Privy Council Appeal No. 60 of 1939

Ryots of Garabandho and other villages - - - *Appellants*

v.

The Zamindar of Parlakimedi and another - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1943

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SIMON)
LORD MACMILLAN
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* THE LORD CHANCELLOR]

This appeal is brought, by leave of the Madras High Court, from an order of that Court dated November 5th, 1937, dismissing the appellants' application that a writ of *certiorari* should issue to the Board of Revenue at Madras to bring up, in order to be quashed, an order made by the Collective Board, on October 9th, 1936, under section 172 of the Madras Estates Land Act, 1908.

The ancient writ of *certiorari* in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because, in its original Latin form, it required that the King should " be certified " of the proceedings to be investigated, and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior " courts " in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, *certiorari* will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior courts, and in particular the court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India.

The appellants are ryots of three villages included in the Parlakimedi estate in the district of Ganjam in the Northern Circars. The respondents are (1) the Zemindar of Parlakimedi and (2) the Board of Revenue at Madras.

In October, 1925, the Zemindar applied, under chapter XI of the Madras Estates Land Act, for the settlement of rent in respect of these villages, and by a supplemental application in March, 1926 (which was inspired by a decision just previously given by the High Court of Madras in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli* (I.L.R. 49 Madras 499)), he applied for settlement of a " fair and equitable rent " under section 168 (1) of the Act. The Government of Madras in November,

1927, directed the Special Revenue Officer of the district to settle a fair and equitable rent in respect of lands in the said villages. After memoranda had been submitted by the contesting parties and after elaborate investigations on the spot, the Special Revenue Officer in 1935 made an Order doubling the previous rents. On the ryots' appeal to the Board of Revenue, a member of that Board sitting alone reversed this decision and allowed an increase of rent of only 12½ per cent., considering himself bound by proviso (*b*) of clause (1) of section 30, which (for the cases to which it applies) runs as follows:—

> " Provided . . . that no enhancement under this clause shall raise rent by more than two annas in the rupee of the rent previously payable for the land."

The Zemindar appealed by way of revision to the Collective Board of Revenue from the decision of the single member. The Collective Board on October 9th, 1936, decided by a majority of two members to one, that proviso (*b*) of section 30 (1) did not apply to the case. On the other hand, they were not prepared to endorse so drastic an enhancement of rent as 100 per cent., and fixed as the appropriate increase an enhancement of 6 annas in the rupee, or 37½ per cent., this increase to be spread over a period of 5 years.

On February 9th, 1937, the present appellants petitioned the Madras High Court for a writ of *certiorari* to quash the order of the Collective Board of Revenue, complaining that the rents had been raised above the limit of 2 annas in the rupee or 12½ per cent., which is the maximum increase permitted under section 30 (1) (*b*) of the Act.

On November 5th, 1937, the Madras High Court (Leach C.J. and Burn J.) held that if the section of the statute applied so that no increase beyond 12½ per cent. could lawfully be made, the appellants would be entitled to a writ of *certiorari* addressed to the Board of Revenue to correct the illegality, but that in the circumstances the Board of Revenue had power to enhance by 37½ per cent. The petition for the writ was therefore dismissed.

The first of these questions, viz. whether a writ of *certiorari* provides a proper remedy if the Board of Revenue had exceeded its powers as above is a question of general importance and of considerable difficulty. Their Lordships have thought it right to enter upon this matter and to decide it, notwithstanding that, if the High Court of Madras is right in saying that the limitation to a 12½ per cent. increase does not apply in the present case, the broader question as to the use of the prerogative writ might be left undecided. In view of this wider issue, their Lordships requested the Secretary of State for India to interest himself in the appeal and to provide assistance in the argument, and their Lordships are much indebted to the counsel instructed by the India Office on behalf of the Governor-General in Council for contributing their help to a somewhat involved investigation.

The view that they had jurisdiction to issue the writ of *certiorari* in the present case was taken by the High Court of Madras as the result of a line of recent decisions in that Court. At one time it had been held that the Board of Revenue exercised its functions under chapter XI of the Madras Estates Land Act as a civil court and was subject as such to the revisional jurisdiction entrusted to the High Court by section 107 of the Government of India Act and section 115 of the Code. This opinion, however, was overruled by a Full Bench in *Raja of Mandasa* v. *Jagannaya-kulu* (1932). 63 M.L.J. 450. Their Lordships have no doubt that the decision of the Full Bench was on this point correct: but in so saying they must not be taken to decide that the Board of Revenue in any of its functions is a court subject to the High Court's appellate jurisdiction within the language of s. 107 of the Act, or a court subordinate to the High Court within the meaning of s. 115 of the Code. The line of decisions which in the end affirmed the jurisdiction to proceed by *certiorari* may be taken as beginning with *In re Nataraja Iyer* (1912), I.L.R. 36, Mad. 72, where the Revenue Divisional Officer of Ariyalur had directed the prosecution of the applicant for giving false evidence by an affidavit sworn in proceedings under the Income

Tax Act of 1886. The two learned judges who decided that case agreed that on the merits no writ of *certiorari* should issue, but they differed on the question of jurisdiction. Sundara Ayyar J. held that there was no jurisdiction. He was satisfied " that the Supreme Court did not possess the power to issue the writ on anyone beyond the limits of Madras unless he was a British subject " (p. 80), and said that " there has apparently been no case in which any of the High Courts issued a writ of *certiorari* on an officer beyond the limits of its own original jurisdiction " (p. 81). Sadasiva Ayyar J., however, held that " the power to issue the writ of *certiorari* to quash judicial proceedings passed by persons in the mofussil does belong to the High Court " (p. 95). In *Penugonda Venkataratnam* v. *Secretary of State for India in Council* (1929), I.L.R. 53, Mad. 979, Venkatasubba Rao J. agreed with the view of Sadasiva Ayyar J., but both he and Madhavan Nair J. held that the writ could not be directed to the Governor in Council since an express statutory exemption protected that authority. It would rather seem that the argument for the respondent in that case was directed not so much to questioning the law as laid down by Sadasiva Ayyar J. in the previous case, as to stressing the exemption enjoyed by the Governor and his ministers: and, for this reason, only the question of exemption was touched upon by Madhavan Nair J. This case was, however, in *Maddur Muniswami Chetty* v. *Board of Revenue*, etc. (1931), I.L.R. 55, Mad. 137, taken to have decided " that in the absence of express statutory prohibition the High Court possesses the same jurisdiction in *certiorari* as the Court of King's Bench in England " (p. 149). In that case the writ was sought in respect of the removal of the applicant from membership of a panchayet court at Tirupathi, but it was refused upon the merits. *Zamindarini of Mandasa* v. *Ryots of Mandasa Zamindari* (1932), I.L.R. 56, Mad. 579, like the present case, concerned the settlement of rent in the Ganjam district under chapter XI of the Madras Estates Land Act, and a writ of *certiorari* was ordered to issue to the Board of Revenue in respect of the Board's action under s. 171 of the Act in order that certain lands should be excluded from the settlement proceedings. The reasoning of the judgments in that case is to the effect that *certiorari* may lie to quash proceedings not only of civil courts but of executive authorities when entrusted with the duty to determine questions affecting the rights of subjects. Having correctly repelled as inconclusive the objection that the Board of Revenue is not a " court ", the learned judges concluded that there was power to issue the writ in a proper case, but did not undertake an independent examination of the constitutional or historical position of the Madras High Court under its charter in respect of the matter then before it. This would seem to show that they regarded the reasoning of Sadasiva Ayyar J. in *Nataraja's* case (*supra*) as having been established by the later decisions in preference to that of Sundara Ayyar J. But so far as their Lordships have been able to discover, the writ which they directed to issue was the first writ of *certiorari* to be issued by a court in India independently of its jurisdiction over a Presidency town and over British subjects or their servants. If any earlier case is to be discovered in the histories or law reports the attention of their Lordships has not been drawn to it. The observation which their Lordships have quoted from the judgment of Sundara Ayyar J., at p. 81 of 36 Mad., has not been shown to be mistaken.

