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Court : Chennai

Decided On : Dec-13-1965

Reported in : 1967CriLJ85

Judge : Anantanarayanan and; Ramakrishnan, JJ.

Appellant : P. Kasinathan and ors.

Respondent : Chief Sectetary to Govt. and anr.

Judgement :

Anantanarayanan, J.

1. This group of writ petitions under Article 226 of the Constitution for the issue of writs of Habeas Corpus in the concerned cases, raises questions of the constitutional propriety, legality and good faith of the relevant detention orders made by Government against the writ petitioners (detenus) which are of considerable interest and significance. We might immediately state that, in all the cases, the orders of detention purport to have been issued under Rule 30(1)(b) and Rule 30(4) of the Defence of India Rules 1962; in all of them, the Government of Madras state to be satisfied that the detention of the concerned detenu was necessary, in their view, to prevent him 'from acting in any manner prejudicial to the defence of India and public safety.'

2. Before proceeding to a scrutiny of the grounds upon which the orders of detention have been challenged, we might briefly state that Sri M.K. Nambiar has addressed arguments to us challenging the validity of Rule 30(4), in the context of Section 3(2)(13) of the Defence of India Act, on grounds of abdication of legislative function or the vice of excessive delegation. Sri M.R. Venkataraman, detenu, has addressed arguments in person on alleged grounds of mala fides or the colourable exercise of power, with regard to the orders of detention, also assailing these orders upon related grounds, such as the detention of the writ petitioners in prison against the spirit and purport of the delegated power, restrictions imposed in violation of Section 44 of the Defence of India Act, the illegality of the subsequent orders of review made without an opportunity given to the detenus to show cause against the continuance of the detention, the service of detention orders in some cases on persons already in jail custody, contrary to laws etc. Sri, V.G. Rao, for certain of the detenus, has also advanced arguments upon subsidiary grounds, and on the facts of some of the individual instances.

3. At the very outset, it is essential to elucidate, with care and precision, the ambit of the power of this Court to interfere with such orders of detention under Article 226 of the Constitution, in the context of the Emergency now prevailing under Article 352, and the Presidential Orders suspending the enforcement of certain Fundamental Rights, by virtue of Arts. 358 and 359. We might immediately add that this matter has received elaborate exposition in four recent decisions of the Supreme Court, namely. (1) Makhan Singh v. State of Punjab : 1964 CriLJ217 (2) Anandas Nambir v. Chief Secy. Govt. of Madras, judgment in WP Nos. 47 and 61 of 1965 : : 1966 CriLJ586 ; (3) A.K. Gopalan v. Govt. of India New Delhi, Judgment in W. A. Nos. 51 and 53 of 1965 : : 1966 CriLJ602 and (4) Dr. Ram Manohar Lohia v. State of Bihar, W. P. No. 79 of 1965 : : 1966 CriLJ608 . The text of the Proclamation of the President will be found in Basu's Commentary on the Constitution of India, 4th Edn, Volume V page 194, and is as follows:

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 right conferred by Art, 14, 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 26th October 1962 is in force, if such person has been deprived of any such rights under the Defence or India Ordinance 1962 (4 of 1962) or any rule or order made thereunder.

4. It is not disputed that the ambit of the power of this Court to interfere with an order of detention made under Section 3(1) and Section 3(2)(15)(i) of the Defence of India Act, read with Rule 30(1)(b) and Rule 30(4) of the Rules made under the Act, in the context of the above Proclamation, has been fully considered by their Lordships of the Supreme Court in Makhan Singh's case : 1964 CriLJ217 . For this reason, a terse statement of the position, as evident in the judgment will be necessary. After setting forth the text of S 3(1) and Section 3(2)(15)(i) of the Defence of India Act, the Supreme Court proceeded to discuss the grounds open to citizens to challenge the legality or the propriety of a detention either under Section 491(1)(b) Crl. P. C. or under Article 226 of the Constitution. The following passages, which are brief and essential excerpts from this judgment, outline the entire situation;

Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order. Take also a case where the detenu moves the court for a writ of Habeas Corpus on the ground that his detention had been ordered mala fide. It is hardly necessary to emphasise that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is mala fide would not be enough; the detenu will have to prove the mala fides. But if the mala fides are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Art, 359(1) and the Presidential Order. There is yet another ground on which the validity of the detention may be open to challenge. If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea thus raised by the detenu cannot at the threshold be said to be barred by

the Presidential Order. In terms, it is not a plea which is relatable to the fundamental rights specified in the said Order. It is a plea which is independent of the said rights and its validity must be examined.....In the present ease, one has merely to read Section 3(1) and the detailed provisions contained in the several clauses of Section 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority, that it would be idle to contend that the Act had delegated essentially legislative function to the rule-making authority. In our opinion, therefore, the contention that Section 3(2)(15)(1) of the Act suffers from the vice of excessive delegation must be rejected.

