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Court : Rajasthan

Decided On : Nov-29-1965

Reported in : 1966CriLJ1338

Judge : I.N. Modi and; V.P. Tyagi, JJ.

Acts : Constitution of India - Articles 19, 226, 352 and 358; Defence of India Rules, 1962 - Rule 30(1); Defence of India Act, 1962 - Sections 40(1) and 40(2); Code of Criminal Procedure (CrPC) - Sections 491

Appeal No. : Criminal Misc. Habeas Corpus Appln. Nos. 402, 405, 527, 529, 558, 559, 582, 583, 584, 597, 598, 619

Appellant : Ghasi Ram and ors.

Respondent : State and ors.

Advocate for Def. : Amrit Raj Mehta, Dy. Govt. Adv.

Advocate for Pet/Ap. : N.M. Kasliwal and; S.M. Jain, Advs.,; C.L. Agrawal,;

Judgement :

Modi, J.

1. This is a group of fourteen applications for a writ of Habeas Corpus under Article 226 of the Constitution by the several petitioners therein praying for their

release from detention under the orders made under Rule 30(1)(b) of the Defence of India Rules, 1962 (hereinafter called the Rules). As some of the points raised in these petitions are common, was propose to dispose of them by a single judgment As, however, some of these petitions are based on some additional facts which are peculiar to them, we think that it would be proper to deal with them in three sub-groups The first subgroup consists of petitions Nos. 527, 558, 559, 582, 583, 584, 597, 598, 619 and 735: the second consists of petitions Nos. 405, 415 and 529, while the third consists of No. 402 only. We shall take up the first sub-group first,

2. As illustrative of the category of cases of the first sub-group, we may state the facts of case No. 527 of 1965. The petitioner claims to be a follower of the Marxist Communist Party. By an order dated the 29th December, 1984, issued under Rule 30 of the Rules, his detention was ordered by the District Magistrate, Pali. The order runs as follows:

'Whereas, I, H.S. Ramani District Magistrate of Pall District, am satisfied with respect to Shri Mohan Puri S/O Sardar Puri alias Mathupuri, resident of Bali, Pali District that with A view to preventing him from acting in any manner prejudicial to the defence of India Civil Defence, the public safety and the maintenance of public order it is necessary to detain him.

Now, therefore, in exercise of powers conferred by Clause (b) of Sub-rule (1) of Rule 30 of the Defence of India Rules. 1962, read with Order No. F. 7/1 (16) Home (AGr. I)/63 dated the 4th of November, 1963, made by the Government of Rajasthan, I hereby Order that the said Shri Mohan Puri be detained in Central Jail Jodhpur as a detenue of the C/2 class under the Rajasthan Conditions of Detention (Defence of India) Order, 1962.

Sd/

(H. S. Ramani] District Magistrate, Pali.'

3. The petitioner was arrested on the 30th December, 1964, and was thereafter lodged in the Central Jail, Jodhpur. Thereafter he has filed the present petition

challenging his datention as illegal. The prinicipal points raised by him may be summarised as follows:-

(1) The detention of the petitioner is contrary to Article 19 of the Constitution notwithstanding the fact that the President has issued a proclamation under Section 352 that a grave emergency existed in this country whereby its security was threatened,

(2) The continuation of the proclamation of emergency which was made some two years ago at the time of the Chinese aggression against this country could not be justified at the date of his detention.

(3) The detention of the petitioner is mala fide as it has been carried out under the instructions of the Home Minister of India to detain members of the Left Communist Party and the detaining authority that is the District Magistrate, Pali, had not at all applied his own mind to his case and was not satisfied of the necessity of his detention.

(4) In any case, the District Magistrate Pali was not authorised to order his detention under the Rules.

4. Before we proceed to dispose or. these contentions, we should like to point out that they are more or less common to all the petitions before us though, as already stated, some additional points arise in the remaining petitions, and, therefore, in so far as these common points are concerned, our decision herein will govern all the applications before us. We now proceed to dispose of these points in the order in which we have set them out above.

