In the Privy Council.

No. 83 of 1945.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT NAGPUR.

BETWEEN

THE KING EMPEROR - - - - - - - *Appellant*

AND

VIMLABAI DESHPANDE and P. Y. DESHPANDE - *Respondents.*

CASE FOR THE APPELLANT.

RECORD.

10 1. This is an appeal by special leave from an order of the High Court of Judicature at Nagpur (Bose and Sen JJ.) made on the 29th September, 1944. This order was made by the High Court purporting to act under the powers conferred on it by Section 491 of the Code of Criminal Procedure (Power to issue directions of the nature of a *habeas corpus*). p. 58, l. 6. The order directed that the Respondent Purushottam Yeshwant Deshpande (hereinafter called " the detenu ") should be set at liberty forthwith on the ground that his detention was illegal and improper.

2. At the date when the order of the High Court was made the detenu was being detained under the provisions of Rule 129 of the Defence
20 of India Rules, 1939. This Rule, made under the powers conferred by the Defence of India Act, 1939, provides as follows :—

" 129.—(1) Any police officer . . . may arrest without warrant any person whom he reasonably suspects of having acted . . .

(*a*) . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war

* * * * * *

(2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government and pending the receipt of the orders of the Provincial Government may, subject to the provisions of sub-rule (3), by order
30 in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government ; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding 2 months.

(3) . . .

of the Provincial Government, and that the police-officer must forthwith report the fact of the arrest to the Provincial Government. The argument that the High Court must have been intended to have the power of deciding whether the police-officer's suspicions were reasonable, because of his subordinate rank, is, in these circumstances, unsound. The view which found favour with the High Court leads to this absurdity, that if the Provincial Government wishes to avoid a discussion in Court of the reasons for its action, and a judicial determination of the question whether its suspicions are reasonable, it cannot exercise the powers conferred by Rule 129, but must make a final order under Rule 26.

As to paragraph 16 (iv).

(IV) Even if the High Court is empowered to decide whether the police-officer's suspicions were reasonable, and does decide that they were unreasonable, it does not follow that the High Court must order the release of the detained person in a case where the Provisional Government, after his arrest, has made an order for his continued detention under Rule 129 (2) and (4).

As to paragraph 16 (v).

(V) The Appellant assumes that the words "exercises power for a collateral purpose" refer to a case where the power is not exercised for any of the purposes for which it was conferred. Upon this assumption the Appellant respectfully concedes that the two propositions deduced by the High Court from the decided cases are correct. It does not concede that an issue of want of good faith is raised merely by an allegation that the executive has acted in bad faith, or that it is for the Court to decide whether the executive's suspicions were reasonable, or that the burden of proof is on the Crown. It is submitted—

(A) that the order of detention cannot be set aside except upon proof that it was made in bad faith,

(B) that it is for the detenu to prove bad faith,

(C) that it is not for the Court to decide whether the executive's suspicions were reasonable, but that if it is for the Court to decide this question, then

(D) that the burden of proving that the suspicions were unreasonable rests on the detenu.

As to paragraph 16 (vi).

(vi) The fact that the order made by K. C. Diwakar was expressed in the alternative is no evidence that his suspicions were unreasonable. In this connection the Appellant will rely on the observations of the Divisional Court in the King *v.* Secretary of State for Home Affairs, ex parte Lees [1941] 1 K.B. 72 at page 78.

As to paragraph 16 (vii).

(vii) The fact that K. C. Diwaker referred to the efficient prosecution of the war, and that the Chief Secretary referred to this and to the public safety, is again no evidence that K. C. Diwakar's suspicions were unreasonable.

As to paragraph 16 (viii).

(viii) The fact that the police had questioned the detenu about Inamdar, his whereabouts and his associates, and the fact (if it was a fact) that the police were investigating a crime of dacoity and that the questions put to the detenu were connected with this investigation, were no evidence that K. C. Diwakar had arrested the detenu merely with a view to investigating that crime, or that the Provincial Government had continued the detention merely with the object of affording facilities for that investigation, or that the arrest could not have been made or the detention ordered with a view to promoting the efficient prosecution of the war or protecting the public safety. No reason was shown to the High Court for impeaching either the good faith or the reasonableness of the police-officer or of the Provincial Government acting in this matter by His Excellency the Governor in person, or for discrediting the statements made on oath by the Chief Secretary to the Government.

It is submitted that this appeal should be allowed for the following among other

REASONS.

(1) Because the High Court had no power to direct the release of the detenu except upon proof that his arrest had been made, and the orders for his detention passed, in bad faith.

(2) Because there was no evidence of bad faith on the part either of the police-officer or of the Provincial Government.

(3) Because the High Court had no power to decide whether the police-officer's suspicions were reasonable.

(4) Because, if the High Court had power to decide that question, it was for the detenu to prove that the police-officer's suspicions were unreasonable, and he failed to discharge this burden.

(5) Because even if the police-officer's suspicions were unreasonable, the Provincial Government, after the arrest, had made valid orders for the continued detention of the detenu.

(6) Because the High Court failed to give effect to the provisions of Section 16 of the Defence of India Act, 1939.

(7) Because the High Court erred in holding that the detention of the detenu was illegal and improper.

(8) Because in the circumstances of the case the High Court had no power to make any order under Section 491 of the Code of Criminal Procedure.

B. MACKENNA.

In the Privy Council.

No. 83 of 1945.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT NAGPUR.

BETWEEN

THE KING EMPEROR - - *Appellant*

AND

VIMLABAI DESHPANDE and
P. Y. DESHPANDE - - *Respondents.*

CASE FOR THE APPELLANT.

SOLICITOR,
India Office.

The Solicitors' Law Stationery Society, Ltd., Law & Parliamentary Printers,
Abbey House, S.W.1. WL968-28928

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No. 83 of 1945.

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AND

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- - *Respondents.*

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P. C. Appeal No. 83 of 1945.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF JUDICATURE AT NAGPUR.

BETWEEN

THE KING EMPEROR - - - - - - - *Appellant,*

AND

VIMLABAI DESHPANDE, and
PUROSHOTTAM YESHWANT DESHPANDE - - *Respondents.*

CASE FOR THE RESPONDENTS.

RECORD.

1. This is an appeal by the King Emperor by special leave of His Majesty in Council granted to the Appellant to appeal against the order of the High Court of Judicature at Nagpur, dated the 29th September, 1944, holding that the detention of the 2nd Respondent under Section 129 (2) of the Defence of India Rules was illegal and improper and directing that the 2nd Respondent be set at liberty. p. 59. pp. 17–58.

2. The aforesaid order of the High Court of Nagpur was made and delivered in respect of an application in the nature of *habeas corpus* proceedings made under Section 491 (1) of the Criminal Procedure Code on behalf of the 2nd Respondent who was detained in the Central Jail at Nagpur in pursuance of Orders purporting to have been passed under Section 129 (2) of the Defence of India Rules on divers dates between the 21st August, 1944, and the 19th September, 1944. p. 4.

3. The facts giving rise to this appeal are as follows:—

On the 21st August, 1944, the 2nd Respondent was arrested without warrant by one K. C. Diwakar, a police officer, who purported so to act under the powers conferred upon him by Rule 129 (1) of the Defence of India Rules, 1940.

The provisions of Rule 129 are as follows:—

"129. *Further Powers of arrest and detention.*—(1) Any police officer, or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act,—

CASE FOR RESPONDENT

RECORD OF PROCEEDINGS

RECORD.

(a) with intent to assist any State at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war;

(b) in any area in which the Provincial Government has, by notification, declared that this clause shall become operative, in a manner calculated to promote, or to assist the promotion of, rebellion against the authority of Government;

(c) in any prohibited place, protected place or protected area, or any other place or area as respects which an order has been made under rule 9 in a manner prejudicial—

(i) to the safety of any such place or area or of any industry, machinery or building in any such place or area;

(ii) to the output or effective control of any such industry or machinery.

" (2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government, and, pending the receipt of the orders of the Provincial Government, may, subject to the provisions of sub-rule (3), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify:

" Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding fifteen days without the order of the Provincial Government; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding two months.

" (3) If any person arrested under clause (c) of sub-rule (1) is prepared to furnish security, the officer who has arrested him may, instead of committing him to custody, release him on his executing a bond with or without sureties that he will not, pending the receipt of the orders of the Provincial Government, enter, reside or remain in the areas in respect of which he became liable to arrest.

" (4) On receipt of any report made under the provisions of sub-rule (2), the Provincial Government may, in addition to making such order, subject to the second proviso to sub-rule (2), as may appear to be necessary for the temporary custody of any person arrested under this rule, make, in exercise of any power conferred upon it by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary.

" (5) Subject to the condition that nothing in this sub-rule shall be deemed to extend the limits of detention prescribed in the first and second provisos to sub-rule (2), the Provincial Government may direct that any person arrested under clause (a) or clause (b)

of sub-rule (1) shall be removed to any other province of which the Provincial Government (hereinafter described as the second Government) has given its consent in this behalf, and thereupon such person shall be removed and the second Government shall take in respect of such person such action as may be lawful in like manner as if such person had been arrested within its province. RECORD.

"(6) When security has been taken in pursuance of the provisions of sub-rule (3), the bond shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, by the Chief Presidency Magistrate or District Magistrate having jurisdiction in the area in respect of which the said security has been taken and the provisions of section 514 of the said Code shall apply accordingly.

4. The 2nd Respondent was thereafter detained under the following orders:—

(1) The order of K. C. Diwakar, dated the 22nd August, 1944, under Rule 129 (2) of the Defence of India Rules ordering the detention of the 2nd Respondent in the Central Jail of Nagpur, "until the receipt by you (the superintendent of Central Jail, Nagpur) of further order concerning him provided that the period of detention in pursuance of this order shall not exceed fifteen days from the date of this order." p. 61.

(2) The order of the Provincial Government, dated the 26th August, 1944, purporting to be made under the powers conferred upon it by Rule 129 (2) and (4) of the Defence of India Rules, ordering the 2nd Respondent to be detained in police custody until the 5th September, 1944. p. 63.

(3) The order of the Provincial Government, dated the 2nd September, 1944, purporting to be made under the said powers ordering that the 2nd Respondent be detained in police custody from the 5th September, 1944, for a further period of fifteen days. p. 63.

(4) The order of the Provincial Government dated the 19th September, 1944, purporting to be made under the said powers ordering that the 2nd Respondent be detained in the Nagpur Jail for a further period of fifteen days. p. 64.

5. From the 23rd August, 1924, to the 5th September, 1944, legal advisers who sought to see the 2nd Respondent were denied access to him. The 2nd Respondent was during his said detention interrogated for long periods, but the evidence given on his behalf, and not contradicted by the Crown, was to the effect that the interrogation related entirely to a dacoity alleged to have been committed in the Bombay Presidency. p. 18, l. 37. p. 21, l. 16. p. 13, ll. 20—31.

6. It never was the case of the Crown that the 2nd Respondent had any connection with the alleged dacoity, nor was it ever their case that the alleged dacoity was other than an ordinary criminal offence or had any political subversive character. p. 13, ll. 32—35.

According to the uncontradicted evidence the said interrogation appeared to have as its object to ascertain the whereabouts of one Inamdar, p. 13, ll. 25—30.

RECORD.

who had been employed as a clerk in the office of the "Bhavitavya" for some time previous to May, 1944, when his employment with the 2nd Respondent ceased, and who was apparently suspected of complicity in the said alleged dacoity.

p. 13, ll. 25—30.

7. It has never been the case of the Crown that the said Inamdar was engaged, or had the intention of engaging, in subversive activities or activities such as are contemplated by Rule 129 of the Defence of India Rules,

Ibid.

8. According to the unchallenged evidence at no time was the 2nd Respondent interrogated with regard to any illegal activities of his own of the kind contemplated by Rule 129 of the Defence of India Rules, or with regard to any association or contemplated association by him with any other person or persons who had engaged or were intending to engage in such activities.

p. 4.

9. On the 25th August, 1944, the 1st Respondent filed

THE PRESENT APPLICATION

under Section 491 (1) of the Criminal Procedure Code, alleging that the arrest of the 2nd Respondent under Rule 129 of the Defence of India Rules was a gross abuse of power, malicious, and a fraud upon the law, and that the 2nd Respondent's detention was illegal and improper, and praying his release.

p. 5, l. 39.

The 1st Respondent sought the direction of the High Court in the nature of a *habeas corpus*.

The 1st Respondent alleged that the said K. C. Diwakar had in fact entertained no such suspicion as was requisite to entitle him to act under Rule 129 of the Defence of India Rules, but merely desired to have the 2nd Respondent in custody while the investigation of the alleged dacoity was being conducted and that the said K. C. Diwakar illegally made use of his said powers of arrest in order so to incarcerate the 2nd Respondent and deprive him of the rights and safeguards open to a person interrogated concerning an alleged crime in the ordinary way.

10. The Crown, when resisting this application before the High Court, elected to offer no evidence by the said K. C. Diwakar to the effect that he had any reasonable grounds for suspecting the 2nd Respondent of anything which would justify his arrest under Rule 129 of the Defence of India Rules, 1940.

p. 17, l. 19.

11. The application came for hearing before Mr. Justice Vivian Bose and Mr. Justice J. Sen on the 11th September, 1944.

p. 17.

The order of the High Court was delivered on the 29th September, 1944.

p. 46, ll. 5—40.

12. The learned Judges held, it is submitted inevitably, that they were not satisfied that the said K. C. Diwakar had in fact any grounds for suspecting the 2nd Respondent of anything which would justify his arrest under Rule 129 of the Defence of India Rules.

p. 57, l. 48, to p. 58, l. 5.

13. The learned Judges held, it is submitted with full justification, from the evidence given as to the nature of his interrogation (which

evidence the Crown made no attempt to contravert) and from the manifest unwillingness of those in authority, either, to allow the legal advisers access to the 2nd Respondent, or, to afford to the High Court even an outline of what were the subversive activities (if any) in which the 2nd Respondent was suspected of having engaged, were satisfied that the arrest of the 2nd Respondent was illegal and constituted a fraud upon the Defence of India Act and the Rules made thereunder.

14. The High Court accordingly directed that the 2nd Respondent be set at liberty. p. 58, l. 6.

15. From that order the Crown has preferred this appeal to His Majesty in Council.

The Order in Council granting special leave to appeal to His Majesty in Council was made on the 30th October, 1945. Special leave to appeal was granted upon the following conditions:— p. 59.

"(1) that the 2nd Respondent shall not in any event be re-arrested in respect of the matters to which the appeal relates and

"(2) that the Petitioner shall pay the costs as between solicitor and client incurred by the Respondents both in opposing the Petition and in the Appeal."

16. The Respondents submit that the appeal should be dismissed for the following, amongst other,

REASONS:—

1. Because the reasoning applied in the case of *The King Emperor* v. *Sibnath Banerji*, L. R. 1945, I. A. 241, being based upon the special terms of Section 205 of the Government of India Act, 1935, has no application to the present case and therefore this appeal is not competentin law.

2. Because notwithstanding the terms imposed with regard to the 2nd Respondent, this appeal generally involves the question of the liberty of the subject, and, no precedent ought to be created which may permit a subject set free under the provisions of Section 491 of the Criminal Procedure Code to be re-arrested as the result of an appeal.

3. Because the High Court on ample evidence, found as a fact that the arrest made in this case was not made in good faith and was a fraud on the Defence of India Act and the Rules made thereunder and that finding was correct and should not be disturbed.

4. Because save where an appeal to the Federal Court may be proceeded with under Section 205 of the Government of India Act, 1935, the High Court were, by Section 491 of the Criminal Procedure Code, constituted the sole

and final judges of fact in proceedings taken under that section.

5. Because, since the Respondent was arrested and detained under Rule 129 of the Defence of India Rules, 1940, the propriety of the proceedings of the police officer depended upon whether he in fact had reasonable grounds for suspecting the 2nd Respondent of being such a person as is referred to in the said Rule and the High Court was right in holding that the onus was upon him to show such grounds, and that he had failed to do so.

6. Because it was for the High Court to decide whether the police officer who arrested and detained the 2nd Respondent had in fact any reasonable grounds for suspecting the 2nd Respondent, and no evidence was tendered by the Crown upon which it would have been open to the High Court to find on that issue against the 2nd Respondent.

7. Because if the arrest and detention of the 2nd Respondent was not justified the High Court was in law bound to set the 2nd Respondent free.

C. S. REWCASTLE.

S. P. KHAMBATTA.

Hy. S. L. Polak & Co.,
Danes Inn House,
265, Strand, W.C.2,
Solicitors for the Respondents.

P. C. Appeal No. 83 of 1945.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF JUDICATURE AT NAGPUR.

BETWEEN

THE KING EMPEROR - *Appellant,*

AND

VIMLABAI DESHPANDE, and PUROSHOTTAM YESHWANT DESHPANDE - *Respondents.*

CASE FOR THE RESPONDENTS.

HY. S. L. POLAK & Co.,
Danes Inn House,
265, *Strand, W.C.2,*
Solicitors for the Respondents.

Fredk. Evison & Co., 7, Chichester Rents, Chancery Lane, W.C.2. 23146

(4) On receipt of any report under the provisions of sub-rule (2) the Provincial Government may, in addition to making such order subject to the second proviso to sub-rule (2) as may appear necessary for the temporary custody of any person arrested under this rule, make, in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary."

3. The grounds upon which the High Court held that the detention was illegal and improper can be summarized as follows :—

p. 34, ll. 19–24. p. 45, ll. 23–27. (A) that where a person has been arrested and detained under the provisions of Rule 129, the High Court must determine the reasonableness of the suspicions entertained by the police officer who arrested him,

p. 34, ll. 19–24. p. 45, ll. 23–27. (B) that the burden of satisfying the High Court that the police officer's suspicions were reasonable rests on the Crown,

p. 35, ll. 25–30. (C) that if this burden of proof is not discharged, and the arrest is in consequence held to be defective, the defect cannot be cured by any subsequent orders made by the Provincial Government under Rule 129 (2) and (4),

p. 50, l. 47. p. 51, l. 4. (D) that in the present case the police had arrested the detenu in order to investigate a crime, and not with any intention of promoting the efficient prosecution of the war or protecting the public safety, and

p. 50, ll. 37–46. (E) that the Provincial Government had made orders for the detention of the detenu under Rule 129 (2) and (4) in order to facilitate the police investigation of a crime and not with any intention of promoting the efficient prosecution of the war or protecting the public safety.

4. The questions raised by this appeal are :—

(i) Whether the High Court has correctly construed the provisions of Rule 129, and

(ii) Whether there was any evidence to support the findings summarised in paragraph 3 (D) and (E) above.

5. Before relating the facts of the case, it will be convenient to set out the material provisions of Rule 26 of the Defence of India Rules, 1939, of Section 16 of the Defence of India Act, 1939, of Section 4 of the Indian Evidence Act, 1872, and of Section 491 of the Code of Criminal Procedure.

Rule 26 of the Defence of India Rules, 1939, empowers the Provincial Government to make orders for the detention of persons. It provides as follows :—

"26.—(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to

P. C. Appeal No. 83 of 1945.

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SERIAL NO.	DESCRIPTION OF DOCUMENT	DATE	PAGE
9	Written statement of the Legal Remembrancer and Secretary to Government, Central Provinces and Berar, Legal Department	—	14
10	Affidavit sworn by the Chief Secretary to Government, Central Provinces and Berar	10th September 1944	16
11	Order of the High Court	29th September 1944	17
	IN THE PRIVY COUNCIL.		
12	Order in Council granting Special Leave to Appeal to His Majesty in Council	30th October 1945	59

APPENDIX OF ORDERS FOR DETENTION.

	DESCRIPTION OF DOCUMENT	DATE	PAGE
A	Order of K. C. Diwakar	22nd August 1944	61
B	Order of Provincial Government	26th August 1944	63
C	Ditto	2nd September 1944	63
D	Ditto	19th September 1944	64

	DATE	PAGE
	—	14
	1944	16
	1944	17

		PAGE
	22nd August 1944	61
.	26th August 1944	63
.	2nd September 1944	63
	19th September 1944	64

In the Privy Council.

No. 83 of 1945.

ON APPEAL
FROM THE HIGH COURT OF JUDICATURE AT NAGPUR.

BETWEEN

THE KING EMPEROR - - - - - - - *Appellant*

AND

VIMLABAI DESHPANDE and
P. Y. DESHPANDE - - - - - - - *Respondents.*

10 # RECORD OF PROCEEDINGS.

No. 1.

ORDER SHEET.

In the High Court of Judicature at Nagpur.

Part I.

No. 1. Order Sheet, 26th August 1944 to 29th September 1944.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

ORDER-SHEET.

Miscellaneous Criminal Case No. 70 of 1944.

VIMLABAI DESHPANDE

Vs.

THE KING EMPEROR and Others.

20 Date of order or proceeding	Order or proceeding with signature of presiding officer	Signature of parties or pleaders when necessary
26th August 1944.	Petition presented on 25th August 1944 by Mr. M. Adhikari counsel for the petitioner. It appears to be properly drawn up, duly stamped, and is accompanied by all the necessary documents. It be registered and placed before Judges for orders on 29th August 1944. Counsel be informed of the date. 30 T. C. SHRIVASTAVA, Deputy Registrar.	

In the High Court of Judicature at Nagpur. Part I. No. 1. Order Sheet, 26th August 1944 to 29th September 1944, *continued.*	Date of order or proceeding	Order or proceeding with signature of presiding officer	Signature of parties or pleaders when necessary
	28th August 1944.	Mr. M. Adhikari, counsel for the applicant heard. Issue notice to the other side for a date to be fixed in office. Superintendent Central Jail Nagpur is directed to produce a copy of the warrant on the order under which Mr. P. Y. Deshpande is detained. VIVIAN BOSE, Judge. J. SEN, Judge.	
	29th August 1944.	Fixed for hearing on 11–9–44. Notice be issued as ordered above and Memo to Superintendent Central Jail, Nagpur asking for a Copy of warrant or the order under which P. Y. Deshpande is detained. Counsel be informed of the date. T. C. SHRIVASTAVA, Deputy Registrar.	
	29th August 1944.	A further affidavit filed by W. V. Deshpande on 28–8–44 be taken on record for consideration at the hearing already fixed for 11th September 1944. T. C. SHRIVASTAVA, Deputy Registrar.	
	31st August 1944.	Application filed by Mr. B. L. Gupta, Counsel for the applicant, on 30–8–44, be placed before judges, for orders on 1st September 1944. Counsel be informed of the date. Attention is invited to para. 8 of the application. There are in all four prayers in one application. A Separate application for each prayer was necessary. T. C. SHRIVASTAVA, Deputy Registrar.	
	1st September 1944.	Mr. T. J. Kedar, with Mr. M. Adhikari and T. L. Sheode counsel for the applicant heard on the application d/– 30–8–44. Issue notice to the Crown and in duplicate to the Legal Secretary to the Provincial Government to show cause against the application dated 30th August 44. Three copies to be supplied to the Advocate General to-day. The case will be heard on Monday at 11 a.m. (4th September 1944). VIVIAN BOSE, Judge. C. R. HEMEON, Judge.	

presiding officer

Signature of parties or pleaders when necessary

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TAVA,
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EMEON,
Judge.