Upon this particular extract, we may observe that the argument repelled by the Supreme Court in this context, is different from the attack which has been put forward by Sri Nambiar on the vice of excessive delegation. As a careful perusal of the judgment will show, what was argued was that the apprehension and detention -itself, by the authorities of the Executive, were illegal, because of an abdication of legislative function, or excessive delegation. What is now argued is that the detention of such persons in jail, subject to the terms and conditions imposed by the State Government, contravenes the law, as Section 3(2)(15)(i) refers merely to the apprehension and detention in custody of any person, and not to the terms, conditions or place of such detention.

If we had held that the impugned provision in the Act suffered from the vice of excessive delegation, it would have become necessary to consider what the effect of that conclusion would have been on the merits of the controversy between the parties....the question would have arisen whether in challenging the validity of the order of detention passed against him the detenu is enforcing his fundamental right under Article 21 of the Constitution. Article 21 is one of the articles specified in the Presidential Order and if at any stage of the proceedings, the detenu seeks to enforce his rights under the said Article, that would be barred.... We do not propose to express any opinion on. this question in these appeals. Since we have held that the Act does not suffer from the vice of excessive delegation as alleged,

it is unnecessary to pursue the enquiry as to whether if the challenge had been upheld, the detenu would have been precluded from urging the said invalidity in support of this plea that his detention was illegal.

5. A word is now necessary concerning the other three decisions of the Supreme Court that we have earlier specified. In W. P. Nos. 47 and 61 of 1965 : : 1966 CriLJ586 , persons-situated precisely like the present writ petitioners, and detained under identical orders of detention by the Government of Madras, moved the Supreme Court assailing the orders. The judgment traverses grounds relating to the validity of Rule 30(1)(b) of the Rules, the privileges of Members of Parliament, and related aspects which do not immediately concern us. But the aspect of mala fides was also adverted to, and it was claimed that the Chief Minister of Madras made the orders in question without satisfying himself concerning their justification. Certain statements of the Union Home Minister in Parliament were relied upon, as supporting this argument, and they have been extracted in the judgment. An affidavit by the Chief Minister of Madras and another by the Chief Secretary to the Government of Madras were filed, & extracts from both appear in the judgment. The Supreme Court finally held that there was no justification for the assumption that the detentions were ordered by the Chief Minister of Madras without proper subjective satisfaction. Their Lordships also expressed that there was no substance in the grievance that the impugned orders were made mala fide; in result, the writ petitions were dismissed. In W. P. Nos. 51 and : 1966 CriLJ602 , issue of mala fides were also raised, and certain of the pleas, such as, the simultaneous issue of a number of orders, of detention on the same date, as indicative of an absence of a proper subjective satisfaction, are applicable to the present proceedings also. Finally, the contentions of illegality and mala fides were rejected, and the petitions were dismissed. In W. P. No. 79 of 1965 : : 1966 CriLJ608 the order of detention was held to be illegal, and the true ground therefor appears in a brief report of the case made available to us by the learned Public Prosecutor (Supreme Court Notes. 1965) as well as in some extracts from the judgments placed before us; what was held was that the actual order of detention in the case was not in terms of the Rule (Rule 30(1)(b)), and was hence invalid. Hidaya-tullah J. observed:

When the liberty of the citizen is put within the reach of authority and the scrutiny from courts is barred, the action must comply not only with the substantive requirements of the law, but also with these forms which alone can indicate that the substance has been complied with.

We propose, First, to examine the entire legal argument of the attack upon Rule 30(4), either because of the vice of excessive delegation, or the alleged abdication of the legislative function, and the related arguments of the ultra vires character of the orders of detention, because they were passed en masse, in order to put into custody the active members of an opposition political group (Members of the Left-wing Communist Party), the illegality of the detention of such persons in jail, and defects or illegalities in the actual orders vitiating them or the service of such orders on persons already in custody; this group of arguments might be termed the arguments at law. The arguments on issues of fact, particularly, mala fides, are separate and conveniently admit of separate treatment. Finally, we have the canvassing of the facts in certain individual cases, which are peculiar to these cases.

6. The Defence of India Act, 1962, set forth, in its preamble, that it was found necessary 'to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith. Section 3(1) of the Act states that the Central Government may make such rules 'as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations....' According to Section 3(2) of the 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....

Section 3(2)(15)(i) runs:

Notwithstanding anything in any other law for the time being in force' (the rules may provide for) 'the apprehension and detention in custody of any person whom

the authority empowered by the rules to apprehend or detain.....suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin or 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.....

