

Binu Vs. State of Kerala

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SooperKanoon Citation : sooperkanoon.com/727354

Court : Kerala

Decided On : Jul-17-2002

Reported in : 2002CriLJ4374

Judge : B.N. Srikrishna, C.J. and; G. Sivarajan, J.

Acts : [Kerala Essential Services Maintenance Act, 1994](#) - Sections 6; ;[Constitution of India](#) - Articles 13, 21, 22, 22(1) and 254; Terrorist And Disruptive Activities (Prevention) Act, 1987; Narcotic Drugs and Psychotropic Substances Act; Abkari Act

Appeal No. : O.P. Nos. 4727, 5041 and 5712 of 2002

Appellant : Binu

Respondent : State of Kerala

Advocate for Def. : M. Ratna Singh, Adv. General

Advocate for Pet/Ap. : P.K. Ibrahim,; R. Padmakumar,; G. Janardhana Kurup,;

Disposition : Original petitions allowed

Judgement :

B.N. Srikrishna, C.J.

1. These Writ Petitions under Section 226 of the [Constitution of India](#) challenge the Constitutional validity of Section 6 of the [Kerala Essential Services Maintenance Act, 1994](#) (hereinafter referred to as 'KESMA'). The petitions have been brought by different organisations representing Government servants and individual Government servants. Since they arise the same question, they are heard together and disposed of by a common judgment.

2. On account of the financial stringency faced by the State Government, the State Government by an order dated 16.1.2002 curtailed, modified and postponed some of the benefits available to Government servants. There was wide spread opposition to this move of the Government and different organisations representing government servants threatened to go on strike. Anticipating such a strike, the State Government issued a notification dated 1st February, 2002, in exercise of its powers under Section 2(1)(a) of the KESMA declaring the services connected with 15 Departments to be 'essential services' for the purpose of KESMA. By another notification of the same date, in exercise of its powers under Section 3(1) of KESMA, the Government of Kerala being satisfied that it was necessary so to do, prohibited strikes in the services declared as essential services by the earlier notification. The strike of the Government servants commenced on 6th February, 2002, continued for about a month and was finally withdrawn with effect from 9th March, 2002.

Scheme of KESMA :

3. As indicated in the preamble to the Act, the Act is 'intended to provide for the maintenance of certain essential services and the normal life of the community in the State of Kerala'. Section 2(1)(a)(i) of KESMA defines the expression 'essential service', inter alia, to mean any service under the Government which the Government may by notification declare to be an essential service for the purpose of the Act. Section 2(b) defines 'strike' as 'cessation of work by a body of persons employed in any essential service acting in combination or a concerted refusal or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept work assigned'. There is certain inclusive definition with which we are not concerned. Section 3 empowers

the Government, if satisfied that it is necessary and expedient so to do in public interest, by general or special order, prohibit strikes in any essential service specified in the order. Such an order is required to be published in an appropriate manner and shall be in force for a period of three months only. The Government, however, has the power to extend such an order for a further period not exceeding three months, if satisfied that it is necessary or expedient to do so in public interest.

4. Sub-section (4) of Section 3 of KESMA is relevant and reads as under:

Section 3(4); 'Upon the issue of an order under Sub-section (1),-

(a) No person employed or engaged, as the case may be, in an essential service to which the order relates shall go or remain on strike.

(b) any strike declared or commenced, whether before or after the issue of the order, by persons employed or engaged, as the case may be, many such service shall be illegal.'

Sections 4, 5 and 6 of KESMA are relevant for the purpose of present discussion and are reproduced below;

'4. Penalty for illegal strikes.- Any person who commences a strike which is illegal under this Act or goes or remains on, or otherwise takes part in, any such strike shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees', or with both.'

'5. Penalty for instigation, etc.- Any person who-

(a) instigates or incites other persons to take part in, or otherwise acts in furtherance of, a strike which is illegal under this Act; or

(b) knowingly expends or supplies any money in furtherance or support any such strike, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.'

'6. Offences to be cognizable and non-bailable,- Any Police Officer may arrest without warrant any person who is reasonably suspected of having committed any offence under this Act and such person shall not be granted bail by a police officer or a court.'

5. On behalf of the petitioners, learned counsel contend that Section 6 of KESMA is unconstitutional and should be struck down for the following reasons.

(I) The provisions of Section 6 of the KESMA are inconsistent with the relevant provisions of Criminal Procedure Code, 1973 and by virtue of Article 254(1) of the Constitution, they must be deemed to have been overridden as KESMA was neither reserved for President's assent, nor received it.

(II) The ban against Court granting bail would take within its sweep the High Court also. Hence, the Act is unconstitutional.

(III) Article 21 of the Constitution guarantees that no person shall be deprived of life or personal liberty except according to the procedure prescribed by law. The procedure prescribed by law must be fair, reasonable, humane, and must not amount to infringement of fundamental rights under Articles 14 and 19. The harsh and draconian provision of blanket denial of power to the Court to judicially review pretrial detention in custody is neither reasonable, nor fair, nor just and, therefore, infringes Article 21.

6. Broadly, these are the heads under which the provisions of Section 6 of KESMA have been assailed. Counsel have urged several contentions expounding different facets of these heads and a large number of authorities have been cited in support. We shall now critically appraise the contentions urged.

