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March 27.

DATTATREYA MORESHWAR PANGARKAR

v.

THE STATE OF BOMBAY AND OTHERS

[PATANJALI SASTRI C. J., MEHER CHAND MAHAJAN, MUKHERJEA, DAS and CHANDRASEKHARA AIYAR JJ.]

Preventive Detention Act (IV of 1950), s. 11 (1)—Confirmation of detention order after report of Advisory Board—Period of further detention not specified—Order not expressed to be in the name of Governor—Validity of detention—Executive decisions—Mode of expression—Constitution of India, Art. 166 (1) and (2)—Whether directory or mandatory.

Section 11, sub-s. (1), of the Preventive Detention Act, 1950, provided that "in any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate government may confirm the detention order and continue the detention for such period as it thinks fit". The case of the petitioner who was arrested under the Act was referred to the Advisory Board and on receiving a report from the Board that in its opinion there was sufficient cause for the detention of the petitioner the Government decided to confirm the order of detention and this decision was communicated to the District Magistrate by a confidential letter signed by the Assistant Secretary to the Government for the Secretary to the Government. The material portion of the letter ran thus:—"The Government is accordingly pleased to confirm the detention order against the detenue. Please inform the detenue accordingly and report compliance." In an application for a writ in the nature of habeas corpus it was contended on behalf of the petitioner that his detention was illegal: (i) because the Government had at the time of confirming the order omitted to specify the period during which, the detention should continue; (ii) because the order of confirmation was not expressed to be made in the name of the Governor as required by Art. 166 (1) of the Constitution:

Held, per PATANJALI SASTRI C.J., MUKHERJEA, DAS *and* CHANDRASEKHARA AIYAR JJ. (MAHAJAN J. *dissenting*)—that the, omission to state the period of further detention while confirming the detention order under s. 11(1) of the Preventive Detention Act could not render the detention illegal because, per PATANJALI SASTRI C. J. *and* DAS J.—on a proper construction of s. 11 (1), a specification of the period of continuation of the detention is not necessary, however desirable it may be; per MUKHERJEA *and* CHANDRASEKHARA AIYAR, JJ.—though s. 11 (1) does contemplate that a period should be mentioned during

which the further detention of the detenue is to continue, mere omission to do so would not make the order a nullity and justify release of the detenue.

Held also, per PATANJALI SASTRI C. J., MUKHERJEA, DAS *and* CHANDRASEKHARA AIYAR, JJ., that though the Preventive Detention Act contemplates and requires the taking of an executive decision for confirming a detention order under s. 11(1), omission to make and authenticate that executive decision in the form mentioned in Art. 166 will not make the decision itself illegal for the provisions in that article are merely directory and not mandatory. Per MUKHERJEA and CHANDRASEKHARA AIYAR JJ.—Section 11(1) of the Preventive Detention Act does contemplate a formal order of confirmation and Art. 166(1) of the Constitution would apply to the case; clauses (1) and (2) of the said article must however be read together. While cl. (1) relates to the mode of expression of an executive order or instrument, cl. (2) lays down the way in which such order is to be authenticated, and when both these forms are complied with, an order or instrument would be immune from challenge in a court of law on the ground that it has not been made or executed by the Governor of the State. Even if cl. (1) is taken to be in independent provision unconnected with cl. (2) and having no relation to the purpose indicated therein, cl. (1) is directory and not imperative in its character.

MAHAJAN J.—Section 11(1) of the Preventive Detention Act contemplates that when the report of the Advisory Board reaches the Government it has to come to a decision and pass an order in accordance with that decision against the detenue to the effect that in view of the report of the Advisory Board the detention order is continued for a certain period and failure to fix the period of further detention would make the detention illegal.

A. K. Gopalan v. *The State* ([1950] S. C. R. 88), *Makhan Singh Tarsikha* v. *The State of Punjab* ([1952] S.C.R. 368), *S. Krishnan* v. *The State of Madras* ([1951] S.C.R. 621), *Chakar Singh* v. *The State of Punjab* (Petition No. 584 of 1951) and *J. K. Gas Plant Manufacturing Co. Ltd. and Others* v. *King Emperor* ([1947] F.C.R. 141) referred to.

ORIGINAL JURISDICTION. Petition (No. 683 of 1951) under Art. 32 of the Constitution of India for a writ in the nature of habeas corpus. The facts are set out in detail in the judgment.

Bawa Shiv Charan Singh (*amicus curiae*) for the petitioner.

M. C. Setalvad, Attorney-General for India (*Jindra Lal,* with him) for the respondents.

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1952. March 27. The Court delivered judgment as follows :—

DAS J.—This is an application under article 32 of the Constitution for the issue of a writ in the nature of *habeas corpus* and for the immediate release of the petitioner who is alleged to have been kept in illegal detention in Baroda Central Prison.

On February 15, 1951, the petitioner was arrested under an order made on February 13, 1951, by the then District Magistrate, Surat, in exercise of powers conferred on him by the Preventive Detention Act, 1950. A copy of the said order was served on the petitioner at the time of his arrest. On the same date grounds of detention were served on the petitioner as required by section 7 of the Act. It was specifically mentioned in the grounds that it was not in the public interest to disclose further facts. The petitioner moved the High Court of Bombay under article 226 of the Constitution complaining that his detention was illegal and praying that he should be forthwith released. In that application one of the points urged was that the grounds in support of the detention were false, vague and fantastic and that the detention order was made in bad faith. Two affidavits were filed on behalf of the State in support of the detention order. That application was, on April 17, 1951, dismissed by the Bombay High Court. In the meantime, the case of the petitioner was placed before the Advisory Board which on April 5, 1951, made a report stating that in its opinion there was sufficient cause for the detention of the petitioner. According to the affidavit of Venilal Tribhovandas Dehejia, Secretary to the Government of Bombay, Home Department, filed in answer to the present application, this report of the Advisory Board was placed before the Government and, on April 13, 1951, the Government decided to confirm the order of detention. This decision was, on April 28, 1951, communicated to the District Magistrate, Surat, in a confidential letter in the terms following :—

Confidential letter

No. B.D. II/1042-D (11) Home Department (Political)
Bombay Castle,
28th April, 1951.