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Date of order or proceeding	Order or proceeding with signature of presiding officer	Signature of parties or pleaders when necessary

4th September 1944.

Mr. T. J. Kedar with Mr. T. L. Sheode, counsel for the applicant.
Mr. M. Hidayat Ullah, counsel for the Crown. He files a order d/– 26th August 44. The case will be taken up tomorrow at 11 a.m.

VIVIAN BOSE, Judge. J. SEN, Judge.

5th September 1944.

Mr. T. J. Kedar with Mr. T. L. Sheode counsel for the applicant. Mr. Hidayat Ullah, Advocate General for the Crown.
The Advocate General states that according to his instructions there will be no objection to either messers T. J. Kedar or T. L. Sheode interviewing Mr. P. Y. Deshpande. Counsel for Mr. Deshpande states that Mr. Sheode can interview him. Mr. Sheode will accordingly get into touch with the D.S.P. in whose immediate charge Mr. Deshpande is and fix an early time for an interview at some reasonable hour.

VIVIAN BOSE, Judge. J. SEN, Judge.

11th September 1944.

Mr. T. J. Kedar with Mr. T. L. Sheode, counsel for the applicant.
Mr. M. Hidayat Ullah, Advocate General for the Crown.
Arguments heard. Order reserved.

B.O.

R. S. NAIK, Reader.

29th September 1944.

Order passed in the presence of Mr. Hidayat Ullah, Advocate - General and M. Adhikari Counsel for the applicant.

VIVIAN BOSE, Judge. J. SEN, Judge.

Superintendent.

Release warrant in duplicate put up.

Issued. T. C. SHRIVASTAVA, D.R.
C. B. MAHAJAN 29th September 44.

No. 2.

APPLICATION of Mrs. Vimlabai Deshpande under Section 491 (1) (b), Criminal Procedure Code.

In the High Court of Judicature at Nagpur.

Part I.

No. 2. Application of Mrs. Vimlabai Deshpande under Section 491 (1) (*b*), Criminal Procedure Code, 25th August 1944.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Mis. Criminal Case No. 70 of 1944.

Applicant :—VIMLABAI DESHPANDE wife of PURUSHOTTAM YESHWANT DESHPANDE, resident of Congress-nagar, Nagpur.

Versus

Non-Applicant :—1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail at Nagpur.

Application under Sec. 491 (*b*) *Cr. Procedure Code.*

The applicant above named states as follows :—

1. That she is the wife of Mr. P. Y. Deshpande, an Advocate of this Hon'ble Court. Her husband is also the Editor of the "Bhavitavya," a weekly journal conducted in Marathi.

2. That her husband was called to the Police Station on 21–8–1944 at about 8 p.m. and since then he has been in custody and is at present lodged in the Central Jail at Nagpur, in the custody of the non-applicant No. 3. The circumstances under which he was called, to the Police Station and detained so far as they are known to her, are stated in the following paragraphs.

The applicant instructed Mr. V. K. Ringe an Advocate of this court to seek an interview with her husband in the Jail in order to get the necessary facts but the non-applicant No. 3 refused to grant the interview.

3. That on 21–8–44 at about 6.30 a.m. Mr. R. K. Misra the Additional District Magistrate, accompanied by several Police officers and a possi of constables surrounded their residence in Congress Nagar and called the petitioner's husband. They immediately came in and started searching the house. The search lasted till 1.30 p.m. and the whole house including the office of the "Bhavitaya" was searched, and certain articles were seized.

4. That the applicant understands that a Warrant was shown to her husband but she does not know the person who issued it nor why it was issued. From a report appearing in the "Hitavada" of the 22nd August 1944, she learns that the warrant was issued under R. 126 of the D.I. Rules by the District Magistrate, Nagpur.

5. That after the search was over the party left instructing Mr. Deshpande to attend the Sitabuldi Police Station at 3 p.m. accordingly Mr. Deshpande, attended the Police Station, but as no body was found there he returned home.

6. That at about 8 p.m. a constable came to call Mr. Deshpande, to the Police Station. Accordingly Mr. Deshpande again went to the Police Station. The applicant understands that Mr. Deshpande, was interrogated by the police, and then arrested and put in the lock up.

7. That Mr. Deshpande is in custody, from that time. On 22–8–44 which was a holiday Mr. Deshpande was removed to the lock up in the compound of the District Magistrates Court and kept there for the whole day, though why the applicant does not know. That on the same afternoon at about 5 p.m. Mr. Deshpande was removed to the Central Jail at Nagpur.

8. That the applicant understands that there was no warrant for his arrest. Mr. Deshpande was never informed why he was being arrested or what the charge against him was.

9. That during the course of the search the police took down the numbers of one hundred rupee notes and questioned the applicant as to where she had got them from.

10. That on 22–8–1944 the police asked Wamanrao the nephew of Mr. P. Y. Deshpande, about the Inamdar, who was employed as a clerk in the Bhavitaya office, and about his friends. This Inamdar had left the service of the Bhavitavya in May 1944, and since then his whereabouts are not known either to the applicant or her husband.

11. That on 23–8–44 at about 10.15 a.m. two persons, said to be police officers from Bombay, came to the applicant's house and questioned her regarding the said Inamdar and his friends.

12. That from the nature of the inquiry by the Police and from the report in the " Hitavada," it appears that Bombay police are investigating into an offence of dacoity and are trying to trace the offenders. The enquiries regarding Inamdar suggest an inference that the police suspect that the said Inamdar who was probably a suspect in the eyes of the police was harboured in the Bhavitavya office.

13. That in order to move an application for bail the applicant had instructed Mr. Ringe, advocate to interview her husband and take instructions as has been stated before. Mr. Ringe was not permitted to interview her husband on the ground that he has been arrested and detained under R. 129 of D.I. Rules.

14. That till searches and enquiries by the police having been ostensibly made in connection with an attempt to trace the offenders in a dacoity alleged to have been committed in Bombay Presidency, the arrest of the applicant's husband ought to have been made under the provisions of the Criminal Procedure Code. But it appears that R. 129 of D.I. Rules has been deliberately and in utter want of good faith used in order to prevent Mr. Deshpande from pursuing the ordinary legal remedies and to deprive him of his ordinary legal rights. This is an abuse of the Defence of India Act and the rules framed thereunder.

15. That the arrest of Mr. Deshpande, under R. 129 of D.I. Rules is a gross abuse of powers by the authorities, malicious and a fraud upon the Law.

16. That the detention of Mr. P. Y. Deshpande is illegal and improper.

Prayer :—It is, therefore, prayed that the Hon'ble Court be pleased to set Mr. P. Y. Deshpande at liberty.

(Mrs.) VIMLABAI DESHPANDE,
Applicant.

T. L. SHEODE
for the applicant
Nagpur
24–8–1944.

B. L. GUPTA.
M. ADHIKARI.

Filed to-day 25th August 1944 by Mr. M. Adhikari Advocate.

R. K. BILLORE,
D.R.'s Reader.

T. L. SHEODE.

In the High Court of Judicature at Nagpur.

Part I.

No. 3.

No. 3. Affidavit sworn by Waman Venkatesh Deshpande, 25th August 1944.

AFFIDAVIT sworn by Waman Venkatesh Deshpande.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Miscellaneous Criminal Case No. of 44.

Applicant

VIMALABAI DESHPANDE wife of PURUSHOTTAM YESHWANT DESHPANDE, resident of Congress Nagar, Nagpur

Versus

Non-Applicants

1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail at Nagpur.

AFFIDAVIT.

I, WAMAN, son of Venkatesh Deshpande, make oath and say :—

1. I am the nephew of Mr. P. Y. Deshpande, who is an Advocate of this Honourable Court and the Editor of the "Bhavitavya." I stay with him in his house in Congress-Nagar, Nagpur.

2. On 21–8–44 at about 6.30 a.m. Mr. R. K. Mishra, Additional District Magistrate, Nagpur accompanied by Several Police Officers and a posse of constables surrounded the house of Mr. P. Y. Deshpande. They called Mr. Deshpande, and immediately entered the house and started searching it. They searched the house and the office of the "Bhavitavya" which is located in a part of the same building till about 1.30 p.m. and seized certain papers. They also took down the numbers of currency notes of Rs.100/– each.

3. After the search the party left instructing Mr. Deshpande to attend the Police Station at Sitabuldi at 3 p.m. of the same day. Mr. Deshpande went to the Police station at 3 p.m. but returned some time after.

4. At about 8 p.m. a constable came to call Mr. Deshpande to the police station, and accordingly he went there. Mr. Deshpande did not return home thereafter. At about 10 p.m. on being informed of the arrest of Mr. Deshpande, I went to the Sitabuldi Station House with meals for Mr. Deshpande and found Mr. Deshpande in the lock up.

5. On 22–8–44 Mr. Deshpande was taken to the lock up in the District Court compound and was kept till about 5 p.m. Mr. Deshpande was taken to the Central Jail at Nagpur at about 5 p.m. Since then Mr. Deshpande is in detention in the Central Jail.

6. On 23–8–44, on the instructions of Mrs. Vimalabai Deshpande I took Mr. V. K. Ringe Advocate to take instructions from Mr. P. Y. Deshpande for the purpose of making an application for bail. Mr. Ringe was not allowed to interview Mr. Deshpande on the ground that he was detained under Rule 129 of D.I. Rules.

7. On 22–8–44, I was asked by a police officer, whether I knew one Inamdar, his present whereabouts and about his visitors. I told him that Inamdar was employed as a clerk in " Bhavitavya " office and left some time in May 1944.

8. Mrs. Vimalabai Deshpande was also asked similar questions by two persons who said they were police officers from Bombay.

9. On 22–8–44, the " Hitvada " a local daily paper published news regarding the search of Mr. Deshpande's house.

10. From the nature of the enquiry made from me and Mrs. Vimalabai Deshpande and from the report in the "Hitavada" I understand that the Bombay Police are investigating into an offence of dacoity and are trying to trace the offenders.

11. I also infer that the police suspect the said Inamdar and that he was harboured in the ' Bhavitavya ' office.

W. V. DESHPANDE.

Nagpur,

Dated the 25th August 1944.

I, Waman son of Venkatesh Deshpande, resident of Congress Nagar, Nagpur, declare that the facts stated in paras. 1 to 9 are from my knowledge and those in paras. 10 to 11 are from information received and believed to be true.

W. V. DESHPANDE.

Sworn before me on the 25th day of August 1944, by Waman son of Vyankatesh Deshpande, who has been identified by B. K. Pachkhede Clerk to Mr. M. Adhikari, Advocate whose signature is hereto appended.

T. C. SHRIVASTAWA,
Deputy Registrar,
High Court of Judicature
at Nagpur.

(seal)

B. K. PACHKHEDE
Clerk to Mr. Adhikari.

Dated 25th August 1944.

In the High Court of Judicature at Nagpur.

Part I.

No. 3. Affidavit sworn by Waman Venkatesh Deshpande, 25th August 1944, *continued.*

In the High Court of Judicature at Nagpur.

Part I.

No. 4. Affidavit sworn by Waman Venkatesh Deshpande, 28th August 1944.

No. 4.

AFFIDAVIT sworn by Waman Venkatesh Deshpande.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Miscellaneous Criminal Case No. 70 of 1944.

MRS. VIMLABAI DESHPANDE wife of Mr. P. Y. DESHPANDE resident of Congress Nagar Nagpur Applicant

versus

CROWN and others - - - - - - Non-Applicant.

AFFIDAVIT.

I, WAMAN son of Venkatesh Deshpande, make oath and say :—

1. On 28th August 1944 at about 10 a.m. my uncle P. Y. Deshpande, was brought from the Central Jail and kept in police custody in the lock up of the Police Station situated in the District Court compound.

2. On being asked by a constable I went at 12 noon with meals for Mr. P. Y. Deshpande to the said Police Station and found him in the lock up there.

3. I took the evening meals also for Mr. Deshpande at about 8.30 p.m. to the same Police Station. To-day I took tea in the morning and his mid-day meals also to the same police station. On these occasions I found Mr. Deshpande in the lock up of the Police Station and I believe that he has been kept there continuously since 27th August 1944 for the purposes of interrogation.

W. V. DESHPANDE.

I make oath and say that the facts stated in paragraphs 1 to 3 are from my personal knowledge.

Nagpur W. V. DESHPANDE.

28th August 1944.

Sworn before me on the 28th day of August 1944, by Waman son of Vyankatesh Deshpande who has been identified by B. K. Pachkhede Clerk to Mr. M. Adhikari, Advocate whose signature is hereto appended.

T. C. SHRIVASTAVA,
Deputy Registrar,
High Court of Judicature at Nagpur.

B. K. PACHKHEDE,
Clerk to Mr. Adhikari.

28th August 1944.

(Seal)

Filed to-day 28th August 1944,

By W. V. Deshpande.
R. K. BILLORE,
D.R.'s Reader.

the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war, it is necessary so to do, may make an order :

* * * * *

(*b*) directing that he be detained ; "

6. The power to call in question orders made under Rule 26 or Rule 129 of the Defence of India Rules is controlled by Section 16 of the Defence of India Act, 1939, which provides as follows :—

"16.—(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority."

Section 4 of the Indian Evidence Act, 1872, provides as follows :—

"4. . . . Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

Section 491 of the Code of Criminal Procedure provides as follows :—

"491.—(1) Any High Court may, whenever it thinks fit, direct . . . (*b*) that a person illegally or improperly detained in public or private custody within such limits [viz. the limits of its appellate criminal jurisdiction] be set at liberty."

7. The following facts were proved by the Appellant :—

(A) On the evening of the 21st August, 1944, the detenu was arrested pursuant to an order given by the Deputy Inspector General, Police (Crime and Railways) acting under Rule 129. The arrest was made by one, K. C. Diwakar, a police officer stationed at Sitabuldi. p. 16, ll. 15–18.

(B) On the 22nd August, 1944, under an order signed by K. C. Diwakar, the detenu was committed to the custody of the Superintendent, Central Jail, Nagpur. The order contained the following recitals :— p. 61, l. 17–p. 62.

"Whereas in exercise of the powers conferred by sub-rule (1) of rule 129 of the Defence of India Rules, I have arrested P. Y. Deshpande Dhantoh : 44 years, resident of Nagpur in the Nagpur district, whom I reasonably suspect of having acted, or of acting, or of being about to act in a manner prejudicial to the efficient prosecution of war.

"And whereas under sub-rule (2) of the said rule 129, I am empowered to commit the said arrested person to any Jail suitable in the province . . ."

(C) On the 23rd August, 1944, the report of the arrest was received by the Provincial Government. p. 16, ll. 18–19.

No. 5.

APPLICATION of Mrs. Vimlabai Deshpande seeking information from the Crown, or the Provincial Government, on certain points.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Mis. Criminal Case No. 70 of 1944.

Applicant.

VIMLABAI DESHPANDE wife of PURUSHOTTAM DESHPANDE resident of Congress Nagar Nagpur

Versus

Non-Applicant.

1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail at Nagpur.

The applicant begs to submit as follows.

1. That this Honourable Court has been pleased to send for the warrant of arrest under which Mr. P. Y. Deshpande was arrested.

2. That it appears that the following information is necessary in order to enable full and complete arguments to be advanced at the hearing :—

(i) Who is the ultimate Officer who made or directed the arrest ;

(ii) What report of the fact of arrest was made to the Provincial Government by the Officer making the arrest ;

(iii) Has the Provincial Government passed any order on such report under sub-rule 2 of Rule 129 ? and if so, what ?

(iv) If the Provincial Government has passed no order, has the officer who made the arrest passed any order in writing in respect of the commitment of the arrested person to custody ? If so what ?

(v) Is there any general or special order of Provincial Government about the commitment of the arrested person to custody. If so what ?

(vi) What is the purpose of transferring the applicant's husband to the lockup in the compound of the District Court ?

3. That ordinarily the period for which the arrested person can be detained by the officer making the arrest is that of 15 days but under the orders of the Provincial Government, this period can be extended to 2 months under rule 129 (D) rules. The hearing of the case in which the applicant urges that the arrest has been made by misusing the powers given by the Defence of India Rules should take place before the end of the first period. The applicant prays that the hearing may be accordingly expedited.

In the High Court of Judicature at Nagpur.

Part I.

No. 5. Application of Mrs. Vimlabai Deshpande seeking information from the Crown, or the Provincial Government, on certain points, 30th August 1944, *continued.*

4. It appears that the applicant's husband has been transferred to the lockup in the compound of District Court from the Jail. He was so transferred on 27th August 1944. He is at present in the said lockup. The purpose of the transfer is not known to the applicant. Presumably it is in connection with an inquiry into an offence under the Penal Code and in order to enable the Police Officers to have facilities of interrogation.

5. The applicant thinks it necessary that since interview by a lawyer was not permitted, the applicant's husband should be ordered to be produced before this Honourable Court to enable the Court to know all the circumstances about the arrest and detention.

6. That if this Honourable Court so decides, it may direct the Provincial Government to allow a lawyer to have an interview with Mr. P. Y. Deshpande before the date of hearing.

7. The transfer of Mr. P. Y. Deshpande from the Jail to the lockup and his continued detention there have given rise to a grave apprehension in the mind of the applicant. The applicant's husband is not in robust health and the transfer to the lockup and detention there would certainly cause mental torture to him which will inevitably undermine his health. There being no restriction on the visits of the Police Officers as regards the times and the periods the applicant's husband might be kept without sleep for days and this would amount to physical torture also. The applicant feels that detention in Jail is the lesser of the two evils so long as detention continues.

8. That the applicant prays for the following reliefs :—

(A) The Crown or the Provincial Government be ordered to supply the information specified in para. 2 of this petition,

(B) the hearing of the main petition under section 491 Criminal Procedure Code be so expedited that the hearing takes place before the end of 15 days from the date of arrest,

(C) the applicant's husband Mr. P. Y. Deshpande should be ordered to be produced at the hearing before the High Court,

(D) a lawyer of Mr. P. Y. Deshpande should be permitted to have an interview with Mr. P. Y. Deshpande at the place of his detention.

Dated, Nagpur
the 30th August
1944.

M. ADHIKARI
B. L. GUPTA.
Counsels for the applicant.

No. 6.

APPLICATION of Mrs. Vimlabai Deshpande for urgent disposal of the case.

No. 6. Application of Mrs. Vimlabai Deshpande for urgent disposal of the case, 30th August 1944.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

An application for urgent disposal of matter.

Applicant :—

VIMLABAI DESHPANDE.

Non-Applicants :—

1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail at Nagpur.

A grave apprehension having risen owing to the transfer of the applicant's husband from the Jail to the lockup in the compound of the District Court, it has become necessary to present this petition for the passing of suitable orders.

The matter may be kindly treated as one of urgency.

Dated, Nagpur,
the 30th August
1944.

M. ADHIKARI.
B. L. GUPTA.
Counsels for the Applicant.

No. 7.

NOTICE.

No. 7. Notice, 1st September 1944.

GEORGE VI, BY THE GRACE OF GOD, OF GREAT BRITAIN IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, KING, DEFENDER OF THE FAITH, EMPEROR OF INDIA.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Notice in Miscellaneous Criminal Case.

Misc. Criminal case No. 70 of 1944, fixed for 4th September 1944.

VIMLABAI w/o P. Y. DESHPANDE of Congress Nagar
Nagpur - - - - - - - - - Petitioner

1. THE KING EMPEROR (2) PROVINCIAL GOVERNMENT and (3) SUPERINTENDENT Central Jail, Nagpur - - - - - - Non-Applicants.

To

The District Magistrate,
Nagpur.

Whereas the petitioner above-named has made an application to this Court urging some prayers mentioned in the application (copy enclosed) and whereas the said application has been admitted to a hearing by the Court.

In the High Court of Judicature at Nagpur.

Part I.

No. 7. Notice 1st September 1944, *continued.*

Notice is hereby given to you that the case will be laid before the Court on the 4th September 1944, or as soon thereafter as may be practicable; and if you consider it necessary, you should take steps to have Government represented at the hearing.

Given under my hand and the seal of the High Court of Judicature at Nagpur, this 1st day of September 1944.

By order of the High Court

A. D. KALE.
Assistant Superintendent,
for Deputy Registrar.

(Seal)

N.B. A copy of the application is being sent to you.

Notice to the Advocate General through the Legal Secretary to Government of the C.P. & Berar, Nagpur is being issued direct from this Court to represent the Crown on the date of hearing.

EXPRESS 2–9–44.

Forwarded to the District Superintendent of Police, Nagpur for favour of service with a special Constable and return to the High Court at 11 hours on the 4th September 1944.

ILLEGIBLE
for District Magistrate
Nagpur 11-40 a.m.

S. O. Sitabuldi,
Illegible
for D.S.P.
2/9/ S. I. Chiney.

Please get the notice noted by Vimlabai today.

K. C. DIWAKAR.
S. O. Sitabuldi,
3/9/44.

Noted the contents of her Notice.

(Mrs.) VIMLABAI DESHPANDE,
3/9/1944.

Forwarded.

K. C. DIWAKAR,
S. O. Sitabuldi,
3/9/

Constable Babu Prasad.

To obtain the signature of Mrs. Vimlabai Deshpande after getting (the contents) noted (by her).

Illegible
3/9

675
4/4/44.

Constable Bhanupratap.

True translation.
S. L. WATE,
Translator
High Court Nagpur.

* * * (Illegible) * * *

Illegible
4/4/44.

No. 8.

AFFIDAVIT sworn by Waman Venkatesh Deshpande.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Miscellaneous Criminal Case No. 70 of 1944.

Applicant

VIMALABAI DESHPANDE wife of PURUSHOTTAM YESHWANT DESHPANDE, resident of Congress Nagar, Nagpur

Versus

Non-applicants.

1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail, Nagpur.

AFFIDAVIT.

I, WAMAN son of Venkatesh Deshpande, make oath and say :—

1. Mr. T. L. Sheode, Advocate for the applicant, had an interview with my uncle, Mr. P. Y. Deshpande who is detained in the lock up in the police station situated in the District Court compound on 6th September 1944 at about 5 p.m. and he received the following instructions from the detenue.