I. Article 254(1) and Inconsistency with the provisions of Cr.P.C. :

7. We may dispose of this contention first.

(a) Entry 2 in List III (Concurrent List) to Schedule VII of the [Constitution of India](#) is 'criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of the Constitution'. It is competent for both the

Parliament and the State Legislature to make laws relatable to this entry. If a situation of inconsistency between the legislation made by Parliament and the one made by a State Legislature arises, then, undoubtedly, by reason of Article 254(1) of the Constitution, the law made by Parliament shall prevail. If the law made by the State Legislature has been reserved for the consideration of the President and has received his assent, by reason of Article 254(2), the State Legislation prevails. However, the question to be considered is whether there is any inconsistency as contended at all.

(b) Section 4 of the Cr.P.C. provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of the Code. Section 4(2) provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating 'the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences'. Section 5 of the Cr.P.C. declares that nothing contained in the Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

(c) Petitioners urge that the first conflict between the provisions of Cr.P.C. and KESMA arises in the manner of classifying offences; the second, is the manner of dealing with the remand and bail of accused when produced before a Magistrate. The expression 'cognizable offence' is defined in Section 2(c) of Cr.P.C. to be 'an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant'. The first Schedule to the Code of Criminal Procedure classifies different offences into cognizable or non-cognizable, bailable or non-bailable, and specifies the court by which they are triable. Class I deals with offences under the Indian Penal Code with which we are not concerned. Class II deals with classification of offences against other Laws. In this classification, only an offence punishable with death, imprisonment for life, or imprisonment for more than seven years is treated as cognizable, non-bailable, and triable by a Court of Sessions. If the offence is

punishable with imprisonment for three years and upwards, but not more than seven years, it would be cognizable, non-bailable, and triable by a Magistrate of First Class. Offences which are punishable with imprisonment for less than three years or with fine only are deemed to be non-cognizable, bailable, and triable by any Magistrate. The contention is that, under KESMA the offences under Sections 4 and 5 are punishable with a maximum term of imprisonment for six months. It is only Section 6 of KESMA which declares the offences under KESMA to be cognizable and non-bailable, whereas under clause II Classification of the First Schedule to Code of Criminal Procedure an offence under any other law punishable with imprisonment for less than three years would be non-cognizable and bailable. Thus, it is contended that there is inconsistency between the provisions of Code of Criminal Procedure and Section 6 of KESMA in the matter of declaring the cognizability and bailability of offences under KESMA.

(d) The second inconsistency urged is that Section 436 of Cr.P.C. empowers the Court to grant bail to a person accused of an offence other than non-bailable offence who is arrested or detained without warrant by a police officer. Section 437 of Cr.P.C. deals with the powers of the Court to grant bail to a person accused of non-bailable offence who is arrested or detained without warrant by a police officer and brought before the Court. Even assuming that the declaration of offences under KESMA as cognizable and non-bailable is valid, the provision of Section 6 of KESMA, which totally ousts the power of the Court to grant bail, is inconsistent with Section 437 of the Code of Criminal Procedure. For both these reasons, it is contended that, by reason of Article 254(1) of the Constitution the provisions of Code of Criminal Procedure would prevail and the provisions of KESMA should yield.

8. The argument, no doubt, is prima facie attractive. But the import of Sections 4 and 5 of Cr.P.C. makes it difficult to accept the argument. Section 4 of Cr.P.C. appears to have been enacted so as to accommodate a deviant procedure under 'any other law' and, if there be one, to declare that offences under other laws shall be investigated, inquired into, tried or otherwise dealt with according to the provisions of Code of Criminal Procedure, but subject to any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with

such offences. KESMA is obviously 'other law' as referred to in Section 4 of Cr.P.C. If Section 6 of KESMA declares a different, albeit inconsistent, manner of investigating, inquiring into, trying and otherwise dealing with the offences constituted under KESMA, it is difficult to accept that there is irreconcilable inconsistency between the provisions of the Code of Criminal Procedure and Section 6 of KESMA, which would bring into play the legal consequence envisaged by Article 254(1) of the [Constitution of India](#). In our view, the provisions of Code of Criminal Procedure are required to be read subject to the provisions of the local law and that is precisely the intendment of Section 4 of Cr.P.C. We, therefore, see no substance in the argument that the provisions of KESMA are overridden by reason of Article 254(1) of the [Constitution of India](#).

9. In *Vishwa Miner v. O.P. Poddar*, AIR 1984 SC 5, the Supreme Court highlighted the import of Section 4(2) of Cr.P.C. by observing: 'It would follow as a necessary corollary that unless in a statute other than Code of Criminal Procedure which prescribes an offence and simultaneously specifies the manner or place of investigating, inquiring into trying or otherwise dealing with such offences, the provisions of the Code of 'Criminal Procedure shall apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure'. After referring to the various provisions of the Code of Criminal Procedure and the absence contained therein of any qualification for a person to set the criminal law in motion, as contrasted to the Trade and Merchandise Marks Act, 1958, Sections 78 and 79, the Supreme Court upheld the requisite that where a special statute prescribes an offence and makes any special provision for taking cognizance of such offence under the statute, the Magistrate cannot take cognizance of the offence, unless satisfied that the eligibility criteria prescribed in the statute are fulfilled.

10. In *Rohtas v. State of Haryana and Anr.*, (1979) 4 SCC 229, the Supreme Court held that Section 5 of Criminal Procedure Code carves out a clear exception to the provisions of trial of an offence under any special or local law for the time being in force or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. (See also in this connection, the judgment of the Supreme Court in *Maru Ram v. Union of India*,

AIR 1980 SC 2147).