To

The District Magistrate,
Surat.

Subject :—Preventive Detention Act, 1950—

Review of detention orders issued under the—

Reference your letter No. Pol. 1187/P, dated the 23rd February, 1951, on the subject noted above.

2. In accordance with section 9 of the Preventive Detention Act, 1950, the case of detenue Shri Dattatreya Moreshwar Pangarkar was placed before the Advisory Board which has reported that there is sufficient cause for his detention, Government is accordingly pleased to confirm the detention order issued against the detenu. Please inform the detenu accordingly and report compliance.

3. The case papers of the detenu are returned herewith.

Sd/- G. K. Kharkar,
for Secretary to the Government of Bombay,
Home Department.

It also appears from the aforesaid affidavit that Sri G. K. Kharkar who signed the letter for the Secretary to the Government of Bombay, Home Department, was at the time an Assistant Secretary and, as such, was, under rule 12 of the Rules of Business made by the Government of Bombay under article 166 of the Constitution, authorised to sign orders and instruments of the Government of Bombay.

The petitioner has now moved this Court under article 32 of the Constitution complaining that he is being unlawfully detained. The only question is whether he has been deprived of his personal liberty in accordance with procedure established by law. He

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is said to be detained by the State in exercise of powers conferred on it by the Preventive Detention Act, 1950, as amended in 1951. The State must, accordingly, satisfy us that the procedure established by law has been strictly followed. Although a supplementary petition has been filed in this Court complaining that the grounds supplied to him are false, vague, lacking in particulars and insufficient to enable the petitioner to make an effective representation against the order of detention, it has not, however, been pressed before us by learned counsel appearing as *amicus curiae* in support of the application. At the hearing before us, learned counsel has confined his arguments to challenging the validity of detention of the petitioner on two grounds, namely, (1) that the State Government has failed to comply with the requirements of section 11(1) of the amended Act in that at the time of confirming the detention order it omitted to specify the period during which the detention would continue, and (2) that the order of confirmation is not in proper legal form, in that it is not expressed to be made in the name of the Governor as required by article 166(1) of the Constitution.

Ground No. 1. The validity of this ground of attack depends on a proper understanding of section 11(1) of the Preventive Detention Act, which, as amended, runs as follows :—

"(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention for such period as it thiks fit".

The argument is that the sub-section contemplates a decision containing two things, namely, (1) a confirmation of the detention order and (2) a direction for the continuantion of the detention. I do not think this argument is sound, for if the intention were that both the things should be included in an order then the sub-section would have been worded differently. It would have ended by saying that "the appropriate

Government may make an order confirming the detention order and continuing the detention for such period as it thinks fit". Grammatically section 11 (1) confers two powers, namely (1) the appropriate Government may confirm the detention order and (2) the appropriate Government may continue the detention for such period as it thinks fit. The confirmation of the detention order certainly contemplates the taking of an executive decision, but the detenu being already in custody and the detention order being confirmed his detention continues automatically and, therefore, no further executive decision is called for to continue the detention. It follows that it is not necessary to include a direction for the continuation of the detention in the decision confirming the detention order.

It is next suggested that the words "such period" in the sub-section clearly imply that it is necessary to specify the period during which the detention would continue, for if the intention of Parliament were otherwise, the section would have stopped after the words "may continue his detention". It is urged that if, as held by this Court in Petition No. 308 of 1951 (*Makhan Singh Tarsikka* v. *The State of Punjab*), it is illegal, after the amendment of the Act, to mention any period of detention in the initial order of detention made under section 3 of the Act and if no period of detention need be mentioned at the time of confirmation under section 11 (1) then the appropriate Government will, after confirmation, lose sight of the case and the detenu will be detained indefinitely. It is suggested that if two constructions are possible, the one that advances the interests of the subject should be adopted. I do not think that two constructions are possible at all or that the suggested construction will be of any advantage to the detenue for reasons which I proceed to state briefly.

There can be no two opinions that detention without trial is odious at all times and that it is desirable, therefore, in cases of preventive detention that a definite period of detention should, if possible, be

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specified. But whether the Act, on a true construction of it, requires such a specification of period is an entirely different question and to answer that question regard must be had to the actual language used in the Act. If the intention of Parliament were that the period during which the detention would be continued must be specified then the sub-section 11 (1) would have empowered the appropriate authority to continue the detention for such "period as it thinks fit to specify" instead of "as it thinks fit". Further, the notion that nonspecification of the period will continue the detention for an indefinite period need not oppress us unduly because the Act itself being of a limited duration such detention must necessarily come to an end on the expiry of the Act. In *A. K. Gopalan's* case(1), Kania C. J. at page 126 said :—

"It was argued that section 11 of the impugned Act was invalid as it permitted the continuance of the detention for such period as the Central Government or the State Government thought fit. This may mean an indefinite period. In my opinion, this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound."

To the like effect were the following observations of Mahajan J. at page 232 :—

"Section 11 of the Act was also impugned on the ground that it offended against the Constitution inasmuch as it provided for preventive detention for an indefinite period. This section in my opinion has to be read in the background of the provision in subclause (3) of section 1 of the Act which says that the Act will cease to have effect on 1st April, 1951".

