

**Virendra Kumar Tripathi Vs. the Crown**

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**Court :** Himachal Pradesh

**Decided On :** Nov-09-1949

**Reported in :** 1951CriLJ3

**Judge :** Harnam Singh and; Falshaw, JJ.

**Appellant :** Virendra Kumar Tripathi

**Respondent :** The Crown

**Judgement :**

**Falshaw, J.**

1. This judgment will deal with three petitions under Section 491, Criminal P.C., Or. Misc. nos. 252, 253 and 254 of 1949. All the three petitions have been filed by one person, Mr. Virendra Kumar Tripathi, on behalf of three different persona who have been placed under detention by the Delhi authorities, namely, Mr. Mohammad Yamin, his wife Mrs. Sara Yamin, and Professor Yag Datt Sharma. All these persons were originally arrested and placed under detention by orders of the Deputy Commissioner of Delhi under Section 3, Punjab Public Safety Act of 1947 as extended to the Province of Delhi and the period of their detention has been subsequently extended by the Chief Commissioner of Delhi under Section 3, East Punjab Public Safety Act of 1949 which has also been extended to the Province of Delhi. In each case the petitioner has alleged that the detention of these persona is illegal on various grounds. In none of the petitions has Mr. Virendra Kumar

Tripathi disclosed that he has any connection of any kind with or any sort of authority to act on behalf of any of the persona on whose behalf he has filed the petitions and when they came up for hearing on 23-9-1949 before Soni, J., the learned Advocate-General raised the preliminary objection in all the petitions that the petitioner was merely a busy body interfering in other peoples' affairs and that he had no locus standi to file these petitions on behalf of the detenus. In this connection, he relied on certain observations of Achhru Ram J. in the case reported as *In re Hardial Singh* A.I.R. (36) 1949 E. p. 130 : 50 Cr. L.J. 370 and also some English decisions cited under para. 1229 at p. 721 in vol. 9 of Edn. 2 of Halsbury's Laws of England. In the circumstances, Soni J. decided that the question should be referred to a larger Bench and the petitions have accordingly been referred to us for disposal.

2. Section 491, Criminal P.C., itself does not appear to place any restrictions at all on the method by which the High Court is to be invoked to use its powers under the section, since the opening words of Sub-section (1) are : 'Any High Court may, whenever it thinks fit, direct.' It is contended by the learned Counsel for the petitioner that no language could be wider than this and that as far as the section itself goes the High Court can be moved to act under the section by anybody whatsoever and he has drawn our attention to the difference between the language in Section 491 and that used in the sections of the Code under which the High Court is to be moved in matters of appeal, revision and transfer. Section 419 deals with appeals and clearly provides that every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader. The language used in Section 435 regarding revisions is wider, the relevant words being:

The High Court.... may call for and examine the record of any proceedings, before an; inferior criminal Court.... for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order...

In Section 526 relating to transfers the relevant Sub-section is (3) which reads:

The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

It is also contended that such oases as deal specifically with Section 491 of the Code also support the right of the present petitioner to bring the petitions.

8. In *Ramji Lal v. The Crown* 1948-60 P. L. B. 325 : A.I.R. (86) 1949 E.P. 67 : 50 Cr. L.J. 971 F.B. the question of who can present a petition under Section 491, Criminal P.C., was not among the questions referred to the Full Bench consisting of Mehr Chand Mahajan, Teja Singh and Khosla JJ , but at p. 234 Mahajan J., who wrote the main judgment observed as follows:

By the very nature of the jurisdiction and the purpose for which it exists it is apparent that a writ could be issued whenever it became necessary to set at liberty a person who had been illegally detained and in exercising this jurisdiction the Judge could not be hampered by rules of practice however sound and salutary they may be, 'Whatever may be the state of English Law on the subject so far as Section 491, Criminal P.C. is concerned, it has been very widely worded and confers jurisdiction on the Court to issue directions whenever it thinks fit. The Court may be moved by the prisoner or by some relation of his, or it may act *sun motu* if it acquires knowledge that a certain person has been illegally detained. The mode and manner in which the Judge has to be satisfied cannot affect the jurisdiction conferred on him under Section 491, Criminal P.C.