11. In our judgment, the contention that the provisions of KESMA are overridden for inconsistency with the provisions of Code of Criminal Procedure by reason of Article 254(1) of the [Constitution of India](#) is without any substance and we reject it.

II. Ban against Court granting bail :

12. The next ground urged is that the ban against Court granting bail contained in Section 6 of KESMA would apply to the High Court also and since the High Court's powers are prerogative powers under the Constitution, S.6 of KESMA would be unconstitutional. In our view, there is some misconception in this contention. The word 'court' Used in Section 6 of KESMA would naturally refer to criminal courts. It would take within its sweep the High Court when it exercises powers under the Criminal Procedure Code as under Sections 439 and 482 of Cr.P.C. That by a competent legislation the powers of the High Court under Section 439 of Cr.P.C. could be curtailed is a matter beyond cavil. (See in this connection, the judgment in Kartar Singh v. State of Punjab, (1994) 3 SCC 569, Paras 342, 345, 347 and 349). The very same judgment further pointed out that powers of the High Court under Article 226 of the Constitution to grant bail cannot be affected by any legislation. We are, therefore, not inclined to accept the contention that Section 6 of KESMA abridges or takes away the High Court's constitutional power under Articles 226 and 227. It, doubtless, abridges the power of the Court, including the High Court, exercisable under the Criminal Procedure Code. The contention as urged, is therefore, untenable and unacceptable.

III. Infringement of Article 21 of the Constitution :

. 13. Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The expression 'procedure established by law' used in this Article has been judicially construed as meaning a procedure which is reasonable, fair and just. (See in this connection, Maneka Gandhi v. Union of India, AIR 1978 SC 597, Gopalanachari v. State of Kerala, AIR 1981 SC 674, Olga Tellis v. Bombay Municipal Corporation., AIR 1986 SC 108).

14. Clauses (1) and (2) of Article 22 of the Constitution, guarantee certain fundamental rights to persons who are arrested. Clause (1) of Article 22 provides that no person who is arrested shall be detained in custody (a) without being informed, as soon as may be, of the grounds for such arrest, (b) such a person shall not be denied the right to consult, and to be defended by, a legal practitioner of his choice. Clause (2) of Article 22 requires that every person arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to court of the Magistrate, and no person shall be detained in custody beyond the said period without the authority of a Magistrate. It is to carry forward this constitutional mandate that the provisions of Section 167 of Code of Criminal Procedure are enacted. For the same reason, Section 57 of Code of Criminal Procedure enjoins that no police officer shall detain in custody a person arrested without warrant for a period exceeding twenty four hours without being produced before a Magistrate. In case the investigation cannot be completed within twenty four hours, Section 167 of the Code of Criminal Procedure enjoins that the arrested person shall not be detained further in custody, unless such continuation in custody is authorised by the Magistrate, for a term not exceeding 15 days at a time. Thus, any detention of an accused arrested by the police beyond the period of twenty four hours can only be under what is popularly known as 'remand order' by the Magistrate. The anxiety of the law is that, within the period of twenty four hours, there shall be application of judicial mind to the facts and circumstances of the case; if it appears that the investigation cannot be completed within twenty four hours of arrest, upon a request made to the Magistrate, the Magistrate may, after considering the relevant facts and circumstances of the case and judicially reviewing them, accede to the detention in custody of the accused for a period not exceeding 15 days at a time. Sub-section (3) of Section 167 Cr.P.C. puts a ceiling on the maximum period of detention beyond which the accused person gets a right of being enlarged on bail. Section 167 read with 436 and 437 of Cr.P.C. makes it clear that, in bailable cases, the Magistrate shall release the accused forthwith; and in non-bailable cases, the court may grant bail subject to such conditions which it thinks fit to impose.

15. The Supreme Court in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, held that, in testing the validity of State action with regard to the fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be eroded. Apart from pointing out that the protection under Article 21 is a limited one, ie., against executive interference which is not supported by law; and law here means 'enacted law' or 'State law', the Court further observed in Para 56:

'Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied'.

16. In *State of Punjab v. Ajib Singh*, AIR 1953 SC 10, the Supreme Court held:

'There can be no manner of doubt that, arrests without warrants issued by a court, call for greater protection than do arrests under such warrants. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. ...there is indication in the language of Article 22 (1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority'. (emphasis ours)

17. In *State of Madhya Pradesh v. Shobharam and Ors.* AIR 1966 SC 1910, the Supreme Court observed (vide para 3):

'It seems to us fairly clear that a person arrested has the constitutional right to consult a legal practitioner concerning his arrest. It is also clear that a person arrested has the constitutional right to be defended by a legal practitioner. But,

against what is he to be defended? We think that the right to be defended by a legal practitioner would include a right to take steps through a legal practitioner for release from the arrest'.

18. In the celebrated case of *Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar*, AIR 1979 SC 1360, the Supreme Court expatiated on the necessity of pre-trial release, not merely on the basis of bail with sureties, but also on the information placed before the court to show that the accused has his roots in the community and is not likely to abscond. The Supreme Court indicated several factors concerning the accused which had to be considered in making the judgment of releasing an accused from arrest on personal bond. It emphasised that a reasonably quick trial can be regarded as reasonable, fair or just and would not fall foul of Article 21. If for some reason such a quick trial is not possible, then continued pre-trial detention and custody of the accused would amount to denial of the fundamental right guaranteed under Article 21, even when there is a prescribed law, the law would be neither reasonable, nor fair, nor just.