These observations were made on section 11 of the Act as it stood before the amendment of the Act. That section has been substantially, if not *verbatim*, reproduced in section 11 (1) of the amended Act and

(1) [1950] S.C.R. 88.

accordingly the above observations will apply to the present section 11 (1) with equal force and cogency. Indeed in *S. Krishnan* v. *The State of Madras*(1) Sastri J., as he then was expressed himself as follows in connection with the present section 11 (1) :—

"The objection to the validity of section 11 (1) can be disposed of in a few words. The argument is that the discretionary power given to the appropriate Government under that sub-section to continue the detention "for such period as it thinks fit" authorises preventive detention for an indefinite period, which is contrary to the provisions of article 22 (4). But, if as already observed, the new Act is to be in force only up to 1st April, 1952, and no detention under the Act can continue thereafter, the discretionary power could be exercised only subject to that over-all limit."

Two points clearly emerge out of these observations as I comprehend them. The very argument as to the invalidity of the section could not be raised at all except on the basis that the section, by itself and on a true interpretation of it, permitted an indefinite detention. In the second place, this argument was met by the Court, not by saying that that was not the correct meaning of the section and that on the contrary the words "such period" necessitated the fixation of a definite period of detention but, by saying that the life of the Act being limited, the duration of detention permitted by the section was in any event co-terminous with the life of the Act and could not go beyond it. This answer of the Court makes it clear that the Court fully recognised that the section, by itself and on its true interpretation, sanctioned an indefinite detention but held that that contingency had been averted by the fact that the Act itself was of a limited duration. It is said that the section should be construed irrespective of whether it occurs in a temporary statute or a permanent one, and it is urged that if the statute were a permanent one the section, on the aforesaid interpretation, would have permitted an indefinite detention. The answer is given by Mahajan J. in the

(1) [1951] S.C.R. 621 at P. 629.

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following passage in his judgment in *S. Krishnan* v. *The State of Madras* (*supra*) at page 639 with which I concurred :—

"It may be pointed out that Parliament may well have thought that it was unnecessary to fix any maximum period of detention in the new statute which was of a temporary nature and whose own tenure of life was limited to one year. Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them. The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law."

For all I know, such drastic and extensive power to continue the detention as long as it may think fit may not be given by Parliament to the executive Government in a permanent statute. But if it does think fit to do so, it will not be for the Court to question the knowledge, wisdom or patriotism of the Legislature and to permit its dislike for the policy of the law to prevail over the plain meaning of the language used by the Legislature. Apart from this consideration, there is a period specified in the sub-section itself, for as soon as the appropriate Government will cease to think fit to continue the detention it will revoke the detention order under section 13 and the period of detention will automatically come to an end. Again, if the idea of indefinite detention were so repugnant as to induce us to construe sub-section 11(1) by reading into it the requirement that the period of detention must be specified at the time the order of detention is confirmed, it will lead us to a situation which cannot be maintained in view of a decision of this Court. The section, it will be noticed, does not authorise the appropriate Government to "continue the detention for such period as it thinks fit from time to time."

Therefore, the power conferred on the appropriate Government by this sub-section will be exhausted by its single exercise and it will not be possible to extend the period of detention any longer. This view of the matter will, however, run counter to our decision in Petition No. 584 of 1951, *Chakar Singh* v. *The State of Punjab,* where it has been held that there is nothing in section 11(1) to prevent the appropriate Government from directing the detention of a person to continue further so long as the period fixed by the previous order has not expired and the person has not been released. According to this decision the appropriate Government may direct the detention to continue even after the expiry of the period fixed by the order confirming the detention order or any subsequent order provided such directions are given before the expiry of the period fixed by the immediately preceding order. From what source does the appropriate Government derive its power to direct the further continuation of the detention after having, in the order of confirmation, once specified the period of detention ? Section 13 of the Act gives power to the appropriate Government to revoke or amend a detention order which must mean the initial order of detention under section 3 of the Act but not an order made under section 11(1) confirming a detention order or fixing a period of detention. Therefore, the authority to extend the period of detention previously fixed which, in view of our decision, must be held to exist, will have to be derived from the very words "may continue such detention for such period as it thinks fit". It follows, therefore, that the specification of the period of detention does not destroy or abridge the wide over-all power of the appropriate Government to direct the continuation of the detention as long as it thinks fit. If the specification of the period of detention is not at all sacrosanct and the appropriate Government may nevertheless continue the detention as long as it thinks fit to do so, why is the specification of a period to be regarded as vitally or at all necessary ? So far as the detenu is concerned, his detention will

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not be any more definite and less irksome if it is open to the appropriate Government to continue the detention by an indefinite number of orders made from time to time until the expiry of the Act itself by afflux of time in the case of a temporary statute or by its repeal in the case of a permanent Act. It is said that if we insist on a specification of a definite period when the confirmatory order is made and thereafter each time the period of detention is extended then the appropriate Government will have to apply its mind to the case of the detenu before it will make an order for further continuation of the detention, but that if we say that no time need be specified, the appropriate Government will lose sight of the case and the detenu will be detained indefinitely. I do not see why we should impute such dereliction of duty to the appropriate Government; but even if we do so and insist on the specification of the period of detention we shall perhaps be driving the appropriate Government to fix the longest permissible period of detention ending with the expiry of the Act itself and then to lose sight of the case of the detenu. That, I apprehend, will do no good to the detenu. Section 13 gives ample power to the appropriate Government to revoke the detention order at any time and it is expected that it will apply its mind to each case and revoke the detention order and release the detenu as soon as it is satisfied that his detention is no longer necessary. In any event, the considerations of hardship urged upon us may make it desirable that a period of detention should be fixed but this cannot alter the plain meaning of the language of the section. The Court is not concerned with any question of policy. It has to ascertain the intention of the Legislature from the language used in the Act. In my judgment, on a proper construction of section 11(1), a specification of the period of continuation of the detention is not necessary, however, desirable one may consider it to be.