5. Taking up the first point first, it is indisputable that the President declared a state of grave emergency by issuing a Proclamation under Article 352 of the Constitution on the 26th October, 1962, which declaration was made presumably in view of China's attack on the north-extern frontier of the country in September, 1962, and which is still in force. On the same day the President promulgated the Defence of India Ordinance and thereafter Rules were made thereunder on the 5th November, 1962. On the 12th December, 1962, the Ordinance was replaced by

the Defence of India Act which continued in force the Rules made under the Ordinance. As a direct result of the Proclamation of Emergency issued by the President, the operation of Article 19 of the Constitution stood and stands completely suspended by virtue of the provision contained in Article 358 of the Constitution.

On the 3rd November, 1962, in the meantime, the President also made an order under Article 359 which reads as follows;

'G.S.R. 1464.--In exercise of the powers conferred by Clause (1) of article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under Clause (1) of article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder.'

By an amendment dated the 11th November, 1962, in this order the expression 'Article 21' was substituted by the expression 'Articles 14 and 21'. We may here read the relevant portion of article 359 which is as follows:-

'Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.'

The resultant situation in law was and is that the right of any person to move any court for the enforcement of the rights referred to in the order issued by the President under article 359 has been suspended (though these rights themselves are not suspended) provided that he is deprived of any such rights under the Defence of India Ordinance, 1962, (later replaced by the Defence of India Act, 1962) or any rule or order made thereunder. On the other hand, so far as Article

19 goes, it stands suspended altogether during the pendency of the Proclamation of Emergency under Article 352 read with Article 358 and such suspension removes the fetters created by the legislative and executive powers of the State by Article 19, and the position is that if the Legislature makes laws or the Executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of emergency or even thereafter. As soon as the Proclamation may cease to operate, the legislative enactments passed and the executive actions taken during the course of emergency shall become inoperative to the extent to which they conflict with the rights guaranteed under Article 19, because when the emergency is so lifted, Article 19 which was suspended during the emergency would be automatically revived and start operating. Article 358 however is a clear authority for the proposition that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over.

6. We may as well refer in this connection to Article 32 which guarantees the enforcement of the fundamental rights contained in Chapter III of the Constitution of which Article 19 forms a part. But Clause (4) of this article itself provides that the right guaranteed thereunder may be suspended as provided for by the Constitution. The Constitution doubtless provides for such a situation when the President makes a declaration that a grave emergency has arisen whereby the security of the country or a part thereof has been threatened and throughout the period such Proclamation of Emergency remains in force under Article 352 of the Constitution. If we may say so, with respect, this is, as it should be, because while the State does or ought to guarantee to the individual, certain fundamental rights to ensure to him freedom and security to develop his own personality, it is perhaps even more important that in times of emergency when the life of the State itself is in danger, the fundamental rights of the individual must yield to the supreme right of the State to protect itself, for if this is not done, the community at large may lose its very existence and with it the individual himself. Perhaps it is hardly necessary to add that this limitation to which article 32 is subject cannot but equally apply to article 226 of the Constitution whereunder the writ jurisdiction of the High Court is invoked for the achievement of the same purpose. If any authority is needed for this proposition, we would invite reference to Makhan Singh v. State of Punjab,

AIR 1964 SC 381.

7. This being the state of the law as a result of a declaration of a grave emergency in our country by the Presidential order referred to above, it is futile for the petitioner to argue that his detention is contrary to Article 19 of the Constitution which has been completely suspended for the period of the emergency. There is, therefore, no force in this plea and we hereby reject it.

8. The second contention is that there was no justification for the continuance of the Proclamation of Emergency at the date of the petitioner's detention, as the Proclamation was made at the time of the Chinese aggression in September, 1962, and consequently the exercise or the emergency powers was illegal. The short answer to this contention is that a declaration as to a grave emergency having arisen in our country has been left by our Constitution under Article 352 to the satisfaction of the President and may also be revoked by him by a subsequent Proclamation. It has been further provided in that article that such a Proclamation shall be laid before each House of Parliament and shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. It is not the petitioner's case before us that the Proclamation was either revoked by a subsequent proclamation or that it was not approved by resolutions of both Houses of Parliament with the result that the Proclamation is still in force. Now whether the Proclamation of Emergency should have been thus allowed to continue or remain in force is a matter which by our Constitution has been left exclusively to the discretion and judgment of the President or in the last resort of the Parliament, and, rightly so, because it is these organs which know the requirements of the situation and it is not for the courts to interpose themselves in a matter like this. Indeed, any other view seems to us to be impossible. This point, therefore, also fails and is hereby repelled.