While on the Act itself, we might also glance at Section 44, which states that the authority or person acting in pursuance of the Act 'shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence'. Under Section 45(1),

No order made in exercise of any power conferred by or under this Act shall be called in question in any court.

The substance of Sri Nambiar's argument is that Makhan Singh's case : 1964 CriLJ217 from which we have set forth extracts earlier does not-deal with the vires of Rule 30(4), framed by virtue of powers under Section 3(2)(15)(i) of the Act. on the principal aspect now relevant. Rule 30: (4) reads:

So long as there is in force in respect of of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the Central Government or the State Government, as the case may be, may from time to time determine.

The argument is that Section 3(2)(15)(i) of the Act makes no reference whatever to the terms and conditions of detention; therefore, Rule 30(4) proceeds beyond the ambit of the delegated power and is ultra vires. Alternatively, such a delegation must be held to amount to an abdication of an essential legislative power. This is shown by the following features of the Constitution itself. In the VII Schedule, List I, item 9, we have the entry 'Preventive detention for reasons connected with Defence, Foreign. Affairs, or the security of India; persons subjected to such

detention'. Likewise, in the Concurrent List III, item 3, we have 'Preventive detention for reasons connected with the security of a State.....persons subjected to such detention.' It is significant that, in both Entries 'persons subjected to such detention' is a separate head of legislation. That can only imply mat the Legislature must enact terms and conditions. for detention of persons, upon whom orders of detention had been already served. This essential legislative function cannot, therefore, be delegated to the rule-making authority. Since, in terms of the criteria laid down in Makhan Singh case : 1964 CriLJ217 such a ground of attack is open to the writ petitioner, the orders of detention must be quashed and the writs allowed.

7. The matter is carried still further by Sri Nambiar on the ground that detention in jail would, in any event, be illegal, in terms of the delegated power. In the State List (List: II of the VII Schedule), item 4 is 'Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein'. This division of powers illustrated that persons preventively detained under either the Preventive Detention Act, or under the Defence of India Act, and Rules, cannot be kept in jail; as there are two separate 'Entries', there should be a harmonious interpretation, modifying the language of one by the other. The following authorities are referred to in support. In Stewart v. Brojendra Kishore : AIR1939 Cal628 , the Judges held that this should be the true canon of interpretation in such a context. Again in In re C. P. Sales of Motor Spirit and Lubricants Taxation Act 1938 , the Judges held that where there is an apparent conflict of power in the Entries, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other; the reason is that it could not have been the intention that a conflict should be perpetuated. The third authority is Subrahmanyan v. Muttuswami Goundan at p. 50. Reference has been also made to the following enactments, namely, the Prisons Act IX of 1894, Section 3 of the Prisoners Act III of 1900, and Madras Regulation II of 1819. But, these laws may require some separate discussion, when we consider the arguments of Sri V.G. Rao upon the same head, and we shall not proceed into this for the present.

8. We have very carefully considered the arguments of Sri M.K. Nambiar, on this aspect, and we are unable to hold that either Section 3(2)(15)(i) or Rule 30(4), or both, can be said to be vitiated by the vice of excessive delegation, or implied abdication of legislative function. It is noteworthy that in Makhan Singh's case : 1964 CriLJ217 , this precise argument was repelled by the Supreme Court, though it does not appear to have been pressed on the ground now advanced. We must here emphasise the significance of the terminology of Section 3(1) itself, which invests the Central Government with a general power to make rules for the wide purposes specified in that sub-section; Section 3(2) commences 'Without prejudice to the generality of the powers conferred by Sub-section (1)'. In Emperor v. Sibnath Banerji , the Judicial Committee were concerned with the almost identical language employed in Section 2(1) and Section 2(2), Entries 5 and 10 of the Defence of India Act 1939 and with Rule 26 framed under the Act, which corresponds to the present Rule 30. The Judicial Committee observed:

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of Sub-sections (1) and (2) of Section 2 Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of Sub-section (2) is merely an illustrative one; the rule making power is conferred by Sub-section (1)...There can be no doubt as the learned Judge himself appears to have thought that the general language of Sub-section (1) amply justifies the terms of Rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to Sub-section (2).