While the sole purpose of the present appeal is to obtain a direction that a writ of *certiorari* should issue out of the Madras High Court to the Board of Revenue in respect of proceedings to settle the rents payable for certain lands in Ganjam, it is necessary to consider the question of jurisdiction from two separate standpoints. This necessity arises out of the circumstance that the Board of Revenue, which was first instituted in Madras in 1786, is located, like most of the organs of provincial government, within the town of Madras. The jurisdiction may therefore be claimed (*a*) independently of the local civil jurisdiction which the High Court exercises over the Presidency town, or (*b*) solely by reason thereof, as an incident of the location of the Board of Revenue within the town. In the decisions above mentioned the jurisdiction does not appear to their

Lordships to have been regarded as incidental to the location of the Board of Revenue and they will first deal with the matter independently of the local civil jurisdiction which the High Court exercises over the Presidency town.

The question depends in the first place upon the true construction to be put on the charter dated 26th December, 1800, establishing the Supreme Court at Madras. If the power was given by that charter it is now vested in the High Court by virtue of the Indian High Courts Act, 1861 (24 & 25 Vic. c. 104, sec. 9), and the statutes repeating this provision (Indian High Courts Act, 1865, 28 & 29 Vic. cap. 15, Government of India Act, s. 106).

The Supreme Court at Madras inherited the powers formerly possessed by the Mayor's Court and Recorder's Court, but the right to issue *certiorari* beyond the Presidency town to Indians or to courts of the Company in the mofussil was not among these powers: their extra-local jurisdiction was confined to British subjects, apart from a limited jurisdiction over persons in the service of the Company or of British subjects (37 Geo. III. c. 142, s. 10). If the power now claimed is to be found in the charter of 1800 it must, their Lordships think, be found either in clause 8 thereof or in the reference which the charter and the statute of 1800, 39 & 40 Geo. III, cap. 79 (section 2) make to the powers of the Calcutta Supreme Court —a reference repeated by sec. 17 of 4 Geo. IV, cap. 71 (1824). Section 2 of the Act of 1800 authorised His Majesty by charter to establish at Madras a Supreme Court " with full power to exercise such civil criminal admiralty and ecclesiastical jurisdiction both as to natives and British subjects and to be invested with such power and authority . . . and subject to the same limitations restrictions and control . . . within the town of Madras . . . and within the territories which now are or may hereafter be subject to the Government of Madras as the said Supreme Court of Fort William in Bengal doth consist of, is invested with . . . within the said Fort William or the . . . provinces of Bengal, Bihar " etc. It is clearly necessary therefore to consider the history of the matter both in Calcutta and in Madras and, in outline at least, the circumstances in which the charter was intended to take effect in the province of Madras.

The East India Company had in 1765 obtained the grant of the *dewani* from the person whom it recognised as the rightful claimant to the throne at Delhi of the Mogul emperors. This grant was expressed to cover Bengal, Bihar and Orissa, but this last name may now be dropped, as the territory then called Orissa has long been part of Bengal, and the province which now goes by the name of Orissa did not become part of British India till 1803. The Company did not undertake the administration of the *dewani* —revenue and civil justice—by its own servants until 1772, but when in that year it " stood forth as *dewan* " a system of civil courts was set up. These courts were not courts of His Majesty the King of England, nor did they administer the law of England. They were manned by European servants of the Company, who were not skilled in any system of law but had the assistance of " law officers "—*kazis, muftis, maulavis,* or *pandits*—to inform them as to the Mahomedan and Hindu laws. The changing and tentative arrangements for criminal justice before 1790 are set forth in detail in the preamble to Reg. IX of 1793. Strictly speaking, criminal jurisdiction was part of the *nizamat* and not of the *dewani*; and the Company, at least after 1775, did not profess to administer this at its own hand until 1790, but left it, nominally at least and subject to some interference or supervision, in the hands of the Naib Nazim, whose chief court (nizamat adalat) sat at Murshidabad. From 1790, however, the Company took criminal jurisdiction into its own hands and continued the Mahomedan criminal law as the public law of the land, applying it with modifications made from time to time, to Hindus as well as to Moslems. Appeals from the civil courts went to the Sudder Dewani Adalat and appeals from the criminal courts to the Sudder Nizamat Adalat—courts which consisted until 1801 of the Governor-General and members of the Council. The Company's courts—civil or criminal—had no jurisdiction over British subjects. These were before the Acts of 1813 and 1833 few in the districts of Bengal and Bihar and mostly in the service of the

Company. It was not even considered that the Company had any legal authority to make regulations binding upon British subjects who were not its servants. A legislative power with a general jurisdiction over British subjects and Indians alike was first established in India by the Act of 1833. Meanwhile the device was resorted to of refusing permission to any British subject to reside more than ten miles from the capital unless he entered into a bond to submit to the jurisdiction of the zillah judge in civil suits not involving more than five hundred rupees. (Ben. Reg. III of 1793, s. 9, XXVIII of 1793, s. 2, Mad. Reg. II of 1802, s. 6.)

In 1773 by the Regulating Act (13 Geo. III, cap. 63), Parliament intervened for the first time to control the Company's administration. It authorised a Supreme Court to be established by charter at Fort William in Bengal to be a court of record and to be a court of oyer and terminer for the town of Calcutta and the factories subordinate thereto. The Supreme Court was to take the place of the Mayor's Court which had since 1726 existed as an English court applying English law to the town and settlement. The 14th section of the Regulating Act provided further that the Supreme Court, when established, should have authority over British subjects who should reside in Bengal and Bihar under the Company's protection, and also that it could hear suits and complaints against any person in the service of the Company or of any British subject. It authorised the Governor-General and Council to make regulations for the settlement and subordinate places but these were to have no effect unless the Supreme Court should think fit to register them; and as the Council was averse from submitting its regulations to this form of censorship this provision was in practice a dead letter. The Governor-General and members of Council and the Chief Justice and Judges were " to be and to have full power and authority to act as justices of the peace " for the settlement and subordinate factories.

As regards the powers committed to the Supreme Court, the charter of 1774 introduced difficulties which cannot be imputed to the statute of 1773. Claiming to be authorised by its charter, the Court, as is well known, proceeded to entertain proceedings (*inter alia*) against the officers of the Company's courts in respect of their official acts, and the consequence of its proceedings in the " Patna " and " Cossijurah " cases was that the Company's government, the Council, took steps to employ military force to prevent the orders of the Court from being carried out, and petitioned the authorities in England against the actions of the Court as attempts to extend the authority of the English law to the inhabitants of Bengal and Bihar. The result was the statute of 1781 (21 Geo. III, cap. 70). The preamble recited (*inter alia*) that it was expedient that the lawful government of the provinces should be supported and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges. The Act fundamentally altered the scope and conditions of the Supreme Court's jurisdiction, superseding to a great extent but without formally amending the charter of 1774.

The terms of the Madras charter of 1800, with which their Lordships are now immediately concerned, are intended plainly enough to incorporate the amendments of 1781 and thus to produce the same general result in Madras as in Calcutta. The Mayor's Court had continued in Madras to exercise its jurisdiction under a charter of 1753 until it gave place in 1798 to the Recorder's Court authorised by the statute of 1797 (37 Geo. III, cap. 142); the Recorder, Sir Thomas Strange, became in 1800 the first Chief Justice of the new Supreme Court of Madras.

