

In Re: Dhruvarajsing Vishwanathsing

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Court : Mumbai

Decided On : May-05-1945

Reported in : AIR1946Bom65; (1945)47BOMLR681

Judge : Bhagwati, J.

Appellant : In Re: Dhruvarajsing Vishwanathsing

Disposition : Appeal allowed

Judgement :

Bhagwati, J.

1. This is a petition filed by one Talukdarsing Ramsumersing Kshatriya, the uncle of the dtenu Dhruvarajsing Vishwanathsing, under Section 491 of the Criminal Procedure Code, 1898, for an order that the dtenu who is at present detained in the Worli Temporary Prison be brought in person before this Court to be dealt with according to law and that he be set at liberty on the ground that the arrest of the dtenu effected on April 10, 1945, and the subsequent detention of him was invalid and improper and was without lawful authority.

2. The petitioner has urged in his petition that the dtenu is a rent farmer (collector) of the Right Honourable Dr. M.R. Jayakar and has been in such employ since 1933, that the dtenu is a member of the Hindu Maha Sabha, that the house of the dtenu was searched by the police on April 10, 1945, but nothing incriminating was

found from the said place by the police, that the dtenu was to the petitioner's knowledge and belief not taking any part in the political movement and was a very peaceful and. respectable person spending a peaceful life in the employ of the Right Honourable Dr. M.R. Jayakar and had not taken part in any prejudicial activities at any time, that the dtenu had during his employment as aforesaid not gone to his native place Jaunpur, U.P., for the last many years except for a month or two to enjoy vacation and had not been to Jaunpur, U.P., since 1942 except for about four or five weeks in connection with his wedding which took place sometime in November, 1943. The petitioner submitted that the detention of the dtenu under Rule 129 of the Defence of India Rules, 1939, was not bona fide and was illegal, ultra vires and beyond the powers conferred by Rule 129 or any other rule of the Defence of India Rules, that no order under Clause (a) or (b) of Sub-rule (1) of Rule 129 of the Defence of India Rules was served on the dtenu and therefore his detention was in any event illegal and without lawful authority. The petitioner further submitted that the said arrest was unlawful inasmuch as the police-officer arresting the dtenu had not satisfied himself that the dtenu was likely to act in a manner prejudicial to the public safety, the defence of India or to the efficient prosecution of war, that the said police-officer had not carried out any personal investigation and had acted merely on instructions received by him and that therefore no question of his being satisfied as required by Rule 129 about the conduct of the dtenu could possibly arise. The petitioner further submitted that the application of Rule 129 to the present case was misconceived and improper.

3. This petition was filed by the petitioner on April 13, 1945. The petitioner made an affidavit in support of the petition in common form. Before this petition was presented, a further affidavit was made by the petitioner on April 16, 1945, incorporating therein the statements as regards the police-officer who arrested the dtenu not having satisfied himself that the dtenu had acted or was likely to act in a manner prejudicial to public safety, defence of India and efficient prosecution of war. This affidavit was evidently in support of the allegations which had been made by way of an amendment in the petition made on April 16, 1945, adding this as a further ground by reason of which it was alleged that the arrest of the dtenu was unlawful. These allegations were the subject-matter of para. 9(a) of the petition. The petition was presented on April 16, 1945, before Rajadhyaksha J.,

who granted a rule and stay order in terms of Clause (f) of the petition. The rule was made returnable on April 24, 1945, and was directed to be served on the Commissioner of Police and the Superintendent, Worli Temporary Prison.

4. The rule came on for hearing before me on April 26, 1945, when the petitioner asked for leave to file his affidavit dated April 24, 1945, in rejoinder traversing the allegations which had been made by Balaram Shamrao Kothare, Superintendent of Police, Special Branch I, C.I.D., on behalf of the Commissioner of Police, in his affidavit dated April 23, 1945. The said affidavit of the petitioner, however, besides controverting the said allegations made by Balaram averred certain new facts which were sought to be relied upon in support of the petition. These facts were set out in para. 2 of this affidavit and they were:

I have now ascertained that the said Dhruvarajsing Vishwanath was arrested at the instance of the Police authorities of the United Provinces who made a request to the Police authorities of Bombay to effect the arrest of the said Dhruvarajsing Vishwanathsing. I have further ascertained that the Police authorities of the United Provinces wanted to arrest the said Dhruvarajsing Vishwanathsing because the said Dhruvarajsing Vishwanathsing helped in collecting funds for the families of the persons in the United Provinces detained in jail either as dtenus or prisoners. The said Dhruvarajsing Vishwanathsing belongs to the United Provinces and in helping the collection of funds as aforesaid he was actuated by humanitarian motives. The said funds were collected in Bombay and sent to the Honourable Babu Purshottamdas Tandon, the Speaker of the United Provinces Legislative Assembly. I submit that the said funds were raised for a lawful purpose, in a lawful manner and with lawful motives. I repeat that the said Dhruvarajsing Vishwanathsing is not in any way connected or associated directly or indirectly to or with any political or subversive movement. Under the circumstances I submit that the Police authorities of the United Provinces in seeking the arrest of the said Dhruvarajsing Vishwanathsing were not acting bona fide. I therefore submit that the arrest and detention of the said Dhruvarajsing Vishwanathsing is mala fide and illegal.

On the application of Mr. D.B. Desai for the petitioner, I allowed him leave to file this affidavit containing these fresh materials and gave leave to the respondents to file an affidavit in rejoinder to the fresh facts stated in that affidavit if so advised. The rule was accordingly adjourned to May 1, 1945, for hearing and final disposal.

5. In his affidavit dated April 23, 1945, Balaram had stated that he was attending to the matter relating to the dtenu and the facts relating to the case and arrest were within his personal knowledge and that he had been authorised and directed by the Commissioner of Police, Bombay, to make that affidavit. He stated that the dtenu Was properly arrested under orders issued by the Commissioner of Police, Bombay, under Rule 129 of the Defence of India Rules, as he was reasonably suspected of having acted in a manner prejudicial to the public safety and the efficient prosecution of war, that the information on which he was arrested had been considered carefully by the Commissioner and by himself and that it was under his orders that the dtenu was arrested. In this affidavit Balaram Shamrao Kothare mixed up the part which he took in the consideration of the case of the dtenu with that taken by the Commissioner of Police. He identified himself with the Commissioner of Police under whom he was working as the Superintendent of Police, Special Branch I, C.I.D., and in more places than one in this affidavit it appears that the Commissioner of Police as well as himself inquired into the case of the dtenu and directed his arrest under Rule 129, that both the Commissioner of Police and himself suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He also stated that the information received and considered by the Commissioner of Police and himself led both of them to the reasonable conclusion that the dtenu had acted and was acting in the manner aforesaid. He further stated that the information received by the Police could not be disclosed as it was of a secret nature and it was against the public interest to disclose the same. He submitted that the arrest and detention could not be challenged and were valid in law and that the dtenu would be dealt with according to law. He finally submitted that the arrest was made on careful consideration, on proper materials and should not be disturbed. After I had granted leave to the petitioner to file his affidavit in rejoinder dated April 24, 1945, Balaram made a further affidavit in rejoinder dated May 1, 1945, wherein he pointed out that para. 2 of the petitioner's affidavit in rejoinder contained various allegations

which were not included in the petition. With reference to those new allegations he submitted that the information upon which action was taken against the dtenu was confidential and was a State secret and could not be disclosed. He submitted that the allegations were therefore otherwise irrelevant and were made merely as an attempt to draw information which was confidential and that therefore he was advised that there were no facts which were either necessary or proper to reply. He reiterated that the information upon which the police authorities acted could not be disclosed and repeated that the Commissioner of Police and he had considered the matter on the materials before them and they reasonably suspected him of having acted and acting in a manner prejudicial to the public safety or to the efficient prosecution) of war.

6. The arrest of the dtenu was effected on April 10, 1945, by Sub-Inspector Antia acting under the orders of Balaram who in his turn, as is stated by the Advocate General, acted under the orders of the Commissioner of Police. It was the Commissioner of Police who, according to the Advocate General, reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war and who in exercise of the powers given to him under Rule 129(1) of the Defence of India Rules arrested the dtenu without a warrant on April 10, 1945. The Commissioner of Police delegated the task of physical arrest under his orders to his subordinate Balaram, the latter in his turn delegating the task of actual physical arrest to Sub-Inspector Antia, who actually effected the physical arrest of the dtenu on the same day. After his arrest as aforesaid the Commissioner of Police detained the dtenu in the Worli Temporary Prison under his order dated April 10, 1945. On April 13, 1945, an order was issued by the Assistant Secretary to the Government of Bombay, Home Department (Political), to the effect that the consent of the Government of the United Provinces had been obtained to the transfer of the dtenu to Lucknow in the United Provinces and that therefore in exercise of the powers conferred by Sub-rule (5) of Rule 129 of the Defence of India Rules, the Government of Bombay was pleased to direct that the dtenu be removed to Lucknow and delivered into the custody of the Superintendent of Police, Lucknow. As I have already stated, Rajadhyaksha J. issued a rule on April 16, 1945, which was served on the Commissioner of Police as well as the Superintendent, Worli Temporary Prison.

