal* State Prisoners *Regulation* .

Arguments of the Parties

Applicant's Arguments

- The Adaptation Order of 26 August 1947 was ultra vires and null because the Governor General lacked power to introduce provisions relating to accession of Indian States, which were not expressly provided for in the Indian Independence Act.
- The Adaptation Order was not a "necessary adaptation" under section 18(3) of the Indian Independence Act and therefore invalid.
- The provisions relating to Indian States had been omitted by the India (Adaptation of Existing Indian Laws) Order of 14 August 1947, so the later Adaptation Order was improper.
- The phrase "reasons of State connected with relations with Acceding States" was vague, uncertain, and meaningless, and thus invalid as a basis for detention.
- The Adaptation Order conferred arbitrary detention powers on the Governor General, exceeding the preventive detention powers permitted by the Government of India Act, 1935.
- The Governor General's Adaptation Order purported to be made under "all other powers" without specifying them, rendering it invalid.

- The adaptation was intended to meet changing political situations rather than to conform to the Indian Independence Act and Government of India Act, which was improper.

Respondent's Arguments

- The Indian Independence Act, read with the Government of India Act, 1935, contemplated the accession of Indian States, and the Governor General had the power to adapt existing laws accordingly.
- The Governor General's powers under section 9 of the Indian Independence Act included making necessary or expedient adaptations to bring laws into conformity with the new constitutional status, including retrospective effect and variation of previous orders.
- The Adaptation Order was a valid legislative act of adaptation, not a fresh enactment, and was necessary to reflect the changed constitutional position after the lapse of British paramountcy.
- The phrase "reasons of State connected with relations with Acceding States" was a valid substitution reflecting the federal relationship between the Dominion and the acceding States.
- The *Regulation* , as adapted, provided for preventive detention consistent with the Government of India Act, 1935, and was not arbitrary detention.
- The court's jurisdiction under section 491(3) of the Criminal Procedure Code is ousted for persons detained under the *Bengal* State Prisoners *Regulation* , 1818.

Table of Precedents Cited

Precedent	Rule or Principle Cited For	Application by the Court
Rana Birpal Singh v. Emperor	Validity of warrants issued under the *Bengal* State Prisoners *Regulation* before accession dates.	Distinguished on facts; no issue raised on validity of adaptations made after accession; upheld the necessity of valid warrant under the *Regulation* .
Liversidge v. Anderson	Deference to executive discretion in preventive detention cases; subjective test for validity of detention.	Supported the principle that courts should not substitute their judgment for the executive's satisfaction on grounds for detention.

Greene v. Secretary of State for Home Affairs	Similar principles on executive discretion and preventive detention upheld.	Reinforced the view that executive satisfaction on grounds for detention is not justiciable on merits.
West Derby Union v. Metropolitan Life Assurance Society	Interpretation of provisos in statutes; provisos do not add substantive enactments.	Used to analyze whether subsection (4) of section 2 was a proviso or substantive enabling provision.
Bretherton v. United Kingdom Totalisator Company, Ltd.	Limits on the legislative effect of provisos; provisos cannot create new substantive rights.	Supported the view that subsection (4) of section 2 was not merely a proviso but substantive.
Murat Patiwa v. Province of Bihar	Distinction between preventive detention and arbitrary detention.	Discussed but not conclusively decided; court acknowledged the distinction as relevant to the nature of detention under the *Regulation* .
Rex v. Halliday	Legality of detention and the rule of law; detention must have legal justification.	Emphasized that detention under a valid statutory power is not arbitrary and must be legally justified.
In re C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act	Permissibility of historical documents (White Paper) in interpreting constitutional statutes.	Permitted reference to the White Paper on Indian States to understand constitutional intent.

Court's Reasoning and Analysis

The Court undertook a detailed examination of the Indian Independence Act, 1947, and the Government of India Act, 1935, to determine the scope of the Governor General's powers to adapt existing Indian laws. The Court found that:

- The Indian Independence Act contemplated the accession of Indian States to the new Dominions, as explicitly provided in subsection (4) of section 2, which was substantive and enabling, not merely a proviso.
- The Government of India Act, 1935, as modified by the Governor General under the Indian Independence Act, formed part of the constitutional framework and was properly considered in adaptations.
- The Governor General had extensive powers under section 9 of the Indian

Independence Act to make adaptations necessary or expedient for bringing the Act into effective operation, including retrospective effect and varying previous orders.

- The Adaptation Order of 26 August 1947 was a valid exercise of these powers, notwithstanding the earlier Adaptation Order of 14 August 1947 had omitted references to the Crown's functions in relation to Indian States.
- The term "adaptation" was properly understood as modifications to bring existing laws into conformity with the changed constitutional status, not as fresh legislation introducing new substantive provisions.
- The *Regulation* , as adapted, provided for preventive detention consistent with the Government of India Act, 1935, and did not amount to arbitrary or punitive detention, although the powers conferred were wide and drastic.
- The Court acknowledged the serious inroads on personal liberty made by the *Regulation* but held that it had been preserved on the statute book and was valid law, thus ousting the Court's jurisdiction under section 491(3) of the Criminal Procedure Code.
- The Court rejected the applicant's arguments challenging the validity of the Adaptation Order, its vagueness, and the Governor General's purported use of unspecified "other powers."
- The Court emphasized that it was not the role of the judiciary to question the political wisdom or desirability of such legislation but to determine its legality within the constitutional framework.

Holding and Implications

The Court held that the *Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947, dated 26 August 1947, was not ultra vires the powers of the Governor General and was a valid exercise of his authority under the Indian Independence Act. Consequently, the *Bengal* State Prisoners *Regulation* , 1818, as adapted by this Order, remained valid law.

By virtue of subsection (3) of section 491 of the Criminal Procedure Code, the Court's jurisdiction to grant relief in habeas corpus proceedings was barred in cases of detention under the *Regulation* . The application for release filed by Sir Gulab Singh was therefore declared incompetent and dismissed.

The Court did not set any new precedent beyond affirming the validity of the Adaptation Order and the consequent ouster of jurisdiction under section 491(3). The decision leaves intact the executive's wide powers of preventive detention under the adapted *Regulation* , while recognizing the severe impact on personal liberty as a matter for political, not judicial, remedy.

JUDGMENT

Wali-Ullah, A.C.J:— This is an application under **section 491 of the Criminal Procedure Code.** The applicant, Sir Gulab Singh, is the ex-Maharaja, Rewa State. The Rewa State acceded to the Indian Union, in August 1947. On the 20th of May, 1948, the Governor-General passed an order addressed to the Superintendent of Police, Dehra Dun. It is an order passed under the provisions of the *Bengal* State Prisoners *Regulation* , 1818, as adapted by the ***Bengal*** **State Prisoners *Regulation* (Adaptation Order), 1947,** promulgated on the 26th of August, 1947, and directs that Sir Gulab Singh, the applicant, shall be placed under personal restraint at No. 10, Dolialwala, Dehra Dun, and be dealt with in accordance with the orders of the Government and the provisions of the *Bengal* State Prisoners *Regulation* 1818. In pursuance of this order, the warrant of commitment — the applicant is being kept in personal restraint at Dehra Dun. By means of this application it is prayed that the applicant may be set at liberty inasmuch as his detention is contrary to law.

In the application many grounds were set out for attacking the order of detention, but, in the course of arguments, only one main point has been urged. It is to the effect that the provisions of the *Bengal* State Prisoners *Regulation* , 1818, under which the order of detention has been passed, were introduced into the old *Regulation* as it stood prior to the 15th of August, 1947, by means of the ***Bengal*** **State Prisoners *Regulation* (Adaptation Order), 1947,** passed on the 26th of August, 1947. According to the Contention of the learned counsel for the applicant, this Adaptation Order made by the Governor General was a nullity inasmuch as the Governor General had no power to introduce the relevant provisions into the *Regulation* on the 26th of August, 1947. It may be noted here that **sub-section (3) of section 491, Criminal Procedure Code,** inter alia, provides that nothing in the section applies to persons detained under the *Bengal* State Prisoners *Regulation* , 1818. It is obvious, therefore, that if the order of detention of the applicant is covered by the provisions of the *Bengal* State Prisoners *Regulation* , this Court Civil have no power to interfere with it in these proceedings.

The crucial question in the case is whether the ***Bengal*** **State Prisoners *Regulation* (Adaptation Order), 1947,** of the 26th of August, 1947 (hereinafter referred to as the impugned Adaptation Order) is ultra vires of the powers of the Governor General. This Adaptation-Order purports to have been made. “In exercise of the powers conferred on the Governor General by **section 9 of the Indian Independence Act, 1947**, and of all other powers enabling him in that behalf.” Article 1(2) of the Order provides that it is to take effect from the 15th of August, 1947, Article 2 introduces many “adaptations” into the various sections as well as the appendix of the *Regulation* of 1818. In substance, for the words “the discharge of the functions of the Crown in its relations with Indian states” wherever they occur, the words “relations Math acceding states” or words “reasons of State connected with relations with acceding states…” have been substituted. Lastly, **Article 3 of the Adaptation Order** declares that, this Adaptation Order i.e, the Adaptation Order dated the 26th of August, 1947, shall have effect notwithstanding anything to the contrary

contained in the India (Adaptation of Existing Indian Laws) Order, 1947, dated the 14th August, 1947.

In order to appreciate the contentions of the learned counsel, it is necessary, first of all, to refer to the relevant **provisions of the Indian Independence Act. This Act** was passed by British Parliament on the 18th of July, 1947. The main object of it was to set up two independent dominions with sovereign powers. Section 2 of the Act, which deals with the territories of the two dominions, in sub-clause (4), lays down:—

"Without prejudice to the generality of the **provisions of sub-section (3) of this section,** nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions."

Section 7 deals with the consequences of the setting up of the new Dominions. In effect, it provides that the paramountcy over Indian states would lapse and along with it the suzerainty of His Majesty together with all obligations of His Majesty towards the Indian States shall cease. It is also provided that treaties and agreements in force at the date of the passing of this Act shall lapse. It was, however, provided that agreements relating to customs, transit and communications, posts and telegraphs etc. shall continue until such agreements are denounced by the ruler of the Indian State or by the Dominion or Province concerned. **Section 8, sub-clause (2)** inter alia provides:—

"Except in so far as other provision is made by or in accordance with the law made by the Constituent Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that. Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor General under the next succeeding section, have effect accordingly."

Section 9, inter alia, provides:—

'The Governor General shall by order make such provision as appears to him to be necessary or expedient—

(a) for bringing the provisions of this Act into effective operation;

(c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions;

(d), for removing difficulties arising in connection with the transition to the provisions of this Act."

Sub-Section (3) of section 9 provides in effect that section 9 shall have retrospective effect and shall be deemed to have come into effect on the 3rd of June, 1947, and any order of the Governor General or any Governor made on or after that date as to any matter shall have

effect accordingly. Sub- section (5) in effect provides that the Governor- General may exercise the powers conferred upon him till the 31st of March, 1948, or such earlier date as may be determined in the case of either Dominion by any law of the Legislature of that Dominion.

The next relevant **section is section 18. Sub-section (3)** thereof provides:—

"Save otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

Section **19, sub-section (5)** provides:—

"Any power conferred by this Act to make any order includes power to revoke or vary any order previously made in the exercise of that power."

The entire scheme of the Independence Act, to my mind, clearly shows that it is a skeleton Act and merely indicates what the broad features of the new constitutional set up would be. The primary object of British Parliament in enacting this statute, as said above, was to set up two independent and sovereign Dominions. It was, therefore, provided that in the interim period before the two new Dominions could be set up and their Constituent Assemblies could frame new Constitutions for the Governance of the two Dominions, the Government of India Act, 1935, as adapted, or modified, by the Governor General under the powers conferred on him by the Independence Act, would be the basis of the constitution of each Dominion. The framers of the Act appear to have realised that in the transition from the existing machinery of the constitution, as it was in force prior to the 15th of August, 1947, to the emergence of the independent new Dominions, to be set up under the Act, various changes would have to be effected in the existing constitution and in the laws in force in British India prior to the 15th of August, 1947, necessary adaptations would have to be made so as to bring them into accord with the new constitutional position. Again, one vital consideration must have been present in their minds and it was this. The interval between the date when the Independence Act was passed, viz. the 18th of July, 1947, and the date for the ushering in of the two new independent Dominions viz., the 15th of August, 1947, was a very short one. In view of all this, the Governor General of India the high dignitary who was present at the spot and was at the helm of affairs — appears to have been commissioned as the supreme authority to act on behalf of Parliament in effecting these changes and in effectively carrying out the intentions of Parliament as embodied in the Independence Act. Thus the Governor General came to be invested by the British Parliament with very extensive powers of an extraordinary character. **Section 9(1) of the Independence Act** provides that the Governor General shall by order make such provision as appears to him to be necessary or expedient for bringing the provisions of the Independence Act into effective operation and also for removing difficulties arising in connection with the transition to the provisions of that Act. His powers to pass such orders

were to continue up to the 31st of March, 1948, or until such time as the Constituent Assemblies, or new Legislatures, of the two Dominions were able to function and enact laws according to which the Government was to be carried on in the respective Dominions. It is a matter of history that in pursuance of the very wide powers conferred upon him, the Governor General started making orders from the 19th of July, 1947, when the Executive Council (Transitional Provision) Order, 1947, was made. Quite a number of other orders followed in quick succession and all this was done with a view to enable the Dominion form of Government to function from the 15th of August, 1947, in the two newly, created states. Most of these orders were made before the 15th of August, 1947.

It seems to me that in judging the various provisions of the Independence Act, this background must be kept in view. The provisions have, no doubt, to be construed according to the well-established canons of interpretation. In the present case, the one substantial question is whether the Governor-General had power to pass the Adaptation Order of the 26th of August, 1947, and to introduce into the *Regulation* of 1818 the provisions under which the order of detention of the applicant came to be made. The impugned Adaptation Order has been attacked on several grounds. First of all, it has been contended that as no provision for accession of Indian States is to be found in the Independence Act, the adaptation of the *Regulation* of 1818 to bring it into accord with the provisions of the Government of India Act as modified by the Governor General was in excess of the powers of the Governor General. I am not impressed with this argument. The **provisions of the Independence Act, particularly sub-section (2) of section 8,** make it clear that the Government of India Act, 1935, as altered or modified by orders of the Governor General passed under section 9, shall provided the basic constitution for the governance of the two new Dominions in the transitional stage. It seems to me that there is a case of "legislation by reference" and the Government of India Act, 1935, has been, in substance, incorporated in the Independence Act. At any rate, it may be said that both the Independence Act and the Government of India Act are enactments of the same constitutional nature and the two are therefore, supplementary to each other. On the 14th of August, 1947, the Governor General, in exercise of the powers conferred on him, by **section 8(2) and section 9(i)(c) of the Indian Independence Act, 1947, passed the India (Provisional Constitution) Order, 1947,** making numerous additions, omissions, adaptations and modifications in the Government of India Act, 1935, with effect from the 15th of August, 1947. This order was subsequently amended by the **India (Provisional Constitution) Amendment Order, 1947, the India Provisional Constitution and Provincial Legislature Amendment Order, 1947, and the India Provincial Constitution (Second Amendment) Order, 1947,** all of which were given retrospective effect to the same date as the principal order. By means of these amendments, **sections 5 and 6 of the Government of India Act made provision** for the accession of Indian States. Further, in the Seventh Schedule of the Government of India Act, in item 1 of Legislative List No. 1, provision was made for "preventive detention for reasons of state connected with defence, external affairs or relations with acceding States." In part 6 of the Government of India Act which deals with "administrative relations between Dominion, Provinces and States," provision was made in sections 125 and 128 for regulating certain

agreements between the Governor General and the ruler of an Indian State in regard to the relations between the Dominion of India and an acceding State. The net result of all this undoubtedly was that the relations of the Dominion of India with an acceding State were brought within the purview of the appropriate Legislature of the Dominion of India. This was also in consonance with the provisions of the Independence Act itself. Reference may be made here to **section 2, sub-section (4)** where it is provided:—

"Nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions."