19. In *re Madhu Limaye*, AIR 1969 SC 1014, it was held by the Supreme Court that, the two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him. Observes the Supreme Court:

'Clause (2) of Article 22 provides the next and most material safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial power may without delay apply its mind to his case',

20. That KESMA is not a complete code in itself is obvious since there are several areas of Criminal Procedure which are not touched upon by the said Act. Thus, provisions of Code of Criminal Procedure, 1973 have to be read in conjunction with the provisions of KESMA and as modified by it. The legislative mandate of Section 6 of KESMA is to deny bail to any person arrested by a police officer

without a warrant on reasonable suspicion of having committed any offence under the Act. Counsel for the petitioners contend that this provision amounts to a total negation of exercise of judicial power and application of judicial mind to the question as to whether continued pre-trial detention of the accused is necessary and to the factors and circumstances material in enlarging such a person on bail. Such a total abrogation of judicial review at the pre-trial stage, it is contended, is a violation of the fundamental right guaranteed under Articles 21 and 22(1) of the [Constitution of India](#).

21. Petitioners also rely on the judgment of the learned single Judge of the Allahabad High Court in *Ram Lochan v. State*, 1978 Cr.L.J. 544, which holds that summary procedure, though legal, is most inappropriate in cases in which government servants are concerned as accused persons because their conviction is likely to result in their dismissal from service, which is a serious loss to them. In our view, it may not be possible to successfully agitate this issue. The Legislature by clear intendment provides in Section 7 of KESMA that all offences shall be tried in a summary way by any Judicial Magistrate of First Class specially empowered by the Government. If the legislation is clear, no argument of inconvenience, however serious, would prevail.

22. It is strongly urged by the learned counsel for the petitioners that the right of an accused person, particularly in a case where he is arrested without warrant issued by a court, to approach the Court and satisfy the judicial mind that there are no reasonable grounds for arrest is an invaluable concomitant of the fundamental rights guaranteed under Articles 21 and 22(1) of the Constitution. Any law which denies this right is invalid and unconstitutional as infringing the fundamental rights guaranteed therein. Learned Counsel contend that, though there is no provision in KESMA which expressly takes away the right of the accused to be informed of the grounds of arrest or being taken to the Magistrate within twenty four hours of arrest and being defended by a legal practitioner of his choice, that is precisely the result brought about by the draconian provision contained in Section 6 of KESMA. If the court is unable to accept the contention that the provisions of KESMA are overridden, to the extent of inconsistency, by the provisions of Code of Criminal Procedure, 1973 in the matter of arrest, bail and remand, then the Court must

unhesitatingly declare that the total prohibition against granting bail in Section 6 of KESMA as unconstitutional for infringement of Articles 21 and 22 of the Constitution. Production of the accused arrested by a police officer without warrant before the court is intended to ensure that there is application of judicial mind to the grounds of arrest, and to the necessity of continued detention. If this is negated or ousted at the threshold, as effectuated by Section 6 of KESMA, then the fundamental right to legal consultation becomes illusory for irrespective of the legal rights of the accused, irrespective of the circumstances warranting the arrest, and irrespective of the circumstances necessitating continued detention of the accused, the only order of the court would be to deny bail, because of the legislative mandate, which the court must respect.

23. The learned Advocate General, however, contended that a legislative provision which imposes restrictions on bail, however severe, does not thereby become unconstitutional. He cited several instances. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act') which imposes severe limitation on the right of the court to grant bail. Section 37 of the NDPS Act declares every offence under the said Act to be cognizable and imposes severe limitation on the power of the granting bail by the court and declares that the limitations on granting bail are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force. Another example is the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, 'TADA Act'). Section 20 of TADA Act also imposes severe limitations on the power of granting bail under Section 167 of the Code of Criminal Procedure. Similarly, under the Kerala Abkari Act (1 of 1077), all offences are made cognizable, and non-bailable under Section 41A and the powers of the Court to grant bail has been limited in an identical manner as done in Section 37 of the NDPS Act. The learned Advocate General contends that these restrictions on the Court's power to grant bail have been considered by the Supreme Court and their constitutional validity has been upheld. He relied on the judgment of the Supreme Court in *Usmanbhai Dawoodbhai Memon v. State of Gujarat*, AIR 1988 SC 922 and the judgment in *Karlar Singh v. State of Punjab*, (1994) 3 SCC 569 as also the judgment in *Krishna Led v. Government of Kerala*, 1995 (1) KLT 172. /

24. In- Usmanbhai Dawoodbhai Memon (supra), the Supreme Court was concerned with the challenge to the validity of the limitations placed on the power of the designated Court under TADA Act. Though S.20(7) of TADA Act did not contain a provision excluding applicability of the provisions of Section 437 of the Code of Criminal Procedure, the Supreme Court read the limitations imposed on granting bail by Section 20(8) of TADA Act as being in addition to the limitations under the Code or any other law for the time being in force. It was held that the exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but also subject to the limitations contained in Section 20(8) of the TADA Act. It was also held that Sections 439 as well as 482 of Cr.P.C. cannot be availed of for grant of bail of cases under the TADA Act.

25. This view came to be expressly affirmed and reiterated by the Constitution Bench in Kartar Singh v. State of Punjab, (supra). The contention urged was that severe limitation placed upon the power to grant bail by the Court made the grant of bail almost an impossible one so as to negate it. Repelling this contention, the Supreme Court held that, it cannot be said that the conditions or limitations imposed on the power of the Court to grant bail are an unreasonable condition infringing the principle of Article 21 of the Constitution. It was observed (vide para 351):

'No doubt, liberty of a citizen must be zealously safeguarded by the Courts, nonetheless the Courts while dispensing justice in cases like the one under the TADA Act should keep in mind not only the liberty of the accused, but also the interest of the victim and their dear and near, and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution'.