After that order was made, it appears that the Secretary to the Government of Bombay, Home Department, issued another order dated April 18, 1945, in supersession of the previous order dated April 13, 1945, to the effect that the Government of Bombay in exercise of the powers conferred by Sub-rule (2) of Rule 129 of the Defence of India Rules was pleased to direct that the dtenu who was arrested and committed to jail custody under Sub-rules (2) and (2), respectively, of Rule 129 on April 10, 1945, should be detained in such custody, pending further orders, for a period not exceeding two months from the date of his arrest. The previous order which had been passed by the Government of Bombay for the removal of the dtenu to Lucknow; and delivery of the dtenu into the custody of the Superintendent of Police, Lucknow, was thus superseded and the dtenu continued in the Worli Temporary Prison.

7. Mr. D.B. Desai for the petitioner has urged that the orders for arrest and detention of the dtenu made by the Commissioner of Police are not bona fide and has attacked the same on various grounds. He has, firstly, urged that under Rule 129(1) the power to arrest without warrant was given to the police-officer actually effecting the arrest, provided such officer reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, that the officer actually arresting the dtenu was Sub-Inspector Antia, who admittedly was not such an officer, he not having personally investigated the case of the dtenu and he not being a person who reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He, therefore, urged that Sub-Inspector Antia was not entitled to arrest the dtenu as he did on April 10, 1945, and that the arrest of the dtenu by Sub-Inspector Antia was illegal. Without prejudice to his aforesaid contention, Mr. D.B. Desai next urged that if the arrest of the dtenu be deemed to have been effected by the Commissioner of Police, the Commissioner of Police had no grounds for reasonably suspecting the dtenu of having acted in a manner prejudicial to the public safety or to the efficient. prosecution of war, that the question whether the suspicion entertained by the Commissioner of Police was reasonable or not was an objective fact to be determined by the Court and was not merely a subjective fact resting in the sole discretion of the Commissioner of Police, that the Commissioner of Police had not placed before the Court any

materials for the purpose of arriving at a conclusion whether the suspicion which he entertained as regards the dtenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war reasonable and that in the absence of such materials placed by the Commissioner of Police before the Court, the Court was entitled to arrive at the conclusion that, as the matter stood, there were no grounds for the Commissioner of Police entertaining a reasonable suspicion in that behalf which was a condition precedent to the exercise of the powers vested in the Police Commissioner under Rule 129(1) of the Defence of India Rules. He, therefore, urged that the order of arrest passed by the Commissioner of Police pursuant to which the dtenu was arrested on April 10, 1945, was illegal.

8. Without prejudice to his aforesaid contention Mr. D.B. Desai further contended that even assuming that the question whether there were sufficient grounds for the Commissioner of Police entertaining reasonable suspicion as to the dtenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war was a subjective fact within the sole discretion of the Commissioner of Police, having regard to the affidavit in rejoinder which the petitioner filed on April 24, 1945, and the fresh facts which were set out in para. 2 thereof and the non-traverse thereof by Balaram Shamrao Kothare in his affidavit in rejoinder dated May 1, 1945, the Court should come to the conclusion that the facts alleged by the petitioner in para. 2 of his affidavit in rejoinder should be taken as admitted by the Commissioner of Police and in the absence of anything contained in the affidavit of Balaram Shamrao Kothare in rejoinder dated May 1, 1945, which would go to show that besides those facts alleged in para. 2 of the petitioner's affidavit dated April 24, 1945, there were any other facts or materials before the Commissioner of Police which would enable him to entertain the reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court should presume that the facts so stated in para. 2 of the petitioner's affidavit were the only facts which were before the Commissioner of Police when he passed the order for the arrest of the dtenu on April 10, 1945 ; that those facts were not at all such as would be sufficient to enable the Commissioner of Police to entertain a reasonable suspicion about the dtenu having acted in a manner prejudicial to the public safety or to the efficient

prosecution of war, that in any event the action of the Commissioner of Police in arresting the dtenu on April 10, 1945, having been actuated not by any information or materials which he had at his disposal but merely with the desire to assist the U.P. Police in arresting the dtenu and transferring him to Lucknow in purported exercise of the powers vested in him under Sub-rule (5) of Rule 129 of the Defence of India Rules was not bona fide but was actuated by indirect or ulterior motives and was a fraud on the powers vested in him under Rule 129(2) of the Defence of India Rules, and that therefore the arrest of the dtenu by the Commissioner of Police on April 10, 1945, was illegal. Mr. D.B. Desai lastly contended that the order purported to be made by the Government of Bombay on April 18, 1945, under Rule 129(2) for temporary detention of the dtenu for a period not exceeding two months from the date of his arrest was also illegal inasmuch as r, 129 of the Defence of India Rules did not contemplate any order for temporary detention of the dtenu. On all the grounds abovementioned Mr. D.B. Desai contended that the orders for the arrest and detention of the dtenu by the Commissioner of Police were not bona fide and were illegal, ultra vires and beyond the powers conferred on the police by Rule 129 or any other rule of the Defence of India Rules, and that therefore the dtenu should be set at liberty.

9. In support of his first contention Mr. D.B. Desai pointed out that on the facts as admitted it was Sub-Inspector Antia who actually arrested the dtenu on April 10, 1945, that Sub-Inspector Antia was merely the vehicle of the oral order purporting to have been passed by the Commissioner of Police and communicated by him through Balaram to Sub-Inspector Antia for the purpose of execution. It is common ground that there was no written order for arresting the dtenu which was communicated by the Commissioner of Police to Sub-Inspector Antia through Balaram. What appears to have been done was that the Commissioner of Police and Balaram decided that the dtenu should be arrested under Rule 129(1) of the Defence of India Rules and Balaram passed on that order of the Commissioner of Police to Sub-Inspector Antia for execution. It is also common ground that Sub-Inspector Antia had not applied his mind at all to the case of the dtenu, nor had he any materials before him to entertain any suspicion, much less reasonable suspicion, that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. Sub-Inspector Antia merely performed the

function of physically arresting the dtenu, the mind behind the arrest being that of the Commissioner of Police. It is argued that on a true construction of Rule 129(2) of the Defence of India Rules, it is the police officer who actually effects the arrest who should reasonably suspect the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. The officer who arrests must be a person who reasonably suspects the dtenu of having acted in that manner. The dtenu must be the person whom the officer who arrests him reasonably suspects of having acted in such manner. The words used are not that the police-officer may arrest without warrant any person who is reasonably suspected or about whom there is reasonable suspicion but the words are that the police-officer may arrest the dtenu whom he' reasonably suspects of having acted in such manner. It is further urged that the words used are that the police-officer may arrest, not that he should direct the arrest of the dtenu. On these considerations it is urged that it is only the police-officer who entertains the reasonable suspicion of the dtenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war that has the power to arrest the dtenu without a warrant as prescribed in Rule 129(2) of the Defence of India Rules. In further support of this argument Mr. D.B, Desai drew my attention to a passage from Halsbury's Laws of England, Hailsham edition, Vol. IX, p. 84, para. 111, where it is stated that

Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.

He also drew my attention to the case of *Genner v. Sparks* (1704) 6 Mod. 173, where it was held that an arrest must be by corporal seizing or touching the defendant's body, and therefore if a bailiff only pronounces words of arrest and shows his warrant and the defendant escapes the Court will not grant an attachment for rescue, for he was not legally arrested. He also drew my attention to Section 46 of the Criminal Procedure Code where in Sub-section (1) it is laid down that in making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is

submission to the custody by word or action.