Ground No. 2: On this head the argument of learned counsel for the petitioner is that no valid order of confirmation has been made in proper legal form at all and that a confidential communication from the

Home Department to the District Magistrate cannot be regarded as an order under section 11(1) of the Act. Learned Attorney-General urges that section 11(1) of the Act contemplates only the taking of an executive decision, namely, the confirmation of the detention order and contends that the sub-section does not contemplate the making of a formal order. He draws our attention to section 3 of the Act which expressly refers to an order of detention and points out that section 11 (1) does not refer to any order of confirmation. Reference may, however, be made to section 13 which authorises the appropriate Government to revoke or modify the order of detention. In this section also there is no reference to any order of revocation or modification but nevertheless revocation or modification must imply an executive decision. Under section 11(1), as under section 13, the appropriate Government has to apply its mind and come to a decision. Whether we call it an order or merely an executive action makes no difference in the legal incidents of the decision. Section 11(1) plainly requires an executive decision as to whether the detention order should or should not be confirmed. The continuation of the detention as a physical fact automatically follows as a consequence of the decision to confirm the detention order and, for reasons stated above, does not require any further executive decision to continue the detention. It follows, therefore, that the Preventive Detention Act contemplates and requires the taking of an executive decision either for confirming the detention order under section 11(1) or for revoking or modifying the detention order under section 13. But the Act is silent as to the form in which the executive decision, whether it is described as an order or an executive action, is to be taken. No particular form is prescribed by the Act at all and the requirements of the Act will be fully satisfied if it can be shown that the executive decision has in fact been taken. It is at this stage that learned counsel for the petitioner passes on to article 166 of the Constitution and contends that all executive action of the Government of a State must be

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expressed and authenticated in the manner therein provided. The learned Attorney-General points out that there is a distinction between the taking of an executive decision and giving formal expression to the decision so taken. Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate Minister or officer. If every executive decision has to be given a formal expression the whole governmental machinery, he contends, will be brought to a standstill. I agree that every executive decision need not be formally expressed and this is particularly so when one superior officer directs his subordinate to act or forbear from acting in a particular way, but when the executive decision affects an outsider or is required to be officially notified or to be communicated it should normally be expressed in the form mentioned in article 166(1), *i.e.*, in the name of the Governor., Learned Attorney-General then falls back upon the plea that an omission to make and authenticate an executive decision in the form mentioned in article 166 does not make the decision itself illegal, for the provisions of that article, like their counterpart in the Government of India Act, are merely directory and not mandatory as held in *J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. and Others* v. *The King-Emperor*(1). In my opinion, this contention of the learned Attorney-General must prevail. It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done. The considerations which weighed with

(1) [1947] F.C.R. 141 (1449).

their Lordships of the Federal Court in the case referred to above in the matter of interpretation of section 40 (1) of the 9th Schedule to the Government of India Act, 1935, appear to me to apply with equal cogency to article 166 of the Constitution. The fact that the old provisions have been split up into two clauses in article 166 does not appear to me to make any difference in the meaning of the article. Strict compliance with the requirements of article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself. The position, therefore, is that while the Preventive Detention Act requires an executive decision, call it an order or an executive action, for the confirmation of an order of detention under section 11 (1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under section 11 (1). That such a decision has been in fact taken by the appropriate Government is amply proved on the record. Therefore, there has been, in the circumstances of this case, no breach of the procedure establitsed by law and the present detention of the petitioner cannot be called in question.

For the reasons stated above, in my opinion, this application must fail.

PATANJALI SASTRI C. J.—I agree with the judgment just delived by my learned brother Das and I have nothing to add.

MUKHERJEA J.—In my opinion this application should be dismissed and I deem it proper to state

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succinctly my own views on the questions that have been raised in the case.

The validity of the detention of the petitioner has been challenged before us on a two-fold ground. The first ground urged is that it was imperative on the part of the appropriate Government, when it confirmed the order of detention under section 11 (1) of the Preventive Detention Act, to sepcify the period during which the detention was to continue; and an omission to state the period vitiates the order. The other contention raised is that the order of confirmation not being expressed to be made in the name of the Governor, as is required under article 166 (1) of the Constitution, is void and inoperative.

So far as the first ground is concerned, it would be necessary to advert to the language of section 11 (1) of the Preventive Detention Act which runs as follows :—

"11. Action upon the report of Advisory Board.—(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit."

It is to be noted that section 3(1) of the Preventive Detention Act under which the initial order of detention is made is worded differently in this respect and it merely empowers the Central Government or the State Government, as the case may be, to make an order, under the circumstances specified in the section, directing that a person be detained; and nothing is said about the period for which such detention should be directed. It is now settled by a pronouncement(1) of this court that not only it is not necessary for the detaining authority to mention the period of detention when passing the original order under section 3(1) of the Preventive Detention Act, but that the order would be bad and illegal if any period is specified, as it might

(1) Vide *Makhan Singh Tarsikka* v. *The State of Punjab*, Petition No. 308 of 1951.

prejudice the case of the detenu when it goes up for consideration before the Advisory Board. The Advisory Board again has got to express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned. It is neither called upon nor is it competent to say anything regarding the period for which such person should be detained. Once the Advisory Board expresses its view that there is sufficient cause for detention at the date when it makes its report, what action is to be taken subsequently is left entirely to the appropriate Government and it can under section 11(1) of the Act "confirm the detention order and continue the detention of the person concerned for such period as it thinks fit." In my opinion, the words "for such period as it thinks fit" presuppose and imply that after receipt of the report of the Advisory Board the detaining authority has to make up its mind as to whether the original order of detention should be confirmed and if so, for what further period the detention is to continue. Obviously that is the proper stage for making an order or decision of this description as the investigation with regard to a particular detenu such as is contemplated by the Preventive Detention Act is then at an end and the appropriate Government is in full possession of all the materials regarding him. It could not have been in the contemplation of the legislature that the matter should be left indefinate and undetermined even then. This, in my opinion, is the reason for the difference in the language of section 11 (1) of the Preventive Detention Act as compared with that of section 3 (1) of the Act. I do not think that once the appropriate Government in making the order under section 11(1) specifies the period during which the detention of the person concerned is to continue, it becomes *functus officio* and is incapable of extending the detention for a further period at a subsequent time if it considers necessary. In my opinion, section 13 of the Act gives very wide powers to the detaining authority in this respect and it can revoke or modify any detention order at any time it chooses and the power of modification would

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certainly include a power of extension of the period of detention, provided such power is exercised before the period originally fixed has expired and provided the extended period does not exceed the over-all limit which is co-extensive with the life or duration of the Act itself. This is quite in accordance with the view taken by this court in *Chakar Singh* v. *The State of Punjab*(1).