The effect of the Act of 1781 is therefore germane to the construction of the charter of 1800. It exempted the Governor-General and Council from the Court's jurisdiction in respect of their official acts; it deprived the Court of jurisdiction in matters of revenue; it provided that no one was to be liable to its jurisdiction by reason of being a land holder or farmer of land or land rent; that no one should be amenable to the Court's jurisdiction by reason of being employed by the Company or by a British subject in any matter of inheritance or contract, but only in respect of actions for wrongs and trespasses or in other civil cases by agreement in writing to submit

thereto. It provided for the maintenance of a register of the names of Indians so employed. It gave the Supreme Court jurisdiction to try actions and suits against all inhabitants of Calcutta providing that the Hindu and Mahomedan laws respectively should be applied to their affairs; or the law of the defendant in cases where only one of the parties was a Hindu or Mahomedan. It preserved the rights of fathers of families. It confirmed the Court of Sudder Dewani Adalat as a court of civil appeal from the country courts, and made it a court of record, and its judgments final and conclusive save for appeal to His Majesty in Council. It gave to the Sudder Court exclusive jurisdiction over offences and extortions in the collection of the revenue. It made the judicial officers of the country courts, whether they were British or Indian, immune from actions in respect of any order made by them and gave protection likewise to others for any acts done by their order. It conferred on the Governor-General and Council the power to make regulations " for the provincial courts and councils "—a very limited power which, strengthened by an Act of 1797, 37 Geo. III, cap. 142, s. 8—has produced the extensive system of laws known as the Bengal Regulations.

Certain other matters must be noticed before attempting to interpret the Madras charter of 1800. Justices of the peace had functioned under the Mayor's Court charters of 1726 and 1753 in Calcutta and Madras. When criminal proceedings became necessary against a British subject in the mofussil, a justice of the peace had to function for the purpose of dealing with the case or committing the accused for trial. Section 151 of an Act of 1793 (33 Geo. III, cap. 52), after reciting that the members of Council and the Judges were the only justices of the peace for the province, gave power to the Governor-General in Council to appoint " such and so many of the covenanted servants of the said Company or other British inhabitants . . . to act as justices of the peace within and for the said provinces and presidencies and places thereto subordinate." Such justices were not to sit on any court of oyer and terminer unless called upon so to do. Their appointments were to issue under the seal of the Supreme Court. By s. 153 all convictions by any justices of the peace out of the court of oyer and terminer were made removable by writ of *certiorari* within six months into the said court. [Similar provision was made for Madras and Bombay in 1807 (47 Geo. III, sess. 2, c. 68, section 4).] In 1813 the statute 53 Geo. III, c. 155, recited in s. 105:

> " Whereas His Majesty's British subjects resident in the British territories in India without the towns of Calcutta Madras and the town and island of Bombay are now by law subject only to the jurisdiction of His Majesty's courts at Calcutta Madras and Bombay respectively, and are exempted from the jurisdiction of the courts established by the said United Company within the said territories, to which all other persons whether natives or other inhabitants of the said territories without the limits of the towns aforesaid are amenable. . . ."

It went on to provide that in cases of assault, forcible entry or other injury accompanied with force a native of India might complain against a British subject to a magistrate of the zillah, who could acquit or convict and impose a fine not exceeding Rs.500. All such convictions were declared to be removable by *certiorari* into the courts of oyer and terminer and gaol delivery in the same way as under the 1793 Act—a provision which remained in force till Act IV of 1843 applied to such cases the ordinary system of appeals in the Company's courts. Section 106 made provision for British subjects in the mofussil being sued in the Company's court for small debts. By s. 107 British subjects living more than ten miles from the Presidency town were put under the civil jurisdiction of the Company's courts, both of first instance and appeal, if the cause of action arose within their jurisdiction, but the British subject might appeal to the Supreme Court instead of to the Company's court of appeal. Act XI of 1836 abrogated this last-mentioned privilege. Other sections of this Act of 1813 have some historical significance: sections 99 and 100 gave the Company power by regulation to impose certain taxes or duties on the Presidency towns and required the Supreme Court to recognise such regulations. Section 114 made the stealing of securities to be felony on the part of any

persons within the local limits of the criminal jurisdiction of any of His Majesty's courts at Calcutta, Madras or Bombay, or on the part of any persons personally subject to the jurisdiction of any such court.

In view of the reference in the Madras statute and charter to the jurisdiction of the Supreme Court at Calcutta it would be almost conclusive of the present question could it be shown that the Calcutta Court after 1781 was in practice exercising or claiming jurisdiction over the country courts throughout Bengal and Bihar by issuing to them the English prerogative writs of *certiorari* and *mandamus*. It would be a task of some difficulty and little profit to investigate the practice before 1781, but their Lordships are not satisfied, in view of *Ramgobind Mitter's* case (1781, Morton 210), to which they will in due course refer, that either of these writs was employed at all, though *habeas corpus* was certainly employed. However that may be, their Lordships think it reasonably plain that between 1781 and the end of the century no such jurisdiction was being exercised in fact. They know of no case in which the Supreme Court issued either *certiorari* or *mandamus* to a country court. The writ of *habeas corpus* came to be used in the form *ad testificandum*—that is as a mode of summoning witnesses—in the course of the Supreme Court's admitted jurisdiction over Calcutta and over British subjects [*cf. Deverall's* case, 1839, Morton 184]. Whether the writ *ad subjiciendum* was issued beyond the local jurisdiction only to British subjects, or to others for the purpose of protecting the liberty of British subjects, or more generally in aid of the Court's local jurisdiction within Calcutta—is a question to which the answer is not altogether clear. But this writ would not ordinarily, if ever, issue to a court, and their Lordships know of no case after 1781 until the Bombay case of 1829, to be hereafter mentioned, in which this writ was used by any of the Supreme Courts so as to interfere with the jurisdiction of any court of the Company. It would seem probable that the exercise of such jurisdiction in Bengal after 1781 would have produced a definite reaction on the part of the Council and that such a jurisdiction would have been constantly appealed to by litigants unsuccessful in the country courts.

The hierarchy of country courts was the creature of the Bengal Regulations and after a number of changes had been made in the original system of 1772, the system as revised was stereotyped in the Cornwallis Code of 1793—a body of forty-eight enactments, many of them lengthy and mostly drafted by Sir George Barlow, which held the field for twenty years as " the system of regulation and polity for the internal government of these provinces " (Harington " Analysis," vol. I, p. 16). An " adalat system," so to call it, similar in character to that described in the Cornwallis Code was introduced into Madras in 1802 by a number of Regulations made by the Madras government in that year and between 1802 and 1806. As noted in William Morley's well known Digest (1850, vol. I, Introd. p. xxx), before 1802 there were no Company's courts at Madras. Civil and criminal justice had in many parts of the province continued much as it had been under the native rulers—there being a concentration of authority in the hands of the collector of the district who took the place and exercised the same wide powers as the *amildar* of the old régime. By 1799, Lord Wellesley had ordered the Madras government to introduce the Bengal system without delay. (Wellesley's Despatches, 1836, vol. II, p. 121.) The creation of a Supreme Court was part of the same general policy. No provisions are to be found in the Bengal or Madras Regulations which suggest that the Company's Courts were liable to control or correction by writs such as *habeas corpus*, *mandamus*, or *certiorari*. Madras Regulation VI of 1802 (section 19) provided for European British subjects being dealt with as amenable only to the Supreme Court in criminal cases, the zillah magistrate's procedure being regulated according as he was or was not also a justice of the peace with power under the Act of Parliament (1793) to commit for trial. The Mahomedan criminal law with certain important amendments and a procedure in which the *futwa* of the *kazi* or *mufti* was a prominent feature were introduced by Madras Regulations VII and VIII of 1802, following the Bengal Regulation IX of 1793 and the Cornwallis Code. Similarly in 1803 Madras Regula-