10. This contention of Mr. D.B. Desai, however, is not at all sound. No doubt according to the true construction of Rule 129(1) of the Defence of India Rules the officer who is empowered to arrest the dtenu is one who entertains a reasonable suspicion that the dtenu has acted in a manner prejudicial to the public safety or to the efficient prosecution of war, but it is nowhere laid down nor is it consonant with reason or common sense that the police-officer who reasonably suspects the dtenu of having acted in such manner and is thus empowered to arrest the dtenu without warrant by virtue of the provisions of Rule 129(2) should effect the arrest of the dtenu personally. If the conditions which invested him with the power to arrest the dtenu are fulfilled, viz. that he reasonably suspects the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, he has the power to arrest the dtenu without a warrant. The person who determines whether the dtenu should be arrested is the police-officer who is thus vested with the power on those conditions being fulfilled, but the physical act of arrest need not be necessarily done by that officer. It may be that by reason of the exigencies of time and space the officer who determines that the dtenu should be arrested without a warrant may arm his subordinate with the authority to effect the arrest on his behalf. The subordinate actually effecting the physical arrest of the dtenu would thus be the mere instrument of carrying the resolution of the officer in execution, as Sub-Inspector Antia was in the case before me. What is important is the decision arrived at by the officer to arrest the dtenu without a warrant. He may issue a warrant or he may not issue one. If he chooses to issue a warrant, then it is his own hand that signs it, and the person who executes the warrant is merely the instrument for the purpose of effecting the physical arrest. If he does not choose to sign the warrant, it is nonetheless his decision and his order which is communicated to the person who actually effects the physical arrest of the dtenu. It is nonetheless an arrest decided upon and effected by the officer, though the hand which actually physically effects the arrest is the hand of the subordinate to whom the task of actually effecting the arrest is entrusted by the officer. The absurdity of this contention would be apparent if we took up an illustration. A police-officer reasonably suspecting that the dtenu has acted, is acting or is about to act in a manner prejudicial to the public safety or to the efficient prosecution of

war might decide that he should arrest the dtenu. The dtenu might be at some distance from the officer. The officer might in that case ask a subordinate of his who is standing by his side to run and apprehend the dtenu who might be at a distance on who might be running away after doing that particular act. Can it be said that in that event the officer should acquaint his subordinate who is asked to apprehend the dtenu by either running after him or otherwise, with the facts of the particular case and the reasonable suspicion which he entertains about the dtenu having acted in such manner before the subordinate would be entitled within the meaning of Rule 129(1) of the Defence of India Rules to actually physically arrest the dtenu? Take another illustration. The dtenu may be accompanied by others who if the officer himself went alone for arresting the dtenu might create trouble for him and in a particular case it may be necessary for the officer to have posse of constables or other subordinates to help him in effecting the arrest. If he takes the posse of constables or subordinates for the purpose of effecting the arrest, can it be said that it is necessary for him in the event of any other police-officer actually effecting the physical arrest to have actually in advance acquainted that person or all such persons who accompanied him for the purpose of effecting that arrest, with the facts of the case and with the fact of his having entertained a reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of the war? Even here the reasonable suspicion which would be entertained would be one entertained by the police-officer himself. The persons to whom he communicated that would be merely the repositories of his confidence. They would not necessarily be persons who would entertain reasonable suspicion about the dtenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, and in a conceivable case even though this information might have been communicated by the officer to all or some of his subordinates whose help he sought in effecting the arrest of the dtenu, it may be that a person to whom such information was communicated may not entertain the reasonable suspicion in the conduct of the dtenu as the officer who communicated that information did. The above illustrations go to show the absurdity of holding that the officer who decides that he should arrest the dtenu without warrant under the circumstances mentioned in Rule 129(1) of the Defence of India Rules should be the person who actually physically arrests the dtenu, or

vice versa that the person who actually physically effects the arrest of the dtenu should be the person who should have entertained a reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. The authorities which are cited by Mr. D.B. Desai also do not help him for the reason that they lay down what is the actual act of arrest qua the arrested person. These authorities go to determine that in order that there may be a complete and effectual arrest either the arrested person should be physically touched and apprehended by the person who arrests him or he should submit to the process by word or action. These authorities have no bearing on the question whether the person who 'arrests' should be the person who actually physically touches the arrested person in the act of such arrest. The person who arrests can either effect the arrest personally or may delegate the actual function of effecting physical arrest to any one duly authorised by him in that behalf, and there is nothing in any of the authorities cited by Mr. D.B. Desai before me which supports his contention that it is only the person who physically arrests and touches the body of the arrested person who can be said to have arrested the person within the meaning of Rule 129(1) of the Defence of India Rules. In my opinion, therefore, this contention of Mr. D.B. Desai fails.

11. The next contention urged by Mr. D.B. Desai, however, raises an important question of law. Under Rule 129(1) of the Defence of India Rules the power to arrest without warrant is given to any police-officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, the condition precedent to the exercise of such power being that the person arresting the dtenu should reasonably suspect the dtenu of having acted, of acting, or of being about to act in a manner inter alia prejudicial to the public safety or to the efficient prosecution of war. On a literal meaning of this provision the power can be exercised by any police-officer including even a police constable, and it is urged with great force and vehemence by Mr. D.B. Desai that when a person who is the last in the hierarchy of the police-officers, viz. the police constable, might also exercise such a power, the reasonable suspicion which he entertains or has entertained as a condition precedent to the exercise of that power should be an objective fact and not a subjective fact merely. The existence of grounds for the entertaining of such

suspicion and the reasonableness of such suspicion entertained by him should fall to be determined by the Court as objective facts really existing before the police-officer can act as contemplated by Rule 129(1). It is pointed out that if the subjective fact was the only fact to be taken into consideration in this behalf, the police-officer who might be even a police constable would be the sole judge of the existence of grounds on which he bases his suspicion and also of the reasonableness of the suspicion which he entertains on those grounds, a power and discretion which having regard to the fact that the provisions of Rule 129 encroach upon the liberty of the subject should not be left to the sole determination of such police-officer, even a police constable, an whose status, capacity and judgment no implicit confidence can ever be reposed. It is, therefore, urged that the ordinary canon of construction which has been adopted in all cases where such powers have been in normal times vested in police-officers or other officers of the Government should be adopted and the questions whether there are sufficient grounds for entertaining suspicion and whether the suspicion entertained is reasonable or not should fall to be determined by the Court as objective facts to be investigated and pronounced upon by the Court before the action taken by the police-officer can ever be justified. It is urged that the liberty of the subject is a very precious treasure which should not be encroached upon by any member of the executive without legal justification for the same, and he who encroaches upon such liberty should justify the encroachment upon the same. The officer who says he reasonably suspects the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war should, when his act is challenged, put before the Court sufficient materials to enable the Court to come to the conclusion whether there were sufficient materials for him to entertain that suspicion and whether the suspicion which he entertained was reasonable under the circumstances of the case. Both these should be put before the Court as objective facts to enable the Court to come to the conclusion whether he was justified in exercising the powers which were vested in him under those circumstances.

12. As against this, it has been urged by the Advocate General for the respondents that the Defence of India Act and the Rules made thereunder are emergency legislation, that whilst construing the Defence of India Act and the

Rules made thereunder the ordinary canon of construction which is adopted in normal times should not be resorted to but regard should be had to the object and intendment of the emergency legislation which has its sanction in the emergency which exists and the necessity of taking preventive measures inter alia to ensure the public safety or the efficient prosecution of war, that under those circumstances when the words which are used in the particular provision of law are capable of more than one meaning, the meaning which should be adopted by the Court should be that which can carry into effect the object and intendment of the emergency legislation, that even a strained construction of the provisions should be resorted to if it may be necessary in order to carry into effect the objects and the intendment of the emergency legislation, that when the words 'whom he reasonably suspects' are capable of an objective as well as a subjective meaning, the subjective meaning should be resorted to as more in consonance with the object and intendment of the emergency legislation, that the officer who is under the special circumstances therein mentioned empowered to effect the arrest of the dtenu without warrant should be the sole judge of the existence of the grounds which would enable him to entertain the suspicion as well as of the reasonableness of the suspicion which he entertains on the basis of those grounds, that the materials which may exist before the officer taking such action may be confidential in their character and may not be at all such as could ever be disclosed before the Court of law, if the Court of law ever had the power to determine on their existence as well as on the reasonable nature of the suspicion entertained by the officer on those materials and that the disclosure of such confidential materials or State secrets could not be enforced by any Court with the result that in a majority of cases, if not all, even if the Court had power to determine these questions as objective facts, the Court would be absolutely without any materials for the purpose of enabling it to determine those questions with the result that in cases of dtenus who are most dangerous and the disclosure of the materials in connection with whom would be the most objectionable from point of divulging the State secrets those dtenus would be released in the absence of such materials as would be considered sufficient by the Court to justify the action of the officer concerned which has been impugned and that therefore the Court should lean on such construction as is in consonance with the spirit and the

object and intendment of the emergency legislation and adopt the subjective fact as determining whether the officer concerned entertained reasonable suspicion that the dtenu was acting in a manner prejudicial to the public safety or to the efficient prosecution of war.

13. These are the two rival contentions vehemently urged by Mr. D.B. Desai for the petitioner and the Advocate General for the respondents. Mr. D.B. Desai has placed reliance on *Vimlabai Deshpande v. Emperor* A.I.R [1945] Nag. 8 decided by Bose and Sen JJ. as also on the speech of Lord Atkin, who delivered a dissenting opinion in *Liversidge v. Sir John Anderson* [1942] A.C. 206. The Advocate General on the other hand has relied very strenuously on the speeches of the majority of the Law Lords in the same case of *Liversidge v. Sir John Anderson* and on the case of *Basanta Chandra Ghose v. King Emperor* : AIR1945 Pat44 ., a full bench decision of the Patna High Court. He also relied upon two recent judgments of our Appeal Court in applications under Section 491 of the Criminal Procedure Code the one delivered by the Chief Justice and Lokur J. in *Emperor v. Gajanan Krishna Yalgi* : AIR1945 Bom533 and other by Chagla and Gajendragadkar JJ. in *Emperor v. Bajirao Yamanappa* : AIR1946 Bom32 .

