MAKHAN SINGH

v.

STATE OF PUNJAB

(AND CONNECTED APPEALS)

1963

September 2

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA AND J. C. SHAH, JJ.)

Constitution of India, 1950, *Arts.* 352 *and* 359—*Proclamation of emergency—President's order restricting enforcement of fundamental rights—Detention under Defence of India Act* (*LI of* 1962) *and Defence of India Rules—Application for release under s.* 491, *Code of Criminal Procedure* (*Act V of* 1898)—*Maintainability.*

The appellants were detained under r. 30(1) of the Defence of India Rules made by the Central Government under s. 3 of the Defence of India Ordinance, 1962. They applied to the Punjab and Bombay High Courts under s. 491(1)(b) of the Code of Criminal Procedure and their case was that ss. 3(2)(15)(i) and 40 of the Defence of India Act, 1962, and r. 30(1)(b) of the Defence of India Rules, which were continued under the Act, were unconstitutional and invalid inasmuch as they contravened their fundamental rights under Arts. 14, 21, 22(4), (5) and (7) of the Constitution and that, therefore, they should be set at liberty. The High Courts held that the Presidential Order which had been issued on November 3, 1962, under Art. 359(1) of the Constitution, after a declaration of emergency under Art. 352, consequent on the Chinese invasion of India, barred their right to move the said petitions and dismissed them. These appeals raised two common questions in this Court, (1) what was the true scope and effect of the Presidential Order issued under Art. 359(1), and (2) did the bar created by the Order operate in respect of the applications under s. 491(1)(b) of the Code. The Presidential Order was as follows:—

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

By a later amendment of the Order Art. 14 was incorporated into it.

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Held: (per Gajendragadkar, Sarkar, Wanchoo, Hidayatullah, Das Gupta and Shah, JJ.) that the proceedings taken by the appellants in the High Courts under s. 491(1)(b) of the Code were hit by the Presidential Order and must be held to be incompetent.

Article 359 of the Constitution was not capable of two interpretations and it was, therefore not necessary to decide the controversy raised by the parties as to whether that Article should be interpreted in favour of the President's power granted by it or the fundamental rights of the citizens.

The King (*At the Prosecution of Arthur Zadig*) v. *Halliday*, [1917] A.C. 260, *Liversidge* v. *Sir John Anderson*, [1942] A.C. 206, *Keshav Talpade* v. *The King Emperor*, [1943] F.C.R. 49, *Nakkuda Ali* v. *M. F. De S. Jayaratne*, [1951] A.C. 66 and *King Emperor* v. *Vimalabai Deshpande*, L.R. 73 I. A. 144, considered.

The words 'any court' in Art. 359(1), construed in their plain grammatical meaning, must mean any court of competent jurisdiction including the Supreme Court and the High Courts before which the rights specified in the Presidential Order can be enforced. It was not correct to say that the use of the words was necessary so as to include such other courts as might be empowered in terms of Art. 32(3). Nor was it correct to say that the words could not include a High Court as its power to issue a writ under Art. 226(1) was discretionary.

In judging whether a particular proceeding fell within the purview of the Presidential Order the determining factor was not its form nor the words in which the relief was couched but the substance of it. If in granting the relief the court had to consider whether any of the fundamental rights mentioned in the Presidential Order, had been contravened, the proceeding was within the Order, whether it was under Art. 32(1) or 226(1) of the Constitution.

The right to move the court for writ of *habeas corpus* under s. 491(1)(b) of the Code of Criminal Procedure was now a statutory right and could no longer be claimed under the common law.

Girindra Nath Banerjee v. *Birendra Nath Pal* I.L.R. 54 Cal. 727, *District Magistrate, Trivandrum* v. *K. C. Mammen Mappillai*, I.L.R. [1939] Mad. 708, *Matthen* v. *District Magistrate, Trivandrum*, L.R. 66 I.A. 222 and *King Emperor* v. *Sibnath Banerji*, L.R. 72 I.A. 241, referred to.

Since the promulgation of the Constitution the two methods by which a citizen could enforce his right of personal freedom were (i) by a writ under Art. 226(1) or Art. 32(1), or (ii) under s. 491(1)(b) of the Code of Criminal Procedure. Whichever method he adopted if the right he sought to enforce was a fundamental right guaranteed by the Constitution the matter must, come within Art. 359(1) of the Constitution. That the court could exercise its power under s. 491(1)(b) *suo motu* could make no

difference and Arts. 372, 225 or 375 could provide no valid ground of attack. The suspension of the right to move any court, as under the Presidential Order, must necessarily suspend the Court's jurisdiction accordingly.

The right to challenge a detention order under s. 491(1)(b) of the Code had been enlarged by the fundamental rights guaranteed by the Constitution and when a detenu relied upon such rights in his petition under that section he was in substance seeking to enforce his fundamental rights. The prohibition contained in Art. 359(1) and the Presidential Order must, therefore, apply.

The expression "right to move any court" in Art. 359(1) and the Presidential Order takes in all legal actions, filed or to be filed, in which the specified rights are sought to be enforced and covers all relevant categories of jurisdictions of competent courts under which the said actions would otherwise have been normally entertained and tried.

Sree Mohan Chowdhury v. *Chief Commissioner Union Territory of Tripura,* [1964] 3 S.C.R. 442, referred to.

Even though the impugned Act may be invalid by reason of contravention of Arts. 14, 21 and 22, as contended by the appellants, that invalidity could not be challenged during the period prescribed by the Presidential Order and it could not be said that the President could not because of such invalidity issue the order.

Where, however, the challenge to the validity of the detention order was based on any right other than those mentioned in the Presidential Order, the detenu's right to move any court could not be suspended by the Presidential Order because the right was outside Art. 359(1).

Where again the detention was challenged on the ground that it contravened the mandatory provisions of the relevant Act or that it was *malafide* and was proved to be so and in all cases falling under the other categories of s. 491(1) of the Code excepting those under s. 491(1)(b), the bar of the Presidential Order could have no application. So also the plea that the operative provision of the law under which the order of detention was made suffered from the vice of excessive delegation, was an independent plea not relatable to the fundamental rights mentioned in the Presidential Order and its validity had to be examined.

The plea that s. 3(2)(15)(i) and s. 40 of the impugned Act suffered from excessive delegation must fail. The legislative policy was broadly stated in the preamble and the relevant provisions of ss. 3(1) and 3(2) gave detailed and specific guidance to the rule making authority and it was not correct to say that the Act had by the impugned sections delegated essentially legislative function to that authority. Rule 30(1)(b) which was consistent with the operative provisions of the Act could not also be challenged on that ground.

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In re The Delhi Laws Act, 1912 *etc.* [1951] S.C.R. 747, *Harishankar Bagla* v. *The State of Madhya Pradesh,* [1955] 1 S.C.R. 380, *Bhatanagars and Co. Ltd.,* v. *The Union of India,* [1957] S.C.R. 701, relied on.