(i) The local police and the Bombay C.I.D. Police interrogated the detenue only about some dacoity alleged to have taken place in the Bombay Presidency, particularly with reference to one Inamdar, who was in his (detenue) service as a clerk in the "Bhavitavya" office and who left his service in May 1944 last, as stated in paragraph 7 of my affidavit dated 25th August 1944. The detenue was further asked whether he knew the whereabouts of the said Inamdar and about his (Inamdar's) friends and associates alleged to be connected with the aforesaid dacoity.

(ii) All these interrogations continued both in jail and in the lock up for about 6 or 7 days and since the last 3 or 4 days all this has stopped altogether.

(iii) Not a single question was ever put to the detenue, at any time, about war activities, or about any writing in the "Bhavitavya" or any other topic. In fact the whole enquiry centred round the dacoity affair only.

(iv) Since the interrogation stopped, the detenue is required to wash his clothes, and clean the pots of his daily use, which formerly used to be done by his servant who took his meals to the lock up and he has thus been deprived of the amenities which were allowed to him previously.

W. V. DESHPANDE.

Nagpur, dated the
8th September 1944.

In the High Court of Judicature at Nagpur.

Part I.

No. 8. Affidavit sworn by Waman Venkatesh Deshpande, 9th September 1944, *continued.*

I make oath and say that the facts stated in the above paragraphs are true from the information received from Mr. T. L. Sheode, Advocate, Nagpur.

W. V. DESHPANDE.

Sworn before me on the 8th day of September 1944 by Waman, son of Venkatesh Deshpande, who has been identified by B. K. Pachkhede Clerk to Mr. M. Adhikari, Advocate whose Signature is hereto appended.

T. C. SHRIVASTAWA,
Deputy Registrar,
High Court of Judicature at Nagpur.

(Seal)

B. K. PACHKHEDE
Clerk to Mr. M. Adhikari.

Dated the 8th September 1944.

Received copy

M. HIDAYTULLAH
Advocate General 1.40 p.m.

Dated the 9th September 1944.

Filed to-day 9th September 1944 by Mr. M. Adhikari.

C. L. TIWARI
Deputy Registrar's Reader.

No. 9. Written statement of the Legal Remembrancer and Secretary to Government, Central Provinces and Berar, Legal Department.

No. 9.

WRITTEN STATEMENT of the Legal Remembrancer and Secretary to Government, Central Provinces and Berar, Legal Department.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

(Miscellaneous Criminal Case No. 70 of 1944.)

MRS. VIMALABAI DESHPANDE

Versus

1. KING EMPEROR.
2. PROVINCIAL GOVERNMENT, Central Provinces and Berar.
3. SUPERINTENDENT, Central Jail, Nagpur.

In re detention of Mr. P. Y. Deshpande under Defence of India Rule 129.

The Provincial Government, Central Provinces and Berar begs to submit as follows :—

1. Certain persons including Mr. P. Y. Deshpande of Nagpur were arrested on the evening of the 21st August 1944 under rule 129 of the

Defence of India Rules under the ultimate orders of the Deputy Inspector General of Police (Crime and Railways). The formal report of the arrest was received by the Provincial Government on the 23rd August 1944.

2. The report was carefully considered by the Provincial Government and *inter alia*, revealed reasonable grounds for suspecting that Mr. Deshpande was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war and in the opinion of the Provincial Government, there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety.

3. On receipt of this report, the Provincial Government passed an order under Defence of India Rule 129 (2) and (4) for Mr. P. Y. Deshpande's detention temporarily in Police custody for a period of 15 days. During this period he was also interrogated with regard to his activities and associates.

4. A further report was sent to the Provincial Government upon which the Provincial Government by an order dated the 2nd September 1944 extended the period of detention by 15 days.

5. An order for search was issued under rule 126 on the 20th August 1944 by the District Magistrate, Nagpur.

6. He was arrested under rule 129 on the evening of the 21st August 1944.

7. That the Provincial Government is advised that it is not the normal practice to make such statements on affidavit and that there are no rules providing for the filing of affidavits.

8. That this Provincial Government is aware that affidavits are filed sometimes to assist the Courts in reaching a just and proper decision.

9. That this Provincial Government is anxious to give all reasonable assistance to this honourable Court so that this Honourable Court may reach a just and proper decision. At the same time this Provincial Government is apprehensive that this action may not in future be accepted as a precedent requiring the Provincial Government to make returns on affidavit.

10. That the Provincial Government, subject to the reservation that this may not be treated as a precedent, is prepared if called upon to file forthwith an affidavit in support of the allegations of fact in paragraphs 1 to 6 above, and particularly in deference to the wishes expressed by this honourable court.

By Order of the Governor,
Central Provinces and Berar,

T. D. WICKENDEN

Legal Remembrancer and Secretary to Government, Central Provinces and Berar, Legal Department.

No. 10.

In the High Court of Judicature at Nagpur.

Part I.

No. 10. Affidavit sworn by the Chief Secretary to Government, Central Provinces and Berar, 10th September 1944.

AFFIDAVIT sworn by the Chief Secretary to Government, Central Provinces and Berar.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

(Miscellaneous Criminal Case No. 70 of 1944.)

MRS. VIMALABAI DESHPANDE

Versus

1. KING EMPEROR.
2. PROVINCIAL GOVERNMENT, C.P. and Berar.
3. SUPERINTENDENT, Central Jail, Nagpur.

In re detention of Mr. P. Y. Deshpande under Rule 129, D.I. Rules.

AFFIDAVIT.

I, THOMAS COOKE SAMUEL JAYARATNAM, Chief Secretary to the Government of the Central Provinces and Berar, do hereby state on solemn affirmation that :—

(1) Certain persons including Mr. P. Y. Deshpande of Nagpur were arrested on evening of 21st August 1944 under rule 129 of Defence of India Rules under the ultimate orders of the Deputy Inspector General, Police (Crime and Railways). The formal report of the arrest was received by the Provincial Government on the 23rd August 1944.

(2) The report was carefully considered by the Provincial Government and, *inter alia*, revealed reasonable grounds for suspecting that Mr. Deshpande was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war and, in the opinion of the Provincial Government, there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety.

(3) On receipt of this report, the Provincial Government passed an order under Defence of India Rule 129 (2) and (4) for Mr. P. Y. Deshpande's detention temporarily in police custody for a period of 15 days. During this period he was also interrogated with regard to his activities and associates.

(4) A further report was sent to the Provincial Government upon which the Provincial Government by an order dated the 2nd September 1944 extended the period of detention by 15 days.

I, T. C. S. Jayaratnam, Chief Secretary to the Government of the Central Provinces and Berar, do hereby state on solemn affirmation that the contents of paragraphs (1) to (3) are true to information received and believed to be true.

Signed and verified this tenth day of September 1944 at Nagpur.

T. C. S. JAYARATNAM,
Chief Secretary to Government
Central Provinces and Berar.

Sworn before me by Mr. T. C. S. Jayaratnam, I.C.S., Chief Secretary to C.P. and Berar Government, who is personally known to me.

(Seal)

P. A. CHAUBEY,
Addl. District Magistrate,
Nagpur. 10–9–44.

No. 11.

Order of the High Court

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944.

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

Miscellaneous Criminal Case.

No. 70 of 1944.

Applicant

VIMALABAI DESHPANDE wife of PURUSHOTTAM YESHWANT DESHPANDE of Nagpur

Versus

Opposite party

1. CROWN.
2. PROVINCIAL GOVERNMENT.
3. SUPERINTENDENT, Central Jail, Nagpur.

Application under section 491 Criminal Procedure Code for releasing Mr. P. Y. Deshpande, Advocate, who has been detained under Sec. 129 (2) of the Defence of India Rules.

Petition presented by Mr. M. Adhikari Counsel for applicant, on 25th August 1944.

The application coming on for final hearing on 11th September 1944 before the Honourable Mr. Justice Vivian Bose and the Honourable Mr. Justice J. Sen in the presence of Mr. T. J. Kedar and Mr. T. L. Sheode Counsel for the applicant and of Mr. Hadiyatullah Advocate General Counsel for the opposite party, the following order was passed by the Court :—

ORDER.

1. This order will also govern Miscellaneous Criminal Case No. 72 of 1944.

2. The cases arise out of applications under section 491 (1) of the Criminal Procedure Code. The applications are in respect of Purs-hottam Yeshwant Deshpande and Yeshwant Vishnu Lele. In order to appreciate the points involved it will be necessary to set out a few relevant facts from the applications and the affidavits which support them.

3. Purushottam Yeshwant Deshpande is an Advocate of the High Court. He is also an Editor of the Bhavitavya, a Marathi weekly which is printed by the Independent Press. He lives in Craddock Town and the office of the Bhavitavya is situate in the adjacent block.

4. W. G. Sheorey, is the Editor, Printer and Publisher of the Independent, an English weekly. He is also the Printer of the Bhavitavya. He lives in a house on the Jail Road in the compound of which is situate the office of the Independent and the press in which it is printed.

5. One Inamdar was employed as a clerk in the Bhavitavya office but he left service in May 1944.

6. On 21st August 1944, at about 6.30 a.m., Mr. R. K. Misra, Additional District Magistrate, Nagpur, accompanied by several Police officers and a posse of constables, surrounded the residence of Deshpande in Congress Nagar and searched the house and the office of the Bhavitavya till 1.30 p.m. and seized certain articles. During the course of the search the police took down the numbers of certain 100 rupee notes. After the search the party left and instructed Deshpande to attend the Sitabuldi Police Station at 3 p.m. He attended as directed but returned as he did not find anyone there. At about 8 p.m. he went to the Police Station again and was interrogated by the police. He was then arrested and put in the police lock-up at Sitabuldi. He was not informed why he was arrested nor was he told what the charge against him was.

7. On 22nd August 1944, which was a holiday on account of Ganesh Chaturthi, Deshpande was removed to the Police lock-up in the compound of the District Magistrate's Court and kept there for the whole day. In the afternoon, at about 5 p.m., he was removed to the Central Jail at Nagpur.

8. A report was published in the Hitavada of the 22nd August 1944 about the searches and arrests made on that date. The relevant portion of the report is reproduced below :—

> "It is reported that simultaneous searches were carried out at Wardha also and some five rupee notes were seized.
>
> These searches are stated to be connected with an armed dacoity alleged to have been committed in East Khandesh some time in April last . . .
>
> The persons connected with the dacoity are still absconding and the search is stated to have been made with a view to catching the absconders."

9. Waman Venkatésh Deshpande, a nephew, of the Deshpande whose case we are considering, was questioned by a Police officer regarding Inamdar, his visitors and his present whereabouts. Deshpande informed the officer that Inamdar was at one time employed as a clerk in the Bhavitavya Office but that he left some time in May 1944.

10. On 23rd August 1944, at about 10.15 a.m., two persons, said to be Police Officers from Bombay, went to the house of Purushottam Deshpande and asked his wife about Inamdar and his friends.

11. On the same day, 23rd August 1944, Mr. V. K. Ringe, an Advocate of this Court, was instructed by Deshpande's wife to see Deshpande in jail in order to obtain necessary facts from him to enable an application for bail to be made, but the Superintendent, Central Jail, Nagpur, refused to grant an interview on the ground that Deshpande was detained under Rule 129 of the Defence of India Rules.

12. Then, on 25th August 1944, Deshpande's wife, Mrs. Vimalabai Deshpande, filed the present application under section 491 (1) (*b*) of the Criminal Procedure Code praying that he be set at liberty as his detention was illegal and improper. This application was supported by an affidavit sworn by Waman Venkatesh Deshpande, his nephew. Relevant paragraphs from the application are reproduced below.

> "12. That from the nature of the inquiry by the Police and from the report in the 'Hitavada' it appears that Bombay Police are investigating into an offence of dacoity and are trying to trace the offenders. The enquiries regarding Inamdar suggest an inference

RECORD.

p. 16, ll. 20–26.

(D) The report revealed reasonable grounds for suspecting that the detenu was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war. In the opinion of the Provincial Government there were reasons to suspect that these persons had already acted in a manner which had prejudiced the public safety.

p. 16, l. 20.
p. 16, ll. 27–28.
p. 63, ll. 1–30.
p. 56, ll. 24–27.

(E) On the 26th August, 1944, the Provincial Government, after a careful consideration of this report, passed an order under Rule 129 (2) and (4) directing that the detenu should be detained in police custody for a period of 15 days expiring on the 4th September, 1944. This order was passed by His Excellency the Governor of the Central Provinces and Berar in person.

p. 16, ll. 29–31.

(F) During the period of detention covered by this order the detenu was interrogated with regard to his activities and associates.

p. 16, ll. 32–34.
p. 63, ll. 30–40.
p. 56, ll. 24–27.

(G) A further report was sent to the Provincial Government. On the 2nd September, 1944, upon the receipt of this report, the Provincial Government passed a further order extending the period of detention for a further 15 days. This order, too, was passed by His Excellency the Governor in person.

p. 64.

(H) On the 19th September, 1944, the Provincial Government passed a third order extending the period of detention for a further 15 days. Again the order was passed by His Excellency the Governor in person. The third recital to this order was in the following words :—

> "And whereas information subsequently received confirms the Provincial Government in the view that there is reasonable suspicion of Mr. P. Y. Deshpande having acted in a manner prejudicial to the public safety and to the efficient prosecution of war ; "

pp. 5–6.

8. On the 24th August, 1944, three days after the arrest of the detenu, the detenu's wife, namely the Respondent Vimlabai Deshpande, filed an application in the High Court, praying for the release of the detenu. The application was supported by an affidavit sworn by W. V. Deshpande, the detenu's nephew. He deposed to the following facts :—

p. 6, l. 16.

(A) The detenu is an advocate of the High Court of Nagpur, and the editor of a newspaper called the " Bhavitavya."

p. 6, ll. 19–26.

(B) On the 21st August, 1944, Mr. R. K. Misra, Additional District Magistrate, Nagpur, accompanied by several police officers, searched the detenu's house and the office of the " Bhavitavya." The police took down the numbers of the currency notes of Rs.100 which they found there.

p. 6, ll. 32–34.

(C) At 10 p.m. on the 21st August, 1944, the deponent was informed of the arrest of the detenu. He went to the Sitabuldi Station house, where he found the detenu in the lock-up.

p. 6, ll. 35–37.

(D) On the 22nd August, 1944, the detenu was taken to the lock-up in the District Court compound, where he was detained until 5 p.m. At 5 p.m. he was removed to the Central Jail.

that the police suspect that the said Inamdar who was probably a suspect in the eyes of the police was harboured in the Bhavitavya office.

* * * * *

14. That searches and enquiries by the police having been ostensibly made in connection with an attempt to trace the offenders in a dacoity alleged to have been committed in Bombay Presidency, the arrest of the applicant's husband ought to have been made under the provisions of the Criminal Procedure Code. But it appears that Rule 129 of the Defence of India Rules has been deliberately and in utter want of good faith used in order to prevent Mr. Desphande from pursuing the ordinary legal remedies and to deprive him of his ordinary legal rights. This is an abuse of the Defence of India Act and the rules framed thereunder.

15. That the arrest of Mr. Deshpande, under Rule 129 of D.I. Rules is a gross abuse of powers by the authorities, malicious and a fraud upon the law."

13. These paragraphs specifically challenge the detention as illegal and improper on the ground that there was utter want of good faith, gross abuse of power and a fraud upon the law. The application also complained that a request for an interview with counsel had been refused.

14. On 28–8–1944 this Court directed issue of notice of the application to the opposite party for a date to be fixed in office. The Superintendent, Central Jail, Nagpur, was further directed to produce a copy of the warrant or order under which Deshpande was detained. The office fixed the hearing for 11–9–1944.

15. On the same day, 28–8–1944, Waman Venkatesh Deshpande filed an affidavit stating that his uncle had been taken from the Central Jail to the lock-up of the Police Station in the District Court compound on 27–8–1944 and that he was being detained in police custody. He stated that he believed that he had been kept there continuously from 27–8–1944 for purposes of interrogation.

16. On 30–8–1944, another application was filed in this Court, seeking information from the Crown, or the Provincial Government, on certain points. We reproduce the relevant portions below.

"2. . . . the following information is necessary in order to enable full and complete arguments to be advanced at the hearing :

(i) Who is the ultimate officer who made or directed the arrest ?

(ii) What report of the fact of arrest was made to the Provincial Government by the officer making the arrest ?

(iii) Has the Provincial Government passed any order on such report under Sub-Rule 2 of Rule 129 ? and if so, what ?

(iv) If the Provincial Government has passed no order, has the officer who made the arrest passed any order in writing in respect of the commitment of the arrested person to custody ? If so, what ?

(v) Is there any general or special order of Provincial Government about the commitment of the arrested person to custody ? if so what ?

(vi) What is the purpose of transferring the applicant's husband to the lock-up in the compound of the District Court ?

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

3. . . . The hearing of the case in which the applicant urges that the arrest has been made by misusing the powers given by the Defence of India Rules should take place before the end of the first period . . .

4. . . . the applicant's husband has been transferred to the lock-up in the compound of the District Court from the jail . . . The purpose of the transfer is not known to the applicant. Presumably it is in connection with an inquiry into an offence under the Penal Code and in order to enable the Police officer to have facilities of interrogation.

5. The applicant thinks it necessary that since interview by a lawyer was not permitted, the applicant's husband should be ordered to be produced before this Honourable Court to enable the Court to know all the circumstances about the arrest and detention.

6. That if this Honourable Court so decides, it may direct the Provincial Government to allow a lawyer to have an interview with Mr. P. Y. Deshpande before the date of hearing.

7. The transfer of Mr. P. Y. Deshpande from the Jail to the lock-up and his continued detention there have given rise to a grave apprehension in the mind of the applicant. The applicant's husband is not in robust health and the transfer to the lock-up and detention there would certainly cause mental torture to him which will inevitably undermine his health. There being no restriction on the visits of the Police officers as regards the times and the periods the applicant's husband might be kept without sleep for days and this would amount to physical torture also. The applicant feels that detention in jail is the lesser of the two evils so long as detention continues.

8. The applicant prays for the following reliefs :

(A) The Crown or the Provincial Government be ordered to supply the information specified in para. 2 of this petition.

* * * * *

(D) a lawyer of Mr. P. Y. Deshpande should be permitted to have an interview with Mr. P. Y. Deshpande at the place of his detention."

17. This application came up for hearing before a bench composed of Hemeon J. and one of us, Bose J. on 1–9–1944. An early hearing was asked for on the ground that the matter was urgent because of the detention in police custody. A complaint was also made in argument that interviews with counsel had not been granted. As to this Bose J. remarked that there was no longer any difficulty about legal interviews. Notice was directed to issue to the Crown and the matter was fixed for hearing at 11 a.m. on 4–9–1944. The learned Advocate General happened to be present in Court in connection with another case and he was told informally that the matter which would be considered on the 4th was the question of detention in police custody rather than jail custody. Counsel on both sides were told that the merits of the application would be considered on the 11th along with the application under section 419 (1) which had already been fixed for that date. But in order that the Provincial Government might have an opportunity of considering all the points raised the order was couched in general terms and was as follows :

"Issue notice to the Crown and in duplicate to the Legal Secretary to the Provincial Government to show cause of" (this is a slip for "against") "the application dated 30–8–44. Three copies to be supplied to the Advocate General to-day. The case will be heard on Monday at 11 a.m. (4–9–44)."

18. On 4–9–44 the learned Advocate General filed a copy of an order of the Provincial Government dated 26–8–1944 directing that Deshpande be detained in police custody during the remaining period of his detention of fifteen days expiring on the 4th September 1944, and stated that there might not be a fresh extension of the period of detention and that Deshpande might be released. Accordingly the case was fixed for 5–9–44 instead of being taken up on the 4th. Complaint was however still made that no legal interviews had been sanctioned and we were asked to pass orders regarding this. We told the learned Advocate General to look into the matter and to let us know the position on the following day at 11 a.m.

19. On the following day, 5–9–1944, the matter was taken up at 11 a.m. Counsel complained bitterly that they were in an exceedingly difficult position because no orders regarding an interview with detenus had been passed and accordingly it was very difficult for them to set out the necessary facts in the absence of instructions from Deshpande himself. We asked the learned Advocate General for an explanation and he assured us that after *Prabhakar Tare's* case (reported in I.L.R. 1943 Nag. 154) there was no longer any difficulty about interviews. He said that his instructions were that in Ringe's case Ringe did not even wait for an answer. He simply went to the jail, asked for an interview, and walked away again. This does not sound likely to us. But that apart, we have an affidavit before us sworn by Deshpande's nephew who was present in person and who swears to the matter to his personal knowledge, that an interview was refused on the ground that Deshpande was detained under Rule 129. There is no affidavit in reply. The complaint about this was made on 28–8–44 and was repeated on 1–9–44 and on 4–9–44. So there was ample time for the Provincial Government to make an affidavit in reply, particularly as both of us stressed on 4–9–44 that an adverse inference would be drawn against the Provincial Government if no affidavit refuting the facts set out in the affidavits before us was filed. In the circumstances we can only conclude that the allegations in W. V. Deshpande's affidavit are true.

20. The next excuse the learned Advocate General made on behalf of the Provincial Government was that no panel of names had been supplied to Government and that the understanding reached after Prabhakar Tare's case was that a panel of names should be supplied so that Government might choose from among the panel. He also said that Deshpande had not asked for an interview but that his wife had made the application. We pointed out that four senior members of the High Court Bar were appearing in the case and that surely by now Government could have made up its mind as to which it would select, or if it considered them all undesirable, could have made alternative proposals.

21. The advocates appearing in Deshpande's case are: Dr. T. J Kedar, Mr. T. L. Sheode, Mr. M. Adhikari and Mr. B. L. Gupta. They filed their memorandum of appearance on 24–8–44, and the application of the 30th August of which copies were supplied to the Advocate General by the orders of this Court, is signed by Messrs. Adhikari and Gupta.

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

Messrs. Kedar, Adhikari and Sheode appeared on 1–9–44. These are Counsel of eminence in the profession and of status. Dr. T. J. Kedar is one of the leaders of the Bar with over 35 years practice. He was Vice-Chancellor of the Nagpur University for six years and as such was in honorary command of the University Training Corps. He had the honorary rank of Lieutenant Colonel. He was also a Minister for some time and has been a member of the Provincial Legislature for many years. Mr. T. L. Sheode is the President of the High Court Bar Association and was formerly a member of the Bar Council. He is one of the leaders of the Bar and has put in over 34 years of practice. Mr. Adhikari is a senior lawyer of over 24 years' practice, and Mr. Gupta has put in over 21 years of practice and is a Lecturer in the University College of Law. What possible objection could there have been to one of these gentlemen being granted an interview? And in fact no objection was made. On the contrary we were repeatedly assured that no obstacles would be placed in the way of an interview. We told the Advocate General that we would give the Provincial Government time till 4 p.m. to make up its mind.