14. The question raised before me is a very important one and has not been the subject-matter of adjudication by our High Court. The relevant provisions of the Defence of India Act in this behalf are:

Section 2. (1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by Sub-section (2), the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely:

* * * * *(x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be

suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything;...

(5) A Provincial Government may by order direct that any power or duty which by rule made under Sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under Sub-section (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government.

When we go to the rules framed under Section 2 of the Defence of India Act-which are called the Defence of India Rules-the only provisions relevant for the purposes of this case are Rule 26 and Rule 129. Rule 26 runs as under:

The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order;

* * * * *(b) directing that he be detained; etc.

The rest of the provisions of this Rule 26 are not relevant for the purposes of this case. Rule 129 runs as under:

(1) Any police officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act,-

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

* * * * *(2) Any officer who makes an arrest in pursuance of Sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government, and, pending the receipt of the orders of the Provincial Government, may, subject to the provisions of Sub-rule (5), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify:

Provided-

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

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

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

(5) Subject to the condition that nothing in this sub-rule shall be deemed to extend the limits of detention prescribed in the first and second provisos to Sub-rule (2), the Provincial Government may direct that any person arrested under Clause (a) or Clause (b) of Sub-rule (1) shall be removed to any other province of which the Provincial Government (hereinafter described as the second Government) has given its consent in this behalf, and thereupon such person shall be removed and the second Government shall take in respect of such person such action as may be lawful in like manner as if such person had been arrested within its province....

15. These are the relevant provisions of the Defence of India Act and the Defence of India Rules which call for consideration in this case. The Defence of India Act as its preamble shows is an Act to provide for special measures to ensure the public safety and interest and the defence of British India and the trial of certain offences, and it has been enacted because, it is stated, an emergency had arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences, and the Governor-General in his discretion has declared by Proclamation under Sub-section (1) of Section 102 of the Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war. This is the object and intendment of the Defence of India Act. Various powers have been given to the Central Government, the Provincial Governments and to the various officers to whom the powers in that behalf are delegated by reason of the provisions of Section 2 of the Defence of India Act with a view to secure the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. The power to make rules for these purposes has been exercised by the Central Government and the Defence of India Rules prescribe the modes in which these various objects are sought to be achieved. It is significant to observe that in the rule-making power which has been given by virtue of the provisions of Section 2(2) of the Defence of India Act, in Clause (x) of that Sub-rule (2) the power expressly given is to frame rules for the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting,

being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of war; and the rule which is purported to have been framed for the purpose of carrying out this object is Rule 129 of the Defence of India Rules. If this rule-making power prescribes in so many words that the grounds on which the person is thus empowered to act in the matter of the apprehension and detention as the case may be should be grounds appearing to such authority to be reasonable, Rule 129 framed in pursuance of such power should normally without any more discussion be read in a subjective manner and not an objective one as contended for by Mr. D.B. Desai. When r129 prescribes that any police-officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, may arrest without warrant any person whom he reasonably suspects of having acted, etc., in a manner prejudicial to the public safety or to the efficient prosecution of war, that Rule 129 cannot be construed as having enacted anything beyond what was warranted by the rule-making power contained in Section 2(2)(x) of the Defence of India Act. If the rule-making power was to be exercised in respect of the apprehension and detention of persons who are suspected on grounds appearing to the authority empowered by the rules to do so to be reasonable, merely because the words used in Rule 129(2) are 'whom he reasonably suspects of having acted' those words in Rule 129(2) cannot be construed as meaning anything except what is warranted by the rule-making power contained in Section 2(2)(x). Even though the words 'whom he reasonably suspects' be capable of more than one construction, viz. from a subjective as well as an objective point of view, as hereinbefore discussed, the very purpose of the enactment of Rule 129(1), as can be gathered from the rule-making power provided in Section 2(2)(x) of the Defence of India Act, was to constitute the authority empowered to make the order of apprehension or detention as the case may be the sole judge of the reasonableness of the grounds on which he suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. If this be the true construction of Section 2(2)(x) of the Defence of India Act and Rule 129(1) of the Defence of India Rules, all

arguments as to the status or capacity, or judgment of the police-officer, even a police constable, and the criticism levelled against the investing of such powers as would encroach upon the liberty of the subject in such officers who might be the last in the hierarchy of the police-officers disappear. The Legislature has expressly given those powers and the rules have been made with a view to the exercise of those powers any grievance which the subject may have as against the inefficiency of the officers concerned or the probable abuse of such powers can be against the Legislature which gave such powers to such persons and not against anybody else.

16. Assuming, however, that I were wrong in this construction which I have put upon Section 2(2)(x) of the Defence of India Act and Rule 129(1) of the Defence of India Rules, the question that remains to consider is whether I should adopt the objective construction which is sought to be put upon the words 'whom he reasonably suspects' in Rule 129(1) of the Defence of India Rules as sought for by Mr. D.B. Desai or should adopt the subjective construction of the words 'whom he reasonably suspects' as sought for by the Advocate General. I have already stated that Mr. D.B. Desai has placed great reliance on the speech of Lord Atkin in the case of *Liversidge v. Sir John Anderson* and the Advocate General has placed equal reliance on the speeches of the other Law Lords in the very same case. In the speeches of all the Law Lords in that case it was taken as common ground that the legislation which the House was there concerned with was emergency legislation. The liberty of the subject was of course the primary concern of all the Law Lords, but in their approach to the question how far the liberty of the subject can be encroached upon in times of great national emergency the views of Lord Atkin on the one hand and the other Law Lords on the other were divergent. The observations of Lord Atkin at p. 244 in this connection are very significant:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch v. Balchin* (1850) 5 Ex. 378 cited with approval by my noble and learned friend Lord Wright in *Barnard v. Gorman* :

[1941] A.C. 378 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.' In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

These observations deserve very great consideration, and it would be absolutely un-judicial and contrary to the traditions of British justice which have been maintained all throughout by our Courts here that Judges should view with complaisance any attempts at encroachment on the liberty of the subject by the executive. The Courts should not countenance any such encroachment unless the same be absolutely justified in law. The liberty of the subject is in existence in so far as it is sanctioned and controlled by law. The Legislature has full power to enact measures which would encroach upon the liberties of the subject. By proper enactments in that behalf the Legislature can deprive a subject of his liberty of person or his rights of property and various other liberties which are his priceless treasures. The realm of law is supreme; *salus populi et supreme lex*. All individual liberty must give way to considerations of national safety, and that is the principle which has been enunciated by Lord Wright in his observations which are to be found at p. 260 of that very case:

What is involved is the liberty of the subject. Your Lordships have had your attention called to the evils of the exercise of arbitrary powers of arrest by the executive and the necessity of subjecting all such powers to judicial control. Your Lordships have been reminded of the great constitutional conflicts in the seventeenth century, which culminated in the famous constitutional charters, the Petition of Right, the Bill of Rights, and the Act of Settlement. These struggles did, indeed, involve the liberty of the subject and its vindication against arbitrary and unlawful power. They sprang (to state it very broadly) from the Stuart theory that the King was King by divine right and that his powers were above the law. Thus a warrant of arrest ' *per speciale mandatum Domini Regis*' was claimed to be a

sufficient justification for detention without trial. But by the end of the seventeenth century the old common law rule of the supremacy of law was restored and substituted for any theory of royal supremacy. All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is ultra vires or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the Subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in; the light of the circumstances and the general policy and object of the measure, I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of emergency

Though the safeguards of liberty which have been spoken of by Lord Wright to exist, viz. the good sense of the people and the system of responsible and representative Government which have been evolved may not exist in India to that extent to which they are supposed to exist in England, the observations of Lord Wright are none the less very apposite. They lay down that even though the liberty of the subject has got to be jealously preserved, Legislature is supreme, and if Legislature enacts certain provisions which have the effect of curtailing the liberties of the subject, the subject has to submit to such encroachments, and the Legislature is supreme. Even Lord Atkin in his observations at p. 239 of his speech stated:

No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this regulation His Majesty has done so.

He did not doubt the power of the Legislature to invest any authority with unlimited power over the person and property of the subject.

17. Approaching the subject from this point of view, the next point to consider is what is the canon of construction which has to be adopted by the Courts in the matter of emergency legislations of the type I have before me. In this connection the observations of Lord Macmillan at p. 251 of that case are apposite:

In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject-rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

To the same effect are the observations of Viscount Maugham at p. 219 in that case:

My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words

used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the prima facie meaning of such a phrase as 'if A.B. has reasonable cause to believe' a certain circumstance or thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if A.B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean if A.B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question.