The impugned Act could not also be struck down as a piece of colourable legislation because the Preventive Detention Act, 1950, was already on the Statute book. The Parliament had power under Entry 9, List I of the Seventh Schedule to the Constitution and if in view of the grave threat to the security of India it passed the Act, it could not be said to have acted *malafide.*

If the Parliament thought that the executive would not be able to detain citizens reasonably suspected of prejudicial activities by a recourse to the Preventive Detention Act, 1950, which provided for the required constitutional safeguards and the impugned Act which it enacted did not, it could not be suggested that it was acting *malafide.* Even if the impugned Act contravened Arts. 14 and 22 and the detentions thereunder were invalid, Art. 359(1) and the Presidential Order, which were precisely meant to meet such a situation, barred investigation on the merits during the period prescribed by the Order.

The proceeding under s. 491(1)(b) of the Code is one proceeding and the sole relief that can be claimed under it is release from the detention. If that could not be claimed because of the Presidential Order it was unreasonable to say that a mere declaration that the impugned Act and the detention thereunder were invalid could be made. Such a declaration is clearly outside the purview of s. 491(1)(b) of the Code as also of Arts. 226(1) and 32(1) of the Constitution.

The period for which the emergency should continue and the restrictions that should be imposed during its continuance are matters that must inevitably be left to the executive. In a democratic state the effective safeguard against any abuse of power in peace as also in emergency is the existence of enlightened, vigilant and vocal public opinion.

Liversidge v. *Sir John Anderson,* [1942] A.C. 206, referred to.

The inviolability of individual freedom and the majesty of law that sustains it are equally governed by the Constitution which has made this Court the custodian of the fundamental rights on the one hand and, on the other, provided for the declaration of the emergency. Consequently, in dealing with the right of a citizen to challenge the validity of his detention, effect must be given to Art. 359(1) and the Presidential Order issued under it. The right specified in that Article must be held to include such right whether constitutional or constitutionally guaranteed and the words "any court" must include the Supreme Court and the High Court.

The Punjab and the Bombay High Courts were, therefore, right in their decision that the applications under s. 491(1)(b) of

the Code were incompetent in so far as they sought to challenge the validity of the detentions on the ground that the Act and the Rules under which the orders were made contravened Arts. 14, 21 and 22(4)(5) and (7) of the Constitution.

Per Subba Rao, J. It was clear that s. 3(2)(15)(i) of the Defence of India Act, 1962, and r. 30(1)(b) made under the Act contravened the relevant provisions of Art. 22 of the Constitution and were, therefore, void.

Deep Chand v. *The State of Uttar Pradesh,* [1959] Supp. 2 S.C.R. 840, *Mahendra Lal* v. *State of* U.P., A.I.R. 1963 S.C. 1019, *A. K. Gopalan* v. *State of Madras,* [1950] S.C.R. 88, referred to.

Under the Constitution, every person has a right to move the Supreme Court, the High Courts or any other court or courts constituted by the Parliament under Art. 32(3) for the enforcement of fundamental rights in the manner prescribed. But while the right to move the Supreme Court is a guaranteed right, the right to move the others is not so.

Article 359, properly construed, meant that the bar imposed by the Presidential Order applied not only to the guaranteed right to move the Supreme Court but also the rights to move the other courts under Art. 32 and Art. 226 of the Constitution.

There is no new rule of construction peculiar to war measures. It is always the same, whether in peace or in war. The fundamental rule is that the courts have to find out the expressed intention of the Legislature from the words of the enactment itself. Words must be given their natural and ordinary meaning unless there is ambiguity in the language in which case the court has to adopt that meaning which furthers the intention of the Legislature.

A constitutional provision such as Art. 359, however, cannot be given a strained construction to meet a passing phase such as the present emergency.

Rex v. *Halliday,* L.R. [1917] A.C. 260, *Liversidge* v. *Sir John Anderson,* L.R. [1942] A.C. 206, *Nakkuda Ali* v. *Jayaratna,* L.R. [1951] A.C. 66, *Gibbon* v. *Ogden,* (1824) 6 L. Ed. 23, discussed.

Section 491 of the Code of Criminal Procedure is wide in its terms and gives a discretionary power to the High Courts. Unlike Arts. 32 and 226, the exercise of the power is not channelled through procedural writs or orders and their technicalities cannot circumscribe the court's discretion.

Girindra Nath Banerjee v. *Birendra Nath Pal,* (1927) I.L.R. 54 Cal. 727, *District Magistrate, Trivandrum* v. *Mammen Mappillai,* I.L.R. 1939 Mad. 708, *Matten* v. *District Magistrate, Trivandrum,* L.R. (1939) 66 I.A. 222, referred to.

Section 491 is continued by Art. 372 and Art. 225 preserves

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the jurisdiction of the High Court. The power it confers on the High Court is not inconsistent either with Art. 32 or Art. 226 or any other Article of the Constitution and the section cannot, therefore, be said to have been impliedly superseded even to the extent Art. 226 empowers the High Court to give relief in cases of illegal detention. Though remedial in form the section postulates the existence of the substantive right that no person can be deprived of his liberty except in the manner prescribed by law. It assumes the existence of the rule of law and empowers High Court to act *suo motu*. The rights, substantive and procedural, conferred by it are different from those under Arts. 32 or 226 of the Constitution. It places the onus on the custodian to prove that the detention is legal and although in scrutinising the legality of the detention the court may have to consider whether the law offends any fundamental rights, that cannot make the proceeding one for the enforcement of fundamental rights or the decision anything but one on the unconstitutionality of a law because of infringement of fundamental rights generally.

The mode of approach to the High Court under s. 491 of the Code or the nature of the relief given thereunder cannot be equated with those under the Constitution. The absolute discretionary jurisdiction under it cannot be put on a par with the jurisdiction under Art. 226 which is hedged in by constitutional limitations.

Alam Khan v. *The Crown*, (1947) I.L.R. 28 Lahore 274, *Ramji Lal* v. *The Crown*, I.L.R. (1949) II E.P. 28, *King-Emperor* v. *Vimlabai Deshpande*, (1946) L.R. 73 I.A. 144, referred to.

While s. 491 gives no right to enforce fundamental rights, operating as it does as a check on arbitrary action, Art. 359 is concerned not with statutory powers but deals with the constitutional right and the constitutional enforcement of it. It was not, therefore, correct to say that Art. 359 would be frustrated if s. 491 was allowed to stand for Parliament might amend that section any time it liked.

The expression "right to move any court for enforcement of such of the rights conferred by Part III" in Art. 359 must refer only to the right to move under Art. 32 or Art. 226 for the said specific relief and could not be applied to the exercise of the statutory power of the High Courts under s. 491 of the Code and, consequently, the expression "all proceedings pending in any court for the enforcement of the rights" must refer to the proceedings initiated in exercise of that right.

The detenus could not, therefore, enforce their fundamental rights under Arts. 21, 32 and 14 while the Presidential Order lasted, but that did not affect the High Court's power under s. 491 of the Code.

The President's Order cannot bar the detenus from proving even under Arts. 32(1) and 226 that the detentions were not made

under the Defence of India Ordinance or the Act as they were outside the Ordinance or the Act or in excess of the power conferred by them or that the detentions were made *malafide* or in fraudulent exercise of power.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 80 of 1963.

Appeals by special leave from the judgment and order dated March 26, 1963, of the Punjab High Court in Criminal Mis. No. 186 of 1963.

Criminal Appeals Nos. 86 *to* 93 *of* 1963.