22. At 4 p.m. the learned Advocate General again assured us that there would be no trouble. We then asked him which lawyer was to be permitted to see Deshpande. He replied that an application regarding this should be made to the District Superintendent of Police as he was now in charge of the Prisoner. On this we were very sharp with him and told him that the Provincial Government must choose immediately between Messrs. Kedar and Sheode and that unless it did so we would either direct Deshpande to be brought before us and permit him to interview any counsel he chose or release him altogether. On this the learned Advocate General stated that his instructions were that there would be no objection to either Dr. Kedar or Mr. Sheode interviewing Deshpande. We accordingly directed that an interview be granted to Mr. Sheode.

23. This is a deplorable attitude, unbecoming a Provincial Government. We could have appreciated a straightforward stand to the effect that under the Defence of India Act and Rules no interviews need be granted and that that is a matter which lies in the sole and exclusive province of the Provincial Government. We could have understood the Crown seeking to make this, or any other case, a test case, and asking for a ruling so that one side or the other might test its validity before a higher tribunal —either the Federal Court or the Privy Council. We could have understood a request for a reference to a Full Bench. All that would have been candid and wholly proper. These are difficult times and the authorities, torn between the stress and strain of war demands and the normal calls of peace time government, have unenviable duties to discharge. They are armed with special powers under an Act and Rules which judges trained to the law find it difficult and perplexing to construe. Opinions differ widely about them—even judicial opinion and strong views are held on both sides as the powerful dissenting judgments of Lord Atkin in *Liversidge's* case and Lord Shaw in Halliday's show. No judge would wish to be harsh or ungenerous in his criticisms of those who are called upon to administer these special and perplexing laws. But judges on their part are entitled to candour and frankness when the matter comes before them and they are entitled to expect that their decisions will be respected until they are set aside by legislation or higher authority. They cannot allow the Court to be trifled with. What we cannot understand

in this case is the repeated assurance that no obstacle would be placed in the way and then find some fresh obstruction at every stage.

24. The first complaint about interviews was made in the application of the 25th August. Notice of this was issued to the Crown. The complaint was repeated in the application of the 30th. It was again repeated in argument on the 1st of September in the presence of the Advocate General, who, though not appearing on that date, was present in Court and was given informal notice of the application by the Judges, and more, was supplied with three copies of the application at his express request. This application is signed by Messrs. Adhikari and Gupta. It expressly asks for an interview. The Counsel who appeared and were present in Court were Messrs. Kedar, Adhikari and Sheode. The Counsel who argued the application was Dr. Kedar with Mr. T. L. Sheode assisting him. Whatever doubts may have existed previously there could have been no doubt on that date about the identity of Counsel. The complaint was again repeated in argument at 11 a.m. on the 4th September—this time, with considerable bitterness. Dr. Kedar and Mr. Sheode argued the application. The Crown had had three days to consider its attitude. In spite of this we allowed another 24 hours to enable the Crown to consider the matter still further. Even then nothing had been done at 11 a.m. on the morning of the 5th, and in spite of the fact that the Crown had before it the names of four senior lawyers of this Court it contended that no panel of names had been furnished, and contended that the application was by Deshpande's wife and not by Deshpande himself. Even then we were forbearing and told the learned Advocate General that these four senior Counsel with two leaders of the Bar among them could be regarded as the panel and gave the Provincial Government time till 4 p.m. either to choose between them or furnish an alternative name or names. And what were we told at 4 p.m. ? After repeated assurances at each stage that no disrespect was intended and that every reasonable facility would be afforded we were told that an application for an interview should be made to the District Superintendent of Police.

25. Judicial patience and temper are apt to wear thin in such circumstances. This Court, having negotiated with the Provincial Government direct through its Advocate General, having allowed adjournments in the face of strong protest by the other side because of the assurances given, having furnished the Crown at its request, with a panel of four names consisting of two of the leaders of the Bar and two Advocates of long standing and experience, even though this panel of names had been before the Provincial Government for at least 3 days, is told at the end of it all that an application to the District Superintendent of Police is now necessary. There was no assurance that the application would be granted. This can only be described as deplorable. One would have thought that if an interview were to be allowed at all that the more dignified course, quite apart from considerations of straightforwardness and frankness, would have been to assent to the position, however unwelcome, with good grace from the start instead of trifling with the Court's time and patience and inviting avoidable criticism and adverse comment.

26. And all this was done to deprive a man of a little legal advice so that he might defend his liberty. All done in the name of public safety and the efficient prosecution of the war. Is the Realm really in such desperate straits ? Are the war efforts really hampered or endangered ?

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

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We have certainly seen no evidence of it, nor do we believe that that can be possible. We have a more robust faith in the might of Allied arms.

27. But if it does, or is likely to then why not frankly and openly take away these rights and liberties by legislation? That is done elsewhere, particularly in countries with which we are at war. Why not here? After all the safety of the Realm is the paramount consideration. And if it is done it will be our duty to give effect to such laws however harsh or oppressive they may be. But if it is not done, and if remnants of liberty are still left to the subject, then we cannot allow this Court to be made a mockery and its proceedings a farce. So long as the law says, as it indubitably does, that a man may defend his liberties in this Court in given circumstances, however restricted, we cannot allow the executive to deprive him of those rights and force us to conduct our proceedings in a manner which has been characterised by the Privy Council as opposed to natural justice—certainly opposed to the British justice which is administered in this Court in His Majesty's name. Even the House of Lords in *Liversidge's* case said that an attempt to try an issue without a full and fair hearing would be "startling," a "fantastic result," and a "travesty of a trial." The point was also considered in *Prabhakar Tare's* case (I.L.R. 1943 Nagpur 154 at 162).

28. The claims of the Crown are dangerous claims. What we decide today for A will ensure tomorrow for B. Even when this Act and its rules have gone other laws may take their place and the principles which we lay down now will live on. Other Governments with other views, may come into being. Of course if that was the intention and meaning of those who framed this Act and its Rules, and if that is the interpretation which the words used bear, then our duty is plain. But there is a human side to all laws, and in a matter of such fundamental importance we would require strong and indisputable evidence to convince us that that is what the Act and the Rules import. Nor can it be forgotten that in this case a wife is seeking desperately for redress for her husband. And what is she told?—that her application is of no avail because her husband has made none. She is not allowed to find out from him what his wishes are and she is not even told that he does not wish to make an application. And in any event, how can she know? How can she be sure that precious time is not being wasted while her husband's application is being bandied about from jailor to magistrate, from magistrate to jailor, from jailor to Secretariat, and from Secretariat back to jailor for oblivion in his files secure from the piercing scrutiny of this Court? That did not happen here. But it has happened. (See Misc. Cr. Case No. 47 of 1944 dated 13–9–44). It might and will happen again if Judges shrink from their duty and relax their vigilance. And anyway, how can she know that it did not, seeing that it has.

29. This vexed question of interviews was thrashed out in *Prabhakar Tare's* case (I.L.R. 1943 Nagpur 154) decided in December 1942, and so far as this Province is concerned the decision is that they must be granted. We were given to understand sometime ago that this principle had been accepted and that a *modus operandi* had been agreed upon. As far as we know no High Court has decided that legal advice can be wholly withheld. The only difference of opinion that we are aware of lies in the procedure to be followed. In the Bombay case, reported in *Manubhai Bhikabhai* v. *The Crown* (I.L.R. 1943 Bom. 433 at 439), the detenu was produced in Court and was permitted to interview his legal advisers there. In our view

it is more convenient, and saves time and expense and trouble all round to leave this in the hands of Government.

30. On the Nagpur view Government is given wide latitude regarding the counsel whom the detenu may see and is afforded scope for regulating the place and manner of the interview. It can take all proper precautions against undesirable practices. On the other view it would be necessary in each case to have detenus from all over the Province brought here every time an application is made. The learned Bombay Judges are agreed that the good faith of a detention can be challenged, and if challenged, that it must be enquired into. But how is any man to set forth his case if he is not allowed either to come in person to plead his own cause or to instruct any legal adviser who can do that for him ? Once the principle is conceded that those orders can be challenged on certain grounds it becomes inevitable that means must be devised to enable this to be done effectively. No Court has yet held that there can never be any challenge. Even the House of Lords has conceded that there can—and they have gone as far, in *Liversidge's* case, as any Court has yet gone in a matter touching the liberty of the subject.

31. In our opinion the view taken in *Prabhakar Tare's* case is the most convenient all round, But whether that be so or not, that is the considered view of this Court and it must be followed until set right by higher authority, or overruled by a Full Bench. We draw attention in this regard to the observations of Lord Reading C.J. in *Rex* v. *Speyer Rex* v. *Cassel* [1916] 1 K.B. 595 at 610 :—

> " This is the King's Court ; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown."

32. After the decision in *Prabhakar Tare's* any refusal in this Province to grant an interview along the lines laid down there, or to afford a detenu reasonable facilities for access to legal advice, or any attempt to place obstacles in his way, will amount to an abuse of power and might even justify an order for immediate release.

33. To return now to the facts. When the case was taken up on the 5th the learned Advocate General produced a copy of another order of the Provincial Government, dated 2–9–44 directing that P. Y. Deshpande be detained in police custody for a further period of fifteen days from the 5th of September 1944. When told that he must choose either Dr. Kedar or Mr. Sheode for an interview, or take the consequences of an order directing the detenue to be produced in this Court for an interview or for release altogether, the learned Advocate General stated that according to his instructions there would be no objection to either of the two interviewing Deshpande. We then directed that Mr. Sheode be permitted to have the required interview.

34. Accordingly Mr. Sheode had the long sought for interview. The purport of the interview has been set out in the affidavit of Waman Venkatesh Deshpande dated 8–9–44. The relevant portions are reproduced below :—

> " (i) The local police and the Bombay C.I.D. police interrogated the detenue only about some dacoity alleged to have taken place in the Bombay Presidency, particularly with reference to one Inamdar, who was in his (detenu's) service as a clerk in the Bhavitavya

In the High Court of Judicature at Nagpur.

Part I.

No. 11.
Order of the High Court, 29th September 1944, *continued.*

office and who left his service in May 1944 last . . . The detenu was further asked whether he knew the whereabouts of the said Inamdar and about his (Inamdar's) friends and associates alleged to be connected with the aforesaid dacoity.

(ii) All these interrogations continued both in jail and in the lock-up for about 6 or 7 days and since the last 3 or 4 days all this is stopped altogether.

(iii) Not a single question was ever put to the detenue at any time about war activities, or about other topic. In fact the whole enquiry centred round the dacoity affair only.

(iv) Since the interrogation stopped, the detenu is required to wash his clothes, and clean the pots of his daily use, which formerly used to be done by his servant who took his meals to the lock-up and he has thus been deprived of the amenities which were allowed to him previously."

35. The case was taken up again on 11–9–1944. On that date the learned Advocate General filed a statement on behalf of the Provincial Government supported by an affidavit of Mr. Jayaratnam, Chief Secretary to the Government of the Central Provinces and Berar, Political and Military Department. The statement is reproduced below :—

"1. Certain persons including Mr. P. Y. Deshpande of Nagpur were arrested on the evening of the 21st August 1944 under rule 129 of the Defence of India Rules under the ultimate orders of the Deputy Inspector General of Police (Crime and Railways). The formal report of the arrest was received by the Provincial Government on the 23rd August 1944.

2. The report was carefully considered by the Provincial Government and *inter alia*, revealed reasonable grounds for suspecting that Mr. Deshpande was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war and in the opinion of the Provincial Government, there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety.

3. On receipt of this report, the Provincial Government passed an order under Defence of India Rule 129 (2) and (4) for Mr. P. Y. Deshpande's detention temporarily in police custody for a period of 15 days. During this period he was also interrogated with regard to his activities and associates.

4. A further report was sent to the Provincial Government upon which the Provincial Government by an order dated the 2nd September 1944 extended the period of detention by 15 days.

5. An order for search was issued under rule 126 on the 20th August 1944 by the District Magistrate, Nagpur.

6. He was arrested under rule 129 on the evening of the 21st August 1944.

7. That the Provincial Government is advised that it is not the normal practice to make such statements on affidavit and that there are no rules providing for the filing of affidavits.

8. That this Provincial Government is aware that affidavits are filed sometimes to assist the Courts in reaching a just and proper decision.

9. That this Provincial Government is anxious to give all reasonable assistance to this Honourable Court so that this Honourable Court may reach a just and proper decision. At the same time this Provincial Government is apprehensive that this section may not in future be accepted as a precedent requiring the Provincial Government to make returns on affidavit.

10. That the Provincial Government, subject to the reservation that this may not be treated as a precedent, is prepared if called upon to file forthwith an affidavit in support of the allegations of fact in paragraphs 1 to 6 above, and particularly in deference to the wishes expressed by this Honourable Court."

36. Paragraphs 1 to 4 of the statement have been reproduced in identical terms in the affidavit, dated 10–9–1944, by Mr. Jayaratnam, Chief Secretary to the Government of the Central Provinces and Berar, Political and Military Department.

37. An ordinary typed copy of the order dated 22–8–1944 passed by K. C. Diwakar, a Police Officer, Sitabuldi, under Rule 129 (1) of the Defence of India Rules addressed to the Superintendent of Central Jail, Nagpur, committing Mr. Deshpande to custody has been filed. The reason for the arrest has been stated thus :—

> "I have arrested P. Y. Deshpande . . . whom I reasonably suspect of having acted, or of acting, or of being about to act in a manner prejudicial to the efficient prosecution of war."

This is a mechanical reproduction of Rule 129 of the Defence of India Rule and is open to the same criticism as was made by the Federal Court in *King Emperor* v. *Sibnath Banerjee* (1944 F.C.R. 1 at 32) and in *Talpade's* case in 1943 F.C.R. 1 at 8. Judges dislike rubber stamps and are suspicious of them. We shall criticise this later.

38. The order of Diwakar which has been filed in the case has not been attested as a true copy by any responsible officer of the Crown. It is necessary in habeas corpus cases that the order signed by the officer making the arrest and committing the person so arrested to custody should be filed : see the observations of Lord Greene M.R. in *Ex parte Budd* (1942 All E.R. 373 at p. 377) :—

> "Now it transpired that no such order had ever been made by the Home Secretary ; the document was false from beginning to end including the statement at the foot that it had been signed by the Home Secretary. This cynical piece of carelessness on the part of departmental officials was severely criticised by the Divisional Court . . . It appeared however that the Home Secretary had in fact made an order . . . for the detention of the appellant under reg. 18B (1A), although no copy of that order was given to the constable or the appellant. On the application of the appellant for a writ of habeas corpus a Divisional Court consisting of Humphreys, Singleton and Tucker JJ. ordered his release."

39. Separate orders passed by Diwakar committing W. G. Sheorey, and Yeshwant Vishnu Lele to custody have been filed. W. G. Sheorey and H. P. Deshpande have been released by the Provincial Government and the applications made on their behalf have been filed as the purpose of the applications has been served. It may be noted that in the above cases the same features occur as in P. Y. Deshpande's case, and the applications for their release were made on the same grounds.

(E) On the 22nd August, 1944, the deponent and the Respondent Vimlabai Deshpande were questioned by the police concerning one Inamdar. The deponent replied that Inamdar had been employed as clerk in the office of the "Bhavitavya," but had left in May, 1944. On the same day the following report appeared in the "Hitavada":— p. 7, ll. 1–6. p. 7, ll. 7–8. p. 18, ll. 20–28.

"It is reported that simultaneous searches were carried out at Wardha also and some five rupee notes were seized.

These searches are stated to be connected with an armed dacoity alleged to have been committed in East Khandesh some time in April last.

The persons connected with the dacoity are still absconding and the search is stated to have been made with a view to catching the absconders."

(F) On the 23rd August, 1944, the deponent, accompanied by an advocate, visited the Central Jail to take instructions from the detenu for the purpose of making an application for bail. The advocate was not allowed to interview the detenu on the ground that he was detained under Rule 129. p. 6, ll. 39–43.

9. On the 28th August, 1944, W. V. Deshpande swore a second affidavit stating that on that day the detenu had been brought from the Central Jail to the Police Station in the District Court compound, and that the deponent believed that he was being kept there for the purpose of interrogation. p. 8.

10. On the 30th August, 1944, the Respondent Vimlabai Deshpande filed an application asking for information relating to the detention of the detenu, and requesting that a lawyer should be permitted to interview him. On the 1st September 1944, the High Court fixed the 4th September, 1944, as the date for the hearing of this application. pp. 9–10. p. 11, l. 20–p. 12.

11. On the 4th September, 1944, the High Court commenced the hearing of the application referred to in the previous paragraph. Counsel for the Appellant produced the order of the Provincial Government dated the 26th August, 1944, directing that the detenu be detained for a period of 15 days (see paragraph 7 (E) of this Case). The hearing was adjourned to the following day. p. 3, ll. 1–6.

12. On the 5th September, 1944, the Advocate General, appearing on behalf of the Appellant, informed the High Court that there would be no objection to Counsel interviewing the detenu. p. 3, ll. 12–25.

13. On the 8th September, 1944, W. V. Deshpande swore a third affidavit. He stated that the advocate for the detenu had interviewed the detenu on the 6th September, 1944, and had received from him the following instructions :— p. 13.

"(i) The local police and the Bombay C.I.D. Police interrogated the detenu only about some dacoity alleged to have taken place in the Bombay Presidency, particularly with reference to one Inamdar who was in his (detenu) service as a clerk in the

40. Yeshwant Vishnu Lele is a teacher in the Khadi Vidyalaya of the All India Spinners' Association, Wardha Branch. He also assists the Secretary of the Gandhi Sewa Sangh Wardha Branch and is a resident of Wardha.

41. On 21–8–1944 at about 7 a.m. two Sub-Inspectors from Wardha and two police Officers from Bombay accompanied by a Magistrate of Wardha, went to the place where Lele was residing and searched it. No warrant for the search was shown to him, nor was he informed about the purpose of the search. In the affidavit of Mrs. Kamalabai w/o Dwarakanath Lele it is stated " They only represented that the search was being taken in connection with some dacoity in Bombay Presidency."

42. After a search of about 2½ hours Lele was arrested and taken to Nagpur and was detained in the Central Jail. An application for his release under section 491 (1) (*b*), Criminal Procedure Code, has been filed by his brother's wife Mrs. Kamalabai w/o Dwarakanath Lele. The grounds urged for release are the same as in Deshpande's case. The application is supported by her affidavit on 11–9–1944 after her lawyer Mr. Gomkale had had an interview with Lele on 7–9–1944. The relevant portion of the affidavit is given below :—

> " 3. That since that date almost every day for about 8 to 10 hours he is being continuously questioned by various police officers about the alleged dacoity in the Bombay Presidency."

In paragraph 4 of the affidavit, after referring to the threats given on the Hazaribagh Hills, it states, " From the above information received by the applicant from Mr. Gomkale, pleader, the applicant believes that Mr. Lele has been transferred from Jail to the police lock-up to give a full and free scope to the police for prosecuting the investigation of the alleged offence of dacoity. It is submitted that this is an abuse of the provisions of Rule 129 Defence of India Rules."

43. In cases where the liberty of the subject is at stake, the responsibility of this Court is great, and it has a right to expect that the Crown will place all the facts before it frankly, or at any rate so much of the facts as will, without disclosing secret information, enable the Court to reach a conclusion on the issue raised : see as to this the observations of Harris C.J. in *Harikishan Das on behalf of Durga Das* v. *The Crown* (I.L.R. 1944 Lah. 245 at 267, F.B.).

44. This Court has to determine whether Deshpande and Lele are illegally or improperly detained and whether the power exercised under Rule 129 of the Defence of India Rules was a fraud on the statute. These are matters which cannot be judicially determined unless the Court has material before it for arriving at a just and proper decision. This is recognised in the statement filed by the Provincial Government. Nevertheless it has made its affidavit under protest and seeks a ruling on the point. As to this it will be more convenient to consider the law first and then the procedure regarding affidavits afterwards.

45. In considering the law the first thing to bear in mind is that the detentions we are considering here are under Rule 129 of the Defence of India Rules and not under Rule 26. There is a fundamental difference between the two. But in order to understand the difference it will be necessary to consider for a moment certain other provisions of the Defence of India Act.

46. Section 14 of the Act directs that—

"Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil courts shall continue to exercise jurisdiction."

And section 15 says,

"Any authority or person acting in pursuance of this Act shall interfere with the avocations of life and the enjoyment of property as little as may be consistent with the purpose of ensuring the public safety and interest and the defence of British India."

47. Now these are two important and fundamental positions. Nothing is to be altered, no rights or liberties to be interfered with, no privileges withdrawn or curtailed, *except as expressly provided by or under the Act.* The ordinary laws are to continue to function except and in so far as they are *expressly* altered *by or under the Act.* More. Even when they are altered the special powers conferred are to be used sparingly, and the ordinary lives and avocations of those proceeded against under the Act and its Rules are to be interfered with as little as possible, and only to the extent consonant with the public safety and interest and the Defence of British India. These conditions are express and restrictive. They are fundamental. The Act and the Rules must be construed in the light of them.

48. The next question is, how far are the ordinary laws altered by the Defence of India Act and the Rules? So far as present purposes are concerned, they do three things. First, they confer certain emergency powers for the purposes set out in section 2 and confer them on a number of persons and authorities, and they frame Rules for carrying this into effect. Secondly, they make a breach of these Rules punishable as an offence and thus create special offences, and also make certain existing offences punishable in a special way. See Rules 34 (6) and 38 (5). Thirdly they confer certain powers of detention. These are conferred by Rules 26 and 129.

49. Now how are these special offences to be punished and what is the procedure to be followed by the tribunal trying them? Chapter III of the Act makes provision for the constitution of Special Tribunals. No Special Tribunal affecting the present matters has been constituted. Therefore that part of the Act is of no avail here. Apart from Chapter III there is no provision as regards a tribunal for trying either these special offences, or any other existing offences, nor is any procedure prescribed. Accordingly sections 14 and 15 of the Act come into play and we are relegated to the ordinary law.

50. The ordinary law is contained in section 5 of the Criminal Procedure Code. Under that—

"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying, or otherwise dealing with such offences."

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

51. Now Deshpande and Lele have either committed offences or they have not. If they have not, then there is no power to detain them or to keep them in custody except under Rules 26 and 129. If they have, then section 5 of the Criminal Procedure Code comes into play. If the offences they are accused of having committed are offences under the Indian Penal Code the procedure regarding the investigation, inquiry and trial is the procedure prescribed by the Code. If they are any of the special offences created by the Defence of India Act and its Rules then sub-section (2) of section 5 of the Criminal Procedure Code operates. There is no special enactment regulating the manner of the investigation and inquiry and so again the procedure in the Code applies. Even if Rule 129 gives the Provincial Government special power to regulate the *place* of detention and the nature of the custody the Provincial Government has no power to regulate the *manner* of an investigation. Therefore the procedure regulating the *manner* of the investigation is the procedure set out in the Criminal Procedure Code.