9. Turning next to the third point as regards the petitioner's arrest being mala fide, the contention is that the arrest of the petitioner (as also of several other communists, some of whom are petitioners before us) has been ordered at the dictation of the Home Minister of the Government of India, and the District

Magistrate who has ordered the detention has not been personally satisfied within the meaning of rule 30 of the Rules that the detention of the petitioner was called for any of the purposes mentioned thereunder and consequently such detention cannot be accepted as legal and deserves to be struck down. In answer to this charge of mala fides, the District Magistrate concerned who is the detaining authority has filed an affidavit in each of these cases in which he has sworn that the papers relating to the concerned petitioner had been placed before him and that he had given thorough consideration to them as a result of which he came to the conclusion that his petitioner's detention was necessary under the Rules with a view to preventing him from acting in any manner prejudicial to the defence of India, civil defence, the public safety and the maintenance of public order, and, therefore, he had issued a warrant for his arrest and detention under the Defence of India Rules and that he had not ordered such arrest because of any pressure or order either from the Union Government or from the State Government or from anybody else. We should like to point out here that the burden to prove mala fides lay squarely on the shoulders of the petitioner and we are not satisfied that he has been able to establish this charge on the material placed before us.

10. The only other circumstance that was relied on before us in this behalf was that the Deputy Home Minister of the State Shri Niranjan Nath Acharya had made a statement on the floor of the State Assembly on the 8th March. 1965, that the arrest of the petitioner as also of the other communist detenues in Rajasthan had been made under the instructions of the Union Home Ministry, and in this connection a copy of the news item from some local daily paper in this State was also produced before us. In order to satisfy ourselves on this point, we called upon the respondents to produce for our perusal the authorised version of the proceedings 6f the State Assembly for the 8th March and this has been done. We do not find that the Deputy Home Minister Shri Acharya made any such statement as has been attributed to him. Indeed it has been conceded before us that these proceedings do not bear out the allegation imputed to Shri Acharya. In these circumstances and having regard to the affidavit produced before us on behalf of the District Magistrate of the district concerned who is the detaining authority, we have no hesitation in coming to the conclusion that the petitioner has failed to establish the charge of mala fides against the detaining authority. This point,

therefore, also fails.

11. This brings us to the fourth point in this series which has been strenuously pressed before us in all these cases, namely that the District Magistrates of various districts who have functioned as the detaining authorities therein were not at all authorised to issue the various orders of detention as a result of which these petitioners were arrested and detained. The argument is put in this way. Section 40 of the Defence of India Act, it is urged, deals with the power to delegate qua the Central Government as well as the State Governments. This Section reads as follows:

'Power to delegate, (1) The Central Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged also.

(a) by any officer or authority subordinate to the Central Government, or

(b) whether or not the power or duty relates to a matter with respect to which a State Legislature has power to make laws, by any State Government or by any officer or authority subordinate to such Government, or

(c) by any other authority.

(2) The State Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed on the State Government or which, being by this Act or any such rule conferred on imposed on the Central Government, has been directed under Sub-section (1) to be exercised or discharged by the State 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 Union territory) an officer or authority subordinate to the Central Government.'

We may as well reproduce here Clause 15(1) of Section 3(2) of the Defence of India Act.

'Without prejudice to the generality of the powers conferred by Sub-section (1), the rules may provide for and may empower any authority to make orders providing for all or any of the following matters, namely:

.....

15. notwithstanding anything in any other law for the time being in force, 'the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate) suspects, on grounds appearing to that authority to be reasonable, or being of hostile origin or of having acted, acting, being about to act or being likely to act in a manner prejudicial to the defence of India and civil defence, the security of the State, the public safety or interest, the maintenance of public order, India's relations with foreign States, the maintenance of peaceful conditions in any part or area of India or the efficient conduct of military operations, or with respect to whom that authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him form acting in any such prejudicial manner.'

On this state of statutory provisions it was argued that while the Central Government is enabled to delegate the power to detain or to the various other things permitted by the Act or the Rules with which we are not concerned to any officer or authority subordinate to the Central Government or to any officer or authority subordinate to a State Government or for that matter any other authority and also to retain such power itself, the State Government could delegate such authority to an officer not below the rank of a District Magistrate completely divesting itself of such authority or not at all. In support of this interpretation, reliance was placed on behalf of the petitioner on the presence of the word 'also' after the words 'be exercised or discharged' in the introductory part of Sub-section (1) of Section 40, which, it was contended, was absent in the second sub-section pertaining to delegation of its authority by a State Government. Our attention was then invited to a notification issued by the Home Department of the State published in the Rajasthan Gazette Extraordinary Part IV dated the 7th November, 1963.