Appeal by special leave from the judgment and order dated February 21, 1963 of the Punjab High Court in Criminal Misc. No. 155, 102, 108, 105, 104, 101 and 107 of 1963 and judgment and order dated February 1963 of the same High Court in Criminal Misc. No. 99 of 1963.

Criminal Appeals Nos. 109 *to* 111 *of* 1963.

Appeals from the judgment and order dated May 31, 1963 of the Maharashtra High Court in Criminal Applications Nos. 217, 218 and 114 of 1963.

Criminal Appeals Nos. 114 *to* 126 *of* 1963.

Appeals from the judgment and order dated May 31, 1963 of the Maharashtra High Court in Criminal Applications Nos. 271, 265, 270, 267, 219, 220, 269, 264, 263, 266 and 273 of 1963.

Criminal Appeal No. 65 *of* 1963.

Appeal by special leave from the judgment and order dated April 3, 1963, of the Maharashtra High Court (Nagpur Bench) in Criminal Application No. 11 of 1963.

M. C. Setalvad, N. C. Chatterjee, A. V. Viswanatha Sastri, S. Mohan Kumaramangalam, C. B. Agarwala, Sarjoo Prasad, D. R. Prem, A. S. R. Chari, S. G. Patwardhan, W. S. Barlingay, Etharajalu Naidu, Veda Vyas, Raghubir Singh, K. T. Sule, Asif Ansari, Hardayal Hardy, Bawa Shiv Charan Singh, S. N. Mukherjee, Durgabhai Deshmukh, M. S. K. Sastri, G. B. Pai, Ganpat Rai, D. N. Mukherjee, A. N. Sinha, Udayaratnam, K. V. Raghnatha Reddy, Janardhan Sharma, K. R. Choudhury, B. P. Maheshwari, J. B. Goyal, A. K. Nag, Y. Kumar, Hardev Singh, M. I. Khowaja, S. S. Shukla, K. K. Jain, Bishambar Lal Khanna, S. Murthi, P. K. Chakravarti, P. K. Chatterjee, A. George Pudussary, Girish Chandra Mathur, Udai Pratap

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Singh, Yogeshwar Prasad, M. R. Krishna Pillai, B. D. Sharma, K. P. Gupta, T. S. Venkataraman, M. Veerappa, T. R. Ramachandra, R. C. Prasad, Santosh Chatterjee, N. N. Keshwani, K. Jayaram, R. Ganapathy Iyer, Thyagarajan, R. Vasudeva Pillai, R. V. S. Mani, S. C. Majumdar, Shaukat Hussain, K. Baldev Mehta, Mohan Behari Lal, Sadhu Singh, V. G. Row, S. N. Kakkar, S. K. Kapur, Parthasarathy, Shanti Swarup Bhatnagar, K. L. Mehta, Satish Mehta, Brij Kishore Prasad, Ali Ahmad, V. A. Syeid Muhammad, Narayanarayan Gooptu, Tapesh Roy, Madhan Bhaittia, Ajit Singh Banis and Brij Raj Kishore, J. B. Dadachanji, O. C. Mathur, Ravinder Narain, D. P. Singh, M. K. Ramamurthi, R. K. Garg, and *S. C. Agarwal,* for the appellant (in Cr. A. No. 80 of 1963).

C. K. Daphtary, Attorney-General, L. K. Kaushal, Deputy Advocate-General, Punjab, D. D. Chaudhuri, R. N. Sachthey and R. H. Dhebar, for the respondent (in Cr. A. No. 80 of 1963).

A. S. R. Chari, D. P. Singh, M. K. Ramamurthi, R. K. Garg and S. C. Agarwal for the appellant (in Cr. A. No. 86 of 1963).

Hardev Singh and *Y. Kumar,* for the appellants (in Cr. A. Nos. 87 to 93 of 1963).

L. D. Kaushal, Deputy Advocate-General, Punjab, D. D. Chaudhri, R. N. Sachthey and *R. H. Dhebar,* for the respondent (in Cr. A. Nos. 86 to 93 of 1963).

A. S. R. Chari, O. P. Malhotra, B. Parthasarathy, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellant (in Cr. A. No. 65 of 1963).

N. C. Chatterjee, and *Janardan Sharma,* for the appellant (in Cr. A. No. 109 of 1963).

K. T. Sule, Jitendra Sharma and *Janardan Sharma,* for the appellants (in Cr. A. Nos. 111 and 114 to 126 of 1963) and for the Detenue-Interveners Nos. 12, 14, 16, 18 and 37).

C. K. Daphtary, Attorney-General, N. S. Bindra, B. R. G. K. Achar, R. N. Sachthey and *R. H. Dhebar,* for the respondents (in Cr. A. No. 65, 109 to 111 and 114 to 126/1963).

C. K. Daphtary, Attorney-General, H. N. Sanyal, Solicitor-General, S. V. Gupte, Additional Solicitor-General, R. N. Sachthey and *R. H. Dhebar,* for intervener No. 1

Naunit Lal, for intervener No. 1.

B. Sen and *P. K. Bose*, for intervener No. 3.

S. P. Varma, for intervener No. 4.

M. Adhikari, Advocate-General, Madhya Pradesh and *I. N. Shroff*, for intervener No. 5.

A. Ranganadham Chetty and *A. V. Rangam*, for intervener No. 6.

G. C. Kasliwal, Advocate-General, Rajasthan, R. H. Dhebar, R. N. Sachthey, for intervener No. 7.

C. P. Lal, for intervener no. 8.

N. C. Chatterjee, Narayan Gooptu, Tapesh Roy, D. P. Singh, M. K. Ramamurthi, R. K. Garg and *S. C. Agarwal*, for intervener No. 69.

A. S. R. Chari, Narayan Gooptu, Tapesh Roy, D. P. Singh, M. K. Ramamurthi, R. K. Garg and *S. C. Agarwal*, for intervener No. 70.

A. S. Peerbhoy A. Desai, M. Rajagopalan and *K. R. Choudhari*, for interveners Nos. 79 and 80.

September 2, 1963. The Judgment of P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah, K. C. Das Gupta and J. C. Shah, JJ. was delivered by P. B. Gajendragadkar, J. K. Subba Rao, J. delivered a dissenting Opinion.

GAJENDRAGADKAR, J.—This group of 26 criminal appeals has been placed for hearing and disposal before a special Constitutional Bench, because the appeals constituting the group raise two common important questions of Constitutional law. Nine of these appeals have been preferred against the decisions of the Punjab High Court, whereas seventeen have been preferred against the decisions of the Bombay High Court. All the appellants are detenues who have been detained respectively by the Punjab and the Maharashtra State Governments under Rule 30(1)(b) of the Defence of India Rules (hereinafter called the Rules) made by the Central Government in exercise of the powers conferred on it by section 3 of the Defence of India Ordinance, 1962 (No. 4 of 1962) (hereinafter called the Ordinance). They applied to the Punjab and the Bombay High Courts respectively under section 491 (1)(b) of the Code of Criminal Procedure and alleged that they had been improperly and illegally detained. Their contention was that s. 3(2)(15)(i) and s. 40 of the Defence

