

Chittambaram - - - - - *Appellant*

v.

The King-Emperor - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH
DECEMBER, 1946

Present at the Hearing:

LORD WRIGHT

LORD PORTER

LORD SIMONDS

LORD UTHWATT

SIR JOHN BEAUMONT

[*Delivered by LORD WRIGHT*]

At the conclusion of the arguments in this appeal, their Lordships expressed their opinion that the appeal should be dismissed and stated that they would give their reasons later. This they now proceed to do.

This is an appeal from the judgment of Mr. Justice Dunkley, Acting Chief Justice of the High Court of Rangoon, dated the 26th March, 1946, in which he reviewed and confirmed a judgment given on the 25th February, 1946, by U. Kyaw U, a Special Judge appointed under the Special Judges Act, 1943 (Burma Act No. X of 1943) for Rangoon Town District. The said Special Judge had convicted the appellant under section 302 of the Indian Penal Code and sentenced him to death. This sentence was confirmed by the High Court.

The appellant petitioned His Majesty in Council for special leave to appeal both on the merits and on the question of the jurisdiction of the Special Judge. His submission on the latter point was that the Special Judge had no jurisdiction to try him and that the whole of the proceedings in his trial were illegal and void. Special leave to appeal was granted by Order in Council dated the 28th October, 1946, solely on the question of the jurisdiction of the Special Judge.

The Special Judges Act (Burma Act No. X of 1943) was an emergency and temporary Act enacted by the Governor of Burma at a time when the Japanese forces had occupied and taken military control of Burma, including Rangoon. The Act was in fact promulgated in Simla, to which place the Governor and the Government of Burma had retired during the hostile occupation. The preamble to the Act may usefully here be quoted:—

“Whereas it is expedient to provide for the appointment of Special Judges for the trial of offences during the present emergency, and to define their jurisdiction and powers;

And whereas by Proclamation dated the tenth day of December, 1942, the Governor of Burma has assumed to himself all powers vested by or under the Government of Burma Act, 1935, in the Legislature or in either Chamber thereof; ”

The Act gave the Governor power to appoint in any area to which the Act extends, a Special Judge for the trial of accused persons under the Act. It defined among other things the requisite qualifications which a Special Judge had to possess. The Special Judge was empowered to try any offence punishable under any law for the time being in force and to pass any sentence authorised by law and to take cognisance of offences without the accused having been committed for trial. The Special Judge was given wide discretion as to the conduct of the trial. There was to be no appeal by a convicted person and no application for revision was to be entertained by any Court. The only provision for any revision was in the case of a death sentence, which was to be submitted for review by a Judge of the High Court nominated by the Governor. That Judge's decision was to be final. There were other provisions of the Act departing from the procedure prescribed by the Code, but subject to all these provisions, the Code and any other law for the time being in force, so far as applicable, were to apply to the trials before a Special Judge appointed under the Act. Legal proceedings in respect of anything done or intended to be done in good faith under the Act were barred.

It was under this Act that the Judge who tried the appellant was appointed and under this Act that all the proceedings took place. The Act had been duly notified so that according to its tenor it came into force in Rangoon and was in force at the material time, having been duly extended from time to time by Resolutions of both Houses of Parliament. The appellant however claimed that the Special Act was wholly illegal and void and accordingly that his conviction and sentence should be set aside as having been *coram non iudice*. In order to examine this contention it will be necessary to refer as briefly as possible to the legal position of the Courts in Burma.

The Government of Burma Act (26 Geo. 5. c. 3) was passed by Parliament in 1935 to give effect to the separation of Burma from India and to define the Constitution of Burma. Part II of the Act vested the executive powers in the Governor. Parts III and IV dealt with the Legislature and it may be noted that certain sections (41 to 43) gave to the Governor particular powers to promulgate ordinances or enact laws under his discretionary powers and subject to the prescribed conditions. Section 34, however, saved the powers of Parliament to legislate for Burma, and also provided that except as expressly permitted by this Act, the Legislature should not be empowered to make any law amending the Act or any Order in Council made under it, or any Rules made under it by the Secretary of State, or by the Governor in his discretion. Part VIII of the Act dealt with the High Court of Rangoon, called the High Court, which was to consist of a Chief Justice and such number of other Judges as His Majesty might deem necessary to appoint by warrant under the Sign Manual.

Section 84 has been much referred to in argument and may be quoted in full:—

“ 84. Subject to the provisions of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the Legislature, the jurisdiction of, and the law administered in, the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court, and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of this Act.”