The Court repelled the contention that stringent provisions like TADA Act were liable to unjustifiably invoked for depriving the accused of getting bail by pointing out that the presiding officer of the Designated Court discharges the judicial functions keeping in view the fundamental rights, particularly of the personal right and liberty of every citizen as enshrined in the Constitution, and therefore, it cannot be said that the provisions of TADA Act could not be effectively

implemented in consonance with the legislative intendment. Finally, the Supreme Court upheld the constitutional validity of Section 20(7) of the TADA Act excluding the applicability of Section 438 of Criminal Procedure Code as not amounting to deprivation of personal liberty of a person enshrined in the Article 21 of the Constitution. It also upheld the provisions of Section 20(8) of the TADA Act imposing the ban on the release on bail of a person accused of any offence punishable under the TADA Act or any rule made thereunder, except on the fulfilment of the two conditions mentioned in clauses (a) and (b) of that sub-section as not to be infringing the principle adumbrated in Article 21 of the Constitution.

26. The learned Advocate General, therefore, maintains that the provisions of S.6 of the KESMA cannot be held to be unconstitutional. As indicated in the preamble, KESMA is intended for the maintenance of essential services and the normal life of the community in the State of Kerala. Since the Legislature considers these to be of paramount importance, it has made the offences under Sections 4 and 5, which tend to interfere with the maintenance of essential services and normal life of community, cognizable and non-bailable and also declares that the persons arrested without warrant for reasonable suspicion of having committed the offence under the Act shall not be granted bail by a police officer or a court. In his submission, on the principle accepted by the Supreme Court in *Usmanbhai* (supra) and *Kartar Singh* (supra), the denial of the power of bail to the Court in Section 6 of KESMA cannot be held to be unconstitutional.

27. The contention urged on behalf of the State, though attractive at first blush, needs more stringent evaluation. Before we embark on an indepth analysis of the contention urged by the learned Advocate General, we may record here that the learned Advocate General frankly conceded that KESMA is not a Code in itself with regard to the procedure to be followed. He submits that the procedure to be followed is laid down by the Criminal Procedure Code, which, by reason of Sections 4 and 5, must be read in conjunction with the provisions of the Act and applied as modified thereby. He, therefore, submits that the provision for bail after sixty days in the proviso to Section 167(2) Cr.P.C. is not abridged or taken away.

28. It appears to us that, the learned Advocate General was compelled to make this submission, because the contingency under which the right to bail accrues under the proviso to Section 167(2) has been held to be the right of the accused by statutory mandate. In *Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi*, AIR 1990 SC 71, it was held by the Supreme Court that, an order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as 'an order on default'. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the contingency contemplated arises, the accused in custody should be released on bail, but at that stage, the merits of the case need not be examined. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 60/90 days. The Magistrate must pass an order of bail and communicate the same to the accused to furnish the requisite bail bond.

29. The situation arises under KESMA is a very peculiar one. As soon as the accused is arrested for an offence under KESMA, he has no right of bail, as no bail can be granted by the Court by reason of the legislative prohibition in S.6. It is conceivable that, in a situation of mass strike, which necessarily involves large numbers, the trial, albeit summary, may not be over in sixty days. After sixty days, the accused in custody is automatically entitled to bail under clause (a) of the proviso to Section 167(2). If the intention of the Legislature in enacting KESMA was to ensure that bail is denied to the arrested person so as to maintain the essential services and, the normal life of the community, we are afraid that, the said legislative intent would not be fulfilled. Particularly so, if the strike itself continued for more than 60 days and bail becomes mandatory to the accused after sixty days under the provisions of the proviso (a) to Section 167(2) of Cr.P.C. Secondly, Section 437 of Code of Criminal Procedure enumerates certain extraordinary contingencies. Under the proviso to Sub-section (1), in the case of persons who are under the age of 16 years or a woman or sick or infirm or if the Court thinks that it is just and proper for any other special reason, bail can be granted. This provision can be made applicable only if the power to grant bail is otherwise available to the court. If that power is totally denied to the Court, the discretion given to the court even under the special cases in Section 437 of Cr.P.C., which are intended for salutary reasons, would be of no avail. The

expression 'Court' is not defined in KESMA at all. It could conceivably include all courts exercising powers under the Code of Criminal Procedure, inclusive of the High Court. In fact, the submission of the learned Advocate General that, even under Sections 437 and 439 of Cr.P.C., the High Court or Court of Sessions cannot grant bail, by reason of the legislative prohibition in Section 6 of the KESMA, may be right.

30. In *Joginder Kumar v. State of U.P.*, 1994 SCC (CrI.) 1172, the Supreme Court had very critical and important observations to make with regard to the violation of human rights and infringement of fundamental rights by indiscriminate arrests. Observed, the Supreme Court, (vide paragraphs 9 to 12):

'9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forth rightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In *People v. Defore*, (242 NY 13, 24) Justice Cardozo observed:

'The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams case* (*People v. Adams*, 176 NY 351) strikes a balance between opposing interests. We must hold it to be the law until those organs of Government by which a change of public policy is normally effected shall give notice to the courts that change has come to pass'.

10. To the same effect is the statement by Judge Learned Hand, in *Fried Re*, (161 F2d 453):

'The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise.'