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of India Act, 1962 (No. 51 of 1962) (hereinafter called 'the Act') and Rule 30(1)(b) under which they have been detained are constitutionally invalid, because they contravene their fundamental rights under Articles 14, 21 and 22(4), (5) & (7) of the Constitution, and so, they claimed that an order should be passed in their favour directing the respective State Governments to set them at liberty. These petitions have been dismissed on the ground that the Presidential Order which has been issued under Art. 359 of the Constitution creates a bar which precludes them from moving the High Court under s. 491(1)(b) Cr. P. C. That is how the decisions of the two High Courts under appeal raise two common questions of considerable importance. The first question is : what is the true scope and effect of the Presidential Order which has been issued under Art. 359 (1)? The answer to this question would depend upon a fair and reasonable construction of Art. 359(1) itself. The second question is : does the bar created by the Presidential Order issued under Art. 359(1) operate in respect of applications made by detenues under section 491(1)(b) of the Code? The answer to this question would depend upon the determination of the true character of the proceedings which the detenues have taken under s. 491(1)(b), considered in the light of the effect of the Presidential Order issued under Art. 359(1). Both the Punjab and the Bombay High Courts have held against the appellants. Meanwhile, when similar petitions were made before the Allahabad High Court in Criminal Cases Nos. 1618, 1759 and 1872 of 1963 *Sher Singh Negi* v. *District Magistrate, Kanpur & Anr.*, the said High Court took a contrary view and directed the release of the detenues who had moved it under s. 491(1)(b) of the Code. It is because the questions raised are important and the answers given by the different High Courts have disclosed a sharp difference of opinion that a Special Bench has been constituted to deal with these appeals. If the two principal questions are answered in favour of the detenues, a third question would arise and that relates to the validity of the impugned sections of the Act and the relevant statutory Rules.

On the 8th September, 1962, the Chinese aggressively attacked the northern border of India and that constituted a threat to the security of India. That is why on

the 26th October, 1962, the President issued a Proclamation under Art. 352 of the Constitution. This Proclamation declared that a grave emergency existed whereby the security of India was threatened by external aggression. On the same day, the Ordinance was promulgated by the President. This Ordinance was amended by Ordinance No. 6 of 1962 promulgated on November 3, 1962. On this day, the President issued the Order under Art. 359(1), suspending the rights of citizens to move any Court for the enforcement of the rights conferred by Arts. 21 and 22 of the Constitution for the period during which the proclamation of emergency issued on October 26, 1962 would be in force. On November 6, 1962, the rules framed by the Central Government were published. Then followed an amendment of the Presidential Order on November 11 1962. By this amendment, for the words and figures "article 21" the words and figures "articles 14 and 21" were substituted. On December, 6, 1962, Rule 30 as originally framed was amended and Rule 30-A added. Last came the Act on December 12 1962. Section 48(1) of the Act has provided for the repeal of the Ordinances Nos. 4 and 6 of 1962. Section 48(2) provides that notwithstanding such repeal, any rules made, anything done or any action taken under the aforesaid two Ordinances shall be deemed to have been made, done or taken under this Act as if this Act had commenced on October 26, 1962. That is how the Rules made under the Ordinance continued to be the Rules under the Act, and it is under Rule 30(1)(b) that the appellants have been detained.

Before dealing with the points which have been raised for our decision in the present appeals, it is necessary to indicate briefly at the outset the general argument which has been urged before us by Mr. Setalvad on behalf of the appellants, and the learned Attorney-General on the other side. Art. 359(1) which falls to be construed, occurs in Part XVIII of the Constitution which makes emergency provisions. Whenever the security of India or any part of the territory of India is threatened whether by war or by external aggression or internal disturbance, the President may, under Art. 352, by proclamation, make a declaration to that effect. Articles 353 to 360 which occur in this Part thus constitute emergency provisions. The learned

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Attorney-General contends that in construing an emergency provision like Art. 359(1), we must bear in mind the fact that the said Article is intended to deal with a situation which has posed a threat to the security of India, and so, fundamental rights guaranteed by Part III which are undoubtedly of vital importance to the democratic way of life guaranteed by the Constitution have to be regulated during an emergency, because the very security of the nation is exposed to serious jeopardy. The security of the nation on such a solemn occasion must have precedence over the liberty of the individual citizens, and so, it is urged that if Art. 359 is capable of two constructions, one in favour of the fundamental rights of the citizens, and the other in favour of the grant of power to the President to control those rights, the Court should lean in favour of the grant rather than in favour of the individual citizen's fundamental rights.

In support of this argument, the learned Attorney-General has relied on two decisions of the House of Lords. In *The King (At the Prosecution of Arthur Zadig)* v. *Halliday*,(1) Lord Finlay L. C. who was called upon to construe Regulation 14B of the Defence of the Realm (Consolidation) Regulations Act, 1914, noticed the argument that if the Legislature had intended to interfere with personal liberty, it would have provided, as on previous occasions of national danger, for suspension of the rights of the subject as to a writ of *habeas corpus,* and rejected it with the observations that the Legislature had selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted on the occasion of previous wars. He added that the suggested rule as to construing penal statutes and the provision as to trial of British subjects by jury made by the Defence of the Realm Act, 1915, have no relevance in dealing with an executive measure by way of preventing a public danger.

The majority decision of the House of Lords in *Liversidge* v. *Sir John Anderson*(2) has also been relied upon by the learned Attorney-General. In that case, the House or Lords had to consider the true scope and effect of Regulation 18B of the Defence (General) Regulations, 1939.

(1) [1917] A.C. 260, 270.
(2) [1942] A.C. 206.

Viscount Maugham in rejecting the argument of the detenu that the liberty of the subject was involved and that the legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown, quoted with approval the language of Lord Finlay, L. C., in the case of *Rex* v. *Halliday*(1). Lord Macmillan who took the same view observed that it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time. Lord Wright and Lord Romer adopted the same approach. The Attorney-General relies on the fact that this approach has also been adopted by Gwyer, C. J., in *Keshav Talpade* v. *The King Emperor*(2). In making his contention in regard to the proper approach which the Court should adopt in construing Art. 359, the learned Attorney-General no doubt contended that the question about the approach would arise only if two constructions are reasonably possible. According to him, Art. 359 was capable of only one construction and that is the construction which the High Courts of Punjab and Bombay have accepted.

On the other hand, Mr. Setalvad has argued that Art. 359 is not an emergency legislation properly so called and on the merits, he has strongly resisted the suggestion made by the learned Attorney-General that if two reasonable constructions are possible, we should adopt that which is in favour of the grant of power to the President and not in favour of the citizens' fundamental rights. He has relied on the minority speech of Lord Atkin in the case of *Liversidge*(3) and has argued that the view taken by Lord Atkin should be preferred to the majority view which the House of Lords adopted in that case. "In this country", observed Lord Atkin, "amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between

(1) [1917] A.C. 260, 270. (2) [1943] F.C.R. 49, 63.
(3) [1942] A.C. 206.