9. If this is applicable to the present situation, it would clearly imply that not merely Rule 30(1)(b) of the rules, which authorises the detention, but also Rule 30(4), in its terms, could be justified, on the generality of the power under Section 3(1) of the Act, even apart from the circumscribed and separate specifications of that power under Section 3(2)(15)(i) etc. Sri Nambiar had drawn and stressed an interesting parallel between the Defence of India Act and the Preventive Detention Act IV of 1950. It is certainly significant, that, under Section 4 of the latter Act, there is statutory provision for the detention, in a prescribed place, of the person

on whom the order has been served, or for removal of such detenu from one place of detention to another. But, we are unable to hold that the Legislature was not justified in taking a wider sweep when enacting the Defence of India Act, without making a separate legislative provision for the place and terms of the detention. The learned Public Prosecutor would appear to be justified in his argument that, during the Emergency, the rigour of the Lists cannot be said to subsist unabated, in view of the specific terms of Article 353 of the Constitution. Article 353 is also relevant upon the other argument, that the orders of detention have not been made upon the subjective satisfaction of the Government of Madras, or should be presumed not to have been so made, in view of certain specific passages in the speeches of the Union Home Minister in Parliament, which preceded the Orders. Certainly, Article 353(a) explicitly states that the executive power of the Union extends, during an Emergency, to giving directions or instructions to a State. Such legislative provisions, as the Entries referred to by Sri Nambiar, do not necessarily imply a legislative obligation to enact upon the topic.

10. Upon one aspect, this entire matter was examined by the Full Bench of the Lahore High Court in Harkishan Das v. Emperor, ILR (1944) Lah 245 : AIR 1944 Lah 33 that related to Sections 2 and 3 of the Defence of India Act 1939 and an order of detention under Rule 26. Section 2(2)(x) corresponded to our present Section 3(2)(15)(i), and the precise argument was that Rule 26 exceeded the rule-making power. Reference was also made to Entries in the VII Schedule of the Government of India Act. Harries C. J. observed:

The conditions of detention, such as the place of detention, the conditions under which a person is to be detained, the discipline to be enforced during detention, and such like are matters of detail which, in my view, can be rightly delegated to a rule-making authority, and need not be dealt with in the statute itself. It is to be observed that the statute does lay down a general principle to guide authorities....

We think that, even apart from any other considerations, the very words of Section 3(2)(15)(i) namely, 'apprehension and detention in custody' of the person referred to, necessarily imply that the detaining authority must detain that person under such terms, as to maintenance and discipline, as the rule-making authority may

specify; it is hardly a reasonable requirement of the legislature that the legislature should expressly specify these terms in the statute, and the broad purport thereof would seem to be necessarily implied. During the course of arguments, for instance, we had to consider the logical outcome of the argument of Sri Narnbiar, if the apprehension and detention were under the law, out the rule-making authority could specify no terms as to place of detention or maintenance of the detenu, because the broad power had not been the subject of legislation, did it imply that the detenu could be kept in any mode, without reference to the civilised usage? This necessarily involves the vires of the Security Prisoners Rules 1963, promulgated by Government, a copy of which is before us, and which forms also the subject of argument. We are fortified in our view of the necessary implication of this power in Section 3(2)(15)(i) because of the judgment of the Supreme Court in Sanzgiri's case, Crl. App. No. 107 of 1965 : : 1966 CriLJ311 . This related to a detenu who wrote a book in Marathi, the title of which could be translated as 'Inside the Atom' and which was an unobjectionable scientific work, designed to disseminate knowledge refarding the Quantum Theory. The authorities eclined to forward the manuscript for publication, because the relevant Rule gave the detenu no such rights, nor did it impose on the authorities any corresponding obligation. The Supreme Court observed that the Bombay conditions of Detention Order 1951, are not privilege conferred on the detenu, but the terms of the restrictions on his liberty. Hence, since there was no term prohibiting the detenu from writing such a book or sending it for publication, the authorities could not prevent the sending of the book for publication. Their Lordships observed that if the view were to be upheld that the rules conferred only privileges, 'it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu'.

11. Where an Act confers a jurisdiction, it impliedly also grants the power of doing of such acts, or of employing such means, as are essentially necessary to its execution. Thus, an Act which empowered the Justices to require persons to take an oath as Special Constables, and gave them jurisdiction to inquire into an offence, impliedly empowered them to apprehend the persons who unlawfully failed to attend before them for these purposes. Attorney General v. Fulham Corporation, 19211 Ch 440. The principle is expounded in Maxwell's Interpretation

of Statutes 11th Edn page 350, In Craies on Statutes, 5th Edn. page 105 it is observed:

If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance....to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty to infer that the statute by implication empowers that detail to be carried out.

Thus, in Cookson v. Lee, (1853) 23 LJ Ch 473 a private Act vested certain lands in trustees for the purpose of enabling them to sell the lands for building purposes, but the Act contained no express power to expand any portion of the purchase moneys in setting out the lands, or in making road. Under these circumstances, the court held that, having regard to the object of the Act such power ought to be implied. For these reasons, we are of the view that, Rule 30(4) cannot be struck down as vitiated by the vice of excessive delegation. We need not, hence, consider the further argument of the learned Public Prosecutor that, even on the assumption that the vice exists, this would necessarily imply the invoking by the detenu of Article 21 in his favour, which is barred by the Presidential Proclamation; a question that has not been answered in Makhan Singh's case : 1964 CriLJ217 .