This section in terms provided for the continuance of the legal system existing at the commencement of the Act, but the whole section was subject (inter alia) to the provisions of any Act of the Legislature.

Part XII (section 139) is of first importance for the decision of this appeal. It contains what are described as provisions in event of failure of constitutional machinery:—

“ 139.—(1) If at any time the Governor is satisfied that a situation has arisen in which the government of Burma cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(a) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion;

(b) assume to himself all or any of the powers vested in or exercisable by any body or authority in Burma;

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable to give effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any body or authority in Burma:

Provided that nothing in this subsection shall authorise the Governor to assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, either in whole or in part, the operation of any provisions of this Act relating to the High Court. . . .”

The remainder of the section contains certain requirements necessary for the continuance in force of such a Proclamation, in particular a Resolution of both Houses of Parliament. Special attention however should be drawn to subsection (4) of the section which is in the following terms:—

“ (4) If the Governor, by a Proclamation under this section, assumes to himself any power of the Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the Legislature, and any reference in this Act to Acts of the Legislature shall be construed as including a reference to such a law.”

The conditions were satisfied. It is now necessary to set out the effect of the Proclamation issued at Simla on the 10th December, 1942, by the Governor of Burma. It was not contended by the appellant that the Proclamation was *ultra vires*. It begins by reciting that the Governor of Burma is satisfied that a situation has arisen in which the Government of Burma cannot be carried on in accordance with the provisions of the Government of Burma Act, 1935. As no suggestion is made that the Governor acts otherwise than in good faith, this declaration cannot be challenged, as the House of Lords held in *Liversidge v. Anderson* [1942] A.C. 206. The Governor then goes on to declare as follows:—

“ Now therefore, in the exercise of the powers conferred by section 139 of the Act, the Governor by this Proclamation

(a) declares that notwithstanding anything to the contrary in the Act all his functions under the Act shall be exercised by him in his discretion;

(b) assumes to himself all powers vested by or under the Act in the Legislature of Burma and all powers vested in either Chamber of the Legislature, but not so as to affect any power exercisable by His Majesty with respect to Bills reserved for the signification of His Majesty's pleasure or the disallowance of Acts:

(2) in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared either that he assents thereto in His Majesty's name or that he reserves it for the signification of His Majesty's pleasure; ”

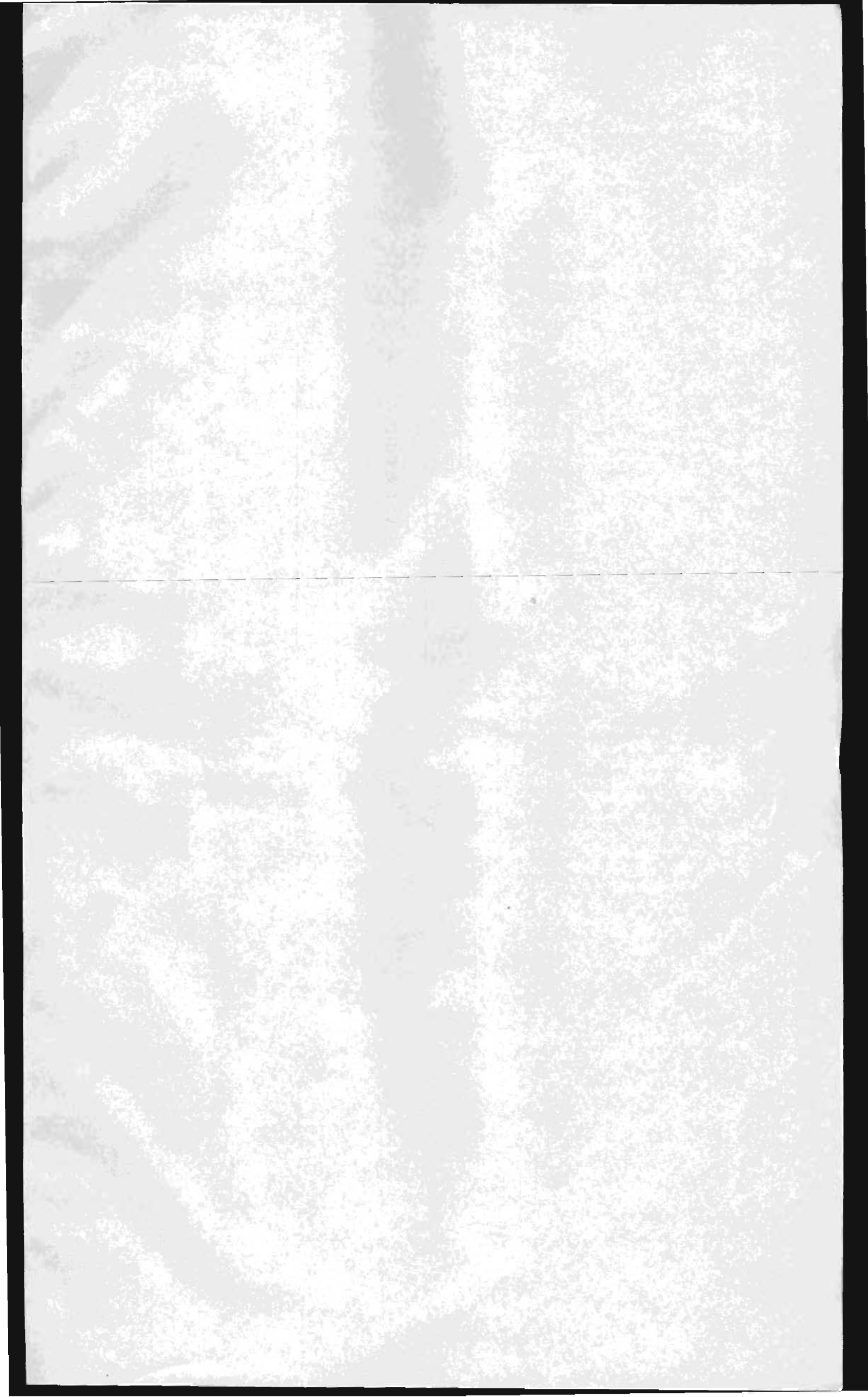
Their Lordships have omitted the reference to incidental or consequential provisions which deal with executive matters which in their Lordships' opinion are not material here. What is material is that the Governor