4. In the case of *Alam Khan v. Emperor* A.I.R. (35) 1948 Lah. 33 : 48 Cr. L.J. 984 F.B. one of the questions considered by a Full Bench of five Judges was the right of a certain person to bring a petition under Section 491, Criminal P.C. The facts are somewhat complicated, but briefly they are that certain persons were accused in some criminal cases pending in Mianwali district and the Deputy Commissioner had withdrawn the cases from the ordinary criminal Courts and sent them for disposal to a Jirga or Council of Elders under Section 11, Frontier Crimes Regulation. Among the resulting petitions to the High Court, in all of which the main question involved was whether the Frontier Crimes Regulation had been validly applied to the district of Mianwali, was a petition under Section 491, Criminal P.C. by the complainant in one of the oases, who was apparently not satisfied with the sentence imposed upon the 'accused in the case in which he was the complainant and wanted that they should be retried according to law. His

petition was thus under Section 491 (1) (e) which reads, 'that a prisoner within such limits be removed from one custody to another for the purpose of trial', and so one of the questions before the Full Bench was whether it was open to a complainant to move the High Court for a writ under this section. The main judgment was written by Ram Lall J. with whom all the other Judges forming the Bench agreed on this point though Abul Rashid, Acting C.J., dissented on certain other points. The relevant portion of the judgment of Ram Lall J. reads:

So far as question 3 is concerned, I am of the opinion that under Section 491, Criminal P.C. the High Court can entertain a petition at the instance of a complainant. The section says: 'The High Court may, whenever it thinks fit, direct....' The language of the section places no limit on the class of person or persona who can move a High Court with relation to a person in custody and if the High Court on hearing the petition thinks fit to do it may make an order that be dealt with according to law. Such a petition at the instance of a complainant is, therefore, competent.

It is contended, and to my mind rightly, that the case relied on by the learned Advocate-General, *In re Hardial Singh* A. I. E. (86) 1949 E. P. 130: (60 or. L.J. 870) rather supports the case of the petitioner than goes against him, In that case several petitions under Section 491, Criminal P.C. came up for decision before a Bench consisting of Achhru Ram J. and myself. Among these petitions were three which, like the present petitions had been filed by a single person on behalf of three detenus with whom he apparently had no particular connection and of whose affairs he had apparently little or no knowledge, since apparently one of the detenus on whose behalf he had filed a petition had actually been released before the petition was filed, while in the other two cases the detenus were released soon after the filing of the petitions and on dates before orders for bail were obtained on their behalf, it being not brought to the notice of this Court when the bail orders were obtained that they had already been released. These facts led Achhru Ram J., to make the following observations, with which I fully agreed:

This demonstrates very clearly the danger of allowing any and every person to move a petition for habeas corpus on behalf and for the benefit of any detenu.

Jagdish Mittar, the petitioner in the present cases is a resident of Simla. He does not appear to be any relation of the detenus in respect of whom he has moved petitions (or issue of writs of habeas corpus, He does not seem even to have been aware of their movements. I wish some rule should be framed by the authorities concerned limiting the right to move petitions under Section 491, Criminal P.C. to the detenus, their relations and at the most their friends. I understand that such is the practice in England and it will Gave a lot of judicial time and a good deal of unnecessary embarrassment to the authorities if a similar practice is introduced in this country. To allow irresponsible people to move petitions of this nature on behalf of persons about whose affairs they have really no knowledge, merely on account of the existence between them of any political or other affinity, seems to me to be prejudicial to the proper and efficient administration of justice and otherwise undesirable.

In the circumstances these remarks were merely obiter, Since the petitions regarding which they were made had become infructuous, but at the same time it is clear that when he made them Achhru Ram J. entertained no doubts as to the legality of the filing of the petitions on behalf of the detenus by persons not in any way intimately Connected with them, and he was merely expressing a wish that the law should be changed so as to make such petitions illegal.

5. On the other hand reliance is placed on the remark at p, 721 of volume 9 of Halsbury's Laws of England to the effect that:

A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not be allowed to apply for habeas corpus.

The cases on which this remark is based are cited in the foot-note as *Bex v, Clarke* (1762) 5 Burr. 1862 ; (97 E. R. 875), *Ex parte Child* (1864) 14 C B. 238 : (139 E.R. 413) and *Be Carter* (1893) 95 L. T. JO. 37. The only one of these cases of which the full judgment was available to us was *Ex parte Child* (1861) 15 Q. B. 338 : (139 E. R. 413) but it is clear that the two later decisions were based on the Habeas Corpus Act of 1816, the relevant portion of Section 1 of which reads:

They are hereby required, upon complaint made to them by or on behalf of the person so confined or restrained....