'Notification Jaipur, November 5, 1963.No. F. 7/1 (16) Home (AGr. I)/63. Inexercise of the powers conferred by Sub-section (2) of Section 40 of the Defence of India Act,1962 (Central Act 51 of 1962), the State Government hereby directs that the power conferred onit by Clause (b) of Sub-rule (1) of rule 30 of theDefence of India Rules, 1962, to direct the detention of a person, shall 'also' be exercisable byeach of the District Magistrates in the State ofRajasthan, within their respective jurisdiction.'

(The underlining here into ' ' is ours).

It is not contended before us that any of thedetaining authorities in these cases were not District Magistrates as such; but what is contendedis that this notification travels beyond Sub-section (2) of Section 40 in so far as power was givento detain under the Rules to District Magistratesand the same power was retained by the Statewhich, according to the petitioners, is not permissible under Sub-section (2), and, therefore, theentire notification is illegal and inoperative.

Alternatively it was argued that even if we came to the conclusion that such alternative powers could be given to the District Magistrates, the power that was given to them was merely to direct the detention of a person under Clause (b) of Sub-rule (1) of Rule 30 and that the duty of subjective satisfaction under Clause (1) had not been delegated to the District Magistrates at all under this notification and consequently the latter had no authority to arrive at such satisfaction, and, therefore, all the detention orders were illegal.

It was further urged in this connection that Section 40 talked of both power and duty' and that what had been delegated under the notification of the 5th November was the power to detain but not the duty of subjective satisfaction under Rule 30(1), and, therefore, the duty of being satisfied having not been really delegated to the District Magistrates who were the detaining authorities in these cases, their arrogation of such authority was wholly unauthorised and incompetent with the result that all that they could do was, after the State Government had satisfied itself with respect to a particular person that it was necessary to prevent him from acting in any manner prejudicial within the meaning of Sub-rule (1) of Rule 30 to order his detention and do no more.

12. We have carefully examined these contentions and are unable to see any force in them.

13. Dealing with the first argument under this head, we should like to point out that although the word 'also' has been used in Sub-section (1) of Section 40 which has not been used in the second sub-section, we are not prepared to hold that by the language used in that subsection, the State Government must have either delegated its entire authority to the District Magistrates without retaining any for itself in that behalf or not at all, and the absence of the word 'also' in the second clause does not make any difference to the correct legal position. It seems to us in the first place that the expression 'in such circumstances and under such conditions' occurring in Sub-section (2) is enough to make such an alternative delegation possible. In the second place, we are of opinion that when an authority delegates its power to another, it does not follow that that authority thereby divests itself of such authority altogether. In other words, when the delegator delegates its authority to the delegate, its authority by itself does not cease, for, it may choose to revoke such authority which it could not do if it did not retain the authority itself. In support of this view, we may refer to Huth v. Clarice, (1890) 25 Q.B.D. 39, where it was held that the word 'delegate' in its usual sense did not mean a parting with or denudation of power or authority by the person who grants the delegation, but rather the conferring of authority by him upon some one also so that the delegate may also do what otherwise he alone could do. Similarly in Smith's 'Judicial Review of Administrative Action the following passage at page 177 thereof is instructive:

'Although in a few specialised forms of administrative relationships delegation is tantamount to abdication, these are undoubtedly exceptions to the general rule. An authority which delegates its powers does not and cannot divest itself of them by mere implication, and in so far as it may purport to do so by express words its act will, as a general rule, be ineffective in law.'

We are, therefore, unable to see any force in this contention.