12. Sri V.G. Rao has submitted certain arguments upon the power of the State Government to frame such rules. But, if Rule 30(4) is valid, the place of detention and the terms of detention may be determined either by the Central Government or the State Government, as the case may be.

13. Sri M.R. Venkataraman has taken us through the actual rules (Security Prisoners Rules 1963) and pointed out certain rigours and defects therein, virtually reducing a security prisoner to the status of a convicted criminal. Particular stress is laid, for instance, on Rule 17 Sub-rule (vi), which renders the security prisoner liable for punishment, if he disobeys 'the orders of any officer of the jail'. We think it is sufficient to indicate, in this context, that persons detained under the Defence of India Act, are certainly not prisoners in the ordinary sense, and the place of detention is, again, not a jail in the ordinary sense; these are the very arguments of the learned Public Prosecutor for the State, as we shall presently show. That

being the case, these rules ought to be framed, taking the special context into consideration, and if, they require any modification, in any respect, a review of the entire set of regulations at a high level would appear to be very desirable.

14. Both Sri Rao and Sri Nambiar have stressed the illegality of the detention of the writ petitioners in jail, in the context of certain provisions in certain prior Acts, and legal character of this particular exercise of the power. This has been stressed, even apart from the argument upon the vice of excessive delegation. The Prisons Act IX of 1894 defines a ' prison' as a jail or place for the detention of prisoners. There is a definition of 'Criminal Prisoner' under Section 3(2), and the learned Public Prosecutor stresses that a detenu is not a 'Criminal Prisoner'. According to him, that is by no means an exhaustive category, and the definition of a 'civil prisoner' in Section 3(4) of the same Act is much wider, excluding a 'criminal prisoner'. The following authorities have been relied upon by the learned Public Prosecutor for the proposition that a detenu would not be a prisoner at all, nor could the place of his detention be termed a 'jail' in the strict sense, apart from mere nomenclature; Vide Taherally v. Chanba-sappa : AIR1943 Bom226 ; Maqbool Hussain v. State of Bombay : 1983ECR1598D(SC) and Bijai Bahadur v. State : AIR1954 All626 . Sri Nambiar has contended that, under Section 3 of the Prisoners Act, 1900, an officer in charge of a prison has authority to receive and detain only persons duly committed to his custody, under the Act or otherwise, by any court, according to the exigency of any writ, warrant or order. How, it is argued, could the Superintendent of the concerned jails, in the present cases, receive the petitioners and take them into custody when the detention has been directed neither by a court, nor under the Prisoners Act III of 1907? But, we do not find this to be a really substantial ground of attack. The Prisoners Act may not be exhaustive of all the categories of persons who could be lodged in prisons. The detenu has to be detained in some place or other, as specified by the authority, which also might subserve the security purposes of the State. They are not prisoners, and, as the learned Public Prosecutor has stressed political or security prisoners would appear to have been lodged in jails ever since 1819. The Madras State Prisoners Regulation 1819 has been referred to, in this context, and also with regard to the obligation to periodically review the detentions, enacted in Section 3 of this regulation. This Regulation prescribes a warrant of commitment,

and, obviously, the procedure may vary or evolve, upon such an aspect. The detention order would be sufficient authority for the Government officer in charge of the jail, to receive 'the persons specified in such orders.

15. We may now proceed to the aspect of the mala fides, and to certain arguments which are subsidiary under that main head. The entire argument could be summarised and set forth as follows.

16. According to Sri M.R. Venkataraman, the exercise of the power by the State Government in the present cases must be held mala fide or colourable, on a variety of grounds. Reliance is placed on Partap Singh v. State of Punjab : (1966)ILLJ458SC , for the view that the grounds of ultra vires and that of mala fides are often inextricably mixed. Mala fides need not necessarily relate to the deliberate misuse of power against an individual, from private motives, by a Minister or Authority of Government. Indeed, Sri Venkataraman has been at pains to assure us that, to his knowledge, no such factor has been operative in any of, the present cases. But, if the power is exercised for a purpose other than that for which it was intended, embodied in statute or rules, that would be a case of fraud on power. In that sense, it would be mala fide, & would be liable to be struck down by courts. According to the argument, the power was used, in the present case, to paralyse the activities of an opposing political ground (left-wing Communist party) from ulterior considerations. The Kerala Elections were due to take place in February 1965, and these wholesale arrests and detentions took place on 29th December 1964, and a few days thereafter, in order to cripple the party in its election prospects there, as the Congress Authorities considered Kerala a test case. The Left-wing Communist party, which was designated 4s a pro-Peking group, as will be clear even from the arguments submitted before the Supreme Court, in Ananda Nambiar's case WP Nos. 47 and 61 of 1965 : : 1966 CriLJ586 , had actually issued several statements and resolutions of strong support to the maintenance of the territorial integrity of India, both as regards Pakistani aggression and as regards the Chinese aggression. The epithet 'Pro-Peking' is unjust and undeserved, and the party was merely given a bad name, in order to paralyse its activities. The statements made by the Union Horn(c) Minister indicate that the Central Government had decided to imprison all prominent members of