It has been contended before us that **Sub-section (4) of section 2** is merely in the nature of a proviso and as such it cannot have the effect of introducing the subject of accession of Indian States when there is no other explicit provision in the Independence Act dealing with that subject. On a close examination of the provisions of section 2 as a whole, it would appear that sub-section (4) is not really in the nature of proviso. It is in reality in the nature of what is called an "enabling provision." The whole object of sub-section (4) was to prevent the possibility of an argument that the definition of boundaries of the two Dominions in the earlier part of section 2 precluded the accession of Indian States. It contemplates the accession of Indian States to either of the two new Dominions after paramountcy and suzerainty of the King over Indian States had lapsed by reason of the provisions of section 7. After an anxious consideration of the whole matter, I have reached the conclusion that the topic "accession of Indian States" is not outside the purview of the Independence Act. As indicated above, in my judgment, the Government of India Act, 1935, as amended by the Governor General, and the Independence Act are inseparably connected with each other and must be read together. Again, it seems to me that **section 18 sub-clause (3)** makes it clear that the laws of British India existing immediately before the 15th of August, 1947, shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions until other provisions are made by the laws of the legislature of the Dominions concerned. The *Bengal* State Prisoners *Regulation* of 1818 was one such law in force immediately before the 15th of August, 1947. On the 26th of August, 1947, when the impugned Adaptation Order was made by the Governor General, the position, in a nutshell, was 'that the Government of India Act dealt with the subject of acceding States and in Item 1, List 1, of the Seventh Schedule, there was explicit provision relating to preventive detention for reasons of State connected with…..relations with acceding States. In this situation, it was necessary to bring the provisions of the old *Regulation* of 1818 into accord with the provisions of the Government of India Act and, in particular, into accord with the provisions of that Act which dealt with the subject of acceding States. The old *Regulation* of 1818 had provided for the "discharge of the functions of the Crown in its relation with Indian States." That was in keeping with the then constitutional position. By reason of the change in the constitutional position in August 1947, it became necessary to adapt the old *Regulation* of 1818 and to substitute for the expression, "the discharge of the functions of the Crown in its relation with Indian States" the words "reasons of State connected with defence, external affairs or relations with acceding States." The Governor General, who had been

enjoined by Parliament under section 9 of the Independence Act to pass orders making such provision as appeared to him to be necessary or expedient for bringing the provisions of the Independence Act into effective operation and who was the only authority indicated in the Independence Act to make the necessary adaptations, was within his powers in making the adaptations that he did in the old ***Regulation*** **of 1818. Section 18(3),** as indicated above, clearly provided for necessary adaptations in the law of British India, existing prior to the 15th August, 1947. It was explicitly laid down that the law of British India including of course the old *Regulation* of 1818, shall continue as the law of each of the new Dominions. It was to continue with necessary adaptations. It has been contended by the learned Advocate General that it would not be a continuance of the *Regulation* if it were to be continued in a mutilated form. It must be continued with corresponding provisions. The extent of the existing law was to remain unchanged but this was subject to adaptations. Would it be "continuing it", if it was not to have along with other provisions, provisions relating to relations with acceding States? It seems to me, therefore, that the Governor General in making the adaptations in the *Regulation* of 1818 as he has done by the impugned Adaptation Order was well within his powers.

Learned counsel for the applicant has contended that on the 14th of August, 1947, the India (Adaptation of Existing Indian Laws), Order, 1947, was promulgated by the Governor General. It was promulgated in exercise of the powers conferred upon him by **section 9(1) read with section 18(3) of the Independence Act. Article 7** of that. Adaptation Order provided as follows:—

"Any reference in an existing Indian Law to the exercise of the functions of the Crown in its relation with Indian States (including any provision the operation of which depends on the exercise of such functions) shall be omitted, and reference in any such law to the Crown representative shall be omitted or construed as reference to the Central Government as the context may require."

In view of this provision of article 7 of the Adaptation Order, it has been contended by the learned counsel for the applicant that on the 26th of August, 1947, when the impugned Adaptation Order was passed, there was no reference left in any existing Indian law e.g, the *Regulation* of 1818, to the exercise of the functions of the Crown in its relation with Indian States. The argument is that this being the position the impugned Adaptation Order of the 26th August, 1947, was meaningless when it sought to amend the *Regulation* of 1818 by substituting for the words from "reasons of State" to "internal commotion", the words "reasons of State connected with defence, external affairs or relations with acceding States or with the maintenance of public order." Similarly, so it is contended, the substitution of the words, "relations with acceding States" for the words, "the discharge of the functions of the Crown in its relations with Indian States" was meaningless. This is no doubt a very plausible argument, but on close analysis, it seems to me that it is devoid of substance. I may here refer to the **provisions of section 19(5) of the Indian Independence Act** which puts it beyond dispute that the power of the Governor General under the Independence Act to make any order includes the power to revoke or vary an order previously made in the exercise of that power. The impugned Adaptation Order made

on the 26th of August, 1947, therefore, must be considered to have been made in virtue of the **provisions of sub-section (5) of section 19 of the Independence Act.** The impugned Adaptation Order may be considered to have revoked to some extent or, at any rate, varied, the India (Adaptation of Existing Indian Laws) Order, 1947, dated the 14th of August, 1949. Furthermore, article 3 of the impugned Adaptation Order of the 26th of August, 1947, has expressly provided that the provisions of this./ Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947. The contention of the learned counsel, therefore, is, to my mind, without any force.

Again, learned counsel has contended that the impugned Adaptation Order of the 26th of August, 1947, in effect, makes an adaptation of an adaptation. The argument is that, in the first instance, the *Regulation* of 1818 was adapted on the 14th of August, 1947. When it was sought to be adapted again on the 26th of August, 1947, the later adaptation was nothing but adaptation of an adaptation. Here again, it seems to me, the argument is without force. In reality what happened on the 14th of August, 1947, was that the old *Regulation* of 1818 was adapted in a certain way. A few days later i.e on the 26th of August, 1947, when the impugned Adaptation was made, it was in reality an adaptation of the same old *Regulation* of 1818. Strictly in the, eye of law, there was nothing improper, though it seems that the adaptations made on the 14th of August, 1947, when all reference to the subject of Indian States was omitted, was perhaps a step taken when the attention of the Governor General was not directed to the question of "relations with acceding States." It was on the 26th of August 1947 that for the first time the Governor General directed his attention to the question of "relations with acceding states" and adapted the *Regulation* of 1818 by means of the impugned Adaptation Order. It may be added that the "White Paper on Indian States" makes it clear that it was never intended that there should be a hiatus re the topic of Indian States in the transition period. It is also clear from it that the Indian States Department came into existence on the 5th of July, 1947. In interpreting a constitutional statute it is permissible to refer to the white paper of Government as a matter of history. This was made clear by Gwyer, C.J In re C.P and Berar Sales of Motor Spirit and Lubricants Taxation Act(1).

Some arguments have been addressed to us as regards the meaning of the word "adaptation" as it occurs in the expression "the necessary adaptations" in **sub-section (3) of section 18 of the Independence Act.** The word "adaptation" is not denned in section 19 of the Act. It must, therefore, be understood in the sense in which it is explained in the authoritative dictionaries of the English language. According to Websters Dictionary Vol. 1 the word "adaptation" carries with it the idea of modification for new uses or a change in form or structure. According to Murray's Dictionary, Vol. 1, the meaning to be assigned to "adaptation" is this:

"Process of modifying a thing so as to suit new conditions." According to the Shorter Oxford English Dictionary, one of the meanings assigned to the word "adaptation" is the process of modifying so as to suit new conditions. It may be mentioned here in passing that the **provisions of article 10 of the India (Adaptation of Existing Indian Laws) Order,**

1947, dated the 14th of August, 1947, would indicate that the notion conveyed by the word "adaptation" is that of rendering the existing law consistent with the **provisions of the Indian Independence Act, 1947, and of the Government of India Act, 1935,** as applicable to the Dominion of India. Reference may also be made to **section 293 of the (unamended) Government of India Act, 1935,** where the expression "adaptations and modifications" occurs and it conveys the same idea of rendering a particular law consistent with the provisions of the principal Act. In the light of the above, the expression "necessary adaptations" in **section 18(3) of the Independence Act** must mean alterations of the phraseology of an enactment in order to bring the enactment into accord with the changed constitutional position. Judged by this standard the provisions introduced into the old *Regulation* of 1818 by the impugned Adaptation Order of the 26th August, 1947, do not, in my judgment, travel beyond the scope of "Adaptations".

Lastly, I shall briefly deal with an argument of the learned counsel for the applicant to the effect that the impugned Adaptations Order is bad for the reason that it gives power of arbitrary detention to the Governor General whereas according to entry 1 of List I of the Seventh Schedule of the Government of India Act, 1935, as adapted, the Governor General can keep a person only in preventive detention. The *Bengal* State Prisoners *Regulation* , 1818, undoubtedly gives very extensive powers to the Governor General for placing under personal restraint individuals against whom there may not be sufficient grounds to institute any judicial proceedings or when such proceedings may, for other reasons, be considered (inadvisable or improper, but that is no ground for contending that the detention of a person under the *Regulation* is merely "arbitrary detention" as distinct from "preventive detention." The *Regulation* itself indicates various reasons for which a person may be detained. It is true that the sufficiency of the reasons witch may move the Governor General to order detention is a matter left to his own discretion. The presumption is that the powers given by the *Regulation* will be used only for good reasons and that the head of the Executive Government would satisfy himself about the existence of the reasons set out in the *Regulation* before issuing a warrant of commitment. I may add that there is nothing novel about such a power being vested in the head of the Executive Government. Reference may be made to very similar **provisions in the Defence of India Act** as also in the Public Safety Acts passed by many Provincial Legislatures in the country. In such cases the sufficiency of the reasons for detention of an individual has been left entirely to the executive authority ordering detention. The nature of detention provided for in the *Regulation* cannot be said to be different from "preventive detention." In substance, in regard to Indian' States, what the *Regulation* provides is that a person who acts in a manner which may embitter relations between the Dominion of India and an acceding State may be placed under personal restraint. I fail to see how such a detention is different from "preventive detention." It may be that the powers given to the executive to issue orders of personal restraint against individuals are very wide and it may be said that, the *Regulation* as it stands may enable the executive to make serious inroads on the liberty of a citizen, but it should not be forgotten that the *Regulation* has remained on the statute book for more than a century without any attempt on the part of the Legislature to circumscribe limits within which the power of detention is to be exercised. It has also been

preserved on the statute book as an existing Indian Law, both by the **Government of India Act, 1935, and the Indian Independence Act, 1947.** I may add that even in these proceedings, the gravamen of the attack by the learned counsel for the applicant has been the adaptations made in the old *Regulation* of 1818 by the Adaptation Order and not the amplitude of powers of detention as conferred on the Governor General by the old *Regulation* of 1818. Once the Adaptation Order, after careful scrutiny, is found to be within the competence of the authority making the adaptations i.e the Governor General, the adapted *Regulation* of 1818 must be held to be perfectly valid. And as soon as this conclusion is reached **sub-section (3) of section 491 of the Code of Criminal Procedure** comes into play and ousts the jurisdiction of the High Court to afford any relief in the nature of habeas corpus. We cannot, therefore, grant to the applicant the relief prayed for.

The result, therefore, is that the application is incompetent and must be dismissed.

Sapru, J.:— This is an application under **section 491 of the Code of Criminal Procedure**, praying that this Court may be pleased to order the applicant's production in this Court and after such inquiry as may be necessary, set him at liberty.

The applicant is the ex-Maharaja of Rewa State which was before the 15th August 1947 an Indian State in the Central India Agency, subject to the paramountcy of the British Crown. He was arrested at Allahabad. The warrant of arrest under which he was arrested purports to have been issued under the *Bengal* State Prisoners *Regulation* , *III* of 1818 and is dated the 20th May, 1948. It is addressed to the Superintendent of Police, Dehra Dun, and runs as follows:—

“Whereas the Governor General, for good and sufficient reasons, being reasons connected with relations with acceding States has seen fit to determine that Sir Gulab Singh, Ex-Maharaja of Rewa, shall be placed under personal restraint at No. 10 Dolialwala, Dehra Dun, you are hereby required and commanded in pursuance of that determination to receive the person above named into your custody and to deal with him in accordance with the orders of the Government and the provisions of the *Bengal* State Prisoners *Regulation* , 1818.”

Under section 491(3) this Court has no power to issue directions in the nature of a writ of habeas corpus in the case of a person detained under the *Bengal* . State Prisoners *Regulation* , 1818 and other similar **Regulations as the Madras *Regulation* , II of 1819, Bombay *Regulation* XXV of 1927, the State Prisoners Act, 1850, or the State Prisoners Act, 1858.** It is well settled that the power of this Court to entertain an application in the nature of habeas corpus is governed by **section 491 of the Code of Criminal Procedure** and that we have no power, independently of that section, to entertain habeas corpus applications. It is, therefore, obvious that in order to enable this Court to exercise the powers that it enjoys under **section 491, Criminal Procedure Code** the applicant must satisfy that the provision of the *Bengal* State Prisoners *Regulation* , 1818, which had been applied to him, was an invalid provision and for that reason must be disregarded by this Court. It is not until this *Regulation* or the part under which Sir Gulab Singh is stated to have been arrested under the warrant is shown to be ultra vires of the

powers of promulgating Adaptation Orders which the Governor General enjoyed under the. Independence Act that this Court can interfere under **section 491 of the Code of Criminal Procedure.** The *Bengal* State Prisoners *Regulation* , 1818' was passed by the Vice-President in Council on the 7th of April, 1818. The objects for the achievement, 6th which this *Regulation* was intended are stated to be in these terms by section 1 of the *Regulation* , part of which is reproduced below:—

"Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint, individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper;…"

Section-II which prescribes the mode of procedure for placing individuals under restraint as state prisoners reads as follows:—

"When the reasons stated in the preamble of this *Regulation* may seem to the Governor General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed."