The effect of which clearly is that a petition for a writ of habeas corpus can only be entertained when it is filed either by the prisoner himself or by somebody duly authorised to act on his behalf. No such restriction is placed by the language of Section 491 of the Code, and I am accordingly of the opinion that there is no legal bar to the filing of a petition under the section by a stranger on behalf of a detenu, and so the present petitions must be disposed of on their merits.

6. It is contended on behalf of the petitioner that the detention of the detenus is illegal on account of a defect which exists in each case in the orders of the Chief Commissioner extending the period of detention. The following are the relevant dates in each of the three cases.

7. The order for the arrest and detention of Mohammad Yamin under Section 3 (1), Punjab Public Safety Act of 1947 was passed by Mr. Rameshwar Dayal, District Magistrate at Delhi on 12-5-1949 when he was ordered to be detained for one month. On 6-6-1949 Mr. Shankar Prasad, Chief Commissioner, passed an order under Section 3 (4) of the same Act extending the period of detention for 3 months from 11-6-49 to 10-9-1949 and finally on 30th August he ordered further extension of three months from 10th September to 9-12-1949 in exercise of his powers under Section 3 (4), East Punjab Public Safety Act of 1949.

8. In the case of Mrs. Sarla Yamin the original order was passed by the District Magistrate under Section 3 (1) of the Act of 1947 on 28-5-1949 and the order of the Chief Commissioner extending the period of detention for 3 months from 27th June till 26th September was passed on 17th June, still under Section 3 (4) of the Act of 1947 and a further order extending the period of detention has been passed by the Chief Commissioner under Section 3 (4) of the Act of 1949.

9. In the case of Professor Yag Dutt Sharma, the original order of the District Magistrate was passed on 19th February and on 18th March the Chief Commissioner passed an order extending the period of detention for three months from 18th March to 17th June. Still purporting to act under Section 3 (4) of the Act

of 1947, the Chief Commissioner on 11th June passed an order extending the period of detention for two months from 17th June to 16th August and on 10th August he passed an order under S 3 (4) of the Act of 1949 extending the period of detention for three months from 16th August to 15-11-1949.

10. As far as the Province of the East Pan. jab is concerned, the Punjab Public Safety Act of 1917 was superseded by the East Punjab Public Safety Act of 1949 on 29 3-1949, The earlier Act had been extended to the Province of Delhi Borne time in 1947 and the date of the notification by which the Act of 1947 was superseded by the Act of 1949 in the Province of Delhi was 4-6-1949. It is thus clear that these orders of the Chief Commissioner passed after 4-6-1949 by which he purported to extend the periods of detention of the detenus in the present petitions under Section 3 (4) of the Act of 1917 were illegal in the sense that the Act of 1947 had ceased to be in force, and the orders should have been passed in exercise of his powers under Section 3 (4) of the Act of 1949 and it is contended on behalf of the petitioner that the effect of this mistake is that from the dates on which these orders were passed the detention of the detenus became illegal, and the fact that later orders further extending their periods of detention were passed under the proper Act, i. e. the Act of 1949 which came into force in Delhi on 4th June could not make their detention legal. Alternatively, it is contended that even if the mistakes in the orders citing the superseded Act could be treated as mere clerical errors, since the Chief Commissioner had power under the Act of 1949 to extend the period of detention and merely cited a Wrong provision of law in his orders the extended periods of detention have still become illegal on the ground that certain mandatory provisions in Section 3 of the Act of 1949, which did not exist in the Act of 1947, have not been complied with. These provisions are contained in Sub-section (5) of the new Act which reads:

As soon as may be after a person is detained In pursuance of an order made under Sub-section (1) the authority making the order may communicate to him, so far as such communication can be made without disclosing facts which it considers against the public interest to disclose, the grounds on which the order has been made and such other particulars as are in its opinion sufficient to enable him to make a representation to the Provincial Government against the order, and

inform him of his right to make such representation and afford him the earliest opportunity of doing so.