tion XV repeated Bengal Regulation LIII dealing with the doctrine and practice of *tazir* or discretionary punishment and with the crime of robbery with violence. The chief civil and criminal courts of appeal, called the *Sudder Adalat* and *Sudder Faujdari Adalat,* sat in the town of Madras and as first constituted consisted of the Governor and Council. Below these, four provincial courts of appeal were established whose members as judges of the circuit courts tried criminal cases of importance; below them were the zillah judges with their " registers " or assistant judges; and there were Indian judicial officers with various powers and styles for the smaller work. In Madras, as in Bengal, neither the Supreme Court judge nor the European judicial officer in the country courts had at this time any knowledge or means of knowledge of the Hindu or Mahomedan laws independently of the *pandits* and *maulavis;* except perhaps for Halheds " Gentoo Code," published in 1776, Hamilton's translation of the *Hedaya* in 1791, and Sir William Jones' translations of Manu in 1794, and of the book on the Mahomedan law of inheritance *Al Sirajiyyah* in 1792. Colebrooke's " Two Treatises " was not published till 1810. Jagannatha (Colebrooke's Digest) was published at Calcutta in 1797 and at London in 1801. The first English treatises on Hindu law were Sir Francis Macnaghten's in 1824 and Sir Thomas Strange's in 1825. The works of Sir W. H. Macnaghten on the Mahomedan and Hindu laws were in 1825 and 1829. In 1802 Colebrooke and Harington were judges of the Sudder Court at Calcutta and the Governor and members of Council were the judges at Madras. Sir Thomas Strange's views upon the function of his new Court will be referred to later in this judgment. It is difficult to think that barrister judges from England, with the Sudder Courts sitting in the Presidency town, were expected to issue English prerogative writs to the confines of the Province to correct in matters of jurisdiction the Company's courts which administered the Regulations and the native laws. So late as 1831 the Supreme Court at Calcutta being in doubt upon a very fundamental point of Hindu law consulted the judges of the Sudder Court and acted on their opinion (*Doe dem. Juggomohun Roy* v. *Sm. Neemoo Dossee* (1831) Morton 90). The Acts of 1781 and 1797, for Bengal, and 1800 (39 & 40 Geo. III, c. 79, s. 11), for Madras, made the Regulations binding on the provincial courts but not on the Supreme Courts. Nowhere does it appear that the latter recognised it as their duty to supervise and control the enforcement throughout the province of the company's regulations or the Mahomedan criminal law.

These historical considerations, however, are not here put forward as conclusive upon any question of jurisdiction but as matters in the light of which the Madras charter of 1800 has to be considered. The charter is a lengthy instrument, but only clause 8 will be here set out:

> 8. And it is our further will and pleasure, that the said Chief Justice, and the said Puisne Justices, shall, severally and respectively, be, and they are all and every of them hereby appointed to be, Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Fort St. George, and the town of Madras, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit.

The argument for the appellants is that this clause gave jurisdiction to the Supreme Court to issue the writ of *certiorari* to a court of the Company anywhere throughout the province. The only words which can for this purpose be relied on are those of the concluding passage. Their Lordships think that the passage cannot be confined to the town and factories and must be read with reference to the " territories . . . subject to . . . the Government of Madras ". On the other hand, it is these words that have the special qualification " as far as circumstances will admit ". The clause is substantially a repetition of the first half of clause 4 of the Calcutta charter of 1774, but the qualifying words just cited are new: the second half of the Calcutta clause reappears in Madras as clause 9. Their Lordships will construe the clause as it appears in the Madras charter—not only because the context in the

confused Calcutta charter adds to the difficulty, but also because the principles established by the Act of 1781 are intended to find place in the charter of 1800. It is one of the early clauses and comes among provisions dealing with the qualification of the Judges, their rank and precedence, the Court's seal, the form of writs, the Judges' salaries and terms of service. Its terms are plainly reminiscent of the passage in Blackstone's Commentaries (1st edition, 1765-9, 5th edition 1773), where in Book III, first published in 1768 (ch. IV, page 41), the learned author describes the King's Bench as " the remnant of the *aula regia* " and refers to the Justices of the King's Bench " who are by their office the sovereign conservators of the peace and supreme coroners of the land ". This passage and its context derive from the fourth part of Coke's Institutes (4 Inst. 73), where the highest language is held concerning the Justices of this Court:

> " It is truly said that the justices *de banco regis* have supream authority, the king himself sitting there as the law intends. They be more then justices in eire. . . . The justices of this court are the soveraign coroners of the land and therefore where the sheriff and coroners may receive appeals by bill *a fortiori* the justices of this court may do it."

After providing for a sheriff, for service of process in distant parts of the country, and for the admission of advocates and attorneys and the appointment of clerks, the charter comes in clauses 21 to 23 to certain matters of jurisdiction. By clause 21 the Court is given jurisdiction over all persons who in previous charters had been described as " British subjects " who should reside within any of the factories dependent on the Government of Madras: it is empowered to hear all actions and suits against them arising in any territory which should then or thereafter be dependent on that Government or within that of any native Indian prince in alliance with that Government; also against any person employed by the Company or by any British subject. The Court is further given all the jurisdiction which the Mayor's and Recorder's courts had enjoyed. Clause 22 repeats the 17th and 19th sections of the Act of 1781, giving power to hear civil suits against all the inhabitants of the town and providing that the Hindus and Mahomedans should have the benefit of their own laws in matters of inheritance and contract. It contains a slight amendment in its reference to the laws and usages which would have been applied by a " native court ". Clause 23 repeats certain exemptions recognised by the Act of 1781—the Governor and the members of Council, like the Judges, are not to be liable to arrest: nor sued in respect of their official acts: the Court is to have no jurisdiction as to revenue: no one is to become subject to its jurisdiction by being a landholder, farmer of rent, etc.: employment by the Company or by a British subject is not to render any person amenable to the jurisdiction in any matters save for wrongs and trespasses only. Judicial officers and persons acting under their orders are not to be sued on account of their judgments or decrees. Clause 33 gives a jurisdiction in equity over those persons previously specified for its ordinary civil jurisdiction. The Court's criminal jurisdiction is conferred by clauses 34 and 35; the former made it a court of oyer and terminer and gaol delivery for the town and factories subordinate thereto: the latter gave it jurisdiction to try British subjects for crimes committed anywhere in the province or in any native State in alliance with the Government of Madras. The ecclesiastical jurisdiction given by clause 37 raised certain points of difficulty which need not here be referred to, but it applied to persons previously described as " British subjects " and extended over the whole of the province.

The 47th clause covers the same ground as the 21st clause of the Calcutta charter of 1774 and deals with the Court of Request, the Court of Quarter Sessions and the Justices and other magistrates of the town. These are made subject to the order and control of the Supreme Court as the inferior courts and magistrates in England are subject to the order and control of the King's Bench: to which end the Supreme Court was thereby empowered to issue writs of *mandamus, certiorari, procedendo* or *error*.

Reverting to the terms of clause 8 above set forth, it must be admitted that the clause does on its face refer to the individual position of the Judges as is shown by the words " severally and respectively " which occur

near the beginning. This feature of the clause had early given rise in Calcutta to the ruling that the Court as distinct from the individual Judge could not issue prerogative writs except when specially authorised by the charter so to do, as it was with reference to the Court of Request (Calcutta charter cl. 21, Madras charter cl. 47). See *R.* v. *Warren Hastings* (1775), Morton 206, *R.* v. *Ramgobind Mitter* (1781), Morton 210. This opinion was based by Sir Elijah Impey on his own knowledge of the intentions of the draftsmen—a number of distinguished persons though not distinguished for knowledge of recent events in Bengal. The Supreme Court at this period would appear to have held that a single Judge could issue the writ of *habeas corpus* but that the Court could not issue any prerogative writ save where specifically authorised by the charter; but it is not clear that prerogative writs other than *habeas corpus* (and perhaps *ne exeat regno*) could in their view be issued at all. Indeed it would appear that they could not.

> " The general powers of the Court of King's Bench are not given to this Court, but the powers of justices of the Court of King's Bench at common law are given severally and respectively to the Judges of this Court; and as (according to Blackstone) the Judges of the King's Bench used to issue writs of *habeas corpus* severally, we have agreed that we have severally authority to issue the writ, but not jointly as a Court (per Chambers J. in *Ramgobind Mitter's* case *supra* in December 1781, but before the new Act had been received in Calcutta in July, 1782 (*cf.* Morton, p. 125)." *cf.* Stephen: Nuncomar and Impey (1885) v. II, p. 139.