On the 26th August 1947 the Governor General passed an Adaptation Order in the exercise of the powers conferred on him by **section 9 of the Indian Independence Act, 1947**, and of all other powers enabling him in that behalf, which, is called the ***Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947**. It was to have effect from the 15th day of August, 1947, which was the appointed day for the ushering in of the two new Dominions. The important changes from the point of view of this case which were made by the Adaptation Order were that in section I for the words from "reasons of State" to "internal commotion", the words "reasons of State connected with defence, external affairs or relations with Acceding States or with the maintenance of public order" were substituted. Also in the third paragraph of **section 2 and in sub-section (1) of section 7-A** for the words "the discharge of the functions of the Crown in its relations with Indian States" the words "relations with Acceding States" were substituted. The main contention of Mr. Pathak is that the Governor General went beyond the powers given him under the Indian Independence Act for adapting existing British Indian laws, inasmuch as he included among the reasons for which a person could be detained reasons connected with relations with Acceding States. This argument is based upon, the supposition that the Indian Independence Act has not provided for the accession of Indian States to the Indian Dominion, though it is conceded that there is in it a "savings clause" that nothing in the Act would prevent the accession of Indian States. It was contended that Parliament had not deliberately provided for the accession of Indian States as the object of the Act it had

passed was merely to create two Dominions out of the areas which were formerly comprised in British India. It is urged that for the achievement of this objective, it was not necessary for it to lay down any specific provisions or machinery for the accession of Indian States.

Before considering this and other arguments which were advanced on behalf of the applicant, a few facts relating to the position of Rewa may be given. It appears that Rewa was one of the States which acceded to the Indian Union on the 16th of August 1947 by an instrument of accession which transferred its authority over defence, external affairs and communications with sovereignty in regard to all other subjects remaining vested in the Rewa State itself. By a covenant signed by the Rulers of certain States of which Rewa was one, the union called Vindhya Pradesh was formed on the 13th March, 1948. By this covenant, the States which were parties to it agreed to unite their territories into one state with a common executive, legislature and judiciary. They further declared that they were entrusting to a constituent assembly consisting of elected representatives of the people, the drawing up of a democratic constitution for the newly created state within the frame work of the constitution of India to which they declared they had acceded. The Government of India concurred in the above covenant and guaranteed all its provisions on the 4th April, 1948. The position, therefore, was that on the date of applicant's arrest. Rewa had acceded first as an individual State and later as part of the Union of Vindhya Pradesh to the Indian Union.

I approach the consideration of the difficult questions which this case raises “with the anxiety” which Gwyer, C.J, in the case of **Keshav Talpade v. Emperor**, observed, “which a Court of justice must always feel where the liberty of the subject is concerned”. Clearly it is our duty in a case of this nature to see that the executive Government is not allowed to exceed the powers which Parliament has thought fit to confer upon it. Undoubtedly the *Regulation* is drastic in its nature and scope and one of the points urged is that it is as a matter of actual fact, inconsistent with the notion of preventive detention which is the only kind of power which the Legislature possesses of passing laws directing arrests without trial. The argument that was addressed to us on behalf of the applicant was that there was a distinction between preventive detention and arbitrary or punitive detention and as the adaptation had been made after 1935, it must be held to have contravened the provisions of the Government of India Act, inasmuch as under that Act *Regulation III* of 1818 which was allowed to continue as an existing enactment, could not have been enacted even by the supreme legislature of the land. It was urged that it was obvious that the Governor General's power could not exceed those of the supreme legislature. I propose to consider this and cognate arguments in a later part of this judgment.

The Indian Independence Act received the assent of the King on the 18th July 1947 and certain parts of it were made retrospective with effect from the 3rd June, 1947. The Governor General was by section 9 of the Act given certain powers to make such provision by orders as appears to him necessary or expedient for the purposes enumerated in that section. The Indian Independence Act is a constitutional statute of the very highest importance, for it effected a silent revolution in the machinery by which this country was

governed until the 15th August, 1947. For the purposes of understanding the point which has arisen in this case, it is thus essential to have a correct appreciation of the scheme of the Act and its main provisions.

Before the Independence Act, there were two Indias, one directly administered by the Crown and the other comprising Indian States of varying sizes and importance, which had either by subsidiary alliances or treaties or sanads or agreements accepted, in the course of time, the suzerainty of the British Crown. They had direct, relationship with His Majesty's Government, i.e the British Cabinet, through the Crown Representative who was also the Viceroy and the Governor General of British India. In fact, it was the Government of India Act, 1935, which for the first time took away from the Government of India powers connected with the exercise of the functions of the Crown in its relations with Indian States and placed them under the authority of persons acting under the authority of His Majesty's representatives. The Government of India Act, 1935 itself did not establish federation. It merely provided that a federation under the Crown by the name of Federation of India could be constituted by proclamation made by His Majesty, if certain conditions were fulfilled. The federating units were to be (1) British India Governor's provinces and the Chief Commissioner's provinces and (2) Indian States which had acceded or might accede to the federation. Before the proclamation promulgating federation could be issued, two conditions had to be fulfilled, namely, (1) an address in that behalf must have been presented to the King by each House of Parliament, (2) Rulers who were entitled to not less than half the seats to be allotted to the States in the Federal Upper Chamber and also representing at least one-half of the population of the States must accede to the federation. Thus federation made dependent upon the willingness of a certain number of States to join it. If the required number of States was not forthcoming, federation could not materialize. The scheme of the Act clearly shows that there was a difference between the status of the Provinces and the States. The Provinces were automatically to come under the federation. There was no question of any option in their case. It was, however, optional for the States to join the federation or not. The federal Government was to have, in regard to a State, authority specifically delegated by duly executed instruments of accession only in respect of subjects to which it was acceding and this too qualified, however, by any reservations or safeguards laid down by the state concerned in its instrument of accession. With subjects other than those included in the instrument of accession the federation was to have no concern. The authority of the States in regard to subjects not transferred to the federal legislature was thus to emain vested in the States, subject to the paramountcy of the British Crown. It was further provided that certain matters of a comparatively minor character would be amendable as they were not of such a nature as to affect the accession of the States. So far as other matters were concerned, they were of a nature which would affect the accession of the States, as laid down by the terms of their Instruments of Accession and it was contemplated that they should not be changed even by the British Parliament unless all the States agreeing to join the Federation had agreed to do so. There was a list of about 59 subjects which were federal. It was not necessary, as stated before, for a state to join in regard to all the subjects included in the list. But if the list was unsatisfactory or inconsistent with the scheme of federation, then the Crown could reject it and in this way it

was expected that the Crown would be able to secure some measure of uniformity. States not joining the federation might do so thereafter, but if a state remained outside the federation for 20 years, then it might not be able to join it until such request had been presented to His Majesty by each Chamber of the Federal Legislature and His Majesty had thereupon been pleased to admit it. The number of subjects included in the Instrument of Accession could be increased by a state joining the federation by supplementary Instruments of Accession. The authority of the federal legislature to legislate in regard to a state was to be determined, as has been pointed out before, by the Instrument of Accession of that state. In other words, it could legislate for the State concerned only to the extent to which it was permitted to do so by the Instrument of Accession of the State. Each Governor General was to receive an Instrument of Instructions which would contain directions as to the way in which his functions were to be exercised. This instrument was to be approved by each House of Parliament. There were three lists provided, federal, concurrent and provincial. The States had nothing to do with the concurrent and the provincial lists. In regard to the federal list, the authority of the federation was to extend only to subjects allotted to it by the Instrument of Accession executed by the State. Defence and external affairs were reserved subjects and were to be administered by the Governor General with the assistance of councillers appointed by him. The executive authority of the province was to be vested in the Governor who was to exercise it, save in matters which were within his discretion or subject to his special responsibilities, on the advice of ministers responsible to the legislature. The Governor General had certain special responsibilities assigned to him under the Act. Both he and the Governor could act in their discretion or in their Individual judgment in a certain class of cases. The Governor General and the Governors were thus responsible, in the ultimate analysis, to the Secretary of State who was to be the minister of the Crown responsible for India to the British Parliament. The position, therefore, was that the general control of the Secretary of State over the Governor General, and through the Governor General over the Governors, was practically retained over the whole field of administration, particularly as both the Governor General and the Governors had, apart from the other powers, referred to before, the power of suspending the entire constitution. There were other powers too in regard to the services which were reserved to the Secretary of State.

I have invited attention to the main provisions of the Government of India Act, 1935 to show that it did not confer independence on India and was not, indeed, intended to free India from the general superintendence and control of the Secretary of State.

The object of the Independence Act was however, quite different. It was to provide for the establishment of two independent Dominions. Section 2 defined the territories of the two Dominions by including in the Indian Dominion territories which were included in British India, except those which under sub-section (2) of that section were to be the territories of Pakistan. Sub- section (3) provided the method whereby the territories of the two Dominions which were carved out of what was formerly British India could be either contracted or expanded. It was further made clear by sub- section (4) that it would be permissible for India States to accede to either of the two new Dominions. Section 6

conferred extra-territorial jurisdiction on the new Dominions and sub-section (2) of that section laid down that—

"No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or in operative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or *regulation* made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or *regulation* in so far as it is part of the law of the Dominion".

In other words, the **Colonial Laws Validity Act of 1864** was not to apply in regard to Parliamentary Legislation so far as this country is concerned. It was further provided by sub-section (5) that

"No Order in Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion."

It is clear from a recital of these provisions that the fullest independence was conceded to the two Dominions which had been brought into existence by the Indian Independence Act. Necessarily the inference to be drawn from the Independence Act is that the intention of the British Parliament was to effect a complete withdrawal of its authority over India. As Parliament was terminating its authority, it became obviously impossible for it, consistently with the notion of an independent India, to continue to carry out or discharge the many obligations and responsibilities that it had undertaken, as the paramount power, in relation to the Indian States. The solution that commended itself to the British Parliament was that it should declare [vide section 7(b)] that—

"the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercising by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise."

There were provisions also in regard to lapse of authority of His Majesty over the tribal areas and an important provision regarding standstill agreements. **Section 7(c)** runs as follows:

"There lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligation of His Majesty existing, at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise:

Provided that, notwithsatnding anything in paragraph (b) or paragraph (c) of this section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements."

It may be noted that the King ceased to be Emperor of India by section 7(2) of the Act.

The withdrawal of British authority from India was not to be dependent upon the linking up of the rulers of States with one or the other of the two Indian Dominions. The British Parliament took the view that, after the attainment of independence of those a portions of the country which were subject to the direct control, in the ultimate analysis, of the Secretary of State, it would be impossible for the Crown to discharge the obligations that it had undertaken in relation to the States by treaty, grant, usage, sufferance or otherwise. Had, Britain continued to function through the Indian States, the independence conceded to India would have been of a farcical character. One of the major defects, from the point of view of India's evolution to an independent status of the plan embodied in the Government of India Act, 1935, was that it had neither transferred paramountcy to an authority responsible to the people of this country, nor visualised its ultimate disappearance on the attainment by India, of Dominion independence. The framers of the Indian Independence Act, therefore, looked upon the withdrawal of suzerainty from the Indian States and the Tribal Areas as a necessary consequence of the declared intention of Parliament to divest itself, of all control over Indian administration. It was however, recognized that it would be impossible even after the establishment of full responsible Governments in the two Dominions and the lapse of suzerainty which the Crown was exercising over the Indian States, for the two Dominions and the Indian States to live together without some sort of a working relationship. It was for this reason that a so called proviso was added to paragraphs (a), (b) and **(c) of section 7 of the Indian Independence Act,** continuing the provisions of agreements relating to customs, transit and communications, posts and telegraphs or other like matters, until they were repudiated either by British India or States or denounced by the Rulers of the Indian States or persons having authority in the Tribal Areas or replaced or superseded by subsequent agreements. The importance of the so-called proviso to section 7 is that, in substance, it did enact the continuance until a contrary decision was taken by either of the Dominions concerned or the Ruler of the Indian State over whom suzerainty had been removed, of what have come to be popularly known as Standstill agreements. Some sort of organic relationship between the States and the two Dominions was thus visualized by the framers of the Indian Independence Act.

That it would have been impossible for the New Indian Dominions to function satisfactorily without developing some organic relationship with the 562 States which constituted, as it were, little islands on the map of India should be manifest to any one who has the slightest acquaintance with how governments function. If either the Indian Government or the Rulers had taken the line that no relationship was necessary after the

establishment of responsible Government in the Indian Dominion and the lapse of suzerainty of the British Crown over the Indian States, the drift towards anarchy and chaos would have been irresistible. Courts hesitate to interpret Parliamentary Statute in a manner which would impute unreasonableness to Parliament. For that proposition high authority is forthcoming. I am fortified in this view by the fact that, not only is there a provision in the Indian Independence Act for the standstill agreements but that also under **section 2(4) of that Act, accession of Indian States** to either of the new Dominions is neither prohibited nor ruled out.

It was urged that it would be contrary to rules governing the interpretation of statutes to import legislation from a proviso into the body of the statute. Reference in this connection was made to two cases in which certain observations were made regarding the exact nature of provisos. In the first of them, namely, **West Derby Union v. Metropolitan Life Assurance Society**, it was observed by Lord Waston that:—

"… If the language of the enacting part of the 1statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words."

In the second case, **Bretherton v. United Kingdom Totalisator Company**, Ltd. (2) in which the question before the Divisional Court was whether a competition in which prizes were offered for forecasts of the result of future events, to wit, football matches which had not then been played was contrary to **section 26, sub-section (1) of the Betting and Lotteries Act, 1934,** it was held that it was a competition and that the proviso could afford no defence to the charge, as it had no application widen the competition was conducted through a newspaper. In dealing with the question of the general nature of provisos, Lord Goddard quoted in that case with approval Lord Hershell and observed as follows:

"A proviso is not to be construed as an enacting provision enabling something to be done which is not to be found in the statute itself.

…. It may be used as a guide between two possible constructions of the words to be found in the statute, or it may be inserted, as is sometimes the case, ex abundanti cautela, to prevent a possible construction which was not intended being placed upon other provisions."

With reference to the Cases which I have discussed above. I may point out that according to Craies on Statute Law, Fourth Edition by W.S Scott, page 197, the position is as follows:

"But sections, though framed as provisos upon preceding sections, may contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before, 'When one finds a proviso to a section' said Lush, J., in **Mullins v. Treasurer of**

Surrey , 'the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso'."