Nothing like this sub-section existed in the Act of 1947, and the argument advanced is that once detention which had originally commenced under Section 4 of the Act of 1947 was converted into detention under the Act of 1949, the provisions of this new sub-section ought immediately to have been complied with, and failure to comply with them renders the detention illegal. It is conceded by the learned Advocate-General that mistakes were undoubtedly made by the Chief Commissioner in extending the periods of detention under the provisions of the Act of 1947 after the date on which this Act had been superseded by the Act of 1949, but it is contended that since the Chief Commissioner had the same power to extend periods of detention under the new Act, the mistake should be condoned, or alternatively that the orders of the Chief Commissioner were saved by the provisions of Section 6, Punjab General Clauses Act. It was further contended that if the detention were not held to be illegal on account of these mistakes, it did not become illegal through the failure to comply with the provisions of Section 3 (5) of the Act of 1949 on two grounds, the first being that the provisions of this sub-section are not mandatory as is indicated by the use of the word 'may,' and the second being that in any case the provisions of this sub-section were only meant to be complied with in the preliminary stages after an arrest and order of detention under Sub-section (1), i. e., by the authority ordering the arrest and detention in the first instance, and the Sub-section had no application in a case of the extension of the period of detention at a later stage by the Provincial Government. The mistakes made by the Chief Commissioner in wrongly invoking his power under Section 3 (4) of the Act of 1947 thus give rise to several problems which will have to be dealt with separately. The first question for consideration is whether the mistakes are saved by Section 6, Punjab General Clauses Act I [1] of 1898 which is in force in the Province of Delhi. This section reads:

Where this Act, or any other Punjab Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-

enacted.

This question must itself be divided into two separate parts, the first being whether an order of the Chief Commissioner extending the period of detention of a person detained under Section 3 (1) of either the Act of 1947 or 1949 is an 'instrument' within the meaning of this section, and the second being whether the section is intended to apply to enactments and instruments which come into existence after the passing of the Act which repeals and re-enacts with or without modification any provision of a former enactment, or whether, as is contended by the learned Counsel for the petitioner, the section only applies to enactments and instruments already in existence. As regards the first of these questions, the word 'instrument' is not defined in the General Clauses Act, nor does it seem to me that the restricted definitions of the word contained in such Acts as the Transfer of Property Act are of any assistance in deciding what is the meaning of the word in the General Clauses Act. In Wharton's Law Lexicon the definition of the word 'instrument' is as follows:-'A formal legal writing, e. g., a record, charter, deed of transfer, or agreement,' In Stroud's Legal Dictionary the definition given is: 'An instrument is a writing, and generally imports a document of a formal legal kind.' There do not appear to be any oases at all in which the meaning of the word 'instrument' in the Punjab General Clauses Act has been discussed, and there only appears to be one case in which the meaning of the word in Section 8 (1), Central General Clauses Act has been discussed. This is *Emperor v. Rayangovda Lingangouda* A.I.R. (31) 1944 Bom. 259 : 47 Cr. L.J. 23. In that case, among many other points, the question arose whether an order of the Provincial Government delegating the power of detaining persons under Rule 26, Defence of India Rules, to District Magistrate was an 'instrument' within the meaning of Section 8 (1), General Clauses Act, the terms of which are almost identical with those of Section 6 of the Punjab Act. In dealing with the point Macklin J. observed as follows:

But the difficulty in the way of the prosecution is that to bring the order of delegation within the provisions of Section 8 (1), General Clauses Act, they must show that the order of delegation is an 'instrument' within the meaning of that section so that the reference to It. 26 in the order of the delegation can be interpreted as a reference to Rule 26 as it might hereafter be re-enacted. We are

not satisfied that the order of delegation can be deemed to be an instrument within the meaning of 9. 8; and it is conceded that it cannot be regarded as an enactment. We have looked into Stroud's Judicial Dictionary and Wharton's Law Lexicon for enlightenment on the point. We find, generally speaking, that an 'instrument' is a writing usually importing a document of a formal legal kind, but that it does not include Acts of Parliament unless there is a statutory definition to that effect in any Act; and in the absence of authority we are not prepared to hold that an order of Government delegating its powers to District Magistrates is an 'instrument' within the meaning of Section 8 (1), General Clauses Act, It is certainly not an instrument as is ordinarily understood.