The question now is whether the omission to state the period of further detention while confirming the detention order under section 11(1) of the Preventive Detention Act makes the detention illegal? The point is not free from doubt, but having regard to the fact that the new Preventive Detention Act is a temporary statute which was to be in force only up to the 1st of April, 1952, and has only been recently extended to a further period of six months, and no detention under the Act can continue after the date of expiry of the Act, I am inclined to hold that non-specification of the further period in an order under section 11(1) of the Act does not make the order of detention a nullity. If no period is mentioned, the order might be taken to imply that it would continue up to the date of the expiration of the Act itself when all detentions made under it would automatically come to an end. Of course, the appropriate Government is always at liberty to terminate the order of detention earlier, if it considers proper, in exercise of its general powers under section 13 of the Act. I am not much impressed by the argument that the non-mentioning of the period in the order of confirmation is likely to cause serious prejudice to the interests of the detenu. It may be that if a period is mentioned, the attention of the Government is likely to be drawn to the case near about the time when the period is due to expire and the facts of the case may be reviewed by the appropriate authority at that time before it decides to extend the detention any further; but it seems to me to be clear from the provision of section 13 that the Act contemplates review of individual cases by the

(1) Petition No. 584 of 1951.

appropriate Government from time to time irrespective of any period being mentioned in the order of detention. It can legitimately be expected that the detaining authority would discharge the duties which are imposed upon it, but even if it does not, there is nothing in the law which prevents it from fixing the period of detention up to the date of expiry of the Act itself which is by no means a long one, and in that case the Court would obviously be powerless to give any relief to the detenu. It is perfectly true that an order for detention for an indefinite period is repugnant to all notions of democracy and individual liberty, but the indefiniteness in the case of an order made under section 11 (1) of the Preventive Detention Act is in a way cured by the fact that there is a limit set to the duration of the Act itself, which automatically prescribes a limit of time beyond which the order cannot operate. In my opinion, section 11(1) of the Preventive Detention Act does contemplate that a period should be mentioned during which the further detention of the detenu is to continue and the Government should see that no omission occurs in this respect, but I am unable to hold that this omission alone would make the order a nullity which will justify us in releasing the detenu.

The other question for consideration is, whether the order is invalid by reason of the fact that it has not been expressed in the manner laid down in article 166 of the Constitution. Article 166 runs as follows:—

"166 (1). All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

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(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

In the case before us the order confirming the detention purports to be signed by Mr. G. K. Kharkar, for the Secretary to the Government of Bombay, Home Department. The affidavit filed in this case by V. T. Dehejia shows that Mr. Kharkar was then the Assistant Secretary to the Home Department and was authorised under the rules framed under article 166 (3) of the Constitution by the Governor of Bombay to sign orders and instruments for the Government of Bombay. The order admittedly is not expressed to be made in the name of the Governor and if article 166 (1) of the Constitution applies to this case, it certainly does not fulfil the requirement of that provision. To get round this difficulty the learned Attorney-General has put forward a two-fold argument. He has argued in the first place that article 166 (1) of the Constitution applies to a case where the executive action has got to be expressed in the shape of a formal order; and it is only such order that requires authentication in the manner laid down in clause (2) of the article. Section 11 (1) of the Preventive Detention Act, it is said, does not necessitate the passing of a formal order at all. It is enough if the detaining authority decides by any form of executive action that the original order of detention should be confirmed. The other argument put forward is that the provisions of clauses (1) and (2) of article 166 are directory and not mandatory in the sense that even if a particular order is not expressed or authenticated in the way mentioned in these provisions, it would not be an ineffective or invalid order provided it is proved to have been made by the proper authority to whom that particular business has been allocated by the rules framed under clause (3) of article 166. The only result of such omission may be that the order would not enjoy an

immunity from challenge on the ground specified in clause (2) of the article.

So far as the first point is concerned, it seems to me to be quite correct to hold that article 166(1) of the Constitution is confined to cases where the executive action requires to be expressed in the shape of a formal order or notification or any other instrument. I cannot, however, agree with the learned Attorney-General that section 11 (1) of the Preventive Detention Act does not contemplate the passing of a formal order. It is true that section 11(1) does not speak of an order of confirmation but when there is an initial order of detention made under section 3 of the Preventive Detention Act, it could normally be confirmed only by passing another order. This would be clear from the provision of section 13 of the Act which empowers the detaining authority to revoke or modify a detention order any time it chooses. Neither revocation nor modification is possible without any order being made to that effect and yet section 13 like section 11(1) does not speak of an order at all. The first contention of the Attorney-General therefore cannot succeed.