14. As far the alternative argument raised in this connection, namely, that the only authority that has been delegated to the District Magistrate under the notification of

the 5th November, 1963, was tne power to detain and not the antecedent duty of being satisfied that there was need to detain, we think that the argument is ingeneous but unsound. As we look at Clause (b) of Rule 30(1) we have no hesitation in saying that we cannot read it sensibly unless we react along with it the main part of Sub-rule (i) which precedes it. The power or authority to direct that a person be detained, having regard to the plain meaning of the rule as a whole, is conditioned on its coming to the conclusion that it is satisfied with respect to such person that for effectuating any of the purposes mentioned in Sub-rule (i), it is necessary to detain him, and it is only then that it is competent for it to detain such person and not otherwise. To put any other interpretation on Clause (b) divorced from what is contained in Sub-rule (i) of which it is a part and parcel could be doing violence to both the language as well as the intendment of the provision, and we are clearly of the opinion that the power and the duty or the duty and the power whichever way we may put it are so inter-mixed with and corelated to each other that they must go together. If it be necessary to cite any authority for this proposition, we would refer to the decision of their Lordships of the Supreme Court in Syed Shah v. Commr. of Wakfs, AIR 1961 SC 1095 which lays down that where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and vice versa the delegation of the powers takes with it the duties also, and it was further pointed out that the proposition hardly needed any authority.

15. The only correct conclusion to come to, therefore, is that the delegation made in favour of the District Magistrates by the notification in question was in no way improper and consequently the District Magistrate had not only the power to direct the detention of a person falling within the mischief of Rule 30(1) but also was invested with the duty to satisfy himself that he so deserved to be detained upon which state of things alone he could order the detention but not otherwise. It must follow, therefore, that the detentions ordered in the cases before us by the various District Magistrates empowered under the notification of 5-11-1963 to detain under Rule 30 of the Rules cannot be struck down on this ground either.

16. There is no other point raised in these petitions and, therefore, we hold that they are without any substance and must fail.

17. We next turn to cases Nos. 405, 415 and 529 of 1965. In these cases the additional point that was raised before us was that the detention of me three detenus herein was not in accordance with Rule 30 and therefore we should strike it down. The principal argument was that me District Magistrate had, on the very face of things, some confused notions about the real scope and content of Rule 30. Thus in Radhavallabh's case (No. 403 of 1965), and the same filing is true of the other cases in this sub-group, while the District Magistrate had recorded in his order that he was satisfied with respect to this detenu that it was necessary to detain him with a view to prevent him from acting in any manner prejudicial to the defence of India, civil defence, public safety and maintenance of public order and therefore he ordered his detention, in the affidavit filed by him while denying the allegations of mala fides against him, he swore as follows:

'It was issued after thorough consideration of the material which was placed before me from which I came to the conclusion that this was necessary with a view to prevent him from acting in any manner prejudicial to the defence of India, civil defence, public safety and the maintenance of the law and order''.

(The underlining (here into ' ') is ours). In the earlier paragraph he had stated that:

'After applying my mind to it (the material) I found that it was a case in which I must detain him under the Defence of India Rules and hence for the reasons mentioned in the detention order I issued the detention order.'

More or less the same kind of confusion is discernible in the affidavits filed in the other two oases in this series. Basing their contention on the majority decision of their Lordships of the Supreme Court in Dr. Ram Manohar Lohia v. State of Bihar, Writ Petn. No. 79 of 1965: (AIR 1966 SC 740) it was strongly pressed before us on behalf of these petitioners that a detention for reasons of maintenance of law and order, among other matters, did not fall within the true scope of Rule 30 because there was a real distinction between the expression 'public order' and 'law and order' and therefore the detention in these cases was illegal and should be struck down. Interpreting these words, Sarkar J. observed as follows:

'It would, therefore, be legitimate to hold that by maintenance of public order what was meant was prevention of disorder of a grave nature, a disorder which the authorities thought was necessary to prevent in view of the emergent situation. It is conceivable that the expression 'maintenance of law and order' occurring in the detention order may not have been used in the sense of prevention of disorder of a grave nature. The expression may mean prevention of disorder of comparatively lesser gravity and of local significance only. To take an illustration, if people indulging in the Hindu religious festivity of Holi become rowdy, prevention of that disturbance may be called the maintenance of law and order. Such maintenance of law and order was obviously not in the contemplation of the Rules.'

Again, Hidayatullah J. speaking for himself and Bachawat J. has expressed himself as follows;

'Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclyasmic happenings. Does the expression 'public order' take in every kind of disorders or only some of them? The answer to this serves to distinguish 'public order' from 'law and order' because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(i)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.'