There is no doubt that if the words used were capable of only one meaning, the Courts should not go out of their way to adopt an unnatural or a strained meaning from what may be presumed to be the object and intendment of the particular piece of legislation, because encroachment on the liberty of the subject is countenanced only in so far as the same is warranted by the strict letter of the law. If, however, the words used are capable of more than one meaning, the Courts should lean while construing the emergency legislation towards a construction which supports rather than defeats the object and the intendment of the emergency legislation and should even adopt a construction which might appear strained or unnatural in times of peace though quite appropriate and suitable to the occasion when emergency powers are sought to be granted to particular individuals in times of great national emergency.

18. Considerable argument was addressed to me based on the observations of the Law Lords in *Liversidge v. Sir John Anderson* as to the status and position of the Secretary of State who in the regulation under consideration there was invested with plenary powers of detention of individuals under certain circumstances therein prescribed. In the speeches of the majority of the Law Lords stress was laid on the facts that it was not a subordinate officer or a police constable who was invested with those powers, that the Secretary of State was a highly placed and responsible officer in whom the public had confidence, that the

Secretary of State was answerable to the Parliament and besides being guided in his deliberations by the advisory committees had to make reports to the Parliament every month as to the working of 'the regulation, and that the press and more so the Parliament could exercise control over the Secretary of State if the plenary powers vested in him were abused by him. It was pointed out that in contrast to the situation which thus obtained in England the position in India was not such as would inspire in the public minds any confidence in the executive or the police-officers in whom these powers were sought to be vested. The executive in India was not responsible to the Legislature, whether the Legislature as in the present times was functioning or not in certain Provinces. The only responsibility of the officers who would be empowered to act under Rule 129(1) of the Defence of India Rules would be to their immediate superiors and to the Government which was also the executive, and there was nothing which would serve by way of check on the excesses of the executive¹ either in the press or in the public opinion voiced through the Legislatures. There were absolutely no safeguards in the provisions of the Defence of India Act and the Defence of India Rules of the type which one found in reg. 18B in operation in England. There were no advisory bodies, there was no responsibility to the Parliament, there was no public opinion to which the executive would be amenable. It was therefore pointed out that the considerations which weighed with the Law Lords in *Liversidge v. Sir John Anderson* in adopting the subjective construction of the words 'reasonable cause to believe' were not available at all in India, with the result that having regard to the encroachment which would of necessity be made on the liberties of the subject, the Courts should not countenance a construction which would not subject the exercise of the power by the executive or the police-officer to scrutiny by the Courts. While recognising the strength of this criticism, one cannot run away from the fact that however irresponsible the executive might be, whatever excesses the executive might commit, howsoever atrocious their conduct in particular cases may be, looked at from one point of view, one has only got to look to the four corners of the particular piece of legislation in order to see what are the powers vested in the executive or the police-officers. If the powers which are vested in them are such as encroach upon the liberties of the subject, the law is there and has got to be administered by the Courts irrespective of whether such wide and

absolute powers which are vested in the executive or police-officers are liable to be abused or not. If the executive or the police officers act within the strict letter of the law and within the scope of the powers which have been given to them under Rule 129(1), there cannot be any question of impeaching the exercise of those powers by them. Whilst talking of the safeguards which have been provided in the reg. 18B, which is in operation in England, one has also got to bear in mind that even here in India, in Rule 129 of the Defence of India Rules there are salutary checks provided to the exercise of the powers by the executive officers or the police-officers concerned. The only power which is given to the executive officer or police officer under Rule 129(1) is, in the event of his entertaining a reasonable suspicion that the dtenu has acted in a manner prejudicial to the public safety or to the efficient prosecution of war, to arrest the dtenu without warrant and that detention is only for a period of fifteen days. The officer arresting the dtenu has to forthwith make a report to the Provincial Government which would presumably contain all information though confidential, on the strength of which the officer arresting the dtenu reasonably suspected him of having acted in a manner prejudicial to the public safety or to the efficient prosecution of the war. There is nothing in Rule 129 to prevent the Provincial Government if it were so minded on a perusal of such report to order immediate release of the dtenu. If, however, the Provincial Government on the receipt of such report thinks that further investigation be necessary, or that further detention of the dtenu be necessary, a temporary order can be made to detain the dtenu for a period of two months from the date of arrest of the dtenu. That order for temporary custody of the dtenu is not operative for any period beyond two months of the date of the actual arrest of the dtenu. That is the time limit given to the Provincial Government to make up its mind for the passing of final orders as regards the dtenu, whether by virtue of the provisions of Rule 26 or by any other law in force the Provincial Government will order the detention of the dtenu for a particular period beyond that period of two months or will order his release and discharge or will impose such terms on the dtenu as regards his activities in the future as might be considered by the Government to be reasonable or necessary. These are the safeguards which have been provided and immediately after the arrest of the dtenu by the executive officer or the police-officer the matter goes into the hands of the Provincial

Government. The criticism which has been offered is that a police-officer without having sufficient grounds before him to entertain a reasonable suspicion of the activities of the dtenu might pass an order which might not be justified under the circumstances of the particular case, and arrest the dtenu. Such deprivation of the liberty of the dtenu is however warranted by Rule 129(1) of the Defence of India Rules. The same is, however, not an indefinite deprivation of liberty or a detention for any indefinite period. An order of the executive officer or police-officer in the first instance is only for a period of fifteen days and these are the limits of the power of the executive officer or the police-officer to detain the dtenu. The officer concerned cannot detain the dtenu for any period beyond fifteen days on his own initiative. If no orders are received from the Provincial Government after that period of fifteen days, the dtenu is automatically released and nothing further need be done. It is only when after the receipt of the report the Provincial Government passes orders for the temporary custody of the dtenu for a period not exceeding two months from the date of his actual arrest that the further detention of the dtenu becomes lawful; and the Provincial Government has a duty laid down upon it by virtue of Rule 129(4) of passing final orders as to the release, detention, or imposing of conditions on the dtenu after that period. In my opinion, these are reasonable safeguards put on the powers of apprehension and detention conferred on the executive officers or police-officers under Rule 129(1) of the Defence of India Rules. They may not bear any comparison with the safeguards which are available in England in the matter of the reg. 18B which was the subject-matter of consideration in *Liversidge v. Sir John Anderson*. It would be idle, however, to compare the constitution in England with the constitution in India. We have to take the facts as they are. The Legislature is supreme both in England and in India and if the Legislature has enacted a provision which confers certain powers howsoever wide they may be, those powers have got to be enforced within the strict letter of the law.

19. It was urged by Mr. D.B. Desai that the decision in the case of *Liversidge v. Sir John Anderson* was arrived at mainly on the consideration of the facts that the Secretary of State was a responsible officer in whom the public had confidence and there were proper safeguards to preserve the liberty of the subject, and had it not been so, it was apparent in the speeches of the Law Lords there and in

particular the speech of Lord Macmillan at p. 254:

Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred on the Secretary of State, but the argument is the) other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interests.

that the decision might have been otherwise. This is only a partial statement of the true position. No doubt this was one of the important provisions which induced the Law Lords in that case to come to the conclusion that the Secretary of State was the sole judge of the existence of the facts and of the sufficiency of the materials as also of the reasonableness of the belief which he entertained on those materials. There is, however, another important aspect of the question which was equally emphasised by the Law Lords in that case, and it was that what the Secretary of State was exercising was an executive function which would involve not only questions of the appreciation of the materials before him but also of the policy which was followed by him. The Courts, on the other hand, were acting judicially and would weigh the materials not from the point of view of the Secretary of State but strictly in accordance with the rules of evidence and would have nothing before them to guide them in matters of the policy of the State. It was, therefore, urged that the law Courts were the last tribunal before whom the state of mind of the Secretary of State could be canvassed. Another important consideration which was also urged was that the materials in the possession of the Secretary of State might be of a confidential nature and being State secrets, he could not be called upon by the Courts to disclose the same before them. It may be that in a particular case the Secretary of State may not be able to disclose any materials whatever. In other cases he might be able to make a partial disclosure of materials, the rest of the materials being confidential and such as could not be disclosed by him even before the Court of law. Would it be possible in such circumstances to arrive at any conclusion on the basis of the objective facts to be determined; by the Court as hereinbefore stated in the absence of any materials or in the event of mere disclosure in part of the materials by the Secretary of State before the Court? In one case there will be no materials at all. In the other case

the partial materials disclosed might afford a very incomplete version of the whole affair and the Court might as well come to the conclusion adverse to the Secretary of State which would not have been arrived at if the fuller materials could have been disclosed by the Secretary of State before the Court. It is well-known that partial truth may be worse than the whole truth and the partial materials thus disclosed might be of the most unsatisfactory character. Can it be said that this would be a satisfactory state of affairs? It would be open to the Secretary of State to merely put forward his ipse dixit that he had materials before him, and that he had after considering those materials reasonable grounds for entertaining the belief under which he acted in detaining the dtenu. If this is the position which may obtain whilst the Court may be called upon to determine the objective facts in the matter of the detention of the dtenu, can it be said that that is the construction which the Court should lean to rather than the other construction which it was possible to adopt, viz. the one which brings into prominence the subjective factor in the determination of the question whether the dtenu should be arrested by the officer authorised in that behalf?