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the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." Realising that he was in a minority, Lord Atkin added that he protested, even if he did it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister. In this connection, Mr. Setalvad referred to two subsequent decisions of the Privy Council in which the view taken by Lord Atkin has been accepted, *vide Nakkuda Ali* v. *M. F. De S. Jayaratne*(1), and *King-Emperor* v. *Vimalabai Deshpande*(2). In the former case, Lord Radcliffe observed that indeed, it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments, and he added that the said decision is an authority for the proposition that the words "if A. B. has reasonable cause to believe" are capable of meaning "if A. B. honestly thinks that he has reasonable cause to believe" and that in the context and attendant circumstances of Defence Regulation 18B they did in fact mean just that. In distinguishing the said decision, Lord Radcliffe made the somewhat significant comment that the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood. Mr. Setalvad has also invited our attention to the fact that the majority decision of the House of Lords in *Liversidge*(3) has not received the approval from jurists, (*vide* Maxwell on Interpretation of Statutes p. 276, footnote 54, Craies on Statue Law p. 309, and Friedmann, Law in a Changing Society p. 37.) Like the Attorney-General, Mr. Setalvad also urged that the stage to choose between two rival constructions would not arise in the present appeals because, according to him, the construction for which he contended was the only reasonable construction of Art. 359.

(1) [1951] A.C. 66, 76. (2) 73 I.A. 144.
(3) [1942] A.C. 206.

In our opinion, it is unnecessary to decide the merits of the rival contentions urged before us in regard to the rule of construction and the approach which the Court should adopt in construing Art. 359. It is common ground that the question of approach would become relevant and material only if we are satisfied that Art. 359 is reasonably capable of two alternative constructions. As we will presently point out, after hearing counsel on both sides, we have reached the conclusion that Art. 359 is reasonably capable of only one construction and that is the construction which has been put on it by the Punjab and Bombay High Courts. That is why we are relieved of the task of dealing with the merits of the controversy between the parties on this point.

Let us then revert to the question of construing Art. 359. In doing so, it may be relevant and somewhat useful to compare and contrast the provisions of Articles 358 and 359. Indeed, both Mr. Setalvad and the learned Attorney-General contended that Art. 359 should be interpreted in the light of the background supplied by the comparative examination of the respective provisions contained in Arts. 358 and 359 (1) & (2). The said two Articles read as under :—

"358. While a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

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

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(2) Any order made as aforsesaid may extend to the whole or any part of the territory of India."

It would be noticed that as soon as a Proclamation of Emergency has been issued under Art. 352 and so long as it lasts, Art. 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Art. 19 during the pendency of the Proclamation of emergency removes the fetters created on the legislative and executive powers by Art. 19 and if the legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Art. 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Art. 19 because as soon as the emergency is lifted, Art. 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Art. 19 is complete during the period in question and legislative and executive action which contravenes Art. 19 cannot be questioned even after the emergency is over.

Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any court for enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Art. 359(1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement. That is one important

distinction between the provisions of Art. 358 and Art. 359(1).

Before proceeding further, we may at this stage, in parenthesis, observe that there has been some argument before us on the question as to whether the fundamental rights specified in the Presidential Order issued under Art. 359 are even theoretically alive during the period specified in the said Order. The learned Attorney-General has contended that the suspension of the citizens' right to move any court for the enforcement of the said rights, in law, amounts to the suspension of the said rights themselves for the said period. We do not propose to decide this question in the present appeals. We will assume in favour of the appellants that the said rights are, in theory, alive and it is on that assumption that we will deal with the other points raised in the present appeals.

The other distinction lies in the fact that the suspension of Art. 19 for which Art. 358 provides continues so long as the Proclamation of Emergency is in operation, whereas the suspension of the right to move any court which the Presidential Order under Art. 359(1) brings about can last either for the period of the Proclamation or for a shorter period if so specified by the Order.

It would be noticed that the Presidential Order cannot widen the authority of the legislatures or the executive; it merely suspends the rights to move any court to obtain a relief on the ground that the rights conferred by Part III have been contravened if the said rights are specified in the Order. The inevitable consequence of this position is that as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law and the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order. If at the expiration of the Presidential Order, Parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the executive in that behalf, the validity and the effect of such legislative action may have to be carefully scrutinised.

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Since the object of Art. 359(1) is to suspend the rights of the citizens to move any court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the Order has been issued, because the Order takes away the right to move any court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Art. 359(1) and the Presidential Order issued under it is instituted after the Order has been issued, it will have to be dismissed as being incompetent. In other words, Art. 359(1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened, and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order.

There is yet another distinction between the provisions of Art. 358 and Art. 359(1). The suspension of Art. 19 for which provision is made under Art. 358 applies to the whole of the country, and so, covers all legislatures and also States. On the other hand, the Order issued under Art. 359(1) may extend to the whole of India or may be confined to any part of the territory of India. These, broadly stated, are the points of distinction between Art. 358 and Art. 359(1).

What then is the true scope and effect of Art. 359(1)? Mr. Setalvad contends that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the Order should be construed to mean the right to move the Supreme Court which has been guaranteed by Art. 32(1). He suggests that as one reads the relevant clause in Art. 359(1), one seems

to hear the echo of the right which has been constitutionally guaranteed by Art. 32(1). His argument, therefore, is that the only right of which a citizen can be deprived under Art. 359(1) is the right to move the Supreme Court, and so, his case is that even in regard to fundamental rights specified in the Presidential Order, a citizen is entitled to ask for reliefs from the High Court under Art. 226 because the right to move the High Court flowing from Art. 226 does not fall within the mischief of Art. 359(1).

This argument attempts to interpret the words "the right to move for the enforcement of the specified rights" in isolation and without taking into account the other words which indicate that the right to move which is specified in the said Article is the right to move "any court". In plain language, the words "any court" cannot mean only the Supreme Court; they would necessarily take in all courts of competent jurisdiction. If the intention of the Constitution makers was to confine the operation of Art. 359(1) to the right to move only the Supreme Court, nothing could have been easier than to say so expressly instead of using the wider words "the right to move any court."

To meet this difficulty, Mr. Setalvad attempted to invoke the assistance of Art. 32(3). Art. 32(3) provides that without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). The argument is that the Constitution contemplates that there may be some other courts in the country on which the powers exercisable by the Supreme Court under Art. 32(2) may be conferred, and so, the words "any court" may have been intended to take within their purview the Supreme Court and such other courts on whom the Supreme Court's powers under Art. 32(2) may have been conferred. This argument is fallacious. The scheme of Art. 32 clearly indicates that the right to move this Court which itself is a guaranteed fundamental right, cannot be claimed in respect of courts falling under Art. 32(3). Art. 32(3) merely provides for the conferment of this Court's

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powers under Art. 32(2) on the courts specified in clause (3). The right guaranteed by Art. 32(1) cannot be claimed in respect of the said other courts. Therefore, on a plain construction of the relevant clauses of Art. 32, it is impossible to accept the argument that courts under Art. 32(3) must be regarded as having the same status as the Supreme Court and as such the right to move them must also be held to constitute a fundamental right of the citizen in respect of such courts. Besides, it would be irrational to suggest that whereas the Constitution did not confer on the citizens a guaranteed fundamental right to move the High Court under Art. 226, it thought of conferring such a guaranteed fundamental right in regard to courts on which the Supreme Court's powers under Art. 32(2) would be conferred by Art. 32(3). Therefore, the attempt to suggest that the use of the words "any Court" used in Art. 359(1) is justified because they take in the Supreme Court and some other courts, fails and the conclusion inevitably follows that the words "any court" must be given their plain grammatical meaning and must be construed to mean any court of competent jurisdiction. In other words, the words "any court" include the Supreme Court and the High Courts before which the specified rights can be enforced by the citizens.