I have referred to the above two cases and Mr. Craies on Statute Law in order to make the argument which was advanced by Mr. Pathak perfectly clear. I am satisfied that neither section 2(4) nor the second part of **section 7 of the Indian Independence Act** is in the nature of a proviso. Though the second part of section 7starts with the word "provided", yet what has to be looked for is not the form but the substance. If we bear this in mind, there is no doubt that it continues a form of relationship in certain matters between Indian States and the Indian Government, though that relationship was to be terminable or alterable by either party. I am also satisfied that the object of section 2(4) was, in view of the fact that there had been a division of the country, to lessen possible controversies between the two Dominions by laying down as a principle of the Constitution that it would be open to the rulers of Indian States, free from suzerainty, to join either of the Dominions. It is important to bear in mind the basic fact that section 2(4) starts with the words "Without prejudice to the generality of the provisions of subjection (3) of this section." This shows that these words constitute, as it were, the governing words of the section. I am satisfied in my mind, that **sub- section 2(1) of the Indian Independence Act** is not a proviso and that this is clear from its opening words which are "Subject to the **provisions of sub- sections (3) and (4) of this section** " which define the territories of the two Dominions. The view that I take is that this sub-section is an enabling one which has not been inserted in the Act by way of extra caution, but which lays down a substantive principle of the constitution in so far as Indian States are concerned.

Of one thing there is no doubt whatever. Accession was not prohibited by the Indian Independence Act. Any such prohibition would, indeed, have been a limitation upon the sovereignty which the British Parliament was conferring on the New Dominions and would have amounted to an assertion of authority over States which were being, freed from the suzerainty of the British Crown. After conceding independence to India and freeing the Indian States from its suzerainty, Parliament could not set limits to the full sovereignty which it had given to the Indian Dominion or the choice which it had conceded to the States. It was for the States freed from suzerainty to negotiate such terms as they could with the Indian Dominion and vice versa.

The Government of India Act, 1935, was based upon a recognition of the fundamental fact that the Constitution of India could only be a federation which would comprise both the States and the territories directly administered by the Crown. After that Act had been placed upon the statute book, it became essential for Parliament to go to the fullest extent that it could so far as transfer of authority to the people of India was concerned and this even before the part relating to the federal centre could be brought into effect. This it did by establishing two independent Dominions and freeing the Indian States from its suzerainty. Parliament was not prepared to wait for the termination of British authority until a Constitution had been drawn up by this country, a partition of which had, in its opinion, become inevitable: During the period that the two Dominions were framing their Constitutions, it was obviously essential for them to possess a working Constitution. This

was provided for them by the Government of India Act which bereft of the clauses, qualifying and limiting the measure of autonomy conceded to the federal and provincial Governments, was a sufficiently elastic instrument for enabling the functioning of an effectively responsible type of Government. After all, the clauses of the Act, which ran counter to the concept of independence, were those which denied the right to the Indian Legislature of changing the Royal Titles Act or made Parliamentary Legislation intended to apply to Indian Prevail over Legislation passed by the Indian Legislature or vested the Governor General and the Governors subject to the control of the Secretary of State, with special powers exercisable by them in their discretion or individual judgment or limited the extra- territorial jurisdiction of the Indian Legislature or its power to amend the Constitution in any way it chose. Even if all these changes had been effected, India could not be effectively independent until British suzerainty over Indian States was removed. The view which prevailed with the Parliament was that it was for the Indian people to decide the system of Government under which they shall live. Parliament also made it clear by section 8 as also by the opening words of **section 10 of the Indian Independence Act that the Government of India Act,** shorn of those features which militated against the concept of independence and made the governments of the two countries subject to the control of the Secretary of State, was to continue to provide a Constitution for the country for the interim period until modified by the Legislature or by the Governor General in the exercise of powers vested in him. Even for the period that the Constitution was being framed, the Government of India Act was made amendable by the Governor General under the powers given to him under **section 9(c)**.

The argument that has been advanced is that the Government of India Act did not by virtue of the Indian. Independence Act become a part of that Act and that, since the adaptation of British Indian Laws could only be to the **Indian Independence Act, the provisions of the Government of India Act** should not be taken into consideration in deciding the question whether the adaptation order under which the ex-Maharaja is being detained is valid or not.

I propose to consider this argument a little closely. **Section 18(3) of the Indian Independence Act** lays down what the position in regard to the existing laws was to be. That section runs as follows:

“Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.”

In order that there might not be a complete breakdown in administration, it was essential that existing British laws should continue. A revolutionary change had taken place in the constitution of the country. The country had been divided and from a semi-dependency had become a sovereign state within the Commonwealth of Nations. It followed, therefore, as a matter of logic that the problem of bringing existing British Indian laws into conformity

with the changed constitutional status of India could not be ignored. Before I discuss the main argument that has been advanced on the point referred to above, I should like to make a few observations about the scope of an adaptation order. On consulting the Encyclopedia Britannica, 4th Edition, Vol. I, page 160, I find that the following explanation is given of what "adaptation" means. I quote it below:

"Adaptation, a process of fitting, or modifying, a thing to other uses, and so altering its form or original purpose."

According to Shorter Oxford English Dictionary, one of the meanings assigned to the word "adaptation" is the process of modifying so as to suit new conditions. It carries with it the idea, according to Webster's Dictionary, Vol. 1, of modification for new uses or a change in form or structure. According to Murray's Dictionary, Vol. I, the meaning to be assigned to adaptation is this. "The process of modifying a thing so as to suit new conditions." From a perusal of **section 10 of the Indian (Adaptation of Existing Indian Laws) Order, 1947,** dated the 14th August, 1947, the notion conveyed by the word "adaptation" is that of rendering the existing law consistent with the **provisions of the Indian Independence Act, 1947, and of the Government of India Act, 1935,** as applicable to Dominion of India. The idea that an adaptation order, when used with reference to a law, means rendering that law consistent with the provisions of the principal enactment is also borne out by a reference to section 293 of the Government of India Act, 1935. I think, however, that, having regard to the meaning which is deducible from a perusal of both section 293 of the Government of India Act, 1935 (which incidentally also used the word "modification" along with "adaptation") and **section 10 of the India (Adaptation of Existing Indian Laws) Order, 1947,** it would not be incorrect to say that the purpose of an adaption order in the context in which it is used is to bring into accord the provisions of an immediately existing British Indian Law with the provisions of the Indian Independence Act. What those provisions are and whether they can be read with the Government of India Act, 1935, is a separate matter which I shall consider a little later. It is certain that an adaptation order in the sense in which it is used cannot, for example, take into consideration the political or economic situation existing at any particular time and bring an existing law into harmony with the news of that situation. It can be used only and this is a point which I wish to emphasise for bringing the law into conformity with a changed constitutional status and nothing more in other words, only changes of form and not of substance in existing British Indian Laws could be brought about by an adaptation order. Section 18(3) merely laid down what the position in regard to existing British Indian Laws was to be. In order to find out the authority who could make the adaptation order, we have to seek the assistance of **section 9(1). Section 18(3)** has, therefore, to be read in conjunction with section 9(1). Section 9(1) is a long section and the parts on which argument has centred are given below:

"(1) The Governor General shall by order make such provision as appears to him to be necessary or expedient—

(a) for bringing the provisions of this Act into effective operation;

(c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council; rules and other instruments made thereunder, in their application to the separate new Dominions:

(d) for removing difficulties arising in connection with the transition to the provisions of this Act."

With the other clauses of this section we are not directly concerned. **Section 9(1)(c)** has to be read with section 8(2) which, subject to the provisos, enacts as follows:

"(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and Other instruments made thereunder, shall so far as applicable, and subject to any express provisions of this Act, and with such omissions, adaptations and modifications as may be specified in orders of the Governor General under the next succeeding section, have effect accordingly;"

The power of passing orders which is exercisable by the Governor General under section 9(1) operated from the 3rd June, 1947, i.e, some time prior to the establishment of independence and could be made retrospective under section 9(3) from any date within 3rd June, 1947. This power of making provincial orders was to last until the 31st of March, 1948 or such earlier date as may be determined in the case of either Dominion by any laws of the Legislature of that Dominion. This is apparent from sub-section (5) of **section 9 of the Indian Independence Act**.

On the 14th August, 1947, certain amendments were made to the **Government of India Act by the India (Provisional Constitution) Order, 1947,** by the Governor General in the exercise of the powers conferred on him by **sections 8(2) and 9(1) (c) of the Indian Independence Act, 1947.** We are only concerned with the amendments to **sections 5 and 6 of the Government of India Act** and to List I, Item 1. The amendment to section 5 runs as follows:

"The Dominion of India established by the Indian Independence Act, 1947, shall, as from the fifteenth day of August, 1947, be a Union comprising—

(a) The provinces hereinafter called Governors' Provinces;

(b). The Provinces hereinafter called Chief Commissioners' Provinces;

(c) The Indian States acceding to the Dominion in the manner hereinafter provided; and

(d) Any other areas that may with the consent of the Dominion be included in the Dominion."

Section 6 of the Constitution Act lays down the method of accession to the Indian Dominion. Shortly put, it was to be by an instrument of accession specifying the matters which the Ruler accepts as matters with respect to which the Dominion Legislature may

make laws for the State, and the limitations, if any, to which the power of the Dominion Legislature to make laws for the State, and the exercise of the executive authority of the Dominion in the State are respectively to be subject. It was further open to the Ruler of an Indian State, by a supplementary instrument executed by him and accepted by the Governor General, to vary the instrument of accession of his State by extending the functions, which by virtue of that instrument were exercisable by any Dominion authority in relation to his State.

I have quoted these Orders as they conclusively go to show that on the 15th of August, the term "India" included the acceding States and the main provisions of the Government of India Act in regard to accession of States had, with such alterations as the changed circumstances of India had necessitated, become a part of the Indian Constitution. The express provisions of the Act in regard to the Government of India Act which were to be held null and void are specified in **sub-sections (a), (b), (c), (d) and (e) of section 8(2).** It may be mentioned that the opening words of section 10(2) which deals with the Secretary of State's services, are that the provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act, relating to appointment to the Civil Services. This **section read with section 8(2) and section 9(c)** conclusively demonstrates that it was not the intention if Parliament that the Government of India Act should of deemed to be completely repealed and that it was, in fact, continued in force as laying down the constitution of this country, except in so far as the grant of independence had necessitated an express direction that certain provisions of it should be deemed to have been repealed or the power of amending, modifying or adapting it had been given to the Governor General or the Legislature competent to act in that behalf I have referred to the opening words of section 10 as they throw considerable light on the intention of the British Parliament.

To sum up, I am firmly of the opinion that the effect of sections 8, 9(1) and the opening part of section 10 read together is that there was no total repeal of the Government of India Act, that it was indeed, on the other hand, contemplated that the Act would, subject to modifications and adjustments, which had become essential on account of the establishment of the two Dominions continue in force as adapted or modified by the Governor General under **section 9(d)** as the law of the constitution of the two Dominions; and that the Indian Legislature could pass any law it chose repealing, modifying or amending the Government of India Act. For this reason, it strikes me that the correct view to take, is that the Government of India Act became by, what may be called, legislation by reference, in the widest sense of the term, part of the Indian Independence Act, subject to the qualifications which I have enumerated above.

On the notion of legislation by reference, I may be permitted to quote from the well-known book of Sir Courtenay Ilbert on "Legislative Methods and Forms" (Oxford Classedan Press, 1901), page 254. The learned writer says:

"Referential Legislation, or legislation by reference, is a favourite subject of invective with cities of parliamentary procedure. But the phrase has more than one meaning, and it may be worth while to consider the different senses in which it is employed. In its widest sense

it includes any reference in one statute to the contents of another. In a narrower sense, it means the application, not by express re-enactment, but by reference, of the provisions of one statute to the purposes of another."

With the controversy whether legislation by reference constitutes, from the point of view either of the Judge or lawyer or general public, a good method of legislation, we are not concerned. The point that emerges from the quotation which I have cited above is that referential legislation whether in its wider or narrower sense, means any reference in one statute to the contents of another or the application by reference of the provision's of one statute to the purposes of another.

Mr. Craies, in his book on "Statute Law", Fourth Edition, by W.S Scott, page 26 defines legislation by reference as consisting of any reference to parts of several Acts, some of which are repealed, some amended and others kept alive, subject to the provisions of the amending Act. It is perfectly true that the Government of India Act is not an amending or consolidating statute. Nevertheless, it is a statute which deals with the question of the transfer of authority from Parliament to the Indian people. It may be pointed out that the object of the Government of India Act was a federation of India with an extremely restricted authority and with ultimate control of the British Parliament remaining vested in the Secretary of State over India. The object of the Indian Independence Act, was, on the other hand, to divide, what was known as British India and to define what were the territories which were to be under the control of each of the Dominions, and to make some consequential arrangements necessitated by this partition. The sections, in which the assignment of territories was made, clearly indicated that there was nothing final about them. "By agreement between the two Dominions, even the boundaries of the Indian Union and Pakistan could be changed. It was further laid down that, without prejudice to the generality of the **provisions of sub-section (3) nothing in sub-section (2)** would be construed as preventing the accession of Indian States to either of the two Dominions. The necessity of the accession of Indian States to the federation of India had been recognized by the Government of India Act, 1935. We can take it for granted that the framers of the Indian Independence Act were not unalive to the problem which the existence of Indian States, enjoying a certain degree of sovereignty under the suzerainty of the British Crown, which had been removed from them, would create for the two Dominions and the States themselves, particularly when it is remembered that the vast majority of these States were small principalities with no adequate resources to give modern administrations to their subjects and were as it were from a geographical and racial view point integrally connected with either India or Pakistan. As they were mere islands on this sub-continent they were so connected with British Indian Territory that it was impossible for both the States and the Dominions to which they were contiguous to do without some sort of working relationship with one another. Most of them were landlocked and it was impossible for them to seek, apart from anything else, because of their geographical situation the composition of their population and small recources, to have relations with the outer world. It was inevitable, therefore, that the new Government of India should, after partition, address itself to the conservation of the heart of India. Some sort of a Centre including the Indian States had

become an absolute necessity. It was impossible for the States to have their own foreign policy and defence system. Both India and the States had to face the problem of interrelationship which the removal of paramountcy from the States had created. The old Government of India Act had provided a machinery whereby the States could accede to the Indian Dominion by instruments of accession executed by their Rulers and accepted by the Governor General. This power of acceptance of the instrument of accession, was vested in the Governor General in order to ensure some uniform principle and coherence in character of the subjects which the States were handing over to the Federal Government. After the instrument had been accepted by the Governor General, the States acceding to the Federation became a constituent unit of the Federation with a position substantially different from that of the provinces. I say substantially different from the provinces because—

(a) the provinces had no opinion either to join or not to join, it being compulsory for them to do so,

(b) Delegation of authority was to proceed in their case from a powerful centre,

(c) There was to be in their case, a concurrent list in regard to which the Federal Centre along with the Provinces retained the right of legislation, and

(d) Powers not specifically given by the States to the centre were to remain vested in the States.