The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

11. This Court in *Nandini Satpathy v. P.L. Dani* (1978) 2 SCC 424 : AIR 1978 SC 1025 (AIR at p. 1032) quoting Lewis Mayers stated: (SCC p. 433, para 15)

'The paradox has been put sharply by Lewis Mayers:

To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right'.

Again (in AIR para 21, at p. 1033) it was observed: (SCC p. 436, para 23)

'We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individual possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since *Miranda v. Arizona*, 384 US 436, there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law breakers. Currently, the trend in the American jurisdiction according to legal journals, is that respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of laws....' (*Couch v. United States*, 409 US 322, 336). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice'.

12. The National Police Commission in its Third Report referring to the quality of arrests by the police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.3% of the expenditure of the jails. The said Commission in its Third Report at p. 31 observed thus:

'It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 percent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all'.

As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.'

If this is the situation noticed by the Supreme Court on the basis of decided cases and the report of the National Police Commission, we must, of necessity, be extremely slow to accept the contention of the State justifying the total ban on the power of the Court to grant bail.

31. In *Gouri Shankar v. State of Bihar*, AIR 1972 SC 711, while dealing with Section 167 of the Code of Criminal Procedure, the Supreme Court observed that, as its language shows, it deals with the stage when a person is arrested by the police on information that an offence has been committed. The object of the section is twofold:-one, that the law does not favour detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing, and, secondly, to enable such a person to make a representation before the Magistrate. If this be the true intendment of Section 167 of Code of Criminal Procedure, extra strong reasons must exist for denying this right of making a representation before the Magistrate. True, as the learned Advocate General pointed out, in cases like offences under the NDPS, TADA and Abkari Acts, where the legislative intendment is to severely curtail the right of the Court to grant bail,

such provisions have been upheld. But, it is worthwhile noticing that offences under the NDPS Act are punishable for terms extending from six months to 20 years and fine which may extend from Rs. 10,000/- to Rupees Two Lakhs. Similarly, the heavy nature of the punishment that the Court is to impose indicates that the offences against NDPS Act were treated as heinous crimes by Parliament intended to be severely punished. Similarly, under the TADA Act and the Abkari Act also, there are stringent punishments for offences committed thereunder as the Legislature considered the offences thereunder to be heinous crimes. When we look at the offences under KESMA, we notice that for these offences, the maximum punishment is six months imprisonment or fine extending to Rs. 1,000/-. They are also liable to be tried summarily. Whatever the disruption of the essential services and normal life of the community, the Legislature did not treat them as equal to heinous crimes under the several Acts, which we have enumerated. In any event, we cannot conceive of a parallel between the offences under the NDPS Act or TADA Act and the offences under Section 4 or 5 of KESMA.

32. In *Asokan v. State of Kerala*, 1998 (1) KLT 265, this Court considered the provisions of NDPS Act, which imposes severe limitations on the power of the Court to grant bail. It, however, pointed out that even under these provisions of law, if the Court is satisfied that there are reasonable grounds to believe that a person is not guilty of such offence, and that he is not likely to commit such offence while on bail, and if it is prima facie satisfied that reasonable grounds exist to hold that the accused is not guilty of such offence, then bail can be granted. This gives the freedom to the Court to look into the records and assess the probabilities. This Court emphasised that fundamental right of freedom is guaranteed even to the accused; but before it is curtailed, the court must see that sufficiently strong grounds exist for that. The offences under the Abkari Act and the NDPS Act are considered very serious; but, even in such cases, the freedom of the individual has to be given due consideration, which will of course, be subject to the larger public interest.

33. The learned counsel for the petitioners emphasise the golden rule of criminal jurisprudence that an accused is presumed to be innocent until proved to be guilty beyond reasonable doubt. Though it is possible for the Legislature to dispel this

presumption by explicit provision in an enactment, no such attempt has been made in KESMA. Hence, every accused who is arrested by a police officer without warrant still must be presumed to be innocent. Further, the KESMA is not intended to be a preventive detention law. A bare perusal of KESMA would suffice to show that it is not intended to preventively detain a person. If it is otherwise, it would fail for it contains no safeguards mandated by Clause (4) to (7) of Article 22 of the [Constitution of India](#).

34. The Universal Declaration of Human Rights, 1948, Article 3, declares that everyone has the right of life, liberty and security of person. Article 9 of the International Covenant on Civil and Political Rights, 1966 declares that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention, and further that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Particularly emphasised is Clause (4) of Article 9 which declares that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a Court, in order that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

35. In a series of judgments, the Supreme Court has held that while interpreting any domestic law, the principles of International law and International Covenants must be read into it, unless the domestic law provides to the contrary, irrespective of whether India is a signatory to such International Covenants or not. We may notice one such instance in Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625, at Para 28, the Supreme Court observed,

'In cases involving violation of human rights, the Courts must for ever remain alive to the International Instruments and Conventions and apply the same to a given case, when there is no inconsistency between the International Norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.'

36. There appears to be substance in the contention of the petitioners. We cannot evaluate the limitations on the right of judicial intervention at the pre-trial stage under S, 6 of KESMA in vacua. The salutary principle accepted by civilized nations, which have formed part of International Law and the guidelines in the International Convention on Civil and Political Rights must inform our assessment of the challenge to the total ban on the right of judicial intervention at the pre-trial stage.