In this connection, it was attempted to be argued that the power of the High Court to issue the writs or orders specified in Art. 226(1) is a discretionary power and as such, no citizen can claim to have a right to move the High Court in that behalf, and so, it was suggested that the proceedings contemplated by Art. 226(1) are outside the purview of Art. 359(1). In our opinion, this argument is not well-founded. It is true that in issuing writs or orders under Art. 226(1), the High Courts have discretion to decide whether a writ or order should be issued as claimed by the petitioner; but the discretion conferred on the High Courts in that behalf has to be judicially exercised, and having regard to the scheme of Art. 226(1), it cannot be said that a citizen has no right to move the High Court for invoking its jurisdiction under Art. 226(1). Art. 226(1) confers wide powers on the High Courts to issue the specified writs, or other appropriate orders or directions; having regard to the nature of the said powers,

and the object intended to be achieved by their conferment, there can be little doubt that in dealing with applications made before them the High Courts have to exercise their discretion in a judicial manner and in accordance with principles which are well-settled in that behalf. The High Courts cannot capriciously or unreasonably refuse to entertain the said applications and to deal with them on the merits on the sole ground that the exercise of their jurisdiction under Art. 226(1) is discretionary. Therefore, it is idle to suggest that the proceedings taken by citizens under Art. 226(1) are outside the purview of Art. 359(1). We must accordingly hold that the right to move any court under Art. 359(1) refers to the right to move any court of competent jurisdiction.

The next question to consider is, what is the nature of the proceedings which are barred by the Presidential Order issued under Art. 359(1)? They are proceedings taken by citizens for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the Order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed, as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Art. 359(1) and would, therefore, be hit by the Presidential Order issued under the said Article. The sweep of Art. 359(1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the

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said specified fundamental rights. We have already seen that the operation of Art. 359(1) and the Presidential Order issued under it is limited to the period during which the proclamation of emergency is in force, or for such shorter period as may be specified in the Order. That being so, we feel no difficulty in holding that proceedings taken by a citizen either under Art. 32(1) or under Art. 226(1) are hit by Art. 359(1) and the Presidential Order issued under it. In this connection it would be legitimate to add that the contention of the appellants which seeks to confine the operation of Art. 359(1) only to the right to move the Supreme Court, would make the said provision almost meaningless. There would be no point in preventing the citizen from moving this Court, while leaving it open to him to move the High Courts for the same relief and then to come to this Court in appeal, if necessary.

That takes us to the question as to whether proceedings taken by a citizen under s. 491(1)(b) are affected by Art. 359(1) and the Presidential Order issued under it. Section 491(1)(b), *inter alia,* provides that any High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public custody be set at liberty. It has been strenuously urged before us that the proceedings for obtaining directions of the nature of *habeas corpus* which are taken under s. 491(1)(b) are outside Art. 359(1), and so, the Presidential Order cannot create a bar against a citizen asking the High Court to issue a writ in the nature of *habeas corpus* under the said provision. It is necessary to examine this argument very carefully.

It is well-known that after section 491 was enacted in the Code of Criminal Procedure in the present form in 1923, the right to obtain a direction in the nature of a *habeas corpus* became a statutory right in India. After 1923, it was not open to any party to ask for a writ of *habeas corpus* as a matter of common law. This question was elaborately considered by Rankin, C. J., in *Girindra Nath Banerjee* v. *Birendra Nath Pal*(1), where the learned C.J. considered the history of the development of the law on this point and came to the conclusion that the relief of a writ in the nature of a *habeas corpus* could be claimed

(1) I.L.R. 54 Cal. 727.

after 1923 solely under Cr. P. C. The same view was taken by a full Bench of the Madras High Court in *District Magistrate, Trivandrum* v. *K. C. Mammen Mappillai*(1), where the said High Court held that it had no power to issue a writ of *habeas corpus* as known to the English Common Law. Its powers are confined in that respect to those conferred by s. 491 of the Code of Criminal Procedure which gives authority to issue directions of the nature of *habeas corpus*. When this point was raised before the Privy Council in *Matthen* v. *District Magistrate of Trivandrum*(2), their Lordships observed that the reasoning of Rankin C.J. in the case of *Girindra Nath Banerjee*(3) was so clear and convincing that they were content to adopt it, as also to state that they were in entire agreement with the views expressed by him. The same view was expressed by the Privy Council in *King-Emperor* v. *Sibnath Banerji*(4). Basing himself on these decisions, Mr. Setalvad contends that the statutory right to obtain relief under s. 491(1)(b) is a right which is separate and distinct from the Constitutional right guaranteed by the relevant Articles of the Constitution, and so, Art. 359(1) cannot be said to apply to the proceedings under s. 491(1)(b).

In support of the same contention, Mr. Setalvad has also pressed into service the provisions of Art. 372 by which the existing laws are continued and he has invited our attention to the provisions of Art. 225 and 375 to show that the jurisdiction conferred on the High Courts by s. 491 Cr. P. C. continues unless it is expressly taken away by a competent piece of legislation.

In this connection, reliance has also been placed on the fact that in the past whenever the operation of s. 491 was intended to be suspended, the legislature made a specific provision in that behalf and as an illustration, reference is made to s. 10 of the Restriction and Detention Ordinance, 1944 (No. III of 1944). Section 10 specifically refers to s. 491 of the Code and provides that no Court shall have power to make any order under the said section in respect of any order made under or having effect under the Ordinance, or in respect of any person the subject of such an order. It is urged that the Presidential Order is con-

(1) I.L.R. 1939 Mad. 708. (2) 66 I.A. 222.
(3) I.L.R. 54 Cal. 727. (4) 72 I.A. 241.

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fined only to proceedings taken for enforcement of constitutional rights and if it was intended that the proceedings under s. 491(1)(b) should also be prohibited, it was essential that the said provision should, in terms, have been suspended by a competent piece of legislation.

Mr. Setalvad has also emphasised the fact that the approach in dealing with a proceeding under s. 491(1)(b) is different from the approach which the courts adopt in dealing with proceedings under Art. 226 or Art. 32. In invoking the jurisdiction of the High Courts under Art. 226(1), or that of the Supreme Court under Art. 32(1), the Courts always enquire whether the party concerned is aggrieved by the order against which complaint is made. Under s. 491(1)(b), however, the court can take action *suo motu* and that brings out the difference in the character of the two respective categories of proceedings. That, broadly stated, is the manner in which Mr. Setalvad has raised his contention that proceedings under s. 491(1)(b) are outside the purview of the Presidential Order and do not fall within the mischief of Art. 359(1).

There is no doubt that the right to ask for a writ in the nature of *habeas corpus* which could once have been treated as a matter of Common Law has become a statutory right after 1923, and as we have already seen after s. 491 was introduced in the Cr. P. C., it was not open to any citizen in India to claim the writ of *habeas corpus* on grounds recognised by Common Law apart from the provisions of s. 491(1)(b) itself. It has, however, been suggested by the learned Attorney-General that just as the common law right to obtain a writ of *habeas corpus* became a statutory right in 1923, a part of the said statutory right has now become a part of the fundamental rights guaranteed by the Constitution, and so, after the Constitution came into force, whenever a detenu claims to be released from illegal or improper detention, his claim can, in some cases, be sustained on the ground that illegal or improper detention affects his fundamental rights guaranteed by Arts. 19, or 21 or 23 as the case may be. If that be so, it would not be easy to accede to the argument that the said part of the statutory right recognised by s. 491(1)(b) retains its distinctive and independent character even after

the Constitution came into force to such an extent that it cannot be said to form part of the fundamental rights guaranteed by the Constitution.