18. Again Mudholkar J. who agreed with the majority judgment observed as follows:

'The expression 'law and order' does not find any place in the rule and is not synonymous with 'public order'. It seems to me that 'law and order' is a comprehensive expression in which would be included not merely public order, but matters such as public peace, tranquillity, orderliness in a locality or a local area and perhaps some other matters. 'Public order' is something distinct from order or orderliness in a local area. Under Rule 30(1) no power is conferred upon that authority to detain a person on the ground that it is necessary so to do in order to prevent that person from acting in a manner prejudicial to the maintenance or order in a local area.'

The law must, therefore, be taken as settled that 'public order' and 'law and order' mean two entirely distinct things, and whereas a threat to one would attract action under Rule 30, a like threat to the other would not. Even so, the learned Deputy Government Advocate appearing for the State argued that so far as the orde'rs detaining these detenues are concerned, they have inter alia mentioned the expression 'maintenance of public order' and not merely 'law and order' and that we should look at the order alone in order to see whether their detention is lawful or not, and that we should not look to the sufficiency of the reasons. In support of his submission, learned counsel referred us to various passages from the judgments of the learned Judges' of the Supreme Court in Ram Manohar Lohia's case, writ petn. No. 79 of 1965: (AIR 1966 SC 740) (supra) wherein they have stressed that courts are only entitled to look at the face of the order and that it is well settled that they cannot inquire into the grounds on which the detaining authority thought that it was satisfied that it was necessary to make an order of detention and further that if an order of detention was on the face of it valid, the court was bound to stay its hands and uphold the order.

On the other hand it was argued by learned counsel for the detenus that where the detaining authority itself brought material on the record denoting inter alia his notions as to his own authority to act under Rule 30, and how he acted thereunder, the court cannot shut its eyes to it, and, therefore, if both the affidavit and the order

are read together in such circumstances it could not but be held that the District Magistrate had rather confused notions about the scope of his authority under Rule 30, and that he had ordered the detention of the persons not only because they did not pose a threat to the public order only out also the law and order and thus acted outside the scope of the Rules.

19. The controversy thus raised in these cases is not free from a certain amount of difficulty. We should like to observe at the outset that as a result of the President having by an order under Article 359 suspended the right of any person to move any court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution during the period of emergency in so far as he has been deprived thereof under the Defence of India Act or the rules made thereunder he cannot 'move any court for the enforcement of such a right whether under Article 32 or 226 of the Constitution and he has therefore no locus standi to enforce such a right during the emergency. It appears to us to Be also well settled that courts cannot inquire into the sufficiency of the grounds on which the Government, or, any other detaining authority thought that he was satisfied that it was necessary to make an order of detention and that courts are only entitled to look at the order itself. It seems to be equally well settled, however, at this date that there are a few exceptions to this rule.

20. Thus it has been held that the detention can be challenged on the ground that it is in violation of the mandatory provisions of the Act or the Rules on the ground that the right of the detenu to move for his release on such a ground cannot be affected by the Presidential order. It has also been held that if a detenu contends that the detaining authority had no competence to order his detention by virtue of any fundamental defect in his authority to do so such a plea can be taken as it cannot be said to be barred under the order of the President issued under Article 359. Yet again the detenu can move the court for a writ of Habeas Corpus on the ground that his detention has been ordered mala fide because such exercise of power would be wholly outside the true scope and ambit of the Defence of India Act and the Rules. Thus in such a case an order though on the face of it may be good is bad for some fundamental reason de hors it. Normally therefore we feel that if an order of detention on the face of it is good, we would not be entitled to

enquire into the reasons or the sufficiency thereof for which it was passed. See AIR 1964 SC 381 and Ram Manohar Lohia's case, Writ Pern. No. 79 of 1965: (AIR 1966 SC 740) (supra).

21. While all this is so, the difficulty that has been created in these cases is on account of some material which has been brought by the detaining authority himself and which snows that that authority made no distinction between a threat to or maintenance of a mere law and order from a threat to or maintenance of public order. The question is how we should act in a case like this? Must we uphold the order of detention simply because it is good on the face of it, though from the affidavit filed by the detaining officer himself, we cannot escape the feeling mat he made no distinction between law and order and public order? In such cases ft seems to us to be difficult for the court to shut its eyes to such a situation and still hold that it will look at the order itself and nothing else. And it further seems to us that if we are left with a doubt whether the rules have been strictly complied with by the detaining authority, for their strict compliance cannot be overlooked in a matter which touches the personal liberty of a citizen, then the benefit of such doubt must go to the detenu. We would refer in this connection to the judgment of Sarkar J. in Dr. Ram Manohar Lohia s case, Writ Petn. No. 79 of 1965: (AIR 1966 SC 740) (supra) where the learned Judge observed as follows:

'If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu'. It is certainly more than doubtful whether law and order means the same as public order.'