52. Under that Code any person accused of an offence has valuable rights. Under section 61 he cannot be kept in police custody for more than twenty-four hours without being produced before a Magistrate. If the police want to detain him longer they must obtain a special order from a magistrate under section 167 and cannot obtain this unless they give reasons and make out a case for it; and the magistrate cannot make the order unless he records his reason for doing so. Then for each successive remand the police must make out a stronger and an ever stronger case. Also he has a right to ask for bail. And all these proceedings are under the general superintendence and control of the High Court. None of this is taken away or touched by the Act. Therefore all the old rights and privileges remain intact.

53. The learned Advocate General relies on section 161 of the Code. But that is restricted to

> "an investigation *under this Chapter*."

That chapter embraces sections 154 to 176 and includes section 167 to which we have just referred. It does not stand alone and must be read in its proper context along with the remaining provisions of the Code.

54. The provisions relating to *detention* are to be found in Rules 26 and 129 of the Defence of India Rules. But they relate to detention and to nothing else. They confer wide powers, but even they have their limitations—limitations which we shall examine in a minute. Up to the present, all we need say is that if either the police or the Provincial Government desire an investigation into any offence, whether under the Indian Penal Code or under the Defence of India Rules, then they are bound to conduct their enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention and in the guise of exercising those powers conduct a secret investigation into a crime. If they have information that these detenus have committed crimes or offences, they are not bound to investigate into them. They can rest content with detaining them under Rules 26 or 129 *provided the matter falls within the ambit of those Rules*. But if they want an investigation they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise it is a fraud upon the Act and their action is not taken in good faith. They cannot make the best of both worlds.

55. Now touching this matter of good faith, there appears to be some misunderstanding. No-one is accusing either the Provincial Government or the police of acting dishonestly or for some ulterior purpose or motive. All that is alleged is that they have mistaken the extent of their powers —a mistake which, as we well realise, can easily be made when Rules of such difficulty and complexity have to be construed. We do however accuse the Provincial Government of want of candour. But that is another matter. Good faith in this connection does not bear the sense in which it is used in the General Clauses Act. In the first place that Act does not apply because we are not construing the expression here as used in any particular Act of the Legislature. Also in any event, all definitions in the General Clauses Act are subject to repugnance in the subject or context. The expression "good faith" as used here is akin to "malice in law" and we cannot do better than reproduce Lord Haldane's description of this in *Shearer* v. *Shields* (L.R. 1914 A.C. 808)—a House of Lords' decision to which we shall have to refer when construing Rule 129. He says—

> "Between 'malice in fact' and 'malice in law' there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may, therefore, be guilty of 'malice in law,' although, so far as the state of his mind was concerned he acted ignorantly, and in that sense innocently. 'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act."

What is alleged here against the authorities is "malice in law" and "malice in fact."

56. That brings us to Rule 129. Sub-rule (1) states (we will only reproduce the portions relevant to these proceedings):—

> "Any police officer . . . may arrest without warrant any person whom he reasonably suspects of having acted . . .
>
> (*a*) . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war."

57. Stopping there and comparing this with the Rule 26, the first point of difference is that under Rule 129 the power is conferred on "any police officer"—that is to say even on a police constable. In Rule 26 the power is conferred on either the Central or the Provincial Government though of course there can be delegation under Sec. 2 (5) of the Defence of India Act. But there has been no delegation here.

58. The next point of difference is that the police officer can act on suspicion. The Provincial Government cannot. It must be *satisfied*.

59. The third point of distinction is that the power given to the police is hedged with a qualification which does not apply in the case of the Central and Provincial Governments. The police can only act if they are *reasonably* satisfied the Provincial Government "if it is satisfied" without any qualification as to its satisfaction.

60. Now this is an important and vital point of difference, as a reference to two House of Lords' cases will show. But before we proceed to that we will refer to a decision of the English Court of Appeal, in *Rex* v. *Denison* reported in 115 L.T.R. 229. The Court was considering there

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

a Defence of the Realm Regulation of 1914 and construing the word "satisfied." The word used in the Regulation was "satisfied" without any qualifying phrase such as "reasonably" or "honestly." Lord Reading C.J. delivering the judgment of the Court held that when the word "satisfied" is used by itself it must mean "honestly satisfied," and if want of honesty could be shown then that would call for action by the Court. But he said that "reasonably satisfied" and "honestly satisfied" are not the same thing.

> "We have come to the conclusion because there is a broad line between honest suspicion and reasonable suspicion. It may be a person is acting quite honestly and yet be acting on unreasonable grounds."

He distinguished the House of Lords' case in *Shearer* v. *Shields* (1914) A.C. 808, on that ground.

61. The House of Lords' decision in *Shearer* v. *Shields* is, in our opinion, in point here. It was a case of a police constable who had arrested a man on suspicion under the powers conferred by the Glasgow Police Act, 1866. Two extracts from the judgments will serve to show what the decision was. Lord Shaw said,

> "By virtue of section 88 of the Glasgow Police Act, 1866, a police constable has power to arrest without warrant any person whom he may *reasonably suspect* of having committed a crime. *It rests upon the constable to show that his suspicion was reasonable, and his act, therefore, justifiable.*"

And Lord Dunedin said,

> "We come to this question. Does the Glasgow Police Act make a difference? It says that constables may arrest if they have *reasonable* ground of suspicion, and on that clause the Glasgow police argue that the constable was allowed to arrest if he suspected, *and the mere fact of stating that he suspected absolutely closed the question.* I should be sorry to suppose that the liberties of the subject in Glasgow have been interfered with in this way by any act of Parliament."

62. That, in our opinion, is almost conclusive authority for this case. Both these decisions were before the Legislature when Rules 26 and 129 were enacted. *Liversidge's* case and *Greene's* case had not been decided. There must, therefore, have been some point in drawing a distinction between the powers conferred on the Central and Provincial Governments in Rule 26 and those on police officers under Rule 129. We think that the distinction means that under Rule 129 the Courts must decide the question of reasonableness and not the police; also that the burden of proof lies on the police.

63. The Crown relies on *Liversidge's case.* But that case introduces a startling departure from preconceived concepts and cannot, in our opinion, be carried further than the decision warrants. Incidentally, and we say this with the greatest deference and respect, though the decision is binding in England it is not binding in Scotland and is not binding on us. We note that the decision has been criticised both in England and in America. We reproduce the criticism of Dr. Allen, an eminent jurist, in 58 L.Q. Review, p. 232 :—

"This aspect of the decision is perturbing to those of us who are unable, whatever may be the exigencies of war, to divest themselves of certain old-fashioned constitutional doctrines. Generations of Englishmen have been brought up to regard it as one vital aspect of the rule of law for which among other things this country is now fighting the most crucial war in its history, that all persons are equal before the law and that for any unjustified infringement of the liberty of the subject the liability of a Minister of State is no whit different from that of a policeman, or indeed from the meanest of the King's subjects. Many of the greatest constitutional battles in our history have been fought on this very issue. If we are to understand for the future that executive office, dignity, or responsibility, whether in peace or in war, exempts the incumbent from inquiry into the reasonableness or arbitrariness of his conduct when it affects the elementary rights of a citizen, then we must revise all our ideas."

64. The following observations in the Harvard Law Review, Vol. 56, page 806, quoted in 1943 Mad. L.J., Vol. II, Journal Section, pages 60–64, are also apposite :—

"Moreover, trusting a Secretary of State does not mean trusting that high official personally. It means trusting subordinates who often cannot be identified and 'investigators' of varying degrees of reliableness and responsibility, working under cover, in a huge and very busy public department. If one thousand or more are arrested at one swoop under such orders, how many cases can the head of the department have given thorough personal examination ? And if he examines a case, what does he look at but material gathered for him by subordinates and investigators as to whom there lacks the guarantee said to be involved in high official position."

65. In our opinion, *Liversidge's* case is distinguishable. But even if it were not we would still have to choose between these two considered decisions of the same august tribunal, sitting it is true in different capacities, once as the ultimate Court of Appeal from Scotland and once from England, but nevertheless decisions of the same weight and authority. We are not bound by either and are free to follow whichever we choose, or in theory—and by this we mean no disrespect—neither.

66. But we are not driven to this choice because we think there is a difference between the two cases. *Liversidge's* case is a very special case and was decided on very special grounds. Again and again the learned law Lords stressed the fact that the person concerned was the Secretary of State, that he was responsible to a removable executive and to Parliament ; also that the person detained was provided with considerable safeguards. We gather that had that not been the case the decisions would have been otherwise, and indeed Lord Macmillan said as much. This has been dealt with in detail in *Prabhakar Tare's* case, I.L.R. 1943 Nag. 154, at 163–5. What was said there need not be repeated here.

67. Lord Romer admitted in *Liversidge's* case that the construction which the majority placed on the words "reasonably satisfied" was not the natural and ordinary one, and he justified a special meaning for them

in that particular instance because the words referred to a Secretary of State. This is what he said :—

"But the context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, *and this is the case here.* For the person who is to have some reasonable cause to believe is not some minor official holding a subordinate position. He is the Secretary of State."

68. So also Viscount Maugham :—

"It is to be noted that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of Government answerable to Parliament for a proper discharge of his duties. *I do not think he is at all in the same position as, for example,* a police constable."

69. But Rule 129 does not deal with a Secretary of State. It deals with, among others, a police officer, and that officer can be a police constable. The House of Lords dealt with a police constable in *Shearer's* case and gave the words "reasonably satisfied" their natural meaning when they had relation to a police constable. We can find nothing here, either in the context or the circumstances, to force us to give these words any but their ordinary meaning, and so prefer *Shearer's* case as being more apposite to the present case, and follow it accordingly. That means that the Court must determine the reasonableness of the suspicion, and that the burden of proof is on the Crown.

70. As regards the other ground taken in *Liversidge's* case—perhaps the strongest point made there—that to require the official concerned to disclose his grounds for suspicion would involve disclosures which might impair much of the usefulness of the information gathered in secret, the answer is, we think, two-fold. If the matter is as delicate as that then the Provincial Government is armed with power under Rule 26. According to *Liversidge's* case this right to deprive a man of his liberty without enquiry or trial is only justifiable if there is some guarantee that his case has been considered by some responsible authority of high standing such as a Secretary of State. And the Noble Lords who decided the case made it clear that those considerations would not apply in the case of some subordinate minor official, or in the case of a police constable. We are not concerned with a police constable in this case though we are concerned with a minor official. But the point is that even a police constable can take action under Rule 129, and whatever we decide regarding its ambit and scope will apply to the procedure of any police constable who chooses to exercise authority under the Rule. Therefore, seeing that Rule 26 affords ample safeguards in the case of matters which are too secret and delicate for disclosure to the Courts, we are unable to extend considerations which apply there to Rule 129. The Provincial Government can, in such cases, take action under Rule 26.

71. The second answer is best given in the language of the Harvard Law Review which criticises *Liversidge's* case :—

"But it ought to be possible to disclose, for example, what the hostile associations were, as disclosed by investigation, so that they might be explained or disproved without disclosing the sources of information. It should be possible to put reasonable limits of this type to the discovery allowed."

72. We now proceed to consider the rest of Rule 129. Sub-rule (1), as we have seen, confers the right of arrest. Sub-rule (2) refers to the place and manner of custody. It runs as follows :—

"(2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government and pending the receipt of the orders of the Provincial Government may subject to the Provisions of sub-rule (3) by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify."

73. There is not much in this. It gives the Provincial Government the right to determine the place of custody. But it is important to observe that it gives no other right. It does not give the Provincial Government power to justify an unauthorized arrest or to make legal that which in the beginning was illegal. Nor does it confer any right to control or regulate the mode of any investigation which the police, or anyone else, may wish to make.

74. After this comes the proviso which regulates the period of detention permissible under this Rule. It runs as follows :—

"Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government ; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding 2 months."

75. The Provincial Government has passed orders in this behalf and those orders do not in our opinion contravene those provisions. But again it is to be noted that there is here no enlargement of powers. Consequently if the original order made by the Police Officer, is defective the subsequent order of the Provincial Government specifying the place of detention and its duration will not serve to cure the original defect.

76. After that we have sub-rule (4) :—

"(4) On receipt of any report under the provisions of sub-rule (2) the Provincial Government may, in addition to making such order" [that is, regarding the custody] "subject to the second proviso to sub-rule (2)" [that is, limiting the total detention to two months] "as may appear necessary for the temporary custody of any person arrested under this rule, make, in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention etc."

77. No final orders have been passed in this case, and so we are not concerned with this sub-rule. All that is relevant at this juncture is to observe that here again there is no enlargement of powers. The final orders cannot be passed under this sub-rule but must be made in accordance with powers conferred elsewhere. One such power, of course, is Rule 26. But there has been no order under that Rule.

78. That brings us to the next question : What powers have we got under Section 491 of the Criminal Procedure Code ? This was decided in *Prabhakar Tare's* case. But as the decision there was provisional and as it related to Rule 26 and not to Rule 129, we feel it incumbent on us to review the matter afresh.

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

79. The power to issue a direction in the nature of a writ of habeas corpus is derived from Section 491 of the Criminal Procedure Code, which runs thus :—

"(1) Any High Court may, whenever it thinks fit, direct—

(*a*) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law ;

(*b*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;

* * * * * *

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

"(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858."

Under Section 491 (2) of the Criminal Procedure Code no rules have been framed by this Court to regulate the procedure in cases under this section.

80. The combined effect of rule 1 (*r*) (vii) of the High Court Rules and rule 4 is that these applications have to be heard by a Bench of two Judges. In accordance with these rules these applications came for hearing and disposal before us.

81. Under the several Regulations mentioned in sub-section (3) of section 491 the executive has been given power to detain a person indefinitely without any charge being formulated and without the person being placed on trial. A High Court has no power to issue a direction under section 491 in regard to persons detained under these Regulations.

82. The rule of law expounded by Dicey in his book "Introduction to the study of Law of the Constitution" is the same in India as in England. In England the executive has no power to detain a person indefinitely without trial in normal times, and the power of the High Court there to issue a writ of habeas corpus in respect of a person detained under the orders of the executive has not been taken away.

83. The power of the High Court in the Letters Patent is subject to the legislative powers of the local legislature and of the Indian Legislature and also of the Governor General in Council under Section 71 of the Government of India Act, and also of the Governor General under Section 72 of that Act. They can be amended and altered in all respects : see clause 38 of the Letters Patent of the Nagpur High Court and Section 223 of the Government of India Act. But they have not been altered. The power of the High Court to issue a direction under Section 491 has not been taken away in regard to persons detained under rule 129 of the Defence of India Rules.

84. Formerly a High Court in India had jurisdiction to issue the common law writ of habeas corpus ; see *In the matter of Ameer Khan*, reported in 6 Bengal Law Reports at pages 392 and 459.

85. Later, there were a series of legislative enactments and there was a difference of opinion in the High Courts on the point whether the power of the High Court to issue a common law writ of habeas corpus had been taken away.

86. The view taken in *In re Govindan Nair* (I.L.R. 45 Mad. 922 F.B.) was that the High Court in India had a right to issue the common law writ of habeas corpus. In *Girindra Nath Banerjee* v. *Birendra Nath Pal* (I.L.R. 54 Cal. 727) however, it was held that a High Court had no such power. The Madras High Court in a subsequent decision in *District Magistrate, Trivendrum* v. *K. C. Mammen Mappillai* (I.L.R. 1939 Mad. 708 F.B.) overruled their previous decision in I.L.R. 45 Mad. 922 and approved the decision in I.L.R. 54 Cal. 727. The matter is now settled by their Lordships of the Privy Council in *Matthen* v. *District Magistrate, Trivendrum* (I.L.R. 1939 Mad. 744) where it has been held that a High Court has no power to issue the common law writ of habeas corpus in cases falling under section 491 of the Code of Criminal Procedure.

87. But though a High Court in India now has no power to issue the common law writ of habeas corpus, the problem which falls for decision under section 491 is the same.

88. In *Prabhakar* v. *Crown* (I.L.R. 1943 Nag. 154) Pollock J. at page 157 summarised the effect of the decision of the House of Lords in *Liversidge* v. *Anderson* (1941 3 All England Reports 338) and *Greene* v. *Secretary of State for Home Affairs* (1942 A.C. 284) and *R.* v. *Home Secretary : Budd Ex parte* (1942 111 L.J.K.B. 475) in these terms :—

> " The position is this, that the Court has no power to enquire into the grounds for the Home Secretary's having ' reasonable cause to believe ' or being ' satisfied ' within the meaning of the regulation and that the only matters upon which the Courts have power to enquire are the good faith of the Home Secretary, the authenticity of the order, and its application to the persons detained."

89. At page 159 he stated that the validity of the order of detention can be challenged on the ground that the person passing the order had no authority to pass it, and on the ground that he was not in fact satisfied that it was necessary to pass such an order and had acted in bad faith. If the person passing the order had authority to pass it and was in fact so satisfied then this Court cannot go into the grounds on which he was satisfied and the order cannot be called in question in this Court.

90. Bose J. at page 160 observed :—

> " Fundamentally, the principles which underlie both provisions are the same. The object of both is to safeguard the liberty of the subject against excess of the Executive and against an abuse of power."

and at page 170—

> " Allegations of want of good faith must be investigated in spite of the war. Other cases, some of less authority, also reach the same conclusion, though they use different language. Thus some call it an ' abuse of power,' others a ' fraud upon the Act.' "

At page 172—

> " It is to be observed that section 16 requires that the order be passed in the exercise of the power conferred by the Act and not merely in colourable exercise of such power. . . . It is not enough

'Bhavitavya' office and who left his service in May 1944 last, as stated in paragraph 7 of my affidavit dated 25th August 1944. The detenu was further asked whether he knew the whereabouts of the said Inamdar and about his (Inamdar's) friends and associates alleged to be connected with the aforesaid dacoity.

"(ii) All these interrogations continued both in Jail and in the lock up for about 6 or 7 days and since the last 3 or 4 days all this has stopped altogether.

"(iii) Not a single question was ever put to the detenu at any time about war activities, or about any writing in the 'Bhavitavya' or any other topic. In fact the whole inquiry centred round the dacoity affair only.

* * * * * *

p. 16. 14. On the 10th September, 1944, Mr. T. C. S. Jayaratnam Chief Secretary to Government, Central Provinces and Berar, swore an affidavit deposing to the facts stated in paragraph 7 (A) to (G) of this Case.

p. 3, ll. 28–35. 15. On the 11th September, 1944, the High Court heard arguments on the application under Section 491 of the Criminal Procedure Code for the release of the detenu. Judgment was reserved. On the 29th September, 1944, the High Court delivered its reserved Judgment, holding that the detention of the detenu was illegal and improper, and directing his immediate discharge.

pp. 17–58. 16. The reasons given by the High Court in a lengthy Judgment may perhaps be summarized as follows :—

(i) Section 61 of the Code of Criminal Procedure provides that no police officer shall detain in custody a person arrested without warrant for a period exceeding 24 hours in the absence of a special order of a magistrate under Section 167.

"... if either the police or the Provincial Government desire an investigation into any offence, whether under the Indian Penal Code or under the Defence of India Rules, then they are bound to conduct their inquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention and in the guise of exercising those powers conduct a secret investigation into a crime. If they have information that these detenus have committed crimes or offences, they are bound to investigate them. They can rest content with detaining them under Rules 26 or 129 *provided the matter falls within the ambit of those Rules*. But if they want an investigation they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise it is a fraud upon the Act and their action is not taken in good faith. They cannot make the best of both worlds. Now touching this matter of good faith, there appears to be some misunderstanding. No one is accusing either the Provincial Government or the police of acting dishonestly or for some ulterior motive. All that is alleged is that they have mistaken the extent of their powers ... The expression 'good faith' as used here is akin to 'malice in law'."

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

therefore that these orders should be passed under colour of the power conferred. They must be done in actual exercise of it and, as I read the law, no power is conferred to make such orders in bad faith, or in abuse of the Act, or for the purpose of effecting a fraud on the Act, and consequently these issues must be investigated if they are raised."

91. In *Jitendranath Ghosh* v. *The Chief Secretary to the Government of Bengal* (I.L.R. 60 Cal. 364) at pages 376–377 Remfry J. interpreted the word "improperly" in section 491 to refer to cases in which although the forms of law have been observed there has been a fraud on an Act or an abuse of the powers given by the legislature, and further stated—

> "The Courts can, and in a proper case, must consider and determine the question whether there has been a fraud on an Act or an abuse of powers granted by the legislature."

92. In *Pratulchandra Mitra* v. *The Commandant, Hiji Detention Camp* (I.L.R. 61 Cal. 197) Ameer Ali J. observed at page 214 :—

> "It is apparent that the English Courts, in their anxiety to do justice between the subject and executive, have asserted and maintained a residuary power to interfere, in certain cases, notwithstanding that the action taken is technically legal."

And later,

> "I agree with Mr. Chaudhuri that, under certain circumstances, the malice of a subordinate would fall to be imputed to the higher authorities."

And after referring to the case of *Sarno* (1916 2 K.B. 742) stated at page 215—

> "This decision appears to me to indicate the type of case, to meet which the English Courts have asserted jurisdiction i.e. cases involving some element of misuse of the statute itself."

93. In *Emperor* v. *Harish Chandra* (I.L.R. 1943 All. 773 F.B.) Iqbal Ahmad C.J. stated at page 775 :—

> "It is however clear that in cases in which even though the forms of law have been observed, the detention constitutes a clear fraud on an enactment or amounts to an abuse of the powers given to the executive by the legislature, it is the duty of this Court to step in and to order that the person detained be set at liberty."

94. In *Rex* v. *Brixton Prison* (*Governor*) *Sarno Ex parte* (1916 2 K.B. 642) Lord Reading C.J. observed at page 749 :—

> "If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers this Court would have jurisdiction to deal with the matter."

Low J. at page 752 observed :—

> "I do not agree that if the Executive were to come into this Court and simply say 'a person is in our custody, and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal' the Court would have no power to consider the matter and if necessary deal with the application for the writ. In my judgment that answer from the Crown in reply to an

application for the writ would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves."

95. In *Liversidge* v. *Anderson* (1941 3 All E.R. 338) Viscount Maugham stated at page 342 :

"It should be mentioned that the good faith of the Secretary of State is not challenged."

At page 348—

"The result is that there is no preliminary question of fact which can be submitted to the Courts, and that in effect there is no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith."

96. Lord Macmillan said at page 364 :—

"In the latter case it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot if he has acted in good faith be called upon to disclose to any one the facts and circumstances which have induced his belief, or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief."