this Party, for political grounds; the subjective satisfaction of the Madras Government or its Chief Minister was really illusory, and did not exist. The above orders were passed on the same day, and the entire approach was that prominent members of the Party should be arrested and detained en masse, because of such membership. There was no possibility of individual satisfaction, and this is really a question of ultra vires. The Defence of India Act does not permit members of a Party, as a group, to be detained; the power relates to individuals alone, whose activities were or might be considered objectionable. The orders were issued on cyclostyled forms, and names might even have been erroneously included. The review orders passed on 30-5-1965 were on printed forms, issued simultaneously. There was nothing particularly significant in the border situation as regards China in December 1964, when the orders were passed making specific reference to the defence of India. Certain passages in the-affidavit of the Deputy Secretary to the Government (Sri Belliappa) are relied on, as indicative that the entire perspective was that of paralysing the group. Particular stress is laid on one passage, which is to the effect that 'where a large group of politically active persons is considered by Government, acting on the basis of information, as liable to endanger the peace and security of the State, individual orders of detention on members of such a group can be validly and legally made.

17. The other grounds of objection are: (1) From the counter affidavit Piled on behalf of the Government, it appears that there was no satisfaction on the question whether the detention was necessary for the defence of India. Reference was made to the security of the State in more than one passage, and this consideration renders the order of detention illegal; Vide Ram Manohar Lohia's case WP No. 79 of 1965 : : 1966 CriLJ608 . (2) The review orders under Rule 30-A are illegal, because no opportunity was given to the detenus to show cause against the continuance of the detention. The review is of a judicial character, or at least quasi-judicial in character, and the principle of audi alteram partem should have been observed. (3) Reference to 'intelligence' agencies in the counter-affidavit indicates that the detentions were merely ordered on police reports. That is illegal, on the authority of , (4) Section 44 of the Act has been violated, as persons have been detained who are from several social strata of widely different avocations, and the normal avocations of all of them have been totally frustrated; Vide

Godavari v. State of Maharashtra : 1964 CriLJ222 . The detenus include a Law Student, petty traders and minor employees, (5) Service of detention orders upon some persons, who were already in jail, is contrary to law.

18. We shall deal briefly with three arguments, upon the aspect of mala fides and the related subsidiary aspects. We shall refer, to the degree which is essential, to the issues of fact, as evident from the materials placed before us. But we must make it plain that, as we comprehend the ambit of our power, once Rule 30(4) is held valid, the subjective satisfaction of the Government cannot really be canvassed by us. As observed by one of us in Thangamani v. 'Chief Secy. Govt. of Madras : AIR1965 Mad225 , in terms of Section 45(1) of the Defence of India Act, 1962, even Section 44 would appear to be directory and not mandatory in character, though certainly, this does not imply that the directive can be set at naught or disregarded by the Executive, in making orders of detention.

19. It is very difficult for us to canvass the aspect of the extent to which the Left-Wing Communist party, to which the detenus belong, was really in co-operation with the Central Government, and, indeed, with almost the entire Nation, in the matter of its attitude to Chinese and Pakistani aggression. Certain public statements and declarations of the Party have been made available to us, in this context. They include references to the territorial integrity of India, and the imperative need to preserve that integrity. According to the learned Public Prosecutor, they significantly do not contain any explicit and categorical denunciation of Chinese aggression upon the borders of this country. Again, the professions and the practice or activities of a political party, or its Members, may be at variance. As regards the activities Government may receive information from a variety of sources, which may include what are termed as 'intelligence reports'. We do not see how all this could be canvassed in a court of law, except, perhaps, to reinforce a conceivable argument that the power to detain was being used mala fide. During the Emergency, a situation fraught with potential danger, such as a border situation, may have to be judged, not merely with respect to its temporary quiescence, but its possible future developments. The courts are not at all advantageously situated to proceed into such issues of fact, and to assess the wisdom of the Executive in taking a particular course of action. We think it is