In short, the States were to be regarded as possessing a sovereign status in all subjects which had not been specifically handed over by them to the Federal Centre by a duly executed instrument of accession accepted by the Governor General.

I have pointed out how and why the Indian Independence Act is inseparably connected with the Government of India Act, 1935. The contention, that adaptations to the Indian Independence Act had to be read without reference to any other legislation previously passed by Parliament regarding the Constitution of India, has for the reasons I shall proceed to give, no force. The duty had been cast upon the Governor General by **Section 9(1)(a) of the Indian Independence Act** by order to make such provisions as may appear to him necessary and expedient for bringing the provisions of this Act into effective operation. Mr. Pathak would read the words “this Act” as meaning only ‘the Indian Independence Act. There is a fallacy underlying this argument. It attaches no importance to two important words in the section, namely, “provisions” and “effectively”. One of the provisions of that Act is, as has been pointed out before, section 8(2) which I have quoted already and which has to be read along with **section (9)(c).** It precedes section 9 and in substance lays down that the Constitution of India for the period until the Constituent Assembly was functioning is to be regulated by the provisions of the Government of India Act, except in so far as Parliament has otherwise provided, or in so far as by Orders made under the authority given to the Governor General or any other competent authority it has been altered, modified or added to. It follows, therefore, from what I have said, that the word “provisions” in section 9(1)(a) implies that it was intended by Parliament that the

Governor General should have power by Orders to make such provisions as right appear to him necessary or expedient to bring the existing laws into conformity with the Indian Independence Act of which the Government of India Act, as modified either by it or by any competent authority in that behalf, had been made as it were an integral part. In the second place, I must point out that some importance has to be attached to the word "effectively". This word described the nature of the burden which had been cast upon the Governor General in the discharge of his duties. He had necessarily to take into account what was essential for giving life to the independence which Parliament had conceded. It was his job to make the Indian Independence Act; a real reality. This is the significance of the word "effectively". I am also satisfied that significance has also to be attached to **section 9(1) (d)** which lays it down as a duty upon the Governor General to remove difficulties arising in connection with the transition to the provisions of the Independence Act. These difficulties no doubt in the context of this case would only be of a constitutional character as we are dealing with an adaptation order.

Personally I am of the opinion that the authority given to the Governor General of adapting existing laws is of a more restricted nature than that which has been conceded to him under **Section 9(1)(c)** in regard to modifications or amendments of the Government of India Act. There is no reference in section 18(3) to omissions from additions to and modifications of existing British Indian Laws. Indian Independence was an established fact on the 15th August, 1947. The power, however, of issuing adaptation orders, which was exercisable by the Governor General, was, as has been pointed out, to operate from the 3rd June, 1947 and could be made retrospective under **section 9(c)** from any date within the 3rd June, **1947. sub-section (5) of section 9 of the Indian Independence Act** makes it clear that this power of making provisional orders was to last until the 31st of March, 1948 or such earlier date as may be determined in the case of either Dominion by any law of the legislature of that Dominion. On the 14th August, 1947, an Order was promulgated by the Governor General. It is called the Indian (Adaptation of Existing Indian Laws) Order, 1947. This Order purported to be under **section 9(1) of the Indian Independence Act** and was meant to provide for the adaptation of all existing Indian laws to the adaptations directed under that Order. I may point out that by **sub-section (5) of section 19** which is the interpretation clause any power conferred by the Independence Act to make any order was to include power to revoke or vary any order previously made in the exercise of that power.

The point that I am driving at is that it was to the constitutional position, as gathered from the **Indian Independence Act read with Government of India Act,** as defined by me, that any existing British Indian laws had to be adapted. It is necessary at this stage to point out what an existing British Indian law means. By the India (Adaptation of Existing Indian Laws) Order, dated the 14th August, 1947, it was laid down that—

"'Existing Indian Law' means any **Act, Ordinance, *Regulation* , Rule, Order** or Bye-law which immediately before the appointed day has the force of law in the whole or any part of the territories which as from that day form the territories of the Dominion of India, but does not include any Act of Parliament, or any Order in Council, rule or other instrument

made under an Act of Parliament, or the General Clauses Act, 1897."

Section 7 of the Indian (Adaptation of Existing Indian Laws) Order, dated the 14th August, 1947, is to the following effect:

"Any reference is an existing Indian law to the exercise of the functions of the Crown in its relation with Indian States (including any provision the operation of which depends on the exercise of such functions) shall be omitted, and references in any such law to the Crown Representative shall be omitted or construed as references to the Central. Government as the context may require."

Section 3 of that Order reads as follows:

"As from the appointed day, all existing Indian laws shall until repealed or altered or amended by a competent Legislature or other competent authority in their application to the Dominion of India and any part or parts thereof, be subject to the adaptations directed in this order."

It is to be noted that there was no adaptation of the *Bengal* State Prisoners *Regulation* of 1818 in express terms by this Order. Nevertheless, the effect of section 7 was that the words "for reasons of State connected with the discharge of the functions of the Crown in its relation with Indian States" had ceased to have any existence in all Indian Statutes of which *Regulation III* of 1818 was one it was on the 25th of August, 1947, that the Governor General in exercise of the powers which had been conferred on him by **section 9 of the Indian Independence Act** made a further Order, styled "The ***Bengal*** **State Prisoners *Regulation* (Adaptation) Order, 1947**" This Order, though passed on the 26th August, is expressed to have effect from the 15th August, 1947. The substantial alterations made by section 2 of that Order are that for the words in section 1 of the *Regulation* from "reasons of State" to "internal commotion" the words "reasons of State connected with defence, external affairs or relations with Acceding States or with the maintenance of public order" and for the words "the discharge of the functions of the Crown in its relations with Indian States" wherever they occurred, including the appendix, were substituted the words "relations with Acceding States". In a comparative table Weston, J. in delivering the judgment in Rana Birpal Singh's case, has tabulated the reasons by which detention under the *Regulation* was justified before and after the so-called Adaptation Order of the 26th August, 1947. I reproduce it below:

"Reasons of State before the Adaptation.Reasons of State after Adaptation.Connected with defence.Connected with defence.

Connected with external affairs.Connected with external affairs.Connected with the discharge of the functions of the Crown in its relations with Indian States.Connected with relations with Acceding States.Connected with the maintenance of public order.Connected with the maintenance of public order."

It is clear that of the five reasons given, four remained as they were under the *Regulation* . It was only the last by one, namely, "reasons connected with the discharge of the functions

of the Crown in its relation with. Indian States" which was replaced by "Reasons of State connected with the discharge of the functions of the Crown in its relation with Indian States" had been omitted by the operation of the first Adaptation Order of 14th August, 1947. The position as I see it, is that on the appointed day, i.e the 15th of August, 1947, the *Bengal Regulation III* of 1818 did not have the words "connected with the discharge of the functions of the Crown in its relation with Indian States", but it did have them immediately before that date. The fact, however, that the words "connected with the discharge of the functions of the Crown in its relation with Indian States" had ceased to be part of *Regulation III* of 1818 was completely overlooked by those responsible for drafting **section 2 of the *Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947.** It does not seem to have occurred to the Governor General that he was directing words to be substituted for words which had disappeared from the *Regulation* which he was adapting on the date on which his second Adaptation Order was passed. It can be urged that as we are dealing with a case of delegated legislation, it is essential for us to make certain that the Governor General knew what he was doing. It has been urged that from section 2 it does not appear that the Governor General was aware of the fact that he was substituting something for something which had ceased to be part of the statute book of the land. Certainly the drafting of section 2 and, indeed, of the entire order is of an extremely clumsy nature. Had section 2 stood alone, I should have little hesitation in holding that what the Governor General did was invalid for no meaning or coherence could be attached to it. It is commonsense that you cannot substitute something for what had ceased to be an immediately existing British Indian Law without first reviving that law. It is only thereafter that you can substitute the adaptation that you consider necessary for it. The position, however, as I see it, is that section 3 of the Adaptation Order, referred to above, lays down that

"The provisions of this Order shall have effect notwithstanding anything to the contrary contained in the Indian (Adaptation of Existing Indian Laws) Order, 1947".

I take this clause to mean "Never mind what I had said in my previous order. There is probably something in the previous order contrary to what I am laying down by this order. But it is my will that this shall be the way how the *Bengal Regulation , III* of 1818, which existed immediately before the appointed day shall be adapted and this will of mine shall prevail over any previous declaration, enactment or order I might have made." The difficulty, in this view, with the manner in which the ***Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947**, was made is thus one form. We may not admire the drafting of the Order, but I cannot go to the extent of holding that the direction that the words "reasons of State connected with relations with Acceding States "shall find a place for the words reasons of State connected with the discharge of the functions of the Crown in its relation with Indian States" in a *Regulation* which was the law of the land immediately before the appointed day as one of the reasons for which valid warrants of arrest could be issued under *Regulation III* of 1818 is invalid. I do not look upon this change as in the nature of a fresh enactment in regard to any existing British Indian Law immediately before the appointed day. Had it been a case of fresh legislation, i.e, had some new reasons which

could not be regarded as an adaptation of the old reason been inserted, I should have been inclined to hold that the Governor General had acted beyond the powers conceded to him by the Indian Independence Act and that the warrant of arrest was, for that reason, invalid. But after giving the matter my Careful consideration, I have come to the conclusion that in the case of a power which was in the nature of an emergency power, the correct view would he to construe it in such a manner as would promote the object for which that power was conceded. There can be no question of the Governor General having any implied powers and it is, therefore, unnecessary to refer to the evolution of the doctrine of implied or inherent powers, whether in the United States of America, Australia, or Canada. In this case, we are dealing, not with legislation passed by a legislature endowed with sovereignty in relation to subjects specifically allotted to it but by the Governor General to whom, for a transitional period, certain powers of legislation, including the power, of making adaptation orders to existing British Indian laws, were delegated by the British Parliament. [See Quick and Garran's Annotated Constitution of the Australian Commonwealth, page 582: Clement's Constitution of Canada (Third edition) page 497: and Cooley's Constitutional Limitations, Volume I, (8th edition), pp. 138-139.]. Undoubtedly, the adaptation is in respect of a *Regulation* which is restrictive of the liberty of the subject and, in construing it, the principle to be borne in mind is that laid down by Lord Atkinson in Res v. Halliday. That principle is to the following effect:

“I think the tribunal whose duty it is to interpret a statute of the one class or the other should endeavour to find out what, according to the well known rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous, equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it. That is a wholly different matter.”

The position, as I see it then, is this. On the appointed date, the 15th August, 1947, the *Bengal Regulation III* of 1818 did not have the words “connected with the discharge of the functions of the Crown in its relation with Indian States”, but it did have them immediately before that date. The Indian States Department, which had replaced the old Political Department which had been wound up, had come into existence on the 5th July, 1947. This is clear from Sardar Vallabhai Patel's statement on the 5th July, 1947, reproduced in the “White Paper on Indian States (Appendix VI, p. 47) to which according to the view which was expressed by Gwyer, Chief Justice, in re C.P and Berar Sales of Motor Spirit and Lubricants Taxation Act, reference as a matter of history is permissible in interpreting a constitutional statute. The Government of India Act had been amended, modified and adapted by the **India Provisional Constitution Section 5,** which deals with the establishment of the Dominion of India and the accession of Indian States, and section 6, which lays down the procedure for accession of the Indian States, were parts of the Government of India Act on the 14th August, 1947, when the first Order was made. For 12 days the Governor General did not feel any necessity for substituting for the words “reasons of State connected with the discharge of the functions of the Crown in its relation

with Indian States" the words "reason of State connected, with relation with Acceding States" or any other words of a similar nature.

On the basis of these facts, the argument, has been advanced by Mr. Pathak that the *Regulation* could not be said, on the date on which the second Adaptation Order, namely, the 26th of August, 1947, was made, to be a necessary adaptation. The word "necessary", is not synonymous with the words "inevitable" or "indispensable", and, in any case, on this matter the court cannot substitute its judgment for that of the Governor General. As I see it, the position on the 15th August, 1947, was (a) that some States had acceded to the Federation; (b) that the States Department had come into existence; and (c) that despite these facts, the Governor General did not consider it necessary to substitute the present words in *Regulation III* of 1818 for the words he was omitting. It may be conceded that adaptation cannot be to changing political or economic conditions but to the constitutional position as it exists on any particular date. Where merely powers of adaptation are conferred, it is not open to the adapting authority to change the substance or to introduce a new matter as, political or economic conditions or any other kind of conditions might demand; the function of the adapting authority is merely to bring the law into conformity with a changed constitutional position. The constitutional position was fully known to the Governor General on the 15th of August and if he deliberately chose to omit something on the 14th, the point is whether he could, under the powers which he possessed under **section 9(1) or 9(1)(d)** read with the inter-pretation clause, i.e section 19(5), by subsequent Order dated the 26th August, after reinstating the omitted words, adapt them to the new constitutional position. In view of the fact that the test provided for "necessity" is a purely subjective one; and that the Governor General was the sole judge of it, I do not think we are competent to go into the question whether the change on the 26th August in *Regulation III* of 1818 was necessary or expedient. [See and compare **Liversidge v. Anderson**] There is no doubt that the Governor General had under section 9(3) power to give retrospective effect to orders passed by him. There is also no doubt that the power to make orders included the power to revoke or vary orders previously made. There is no question of revocation here because it is only in one section of the Order dated the 14th August, namely, section 7 that changes were made by virtue of the ***Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947**. The question is whether what the Governor General did can be described as a variation of his previous order. It was urged that if the executive could do for a period of 12 days without the words which are the subject matter of controversy in this case, then it cannot be said that the adaptation effected by the Governor General on the 26th was a necessary adaptation. It has been strenuotisly argued that what was done on the 26th August was done not by way of necessary adaptation but was in fact, a piece of fresh legislation not amounting to necessary adaptation. The position on the 26th August was that, so for as Indian States were concerned, the *Regulation* was not alive. Rerancellation of an Adaptation Order is no doubt contemplated by section 19(5) but here, it is urged, there is neither revocation nor variation of a previous Order but introduction of new matter and inasmuch as it changed an existing law, it could only be described as legislation. After having given this argument my very careful consideration, I, feel compelled to come to the conclusion that, having regard to the wide language of

section 9(1)(a) and (d) read in the light of the interpretation clause, namely, **section 19(5) of the Independence Act,** what was done by the Governor General is covered by the word "vary" as it was only part of a section he was modifying. It is therefore valid. That being so., the conclusion I have come to is that the warrant of arrest under which the ex-Maharaja is being detained is valid in law.