And Lord Wright said (page 373) :—

"The Judge adds, as is obvious, that the Court might no doubt be called upon to decide questions of bona fides or mistaken identity, if they should ever arise."

97. Lord Romer said (page 384) :—

". . . if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted unless it can be shown that he was not acting in good faith and the onus of showing this would lie upon the plaintiff."

98. In *Greene* versus *Secretary of State for Home Affairs* (1941 3 All E.R. 388) Lord Macmillan observed at page 396 :—

"The result in my opinion is that the production of the Secretary of State's order, the authenticity and good faith of which are in no way impugned, constitutes a complete and peremptory answer to the appellant's application."

99. At page 403 Lord Wright observed :—

"If the Home Secretary were to misrepresent the state of his mind that would be fraud . . ."

100. In *Ex parte Pitt-Rivers* (1942 1 All E.R. 207) Viscount Caldecote L.C.J. observed at page 209 :—

"It would be a gross abuse of the powers given by Parliament to attempt to use them in order merely to suppress unpopular or obnoxious opinions. Regulations not required for any of the purposes stated in the Emergency Powers (Defence) Act, 1939,

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

section 1 or in the amending Act of 1940, would indeed be *ultra vires*."

And Wrottesley J. (page 213) :—

" . . . the Court is entitled to be told what the applicant is entitled to be told, and in addition since the Habeas Corpus Act, 1640, the Courts have power to supervise and control the Crown and its ministers in matters affecting the freedom of the subject."

101. In *Galloway* versus *The Mayor and Commonalty of London* (1866) (L.R. 1 H.L. 34) it was laid down that where persons have special powers conferred on them by Parliament for effecting a particular purpose they cannot be allowed to exercise those powers for any purpose of a collateral kind.

102. In *Westminster Corporation* versus *London and North Western Railway* (1905 A.C. 426) Lord Macnaghten observed at page 430 as follows :—

" There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably The last proposition is involved in the second, if not in the first."

So also in *Rex* versus *Minister of Health, Yaffe, ex parte* (L.R. 1930 2 K.B. 98) Scrutton L.J. said at page 145 :—

" The Attorney-General went so far as to argue that though the Order violated all the statutory conditions ; was made without a scheme, or advertisement or public inquiry, once the Order was made, it had the effect of a statute. I cannot agree. In my view an Order which goes beyond the statutory conditions under which alone it can be made, an Order which for that reason the Minister could be prohibited from making, if he announced his intention of making it, is not an Order which when made can . . . have statutory effect."

And Greer L.J. at page 157 :—

" If the Minister had, in the events that happened, no power to make any Order at all, his delegated power of legislation never came into existence."

And Slesser L.J. at page 170 :—

" I do not think that the mere fact that the mnister describes the Order as an Order necessarily constitutes it one."

The decision of the House of Lords in *Metcalfe* versus *Cox* (L.R. 1895, A.C. 328) can also be referred to.

103. The propositions deducible from these cases are—

(i) If a person exercises power conferred on him in bad faith, or for a collateral purpose, it is an abuse of the power and a fraud upon the statute and is not really an exercise of the power at all, and a Court can interfere with such colourable exercise of the power ; and

(ii) When the issue is raised that any particular order has been made in bad faith or for a collateral purpose and therefore not made in exercise of the power, the Court is bound to enquire into the facts ; See *In re Banwarilal* (48 C.W. N. 766 at 782).

104. The question is, is there anything in the Defence of India Act or the rules framed thereunder which has in any way modified these well settled propositions ?

105. Section 16 of the Defence of India Act 1939 is in these terms :—

" (1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

The presumption raised by sub-section 2 of section 16 is a rebuttable one. Under section 4 of the Evidence Act a Court shall presume that the order was so made until it is disproved.

106. In *Prabhakar* versus *Crown* (I.L.R. 1943 Nag. 154) the order of detention under rule 26 of the Defence of India Rules was passed by Mr. Farquhar, Additional District Magistrate. With reference to such an order Pollock J. observed at page 157 :—

" The first question to be decided is whether Mr. Farquhar had power to pass such orders. If he had no such power, then the order was not made in exercise of the power conferred upon him under the Defence of India Rules and its validity could be challenged in this Court."

Bose Judge said at page 172 :—

" . . . section 16 requires that the order be passed in the exercise of the power conferred by the Act and not merely in colourable exercise of such power."

107. In *Keshav Talpade* v. *Emperor* (A.I.R. 1943 F.C. 1) at page 9 the Federal Court held—

" We are clearly of opinion that where the order is made under or by virtue of a rule which is invalid and therefore of no force or effect, the order is a nullity and section 16 (1) has no application."

108. The question there was whether the order of detention which was passed under Rule 26 which was in excess of the Rule making power conferred under section 2 (2) (*x*) could be challenged. The decision was that section 16 of the Defence of India Act was no bar and that the order of detention of Talpade was declared to be illegal.

109. In *Shib Nath Banerjee* v. *Porter* (A.I.R. 1943 Cal. 377) the question was whether the orders of detention passed under rule 26 of the Defence of India Rules which contained a recital that the Governor was satisfied that the detention of the persons mentioned in the orders was necessary for the purpose mentioned in them could be challenged. It was held that section 16 of the Defence of India Act was no bar and the orders of detention were declared invalid as the Governor was not satisfied that their detention was necessary. This was affirmed by the Federal Court In 1944 F.C.R. 1 (*King-Emperor* v. *Sibnath Banerjee*).

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

110. In *The Lahore Electric Supply Company Limited, Lahore* v. *The Province Punjab* (I.L.R. 1943 Lah. 617 F.B.) the Provincial Government passed a requisite order under Rule 75–A of the Defence of India Rules. It was held that section 16 of the Act did not preclude the order from being challenged on the ground that it was *ultra vires* or that it was not made bona fide but for some collateral purpose. The decision was that the order was *ultra vires* and that it had been not made in good faith but for a collateral purpose, that is for a purpose other than that for which the Legislature had invested the Provincial Government with extraordinary powers.

111. In *Re Banwarilal Roy* (48 C.W.N. 766) the question for decision was whether the order passed by the Provincial Government superseding the Howrah Municipality under sub-rule 6 of Rule 51 (*f*) of the Defence of India Rules was invalid. The order contained a recital that the Governor was of opinion that it is necessary to supersede the Commissioners of the Howrah Municipality for ensuring the due maintenance of the vital services of the said local authority in the event of hostile attack. Das J. reviewed the case-law on the subject and held that section 16 of the Defence of India Act was no bar to an inquiry whether the order was passed in good faith, and held that the order was invalid as it was made for a purpose not contemplated by the Defence of India Act or the Rules framed thereunder.

112. Section 16 of the Defence of India Act is thus no bar to an enquiry whether the order passed under the Defence of India Act or the rules framed thereunder is a valid order made in good faith, and the question of good faith, when raised, has to be decided by the Court : see *Surajprasad* v. *Yeshwanta* (I.L.R. 1944 Nag. 629).

113. In *Eshugbayi Eleko* v. *Government of Nigeria* (Office Administering) (1931 A.C. 662) Lord Atkin at page 670 observed :—

> " In accordance with British jurisprudence no member of the executive can interfere with the 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. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

114. In *Liversidge* v. *Anderson* (1941 3 All E.R. 338) Lord Atkin at page 361 observed :—

> " In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

115. The following passage from Dicey's Introduction to the Story of the Law of the Constitution, 9th edition, pages 293 and 294, will illustrate the lengths to which the courts will go to uphold the law :—

> " Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than Wolfe Tone's Case (1798. 27 St. Tr. 614). In 1798, Wolfe Tone, an Irish rebel, took part in the French invasion

of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a Court martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place application was made to the Irish King's Bench for a writ of habeas corpus. The ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a Court martial, or in effect, that the officers who tried him were attempting illegally to enforce martial law. The Court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the Court was made up of judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be remembered that no more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench."

116. These traditions continue. In *Rex* v. *Home Secretary* (1923/92 L.J.K.B. 797) Scrutton L.J. said :—

> "This care is not to be exercised less vigilantly because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases in which you have no sympathy at all."

117. Those observations were quoted and acted on by this Court in *Venkatesh Yeshwant Deshpande* v. *The Crown* (I.L.R. 1940 Nagpur 1 at 10) and in *Prabhakar* v. *Crown* (I.L.R. 1943 Nagpur 154 at page 165) and were applied as recently as this month by this Bench in Miscellaneous Criminal Case No. 47 of 1944.

118. Formerly England was full of private prisons—the prisons of Lords who claimed jurisdiction by royal grant or by prescription. At the suit of an imprisoned subject the King would send his writ to the keeper of gaol bidding him have the body of that subject before the King's court, to undergo and receive what that court should award. This prerogative of the King came to be regarded as the right of the subject : See Maitland's Constitutional History of England, page 271.

119. In the seventeenth Century, however, there arose a conflict between the King and his subjects. The King claimed certain prerogative rights and asserted that they were necessary for the Defence of the Realm. This was disputed by his subjects. When the King sought to levy loans from the subjects without the sanction of Parliament it was resisted by Darnel and others who were committed to prison under the orders of the King. The writ of habeas corpus was issued and the return was *per speciale mandatum Domini Regis* : (1627 S.Tr. p. 1). This was considered sufficient and the writ was discharged. The history of the constitutional struggle has been traced by Lord Wright in *Greene* v. *Home Secretary* (1941 3 All E.R. 388 at 399).

120. Parliament nullified the decision in *Darnel's* case and reaffirmed the right to personal liberty in section 3 of the Petition of Rights, 1627. In 1640 the Star Chamber which claimed the prerogative of committing persons to prison was abolished and the Habeas Corpus Act of 1646

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

guaranteed to the subject against the King and his Council the writ of habeas corpus. Various devices however had been adopted to evade the writ of habeas corpus. The Habeas Corpus Act 1679 was passed for the better securing the liberty of the subject. The object of the Act was to prevent the delay or evasion in making the return. The Act dealt with criminal or supposed criminal matters other than felony. The Habeas Corpus Act of 1816 dealt with detention or illegal deprivation of liberty other than those on a criminal charge. The two Habeas Corpus Acts made the remedy more speedy, efficacious and certain.

121. "The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty" Dicey's Introduction to the Study of the Law of the Constitution, 9th Edition, page 199. *At page* 221, "There is no difficulty and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Act have achieved this and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights."

122. The writ of *habeas corpus ad subjiciendum*, commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in habeas corpus. In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on habeas corpus. The judges owe a duty to safeguard the liberty of the subject, not only to the subjects of the Crown but also to all persons within the realm. The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute : See Halsbury's Laws of England (Hailsham Edition) Vol. 9, paragraphs 1200–1205 pp. 701–06 : *Greene* v. *Home Secretary* (1941 3 All E.R. 388 at 399–400).

123. The procedure on habeas corpus was regulated by rules 216–227 given at pages 319–332 of Short and Mellor's book on the Practice on the Crown Side, and is now regulated by Order 59, rules 14–23 of Rules of the Supreme Court. The truth of a return in criminal cases of imprisonment for debt or by any process in civil suit, cannot as a general rule be traversed or impeached by affidavit, though matters may be stated on affidavit in confession and avoidance of the facts alleged in the return. In other cases the judge is by statute empowered to inquire into the facts set forth in the return : See Halsbury's Laws of England (Hailsham Edition) Vol. 9, paragraph 1254 p. 735.

124. Lord Wright in *Liversidge* v. *Anderson* at page 372 observed :—

> "The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."

125. Both in England and in India fundamental rights are not guaranteed. The right to personal liberty of the subject and other rights

flow from the ordinary law of the land. The interference with personal liberty is remedied in England by a writ of habeas corpus and in India by an application under section 491 Criminal Procedure Code.

126. The Emergency Powers Defence Act of 1939 conferred powers on His Majesty to make such regulations as appear to him to be necessary or expedient for purposes connected with the defence of the realm. Under section 1 (2) (*a*) of the Act provision could be made for the detention of persons whose detention appeared to the Secretary of State expedient in the interest of public safety and the defence of the realm.

127. In exercise of the powers thus conferred the King in Council framed regulation 18B. The text will be found reproduced in *Liversidge's* case in (1941 3 All E.R. 338) at page 341. This was the regulation which the House of Lords had to construe in that case, and they showed that despite the wide powers conferred by that Regulation the right to the writ still remained.

128. All this shows that the right to the writ of habeas corpus and the corresponding guarantee of liberty under Section 491 of the Criminal Procedure Code are living realities and form one of the most fundamental and powerful forces in the constitution. It also shows with what extreme zealousness the right is guarded and upheld by the Courts. Our conclusion then is that we have the power to take action under Section 491. The rights conferred by that section have not been taken away or affected.

129. That means that in this case we are entitled to enquire into the allegations made because, first an issue of want of good faith is raised, and because secondly, in a matter under Rule 129 as contrasted with Rule 26, the Court can and must enquire into the reasonableness of the suspicion which justifies the detention, the burden being on the Crown.

130. We now turn to the facts.

131. The reason stated for the arrest of Deshpande and Lele in the order of arrest is that the officer arresting reasonably suspects them of having acted or of acting, or of being about to act in a manner prejudicial to the efficient prosecution of war. The word " or " before " being about to act " is perfectly in order in the Rule, but it is out of place in the orders of detention. The police officer making that order has not stated whether the persons had acted in the past in a manner prejudicial to the efficient prosecution of war, or were acting at present, or were about to act in the future, in a manner prejudicial to the efficient prosecution of the war. There is no reference of any reasonable suspicion that these persons acted in a manner prejudicial to the public safety.

132. The police officer who makes an arrest in pursuance of sub-rule (1) is required forthwith to report the fact of arrest to the Provincial Government. We take it that the order of detention under rule 129 (4) of the Defence of India Rules passed on 22–8–1944 was made on the strength of such a report. On 26–8–1944 the Provincial Government directed that Deshpande be detained in police custody during the remaining period of his detention of 15 days expiring on 4th September 1944. On the 2nd September 1944 an order directing Deshpande to be detained in police custody was extended for a further period of 15 days from the 5th September 1944. In none of these orders is there any reference to the fact that P. Y. Deshpande has acted in any manner prejudicial to the

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

public safety—not that such a reference would have been in place in such an order. But it serves to show that the orders of the Provincial Government were made on the basis of the police report. And that of course is in order.

133. Under Rule 129 the power to arrest and detain is conferred on the police, or on any other officer of Government empowered in that behalf by general or special order of the Central Government or the Provincial Government. It is not conferred on the Provincial Government. The powers of the Provincial Government are to be found in Rule 26. Under Rule 129 all that the Provincial Government can do is to specify the place of detention and up to a limit of two months, its duration. Therefore, the only authority we are concerned with under Rule 129 is the police officer who made the detention, and it is for him to show that he had reasonable grounds for suspicion. Clearly he cannot discharge that onus by merely asserting that he had reasonable grounds because that is the very question we have to decide. Under the law as we understand it the Court is to be the Judge of that and not the police officer. Therefore he must tell us what those grounds were and leave us to decide whether they are reasonable. That was the very point argued and decided in *Shearer's* case by the House of Lords.

134. That apart. In this particular case we have not even a *prima facie* guarantee that there is a reasonable suspicion. The alternative terms in which the order is couched shows that the police officer making the arrest did not know his own mind. He did not know what he suspected and floundered about in his order from one alternative to another. If one suspects that A has acted in a certain manner one says so. If the suspicion is that he is in addition about to act in that or a similar manner again one says so and uses the word "and," not "or." The moment the "or" is introduced it becomes patently apparent that no thought has been given to the requirements of the rule and that a rubber stamp order has been made. That will certainly not satisfy the contentions of "reasonable suspicion" which Rule 129 requires.

135. Incidentally this order has not been supported by an affidavit, and the burden being on the Crown the mere production of an order under Rule 129 is not enough. There must be proof. The only affidavit we have on the side of the Crown is one which tells us about the suspicions entertained by the Provincial Government, not by the police officer making the arrest. But what we have to determine here is what were his suspicions and were they reasonable, and not what the Provincial Government's suspicions are.

136. Turning next to the affidavit made by the Chief Secretary, when we examine its terms it becomes more apparent than ever that the police officer making the order did not know what he suspects. As we have said, his order is confined to matter which will be

> "prejudicial to the efficient prosecution of the war. The affidavit of the Chief Secretary on the other hand sets out that the material placed before the Provincial Government gave rise to the suspicion that Deshpande's activities were calculated to prejudice the public safety and the efficient prosecution of the war."

137. Now under rule 129 the Provincial Government can only act on the report of the police made under sub-rule 2. If the police had no

material which in their opinion would have justified an order on the ground that the public safety was likely to be endangered how can the Provincial Government decide otherwise? Of course the Provincial Government can act under Rule 26, but if it does not choose to do so it cannot decide *ex post facto* that the police officer making the arrest ought to have accepted matter which in the police officer's opinion would not have justified him in making the arrest. As we have said, all we can consider under Rule 129 is whether the police officer making the arrest had reasonable grounds for suspicion at the time of making the arrest. He seems to have entertained no suspicion on the score of public safety therefore this difference of opinion between the police officer and the Provincial Government in itself shows that there is room for a difference of view on the material set out in the report, and accordingly makes it all the more incumbent upon us to know what the grounds for the suspicions are.

As regards the question of public safety. In one sense every offence, however trivial, affects public safety—even some silly personal defamation or a drunken brawl between a couple of inebriates. But that cannot be the connotation in which these words are used here. They import something much wider relating to the defence of the realm. A clue to the meaning of the words is to be obtained from Part X of the Rules in the chapter headed "Public Safety and Order." They relate to matters like the holding of, or taking part in, public processions, meetings or assemblies, and to trade disputes, hertals, etc., and to the wearing of unauthorized uniforms. The chapter is a preventive chapter and has no reference to offences committed in the past even if they be offences like dacoity.

138. If Messrs. Deshpande and Lele are suspected of having committed an offence under the Penal Code the investigation into the offence has to be in accordance with the provisions of the Criminal Procedure Code. If, however, they are suspected of having committed a prejudicial act within the meaning of rule 34 (6), punishable under rule 38 (5) of the Defence of India Rules, or of having committed any offence under those rules the investigation into them has to be conducted in accordance with the provisions of the Criminal Procedure Code as no separate procedure has been provided for investigating an offence committed under the Defence of India Act. The procedure for investigating into an offence is regulated by Chapter XIV, section 154 to 176, Criminal Procedure Code.

139. The learned Advocate General contended that under section 161 of the Criminal Procedure Code a police officer has power to question any person supposed to be acquainted with the facts and circumstances of the case. Any person in the section is wide enough to include an accused person: See *Narayanswami* v. *Emperor* (I.L.R. 18 Pat. 234 P.C.); *In re Dinanath* (I.L.R. 1940 Nag. 232). Section 161 has to be read along with other provisions in the chapter. An accused has a right that he should be placed before a magistrate within 24 hours of the arrest. The magistrate has to decide whether a remand should be granted. If so, on what conditions, and for each successive remand a stronger case has to be made out by the prosecution. The accused is entitled to move for bail. All these rights are inter-related and the power of the police cannot be considered apart from the right which an accused person has. Under-trial prisoners are entitled to all reasonable facilities for interviewing or otherwise

(ii) The High Court compared the provisions of Rule 26 and 129 (set out in paragraphs 2 and 5 of this Case). (A) Under Rule 26 the power is conferred on either the Central or the Provincial Government (though with a power of delegation). Under Rule 129 power is conferred on a police officer. (B) The police officer can act on suspicion. The Provincial Government must be "satisfied." (C) Rule 129 contains the qualifying word "reasonably." Rule 26 contains no such qualification. p. 31, ll. 30–48.

"There must, therefore, have been some point in drawing a distinction between the powers conferred on the Central and Provincial Governments in Rule 26 and those on police officers under Rule 129. We think that the distinction means that under Rule 129 the Courts must decide the question of reasonableness and not the police; also that the burden of proof lies on the police." p. 32, ll. 37–42.

(iii) The High Court stated an objection to the conclusion summarized in (ii) above, and suggested two answers to that objection :—

"As regards the other ground taken in Liversidge's case— perhaps the strongest point made there—that to require the official concerned to disclose his grounds for suspicion would involve disclosures which might impair much of the usefulness of the information gathered in secret, the answer is, we think, twofold. If the matter is as delicate as that then the Provincial Government is armed with power under Rule 26 . . . p. 34, ll. 25–52.

"The second answer is best given in the language of the Harvard Law Review, which criticizes Liversidge's case :—

'But it ought to be possible to disclose, for example, what the hostile associations were, as disclosed by investigation, so that they might be explained or disproved without disclosing the sources of information. It should be possible to put reasonable limits of this type to the discovery allowed.'"

(iv) The High Court adverted to the orders made by the Provincial Government under Rule 129 (2) and (4) :—

"The Provincial Government has passed orders in this behalf and those orders do not in our opinion contravene those provisions. But again it is to be noted that there is here no enlargement of powers. Consequently if the original order made by the police officer is defective, the subsequent order of the Provincial Government specifying the place of detention and its duration will not cure the defect." p. 35, ll. 25–30.

(v) "That brings us to the next question: What powers have we got under Section 491 of the Criminal Procedure Code? . . . p. 35, ll. 46–47.

The propositions deducible from these cases are— p. 40, l. 43–p. 41, l. 4.

(i) If a person exercises power conferred on him in bad faith, or for a collateral purpose, it is an abuse of the power and a fraud upon the statute and is not really an exercise of the power at all, and a Court can interfere with such colourable exercise of the power; and

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

communicating either orally or in writing with their relatives, friends and legal advisers : see Jail Manual, Rule 906, page 283. These rights are not available if they are detained under rule 129 of the Defence of India Rules. A copy of the order dated 22–1–1944 giving instructions of the Provincial Government regarding the conditions to be applicable to all persons detained in police custody under rule 129 of the Defence of India Rules has been placed before us. Instructions 9 and 10 are reproduced below :—

"Interviews—

(9) (i) A prisoner shall not be permitted to have an interview with persons other than police officers except on the written order of the Superintendent.

(ii) The Superintendent shall be competent subject to any special directions that may be issued by the Inspector General of Police, to allow or refuse an interview.

Police Interviews.

10. Subject to the directions of the Inspector General of Police the Superintendent may by general or special order authorise any police officer, either singly or with another police officer and accompanied or unaccompanied by subordinate police officers, to interview any prisoner."

140. If a police officer, for facility of carrying on an investigation unhampered and unrestricted detains an accused person, or a witness supposed to be acquainted with the facts and circumstances of the case, under Rule 129 of the Defence of India Rules, that would be an abuse of the power conferred under Rule 129 : see the judgment of Harries C.J. in *Dilbagh Singh* v. *Emperor* (A.I.R. 1944 Lah. 373 at 375).