20. Having regard to all the above observations, I have come to the conclusion that even though it was open to the Court to say that the words 'whom he reasonably suspects' are capable of two constructions, one the objective construction contended for by Mr. D B. Desai and the other the subjective construction contended for by the Advocate General, the Court should lean towards the subjective construction contended for by the Advocate General, more so in view of the provisions of Section 2(2)(x) of the Defence of India Act.

21. This, however, does not mean that in all cases where the executive officer or police-officer has purported to act under Rule 129(1) of the Defence of India Rules, his action is not liable to be impeached at all. In cases where the executive officer or the police-officer though purporting to act under Rule 129(1) really acts with ulterior purposes, not in furtherance of the objects which are prescribed in the preamble of the Defence of India Act and in Section 2 thereof as elaborated in Rule 129(1) of the Defence of India Rules, the action of the executive officer or the police-officer concerned would be outside the scope of that provision, would be a fraud upon the Act and the Rules framed thereunder, would be wrongful and mala

fide and would certainly be liable to be impeached. No authorities are needed for this proposition as they have been fully discussed in the case of *Liversidge v. Sir John Anderson* and also in the case of *Vimalabai Deshpande v. Emperor*, I may nonetheless quote a passage from the judgment of Chagla J. in *Emperor v. Bajirao Yamanappa* referred to by me above. There it was a question of an order made by the Provincial Government under Rule 26 of the Defence of India Rules (p. 677):

Section 10 of Ordinance III of 1944 provides that no order made under the Ordinance shall be called in question in any Court, and no Court shall have power to make any order under Section 491 of the Code of Criminal Procedure, in respect of any order made under or having effect under the Ordinance, or in respect of any person the subject of such an order. But it is clear that the jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order 'made under the Ordinance.' It must be made by the detaining authority in the proper exercise of its powers. It would not be an order 'made under the Ordinance' if it was made merely in the colourable exercise of its powers or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed¹ all the safeguards. The order must not be made for an ulterior purpose—a purpose which has no connection with the security of the State or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigation of a crime nor to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. The powers conferred on the executive under the Ordinance are for the purpose of preventive detention and they are not punitive in their nature. The executive; must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the safety of the State or the efficient prosecution of the war. It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can

scrutinize them in order to see what was the condition of the mind of the detaining authority when it made the order. These principles which I have stated clearly emerge from the various decisions of the Federal Court and the High Courts in India which have been cited at the bar. In *Basanta Chandra Ghosh v. King-Emperor* [1944] F.C.R. 295 Sir Patrick Spens, Chief Justice, delivering the judgment of the Federal Court, observed at p. 316:

In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance III of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under Rule 26 and now deemed to be made under Ordinance III or a new order purporting to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that Rule 26 was ultra vires, Section 10 of Ordinance III will no more prevent it from so finding than Section 16, Defence of India Act, did. Such an invalid order, though purporting to be an order, will not in fact be an 'order made under this Ordinance' or having effect by virtue of Section 6 as if made under this Ordinance at all for the purposes of Section 10.

Harries C.J. in *Dilbagh Singh v. Emperor* A.I.R [1944] Lah. 373, in the course of his judgment, said (pp. 375, 376):

In my judgment Rule 129...cannot be used legally for any purpose, other than that for what it was intended, namely, to ensure inter alia the security of the State and the efficient prosecution of the war.

To use it for some entirely different purpose, wholly unconnected with the security of the State or the efficient prosecution of the war, is in my view a misuse of the powers given by that rule and an order passed for such purposes cannot be said to be an order under Rule 129, Defence of India Rules....

It would in my view be extremely dangerous to hold that the police or the Provincial Government had any right to detain persons under Rule 129 unless the

order was made with the object of making it impossible for the person detained to interfere with matters connected with the defence of India or the efficient prosecution of the war.

22. The judgment of Harries C.J. in *Dilbagh Singh v. Emperor* is pertinent so far as it was on Rule 129 of the Defence of India Rules, and if the Court ever came to the conclusion that the power invested in the executive officer or police-officer under Rule 129(1) was used for any purpose other than to ensure inter alia the security of the State and the efficient prosecution of war, it would be a misuse of the powers given by that rule and an order passed for such purposes could not be said to be an order passed under Rule 129 of the Defence of India Rules. That is the only object with which the order can be made, and if it is not made for those objects, it is liable to be set aside. This is the scope of the authority of the Courts to interfere with orders which are made under Rule 129(1) of the Defence of India Rules. Save for that, I apprehend the Courts have no jurisdiction to interfere, and once it is brought to the notice of the Court that the officer concerned had materials or information before him on a consideration of which he came to the conclusion that there was ground for entertaining reasonable suspicion about the dtenu within the meaning of Rule 129(1), it would not be possible to challenge the apprehension and detention of the dtenu.

23. Mr. D.B. Desai drew my attention to the difference in the expressions used in Rule 26 and Rule 129 of the Defence of India Rules. In Rule 26 the condition precedent to the Government's acting under the said rule was, that it should be satisfied with regard to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the public safety, or the efficient prosecution of the war, it was necessary so to make an order, whereas under Rule 129 the condition precedent was that the officer concerned should reasonably suspect the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In the one case it was that the Government should be satisfied and in the other case it was that the officer concerned should reasonably suspect the dtenu of having acted in the manner specified therein. It was, therefore, urged that the insertion of the word 'reasonably' in Rule 129 made a difference to the whole position. It was argued that the word

'reasonably' was advisedly put in in Rule 129 with the object of having the existence of the grounds of suspicion and the reasonableness of the suspicion entertained on those grounds determined by the Court whereas no such word was to be found in Rule 26. This argument was sought to be supported by the observations of Lord Atkin in his speech in *Liversidge v. Sir John Anderson* where the difference between these two expressions was pointed out by Lord Atkin and the Noble Law Lord came to the conclusion on a contrast of those expressions used in the different contexts therein mentioned, that the word 'reasonably' imported that the Court should determine the reasonableness of the suspicion entertained by the officer concerned. It is, however, necessary to observe that even as regards the construction of Rule 26 of the Defence of India Rules, the word 'satisfied' has been interpreted as reasonably satisfied as contrasted with arbitrarily or capriciously or dishonestly satisfied, the existence of which latter circumstance would vitiate the order altogether. Observations to this effect are to be found in both the judgments of our Appeal Court hereinbefore referred to by me as also in the observations of Lord Wright in the judgment in *Liversidge v. Sir John Anderson*, The use of the word 'reasonably' therefore in Rule 129 as contrasted with the absence thereof in Rule 26 does not, in my opinion, make any difference to the position. The words 'reasonably suspects' are used in Rule 129(1) with a view to connote the state of mind of the officer concerned, of which state of mind he, as I have already stated above, is the sole judge, it being left to his sole discretion as to whether the grounds on which he entertained the Suspicion about the conduct of the dtenu were in fact in existence and whether the same grounds did constitute reasonable grounds for suspecting the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the only difference being that if it could be demonstrated before the Court in the event of the arrest and detention of the dtenu by the officer concerned in exercise of the powers vested in him under Rule 129(1) that the officer concerned arbitrarily or capriciously or dishonestly suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the officer would be acting outside the powers vested in him under Rule 129(1) much more so if it could be, demonstrated that he used those powers for purposes extraneous to the purpose for which he was invested with the same or exercised those powers

with ulterior or indirect motives because in that event it would be a fraud on the provisions of the Defence of India Act and the Defence of India Rules framed thereunder. This argument, therefore, based on the comparison of the words used in Rule 26 and those used in Rule 129 of the Defence of India Rules does not carry the case of the petitioner any further.