Before parting with this part of the case I may notice the case of Rana Birpal Singh, to which reference was made by both the learned Advocate General and counsel for the applicant. In that case the warrant of arrest was issued before the 15th August, 1947. The reason why the Bombay High Court held that Rana Birpal Singh was improperly detained was that it was not possible for Government to issue any warrant under the *Regulation* between 15th August, 1947 and 26th September, 1947, which was the date of accession of Bhajji State to the Indian Dominion. The point, whether the change subsequently effected by the Amending Order on 26th August, 1947, was an invalid change, was not in issue in that case. The basis of the decision was the invalidity of the warrant for the reason that Bhajji State had not acceded to the Indian Dominion on the date of the warrant of arrest.

I now come to a part of the case which was argued at some length by Mr. Pathak, namely, that the expression "reasons of State connected with relations with Acceding States" was vague and meaningless; that no such thing as relations between a "Federal Centre and an acceding; State is possible because a State after accession became an integral part of the Indian Union," and there could be no relations, apart from constitutional or administrative relations, between the Union and the State. It was, further pressed by him that the idea that these words connote is a new idea and could not be a substitute for the old idea of relations between the paramount power and the States which were subject to its paramountcy. It was, for this reason, argued that the so- called adaptation was no adaptation at all but something in the nature of a fresh enactment.

There is a fallacy underlying the argument that there can be no relations between a Federal Centre and an acceding State. The argument is based upon a misapprehension of the nature of a Federal Union. Professor Dicey in his Introduction to the Law of the Constitution, 9th Edition, revised by E.C.S Wade, page 143, observes:

"A Federal State is a political contrivance intended to reconcile national unity and power with the maintenance of 'State rights'. The end aimed at fixes the essential character of federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common of national government and the separate States. The details of this division vary under every different federal constitution but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government.

"All matters which are not primarily of common interest should remain in the hands of the several States."

For the most important feature which distinguishes a Federal Constitution from that based upon the unitary principle is the distribution of sovereign powers which Government possesses between a Central Government having full authority in certain matters for the area comprised by the entire Federation and a number of States and Provincial Governments exercising sovereign authority in certain other matters within the limits assigned to their State Government. The nature of Federations has differed very greatly. At one extreme is Canada which is a quasi Federal State in which all powers not specifically assigned to the provinces are reserved for the centre and in which further the Dominion Governor General has the right assigned to him, on the advice of the Dominion Cabinet, of disallowing Acts passed by Provincial legislatures. At the other extreme are Australia, United States of America and Switzerland in which the Federal Legislature has been allotted only certain powers the residue remaining vested in the States. The States were on the 15th August, 1947, to come into the Federation on terms specified by their instruments of accession. They were to be autonomous in all spheres excepting those which had been specifically handed over by them to the Federal Centre. The fact that there could be administrative relations between the Federation and Provinces is recognized by the Government of India Act itself and it devotes a whole part (Part VI) to this question. Under the scheme of Federation as originally framed by the 1935 Act Indian States were to have relations with the Crown representative in all non-federal matters. But this is irrelevant for our purpose. As an instance of the relations which might exist between States and the Centre under the present arrangement, I may refer to economic matters. In the preservation of order, the Federal Government would necessarily be interested. What happens in one part of the country may have repercussions on other parts. It is possible for an individual or group of individuals to stir up feelings between the Centre and the Provinces to the breaking point, even though actually the Union may be an indissoluble Union. The American Civil War which was fought between the southern and the northern States after the American Union had been formed on the basis that it was to be a perpetual and indissoluble Union is an instance of the mischief which those who are out to disrupt the bond which connect the units to the Federal Centre is capable of doing. Even though the Commonwealth of Australia is a Federal Union, claims on the part of western Australia to secede from the Commonwealth of Australia were at one time put forward. Instances are known of Federations in which what is commonly called the second chamber was nothing more than a council of ambassadors. I am referring to the constitution which Bismark gave to Germany on the morrow of the defeat of Napolean *III* in 1872. This confederation lasted until 1919 when the Weimar Republic was born. The word “relation”; therefore, is not a misnomer when applied to the nature of the tie that was to exist between the Indian States and the Indian Government. It is, in my opinion, a correct proposition that for relations to exist between India and the Indian States, there had to be either a federal or quasi federal relationship or relationship based upon the principle of subsidiary alliances or relationship based upon the concept of paramountcy. As I read the Indian Independence Act together with the Government of India Act, there is no complete merger of the States in the Indian Union. The States for certain purposes, perhaps originally larger than those contemplated by the Federation of India under the Government of India Act, 1935,

retained their separate identity. That, being so, it is possible to conceive of various kinds of relationships between the Indian States and the Dominion, Government and I do not, therefore, see airy force in the argument which was advanced by Mr. Pathak that “reasons of State connected with relations with Acceding States” could not be regarded as a substitute for the relationship which existed between the Indian States and the Government of India prior to the establishment of Indian Independence. It may be that what Britain had given to India was not paramountcy but the means to acquire it.

In this connection I may refer to another aspect of the case. I have pointed out that the Governor General had the power given to him by an Act of Parliament, namely, the Indian Independence Act, of adapting existing Indian laws to the Indian Independence Act, the scope of which has already been defined. I have pointed out that the word ‘adaptation’ connotes the idea of bringing the provisions of one Act into conformity or consonance with the changed constitutional position as visualized by the Indian Independence Act as defined by me before. Adaptation is not a merely ministerial Act. It is a legislative Act, though the powers of what might be called legislation included in the word “adaptation” are of a limited character. By adaptation the Governor General could change the form but not the substance of any statute. He could not, for example, create an offence which did not exist before. But he could take into account the fact that paramountcy had disappeared; that consequently the words “reasons of State connected with the performance of the functions of the Crown Representative in relation to the Indian States” had become meaningless, that a new relationship had sprung up between the Dominion and the Indian States based on the federal conception and that for that reason for the words “reasons of State connected with the performance of the functions of the Crown Representative in relation to the Indian States” the words “reasons of State connected with relations with Acceding States” might well be substituted. For the reasons given above, I am not prepared to attach any importance to the argument that there could be no such thing as “reasons of State connected with relations with acceding States” and that these words constituted a new idea which could not be regarded as an adaptation of the one they had replaced.

I come now to a different part of the case. One of the arguments which has been addressed to us is that it was not competent to the Governor General to order any so-called adaptation to *Regulation III* of 1818 as the principle underlying that *Regulation* is that of arbitrary or punitive and not preventive detention. In order to appreciate this argument, it is necessary to invite attention to entry 1 of List I of the Seventh Schedule of the Government of India Act, 1935. In this entry the legislative power which the Indian Legislature possesses in regard to detention is given in these terms:

“Preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.”

In entry 1 of List 2 which concerns itself with the legislative powers of Provincial Legislatures the words used are:—

“preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.”

In passing it may be mentioned that the validity of *Regulation III* of 1818 at the time it was passed is not questioned. It was enacted by the Governor General in Council and there were no such restrictions at that time on his power as were imposed by the Act of 1935, after the system of distribution of legislative powers 1 among the component parts of the federation came into existence. The legislative lists, which, because of the completeness of their classification, constitute a distinct feature of the Constitution provided by the Government of India Act, 1935, were conspicuous by their absence in the **Amending Act of 1919. The Act of 1919** had pointed the way towards devolution and not federation. Right up to 1935 when the Government of India Act became the law of the land no question as to the validity of *Regulation III* of 1818 could arise. It was only after that Act came into force that by entry 1 of List I of the Seventh Schedule of that Act the restriction that an Act authorising detention must have preventive detention as its aim was inserted. In the learned argument which Mr. Paihak has addressed to us, a distinction has been sought to be drawn between preventive detention, on the one hand, and arbitrary or punitive detention, on the other. It has been submitted that what, the Indian Legislature is now competent to do is to provide only for preventive detention which is something quite different from arbitrary or punitive detention. On the basis of this distinction, it has been sought to be argued that legislation of the nature of *Regulation III* of 1818 could not have been enacted by the Indian Legislature after 1935. What the Legislature could not do, the Governor General could not do. This is perfectly correct; but even on the assumption that there is a distinction such as has been sought to be drawn by Mr. Pathak between preventive arbitrary and punitive detention and that the *Regulation* in question cither authorises arbitrary or punitive detention or mixes up arbitrary, punitive and preventive detention, the position is that by virtue of section 293 of the Government of India Act, RegulationIII of 1818 continued in force in British India as it was an Act in force in British India immediately before the commencement of Part *III* of that Act. It continued in force even after the passing of the **Indian Independence Act by virtue of section 18(3) of that Act** as it was a law which was in operation immediately before the commencement of that Act. Had I come to the conclusion that what the Governor General had done did not amount to ‘adaptation’ of an existing British Indian Law but was in fact, a fresh enactment the question raised would have been of considerable importance. Nevertheless, as the point was raised before us, I desire to state shortly my conclusions in regard to the weight to be attached to it.

For the proposition that is a distinction between preventive detention and arbitrary or punitive detention reliance was placed upon certain observations of the learned Judges who decided the Full Bench case of Murat Patiwa v. The Province of Bihar. The Full Bench did not express any final opinion on the point raised before it as in the view the learned Judges took of the case before them it could be decided on other grounds. The point is of some nicety and desire to say a few words in connection with it. In the British- Constitution, there is an absence of those declarations of right which one finds, for example in the Constitution of the Irish Free States or most other continental countries. It may be pointed out that the position in the United States of America is that there is a Bill of Rights which ensures certain fundamental rights. The 5th and 14th amendments of the United States

Constitution lay down that no person shall be deprived of life, liberty or property without 'due process of law.' This has come to be known as the 'due process clause."

I may be permitted to quote the observations of Spens, C.J, on this question as they explain the constitutional position in India with, if I may say so with 3 respect, admirable lucidity. "The constitutional position in India is "as was observed by Spens, C.J, in the case of **Piare Dusadh v. Emperor** "different." Comparing the American Amendments with the **provisions of the Constitution Act, 1935,** it will be seen that the latter contains nothing corresponding to so much of the Amendments as related to deprivation of 'life or liberty' and that even as to 'property' it only requires that such deprivation should be 'By authority of law see section 299". Spens, C.J, however went on to explain that:—

"This does not of course mean that the well established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India. But as pointed out by Dicey, the rule remains only as a principle of 'private law' and is not a part of the Constitution: (See Diceys 'Law of the Constitution,' Edn. 9, p. 203 and Wade and Phillips 'Constitutional Law', Edn. 2, p. 354)'.

Reference may be made to Sir William Anson's Law and Custom of the Constitution, Vol. II, Fourth Edition, by Keith, p. 295. On this point Sir William Anson says:—

The English rule of law as expounded by Dicey includes three things:—

"(1) the absence or arbitrary power on the part of the Government;

(2) the objection of every man, whatever his rank or position, to the ordinary law of the land and his amenability to the jurisdiction of the ordinary tribunals; and

(3) the derivation of the constitutional rights from the decisions of the courts on individual cases brought before them, and the application by the courts of the rules of private law to the Crown and its officers."

It may be remarked that as observed by Spens, C.J,

"While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental; (see Dicey, page 200, footnote)."

Spens, C.J:— In the case referred to above also observed that—

"The principle of the English law as to personal liberty was stated by **Lord Atkinson in (Eshugbayi v. Nigeria Administration** in the following terms:

'In accordance with British jurisprudence no member of the executive can interfere with liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice'."

If the American Amendments are compared with the English rule, then the position is, as observed by Spens, C.J, that—

"…. What is required under the English rule is not 'due process of law' but 'legal justification' and such justification may be shown as much by legislation or statutory rules as by production of an order of Court: see Rex v. Halliday."

The conclusion at which Spens, C.J, arrived; was that—

"It does not, however, follow that Legislatures in India can arbitrarily interfere with the life or the liberty of the citizen, because they have only such powers as have been conferred on them by schedule 7, Constitution Act."

The Government of India Act, 1935, was a statute for which British Statesmen, steeped in the traditions of British Jurisprudence, wrere responsible. They were familiar with the great constitutional landmark's in their country, Magna Charta, 1215; the Petition of Rights, 1628; the Bill of Rights, 1689; and the Act of Settlement of 1701 and their importance from the point of view of personal liberty. They knew their constitutional significance.

An explanatory of the attitude of English law towards personal liberty, I take the liberty of quoting from the speech of Lord Atkinson made in Rex v. Halliday, re Zad Zig:

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive. What is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact. It was also urged that this Defence of the Realm Consolidation Act of 1914, and the regulations made under it, deprived the subject of his rights under the several Habeas Corpus Acts. This is an entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a court of law by means of a writ of Habeas Corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra vires, do not infringe upon the Habeas Corpus Acts in any way whatever or take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land. If it were otherwise, then every statute and every intra vires rule or bye law having the force of law creating a new offence for which imprisonment could be inflicted would amount, pro tanto, to a repeal of the Habeas Corpus Acts or of Magna Charta quite as much as does this statute of November 27, 1914, and the regulations validly made under it. It was held that the statute clearly authorised prevention in the widest terms by means other than punitive."

I have quoted at length Lord Atkinson's observation as it strikes me that for statesman who must have been familiar with the great constitutional landmarks in their history, Magna

Charta, 1215, the Petition of Rights, 1628, the Bill of Rights, 1689 and the Act of Settlement of 1701, the words “preventive detention” must have conveyed a particular significance. They must have known that detention without trial could be justified, if at all, by the necessity of the situation, the executive had to handle at any particular time; that the object of such detention must not be the punishment of the individual for what he has done or is supposed to have done, but the protection of ordinary citizens by preventing him from doing something which is dangerous to the community or which might occasion serious breaches of public tranquillity.

The proposition that the executive is the sole judge of what is needed by way of prevention in any particular situation or not; that into the sufficiency or otherwise of the reasons for detention the court cannot substitute its judgment for that of the executive; that it is not open to the court to enquire into the grounds, provided they are stated in sufficiently clear terms to enable the accused person to make proper representations to the authority responsible for his detention, for the belief which led to the making of the detention order; that in regard to a political and not triable issue a subjective and not an objective test could only be applied; and that even a failure to give the detained person correct reasons of his detention would not necessarily invalidate the detention order, are undoubtedly deducible from the cases of **Liversidge v. Anderson**, and Greene v. Secretory of State for Home Affairs.