Upon the view taken on this point depends in some measure the answer to the question whether clauses 21, 22, 33 and 34 have any, and if so what, bearing upon clause 8. Thus in *Nataraja's* case already cited Sadasiva Ayyar J. held that the powers given by clause 8 were given to the Judges not merely in their individual capacity but as constituting the Supreme Court, and that clauses 21, 22, 33 and 34 did not limit the powers given by clause 8 (I.L.R. 36, Mad. 72, 91, 93). On the first point their Lordships agree. It is an important feature of the clause that it speaks of the individual Judge, but this in their Lordships' view it clearly does as part of the exposition of the nature and jurisdiction of the Court of which he is to be a member. The view so dubiously based upon the supposed intentions of a number of persons consulted upon the draft of the Calcutta charter of 1774 fails as a matter of interpretation of the charter of 1800. Without claiming to construe the former document as it stood before the Act of 1781—a task long recognised to be difficult almost to the point of impossibility—their Lordships think that as it stands in the Madras charter clause 8 is too narrowly and rigidly interpreted if it is taken to intend that certain writs could be issued by a single Judge which three Judges sitting together as a Court had no power to issue. This construction overlooks or misappreciates the function of clause 8 in relation to the rest of the charter.

The first thing effected by the clause is to make the Judges justices of the peace. It makes them such justices throughout the province—alike within and without the town of Madras. It does not say that they are to be justices within the town, but outside it are to be justices *sub modo*. Yet it is clear enough that the Judges of the Supreme Court were not thereby made magistrates of the zillah intended to serve the Company in the administration of the Company's ordinary criminal courts of the mofussil by dealing with Indians throughout the province, and administering to them the Mahomedan criminal law as modified by the Regulations. Outside the local limits of Madras to be a justice of the peace was to hold an office which had reference solely to an English jurisdiction and was by its nature restricted to British subjects. " Justice of the peace " like the word " felony " has an English content. Inside the town, the English law was the *lex loci*, and the jurisdiction of the Judge as a justice of the peace extended to all persons. The first Judges in Calcutta were much occupied in the discharge of their functions as justices of the peace (see Lord Teignmouth's Life of Sir William Jones, 1804, p. 243). Reference has already been made to the provisions of the Acts of 1793 and 1813 showing the part played and to be played by justices of the peace in the mofussil; and in their Lordships' view it is impossible to disagree with the observation made in Morley's Digest (vol. I, Introd., p. cxv).:—

> " It may be here remarked that the jurisdiction of the Supreme Courts, both at Madras and Bombay, is generally restricted to British subjects, and this would seem to limit the power of the Judges to act in the Provinces as Conservators of the Peace."

An interpretation of the later words of the 8th clause may be arrived at on the same lines. The judges were to be " King's Bench judges ", as they were to be justices of the peace, throughout the whole extent to which they might have occasion to act at all—this being the status and authority with which they were armed without as well as within the town. The concluding part of clause 8 makes no reference to prerogative writs, but is a broad and summary reference to the whole of a King's Bench judge's jurisdiction and authority. It cannot be construed as restricted to such powers only as were peculiar to the King's Bench and were not shared by the other superior courts of common law. Is it really the effect of these words to subject the Indian inhabitants throughout the province and all matters of dispute between themselves to the same jurisdiction as the King's Bench would apply to the inhabitant of an English county? Do the words put the Indian living at Ganjam equally under this jurisdiction with the Indian inhabitant of the Presidency town, because they say that the judges within and without the town are to have the jurisdiction and authority which a Justice of the King's Bench has in England? Their Lordships think that there can be but one answer to these questions. Jurisdiction—if not a word of many meanings—is a word which may be used with either a wider or a narrower connotation; and in this passage the ordinary English word " authority " accompanies and explains it. Nothing is said in clause 8 about the persons over whom the authority is to be exercised. Much is said in clauses 21 and 22, 33 and 34. If it was intended by clause 8 to grant jurisdiction as in England over all inhabitants of the province, why is the jurisdiction defined, limited, and guarded by the elaborate provisions of the later clauses? What is the point in saying that Indians employed by the Company should only come under the jurisdiction for wrongs and trespasses—if all Indians are put by clause 8 under all the jurisdiction that there is? Why is it said that to be a landholder or *ijaradar* shall not subject an Indian to the jurisdiction if all Indians have been made subject to it? Why is it so elaborately provided in clause 22 that Hindus shall have the benefit of the Hindu law and yet not a word is expended in clause 8 to safeguard any personal law? These considerations lead necessarily, as their Lordships think, to the conclusion that clause 8 gives and in general terms defines an authority which is to be exercised over those who by the later clauses are made subject to it. The character and quality of the jurisdiction is naturally approached from the standpoint of the status and authority of the individual judge. It is not possible to treat clause 8 as giving a separate jurisdiction over all persons in the province independently of clauses 21, 22, 33 and 34. On this point their Lordships cannot agree with Sadasiva Ayyar J. in *Nataraja's* case. As that learned judge himself stated in one passage of his judgment, at p. 94, " the Company's subjects . . . were not even considered as British subjects owing direct allegiance to the Crown. British laws did not run in the Company's mofussil territory." These are circumstances to be borne in mind when construing clause 8. It may perhaps occasion some surprise that after the experiences which led to the Act of 1781 the terms of the fourth clause of the Bengal charter should have been repeated in 1800; but it may be replied that the determination of Parliament in 1781 had been unmistakable, and that the added words " as far as circumstances will admit " rendered it impossible to regard the reference to the King's Bench as founding a general jurisdiction outside the Presidency town independent of and inconsistent with the other provisions of the charter. That any prerogative writ can be employed at all, apart at least, from clause 47, involves an assumption as to the general authority and capacity of the Court, and it is this which by reference to the King's Bench is declared in clause 8. But their Lordships are not of opinion that the Supreme Court would have had any jurisdiction to correct or control a country court of the Company deciding a dispute between Indian inhabitants of Ganjam about the rent payable for land in that district. As it was put in argument in the Bombay case of 1829

hereinafter mentioned: "Though there are words in the charter giving to the Court the authority of the King's Bench, it is the nature of the authority which is here described and not the extent of the jurisdiction." (1 *Knapp*, at p. 38-9.)

While their Lordships will not here undertake to give a concise description of the position of the Supreme Courts at the beginning of the nineteenth century they will quote a passage from a letter which the Judges of Bengal addressed to the authorities in England in September, 1830 (*Parliamentary Papers*, 1831, vol. 6. *Reports of Committees* (3), p. 129).

> "It is obvious that the jurisdiction as it exists is essentially of a very peculiar character, and that many difficulties are inseparably connected with it. It is an exclusive personal jurisdiction as to a particular class, thinly scattered over a wide extent of country amongst a dense population who are considered to be themselves for the most part exempt from the jurisdiction and to live under a very different system of law. In every part of these territories, nevertheless, the process of the Court must be enforced, and even lands must occasionally be seized and divided or sold, although there is an absolute prohibition against the jurisdiction being exercised in any matter of revenue, which revenue is in fact a share, and a very large one, in every parcel of land throughout the Presidency."

The construction which they have put upon the charter is, as their Lordships think, in line with the chief decisions as to the extent of the powers of the Supreme Courts. The first case to be mentioned is that of *Nagapah Chitty* v. *Rachummah* (Strange: Notes of Cases Vol. 1, p. 152) which came before the Supreme Court at Madras in 1802. The defendants were the widow and son of Peira Nagapah and had come to Madras in order to obtain the setting aside of letters of administration to the estate of Peira Nagapah which had been obtained by the plaintiff. Objection having been taken to the jurisdiction of the Court to entertain a suit against them for an account of the property of the deceased come to their hands, the Chief Justice, Sir Thomas Strange, said:

> "It has been truly observed that it is impossible to argue in this Court from analogous cases of jurisdiction in the Courts at home, those courts being by their constitution according to their respective modes and purposes of proceeding, the great depositaries of the universal justice of the realm, and, as such, in every instance in which it is attempted to withdraw a case from their cognizance, bound to see distinctly and unequivocally that a jurisdiction adequate to the object in view exists elsewhere. If that be not stated, so as to appear to the Court, a plea to the jurisdiction fails, and the jurisdiction remains. But it is different here, because, though co-ordinate in its nature with those Courts so far as its jurisdiction attaches, the jurisdiction of this Court is limited with regard to persons, not being British subjects. Generally speaking, it is restricted with regard to the natives (whether wisely or not is not for us to consider) to the inhabitants of Madras, and the plea therefore very properly confines itself to those facts upon which the Court is fairly called upon to say whether the defendants, being natives, can be considered as inhabitants of Madras for the purpose of being subject to our jurisdiction upon the present bill." (*Strange: Notes of Cases*, v. I, p. 155.)