The other contention raised by the learned Attorney-General involves consideration of the question as to whether the provision of article 166 (1) of the Constitution is imperative in the sense that non-compliance with it would nullify or invalidate an executive action. The clause does not undoubtedly lay down how an executive action of the Government of a State is to be performed; it only prescribes the mode in which such act is to be expressed. The manner of expression is ordinarily a matter of form, but whether a rigid compliance with a form is essential to the validity of an act or not depends upon the intention of the legislature. Various tests have been formulated in various judicial decisions for the purpose of determining whether a mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is unnecessary for our present

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purpose to discuss these matters in detail. In my opinion, article 166 of the Constitution which purports to lay down the procedure for regulating business transacted by the Government of a State should be read as a whole. Under clause (3) the Governor is to make rules for the more convenient transaction of such business and for allocation of the same among the Ministers in so far as it does not relate to matters in regard to which the Governor is required to act in his discretion. It is in accordance with these rules that business has to be transacted. But whatever executive action is to be taken by way of an order or instrument, it shall be expressed to be taken in the name of the Governor in whom the executive power of the State is vested and it shall further be authenticated in the manner specified in the rules framed by the Governor. Clauses (1) and (2) of article 166 in my opinion are to be read together. Clause (1) cannot be taken separately as an independent mandatory provision detached from the provision of clause (2). While clause (1) relates to the mode of expression of an executive order or instrument, clause (2) lays down the way in which such order is to be authenticated; and when both these forms are complied with, an order or instrument would be immune from challenge in a court of law on the ground that it has not been made or executed by the Governor of the State. This is the purpose which underlies these provisions and I agree with the learned Attorney-General that non-compliance with the provisions of either of the clauses would lead to this result that the order in question would lose the protection which it would otherwise enjoy, had the proper mode for expression and authentication been adopted. It could be challenged in any court of law even on the ground that it was not made by the Governor of the State and in case of such challenge the onus would be upon the State authorities to show affirmatively that the order was in fact made by the Governor in accordance with the rules framed under article 166 of the Constitution. This view receives support from a pronouncement of the Federal Court

in *J. K. Gas Plant Manufacturing Company Limited and Others* v. *King-Emperor*(1), where a somewhat analogous provision contained in section 49(1) of Schedule IX of the Government of India Act came up for consideration and the provision was held to be directory and not imperative.

Even if clause (1) of article 166 is taken to be an independent provision unconnected with clause (2) and having no relation to the purpose which is indicated therein, I would still be of opinion that it is directory and not imperative in its character. It prescribes a formality for the doing of a public act. As has been said by Maxwell(2), "where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or in other words as directory only." In the present case the order under section 11 (1) of the Preventive Detention Act purports to be an order of the Government of Bombay and is signed by the officer who was competent to sign according to the rules framed by the Governor under article 166 of the Constitution, and in these circumstances I am unable to hold that the order is a nullity even though it has not been expressed to be made in the name of the Governor. The result is that both the grounds fail and the petition is dismissed.

CHANDRASEKHARA AIYAR J.—I concur in the order just now pronounced by my learned brother Mukherjea J. and I have nothing useful to add.

MAHAJAN J.—The legality of the detention of the petitioners in all the above-mentioned petitions is challenged on two grounds: (1) That the order of

(1) [1947] F.C.R. 142.

(2) Maxwell on Interpretation of Statutes, pp. 379-80.

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continuance of the detention made under section 11 of the Preventive Detention Act, 1950, as amended, does not specify the period of detention. (2) That it is not expressed "in the name of the Governor" as required by article 166 (1) of the Constitution. The petitioners were informed through the District Magistrate that government had confirmed the detention orders but they were not told for what period their detentions were to continue. No order expressed in the manner contemplated by article 166(1) was served on them.

It was contended on behalf of the petitioners that the requirements of the Preventive Detention Act should be strictly complied with, that it was one of the requirements of section 11 of the Act that the government should at the time of confirming the detention order specify the period of the continuance of such detention and that non-compliance in this particular vitiated the continuance order. It was further urged that unless the order was expressed in the manner required under article 166(1) of the Constitution and served on the person concerned it had no force.

The learned Attorney-General ontested both these contentions. He argued that it was not incumbent on government to make any formal order under section 11 and all that the section contemplates is an executive action indicating an intention of the government to confirm the detention order and continue the detention after receipt of the report of the Advisory Board, that there was nothing in the language of the section which obliged the government to specify the period of such detention and that any omission to mention the period would not make the continuation of the detention illegal. It was also argued that the action of the government under section 11 need not necessarily be expressed as required in article 166(1) that these provisions were merely directory and not mandatory and had been substantially complied with.

For a proper appraisal of these contentions it is necessary to set out the relevant provisions of the

Constitution and of the Preventive Detention Act. Articles 22 (4) and (5) of the Constitution are in these terms :—

"(4) No law providing for preventive detention shall authorise the detention of a person for *longer period* than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported *before the expiration of the said period of three months* that there is in its opinion sufficient cause for such detention.....

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making representation *against the order.*"

Sections 3, 9, 10, 11 and 13 of the Preventive Detention Act provide as follows :—

"3. The Central Government or the State Government may—(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to.....it is necessary so to do, *make an order directing that such person be detained.*

"9. In every case where a detention order has been made under this Act, the appropriate Government shall, *within six weeks* from the date specified in sub-section (2) place before an Advisory Board constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report made by such officer under sub-section (3) of section 3."

"10. (1) the Advisory Board shall, after considering the materials placed before it and, after calling for such further information, as it may deem necessary, from the appropriate Government or from the person concerned, and if in any particular case it considers it essential, after hearing him in person, submit its

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report to the appropriate Government *within ten weeks* from the date specified in sub-section (2) of section 9.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned."

"11. (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the *detention order* and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall *revoke the detention order* and cause the person to be released forthwith."

"13. (1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897 (X of 1897), a *detention order* may at any time be revoked or modified,.....

(2) The revocation of a detention order shall not bar the making of a fresh detention order under section 3 against the same person."

The answer to the first question depends on the construction to be placed upon the words "such period as it thinks fit" occurring in section 11 of the Act. The words have to be given their plain meaning irrespective of the circumstances that they occur in a temporary statute and have to be construed in the same manner if they occurred in a permanent statute.