This decision, with which Sen J. concurred, was reached after the learned Judges had had the benefit of arguments from such learned Counsel as Mr. N. P. Engineer, a former Advocate General of India, and Mr. M. C. Setalvad, the present Advocate-General of India, and it must be presumed that if there had been any case law available on the point these learned gentlemen would have cited it. It can be argued with some plausibility that the term 'writing of a formal legal character' could include an order of detention passed in exercise of powers conferred by a statute, but I can see no difference in principle between an order of a Provincial Government delegating powers of detention to an officer, and an order by an officer for the detention of a particular person, and I am inclined to agree with Macklin J. that such an order is not what is ordinarily meant by the word 'instrument,' and that in the absence of any authority it should not be held to be an 'instrument' within the meaning of the General Clauses Act. The learned Counsel for the petitioner has drawn our attention to the wording of ss. 22 and 26, Punjab General Clauses Act, in support of his contention that the word 'instrument' in the Act is not being used in its widest sense so as to include an order. Section 32 reads:

22. Where any Punjab Act is repealed and re-enacted with or without modification, then unless it is otherwise expressly provided, any order, scheme, rule, form or bye-law, issued under the repealed Act, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted, unless and until it is superseded by any order

scheme, rule, form or byelaw issued under the provisions so re-enacted ' Section 26 reads:26. In any Punjab Act and in any rule, byelaw, instrument or document, made under, or with referenda to, any such Act, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof....

The specific use of the word 'order' in Section 22, appears to indicate that there was a distinction in the minds of the Legislature between 'instrument' and 'order', and on the whole I am inclined to take the view that an order of detention under either of the Public Safety Acts is not an 'instrument' within the meaning of Section 6. In any case, to come to the second of the questions involved in this part of the case, it does not appear to me that Section 6 is intended to apply to enactments and instruments coming into existence after the pa83ing of the repealing and modifying Act. The whole object of the General Clauses Act appears to be to preserve and maintain the legality of things done under previous Acts when changes are made in the law. It seems to me to be inconceivable that in enacting Section 8 the Legislature could have been contemplating the possibility of a reference in any future Act to the provisions of some Act which had already been repealed and re enacted with or without modifications, since such a reference could only arise in the case of gross error, if the section cannot be taken as being meant to apply to enactments which were to come into existence at a later date, it equally cannot be taken as being intended to apply to instruments to be created at a later date, in which a reference to an enactment re. pealed or reenacted with or without modification could also only be due to a gross error. I am therefore of the opinion that even if an order extending a period of detention under the Public Safety Act were to be deemed to be an instrument, a mistaken reference to a repealed enactment would not be saved by this section.

11. Whether the mistakes in these cases can be condoned as mere clerical errors is a rather difficult question. If a mistake of this kind had been made by a civil Court which had passed a decree purporting to be under the provisions of an Act which had been repealed but re-enacted in such a way that the Court still had power to pass the same decree under the new Act, or in the case of a similar mistake by a criminal Court, I do not think there would be any difficulty and the

mistake in either case could be treated as a clerical error, and corrected either by the trial Court or by a Court of appeal. The mistake could also be corrected in appeal as a mistake of law and not merely a clerical error.

12. The only case which has been cited in which a similar mistake has been made is Cri. Misc. No. 136 of 1949 decided by Khosla J. on 18-8-1949. This was a case in which the detenu was arrested and ordered to be detained for one month by the Superintendent of Police, Ambala, on 2-3 1949 and on 31st March an order was passed by the Provincial Government extending the period of detention up to 1.9-1949, The new Act had come into force in this Province on 29th March, but in the order signed by the Home Secretary on 31st March it was stated that the period of detention was being extended by the Governor in exercise of his powers under Sub-sections (4) and (6) of Section 8 of the Act of 1917. In the circumstances, Khosla J. held that the order extending the period of detention was without authority and ultra vires and he accordingly ordered the release of the detenu, In the only case cited by the learned Advocate-General on behalf of the Crown, Basanta Chandra v. Emperor a decision of the Federal Court reported as 46 Cr. L.J. 559: (A.I.R. (32) 1945 F.C 18) the facts were not on all fours with those of the) present cases, but there are some remarks of Sir Patrick Spens C. J., which may have bearing on the question involved. The detenu in that case had been ordered to be detained under B. 26, Defence of India Rules by the Governor of Bihar by an order, dated 19-3-1942, He filed a petition under Section 491, Criminal P.C. in the High Court of Patna more than a year later, as late as April 1943, and for various reasons the petition only came up for hearing in February 1944, ordinance III 3. of 1944, having come into force in the meantime on 15th January of that year. In view of certain provisions in the Ordinance the petition was summarily dismissed by the High Court. On appeal, however, the Federal Court held that the power of the High Court to deal with the petition was not removed by the Ordinance, and the case was remanded to the High Court, on 23-5-1944 for disposal on the merits. Before the case could be decided by the High Court, the Governor of Bihar passed two fresh orders on 8-7-1944, by the first of which he cancelled the previous order of detention and by the second of which he again ordered the detention of the petitioner. By a lengthy judgment reported as Basanta Chandra v. Emperor A. I. R (32) 1945 Pat 44 : 23 Pat, 968 F.B. a Pull Bench finally

dismissed the petition and the detenu again appealed to the Federal Court. The learned Chief Justice dealt this part of the case in the following passage:

It was next argued as a matter of law that once the order of 19-3-1942 had been cancelled, there was no power to pass a fresh order of detention except on fresh materials and it was contended that the learned Judges of the High Court were not justified in presuming that fresh material must have existed when the order of July 1944 was made. The first step in this argument seems to us unwarranted. The observations of the Court of Appeal in *R. v. Home Secretary, Ex parte Budd* 1941-2 All E. R. 749 show that in this broad form the proposition is untenable. It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention, a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds\* But where the earlier order of detention is held defective merely on formal grounds, there is nothing to preclude a proper order of detention being based on the pre existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention. The decision of the Patna High Court in *Kamla Kant v, Emperor* A. I. R (31) 1944 Pat. 354: (23 Pat. 252) cannot be understood as laying down any such proposition as a general proposition of law. The learned Judges seem to have drawn an inference of fact from the circumstance of the case that the order then in question was not one made in the bona fide exercise of the Governor's powers.

It was finally contended that as the previous order of this Court directed an enquiry into the validity of the detention under the order of 19-3-1942, the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of 3-7-1944. This contention proceeds on a misapprehension of the nature of habeas corpus proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. 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 (or detention. The

question is not whether the later order validates the earlier detention but whether in the face of the later valid order, the Court can direct the release of the petitioner.' It is pointed out by the learned Advocate General that in all the three present cases there are subsequent orders of the Chief Commissioner further extending the period of detention which have been passed under the proper section, namely, Sub-section (4) of Section 3 of the Act of 1949 and his argument is that the latter part of the remarks cited above applies to these cases, and now that the detenus are being detained under valid orders extending their periods of detention, it is not really necessary to go into the question of the validity of the earlier orders extending the periods of detention, and in the words of Sir Patrick Spens, the question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioners. He has also tried to distinguish the case referred to above decided by Khosla, J. on the ground that in that case there was only the prima facie wrong order extending the period of detention under Section 8 (4) of the Act of 1917, there being no further order extending the detention under the provisions of the new Act. In any case it appears to me that Khosla J, in observing that the order extending the detention of the petitioner was without authority and ultra vires, has not considered another aspect of the case, namely, that although the order invoking the powers of the Governor under Section 3 of the Act of 1917 was prima facie invalid on account of the fact that the Act of 1947 had ceased to have any force after 29-3-1949, nevertheless the Governor had power to pass a similar order under the provisions of Section 3 (4) of the Act of 1949. In other words his order was not without authority and ultra vires in the sense that he had no power to pass an order extending the period of detention and merely a mistake was made by his invoking the wrong provision of law, and it seems to me with due respect that this aspect of the matter requires serious consideration before such an order is held to be altogether without authority and ultra vires. After giving the matter my careful thought, I am of the opinion that the fact that the Chief Commissioner invoked the provisions of Sub-section (4) of Section 3 of the Act of 1917 in extending the periods of detention of the present detenus instead of invoking Sub-section (4) of Section 3 of the Act of 1949 under which he was empowered to extend the periods of detention in exactly the same way, does not

invalidate the orders in question, and that in any case the detenus are now being validly detained under the subsequent orders further extending their detention in which correct provision of law was invoked.

13. This brings us to the question of the effect of the non-compliance of the authorities with the provisions of Sub-section (6) of Section 3 of the Act of 1919. It is not disputed that since the present detenus were originally arrested and ordered to be detained, upto the present date, none of the detenus has been supplied with any of the materials contemplated by this subsection for making a representation to the local Government nor has he been informed of his right to make such a representation, and it is contended on behalf of the petitioner that once the detention of the detenus which began under the Act of 1917 was converted into detention under the Act of 1949 the provisions of this sub-section which are mandatory, ought immediately to have been complied with and that non-compliance renders their detention illegal. In support of this reliance was placed on the decision of the Full Bench reported as *Durgadas v. Rex*, A I. R. (36) 1949 all. 148 : (60 Cr. L.J. 214 F.B.) in which it was held that non-compliance with the provisions of Section 5, U. P, Maintenance of Public Order (Temporary) Act of 1947, which are similar to, but not identical with, the provisions of Sub-section (5) of Section 3, East Punjab Act, renders the detention of the detenu illegal.