It is correct that the order of detention mentions certain other grounds also such as threat to defence of India, civil defence and public safety, that however would not improve matters because it is impossible to visualise to what extent the valid and the invalid grounds operated on the mind of the authority concerned to arrive at the satisfaction required by the rule. We may also mention in passing tnat it was never argued before us that the expression 'law and order' as used in the affidavits in these cases was used merely as a typing error or other kind of slip. We have pondered deeply over these cases and on the whole we are inclined to the conclusion that in a situation like this, we should lean in favour of the liberty of the

subject and hold that the detention orders in these cases do not conform to the Rules.

22. This brings us to the last case, Ghasi Ram v. State of Rajasthan and others (No. 402 of 1965). The facts of this case are somewhat peculiar and require to be stated at some length. This defendant first detained by the order of the officiating collector and District Magistrate Jhunjhunu dated 30th December, 1964. He filed a petition for the Writ of Habeas Corpus from jail on the 18th February, 1965. This was forwarded to this Court by the jail authorities as late as the 5th March, 1965, and was received in this Court on the 8th March, 1965. The case came up for hearing in the first instance before a bench of this Court on the 19th April. 3965. It remained part-heard on that date and was fixed for the next following date, that is, the 20th April, 1965. It was then adjourned at the request of the Government Advocate to the 29th April, 1965, to enable him to produce a copy or the judgment of the Supreme Court in Ajaib Singh v. State of Punjab which was decided on 2-2-1965: (reported in AIR 1965 SC 1619). The case thus came before the Court again on the 29th April, 1965 on which date it was represented by the Government Advocate Shri M. M. Vyas to the Court that the Government had released the petitioner. It was in this state of things that the following order was passed:

'The Government has released the petitioner. The writ petition has become infructuous and it is, therefore, dismissed.'

The contention of the petitioner, however, is that he was never released from jail and that what had really happened was that the order dated the 30th December 1964 had been cancelled by an order of the Government dated the 28th April 1965 because of some technical flaw in the passing of the said order of detention and by another order of the same date, he was again ordered to be detained by the Government, Both these orders have been brought on the record and are not disputed.

23. It was strenuously contended before us in these circumstances that, first, the detention of the petitioner was mala fide and, second, that the second order of detention which was passed prior to the court's order dated 29th April, 1965, was null and void and of no legal effect.

24. It may be stated at the very outset that the Government seems to have realised that the first order of detention which was passed by the officiating District Magistrate, Jhunjhunu, against the petitioner was bad in law inasmuch as the officiating District Magistrate was not a competent authority within the meaning of Rule 30 read with Section 3(15) of the Act to pass such an order, and, therefore, that order seems to have been cancelled by the Government. To that we do not object. But what is seriously objectionable in this case is that while the Government had cancelled the earlier order of detention prior to the 29th April, 1965, when a bench of this Court had dismissed the petitioner's writ application, it having been represented to it that the detenu had been released, the incontrovertible facts are (1) that the detenu had never been released as a matter of fact and (2) that simultaneously with the cancellation of the earlier order of detention a new order of detention had been served on him and (3) that this latter fact had not been brought to the notice of the Court and had been suppressed from it. We have no doubt that if the true facts had been brought to the notice of the Court, there should have been no occasion for the dismissal of the writ application, and as the petitioner was still under detention, he was perfectly entitled to invite the decision of the court on the legality thereof.

25. The learned Deputy Government Advocate appearing for the State submitted before us that the statement which was made before the Court on the 29th April, 1965, was made because the detention of the petitioner under the earlier order of detention dated the 30th December, 1964, had come to an end and that the proceeding before the Court was to question that detention.