37. The learned Advocate General strongly relied on the judgment of a learned Single Judge of the Andhra Pradesh High Court in *K. Mattesham v. State of A.P.* 1999 Cr.L.J. 324, rendered under the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, to contend that by reason of Section 18 of the said Act, the application of provisions of Section 438 Cr.P.C. are excluded. Relying on the Supreme Court judgment in *State of M.P. v. Ram Krishna Balothia*, AIR 1995 SC 1198, upholding the constitutional validity of Section 18, it was held by the Andhra Pradesh High Court that the matter of exclusion of Section 438 of the Code of Criminal Procedure has to be viewed in the context of the 'prevailing social conditions which give rise to such offences and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail'. The Andhra Pradesh High Court also took the view that, as a principle of interpretation of statute, a special law or provision shall always prevail over the general law or provision. So the provisions of Section 438 Cr.P.C. shall be deemed to be overridden by virtue of the inclusive provision in Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

38. The learned Advocate General cited for support the decision in *Kartar Singh v. State of Punjab*, (supra), where the Supreme Court upheld the constitutional validity of TADA Act, which curtail the powers of anticipatory bail under Section 438 of Code of Criminal Procedure. He urged that the procedure of summary trial is applicable to other offences also in Section 260 of the Code of Criminal Procedure at the discretion of the Court. He contends that the provisions of KESMA are transitory in nature and the prohibition would apply only for a

maximum period of six months during the operation of the notification. Since the Act is intended to deal with a transient phenomenon like wide spread strike on the part of the Government Servants in Essential Services, the trial of the persons arrested for an offence under the provisions of KESMA would necessarily be disposed of speedily. Hence, he contended that not grant-ing of bail is of no consequence. He further argued that, in any event, if the investigation is not over within sixty days, the statutory bail under the provisions of Section 167 Cr.P.C. would come into play and the accused will have to be released on bail by virtue of the legislative mandate.

39. In our view, the contentions urged on behalf of the State cannot be accepted. Every arrest of an accused person is a deprivation of his personal liberty and an inroad on the fundamental right guaranteed to him under Articles 21 and 22(1) of the Constitution. Every such person has a right of being produced before a Magistrate under Article 22(1) of the Constitution for the reason that at that stage itself a judicial forum can critically examine the necessity for arrest or continued detention on arrest of a person suspected of the offence, as the Supreme Court has pointed out in *re Madhu Limaye* (supra). This is all the more imperative where the arrest is not by a warrant issued by a court, but an arrest without warrant by a police officer. The production of the accused before the Magistrate is not an empty formality, but is intended to afford an opportunity to the accused to satisfy the judicial forum that the arrest was wholly untenable, illegal or otherwise proceeded on misconception of law and facts; it also enables the accused to satisfy the judicial forum that, even if the arrest is justified, the continued pre-trial detention in custody of the accused person is unnecessary. Any statute which infringes this fundamental right must fall foul of Articles 21 and 22 of the Constitution. We are also not in agreement with the submission of the learned Advocate General that the situation contemplated by KESMA is equivalent in seriousness to that under the NDPS Act, FERA Act, TADA Act or the Abkari Act. True, that serious maladies require strong remedies. But, we are unable to accept the contention of the State that a strike by the government servants can be viewed as seriously as an offence under the special statutes we have referred to above. We also cannot lose sight of the fact that, at the pre-trial stage, the presumption of innocence of the accused remains in tact. It is not as if the relevant statute, KESMA, has reversed the

presumption of innocence of the accused. At that stage, presumably innocent persons are held under arrest and continued to be detained under arrest without effective judicial intervention. It is not sustainable in the face of Articles 21 and 22 of the Constitution.

40. In *Dadu Alias Tulsidas v. State of Maharashtra*, (2000) 8 SCC 437, the validity of Section 32A of the NDPS Act, 1985 was challenged. Section 32A of the Act, in so far as it is relevant to us, provides that notwithstanding anything contained in the Code of Criminal Procedure or any other law for the time being in force, but subject to the provisions of Section 33, no sentence awarded under the NDPS Act other than Section 27 shall be suspended or remitted or commuted. While the Supreme Court upheld the provisions of Section 32A with regard to remand and commutation, it frowned upon the abrogation of the right of suspending the sentence by a judicial forum hearing an appeal there against. The Supreme Court took the view that providing a right of appeal under the statute, but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution, particularly when no mechanism is provided for early disposal of the appeal. It took judicial notice of the fact that there was large scale pendency of criminal litigation with no possibility of early hearing of the appeal and its disposal on merits at least in several courts in the country. The exercise of judicial discretion on well recognised principles is the safest possible safeguard for the accused which is at the very core of criminal law administered in India. The Legislature cannot, therefore, make law to deprive the courts of their legitimate jurisdiction conferred under the procedure established by law. The Court highlighted the observations of the Constitution Bench in *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124, that judicial review is the heart and sole of our constitutional scheme. In *S.P. Sampath Kumar* (supra), the Supreme Court held:

'It is also a basic principle of the rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of

law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality.'

The observations in *S.S. Bola v. B.D. Sardana*, AIR 1997 SC 3127, that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law, was also reiterated. The Supreme Court further held that, just as judicial review is an integral part of the Constitution, the filing of appeal, its adjudication and passing of appropriate interim orders is a part of the legal system prevalent in our country. Finally, it was held in para 25,

'Judged from any angle, the Section in so far as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the Court to suspend the sentence awarded to a convict under the Act is unconstitutional'.