141. It may be noted that there is no restriction as regards the time, period and the number of interviews which a police officer, is entitled to have with a detenu in a day. The complaint made here is that Deshpande has been subjected to continuous interrogation by the police for a number of days and there is no refutation of that allegation.

142. The question is whether the police officer in question passed the order of detention under Rule 129 of the Defence of India Rules in good faith or whether the detention was made with a view to facilitating the investigation into a dacoity in East Khandesh unhampered and unrestricted by any of the provisions of the Criminal Procedure Code and was not made in *bona fide* exercise of the power.

143. The affidavit and the application on behalf of Deshpande complained that no interview was allowed and that he was in the police lock-up instead of in jail. In paragraphs 2 and 13 of the application dated 25–8–44 it was definitely alleged that Mr. Ringe, Advocate, was not permitted to interview Deshpande by the Superintendent, Central Jail, Nagpur, on 23–8–1944 on the ground that Deshpande had been arrested and detained under rule 129 of the Defence of India Rules. This is supported by the affidavit of Waman who had gone with Mr. Ringe to the Jail on 23–8–1944 and in whose presence the interview was refused on the ground that Deshpande was detained under rule 129 of the Defence of India Rules.

144. On 27–8–1944 Deshpande was brought from the Central Jail and was kept in the police lock-up. On 30–8–1944 an application was filed for particulars from the Provincial Government in order to enable the case to be properly represented on behalf of the applicant. In the application dated 30–8–1944 it was prayed that as a request for an interview with a lawyer had not been permitted either Deshpande be ordered to be produced in Court or this Court be pleased to direct the Provincial Government to allow a lawyer to have an interview with Deshpande before the date of hearing.

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

145. What happened has already been set out earlier in this judgment. This refusal to grant an interview or to afford facilities to the detenu to place his case before the Court amounts to an abuse of power under the Defence of India Act and the rules framed thereunder and is an additional ground for suspecting the good faith of the authorities.

146. The complaint in the application was that the arrest and detention have been with a view to facilitating an investigation into a dacoity which took place in East Khandesh, and that the detention under Rule 129 was in utter want of good faith and was made to prevent Deshpande from pursuing his ordinary legal remedies and to deprive him of his ordinary legal rights. This, it was urged, is an abuse of the Defence of India Act and rules framed thereunder.

147. An affidavit was filed on 28–8–1944 to the effect that Deshpande was kept in police custody from the 27th August for purposes of interrogation. On 30–8–1944 the applicant wanted information as to the purpose of transferring the applicant's husband to the lock-up in the compound of the District Court and stated that the detention in jail was the lesser of the two evils so long as the detention continued. On 6–9–1944, after Mr. Sheode had had an interview with Deshpande an affidavit was filed stating that the interrogations continued both in jail and in the lock-up for about 6 or 7 days. In spite of the definite and specific allegation that the order of detention was not made in good faith but with an ulterior purpose in order to facilitate the police in carrying on investigation into a dacoity the Provincial Government passed an order on 26th placing him in police custody. The protest of the applicant was registered on 30th August, and in spite of that protest a fresh order was passed on the 2nd September 1944 extending the period of detention in police custody for a further period of 15 days from the 5th September 1944.

148. The application filed on behalf of the Provincial Government and the affidavit sworn by the Chief Secretary lack details and particulars. They may be compared and contrasted with the affidavits and particulars furnished in *King* v. *Secretary of State for Home Affairs, Lees, Ex Parte* (1941 1 K.B. 72). The order of the Home Secretary is at pp. 72–73, the particulars furnished by the Advisory Committee under the Defence Regulations at pp. 73–74 and the affidavit of Sir John Anderson at pp. 75–76. A part of the affidavit of the Secretary of State in *R.* v. *Home Secretary Ex Parte Budd* (1941 3 All E.R. 749) will be found at pages 753 and 754.

149. The affidavit filed by the Chief Secretary is open to the criticism which Stable J. made in *Ex Parte Budd* (1941 2 A.E.R. 749 at p. 759): "An affidavit in stock form, applicable to all cases and, as Langton, J.,

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

expressed it in a recent case, ' Over the rubber stamp ' is in my judgment, undesirable in almost any proceedings and most particularly undesirable in proceedings of this nature, where the liberty and reputation of the subject are involved and in which consequently particular individual attention must, as a matter of right be given to every relevant factor." This was cited with approval by Shearer J. in *Kamla Kant Azad* v. *King-Emperor* (I.L.R. 1944 Pat. 252 at 258).

150. The applicant made definite and specific allegations of fact viz. that a dacoity was committed in East Khandesh some time in April last, that Police officers from Bombay were investigating into the offence, that the arrests and searches were made with a view to find out the culprit and catch the absconders, that the police officers from Bombay had questioned Deshpande about Inamdar and his whereabouts and his associates, that no question was asked from Deshpande about the articles in Bhavitavya or about his activities in relation to the War and that the inquiries have been restricted to find out the whereabouts of Inamdar and his associates. These facts have not been denied either in the statement filed by the Provincial Government or in the affidavit of the Chief Secretary.

151. Paragraph 2 of the statement of the Provincial Government is cryptic and it is almost impossible to find out what is alleged against Deshpande. It is not asserted that Deshpande was engaged in underground activities calculated to prejudice the public safety and/or the efficient prosecution of war. The only allegation against him is that he was actively associated with persons who were engaged in such activities. In the English cases there were definite allegations made that the persons detained were members of the British Union of Fascists and the parts which they had taken and how their activities were calculated to endanger public safety were set out.

152. We have a right to expect the statement made on behalf of the Provincial Government to be full and frank. The Provincial Government has undoubtedly a right to withhold its sources of information, as also the evidence on which the conclusion was reached. But it must state frankly matters on which there can be no question of secrecy, particularly when they have already been made public and have even been published in the papers. The statement studiously avoids any reference to the investigation which is being carried out by the police officers from Bombay in a dacoity which was committed in East Khandesh. The order of the Provincial Government placing Deshpande in police custody could not have been with a view to promote the efficient prosecution of the war or to safeguard the public safety, but must have been with a view to afford facilities to the police officers to carry on the investigation into the offence which had already been committed and to find out traces of Inamdar and his associates. Had the case been otherwise the Provincial Government would have taken the responsibility for the detention upon itself and would have acted under Rule 26. That in turn would have given Deshpande certain limited privileges.

The police officer who arrested and ordered the detention has not filed any affidavit. The circumstances in the case leave no manner of doubt that the arrest and search were made with a view to trace the whereabouts of Inamdar and his associates and to investigate into the offence of dacoity which has been committed. Deshpande was placed in

police custody in order to give police officers facilities for carrying on an investigation. The detention in police custody could not possibly have contributed to the efficient prosecution of the war or in any way to safeguard the public safety.

153. In the case of Lele there is a definite statement that two police officers from Bombay searched his quarters and stated that the search was being made in connection with a dacoity in the Bombay Province. This has not been controverted by the Provincial Government. No statement or affidavit has been filed by the Government in Lele's case. The learned Advocate General submitted that the statement filed in Deshpande's case should be taken as a statement in this case also. But there is no reference at all to Lele in either the statement or the affidavit in Deshpande's case, accordingly neither can be read as applicable to Lele. If this was due to laxness then we say with Lord Wright in *Green's* case " I feel very strongly that in a question like this affecting the liberty of the subject the greatest care should be taken and the greatest correctness or procedure observed. Laxity is most reprehensible, whoever may have been responsible." The circumstances of his case also indicate that the order of detention by the police officer was not made in good faith in exercise of the powers for the purpose mentioned in the Rule but that they were made with the ulterior purpose of facilitating the police investigation.

154. That brings us to the question of affidavits. As we have said the Provincial Government filed its affidavit under protest and asked for a ruling.

155. Affidavits have been filed in numerous cases in England as well as in India to justify detention. An affidavit was filed in the case of *Rex* v. *Brixton Prison (Governor) Sarno, Ex Parte* (1916 2 K.B. 742). Reference to the affidavit will be found at pages 743 and 749 and at page 750, where Lord Reading C.J. said :—

> " In my judgment, upon the material before us, namely, the affidavit of the Assistant Secretary of the Home Office, there was sufficient ground for the exercise of his powers by the Secretary of State, and consequently the applicant is not illegally detained in prison."

156. In the case of the *King* v. *Secretary of State for Home Affairs, Lees, Ex Parte* (1941 1 K.B. 72) two affidavits of the Home Secretary were filed. The text of the affidavits will be found at pages 75–76. At page 78 the affidavit is quoted and at page 80 Humphreys J. observed :—

> " We accept those statements made upon oath by Sir John Anderson and accepting them, we are satisfied that he had reasonable cause for believing that the applicant was a person to whom the reg. 18B (1A) applied."

In appeal MacKinnon L.J. at page 84 observed :—

> " I have his affidavit and I have no reason to think that it was otherwise than strictly honest and correct. Therefore, he has proved to my satisfaction that he had reasonable cause to believe and did honestly believe, in the terms of the regulation, and that being so, the order was validly issued pursuant to this regulation."

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

157. In *Re Home Secretary, Ex Parte Budd* (1941 2 All E.R. 749) at page 755, after referring to the affidavit of the Home Secretary, Viscount Caldecote L.C.J. observed :—

"I see no reason to doubt that the Home Secretary has given proper and careful consideration to this particular case, and that he has considered reports and information which appear to him to justify his belief."

Later,

"The Secretary of State has declared on oath, as well as having stated in the order, that he is satisfied as to the first of these conditions, and, as to the second, that he is satisfied, or has reasonable cause to believe, that it is necessary to exercise control over the applicant."

158. The judgment of the Court of Appeal will be found in (1942 1 All E.R. 373). Lord Greene, M.R. at page 376 stated :—

"In cases to which that Act applies, it is open to the Court, although the return to a writ of habeas corpus may be good and sufficient in law, 'to examine into the truth of the facts set forth in such return.'

* * * * *

It is clear that there may be many matters into which the court can and will inquire under the section if occasion arises, e.g., the *bona fides* of the Secretary of State, the genuineness of the detention order itself and the identity of the applicant with the person referred to in the order."

Goddard L.J. at pages 377–78 stated :—

". . . permit me to take this opportunity of correcting a passage in my judgment in *R.* v. *Home Secretary Ex P. Greene* (1941 3 All E.R. 106 at 119). I there said that the prisoner's right to controvert the return to a writ of habeas corpus was expressly preserved by the Habeas Corpus Act, 1816, s. 4. This was a mistake. *The right of controverting the return was first given by the Act*, by sect. 3 where the writ was granted by a single judge, and by sect. 4 where it was granted by the full court. A perusal of the opinion of Wilmot C.J., delivered in the House of Lords in 1758, when a bill for amending the law relating to habeas corpus was before the House, makes it clear that no dispute on any matter of fact was allowed on a return to the writ, and that the only question which could be debated was whether the return disclosed on its face a ground for the detention which was sufficient in law. *The reason was that in those days it was only a jury that could try a question of fact.* Accordingly, if the applicant for the writ desired to dispute any fact alleged in the return, he could do so only by an action, or by preferring an indictment, for a false return. If he obtained a verdict, the court would *then* take notice that the allegation was false and proceed accordingly. . . . it was by the Act of 1816 that the law in this respect was *first* altered."

159. In *Ex parte Greene* (1941 3 All E.R. 104) Goddard L.J. at page 119 observed :—

"By section 3, the Court is given power to inquire into the truth of the return by affidavit."

continued at page 120—

"... still leaves it open to the subject, under section 4, to controvert the return, in which case the onus is upon him."

and concluded the judgment at page 123 with the observation—

"... the old procedure did not require a return to be verified, at any rate in the first instance, *modern practice does require an affidavit*, and care should be taken in these under the regulations *to exhibit the actual order signed by the Secretary of State*, which alone is the authority for detaining the prisoner."

160. In the case of *Greene* v. *Secretary of State for Home Affairs* (1942 A.C. 284) two affidavits were filed; one for Sir John Anderson, and the other of Mr. Herbert Morrison, his successor. The terms of the affidavits are quoted at pages 285–286.

161. In *Liversidge* v. *Sir John Anderson* (1942 A.C. 206) Lord Atkin observed at page 242 as follows:—

"I agree with the Divisional Court, in the case of Greene, in accepting what appears at that time to have been the contention of the Home Secretary that the Home Secretary's affidavit establishes the particulars as constituting reasonable cause."

and pointed out that in *Rex* v. *Secretary of State for Home Affairs Ex Parte Lees* (1941 1 K.B. 72)—

"the Home Secretary, when represented by the same Solicitor-General and the same junior counsel as in the case, frankly accepted the burden of proving reasonable cause."

162. The case of *Liversidge* v. *Sir John Anderson* arose out of an action for a declaration that his detention was unlawful and for damages for false imprisonment. The defendants in the case were Sir John Anderson the previous Home Secretary and his successor Mr. Herbert Morrison. The defence was that the plaintiff was in lawful detention in pursuance of the detention order in exercise of the powers conferred on the Home Secretary under Reg. 18B of the Defence General Regulations 1939. The plaintiff applied that the defendants should be called upon to furnish particulars of the grounds on which the first defendant had reasonable cause to believe the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over the plaintiff. This was refused by Master Moseley and his order was affirmed by Tucker J. in appeal. The Court of Appeal held that the onus of proof was on the plaintiff and that the defendant could not be called upon to furnish particulars.

163. The matter came up for decision before the House of Lords in (1941 3 All E.R. 338). The decision of the majority was that where the Secretary of State acting in good faith under Reg. 18B of the Defence (General) Regulations 1939, makes an order in which he recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him and directs that that person be detained, a Court of Law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief and that the matter is one for the executive discretion of the Secretary of State. Accordingly it was held that in an action by a person detained against the Secretary of State for damages for false imprisonment a Court cannot compel the defendant to give particulars of the grounds on which

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

he had reasonable cause to believe the plaintiff to be a person of hostile associations and that by reason of such hostile associations it was necessary to exercise control over the plaintiff. The decision turned on the interpretation of the expression " if the Secretary of State has reasonable cause to believe " in Reg. 18B, paragraph 1 of the Defence (General) Regulations 1939. The majority held that the administrative and plenary discretion was vested in the Secretary of State and that it was for him to decide whether he had reasonable grounds and to act accordingly. Lord Atkin, however, took the view that the expression was capable of only one meaning that in fact there must be reasonable cause for the belief, and that the matter can be enquired into by a Court. The question of good faith was not raised and the noble and learned Law Lords made it clear that if the question had been raised it would be for the Courts to decide that issue.

164. The case of *Greene* v. *Secretary of State for Home Affairs* (1941 3 All E.R. 388) arose out of an application for a writ of habeas corpus. The good faith of the Secretary of State was not challenged. The only fact which was challenged was that the Secretary of State had no reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. Greene wanted that the information on which the Secretary of State formed the belief which he professed to entertain should be produced before the Court to enable it to decide whether in fact he had such reasonable cause, and wanted the Secretary of State to state evidence on which he proceeded : See pages 297 and 299. The decision of the House of Lords was that the Secretary of State could not be compelled to disclose the information and to justify the reasonableness of his belief. Viscount Maugham at page 391 observed:—

> " On the other hand, in cases other than for some criminal, or supposed criminal, matter, and except cases of imprisonment for debt or by process in any civil suit, the Judge is empowered by the Habeas Corpus Act, 1816, s. 3, although the return to the writ be sufficient in law, to examine into the truth of the facts therein set forth by affidavit or by affirmation . . . "

At page 394 the noble and learned Law Lord reproduced with approval the observations of Goddard L.J. in (1941 3 All E.R. 104 at p. 121), viz. :—

> " I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit. It must depend on the ground on which the return is challenged . . . "

At page 395 Viscount Maugham observed—

> " In the present case, therefore, there was, in my judgment, no necessity for an affidavit by the Secretary of State once the order itself was proved or admitted. However, I am not attempting to lay down a general rule."

165. The decision in *Greene's* case was that the production of the Secretary of State's order, the authenticity and good faith of which were in no way impugned, constituted a complete and peremptory answer to the appellant's application for a writ of habeas corpus and no affidavit by the Home Secretary justifying his cause of belief was necessary.

166. The two cases cited by the learned Advocate-General do not justify the wider proposition that the truth of the return to a writ of habeas corpus cannot be challenged in Court.

167. The cases of *Liversidge* v. *Sir John Anderson* and *Greene* v. *Secretary of State* were decided on 3–11–1941. Even after the decision of these cases an affidavit by Sir John Anderson sworn on November 24, 1941, was filed in *R.* v. *Brixton Prison* (*Governor*) *Ex parte Pitt-Rivers* (1942 1 All E.R. 207). At page 210 Viscount Caldecote L.C.J. observed:—

"Whether or not the Secretary of State had such reasonable cause did not, and could not, depend on a recital to that effect. What was vital was that the Secretary of State should have had reasonable cause, and the Court, in my opinion, can properly find such case to exist from the sworn statement of Sir John Anderson, which I have read. . . . The truthfulness and honesty of Sir John Anderson are not assailed.

* * * * * * *

When . . . it is reinforced, as in this case by the affidavit of Sir John Anderson who made the order, it seems to me unassailable."

Humphreys J. at page 212 observed :—

"I see no reason why, in a case where there is no conviction, this Court should not look at any matter in evidence in the case to enable it to decide whether there is legal justification for the detention. If, then, we are at liberty to look at the affidavit of Sir John Anderson, it becomes plain that, in making the order in question the Secretary of State did believe, on grounds which to him seemed reasonable, that it was necessary to exercise control over the applicant."

168. In *Shib Nath* v. *Porter* (A.I.R. 1943 Calcutta 377) the Calcutta High Court granted liberty to the Crown to file affidavits in answer to the affidavits filed by the applicants. An affidavit sworn on the 24th May 1943 by Mr. Porter, the Additional Secretary in the Home Department of the Government of Bengal, was filed and it was taken into consideration in deciding the question whether the applicants were illegally or improperly detained. Similarly the Federal Court in *King-Emperor* v. *Sibnath Banerjee* (1944 F.C.R. 1) based its decision on the affidavit.

169. In *Rex* v. *Chiswick Police—Station Superintendent, Sacksteder, Ex parte* (L.R. 1918 1 K.B. 578) although an affidavit was filed in the King's Bench Division the Court of Appeal directed that a fuller one be filed and it was filed accordingly. Pickford L.J. said at p. 585:—

"It is not a question of the liberty of a British subject; it is a question of the liberty of a person living under the protection of our laws; and when power is given to a dignified high officer to restrict that person's liberty, I am inclined to think—it is not necessary to decide it—that it must be done by that high officer himself; that he cannot make a general order without considering the circumstances of each case, but that he must examine and see whether the particular person ought to be detained in custody. In consequence we asked that a further affidavit should be made by Mr. Pedder, and he made one."

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

170. That incidentally is one of the matters we have to decide here. According to the Federal Court these orders under Rule 26 (and the same will apply to Rule 129 so far as the powers of the Provincial Government go) must be made by His Excellency the Governor personally. They purport to be made in the present cases by the Provincial Government. The question is whether the Provincial Government necessarily means His Excellency the Governor. The Federal Court held, in different circumstances it is true, that it does not. If it does not, then on the view of the Federal Court the orders of the Provincial Government are invalid. That this was one of the points on which we desired enlightenment, but the affidavit filed by the Chief Secretary adheres to the formula "the Provincial Government," and we were asked to deduce from a number of none too clear provisions that in this Province the Provincial Government can only mean His Excellency the Governor.

171. In the English case just cited a decision on a similar difficult question was obviated by the assistance of the Crown in making the affidavit. We were also anxious to obviate waste of time and energy and so asked for an affidavit. The matter is within the knowledge of the Provincial Government and a single sentence in the affidavit would have settled the question in two minutes and thus have obviated much tedious argument and tiring deliberation. Unfortunately the affidavit did not make the point clear and adhered to the ambiguous formula "the Provincial Government," which, as we have said the Federal Court considered insufficient. Fortunately, however, the learned Advocate General was able to tell us that he had seen the files personally and could assure us that the files had been placed before His Excellency the Governor and that the orders were passed by His Excellency in person. Of course we at once accepted the learned Advocate General's assurance, it having been made on personal knowledge from a personal inspection of the files and not merely on instructions. That has obviated hours of fruitless argument and consequent loss of time over a matter which, as it turns out, would have been purely academical seeing that His Excellency had in fact passed the orders. But the matter ought to have been cleared up in the affidavit.

172. The question about the necessity of filing an affidavit was considered by the House of Lords in *Greene* v. *Secretary of State for Home Affairs* (1942 A.C. 206). Lord Wright put the matter generally thus—

> "The guiding principle of habeas corpus is, as I have explained, that it is *festinum remedium*. Hence there is a presumption against unnecessary affidavits."

As the learned law lord explains, the whole object of these proceedings is to make them expeditious, to keep them as free from technicality as possible, and to keep them as simple as possible. Accordingly when there is nothing to enquire into, that is to say, when there is no question of fact to be examined, as was the case in *Greene's* case, there is no need for an affidavit. As Lord Wright put it—

> "Until there emerges a dispute of fact into which the Court feels it should inquire, I think the defendant's statement is enough, though no doubt if the Court is proceeding to inquire into the merits it may order affidavits."

We do not think we can put the matter more concisely than that.

173. But the point to note is that in all these cases—even in two cases after this decision, the Crown in its anxiety to assist the Court and to avoid any possible waste of time went out of its way to make affidavits even though the House of Lords itself had decided that affidavits were unnecessary. That is a refreshing contrast to the attitude here. It is not always easy to anticipate whether the Crown need answer the application once it has produced its order of detention, therefore, even though it was not strictly necessary to do so it invariably produced an affidavit in the cases we have set forth. And that excellent tradition has been followed in certain Indian cases. That deals with the position when no issue of fact requiring an answer is raised. It is not necessary then to file an affidavit in the first instance *if the return is good on the face of it.* But it is always wise to do so. It assists the Court. It avoids unnecessary waste of time, and it obviates attacks on Government's good faith. Candour and frankness are always appreciated.

174. But if an issue of fact is raised in the application then an affidavit in reply refuting the facts, or explaining them away, is always necessary, and should be filed along with the return. Otherwise the truth of the facts alleged will normally be accepted.