It has been held by this Court in *Makkan Singh Tarsikha* v. *State of Punjab,* Petition No. 308 of 1951, that fixing of the period of detention in the initial order of detention under section 3 is contrary to the scheme of the Act inasmuch as such a construction tends to prejudice the case of the detenu when placed before the Advisory Board. It was emphasized that before a person is deprived of his personal liberty, the procedure established by law must be strictly followed

and must not be departed from to the disadvantage of the person affected. The language employed in section 11 of the Act is different from the language of section 3 and to my mind, this difference indicates a contrary intention. The words "such period as it thinks fit" have the meaning that government has to specify and fix the period of such detention. If these words were construed in the manner suggested by the learned Attorney-General, it will lead to the result that the Preventive Detention Act would authorise detention of a person without specification of the period of such detention at any moment of time, subject of course to the over-all limit fixed for the life of the Act itself, and that the government would not be obliged to apply its mind to the question of duration at all. Such a conclusion, to my mind, has to be avoided unless the language employed conclusively points to it.

Under the Constitution, the detention of a person under any law providing for preventive detention cannot be for a period of more than three months unless the Advisory Board is of the opinion that there is sufficient cause for the detention of the person concerned. The Constitution itself has specified the maximum limit of the initial detention and detention for a period longer than three months can only be made on the basis of the report of the Advisory Board. The words "longer period than three months" to my mind do not indicate that the period can be of indefinite duration, as it could be under the unique Regulation III of 1818. On the other hand, they indicate a specified period, though longer than three months. The Constitution visualizes, in my opinion, a period of detention initially for three months, which may subsequently be extended for a further period of time; but it rules out the idea of detention without a fixed duration, *i.e.*, with a beginning but without an end. Any notion of an indefinite period of detention is wholly foreign to a democratic constitution like ours. As pointed out by me in *Gopalan's* case(1), the law of

(1) [1950] S.C.R. 88.

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preventive detention during peace times is an evil of necessity as it deprives a person of his personal liberty without a trial and even without a personal hearing and that being so, the safeguards provided against unregulated executive action have to be construed as widely as possible for the benefit of a person detained. The words "such period" imply that there has to be a beginning and an end of that period; in other words, it has to be for a certain duration the extent depending on the pleasure of the government. Though the government is entitled to fix the period of detention at its choice, it is bound to make a decision about it. If this was not the true import and meaning of the language employed in the section and the intention was that the government need not specify the duration of the detention, the section, in my view would have been drafted differently. There was no necessity to use the words "for such period as it thinks fit" therein at all. The intention would have been well expressed if the section was worded as follows :—

"The appropriate Government may confirm the detention order".

It was on these lines that rule 26 of the Defence of India Rules was drafted and the same was the scheme of Regulation III of 1818. The warrant to the jailer in the regulation directed him to receive the person into custody and to deal with him in conformity with the orders of the Governor-General. The same phraseology could have been employed in section 11.

It has been held by this Court in *Chakkar Singh* v. *The State of Punjab* (Petition No. 584 of 1951), that the power of the detaining authority under section 11 is not exhausted once it specifies the period of detention but that it can, before the expiration of the period initially fixed, direct the detention of a person to continue for a further period. I took this view for the simple reason that it was in accord with the provisions of the General Clauses Act which provide that the authority which has the power to make a certain order or to give a certain direction has also the power before it becomes *functus officio* to revise and reconsider that

order or to amend or to alter it. That decision does not by implications suggest that it was not obligatory on government to specify the period of detention under section 11. On the other hand, it presupposes that such a period should be fixed but the Government can change its mind if it considers necessary.

The conclusion that the section authorizes detention for an indefinite period was negatived by the late Chief Justice and by me in *Gopalan's* case(1). The learned Chief Justice in that case in dealing with section 11 made the following observations :—

"It was argued that section 11 of the impugned Act was invalid as it permitted the continuance of the detention for such period as the Central Government or the State Government thought fit. This may mean an indefinite period. In my opinion this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound."

In the same case I said as follows :—

"Section 11 of the Act was also impugned on the ground that it offened against the Constitution inasmuch as it provided for preventive detention for an indefinite period. This section in my opinion has to be read in the background of the provision in subclause (3) of section 1 of the Act which says that the Act will cease to have effect on 1st April, 1951."

In *S. Krishnan* v. *The State of Madras*(2), the question of the validity of section 11 was again examined. The court took the view that the section was good. Bose J. dissenting held that the section was bad as it provided for an indefinite period of detention. Patanjali Sastri J., as he then was, and with whom the learned Chief Justice agreed as to the validity of the section observed as follows :—

"The objection to the validity of section 11 (1) can be disposed of in a few words. The argument is that the discretionary power given to the appropriate

(1) [1950] S.C.R. 88. (2) [1951] S.C.R. 621.

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Government under that sub-section to continue the detention 'for such period as it thinks fit' *authorises preventive detention for an indefinite period, which is contrary to the provisions of article* 22(4). *But, if as already observed, the new Act is to be in force only up to* 1*st April,* 1952, *and no detention under the Act can continue thereafter, the discretionary power could be exercised* only subject to that over-all limit."

In the same case while upholding the validity of section 11, I made the following observations :—

"It may be pointed out that Parliament may well have thought that it was unnecessary to fix any maximum period of detention in the new statute which was of a temporary nature and whose own tenure of life was limited to one year. Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them. The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law."

The point for decision that case was whether it was necessary while enacting the Preventive Detention Act to fix a maximum period for the detention of a person as contemplated by article 22 (7) of the Constitution, and whether for want of such fixation the statute was void. That contention was negatived. The point that arises for determination in the present case, however, is whether the Government when making an order under section 11 of the Act has got to specify a period for the continuance of the detention. The question as to the meaning of the words "such period as it thinks fit" was neither argued nor decided in either of the cases mentioned above. The result of the above decisions to my mind is this : that section 11 does not provide for an indefinite period of detention and is not bad on that ground, though Bose J. took a contrary

view. The section in view of these decisions should read thus :—

"In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit, (but not beyond the period of the life of the Act itself)."