At the same time, it was pointed out that, despite Section 32A being held as unconstitutional for ousting the right of the Court to suspend the sentence awarded, it would not entitle the accused to ask for suspension of the sentence as a matter of right in all cases, nor it would absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the NDPS Act, since, as held in *Union of India v. Ram Samujh*, (1999) 9 SCC 429, the jurisdiction of the court to grant bail is circumscribed by Section 37 of the NDPS Act.

41. In our view, in *Dadu Alias Tulsidas* (supra), is very illuminating on the manner in which the court must weigh the situation. KESMA is not intended to deal with heinous crimes affecting society at large such as offences under the NDPS Act, or the Abkari Act or the terrorists dealt with by the TADA Act. May be, strike by

government servants in essential services does disrupt the normal and smooth functioning of the society. But that does not mean that a person suspected of an offence under KESMA can be arrested by a police officer without a warrant and held indefinitely without recourse to a judicial forum till he is tried or enlarged by operation of the proviso (a) to Section 167(2) coming into operation. While the Legislature may, for good reason, circumscribe or even severely restrict or limit the power of the court to grant bail to an accused at the pre-trial stage, we are of the opinion that, total negation of such a right would amount to infringement of the fundamental rights under Articles 21 and 22 of the Constitution, which are available to all persons including persons suspected to an offence under KESMA.

42. The provisions of the Essential Services Maintenance Act, 1981 (Act No. 40 of 1981), a Central Act, intended for the same purpose as KESMA afford useful guidelines. The Preamble to the Central Act also states that it is an Act 'to provide for the maintenance of certain essential services and the normal life of the community'. There are similar provisions with regard to the declaration of essential services, power to prohibit strikes and lockouts in certain employments, and prohibition against going or remaining in strike by any person employed in any essential service. Section 5 of Act No. 40 of 1981 makes it an offence for any person to commence any strike which is illegal or going on or otherwise taking part in such strike and the punishment provided is imprisonment which may extend to six months or with fine which may extend to one thousand rupees or both. Section 6 of the Act No. 40 of 1981 makes it an offence for any person who instigates or incites other persons to take part in or otherwise acts in furtherance of a strike which is illegal and the punishment provided for imprisonment which may extend to one year, or with fine which may extend to two thousand rupees, or with both. There is also provision in Section 10 of the Central Act that, notwithstanding anything contained in the Code of Criminal Procedure, 1973, any police officer may arrest without warrant any person who is reasonably suspected of having committed an offence under the Act. Section 11 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences shall be tried in a summary manner by any Metropolitan Magistrate, or any Judicial Magistrate of First Class specially empowered in this behalf by the State Government. Section 12 provides that the provisions of the Act and any order

issued thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force. Despite all these stringent provisions, there is no doing away with the power of judicial review at a pre-trial detention stage. The provisions of the Code of Criminal Procedure with regard to bail and remand are not abridged by the Central Act. There is no provision which declares that no Court shall grant any bail to any person reasonably suspected of having committed an offence, who is arrested without warrant by a police officer. We do not think that the responsibility for maintenance of essential services and normal life of community in the State of Kerala is any more onerous than it is throughout India. Petitioners therefore, justifiably contend that there is no specific reason why a draconian provision should be introduced in Section 6 of KESMA which completely negates the power of the court to grant bail to a person who is reasonably suspected of having committed an offence under the Act.

43. The constitutional validity of the limitations in the Court's power to grant bail may be upheld depending upon the nature of the offence with which the statute deals and the menace to society which is sought to be curbed. But total negation of the right to move a judicial forum for consideration of the legality of the arrest and the necessity for continued pre-trial detention of the accused are, in our view, inconsistent with the fundamental rights guaranteed under Articles 21 and 22 of the Constitution. In our judgment, these are as much a part of the judicial process of the country, and the appellate court's power to suspend the sentence of an accused person noticed by the Supreme Court in *Dadu Alias Tulsidas* (supra). In fact, it appears to us that the case of the petitioners is on firmer ground. While the suspension of the sentence of an accused person would arise only after his guilt has been determined at trial, persons suspected of offences under KESMA are still presumed to be innocent. If in the case of persons held guilty, the abrogation of the power of the court to suspend the sentence is unconstitutional, in our judgment, total abrogation of the courts power to look into the necessity for continued detention of a person presumed to be innocent would, a fortiori, be unconstitutional.

44. The view which we are inclined to take would not defeat the purpose of KESMA. Merely because the Court is entitled to grant bail, it does not mean that the Court would or should grant bail indiscriminately. The Court would, of necessity, have to consider whether the accused is likely to continue with the commission of the offence if released on bail, and must take proper safeguards to ensure that he would not commit the offence, i.e., he would give up the strike and go to work or stop inciting the illegal strike or acts in furtherance of such illegal strike, while he is on bail. These are matters which could be taken care of by imposition of suitable terms while enlarging the accused on bail. As we said earlier, restrictions can be put on the liberty of the citizen and those restrictions can be moulded by the court, depending on the facts and circumstances of the case and the object of the legislation. But, to totally negate the power of the Court, as done in Section 6 of KESMA, would be unconstitutional and violative of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution.

45. In the result, we hold and declare that the provisions of Section 6 of KESMA, insofar as it provides that any person who is reasonably suspected of having committed an offence under this Act and arrested by a police officer without warrant, 'shall not be granted bail by a court', is unconstitutional. By reason of Article 13, that portion of Section 6 of KESMA is void for inconsistency with the fundamental rights of the petitioners guaranteed under Articles 21 and 22 of the Constitution, and unenforceable. We, therefore, strike down the offending provision of Section 6 of KESMA as unconstitutional.

The Original Petitions are allowed as above.