I may also refer in this connection to the observations of Sir William Anson in his book, The Law and Custom of the Constitution, Vol. II, Fourth Edition, by Keith, pp. 295-296 on the question of arbitrary interference with personal liberty:

“The characteristics of the Constitution enunciated by Dicey have often been criticised and it is true that in some measure, as he himself recognized, the trend of legislation has weakened their force. But, there is still noteworthy the reluctance to allow arbitrary interference with personal liberty, or with the due course of judicial procedure. It is true that, strictly speaking, it may be claimed that, if the executive is given arbitrary discretion to imprison by a law, action under that power is still consonant with the rule of law. But it is emphatically contrary to the spirit of English law that the executive should have such powers, as is shown by the fact that even in stress of war dissent was expressed by Lord Shaw as to the validity of a statutory *regulation* giving the power to imprison a naturalised alien as a person of hostile origin and association. Moreover, so strongly is liberty favoured that even an alien engaged in war time in hostile activities against the Crown in Ireland is entitled to the protection of his liberty as fully as a British subject. Still more significant is the case of Art O'Brien, who was sent to the Irish Free State under a *regulation* under the Restoration of Order in Ireland Act, 1920, on the score of his hostile activities against the Irish Free State, but set free on application to the English Courts, on the ground that the *regulation* was in effect repealed by the Irish Free State Constitution Act, 1922.”

Reference was made in the course of arguments to **Chester v. Bateson**, which was a case in which during the first World War it was held that a *regulation* which denied to a person

from applying to the Court, without the consent of the Minister of Munitions, to recover possession of a premises occupied by a munition worker was not validly made for public safety or the defence of the realm. That, however, had no relevance to the case before us and I heed not consider it.

My general conclusion in regard to the scope of preventive detention is that it is different in nature from both punitive detention and arbitrary detention; that preventive detention means detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace, cause public disorder or lead to a situation which might become critical from, a defence, external affairs or law and order point of view; and that, therefore, it is not to be confounded with punitive detention which is meant to punish a person for what he has done or arbitrary detention which empowers the executive to arrest at will without any reason whatever.

After having gone through the *regulation* in question carefully, I am inclined to the view that the words authorising the executive to issue orders of personal restraint against individuals are far too wide and sweeping. For orders of detention can be issued against individuals when there may not be sufficient grounds to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or without any immediate view to ulterior proceeding of a judicial nature or when legal proceeding may for other reasons be unadvisable or improper. There is little doubt in my mind that *Regulation III* of 1818 is not in accordance with the notion of preventive detention as used in the Government of India Act, 1935. It would thus seem to have provided not only for preventive but also arbitrary or punitive detention. It is, however, a *regulation* which was, as I have said before, preserved as an existing British Indian Law on the statute book both by the **Government of India Act, 1935, and the Indian Independence Act, 1947.** For this reason no relief can be given to the applicant on the ground that the *regulation* in question is not altogether in harmony with the notion of preventive detention as I have explained it.

One of the points made by Mr. Pathak was that the opening words of the ***Bengal*** **State Prisoners *Regulation* (Adaptation) Order, 1947**, namely, “In the exercise of the powers conferred by **section 9 of the Indian Independence Act, 1947** and of all other powers” were open to objection as it was the fundamental right of every subject to know what powers were exercised in the case of delegated legislation and the words “all other powers” could not be said to have specified them. I have indicated the sections under which the Governor General could act, as he has done. What the court can do in the case of delegated legislation is to declare a piece of legislation ultra vires if it is found that the delegated authority had exceeded his or its power. Actually real control in the modern State over delegated legislation is provided by the working of the parliamentary machine. It is the vigilance of Parliament that ensures an effective check over delegated legislation. I am unable to discover any case where detention has been held to be improper merely because in order or *regulation* under the authority of Parliament the powers under which the delegated authority could act have not been completely specified.

After carefully considering all the points that were urged in favour of the applicant I have come to the conclusion that it is not competent for this Court to issue a writ in the nature of habeas corpus under **section 491 of the Code of Criminal Procedure.** Undoubtedly, the *regulation* under which the applicant is being detained is highly drastic in nature. It is cerainly not in keeping with democratic notions of personal freedom and goes, to a certain extent, against the idea conveyed by the expression "preventive detention" and mixes-up ideas of preventive arbitrary and punitive detention. The question which this Court has to consider is not whether the *regulation* is a desirable piece of legislation which should continue on the statute book, but whether the order of the Governor General adapting it to suit the new constitutional set-up was a valid one. Had I come to the conclusion that the notion of "reasons of State connected with relations with Acceding States" could not be substituted as an adaptation for the old formula of I reasons of State connected with the discharge of the functions of the Crown in its relations with Indian States", I should have unhesitatingly held that the arrest was ultra vires. As it is, this Court is powerless to give any relief to the applicant. The case undoubtedly raises a case issue, namely, that of personal liberty. It is for the Constitution makers of the new India to provide adequate guarantees for personal liberty. The remedy, therefore, which can enable citizens to feel sure that their liberty shall not be curtailed by *Regulation III* of 1818 is a political one. Into that region, I cannot enter. I must, therefore, hold that this Court is powerless, as the law stands at present, to give any relief to the applicant.

The application is accordingly dismissed.

Bind Basni Prasad, J.:— This is an application under **section 491 of the Code of Criminal Procedure** by Sir Gulab Singh, the ex-Ruler of Rewa State, who has been placed under, personal restraint at No. 10, Dobalwala, Dehra Dun, according to an order passed by the Governor General on the 20th May, 1948, under the provisions of the *Bengal* State Prisoners *Regulation* , 1818 (hereinafter referred to as the *Regulation*) as adapted by the ***Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947**, promulgated by the Governor General on the 26th August, 1947 (hereinafter referred to as the Impugned Order). It is prayed that the applicant may be set at liberty and his personal restraint may be removed.

It is a well established rule of law that in the issue of directions of the nature of Habeas Corpus the powers of this Court are confined within the four corners of **section 491. Sub-section (3) of that section** provides inter alia that nothing in that section shall apply to persons detained under the *Bengal* State Prisoners *Regulation* , 1818. The contention on behalf of the applicant is that the impugned adaptation made into the *Regulation* was ultra vires and nullity and as the detention is by virtue of the powers assumed by the Governor General under the provisions inserted by the impugned Adaptation Order, the detention is illegal.

The order under which the applicant has been placed under personal restraint is as follows: —

"GOVERNMENT OF INDIA

Ministry of States

The SUPERINTENDENT of POLICE,

Dehra Dun.

No. F. 167-P/48-II, dated New Delhi, the 20th May 1948.

Whereas the Governor General, for good and sufficient reasons, being reasons connected with relations with acceding States, has seen fit to determine that Sir Gulab Singh, ex-Maharaja of Rewa, shall be placed under personal restraint at No. 10, Dobalwala, Dehra Dun, you are hereby required and commanded in pursuance of that determination to receive the person above named into your custody and to deal with him in accordance with the orders of the Government and the provisions of the *Bengal* State Prisoners' *Regulation* , 1818.

(Sd.) M.K KIRPALANI,

Joint Secretary to the Government of India.'

A number of grounds were taken in the petition, but the only ground which was urged in arguments was that the Adaptation Order of the 26th August, 1947, was illegal. The grounds, upon which the legality of this Adaptation Order was assailed, were as follows:

(1) The adaptation of the existing Indian laws could be made by the Governor General only to the **provisions of the Indian Independence Act and as this Act** makes no provision for accession of Indian States, the adaptation of the *Regulation* to bring it in conformity with the provisions of the Government of India Act, 1935, as modified by the Governor General, was in excess of his powers.

(2) According to **sub-section (3) of section 18 of the Indian Independence Act,** only such adaptations could be made into, the existing Indian Law as were necessary. The impugned adaptation being not a "necessary adaptation" was a nullity.

(3) The intention of the Parliament was that provisions of the nature inserted in the *Regulation* by the impugned Adaptation Order should be enacted by the Legislature and not incorporated by means of the delegated legislation by the Governor General.

(4) When provision relating to Indian States was omitted by **section 7 of the India (Adaptation of Existing Indian Laws) Order, 1947,** from the *Regulation* , there was no question of its adaptation on the 26th August, 1947.

(5) The additional matter introduced in the *Regulation* by the impugned Adaptation Order is vague, uncertain and meaningless and under such a provision the liberty of the subject cannot be restrained.

(6) The impugned Adaptation Order gives power of arbitrary detention to the Governor General; whereas according to entry 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935, as modified by the Governor General under **sections 8 and 9 of the Indian Independence Act,** the Governor General can detain a person only

for preventive reasons.

(7) The adaptation was intended to bring the existing Indian Laws in conformity with the **provisions of the Indian Independence Act and the Government of India Act** and not to meet the changing political situation.

(8) As the impugned adaptation purports to have been made by the Governor General not only under **section 9 of the Indian Independence Act**, but also under "other powers enabling him in that behalf" and these "other powers" have not been specified, the adaptation is rendered invalid.

(9) As the impugned adaptation makes a serious inroad, into the liberty of the subject, it should be strictly scrutinized and the subject should be given the benefit of all ambiguities.

I take up the above points in seriatim. The Indian Independence Act was passed on the 18th July, 1947, but the provisions of section 9 of the Act, which gave extensive powers to the Governor General during the interim period, was given a retrospective effect by **sub-section (3) of that section from the 3rd June, 1947. From sub-section (5) of that section** it will be seen that the interim period was to last up to the 31st March, 1948, or such earlier date as may be determined in the case of either Dominion by any law of the Legislature of that Dominion. A close examination of this Act will show that not only did it set up two independent Dominions, namely, India and Pakistan, but it made provisions also for the future governance of the territories. By sub-section (2) of section 8 of the Act it was provided that—

"Except in so far as other provision is made by or in accordance with a law made by the Constituent] Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor General under the next succeeding section, have effect accordingly."

By sub-section (1) of section 9 of the Act it is provided that the Governor General shall by order make such provisions as appear to him to be necessary or expedient—

"(a) for bringing the provisions of this Act into effective operation;

(c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions;

(d) for removing difficulties arising in connection with the transition to the provisions of this Act."

sub-section (3) of section 18 of the Act provides as follows:—

"Save as otherwise expressly provided in this Act, the law of British India and of the

several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other. Legislature or other authority having power in that behalf."

Prior to the 15th August, 1947, entry no. 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935, provided inter alia for—

"Preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States."

There were provisions also in the Government of India Act, 1935, for the exercise of the functions of the Crown in its relations with Indian States, the accession of Indian States to the Federation and the administrative relations between the States and the Federation, e.g, sections 3, 5, 6 and Part VI of the Act.

On the 14th August, 1947, the Governor General, acting under **sub-section (2) of section 8 and paragraph (c) of sub- section (1) of section 9 of the Indian Independence Act,** promulgated the India (Provisional Constitution) Order, 1947, whereby fundamental changes were made in the Government of India Act, 1935. Section 5(c) of the adapted Government of India Act, 1935, contemplates the accession of Indian States to the Dominion of India and provides that such an acceding State will be a part of the Dominion. Section 6 provides the procedure of accession. Part VI provides for administrative relations between the Dominion and the States. As by **section 7(1)(b) of the Indian Independence Act** the suzerainty of His Majesty over the Indian States had lapsed, the words or the discharge of the functions of the Crown in its relations with Indian States appearing in entry no. 1 of List I of the Seventh Schedule of the Government of India Act was omitted. After the lapse of the suzerainty, there was no occasion for preventive detention for this purpose.

On the 26th August, 1947, another Order known as the **India Provisional Constitution (Amendment) Order, 1947,** was passed by the Governor General in exercise of the powers conferred by section 9 of the said Act whereby the words "or relations with Acceding States "were inserted after the words "external affairs "in entry 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935, After this Order of the 26th August, 1947, this entry provided inter alia for—

"preventive detention for reasons of State connected with defence or external affairs or relations with Acceding States.

On the same day, viz. the 26th August, 1947, the impugned Older was also promulgated by the Governor General in exercise of the powers conferred by **section 9 of the Indian Independence Act** and of "all other powers enabling him in that behalf." Prior to the 15th August **1947, section 1 of the *Regulation*** ran as follows:—

"Whereas reasons of State, embracing the due maintenance of the alliances formed by the

British. Government, with foreign powers, the preservation of tranquility in the territories of Native Princes entitled to its protection and the security of the British dominions from foreign hostility and from internal commotion occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be un-advisable or improper."

The existing Indian Laws were adapted, firstly, by the Adaptation Order of the 14th August, 1947. No change in any specific terms was introduced by it in the *Regulation* by the terms of that Order. Section 7 of that Order, however, provided as follows:

"Any reference in an existing Indian law to the exercise of functions of the Crown in its relation with Indian States (including any provision the operation of which depends on the exercise of such functions) shall be omitted, and references in any such law to the Crown Representative shall be omitted or construed as references to the Central Government as the context may require."

The effect of the above provision was to omit from the *Regulation* all provisions about the territories of Native Princes entitled to the protection of the British Government. By the impugned Adaptation Order, in section 1 of the *Regulation* for the words from "reasons of State" to "internal commotion", the words "reasons of State connected with defence, external affairs or relations with Acceding States or with the maintenance of public order" were substituted. Certain other consequential changes were also made in the *Regulation* . Section 3 of the impugned Order provided that the provisions of the order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing **Indian Laws) Order, 1947. By sub-section (2) of section 1** of the impugned Order it was provided that it shall be deemed to have effect from the 15th August, 1947.

Having set out the impugned Adaptation Order and the law under which the Governor General purported to have made it, I proceed now to examine whether he was competent to make such an adaptation.

The first question in this connection is whether the Indian Independence Act makes any provision for the accession of Indian States, because the argument is that there being no such provision, no adaptation could be made in any existing Indian law so as to provide for Acceding States. I am clearly of opinion that the Indian Independence Act does make provisions for accession of Indian States. The first provision in this connection is contained in **Sub-section (4) of section 2 of the Indian Independence Act.** It runs as follows:

"Without prejudice to the generality of the **provisions of sub-section (3) of this section,** nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions."

Learned counsel for the applicant contends that this is a saving clause or a proviso to the section and not a substantive enactment. Reliance is placed upon the Guardians of the Poor of the **West Derby Union v. The Metropolitan Life Assurance Society Bretherton v. The United Kingdom Totalizator Co., Ltd. and the Goveronr General v. Municipal**

Council Madhura (3). These rulings do not apply to the facts of the present case. **Sub-section (4) of section 2** is not in the form of a proviso or a saving clause. The importance of sub- section (4) will be apparent from the fact that both in sub- section (1) and sub-section (2) there occurs the important phrase "subject to the **provisions of sub-sections (3) and (4) of this section**". This means that sub-section (4) is an all important governing part of section 2. I am unable to assign to sub-section (4) the function of a proviso or a saving clause. The real position is that by **clause (b) of sub-section (1) of section 7 of the Indian Independence Act** the suzerainty of His Majesty over the Indian States lapsed. The Act, however, contemplated to substitute for the permanent the of paramountcy between His Majesty and the Indian States a permissive relationship of accession by consent between the Indian States and the Dominion of India. What was formerly a mandatory thing became optional for Indian States. The basis of the relationship was changed. Whereas formerly the Indian States were under the suzerain of His Majesty, it was now a matter of negotiation between the Indian States and the Dominion of India to form a new relationship by acceding to the Indian Dominion. It was with this intention to promote the accession of Indian States to either of the New Dominions that **Sub-section (4) of section 2 of the Indian Independence Act** was enacted. This central idea runs throughout the Indian Independence Act. In the proviso to sub-section (1) of section 7 of the Act provision has been made for the continuance of agreements between His Majesty and the Indian States relating to customs, transit, communications, posts and telegraphs or other like matters. The proviso runs as follows:

"Provided that, notwithstanding anything in paragraph (b) … of this sub- section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements."