24. Having regard to the above observations I do not think it necessary for me to discuss in detail the judgment of Bose and Sen JJ. in *Vimalabai Deshpande v. Emperor* or the speech of Lord Atkin in *Liversidge v. Sir John Anderson*. I respectfully dissent from the observations of the learned Judges of the Nagpur High Court as also the portions of the speech of Lord Atkin in so far as they are contrary to or inconsistent with the opinion hereinbefore expressed. It is also not necessary for me to refer any further to the observations of the full bench in *Basanta Chandra Ghosh v. Emperor* or the speeches of the majority of the Law Lords in *Liversidge v. Sir John Anderson*. Even though the observations of the full bench in *Basanta Chandra Ghosh v. Emperor* and the speeches of the majority of the Law Lords in *Liversidge v. Sir John Anderson* as also the observations of Chagla and Gajendragadkar JJ. in *Emperor v. Bajirao* above referred to, were with reference to Rule 26 of the Defence of India Rules and the analogous provisions thereto obtaining in England in reg. 18B which was the subject-matter of the decision in *Liversidge v. Sir John Anderson*, the principles there discussed are in consonance with the principles which I have discussed in the earlier portion of my judgment, and in view of that fact I need not discuss the same any further beyond observing that I respectfully agree with the same.

25. In the result, I reject the contention of Mr. D.B. Desai, accept the contention of the Advocate General and am of opinion that in the matter of the exercise of the powers vested in the executive officer or the police-officer under Rule 129(1) of the Defence of India Rules, the question whether there are sufficient grounds or materials in fact which would enable the officer concerned¹ to entertain a suspicion about the conduct the dtenu and whether the suspicion entertained by the officer concerned on those grounds or materials is a reasonable one or not fall to be determined by the officer concerned and not by the Court before which the order of the officer concerned might be challenged by the dtenu on proceedings

taken in that behalf.

26. The next contention urged by Mr. D.B. Desai was that even assuming that the reasonableness of the suspicion was a factor to be determined by the officer concerned and not by the Court, in the circumstances of the present case the exercise of the powers by the officer concerned, viz. the Commissioner of Police was not bona fide, was not within the four corners of Rule 129(1) of the Defence of India Rules, was made by him with indirect or ulterior motives and not for the purposes warranted by the provisions in the rule and that it was a fraud on the Defence of India Act and the Rules framed thereunder. In support of this contention Mr. D.B. Desai has urged that in his petition the petitioner had set out in detail the activities and the political ideas of the dtenu and had further in para. 2 of his affidavit dated April 24, 1945, pointed out that it was only at the instance of the U.P. Police who wanted to apprehend the dtenu by reason of the facts therein mentioned that the Commissioner of Police had purported to act in the exercise of the powers vested in him under Rule 129(1) of the Defence of India Rules and that therefore the order for arrest and detention of the dtenu made by the Commissioner of Police was illegal. Mr. D.B. Desai pointed out that the various allegations which the petitioner had made in his petition and in his affidavit dated April 24, 1945, had not been traversed by Balaram who purported to make the affidavit in rejoinder under the authority of the Commissioner of Police, and that in the absence of any traverse of those allegations the Court should hold that the said allegations should be deemed to have been admitted by the Commissioner of Police. If those allegations be deemed to have been admitted by the Commissioner of Police, it was further urged that these were the only materials before the Commissioner of Police before he exercised the power of arrest and detention of the dtenu under Rule 129(1), and unless and until the Commissioner of Police satisfied the Court that there were other materials before him on the strength of, which he came to entertain a reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court was entitled to hold that the exercise of the powers reserved to him under Rule 129(1) by the Commissioner of Police under those circumstances was made by the Commissioner of Police with indirect or ulterior motives and not for the purposes specified in Rule 129(1), with the result that the exercise of the said

powers was not bona fide and the arrest and detention of the dtenu by the Commissioner of Police was illegal.

27. The Advocate General replied by stating that it was not obligatory upon his clients either to make an affidavit, or if an affidavit was made, to aver that there were any materials besides those which were set out in the petition and para. 2 of the affidavit of the petitioner dated April 24, 1945, on the strength of which the Commissioner of Police entertained a reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He went a step further and urged that it was not at all necessary for his client the Commissioner of Police to traverse the allegations which had been made by the petitioner in his petition and in para. 2 of his affidavit dated April 24, 1945. He relied in this behalf upon the decision of the House of Lords in *Greene v. Secretary of State for Home Affairs* [1942] A.C. 284, where it was held that the production of the Home Secretary's order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application by the appellant for a writ of habeas corpus, and no affidavit by the Home Secretary justifying his cause of belief was necessary. He also relied upon the observations of the Appeal Court in *Emperor v. Gajanan Krishna Yalgi* : AIR1945 Bom533 decided by the Chief Justice and Lokur J. on April 9, 1945, where also it was held, following the two cases of *Liversidge v. Sir John Anderson* and *Greene v. Secretary of State for Home Affairs*, that if the order of the Secretary of State was proved or admitted, it must be taken prima facie, i.e. until the contrary was proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with, and that once that was done, the only method of escape was to show that the alleged order was in fact no order at all or was a fraud on the provisions of the law enacted in that behalf. I do not agree with this contention of the Advocate General. There is this difference between the orders made under Rule 26 and the orders made under Rule 129(1) of the Defence of India Rules that whereas in the case of the orders made under Rule 26 there is a regular written order issued by the Provincial Government in that behalf which ex facie complies with the requirements and connotes the fulfilment of the conditions precedent to the exercise of the powers in that behalf, in the case of orders under Rule 129(1) there is no written order. There is no warrant. In fact there is nothing in writing to

show that the officer concerned reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. There is merely an arrest by the officer concerned or an oral order for arrest communicated by him to his subordinate for the arrest of the dtenu and there is nothing ex facie in the circumstances of the case to enable the Court to presume that the officer concerned acted bona fide within the four corners of Rule 129(1). In the case of orders under Rule 26 the production of the order made by the Provincial Government thereunder would be sufficient compliance with the requirements of the situation and would be ex facie proof of the conditions of Rule 26 having been fulfilled and therefore it would not be necessary for the Government to make any affidavit in that behalf. In the case of orders under Rule 129(1), however, there being nothing which would be ex facie proof of the conditions therein laid down having been fulfilled, it would be incumbent on the officer concerned who arrested the dtenu under the circumstances therein prescribed to make an affidavit showing that he reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In that affidavit the officer concerned is not bound to disclose any confidential information or any State secrets. It might be sufficient for him to aver that he had grounds or materials before him which were sufficient within his own mind to create a suspicion as to the conduct of the dtenu and that on a consideration of those grounds or materials before him he reasonably suspected the dtenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution, of war. This would be sufficient in the normal course of affairs, for in the majority of cases the dtenu being in the unfortunate position of not knowing at all what were the grounds or the materials before the officer concerned which enabled him to entertain the suspicion about his conduct, would not be in a position to make any averment in his petition or the affidavit filed in support thereof. He could only put forward what he knew about his own activities and of his not having taken any part in any activities which would by any process of reasoning or by any stretch of imagination be connected with activities detrimental to the public safety or to the efficient prosecution of war. In those cases it may not be necessary for the officer concerned to aver anything more than what I have already indicated above. The position is, however, different

when, as in the present case, the petitioner is in a position to aver much more than mere protestations of his innocence or his political and other activities as I have hereinbefore stated. If the petitioner is in a position to aver specifically that according to the best of his knowledge, information and belief there was certain information which was the only information on which the officer concerned acted in the matter of his arrest and detention in the purported exercise of his powers under Rule 129(1) of the Defence of India Rules, it would not be enough for the officer concerned in the affidavit which he makes in the proceedings merely to aver that the statements made by the petitioner in his affidavit are irrelevant or that he is not bound to reply to the same. The officer concerned must, in my opinion, traverse the allegations made in the affidavit of the petitioner and if he does not so traverse them and does not state that besides those materials he had other materials on which he came to entertain the reasonable suspicion of the dtenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court would be entitled as in the case of other litigants to presume the correctness of the allegations made by the petitioner in his affidavit and also to presume that there were no other materials before the officer concerned which would have enabled him to entertain a reasonable suspicion about the conduct of the dtenu within the meaning of the provisions of Rule 129(1). It would then be open to the Court on the materials put before it to come to the conclusion whether the exercise of the power by the officer concerned was not bona fide or was made with indirect or ulterior motives or was a fraud upon the powers vested in the officer concerned under Rule 129(1). I am aware that in the judgment which he delivered in *Emperor v. Gajanan Krishna Yalgi Lokur J.* has observed (p. 675):

Moreover, Government is not bound to disclose all the materials on which such a conclusion was reached. In fact the Secretary to Government, Home Department, has stated in his affidavit that he has been advised not to disclose these materials, but that H.E. the Governor did apply his mind to them and come to the conclusion that the order of detention passed by him was necessary. Mr. Jahagirdar contends that it is not stated in his affidavit that there were any materials before H.E. the Governor other than the ten criminal cases against the petitioner, but even that need not be disclosed. There is no reason to presume that there were no other

materials and that in regarding even these cases themselves to be sufficient to require the petitioners detention in the interest of public safety or maintenance of public order, H.E. the Governor did not act in good faith. It is not disputed that H.E. the Governor did apply his mind tot the materials before him and it is not for the Court to decide whether those materials were or were not reasonably sufficient.