Within the period of the life of the Act the Government can fix any period for the duration of the detention. The words "such period as it thinks fit", in my opinion, oblige the Government to fix a period of the detention of the person concerned within the over-all limit of the period of the life of the Act. The government must make up its mind and decide in each individual case after the receipt of the report of the Advisory Board whether a particular detenu has to be kept in detention for the whole of the over-all period, or for any period shorter than that. It cannot be presumed that every case requires detention for the maximum period. That decision is however subject to review and alteration before the time originally determined runs out.

The contention that the Government need make no order at all under section 11 and that it can indicate its intention by some other method seems to me to be unsound. This result was sought to be spelt out of the phraseology of sections 3 and 11 of the Act. Section 3 provides for the making of an order of detention, while section 11 does not use that phraseology. In my opinion, however, this difference in the phraseology of the two sections does not in any way support the contention raised. The making of an order is implicit in the language of the section itself. Confirmation of an order already passed can only be by making an order. The section in another part provides for the revocation of an order. Revocation of an order again can only be made by passing an order of revocation and cannot be done by any other process. Section 13 provides not only for

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revocation of an order but for modification of the order of detention. It is obvious that the modification of an order is only possible by passing a fresh order and not in any other manner. No particular significance can attach to the omission of the words "make an order" in section 11. The word "order" has numerous meanings but the meaning relevant in the present context is "decision". It also means "an authoritative direction or mandate". It cannot be contended that Government can confirm or continue the detention without taking a decision or issuing a direction. Such a decision or direction is tantamount to an order. I am therefore clearly of the view that it is the intention of the law that when the report of the Advisory Board reaches the Government, it has to come to a decision and pass an order in accordance with that decision against the detenu to the effect that in view of the report of the Advisory Board the detention order is continued for a certain period.

Reliance was placed by the learned Attorney-General in support of his contention on two decisions of the High Courts in India. In *Prahlad Krishna* v. *The State of Bombay*(1), it was held that it was not necessary to mention the period during which the detenu will be further detained after the State Government had confirmed the detention order. This conclusion was reached on the following reasoning :—

"The words of the section are exactly similar in effect to the words of a contract between two parties in which one said to the other that the latter should keep a cycle lent by the former for such period as he thought fit. There would be no necessity in such a case for the person to whom the cycle was lent to say how long he would keep the cycle.....If the legislature had intended that the appropriate Government should make an order after receiving a report of the Advisory Committee as to how long the detenu should be detained, it would have said not that the detenu's detention should continue as long as the appropriate Government thought fit, but 'pass an order for the

(1) A.I.R. 1952 Bom. 1.

detention of the person concerned for such further period as it deemed fit'."

The analogy of the cycle contract, in my opinion, is neither happy nor apposite, in the construction of section 11 of the Preventive Detention Act. Further I am not able to see how the draft suggested by the High Court would have more appropriately brought out the intention of the legislature than the words of the section as it now stands. The addition of the word "further" does not necessarily indicate that the Government is bound to specify a period if the original words "such period" do not so indicate.

In *Ram Adhar Misra* v. *The State*(1), it was held that an order of detention which does not specify the period of detention cannot be regarded as illegal. Reliance was placed on the observations of the late Chief Justice and myself in *Gopalan's* case(2), and cited earlier in this judgment. These observations do not support the conclusion reached by the High Court, as already observed. The decision is not supported on any other independent reasoning.

The nearest analogy to the language employed in section 11 is found in the provisions of Part IV of the Code of Criminal Procedure relating to prevention of offences. In sections 106 to 110 of this Part the language employed is "a person can be called upon to execute a bond for his good behaviour etc. for *such period* not exceeding one year or three years as the Magistrate thinks fit to fix." It is not possible to argue that the magistrate can call upon a person to execute a bond without fixing a period for which that bond is to be good, and that in the absence of such determination it has to be presumed that the bond has to be executed for the maximum period mentioned in the section. In my opinion, failure to fix the period for which the bond is to be operative would make the order ineffective and any default on the part of the person called upon to give the bond would not be punishable. The discretion given to Government by

(1) A.I.R. 1951 All. 18. (2) [1950] S. C. R. 88.

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the phrase "as it thinks fit" is limited by the duty imposed on it by the provisions of the section.

The next question that falls to be determined and which is of some difficulty, is whether failure to fix the period makes the detention illegal. After considerable thought I have reached the conclusion that the non-determination by Government of the period of the continuance of the detention operates prejudicially against the detenus and makes the detention illegal. It is possible and even probable that had the Government on receipt of the report of the Advisory Board applied its mind and come to a decision on the point, it might well have fixed the duration of the detention at a point of time that would have expired by now, though it is also likely that it might not have expired by now. In such a situation when the matter is in doubt it is not right to hold that the detention of the petitioners at the present moment is lawful. The onus of establishing affirmatively that the detention of these petitioners is lawful at the present moment rests on the detaining authority and in the circumstances it has to be held that this onus remains undischarged. The subsequent conduct of the Government in resisting these petitions is not relevant in this enquiry in the absence of an order as prescribed by the statute. If the Government finds that the detention of the petitioners is necessary up to 31st March, 1952, it can give effect to that intention in these cases by issuing a fresh order of detention.

The result therefore is that, dissenting from the decision of the majority of the court, I hold that the petitioners are not detained according to procedure established by law and are entitled to their release. I therefore direct that they be released forthwith.

In this view of the case I do not feel called upon to decide the second point raised in these cases.

Petitions dismissed.

Agent for the respondents: *P. A. Mehta.*