It is true that there are two remedies open to a party whose right of personal freedom has been infringed; he may move the Court for a writ under Art. 226(1) or Art. 32(1) of the Constitution, or he may take a proceeding under s. 491(1)(b) of the Code. But it seems to us that despite the fact that either of the two remedies can be adopted by a citizen who has been detained improperly or illegally, the right which he claims is the same if the remedy sought for is based on the ground that there has been a breach of his fundamental rights; and that is a right guaranteed to the citizen by the Constitution, and so, whatever is the form of the remedy adopted by the detenu, the right which he is seeking to enforce is the same.

It is no doubt urged that under s. 491(1)(b) a stranger can apply for the release of a detenu improperly or illegally detained, or the Court itself can act *suo motu*. This argument is based on the provision that the High Court may, whenever it thinks fit, issue the appropriate direction. The learned Attorney-General contended that the clause "whenever it thinks fit" postulates that some application or petition has been filed before the Court and on perusing the application or petition it appears to the Court fit to take the appropriate action. In other words, his argument is that the Court cannot take *suo motu* action under s. 491(1)(b). He has also urged that a third person may apply, but he must show that he has been duly authorised to act on behalf of the detenu or he must at least purport to act on his behalf. We do not think it necessary to express any opinion on this part of the controversy between the parties. We are prepared to assume that the court can, in a proper case, exercise its power under s. 491(1)(b) *suo motu*, but that, in our opinion, does not affect the decision of the question with which we are concerned. If Art. 359(1) and the Presidential Order issued under it govern the proceedings taken under s. 491(1)(b), the fact that the court can act *suo motu* will not make any difference to the legal position for the simple reason that if a party is precluded from claiming his release on the ground set out by him in his petition, the

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Court cannot, purporting to act *suo motu,* pass any order inconsistent with the provisions of Art. 359(1) and the Presidential Order issued under it. Similarly, if the proceedings under s. 491(1)(b) are hit by Art. 359(1) and the Presidential Order, the arguments based on the provisions of Art. 372 as well as Arts. 225 and 375 have no validity. The obvious and the necessary implication of the suspension of the right of the citizen to move any Court for enforcing his specified fundamental rights is to suspend the jurisdiction of the Court *pro tanto* in that behalf.

Let us take a concrete case which will clearly bring out the character of the proceedings taken by the detenues in the present cases. An application is made on behalf of the detenu that he is illegally or improperly detained. The State in its return pleads that the detention is neither illegal nor improper because it has been effected under rule 30(1)(b), and in support of this return reliance is placed on the provisions of s. 3(2)(15)(i) of the Act. On receiving this return, it is urged on behalf of the detenu that the provisions of s. 3(2)(15)(i) as well as Rule 30(1)(b) are invalid because they contravene the fundamental rights guaranteed to the citizens under Arts. 14, 21 and 22; and so, the sole issue which falls to be determined between the parties relates to the validity of the relevant statutory provisions and Rules. If the impugned provisions in the Act and the Rules are *ultra vires,* the detention is illegal and improper, but if, on the other hand, the said provisions are valid, the detention is legal and proper. In deciding this point, the Court will naturally have to take into account the provisions of s. 45(1) of the Act. Section 45(1) provides that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court; and the reply of the detenu inevitably would be that notwithstanding this provision, the validity of the impugned legislation must be tested. This clearly brings out the true nature and character of the dispute which is raised before the Court by the detenu in asking for the issue of a writ of *habeas corpus* in the present proceedings.

The question which thus arises for our decision is, can it be said that the proceedings taken under s. 491(1)(b) are

of such a distinctly separate character that they cannot fall under Art. 359(1)? Under s. 491 as it stood before the date of the Constitution, it would have been open to the detenu to contend that the law under which he was detained was invalid, because it was passed by a legislature without legislative competence. The validity of the law might also have been challenged on the ground that the operative provision in the law suffered from the vice of excessive delegation. The detenu might also have urged that in detaining him the mandatory provisions under the Act had not been complied with. But before the Constitution was adopted, it would not have been open to the detenu to claim that the impugned law was invalid because it contravened his fundamental rights guranteed by the relevant Articles of the Constitution. The right to challenge the validity of a statute on the ground that it contravenes the fundamental rights of the citizens has accrued to the citizens of this country only after and as a result of the provisions of the Constitution itself, and so, there can be no doubt that when in the present proceedings the detenues seek to challenge the validity of the impugned statutory provision and the Rule, they are invoking their fundamental rights under the Constitution. If s. 491 is treated as standing by itself and apart from the provisions of the Constitution, the plea raised by the detenues cannot be entertained in the proceedings taken under that section; it is only when the proceedings taken under the said section are dealt with not only in the light of s. 491 and of the rights which were available to the citizens before 1950, but when they are considered also in the light of the fundamental rights guaranteed by the Constitution that the relevant plea can be raised. In other words, it is clear that the content of the detenu's right to challenge the legality of his detention which was available to him under s. 491(1)(b) prior to the Constitution, has been enlarged by the fundamental rights guaranteed to the citizens by the Constitution, and so, whenever a detenu relies upon his fundamental rights even in support of his petition made under s. 491(1)(b) he is really enforcing the said rights and in that sense, the proceedings inevitably partake of the character of proceedings taken by the detenu for enforcing these rights; that is why the argument that Art. 359(1)

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and the Presidential Order issued under it do not apply to the proceedings under s. 491(1)(b) cannot be sustained. The prohibition contained in the said Article and the Presidential Order will apply as much to proceedings under s. 491(1)(b) as to those under Art. 226(1) & Art. 32(1).

In this connection, it is hardly necessary to emphasise that in deciding the present question, we must take into account the substance of the matter and not attach undue or exaggerated importance to the form of the proceedings. If the form which the proceedings take is held to be decisive in the matter, it would lead to this irrational position that an application containing the requisite averments in support of a plea for the release of the detenu, would be thrown out by the High Court if in form it purports to be made under Art. 226, whereas it would be entertained and may indeed succeed if it purports to be made under s. 491(1)(b). Indeed, this argument seems to suggest that when the Constitution-makers drafted Art. 359, they intended that whenever an emergency arises and a Presidential Order is issued under Art. 359(1) in regard to the fundamental rights guaranteed by Arts. 21 and 22, it would be necessary to pass another piece of legislation providing for an appropriate change or repeal of a part of the provision of s. 491(1)(b), Cr. P. C.; and since the legislature has through oversight omitted to pass the necessary Act in that behalf, proceedings under s. 491(1)(b). must be allowed to be continued free from the bar created by the Presidential Order. In our opinion, this position is wholly untenable. Whether or not the proceedings taken under s. 491(1)(b) fall within the purview of the Presidential Order, must depend upon the construction of Art. 359(1) and the Order, and in dealing with this point, we must look at the substance of the matter and not its form. Before giving relief to the detenu who alleges that he has been illegally and impropely detained, is the High Court required to consider the validity of the operative provisions of the impugned Act on the ground that they infringe the specified fundamental rights? If yes, the bar created by Art. 359(1) and the Presidential Order must inevitably step in even though the proceedings in form may have been taken under s. 491(1)(b) of the Code. In our opinion, therefore, once it is shown that the proceedings under

s. 491(1)(b) cannot make a substantial progress unless the validity of the impugned law is examined on the ground of the contravention of the specified fundamental rights, it must follow that the bar created by the Presidential Order operates against them as much as it operates against proceedings taken under Art. 226(1) or Art. 32(1). Thus, the true legal position, in substance, is that the clause "the right to move any court" used in Art. 359(1) and the Presidential Order takes in all legal actions intended to be filed, or filed, in which the specified rights are sought to be enforced, and it covers all relevant categories of jurisdictions of competent courts under which the said actions would otherwise normally have been entertained and tried.