175. Then again, much depends upon the circumstances of the detention and the power under which it is made. If the detaining authority is the Provincial Government acting under Rule 26, then provided issues of good faith and the like are not raised, a return, good on the face of it would be sufficient. On the other hand if the detention is under Rule 129, where in our view, the burden being on the Crown, it has to justify its action by disclosing facts which show the reasonableness of the suspicion entertained, then a bald return unaccompanied by an affidavit furnishing particulars will not be enough. The burden is on the Crown and if it takes no steps to discharge it, *when making the return* the applicant will normally be entitled to immediate release. This is explained by Visount Maugham in *Liversidge's* case where he says, quoting Goddard L.J., in the Court of Appeal :—

> " I am of opinion that where on the return an order or warrant which is valid on its face is produced it is for the prisoner to prove the facts necessary to controvert it and in the present case this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit : *it must depend on the ground on which the return is challenged*, but where all the prisoner says in effect is ' I do not know why I am interned, I deny that I have done anything wrong,' that does not require an answer because it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe otherwise."

As we have said these remarks apply in India to detentions under Rule 26. They do not apply to ones under Rule 129. There the prisoner is entitled to say " I do not know why I have been detained, I have done no wrong" and then it is for the Crown to justify the detention *when it makes its return.*

176. In the present case issues of fact were raised. The good faith of the police and of the Provincial Government were expressly challenged, and facts were set out which, if unrebutted and unexplained, were sufficient

RECORD.

(ii) When the issue is raised that any particular power has been made in bad faith or for a collateral purpose, and therefore not made in exercise of the power, the Court is bound to enquire into the facts . . .

p. 45, ll. 23–27.

That means that in this case we are entitled to enquire into the allegations made because, first an issue of want of good faith is raised, and because secondly, in a matter under Rule 129 as contrasted with Rule 26, the Court can and must enquire into the reasonableness of the suspicion which justifies the detention, the burden being on the Crown."

p. 46, ll. 21–40.

(vi) "In this particular case we have not even a prima facie guarantee that there is a reasonable suspicion. The alternative terms in which the order [viz. the order of K. C. Diwakar made on the 22nd August, 1944, and set out at pages 61–2 of the Record] is couched show that the police officer making the arrest did not know his own mind . . . Incidentally this order has not been supported by an affidavit, and the burden being on the Crown the mere production of an order is not enough. There must be proof. The only affidavit we have on the side of the Crown is one which tells us about the suspicions entertained by the Provincial Government, not by the police officer making the arrest. But what we have to determine here is what were his suspicions and were they reasonable, and not what the Provincial Government's suspicions are."

p. 46, l. 40–p. 47, l. 14.

(vii) The High Court pointed out that the order made by the police officer referred to acts done "in a manner prejudicial to the efficient prosecution of the war" [Record, page 61, l. 26] and that the affidavit sworn by the Chief Secretary referred to "activities calculated to prejudice the public safety and efficient prosecution of the war." [Record, page 16, l. 23].

"He [the police-officer] seems to have entertained no suspicion on the score of public safety therefore this difference of opinion between the police officer and the Provincial Government in itself shows that there is room for a difference of view on the material set out in the report, and accordingly makes it all the more incumbent upon us to know what the grounds for the suspicions are."

p. 48, ll. 32–37.

(viii) "The question is whether the police officer in question passed the order of detention under Rule 129 of the Defence of India Rules in good faith or whether the detention was made with a view to facilitating the investigation into a dacoity in East Khandesh unhampered and unrestricted by any of the provisions of the Criminal Procedure Code and was not made in *bona fide* exercise of the power . . .

p. 50, ll. 8–18.

The applicant made definite and specific allegations of fact viz. that a dacoity was committed in East Khandesh some time in April last, that police officers from Bombay were investigating into the offence, that the arrests and searches were made with a view to find out the culprit and catch the absconders, that the police officers from Bombay had questioned Deshpande about Inamdar and his whereabouts and his associates, that no question was asked from Deshpande about the articles in 'Bhavitavya' or about his activities in relation to the war and that the inquiries have been restricted to

In the High Court of Judicature at Nagpur.

Part I.

No. 11. Order of the High Court, 29th September 1944, *continued.*

to support the allegations. An affidavit therefore was necessary and should have been filed from the start. In fact it is the complete absence of any refutation of these facts and the failure to explain them that leads us to conclude that the orders in these two cases were not made in good faith and that they are a fraud on the Defence of India Act and its Rules.

177. We hold that the detentions of Purushottam Yeshwant Deshpande and Yeshwant Vishnu Lele are illegal and improper and direct that they be set at liberty forthwith.

178. We wish to make it plain that the validity of Rule 129 was not questioned before us and accordingly we express no opinion about its *intra vires* character.

179. After we had delivered judgment, but before we had signed it, the learned Advocate General stated that we had misunderstood the position of the Provincial Government regarding the granting of interviews and asked us to embody the following explanation in our order. That we have pleasure in doing.

"There has been a misunderstanding on two points which I must clear :—

(1) When I informed your Lordships that either Mr. Kedar or Mr. Sheorey could interview and they had to apply to the District Superintendent of Police, I meant to say that they had to get in touch with the District Superintendent of Police.

(2) I assured your Lordships that no interview was asked for by the prisoner and that no interview was refused. All the applications were to the High Court. The only request to the Government (i.e. Jail authorities) being an application by Mr. Ringe.

As this misunderstanding should, I think, be removed, I am drawing your Lordships' attention to it before the order is signed."

VIVIAN BOSE,
Judge.
29–9–1944.

J. SEN,
Judge.
29–9–1944.

No. 12.

ORDER IN COUNCIL granting Special Leave to Appeal to His Majesty in Council.

In the Privy Council.

No. 12. Order in Council granting Special Leave to Appeal to His Majesty in Council, 30th October 1945.

L.S.

AT THE COURT AT BUCKINGHAM PALACE

The 30th day of October, 1945

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
DUKE OF ABERCORN
MR. SECRETARY BEVIN
SIR STAFFORD CRIPPS
MR. WILMOT
MR. HOFMEYR
SIR JAMES TUCKER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 9th day of October 1945 in the words following viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Your Majesty in the matter of an Appeal from the High Court of Judicature at Nagpur between the Petitioner (Appellant) and (1) Vimlabai Deshpande (2) Puroshottam Yeshwant Deshpande Respondents setting forth (amongst other matters): that on the 21st August 1944 the 2nd Respondent Puroshottam Yeshwant Deshpande was arrested without warrant by one K. C. Diwakar a police officer acting under the powers conferred on him by Rule 129 (1) of the Defence of India Rules: that at the time when he arrested the 2nd Respondent the said K. C. Diwakar reasonably suspected him of having acted of acting or of being about to act in a manner prejudicial to the efficient conduct of the war: that the said K. C. Diwakar reported the arrest to the Government of the Central Provinces and Berar (therein called "the Provincial Government") and on the 22nd August 1944 pending the receipt of the orders of the Provincial Government by order in writing committed the 2nd Respondent to the custody of the Superintendent of the Central Jail Nagpur: that on the 26th August 1944 the Provincial Government acting under the powers conferred on it by Rule 129 (2) and (4) of the Defence of India Rules and having considered the report of the said K. C. Diwakar ordered that the 2nd Respondent should be detained in police custody until the 5th September 1944: that on the 2nd September 1944 the Provincial Government acting under its said powers and having considered a further report ordered that the 2nd Respondent should be detained in police custody from the 5th September 1944 for a further period of 15 days: that on the 19th September 1944 the Provincial Government acting under its said powers ordered that the 2nd Respondent should be detained in the Nagpur Jail for a further period of 15 days: that before making each of the said orders the Provincial Government was

In the Privy Council.

No. 12. Order in Council granting Special Leave to Appeal to His Majesty in Council, 30th October 1945, *continued.*

satisfied that there were reasonable grounds for suspecting that the 2nd Respondent was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and the efficient prosecution of the war and that there were reasons to suspect that these persons had already acted in a manner which had prejudiced the public safety : that on the 29th September 1944 the High Court acting under Section 491 of the Code of Criminal Procedure 1898 ordered that the 2nd Respondent should be set at liberty upon the ground that his detention was illegal : that the grounds of the Judgment of the High Court may be summarized thus :—(1) that the said K. C. Diwakar had no reasonable grounds for suspecting that the 2nd Respondent had acted was acting or was about to act in a manner prejudicial to the efficient conduct of the war ; (2) that the reasons of the Provincial Government for ordering his detention under Rule 129 were immaterial ; (3) that the said K. C. Diwakar in arresting the 2nd Respondent and the Provincial Government in ordering his detention had not acted in good faith but had used the powers conferred upon them by Rule 129 for the purpose of investigating crimes freed from the restrictions imposed upon such investigations by the Code of Criminal Procedure : that the questions raised by this Petition are :—(1) whether the High Court had any power to question the arrest or the order made by the said K. C. Diwakar or the orders of the Provincial Government ; (2) whether the High Court was right in holding that the Provincial Government's grounds for ordering the detention of the 2nd Respondent were immaterial ; (3) whether the High Court was right in holding that the said K. C. Diwakar had no reasonable grounds for suspecting that the 2nd Respondent had acted was acting or was about to act in a manner prejudicial to the efficient conduct of the war and that the said K. C. Diwakar and the Provincial Government had not acted in good faith : that it is submitted that the Judgment of the High Court cannot be supported upon any ground : And humbly praying Your Majesty in Council to grant special leave to appeal from the Order of the High Court dated the 29th September 1944 or for such other Order as to Your Majesty in Council may seem fit :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Order of the High Court of Judicature at Nagpur dated the 29th day of September 1944 upon the following conditions :— (1) that the 2nd Respondent shall not in any event be re-arrested in respect of the matters to which the Appeal relates and (2) that the Petitioner shall pay the costs as between solicitor and client incurred by the Respondents both in opposing the Petition and in the Appeal :

" AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the

Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

In the Privy Council.

No. 12. Order in Council granting Special Leave to Appeal to His Majesty in Council, 30th October 1945, *continued.*

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Nagpur for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

APPENDIX
of
Orders for detention.

Appendix

A.

ORDER of K. C. Diwakar.

A. Order of K. C. Diwakar, 22nd August 1944.

Order by Police Officer under rule 129, clause (2) of the Defence of India Rules committing a person to custody.

To The Superintendent of Central Jail,
Nagpur.

Whereas, in exercise of the powers conferred by sub-rule (1) of rule 129 of the Defence of India Rules, I have arrested P. Y. Deshpande Dhantoh : 44 yrs. resident of Nagpur in the Nagpur district, whom I reasonably suspect of having acted, or of acting, or of being about to act in a manner prejudicial to the efficient prosecution of war.

And whereas under sub-rule (2) of the said rule 129, I am empowered to commit the said arrested person to any Jail suitable in the province.

This is to authorize and require you, the said Superintendent to receive the said arrested person into your custody in the said jail together with this order, and to detain him until the receipt by you of further order concerning him provided that the period of detention in pursuance of this order shall not exceed fifteen days from the date of this order.

This is further to authorize you to transfer the said person subject to the order of the Inspector-General of Prisons together with this order

Appendix.

A.
Order of K. C. Diwakar, 22nd August 1944, *continued.*

to any other jail in the province and the Superintendent of such other jail shall comply with this order as above directed.

K. C. DIWAKAR
S.O.

Signature of the Police Officer with designation.
Sitabuldi.

Dated 22nd August 1944

Class—One.

Written on reverse of Order

Sec Pr Class I
P. Y. Deshpande

From 22–8–44
To 5–9–44

15 days detention

Jailor.
Nagpur Jail.

Property
Bedding & clothing
Rs.14/15/–

4097/10
8/8/44

Superintendent
Central Jail, Nagpur.

Handed over to police on 27.8.44 as directed by the Prov. Govt. vide No. 756–707/Con

dt. 26.8.44

Superintendent
Central Jail, Nagpur.

Seen. Inform accordingly.

Appendix.

B.

ORDER of Provincial Government.

B. Order of Provincial Government, 26th August 1944.

GOVERNMENT OF THE CENTRAL PROVINCES AND BERAR,
Political and Military Department.
ORDER.

To The Superintendent,
Central Jail,
Nagpur.

Nagpur, the 26th August 1944.

No. 756–707/Con.—WHEREAS the Provincial Government has received a report as required by sub-rule (2) of rule 129 of the Defence of India Rule that P. Y. DESHPANDE OF NAGPUR has been arrested and committed to your custody under the said rule;

AND WHEREAS under sub-rule (4) of the said rule the Provincial Government is empowered to make such order as may appear to it to be necessary for the temporary custody of the person so arrested;

NOW, THEREFORE, in exercise of the said power the Provincial Government is pleased to direct that the said P. Y. DESHPANDE, subject to any further orders that may be made, be detained in police custody during the remaining period of his detention of fifteen days expiring on the 4th September 1944.

This is to require you to hand over the said person to the District Superintendent of Police, Nagpur.

By order of the Governor,
Central Provinces and Berar,
Sd. T. C. S. JAYARATNAM,
Secretary to Government,
Central Provinces and Berar,
Political and Military Department.

C.

ORDER of Provincial Government.

C. Order of Provincial Government, 2nd September 1944.

GOVERNMENT OF THE CENTRAL PROVINCES AND BERAR,
Political and Military Department.
ORDER

Nagpur, the 2nd September 1944.

No. 793–724/Con.—In exercise of the powers conferred by sub-rules (2) and (4) of rule 129 of the Defence of India Rules, the Provincial Government is pleased to direct that P. Y. DESHPANDE OF NAGPUR shall be detained in police custody for a further period of fifteen days from the 5th September 1944.

By order of the Governor,
Central Provinces and Berar,
Sd. T. C. S. JAYARATNAM,
Secretary to Government,
Central Provinces and Berar,
Political and Military Department.

Appendix.

D.
Order of Provincial Government, 19th September 1944.

D.

ORDER of Provincial Government.

GOVERNMENT OF THE CENTRAL PROVINCES AND BERAR,
Political and Military Department.

ORDER UNDER RULE 129 (2) AND (4) D.I.R.

Nagpur, the 19th September 1944.

No. 829–707/Con.—WHEREAS the Provincial Government, on receipt of a report under sub-rule (2) of rule 129 of the Defence of India Rules, passed an order extending the period of detention of Mr. P. Y. DESHPANDE OF NAGPUR, by fifteen days with effect from the 5th September 1944 ;

AND WHEREAS the period so extended expires on the 19th September 1944 ;

AND WHEREAS information subsequently received confirms the Provincial Government in the view that there is reasonable suspicion of Mr. P. Y. DESHPANDE OF NAGPUR, having acted in a manner prejudicial to the public safety and to the efficient prosecution of war ;

NOW, THEREFORE, in exercise of the powers conferred by sub-rules (2) and (4) of rule 129 of the Defence of India Rules, the Provincial Government is pleased to extend the period of detention of Mr. P. Y. DESHPANDE OF NAGPUR, for a further period of fifteen days and to direct that he be detained in the Nagpur Jail.

By order of the Governor,
Central Provinces and Berar,

Sd. T. C. S. JAYARATNAM,
Secretary to Government,
Central Provinces and Berar,
Political and Military Department.

L.S.

At the Court at Buckingham Palace

The 30th day of October, 1945

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
DUKE OF ABERCORN
MR. SECRETARY BEVIN
SIR STAFFORD CRIPPS
MR. WILMOT
MR. HOFMEYR
SIR JAMES TUCKER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 9th day of October 1945 in the words following viz.:—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Your Majesty in the matter of an Appeal from the High Court of Judicature at Nagpur between the Petitioner (Appellant) and (1) Vimlabai Deshpande (2) Puroshottam Yeshwant Deshpande Respondents setting forth (amongst other matters): that on the 21st August 1944 the 2nd Respondent Puroshottam Yeshwant Deshpande was arrested without warrant by one K. C. Diwakar a police officer acting under the powers conferred on him by Rule 129 (1) of the Defence of India Rules: that at the time when he arrested the 2nd Respondent the said K. C. Diwakar reasonably suspected him of having acted of acting or of being about to act in a manner prejudicial to the efficient conduct of the war: that the said K. C. Diwakar reported the arrest to the Government of the Central Provinces and Berar (therein called " the Provincial Government ") and on the 22nd August 1944 pending the receipt of the orders of the Provincial Government by order in writing committed the 2nd Respondent to the custody of the Superintendent of the Central Jail Nagpur: that on the 26th August 1944 the Provincial Government acting under the powers conferred on it by Rule 129 (2) and (4) of the Defence of India Rules and having considered the report of the said K. C. Diwakar ordered that the 2nd Respondent should be detained in police custody until the 5th September 1944: that on the 2nd September 1944 the Provincial Government acting under its said powers and having considered a further report ordered that the 2nd Respondent should be detained in police custody from the 5th September 1944 for a further period of 15 days: that on the 19th September 1944 the Provincial Government acting under its said powers ordered that the 2nd Respondent should be detained in the Nagpur Jail for a further period of 15 days: that before making each of the said orders the Provincial Government was satisfied that there were reasonable grounds for suspecting that the 2nd Respondent was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and the efficient prosecution of the war and that there were reasons to suspect that these persons had already acted in a manner which had prejudiced the public safety: that on the 29th September 1944 the High Court acting under Section 491 of the Code of Criminal Procedure 1898 ordered that the 2nd Respondent should be set at liberty upon the ground that his detention was illegal: that the grounds of the Judgment of the

High Court may be summarized thus:—(1) that the said K. C. Diwakar had no reasonable grounds for suspecting that the 2nd Respondent had acted was acting or was about to act in a manner prejudicial to the efficient conduct of the war; (2) that the reasons of the Provincial Government for ordering his detention under Rule 129 were immaterial; (3) that the said K. C. Diwakar in arresting the 2nd Respondent and the Provincial Government in ordering his detention had not acted in good faith but had used the powers conferred upon them by Rule 129 for the purpose of investigating crimes freed from the restrictions imposed upon such investigations by the Code of Criminal Procedure: that the questions raised by this Petition are:—(1) whether the High Court had any power to question the arrest or the order made by the said K. C. Diwakar or the orders of the Provincial Government; (2) whether the High Court was right in holding that the Provincial Government's grounds for ordering the detention of the 2nd Respondent were immaterial; (3) whether the High Court was right in holding that the said K. C. Diwakar had no reasonable grounds for suspecting that the 2nd Respondent had acted was acting or was about to act in a manner prejudicial to the efficient conduct of the war and that the said K. C. Diwakar and the Provincial Government had not acted in good faith: that it is submitted that the Judgment of the High Court cannot be supported upon any ground: And humbly praying Your Majesty in Council to grant special leave to appeal from the Order of the High Court dated the 29th September 1944 or for such other Order as to Your Majesty in Council may seem fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Order of the High Court of Judicature at Nagpur dated the 29th day of September 1944 upon the following conditions:—(1) that the 2nd Respondent shall not in any event be re-arrested in respect of the matters to which the Appeal relates and (2) that the Petitioner shall pay the costs as between solicitor and client incurred by the Respondents both in opposing the Petition and in the Appeal:

"AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Nagpur for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
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(46068) Wt. 8079—38 14 11/45 D.L. G. 338

831+5

L.S.

At the Court at Buckingham Palace

The 15th day of May, 1946

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL
MR. SECRETARY HALL
SIR ALAN LASCELLES
MR. SILKIN

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 7th day of May 1946, in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the High Court of Judicature at Nagpur between Your Majesty Appellant and (1) Vimlabai Deshpande (2) Purushottam Yeshwant Deshpande Respondents (Privy Council Appeal No. 83 of 1945) and likewise the humble Petition of the Appellant setting forth: that Orders for the detention of the 2nd Respondent having been made by K. C. Diwakar a Police Officer in exercise of powers conferred by Clause 2 of Rule 129 of the Defence of India Rules and by the Government of the Central Provinces and Berar in exercise of powers conferred by Clause 2 of Rule 129 aforesaid the 1st Respondent applied to the High Court on the 25th August 1944 under section 491 of the Code of Criminal Procedure (Act V of 1898) for an Order that the 2nd Respondent be set at liberty: that by its Order dated the 29th September 1944 the High Court held that the detention of the 2nd Respondent was illegal and improper and directed that he be set at liberty forthwith: that on the 30th October 1945 the Appellant obtained special leave to appeal: and humbly praying Your Majesty in Council to take this Appeal into consideration and that the Order of the High Court dated the 29th September 1944 may be reversed altered or varied or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and the Order of the High Court of Judicature at Nagpur dated the 29th day of September 1944 affirmed:

"AND in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Appellant to the Respondents their costs of this Appeal as between Solicitor and Client incurred in the said High Court and the sum of £981 7s. 3d. for their costs thereof as between Solicitor and Client incurred in England."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Nagpur for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

[16]

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find out the whereabouts of Inamdar and his associates. These facts have not been denied either in the statement filed by the Provincial Government or in the affidavit of the Chief Secretary . . . .

" The only allegation against him is that he was actively associated with persons who were engaged in such activities [viz. activities calculated to prejudice the public safety and/or the efficient prosecution of the war] . . . p. 50, ll. 23–24.

" The order of the Provincial Government placing Deshpande in police custody could not have been with a view to promote the efficient prosecution of the war or to safeguard the public safety, but must have been with a view to afford facilities to the police officers to carry on the investigation into the offence which had already been committed and to find out traces of Inamdar and his associates. Had the case been otherwise the Provincial Government would have taken the responsibility upon itself and would have acted under Rule 26. That in turn would have given Deshpande certain limited privileges. The police officer who arrested and ordered the detention has not filed any affidavit. p. 50, l. 37–p. 51, l. 4.

" The circumstances in this case leave no manner of doubt that the arrest and search were made with a view to trace the whereabouts of Inamdar and his associates and to investigate into the offence of dacoity which was committed. Deshpande was placed in police custody in order to give police officers facilities for carrying on an investigation. The detention in police custody could not possibly have contributed to the efficient prosecution of the war or in any way to safeguard the public safety."

17. The Appellant makes the following submissions upon the reasons of the High Court summarized in the preceding paragraph of this Case :—

As to paragraph 16 (i).

(i) A person detained under Rule 129 may be questioned by the police with reference to a crime committed by him or by any other person. The detention does not become thereby illegal. Want of good faith in the exercise of the powers conferred by Rule 129 means acting dishonestly or for some purpose other than that for which the power was conferred, and unless want of good faith in this sense be proved, the exercise of these powers cannot be questioned.

As to paragraph 16 (ii) *and* (iii).

(ii) and (iii). The provisions of Rule 129 are ancillary to those of Rule 26. As the executive must be the judge of the necessity for making a final order under Rule 26, so it must be in respect of a temporary order under Rule 129. The provisions of Section 16 of the Defence of India Act, 1939 (which provide that no order made in exercise of any power conferred under the Act shall be called in question in any Court) apply to orders made under Rule 129, as much as to orders made under Rule 26. The High Court has no greater power of questioning the acts of the executive in the one case than in the other. It is true that the powers conferred by Rule 129 can be exercised by a police-officer, but it is also true that the arrested person cannot be detained for more than 15 days without an order