Accordingly the plea to the jurisdiction was allowed. The suit was on the equity side of the Court, under clause 31 of the charter of 1800, which gave jurisdiction over the persons subject to the Court's ordinary civil jurisdiction.

In *R.* v. *Goculnauth Mullick* (1824), Morton, p. 220, a writ of *habeas corpus* had been directed to an Indian who claimed that he was not an inhabitant of Calcutta nor in any manner subject to the jurisdiction of the Court. Puller C.J., holding that it must be assumed to be true that the applicant was resident at Andool in Bengal and not in Calcutta, proceeded to say with the concurrence of Macnaghten and Buller JJ:—

> "Then as to the question of law nothing could be found in the Acts which empowered the Court to assume any authority over a native, who was not in law an inhabitant of Calcutta or the factory of Fort William or their local limits. . . . The Charter did not, and could not, confer a more extensive jurisdiction than the Act of Parliament declares that the Court may possess. It appeared to him therefore that (assuming Goculnauth to be an inhabitant of Andool) he was not subject to the jurisdiction of the Court in any civil suit and that he must therefore be considered as a person not amenable to its authority in any proceeding whatsoever."

The case of *James Pattle* (1836) Fulton's Reports 313 came before Ryan C.J., Grant J. and Malkin J. on an application for a writ of *certiorari* to remove an order made by one Patton a magistrate of the Twenty-four Pergunnahs convicting the applicant. It would seem that the magistrate had decided that certain persons were entitled to obtain water from a tank within his jurisdiction and that the applicant had prevented them from so doing. On the footing that this was a conviction made by a magistrate of a British subject for contempt of his Court and not a case coming within the Act of 1813 (53 Geo. III, ch. 155), a statute to which their Lordships have already made some reference, it was held, Grant J. dissenting, that the Court could not grant *certiorari*. The Chief Justice said:—

> " The Court has no jurisdiction to remove the convictions of magistrates of *zillahs* made on British subjects, but under the 53 Geo. III, ch. 155 . . . . The magistrate may have acted illegally and without authority—he may be responsible on the criminal side of the Court—but we can do nothing in the present proceeding. A Court, having no jurisdiction over a British subject, which may or may not be the case in this instance, has still a jurisdiction over all persons for contempt."

In *Kerry* v. *Duff* (1841) Fulton 111 before Ryan C.J., Grant and Seton JJ. the question arose out of an agreement for the sale of an indigo factory by the defendant to the plaintiff. The plaintiff had apparently taken possession but had not paid the purchase money, setting up objections to the title. The parties had litigated in a competent *mofussil* court which had passed a decree against him as purchaser for payment of the purchase money. This decree was naturally pleaded by the defendant in bar of the suit brought in the Supreme Court and the plea was upheld. Ryan C.J. observed:—

> " In the case of a foreign judgment or the judgment of an inferior Court if the Court had jurisdiction and the parties were properly before it this Court would be unwilling to interfere on the merits. But this is not the case of a foreign judgment or the judgment of an inferior Court. It is a judgment of one of the tribunals of the country and as such is entitled to the same respect from this Court which the judgment of this Court would be entitled to, and would no doubt receive, from the Courts of the *mofussil*."

Grant J. on the contrary thought that " the decrees of these Courts must be looked upon in the Supreme Court as decrees of inferior Courts in England and of foreign Courts which are considered on a footing with those of inferior Courts by the Court of Westminster Hall." Seton J. " agreed with the Chief Justice in thinking that the decrees of the *mofussil* Courts must be regarded as decrees of the Superior tribunals of the country and as of paramount authority with the decrees of the Supreme Court." At page 208 of Fulton's volume it is said that for the word " paramount " in the judgment of Seton J. the word " equal " should be read.

In re *The Justices of the Supreme Court of Judicature at Bombay* 1829, 1 Knapp 1 is the well-known case which arose upon the Bombay charter of 1823 out of certain orders passed by the Supreme Court in 1828, directing two writs of *habeas corpus ad subjiciendum* to issue. One was to an Indian inhabitant of Poona for the production of the body of an Indian lad who was his ward. The other was to the head gaoler at Tannah outside the town and island of Bombay, directing him to produce the body of a certain Indian then a prisoner in his custody who was detained under an order of the *zillah* Court. The Government of Bombay had refused to allow the authority of the Provincial courts to be questioned and had addressed a letter to the Judges of the Supreme Court asking them to abstain from any act which " must have the effect of producing collision between our authority and yours " until directions could be obtained from higher authorities in England. A petition to His Majesty in Council having been made by Sir John Peter Grant on behalf of the Supreme Court the various questions of jurisdiction were argued before a Committee of the Privy Council on which sat the Lord Chancellor, the Lord President, Lord Ellenborough, Lord Tenterden, Sir John Nicholl, Sir John Becket, Mr. C. W. Wynn, the Lord Chief Baron, Lord Chief Justice Best, Sir Christopher Robinson, Mr. Courtenay and Mr. Hobhouse (Parliamentary Papers 1852/3, vol. 31, p. 630). The Committee reported to His Majesty that the writs of *habeas corpus* were improperly issued in the two cases referred to:

> " that the Supreme Court has no power or authority to issue a writ of *habeas corpus* except when directed either to a person resident within

those local limits wherein such Court has a general jurisdiction or to a person out of such local limits who is personally subject to the civil and criminal jurisdiction of the Supreme Court; that the Supreme Court has no power or authority to issue a writ of *habeas corpus* to the gaoler or officer of a native Court as such officer, the Supreme Court having no power to discharge persons imprisoned under the authority of a native Court."

In *Ameer Khan's* case (1869) 6 Ben. L.R. 392, no *mofussil* Court was concerned. Government had arrested in Calcutta under an old regulation of 1818 an Indian inhabitant of the town whom they confined in a gaol outside the town's limits. The gaoler, as often happens, was a medical man, a Dr. Fawcus, apparently a European British subject. Norman J. and the Appeal Court agreed in dismissing the application for *habeas corpus* on the merits. Norman J. expressed the view that the writ could have issued consistently with the ruling in *the Bombay Justices'* case (*supra*). The Appeal Court said nothing about jurisdiction. The opinion of Norman J. as to jurisdiction led to the old English writ being restricted to the Presidency town (Act X of 1872 s. 82), and in effect superseded (Act X of 1875, section 148). The objection taken before him was, and had to be, put as high as this—that the writ could not be issued into the *mofussil* even to a European British subject. He regarded this contention with surprise, saying that the same reasoning would apply to any process. But the question is not whether a prerogative writ can ever issue into the *mofussil* but to whom and in what cases it can issue if it be not directed in the exercise of the local jurisdiction over the Presidency town.

Sadasiva Ayyar J. in *Nataraja's* case (*supra*) would appear to have thought that Norman J. was of opinion that prerogative writs could be issued into the *mofussil* provided that they were not issued so as to affect Courts. If this was his view he would seem to have misread the case. One of the resolutions in *the Bombay Justices'* case (*supra*) had specifically laid down that the writ could only issue to one who was personally subject to the jurisdiction and the fact in *Ameer Khan's* case that the gaoler was apparently a British subject lies at the root of Norman J.'s decision. Their Lordships find themselves in agreement with Sundara Ayyar J. in *Nataraja's* case (p. 80): "The Supreme Court had no general power or control over the Courts of the East India Company in the *mofussil* or over their officers acting judicially. I believe this proposition would be correct even in cases where the officers exercising jurisdiction might be British subjects."