26. We should like to point out in this connection that what has to be considered in a proceeding for a writ of Habeas Corpus or under Section 491 Cr. P. C. is the legality of the detention of a particular person not with reference to a particular order of detention only but with reference to his detention as it may happen to exist at the date of hearing. In support of this view reference may be made to Subodh Singh v. Province of Bihar, AIR 1949 Fat 247. Indeed any other view may lead to some very absurd results because it is possible in such a case that the Court may order the release of the detenu because of certain grounds and the second order of detention may substantially be based on the same grounds. We may also invite

attention to a decision of the Federal Court in Basanta Chandra v. Emperor, AIR 1945 FC 18 wherein it was held that the analogy of a civil proceeding in which the rights of parties have ordinarily to be ascertained as on the date of the institution thereof cannot be applied to a habeas corpus proceeding and consequently if at any time before the court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention.

27. In this state of the law, we have no hesitation in holding that it was and must be the duty of the Government in such cases to bring to the notice of the Court all orders of detention which might have been passed against the detenu upto the date of the hearing of his petition by the court for release from detention.

28. An almost parallel case seems to have come up before the Madras High Court in In re A.K. Gopalan, AIR 1953 Mad 41. The facts of this case were these. The petitioner there was ordered to be set at liberty forthwith on the 22nd February, 1951, as a result of the judgment which was delivered by the High Court on that date. The petitioner was present in court at the time of the order announcing his release and after he and his advocate had proceeded a few yards from the gate of the High Court the petitioner was again arrested. It appeared that the second order of detention bearing the date 22nd February, 1951, was made before the court announced its judgment on that date which fact was not disputed before the, Court. It was urged on behalf of the Government that after the arguments on the first petition were over, the Government were informed by their legal adviser that the petitioner would, in all probability, be released by the High Court on the technical contention that the order passed against him under S, 12(2) of the Preventive Detention Act did not specify the period of his detention. It was further urged that in view of the petitioner's antecedents and his violent activities, the Government were satisfied that in the event of his release by the High Court, he would go underground at once and carry on subversive activities prejudicial to the security of the State and maintenance of public order, and, therefore, immediate action was called for and it was in these circumstances that the Government issued a fresh order of detention on the 22nd February, 1951.

The position, therefore, was that the second order of detention was within the knowledge of the Assistant Commissioner of Police, among others, who was actually present in court at the time of the hearing of the case and yet no steps were taken to bring the order to the notice of the Court. It was in these circumstances held that it was the duty of the Government to have stated frankly before the Court immediately after the judgment was pronounced that in view of the imperative necessity and the immediate danger to the State and its security, a fresh order of detention was proposed to be passed against the detenu and. therefore, he was going to be arrested. It may be permissible to point out in parenthesis that the second order of detention could have been served on the petitioner before the judgment releasing him was announced in all the circumstances of the case and his detention thereunder might well have been brought to the notice of the Court, Be that as it may, it was held in these circumstances that the second order lacked bona fide and the detenu was ordered to be released forthwith.

29. The present case, in our opinion, stands on a much stronger footing inasmuch as here the order of detention was obviously prepared, passed and served on the petitioner before the court dismissed his writ application it having been represented to it that he had been released by the Government and consequently his writ application became infructuous. The learned Deputy Government Advocate cited some cases before us showing that a second order of detention could be validly served on a detenu after the first (see e.g., Ghulam Ahmad v. State. AIR 1954 J and K 59 (KB)) but with that proposition we have no quarrel whatsoever. What is greatly to be deplored in this case is that the second order of detention having been passed by the Government and served on the petitioner was not brought to the notice of the Court. And from this it can legitimately be inferred that the order lacked bona tides. There can be no question that an order of detention passed under the Defence of India Act read with its Rules can be struck down if it can be successfully shown to be characterised by mala fides. See Makhan Singh's case. AIR 1964 SC 381 (supra). It was also pressed before us that the second order of detention having been passed and served on the petitioner prior to the court's order dismissing his writ application on the ground that he had already been released should be held to be a nullity, and reliance was

placed in support of this proposition on AIR 1949 Pat 247 (supra). But having regard to the conclusion at which we have arrived above on the question of lack of bona fides, we do not think it necessary to pursue this point and make a considered pronouncement thereon.

30. For the reasons mentioned above the petition of detenu Ghasiram must succeed.

31. The net result is that we dismiss petitions Nos. 527, 558, 559, 582, 583, 584, 597,598, 619 and 735 and allow petitions Nos. 405,415, 529 and 402 and hereby direct the releaseof the several petitioners in the last mentionedoases namely detenus Radhavallabh, Het Ram,Sabal Singh and Ghasi Ram forthwith.

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