14. The two contentions raised in reply by the learned Advocate-General are that the provisions of Sub-section (5) of Section 3 are not mandatory, and that in any case they have no application except at the stage of arrest and detention by the original authority, and they are not meant to be applied in cases where detention is merely extended by the local Government. The first of these points has already come up for consideration by me in or. Misc. no. 212 of 1949 decided on 22-9-1949. The principal difference between Section 6, U P. Maintenance of Public Order Act and sub s, (5) of Section 3, East Punjab Act, is that whereas in the former the word 'shall' is used the word used in the latter is 'may'. However, after considering the section in Maxwell's Interpretation of Statutes contained in pp. 216 to 251 of Edn. 9, I came to the conclusion that the word 'may' in this context must be interpreted as equivalent to "shall". My conclusions were summed up in the following passage:

On behalf of the Crown it was contended that the drafters of the East Punjab Act and the Legislature were presumably aware of the similar provisions in other Provincial Acts, and that the word 'may' was deliberately used in Sub-section (5) in order to make it discretionary for the arresting authority to carry out the provisions of this sub-section or not, and it was also contended that the powers discussed by Maxwell above mostly related to powers given to Courts to adjudicate on points raised before them, but it is dear that the principle which emerges from the discussion is that the test is whether any duty is imposed on the donee of the power, or whether he has only his own interests or convenience to consult. I cannot believe that it was the intention of the Legislature in the present case that it was nothing but the interest and convenience of the arresting authority which are to be consulted and the rights of the subject and the safeguards afforded to anyone arrested under Section 3 (1) were to be ignored and taken away in a matter affecting his liberty, and I am therefore of the opinion that the provisions of Section 8 (5) are mandatory and must be complied with and that non compliance with them tenders the detention of the detenu illegal.

I see no reason now to differ from the conclusion at which I arrived in that case and I am therefore of the opinion that the provisions of subs. (5) are mandatory, It is, however, clear from the words of the sub-section, as the learned Advocate-General contends, that these provisions are intended to be complied with as soon as possible after the first order of arrest and detention, and by the authority making these orders. The question which arises is whether after a person has been arrested and detained under the Act of 1947 and his detention is later extended under the Act of 1949, it becomes necessary to supply the detenu with material for making a representation to the local Government and to inform him of his right to make such a representation. It is to be noted that while the Act of 1949 contains certain new provisions which are in the interests of and for the protection of persons detained, since in addition to the provisions of Sub-section (5) there are also certain new provisions in Sub-section (4) for the consideration of cases of detained persons by an Advisory Tribunal which was to be set up, there is also one provision in the new Act which is very much to their disadvantage, This is that whereas under the Act of 1947 the total period of detention under Section 3 was limited to six months which was later increased to one year by an amending Act,

no such limitation exists in the Act of 1949, and the local Government can now go on indefinitely prolonging the period of detention of a person detained. In the circumstances it certainly seems desirable that some provision should be made in the new Act for supplying materials for a representation and informing the detained person of his right to make a representation in the case of persons who were originally detained under the old Act and in whose case the new Act is only applied for the purpose of extending their detention. It does not, however, seem to me that as they stand the provisions of subs. (5) are applicable in the case of such persons, and I therefore do not consider that the failure to comply with them renders the detention of such persons illegal. I would, however, venture to suggest that it would be in the interests of justice if some amendment were to be introduced into the provisions of Sub-section (5) so as to make it obligatory to extend the benefits of the provisions of this sub-section to persons who were arrested and detained before it was introduced into the Act, and even without the introduction of such an amendment in the sub-section it is obviously open to the local Government concerned to see that these facilities are given to persons originally detained under the Act of 1947 as an act of grace.

15. The result of my conclusion is that I would hold that the detention of the persons on whose behalf these three petitions have been filed is not illegal and I would therefore dismiss the petitions,

**Harnam Singh, J.**

16. I agree.