It is very important on *Nataraja's* case to observe that it was not the view of Sadasiva Ayyar J. that the Supreme Court had jurisdiction to issue *certiorari* to the Company's courts. The learned Judge thought that by special statutes and charters the East India Company had power to establish courts and that either for this reason or because the *mofussil* courts were practically foreign courts, the general jurisdiction to issue prerogative writs given by the terms of clause 8 of the charter could not take effect upon *mofussil* courts. Their Lordships are not quite clear upon the point, but think that the learned judge considered that the jurisdiction might take effect to quash decisions passed by persons in the *mofussil* who did not constitute a Court. This was not the view maintained for the appellants on this appeal, and in order to put a proper construction upon clause 8 of the charter their Lordships have dealt fully with the question of the position of *mofussil* courts as regards the power given to the Supreme Court by clause 8. But in their view it is impossible to maintain that under clause 8 the Supreme Court derived a right to issue prerogative writs to a person outside the limits of the Presidency Town who was not personally subject to their civil and criminal jurisdiction. The courts were no more foreign courts than Indian subjects of the Mogul Emperor were foreign subjects. If that Sovereign, or the company in exercise of the *dewani* right committed by him to them, chose to appoint an individual or an executive authority such as the Board of Revenue to give a decision between Indians in Ganjam upon particular matters of individual right, the Supreme Court by the terms of clause 8 of this charter could have no more right to interfere by *certiorari* with such a decision than in the case of the decision of one of the Company's courts. No distinction can for this purpose be drawn, in their Lordships'

view, as regards the issue of prerogative writs between a criminal, a civil, a revenue, or any other court of the Company and an officer of the Company authorised to make a decision of a judicial character.

The last case to which reference will here be made was decided in 1913, shortly after *Nataraja's* case, by the Calcuttta High Court in *Legal Remembrancer* v. *Matilal Ghose* (1913), I.L.R. 41, C. 173. The question was whether the High Court had jurisdiction to punish the publisher of a paper for contempt of the court of a magistrate at Barisal. It was invited to do so on the principle of *R.* v. *Davies*, L.R. [1906] 1 K.B. 32, which held that the Court of King's Bench could punish for contempt of an inferior court being " the *custos morum* of all the subjects of the realm ", as stated in Hawkins' " Pleas of the Crown " (Bk. 2, c. 3). The Calcutta High Court disclaimed any such jurisdiction, holding that the Supreme Court never held throughout Bengal the position of *aula regis* or *custos morum* as the King's Bench did throughout England. Having cited the 4th and 21st clauses of the Bengal charter of 1774 (corresponding to the 8th and 47th clauses of the Madras charter of 1800), Jenkins C.J. said:

> " It is a sufficiently accurate statement for the purposes of this case to say, that as the result of this and subsequent legislation, the criminal jurisdiction of the Supreme Court (apart from crimes maritime) was limited to the local limits except as to British subjects, and the Court had no general control or power over *mofussil* criminal courts. The common law was similarly limited in its application to the Presidency towns and to British subjects outside the local limits."

It is necessary now to consider the question whether jurisdiction to issue *certiorari* in such a case as the present accrued to the High Court or would have accrued to the Supreme Court by virtue of the fact that the location of the Board of Revenue is within the Presidency Town. The Town of Madras has, since 1726, been considered to be governed by the principles of English law though not all the provisions of that law have been received as applicable to the circumstances of the country; and the British statutes passed since 1726 have not been given effect unless specially extended to India. The Board of Revenue, as already noticed, was established in 1786 and at various times has discharged different functions some of them judicial in character. See Madras Regulation I of 1803 and Regulation II of 1806. By Regulation V of 1804 it became a Court of Wards for the Presidency. Under Regulation VII of 1817 it had for many years control over religious and other endowments. Their Lordships will not assume that in 1800 it would have been regarded as a Court. For the purposes of the present case, it may here be said also that in giving directions under Section 172 of the Madras Estates Land Act, 1908, the Board of Revenue is to be considered not as a Court, or as the highest Court in a hierarchy of Revenue Courts, but as an official body especially entrusted with particular duties which include duties of a judicial character. The *Mandasa* cases (1931) 63 M.L.J. 450, and 1932 I.L.R. 56 Mad. 579, show that this view is in accordance with the opinion of the High Court. The Board of Revenue has always had its offices in the Presidency Town, and in the present case the Collective Board, which made the order complained of, issued this order in the town. On the other hand, the parties are not subject to the original jurisdiction of the High Court and the estate of Parlakimedi lies in the north of the province. On the present question their Lordships lay no stress upon any negative implication derivable from clause 47 of the charter which authorised the Supreme Court to issue writs of *mandamus*, *certiorari*, etc. to the justices and other magistrates of the town and to the two Courts therein mentioned, the Court of Request and the Court of Quarter Sessions. The terms of this clause make it difficult to think that *Courts* other than those mentioned were intended to be regarded as inferior Courts for this purpose. The case of *Annie Besant* v. *Advocate General of Madras* (1919) L.R. 46, I.A. 176, is an authority of this Board that the power to issue *certiorari* still remains in the High Courts of Calcutta, Madras and Bombay in the exercise of their local jurisdiction. On this point it confirmed the decision in *Nundo Lal Bose* v. *Calcutta Corporation* (1885), I.L.R. 11, C. 275, where *certiorari* was issued to bring up and quash an assessment made by the Commissioners of the town of Calcutta upon a certain dwelling house, it being held that the error in the assessment was an error which went to jurisdiction. The

question is whether the principle of that case can be applied in the present case to the settlement of rent for land in Ganjam merely upon the basis of the location of the Board of Revenue, as a body which is ordinarily resident or located within the town of Madras, or on the basis that the order complained of was made within the town. If so it would seem to follow that the jurisdiction of the High Court would be avoided by the removal of the Board of Revenue beyond the outskirts of the town, and that it would never attach but for the circumstance that an appeal is brought to, or proceedings in revision taken by, the Board of Revenue. Their Lordships think that the question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing *certiorari* to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court, in the matter of the settlement of rents for *ryoti* holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance.

It has next to be considered whether, if the charter of 1800 did not confer upon the Supreme Court the power in such a case as the present to issue a writ of *certiorari*, that Court obtained the power upon the passing of the Act of 1858, 21 & 22 Vic., cap. 106, which put an end to the government of the East India Company and established direct allegiance to the Crown on the part of the Indian inhabitants of the province. This suggestion is to be found in the judgment of Sadasiva Ayyar J. in *Nataraja's* case and it has been urged by Mr. Khambatta in his very full and able argument for the appellants. Long before 1858 it had become evident that the existence of the Mogul Empire and the position of the Company as entrusted with the *dewani* had a certain element of unreality. The preamble to the Charter Act of 1813 which continued to the Company its territorial acquisitions and rights for a further period, expressly stated that this was expedient " without prejudice to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same ". By the Act of 1853 (16 & 17 Vic., c. 95), the territories in possession of the Company were continued under its Government in trust for Her Majesty until Parliament should otherwise provide. As a matter of law their Lordships think it impossible to hold that the Supreme Court after 1858 became invested for the three further years of its existence with any larger jurisdiction over Courts or persons in the *mofussil* than it had previously enjoyed. They find nothing in the Act of 1858 to supersede the general scheme of the charter of 1800, or to produce a conflux or confusion of the separate jurisdictions previously obtaining throughout British India. They are not of opinion that it brought Indians generally within the meaning of those clauses of the charter of 1800, which distinguished certain persons as British subjects in contrast with natives of India, or that it gave to the Supreme Court any extended jurisdiction. The change effected by the Act of 1858 was certainly profound. It rendered obsolete the old distinction between Company's Courts and King's Courts and made it eminently desirable that by way of reform a greater unity should be established in respect of judicial administration. These reforms, however, did not follow operatively of themselves by virtue of anything in the Act of 1858, but were introduced by the Indian High Courts Act of 1861. By the terms of that Act and the statutes which have continued it in effect the High Court inherited the power of the Supreme Court; but if it be shown, as their Lordships think it is shown, that the Supreme Court had not the power now in question under the Charter of 1800, there is nothing else in the Act of 1861 to confer the power.