sufficient to state that, upon none of the grounds of fact adverted to by Sri M.R. Venkataraman, we are able to hold that the action of the Government was mala fide. The Kerala Elections, though due in February 1965, were over long previously, when the orders of review were made in these cases, continuing the detentions in a large number of cases. Many, or most of the persons detained could hardly have affected these Elections in another State, by active intervention or speeches in the course of the campaign. A consideration of all the factors, and a consideration of each individual case, could well have preceded the simultaneous issue of orders of detention on a particular date; a fairly obvious rule of administrative exigency seems to have led to the promulgation of simultaneous orders. Such matters as the use of cyclostyled forms, or printed forms in review cases, cannot affect the legality of the orders if, substantially, there was individual satisfaction or due consideration. The learned Public Prosecutor relies on the following authorities in support of this contention, namely, Stuart v. Anderson and Morrison, 1941 2 All ER 665, Kamlakant v. Emperor : AIR1944 Pat354 ; Emperor v. Sibnath Banerjee AIR 1943 FC 75 and WP Nos. 51 & 53 of 1965 : : 1966 CriLJ602 .

20. We think that a word is necessary about the main argument on the matter of mala fides, that the perspective of approach has been erroneous. It is argued that it is ultra vires and amounts to a colourable use of power, that the power to detain should be exercised en masse, with respect to members of a particular political group, though the outward semblance or form may be that of individual satisfaction. The passage in the affidavit of Sri Belliappa, that we have earlier referred to, is cited in support. The two English decisions placed before court by the learned Public Prosecutor (apart from the well-known decision Liversidge v. Anderson, 1942 AC 206 are also distinguished on this aspect. In Rex v. Secretary of State for Home Affairs; Lees, Ex parte, 1941 1 KB 72, the Regulation in question empowered the executive to detain a person, because he was a member of a group with objectionable activities. In contrast, the argument is that the Defence of India Act refers only to the detention of individuals whose activities are objectionable. In 1941 2 All ER 665, the order of detention was held not invalid because it was a general one, and common to all the individuals whose names were set out in the Sch. to the order. We think it is sufficient to point out that a

refinement or distinction applies here, which, as a question of fact, we have no reason to think was ignored, in the present instances. If we suppose that the activities of the members of a particular group were prejudicial to the safety of India, we do not think that it could be contended, for a moment, that the Executive would not be justified in considering the detention of the members of that group. It cannot be argued that such a perspective of approach per se, is erroneous or opposed to the Defence of India Act and the rules. But, when detaining such individual, the consideration ought to be the subjective satisfaction that such an individual, as a member of the group, had also indulged in objectionable activities, or was likely to do so. To detain him qua membership of the group, and without consideration of his participation, in these activities would certainly be illegal. But the affidavits of the Chief Secretary and the Deputy Secretary, have, obviously, to be read as a whole. In our view, they adequately indicate that the subjective satisfaction related to each case, though the consideration might have originated from the knowledge of the activities of a group. We may point out that out of several thousands of the members of the party, only a few have been detained, and certain Left-wing Communists, at least, have not been detained. We see no reason for an inference that the detentions were en masse destitute of the element of individual satisfaction.

21. The argument that the detentions were illegal, because of references in the affidavits to the Security of the State, as distinguished from the defence of India, does not appear to be sound. The decision in Ram Manohar Lohia's case WP 79 of 1965 : : 1966 CriLJ608 has no application to the present context. Here, the detention orders are couched in proper language, and it is only in isolated passages of the affidavits that there is some intermingling of purposes. The two counter affidavits have to be read as a whole, though there might be a passage here and there, in which stress is laid on the security of the States, thus read, it is clear enough that activities prejudicial to the defence of India, or likely to be so prejudicial, formed the basis of the general consideration. These categories are, after all, not rigidly exclusive of each other, as a bare scrutiny of Section 3(1) of the Act or Rule 30(1) of the Rules will indicate. The learned Public Prosecutor has stressed that Police reports were not the only source of information to the Government, and, apart from this, may not apply to the present facts, since the

reports were fully considered.