No doubt Rulers of Indian States have been given the right to denounce the said agreements, but this does not alter the situation. As already stated above, the relations between the Dominions and the Indian States were based on an optional basis by the Indian Independence Act. There was an element of compulsion formerly in the relationship between His Majesty and Indian States. That element disappeared by virtue of **section 7 of the Indian Independence Act**. I hold, therefore, that the Indian Independence Act does make provision of a permissive nature for the accession of Indian States to either of the two new Dominions, and the *Regulation* could be adapted so as to provide for the preservation of accession of an Indian State.

The second question is whether adaptation to an existing Indian Law could be made only to the provisions of the Indian Independence Act or also to those, of the Government of India Act 1935, with the omissions, additions, adaptations and modifications made by the Governor General under section 9 of the Act. I am of opinion that the existing Indian laws have to be brought in conformity with both of these Acts Learned counsel has argued that

the adaptation of the **Government of India Act, 1935, contemplated by sections 8 and 9 of the Indian Independence Act** could be only to the provisions of the Indian Independence Act and so it should be inferred that the adaptation of the existing Indian laws under **sub-section (3) of section 18** should also be to the provisions of the Indian Independence Act. I am unable to agree with this. Today in the field of the Government of this Dominion the Indian Independence Act stands supreme. Next to it, comes the Government of India Act, 1935, with the omissions, additions, adaptations and modifications made to it by the Governor General. From the very nature of things the adaptations to the Government of India Act, 1935, had to be made to the provisions of the Indian Independence Act only. But as the Constitution of the country at present is contained not only in the Indian Independence Act., but also in the Government of India Act, 1935, as continued in force by the Indian independence Act, the existing Indian laws have to be adapted to both of these Acts. **sub-section (3) of section 18 of the Indian Independence Act** does not provide in express terms that the adaptations are to be only to the provisions of the Indian Independence Act.

There is another reason for this. There is a fundamental difference in the basis of the two Acts, namely, the **Indian Independence Act and the Government of India Act, 1935,** as it stood before the 15th August, 1947. By the former Act all power of legislation (section 6) and all responsibility for the Government [section 7(1)(a)] have been transferred to the new-Dominions. On the other hand, according to the Government of India Act, 1935, as it originally stood all powers vested in His Majesty (section 2) and the supreme power of legislation in respect of British India vested in the Parliament (section 110). Owing to this basic difference between the two Acts the Government of India Act, 1935, in its original form could be coexist with, the Indian Independence Act. It would have been deemed as repealed after the passing of the Indian Independence Act had it not been continued in force in its modified form by the last mentioned Act. Here I may refer to the **provisions of sub-section (1) of section 10 of the Indian Independence Act,** the opening words of which indicate that the Government of India Act, 1935, has been kept in force by the Indian Independence Act. The modified Government of India Act, 1935, is a part and parcel of the Indian Independence Act. The Indian Independence Act instead of making detailed provisions about the government of the Dominion during the interim period provides that the Government of India Act, 1935, shall be continued in force with such omissions, additions, adaptations and modifications as the Governor General may make in it. It has treated the Government of India Act, 1935, as the framework of the Constitution for the 1 time being giving liberty to the Governor General to modify it as he may deem fit. Until the Constitution has been framed by the Constituent Assembly the **provisions of the Government of India Act, 1935, read with the Indian Independence Act** contain the Constitution of this Dominion. Hence, even if it be assumed that the Adaptation of the existing Indian laws can be made only to the **provisions of the Indian Independence Act the adaptation of the *Regulation* to the provisions of the Government of India Act, 1935,** as modified by the Governor General is really an adaptation to the **Indian Independence Act. By clause (a) of sub-section (1) of section 9 of the Indian Independence Act** the Governor General has authority to make provisions for bringing the

provisions of that Act into effective operation. The adaptation of an existing Indian law so as to bring it in conformity with the modified Government of India Act, 1935, was thus clearly an Act for bringing the provisions of the Indian Independence Act into effective operation.

It is not contended that the change made in entry 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935, on the 26th August, 1947, was beyond the powers of the Governor General. When that change in the provisions of the *Regulation* became necessary, the first ground of attack, therefore, fails.

Coming to the second ground of attack, learned counsel for the applicant argues that when the Government of India could carry on for eleven days from the 15th to, the 26th August, 1947, without the impugned adaptation in the *Regulation* , it cannot be said that the impugned adaptation was a "necessary adaptation". The contention is that the words "necessary adaptation "mean adaptations without which the Indian Dominion would have been stultified. I am unable to agree with this. There is a difference between the words "necessary" and "indispensable". The word used in **sub- section (3) of section 18** is "necessary" and not "indispensable". The words "necessary adaptation" mean adaptations which have been rendered necessary on account of the constitutional changes in the country, changes which were incorporated in the **Indian Independence Act and the modified Government of India Act, 1935.** The Governor General was given vast powers by **section 9 of the Indian Independence Act** and his discretion in making such provision as appeared to him to be necessary or expedient cannot be questioned. In this connection I may refer to The **Progressive Supply Co., Ltd. v. Dalton**. The discretion exercised by the Governor General cannot be questioned in court. The vast powers given to the Governor General by the Indian Independence Act were exercisable by him during a limited period and, having regard to the **provisions of sub- section (3) of section 19 of the Indian Independence Act,** I have no doubt in my mind that he could exercise them from time to time as and when he found it necessary. It must be remembered that the situation was an exceptional one. There was a change over of Government. Unforeseen contingencies were likely to arise and to meet them the Governor General had to be armed with these extensive and extraordinary powers. I hold that the impugned adaptation was necessary in view of the change made in the Government of India Act, 1935, on the 26th August, 1947.

Coming to the third point, the argument is that by the impugned Adaptation Order a new matter was inserted and that it was really not an adaptation but a legislation of substantive nature which could be undertaken only by the Legislature of a Dominion under **section 6 of the Indian Independence Act.** It has already been pointed out above that prior to the 15th August, 1947, the *Regulation* did contain certain provisions relating to "the preservation of tranquillity in the territories of Native Princes" entitled to the protection of the British Government. With the lapse of the suzerainty of His Majesty over the Indian States these words became inconsistent in the *Regulation* . Hence for the relationship of suzerainty there was substituted a relationship by accession. It became necessary, therefore, to provide in the *Regulation* for the protection of the relations between the Indian Dominion and the Acceding States. It was with this end in view and in consonance

with the provisions regarding the accession of Indian States as contained in the **Indian Independence Act and the modified Government of India Act, 1935,** that the impugned adaptation was made in the *Regulation* . It was not a new matter unconnected with the change in the constitutional position. It was a matter directly flowing from the altered constitutional situation. The subject matter dealt with by the impugned *Regulation* is the relation between Acceding States and the Indian Dominion. Before the 15th August, 1947, also it dealt with the subject of relations between the British Government and the Indian States. I see no force in the third point also.

It is true that by virtue of the adaptation made into the existing Indian laws by the Adaptation Order passed on the 14th August, 1947, the provision in the *Regulation* relating to the Indian States should be deemed to have been omitted. The question is whether by reason of that omission the Governor General was debarred from inserting the provision which he did under the impugned Adaptation Order. The word “adapt” means to bring in accord with. In this process it may be necessary not only to substitute words, but also to omit or add words in a statute, subject to the all-important consideration that such substitution, omission or addition shall be only to bring the adapted law in conformity with the Act to which the adaptation is made. Hence, although references to the Indian States did not exist in the *Regulation* when the impugned adaptation was made, it was permissible for the Governor General to insert the impugned words when he made a corresponding change in entry 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935.

Coming to the fifth point, it is argued that the words “reasons of State connected with… Acceding States” are meaningless, vague and uncertain. In this connection it was also argued that Acceding States having become a part of the Indian Dominion, there could hardly be any relation between parts of the same body. I see no force in this argument. There can be relations inter se the parts of the Indian Dominion and in this connection I would only refer to the heading of Part VI of the Government of India Act, 1935. It is well known that Constitution Acts do provide to regulate relationship between the centre and its constituent parts.

Nor do I see any force in the contention that the expression quoted above is vague or uncertain or meaningless. Reasons, which tend to embitter or weaken the relations between an Acceding State and the Indian Dominion, fall within the meaning of the above phrase. The Rewa State acceded to the Indian Dominion on the 16th August, 1947. The warrant against the applicant was issued on the 20th May 1948, and the reasons of his detention as given in it are reasons connected with relations with Acceding States.” Once it is held that a person is being detained under the *Bengal* State Prisoners *Regulation* , 1818, there is no jurisdiction under section 491 which this Court can exercise in the matter and in this connection I may refer to **Ex-Rana Birpal Singh of Bhajji State v. Emperor** and also to the case of this very person Weston, J., while holding the warrant issued against the ex-Rana prior to the 15th August, 1947, inoperative after that date observed:

“It may be that Government still consider for any of the reasons of State provided in the

Regulation as it now is, that further detention of Birpal Singh is desirable. If this is so it is for Government to effect his detention by valid warrant under the existing *Regulation* or other appropriate enactment."

The detention having been effected under the *Regulation* , the jurisdiction of the court is ousted.

Coming to the sixth point, learned counsel has relied upon **Murat Pativa v. Province of Behar** in which a distinction was made between a preventive and an arbitrary detention. The argument is that according to entry 1 of List 1 of the Seventh Schedule of the Government of India Act, 1935, provision can be made only for preventive detention, but, as the *Regulation* provides for arbitrary detention, no such provision could be made in it. In this connection reference is made to the fact that detentions under the *Regulation* are made when there are no sufficient grounds to institute any judicial proceeding or when such proceeding may not be adapted to the nature of the case or may for other reasons be unadvisable or improper. Do these words in the *Regulation* indicate that the detention under the *Regulation* is arbitrary? I am unable to infer this. The *Regulation* lays down the reasons for which a person may be detained under it. It is true that the existence of those reasons cannot be adjudicated upon in courts of law. Nevertheless it casts upon the Executive a duty to determine the existence of those reasons and only when it is satisfied of their existence then can it issue an order of commitment. The forms of commitment given at the end of the *Regulation* point to this fact. The presumption is that the *Regulation* will be administered in good faith by those who are-armed with powers under it. The various Public Safety Acts passed in the Provinces recently make the Executive the sole judges of the existence or nonexistence of the grounds for detention and it has been held in a large number of cases that the satisfaction, of the detaining authorities as to the desirability of the detention of a particular person cannot be questioned in courts. The *Regulation* has been in existence for one hundred and thirty-one years. Its legality has been questioned in the past, but it has been upheld as valid. It provides for preventive detention for reasons mentioned there. An arbitrary detention is a detention without any reason. The *Regulation* as adapted does not contemplate detention without any reason. Various considerations may render it desirable that such cases may not go to court, e.g, undesirability of giving publicity to the facts, the necessity of prompt and quick action, the fact that strict legal proof may not be available-although there may be a moral certainty of the facts. **Rule 26 of the Defence of India Rules** provided for detention without trial. Its legality was, however, upheld by courts. So far as the Acceding States are concerned, the *Regulation* lays down in effect that a person may be placed under personal restraint if he acts in a manner so as to embitter or weaken the relations-between the Dominion of India and Acceding Indian-States. The sixth ground also has, in my view, no force.

Coming to the seventh point, I have only to refer to the fact that when the impugned adaptation was made in the *Regulation* , there did exist a provision in the Government of India Act, 1935, namely, in entry 1 of List 1 of the Seventh Schedule of that Act to which it had to be adapted. It may be that the change was effected in the Government of India Act; 1935, on the 26th August, 1947, in view of the changing political situation. Laws are

always the reflex of the change in the social order. The motive behind the law is irrelevant for the courts. We have only to see whether a valid law was made or not. With the aforesaid change in the Government of India Act, 1935, the insertion of the impugned words in the *Regulation* did not trespass the ambits of adaptation. The seventh point also falls to the ground.

In the Impugned **Adaptation Order section 9 of the Indian Independence Act, 1947,** has been specifically referred to. The other powers mentioned therein clearly refer to **sub-section (3) of section 18 of that Act** which authorizes "other authority" also to make "other provisions" in the law of British India. The adaptation was made under the Indian Independence Act, which is not a big Act, consisting, as it does, of only twenty sections. I cannot see how the applicant has been prejudiced by the non-indication of **sub-section (3) of section 18**. His legal advisers could well find out the powers of the Governor. General from the provisions of the Indian Independence Act. It cannot be said that the applicant would have any great difficulty in finding out the source of the power under which the Governor General made this adaptation. The non-specification of "other powers" in the Impugned Adaptation Order does not, in my opinion, invalidate it.

Coming to the last ground, it is true that the impugned adaptation makes a serious inroad in the liberty of the subject and that its provisions should be strictly scrutinised. But at the same time we cannot shut our eyes from the express provisions of the law. Once we arrive at the conclusion that the Impugned Adaptation Order was valid, then by virtue of **sub-section (3) of section 491 of the Code of Criminal Procedure** our jurisdiction is barred and we cannot afford any relief to the petitioner. The *Regulation* no doubt makes exceptional provisions with no right of defence in court to a person, who is placed under personal restraint; but the *Regulation* has remained on the Statute Book for all these years. It is a valid law. We cannot ignore its provisions. The Impugned Adaptation Order does not suffer from any illegality. The detention of the applicant being under the *Bengal* State Prisoners *Regulation* , 1818, we cannot grant him the relief prayed for.

I would, therefore, dismiss the application.

By the Court: — We are of opinion that the ***Bengal* State Prisoners *Regulation* (Adaptation) Order, 1947**, dated the 26th August, 1947, is not ultra vires of the powers of the Governor General. It follows, therefore, that the *Bengal* State Prisoners *Regulation* , 1818, as adapted by the aforementioned order is perfectly valid. By reason of **sub-section (3) of section 491, Criminal Procedure Code,** the detention of the applicant cannot be questioned in proceedings under **section 491, Criminal Procedure Code.** This application is, therefore, incompetent and is dismissed.

We are satisfied that the conditions prescribed by **section 205(1) of the Government of India Act** as adapted by the India (Provisional Constitution) Order, 1947, are satisfied in this case. We accordingly grant a certificate that the case is a fit one for appeal to the Federal Court.

Application dismissed.

Indian Independence Act, 1947,