A final suggestion was made by Sir Walter Monckton, the learned Counsel instructed by the India Office. He pointed to the power of superintendence given by section 15 of the Indian High Courts Act of 1861 and afterwards by section 107 of the Government of India Act. He suggested that this would include a right of control similar to that exercised in England by writ of *certiorari*. Although this right is only given over Courts subject to the High Court's appellate jurisdiction, he suggested that the High Court might have a similar right over individuals or official bodies exercising

judicial functions in the *mofussil*. Their Lordships are not prepared to accept this argument. The power given by section 15 is given by way of succession to the *Sudder Dewani Adalat*, as is sufficiently shown by the reference to the appellate jurisdiction. If the Supreme Court is not shown to have possessed jurisdiction to issue *certiorari* to the Board of Revenue in such a case as the present their Lordships are not prepared to read any similar power into the Indian High Courts Act, section 9 whereof is plain enough. It is not, and cannot be, suggested that the *Sudder Dewani Adalat* at any time issued writs of *certiorari* to individuals or official bodies exercising judicial functions. Unless taken away by special enactment there is a *prima facie* right in any person aggrieved by an order made in excess of jurisdiction to challenge it by a suit in the ordinary civil court—subject, as regards specific relief, to the terms of the Specific Relief Act (I of 1877)—but if this right has been taken away by the legislature in any case in which the Board of Revenue or any other body exercises judicial functions it may well be that the only method of challenging a judicial determination on the ground of jurisdiction is by appeal to His Majesty in Council. It is conceded that in the present case an appeal might have been brought to His Majesty in Council by leave from the order of the Board of Revenue. There is therefore neither logic nor necessity to justify any doctrine to the effect that the right of superintendence includes a right to issue a writ of *certiorari*.

In the result, their Lordships conclude that assuming that the Board of Revenue exceeded its power when it enhanced the appellants' rents by 37½ per cent., the High Court had no jurisdiction to issue a writ of *certiorari*.

Upon the merits also their Lordships think that this appeal fails, since it is not shown that the Board of Revenue by enhancing the rents of the appellants by 37½ per cent. have exceeded the powers entrusted to them under section 172 of the Madras Estates Land Act, 1908. The argument that no enhancement of rent is permitted by the Act if it exceeds 12½ per cent. or 2 annas in the rupee upon the rent previously payable depends in the first instance upon proviso (*b*) of clause (i) of section 30 above cited. Section 30 deals with an application made by the landowner to the Collector for enhancement of rent on one or more of four grounds therein mentioned, of which the first is that during the currency of the existing rent there has been a rise in the average local prices of staple food crops. In the present case the question of enhancement arises not out of any such application, but out of proceedings under Chapter XI of the Act; the Government having on the 18th November, 1927, directed the preparation of a Record of Rights under section 164 and the settlement of a fair and equitable rent under section 168. The appellants' argument that the proviso already cited from section 30 of the Act applies to the present case is based upon sub-section 2 of section 168:

> (2) " In settling rents under this section the Collector shall presume, unless the contrary is proved, that the existing rent or rate of rent is fair and equitable and shall have regard to the provisions of this Act for determining rates of rent payable by a *ryot*."

The view taken by the majority of the Collective Board of Revenue in making the order dated the 19th October, 1936, which is now complained of, is that the requirement to " have regard to " the provisions in question has no more definite or technical meaning than that of ordinary usage, and only requires that these provisions must be taken into consideration. In their view the prime duty of the Revenue Officer under Chapter XI is to fix a fair and equitable rent, and though he must be guided by the principles underlying such provisions as are contained in Chapter III, he is not strictly bound by such provisions. Having regard to the long time that had elapsed since the last tentative settlement of rent in 1867-8, to the prodigious rise in prices that had taken place since then, and to the general economic improvement of this part of the country, the Collective Board considered that an enhancement of 37½ per cent. would not be oppressive and directed the Revenue Officer to reduce to that figure the enhancement of 100 per cent. which he had made. This view of the effect of the direction to " have regard to " the provisions of the Act for determining rates of rent payable by a *ryot* is supported by the decision of the High Court in the case of *Valluri Narasimha Rao* v. *The Ryots of*

Peddamamidipalli (1925), I.L.R. 49, Mad. 499, at 506. It is also confirmed by certain observations of Reilly J. in *Rajah of Mandasa* v. *Jagannayakulu* (1932), 63 Madras Law Journal 450, at 486, where the learned judge said:—

> " Where the settling officer has to deal only with such questions as would arise in a suit for commutation, for enhancement, or reduction of money rent, under section 168 (2) he must be guided by the appropriate principles as set out in the Act, but there is no doubt that his settlement may embrace a much wider field of question and whenever he has not merely to adjust the lawful rent but to fix what is fair and equitable in variation from the lawful rent which can be exacted in a suit, his settlement is clearly something which no Civil Court could do unless specially empowered."

Their Lordships find themselves on this matter in agreement with the view taken by the majority of the Collective Board. It is not possible to peruse the proceedings of the Special Revenue Officer in this case without seeing that a number of matters besides the rise in prices of staple food crops were considered by him, and had to be considered by him, if he was to carry out his duty under Chapter XI. He observed in paragraph 30 of the final proceedings dated the 10th December, 1935:—" I hold that the present settlement is also a fresh and initial settlement wherein everything has to be re-classified afresh and new rates of rent have to be fixed. It is not therefore a case of enhancement but of fixing and introducing a new rate of rent based on the principles of equity and fairness as laid down in Chapter XI of the Estates Land Act." The main distinction between such a proceeding as the present and steps taken under Chapter III of the Act is that under Chapter III the existing rent is a statutory datum line. This is necessarily involved in the character of the right which is granted to the landlord by the terms of clause (1) of section 30. But, under Chapter XI, the existing rent has only the benefit of a presumption and its fairness has to be probed. For this purpose many matters have to be considered and rules have been made under the Act requiring that attention should be paid to a number of matters such as the condition of the land, the nature of the soil, the prevailing rates of rent in adjoining villages, and so forth. Some reference to these will be found in the judgment of Ananta Krishna Ayar J. in the *Raja of Mandasa's* case—63 Madras Law Journal, pp. 502-3. In these circumstances their Lordships think it impossible to say that the duty to have regard *inter alia* to the prohibition contained in proviso (*b*) of the first clause of section 30 is a duty to keep rigidly within the limit there imposed for cases to which the section of its own force applies. While there is force in the view that a negative provision is not regarded unless it is obeyed, their Lordships do not think it possible to construe the words of sub-section 2 of section 168 in one manner as regards negative provisions and in another manner as regards positive provisions. The expression " have regard to " or expressions very close to this, are scattered throughout this Act, but the exact force of each phrase must be considered in relation to its context and to its own subject matter. Any general interpretation of such a phrase is dangerous and unnecessary, but it is fairly clear as a matter of English that the view taken by the majority of the Collective Board is nearer to the ordinary meaning of the phrase " have regard to " when it appears in a statute than is that of the dissentient member. This may be illustrated by such English cases as *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, and *McDermott* v. *Owners of s.s. Tintoretto* [1909], 2 K.B. 704. Their Lordships are not, however, in complete agreement with one observation of the learned Chief Justice in his judgment of the 5th November, 1937, delivered when making the order now under appeal. He said:

> " The words ' and shall have regard to ' the provisions of this Act for determining rates of rent payable by a *ryot* in sub-section 2 of section 168 can only apply to the provisions of the Act which have general application."

This would seem to involve that the Collective Board need not even have considered the limit of 12½ per cent. referred to in proviso (*b*) of clause 1 of section 30. Their Lordships are not prepared to go so far.

The contention that the Board of Revenue have exceeded their powers is, in their Lordships' view, unfounded.

They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondent Zemindar.

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In the Privy Council

RYOTS OF GARABANDHO AND OTHER VILLAGES

v.

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DELIVERED BY THE LORD CHANCELLOR

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