22. Sri M.R. Venkataraman argued that the detention orders, in several cases, including his case, specified other places of detention, such as Vellore jail, but actually these persons were detained in the Cuddalore Jail contrary to the terms of the original orders. The matter has been explained in the counter affidavit of the Deputy Secretary (Sri Balliappa). As apparently happened in the Supreme Court case, there was a subsequent order of Government, modifying the places of detention, with an attached Schedule, and we have also been shown such an order. The argument that orders of detention cannot be served on persons who were already in jail, and that such orders would be illegal, is an interesting one. It proceeds, obviously, on the principle that at least at the moment of service of such an order, that person is incapable of indulging in prejudicial activities; nor could there be any apprehension about this. But the earlier decisions of the Supreme Court on this aspect, Rameshwar v. Dist. Magistrate Burdwan : 1964 CriLJ257 and Makhan Singh v. State of Punjab : 1964 CriLJ269 , have been explained in the later decision : 1964 CriLJ222 . In the present instances, the detenus who have been apprehended earlier, had either been apprehended under Section 151 or Section 54 of the Criminal Procedure Code, and were not in indefinite custody or custody of specific and long duration. These services would, therefore, appear to be legal and free from objection. Upon any technical defects that might have applied at the time of the service of the original orders of detention, we think that we must accept the argument of the learned Public Prosecutor that if the detention is legal at the time of the return in the habeas corpus application, that point of time alone would be material, and a prior illegal order would not truly affect the situation. The authorities in support are Basantha Chandra v. Emperor , Ranmarayan Singh v. State of Delhi : 1953 CriLJ113 and Naranja Singh v. State of Punjab (1) : 1952 CriLJ656 .

23. We may pass on to the last general argument, before considering the facts of the individual cases, namely, the manner in which the power of review has been exercised; in the petitions before us. In all these cases, where the continuance in detention has been ordered and the Review has been declined, the orders have been on prined forms. Further, there is nothing to show that an opportunity was

given to the concerned detenus to make any representations, or that such representations were heard. Sri Rao argues that this is not merely in contrast to the beneficent provisions of Section 3 of Madras Regulation II of 1819, but it indicates that we have regressed in this matter of democratic practice, as compared with 1819. It is stressed that the power of review should at least be termed a quasi-judicial power, and that the detenu ought to be informed, at this stage at least, of the broad grounds of his detention, and permitted to make his representations, if continuance of detention is to be decided upon. In the judgment of in WA No. 16 of 1965 and WP 1298 of 1964 (Mad), to which one of us was a party, this Court had occasion to consider, at some length, the principles upon which a particular exercise* of power could be termed quasi judicial in character, following the criteria in Rex v. Electricity Commrs., 1924 1 KB 171 as further elaborated in Ridge v. Baldwin, 1963 2 WLR 935 and in such decisions of the Supreme Court as Province of Bombay v. Khushaldas S. Advani, : [1950]1SCR621 Radheshyam v. State of M. P. : [1959]1SCR1440 , Board of High School and Intermediate Education U.P. Allahabad v. Ghanshyam Das Gupta : AIR 1962 SC1110 and Shankarlal Aggarwala v. Shankarlal Poddar : [1964]1SCR717 As pointed out by the learned Public Prosecutor, this power of review in cases of detention, is a new provision in the Defence of India Act 1962, which is not to be found in the 1939 Act or in the 1962 Ordinance.

24. That an order of review is executive and not quasi-judicial in character, has been recently held by the Supreme Court in Sadhu Singh v. Delhi Administration, 1965-7 SC (Notes) 228 : : [1966]1SCR243b . The scope of the power of review has beeri indicated by the Supreme Court in Biren Dutta v. Chief Commissioner of Tripura : 1965 CriLJ501 and Balmukund v. Dist. Magistrate, Delhi : 1965 CriLJ4 . As indicated in these cases, where the order of detention is being reviewed, the question of the possible or probable further activities of the detenu cannot be relevant, for the simple reason that he is in detention; his activities, from the date of his detention, upto the date of the actual review, he having been immobilised, are without significance. But, the situation which led to his detention could be assessed as well as its further potentialities. The reviewing authority must also take into consideration the probable future activities of the detenu if his detention were to cease. According to the learned Public Prosecutor, the power of review

has been exercised in favour of the detenus in certain cases, on representations made by them disassociating themselves with certain programmes, or with the left-Wing Communist Party of India. It is in this context we think that we should emphasise that the power ought not to be mechanical, or a mere formality. It is a substantial right of the detenu, and it should be real; there should be a careful consideration of all relevant factors, and it would be highly desirable, even if the absence of this procedure does not vitiate the exercise of the power, that the detenu should be afforded an opportunity to make his representations, and that he should be heard. We think that the use or non-use of printed forms is a very minor matter altogether. Clearly, the printed forms could be used after the most mature consideration of every individual case. Per contra, the orders could be in writing, or type-script, relevant ex facie to each individual case separately, and could still be a mere mechanical use of the power.

25. Finally, we shall deal though briefly, with the special facts of certain cases which have been placed before us by Sri Rao. We may add here that we have taken the trouble to go through the record in each of these cases, which fall into certain clear categories of objection or complaint.

(The rest of the judgments are not material for purposes of this report.)

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