assumes all legislative powers vested in the Legislature. In this capacity he enacted the Special Act, which in all the circumstances has the force and validity of an Act of the Legislature, and is part of the Law of Burma at every material time.

It is clear that the Special Act has altered the jurisdiction of and the law administered in the High Court in several material aspects as compared with the position described in section 84 of the Act of 1935, but section 84, as already stated, was subject to the provisions of any Act of the Legislature. Now it is in their Lordships' judgment clear that by the Emergency Powers given to the Governor by section 139 of the Act of 1935, and in virtue of the Proclamation whereby he has (*inter alia*) assumed to himself the powers vested in the Legislature under the Government of Burma Act, he can validly and legally change the pre-existing system of jurisdiction at least to the extent which he has done in the Special Judges Act. Under the Emergency Powers of legislation he could validly make the same sort of changes which the Legislature could have made, so far as is relevant for the purposes of this case. The Special Judges Act is in truth an Act of the Legislature.

The appellant has sought to show that the Special Judges Act was incompetent on various grounds. That the Act altered the law cannot be questioned. The accused was under the Act deprived of the right to have the evidence taken at a public enquiry on oath before a magistrate, of a trial by jury presided over by a Judge of the High Court selected by the High Court, and of a right of appeal. But any one of these infringements of the subject's rights may have happened in war-time to any subject of any of the allies, and may be justifiable in law as an emergency or temporary measure. The main specific objection taken on behalf of the appellant is that the Governor has infringed the provisions of the proviso to section 139 (1) of the Burma Act by assuming to himself powers vested in or exercisable by the High Court or has suspended the operation of the provisions of the Act in relation to the High Court. This in their Lordships' judgment involves a misconception. The Governor did not interfere with the High Court or its jurisdiction. There was nothing to give exclusive jurisdiction to the High Court. Indeed if that is material, the High Court was not able to exercise its jurisdiction; it was not functioning. But in any case there was no law to prohibit the legislative authority in Burma from establishing a new or collateral Court. It is obviously a fallacy to say that by establishing a new Court the Governor was assuming to himself the powers vested in the High Court. He was not making himself the Judge and he was entitled to vest the right to appoint the Judges of the new Court, as he did under the Special Judges Act. Nor was he altering the jurisdiction of the High Court by establishing a new Court with its own jurisdiction. All the objections taken by the appellant fail in their Lordships' judgment. They are of opinion that the Special Judges Act was valid and authorised what was done under it.

Such are the reasons for the advice humbly given to His Majesty that the appeal should be dismissed.



In the Privy Council

CHITTAMBARAM

2.

THE KING-EMPEROR

DELIVERED BY LORD WRIGHT

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