28. With great respect I do not agree with these observations of Lokur J. in so far as they might be sought to be applied to any order made by the officer concerned under Rule 129(1) of the Defence of India Rules. These observations of Lokur J. might be appropriate in a case like the one which the Appeal Court was considering in that criminal application, viz. an order under Rule 26 of the Defence of India Rules, but they do not afford any guidance or any precedent for holding that where an order made by an officer concerned under Rule 129(1) is challenged before the Court, the Court should under the circumstances like those obtaining in the present case treat the affidavit of the officer concerned as sufficient compliance with the requirements of the situation and is bound to treat the non-traverse of the relevant allegations made by the petitioner in his affidavit as any different from the non-traverse of the said allegations if it had been made by an ordinary litigant appearing before the Court. The Court is in such circumstances entitled to presume the correctness of the allegations contained in the affidavit made by the petitioner and is entitled to act as if these were the only materials before the officer concerned when he came to exercise powers vested in him under Rule 129(1) of the Defence of India Rules, in the absence of any averment in the affidavit of the officer concerned that besides those materials which were set out in the affidavit made by the petitioner he had other materials before him which in his opinion were sufficient to enable him to entertain the reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war.

29. In the case before me the petitioner besides stating in the petition that the dtenu was not guilty of any subversive or any/activities which were detrimental to the public safety or to the efficient prosecution of war has specifically averred in para. 2 of his affidavit dated April 24, 1945, that the action of the Commissioner of Police was the result of the desire of the U.P. Police to apprehend the dtenu by

reason of the facts therein mentioned, that it was not the bona fide act of the Commissioner of Police himself being the result of any reasonable suspicion entertained by him that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, and that in the matter of the arrest and detention of the dtenu the Commissioner of Police had acted not bona fide but with ulterior or indirect motives, viz. that of apprehending and handing over the dtenu to the custody of the U.P. Police and the U.P. Government, and that therefore the orders of the Commissioner of Police as regards the arrest and detention of the dtenu were illegal. In the affidavits filed by Balaram I do not find any traverse of these allegations. As I have already stated it was necessary for the Commissioner of Police or Balaram, who made his affidavit in accordance with the directions of the Commissioner of Police, to aver either that these were not the materials before the Commissioner of Police or that besides those materials there were other materials before the Commissioner of Police which were sufficient to enable the Commissioner of Police to entertain a reasonable suspicion that the dtenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In the absence of such averment, I am constrained to hold that the materials set out in the petition and in para. 2 of the affidavit of the petitioner dated April 24, 1945, were the only materials on which the Commissioner of Police acted in purported exercise of the powers vested in him under Rule 129(1) of the Defence of India Rules. I am further fortified in this conclusion of mine by the order which was passed by the Government of Bombay on April 13, 1945, within only three days of the arrest of the dtenu by the Commissioner of Police directing the removal of the dtenu to Lucknow and his delivery into the custody of the Superintendent of Police, Lucknow. This leaves no doubt in my mind that the arrest of the dtenu under the orders of the Commissioner of Police on April 10, 1945, was with the view to hand him over to the U.P. Police and the U.P. Government as stated in para. 2 of the affidavit of the petitioner dated April 24, 1945, and that the purported exercise of the powers conferred by Sub-rule (5) of Rule 129 on the Government of Bombay in the matter of the removal of the dtenu to Lucknow, and his delivery into the custody of the Superintendent of Police, Lucknow, was also in furtherance of the same design. If this is the true position, it cannot be stated that the purported exercise of the power of arrest and detention

of the dtenu by the Commissioner of Police on April 10, 1945, or the steps taken thereafter by the Government of Bombay were bona fide or were not actuated by indirect or ulterior motives, viz. that of arresting and detaining the dtenu merely on information purporting to have been supplied by the U.P. Police and the U.P. Government to the Commissioner of Police, Bombay, and removing him, under guise of the purported exercise of the powers under Rule 129 of the Defence of India Rules, within the jurisdiction of the U.P. Government. It cannot be stated that the Commissioner of Police under these circumstances reasonably suspected the dtenu of having acted in a manner detrimental to public safety, or to the efficient prosecution of war, or that the order for the arrest and detention of the dtenu made by him was an order within the meaning of Rule 129(1) of the Defence of India Rules. The cancellation of the order of the Government of Bombay dated April 13, 1945, directing the removal of the dtenu to Lucknow and his delivery into the custody of the Superintendent of Police, Lucknow, by the further order of the Government of Bombay dated April 18, 1945, does not in my opinion make any difference to the position. The latter order appears to have been made by the Government of Bombay after Rajadhyaksha J. granted the rule against the Commissioner of Police and issued the stay order in terms of Clause (f) of the petition. The materials set out in para. 2 of the petitioner's affidavit dated April 24, 1945, and the correctness thereof which I have presumed by reason of the non-traverse of the said allegations in the affidavit filed by Balaram Shamrao Kothare in rejoinder on May 1, 1945, taken along with the order of the Government of Bombay dated April 13, 1945, which I have hereinbefore set out, leave no doubt in my mind that what the Commissioner of Police purported to do on April 10, 1945, was not bona fide, was actuated by indirect motives of arresting the dtenu and transferring him within the jurisdiction of the U.P. Government and was a fraud on the powers invested in the Commissioner of Police under Rule 129(1) of the Defence of India Rules. I have, therefore, come to the conclusion that the orders for arrest and detention of the dtenu dated April 10, 1945, and the further detention of the dtenu under the order of the Government of Bombay dated April 18, 1945, following upon such illegal detention of the dtenu are illegal.

30. The only thing which remains for me to consider is whether the order made by the Government of Bombay under Rule 129(2) of the Defence of India Rides for

temporary detention of the dtenu was illegal. This order of the Government of Bombay dated April 18, 1945, has been challenged as illegal on the ground that Rule 129(2) of the Defence of India Rules does not empower the Provincial Government to make any orders for temporary custody of the dtenu who might have been arrested by the officer concerned under Rule 129(1). Mr. D.B. Desai has urged that no express powers have been given to the Provincial Government in this behalf under any of the provisions of Rule 129, and that such powers for the temporary detention of a dtenu cannot be read into Rule 129 merely by necessary implication in that behalf. It has been pointed out by the Advocate General that the proviso (I)' to Sub-rule (2) of Rule 129 implies that the dtenu can be detained in custody under that sub-rule for a period exceeding fifteen days under the order of the Provincial Government. The words used in that proviso are:

No person shall be detained in custody under this sub-rule for a period exceeding fifteen days without the order of the Provincial Government.

This necessarily implies according to the Advocate General that he can be detained in custody for a period exceeding fifteen days if the Provincial Government passed orders in that behalf. That this is the necessary implication of this proviso is made clear when one goes to the provisions of Sub-rule (4) of Rule 129 where it is expressly laid down that in addition to making such order, subject to proviso 2 to Sub-rule (2)-which lays down that no person shall be detained in custody under¹ that sub-rule for a period exceeding two months-as may appear to be necessary for the temporary custody of any person arrested under this rule, the Provincial Government might make such final order as to his detention, release, residence or any other matter concerning him, etc. as may appear to the Government in the circumstances of the case to be reasonable or necessary. This Sub-rule (4) of Rule 129 makes a provision for a final order to be passed by the Provincial Government in relation to the dtenu but it makes a specific reference to the orders for the temporary custody of the dtenu to be made by the Provincial Government subject to the second proviso to Sub-rule (2), viz. that no person shall be detained in custody under this sub-rule for a period exceeding two months. Reading the first proviso to Sub-rule (2) and this provision made in Sub-rule (4) of Rule 129 I have come to the conclusion that by necessary implication the

Provincial Government has been invested therein, with the power of making such orders as to the temporary detention of the dtenu as may be necessary in the opinion of the Provincial Government not exceeding a period of two months from the date of the arrest of the dtenu pending the final orders to be made by the Government for the detention, release, or residence or any other matter concerning him as might appear to the Government in the circumstances of the case to be reasonable or necessary. There is, therefore, no force in this contention of Mr. D.B. Desai.

31. Having regard, however, to the observations made by me in the earlier portion of my judgment and the conclusion which I have come to that the orders for the arrest and detention of the dtenu made by the Commissioner of Police on April 10, 1945, and the further detention of the dtenu under the order of the Government of Bombay dated April 18, 1945, are illegal, I do order that the dtenu should be immediately set at liberty.

32. As regards the costs of this rule and the petition, it has been conceded by both the parties that having regard to the fact that the point which was argued before the Court was not covered by any authoritative pronouncement of this Court, the costs of each party to this petition and rule should be borne by the respective parties. I, therefore, order that each party do bear and pay their own costs of this petition and the rule.

33. The dtenu Dhruvarajsing Vishwanathsing shall therefore be immediately set at liberty. There will be no order as to the costs of the petition and the rule.