At this stage, we may conveniently refer to the recent decision of this Court in *Sree Mohan Chowdhury* v. *The Chief Commissioner, Union Territory of Tripura*(1), wherein this Court rejected the detenu's petition on the ground that it was barred by the Presidential Order and it refused to entertain the argument that the Ordinance and the Act and the Rules framed thereunder were void for the reason that they contravened Arts. 14, 21 & 22, with the observation that the challenge made by the petitioner in that behalf really amounted to "arguing in the circle". If the Presidential Order precludes a citizen from moving the Court for the enforcement of the specified fundamental rights, it would not be open to the citizen to urge that the Act is void for the reason that it offends against the said fundamental rights. It is in order to prevent the citizen from making such a claim that the Presidential Order has been issued, and so, during the period of its operation, the challenge to the validity of the Act cannot be entertained. Incidentally, it may be observed that a petition for a writ of *habeas corpus* made by Mohan Chowdhury which was rejected by this Court on the ground that it was barred under the Presidential Order would, on the view for which the appellants contend, be competent if it is presented before the appropriate High Court under s. 491(1)(b) of the Code; and that incidentally illustrates how exaggerated importance to the form of the petition would lead to extremely anomalous and irrational consequences. Therefore, our conclusion is that the proceedings

(1) [1964] 3. S.C.R. 442.

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taken on behalf of the appellants before the respective High Courts challenging their detention on the ground that the impugned Act and the Rules are void because they contravene Arts. 14, 21 and 22, are incompetent for the reason that the fundamental rights which are alleged to have been contravened are specified in the Presidential Order and all citizens are precluded from moving any Court for the enforcement of the said specified rights.

The next question to consider is the validity of the Presidential Order itself which was issued on the 3rd November, 1962. This is how the Order reads:

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

We have already stated that this Order was subsequently modified on the 11th November, 1962, by the addition of Art. 14. The first argument which has been urged against the validity of this Order is that it is inconsistent with the provisions of Art. 359(1). It is argued that the Order which the President is authorised to issue under this Article must be an Order of general application; in fact, the Order purports to be confined to persons who have been deprived of any of the specified rights under the Defence of India Ordinance, 1962, or any Rule or Order made thereunder. In other words, there is no doubt that this Order does not apply to persons who have been detained under the provisions of the earlier Preventive Detention Act No. 4 of 1950, and so, in limiting the application of the Order to persons who have been detained under the Ordinance, the President has acted outside the powers conferred on him by Art. 359(1). In our opinion, this argument cannot be sustained. The power conferred on the President is wide enough to enable him to make an Order applicable to all parts of the country and to all

citizens and in respect of any of the rights conferred by Part III. This wide power obviously includes the power to issue a limited order. What the Order purports to do is to provide that all persons wherever they reside who have been detained under the Ordinance or the Act, will be precluded from moving any court for the enforcement of the rights specified in the Order. It is not easy to see how this Order can be said to contravene or be otherwise inconsistent with the powers conferred on the President by Art. 359(1).

It is then argued that the said Order is invalid because it seeks to give effect to the Ordinance which is void. It will be recalled that Ordinance No. 4 of 1962 was promulgated on the 26th October, 1962, whereas the Order was issued under Art. 359(1) on the 3rd November, 1962. The argument is that during the period between the 26th October and the 3rd November the validity of the said Ordinance could have been challenged on the ground that it contravened Arts. 14, 21 and 22, and so, the said Ordinance can be held to have been a still-born piece of legislation and yet detentions effected under such a void law are sought to be protected by the Presidential Order by depriving the the detenues of their right to move any court to challenge the validity of the orders of detention passed against them. In our opinion, this argument is wholly misconceived. We have already stated that for the purpose of these appeals, we are prepared to assume that despite the issue of the Order under Art. 359(1), the fundamental rights guaranteed by Arts. 14, 21 and 22 are not suspended; what is suspended is the enforcement of the said rights during the prescribed period, and so, what is said about the invalidity of the Ordinance during the period between 26th October and 3rd November is true even after the Order was issued on the 3rd November. If the detenues are justified in contending that the Ordinance and the Act which took its place contravened the fundamental rights guaranteed by Arts. 14, 21 and 22, the said Ordinance and the Act would be and would continue to be invalid; but the effect of the Presidential Order is that their invalidity cannot be tested during the prescribed period. Therefore, the argument that since the Ordinance or the Act is invalid, the Presidential Order cannot preclude a citizen from test-

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ing its validity, must be rejected.

The same argument is put in another form. It is urged that we have merely to examine the Ordinance and Act to be satisfied that Arts. 14, 21 and 22 (4), (5) and (7) have been contravened and it is suggested that if these infirmities in the Ordinance and the Act are glaring, it would not be open to the President to issue an Order preventing the detenues from challenging the validity of the said statutory provisions. That, in substance, is what is described by this Court in *Mohan Choudhury's case*(1) as "arguing in the circle". Therefore, we are satisfied that the challenge to the validity of the Presidential Order is not well-founded.

It still remains to consider what are the pleas which are now open to the citizens to take in challenging the legality or the propriety of their detentions either under s. 491(1)(b) of the Code, or Art. 226(1) of the Constitution. We have already seen that the right to move any court which is suspended by Art. 359(1) and the Presidential Order issued under it is the right for the enforcement of such of the rights conferred by Part III as may be mentioned in the Order. If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the Order, his right to move any court in that behalf is not suspended, because it is outside Art. 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Art. 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

Take also a case where the detenu moves the Court for a writ of *habeas corpus* on the ground that his detention has been ordered *malafide*. It is hardly necessary to emphasise that the exercise of a power *malafide* is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is *malafide* would not be

(1) [1964] 3. S.C.R. 442.

enough; the detenu will have to prove the *malafides*. But if the *malafides* are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Art. 359(1) and the Presidential Order. That is another kind of plea which is outside the purview of Art. 359(1).

Section 491(1) deals with the power of the High Court to issue directions in the nature of the *habeas corpus*, and it covers six categories of cases in which such a direction can be issued. It is only in regard to that class of cases falling under s. 491(1)(b) where the legality of the detention is challenged on grounds which fall under Art. 359(1) and Presidential Order that the bar would operate. In all other cases falling under s. 491(1) the bar would be inapplicable and proceedings taken on behalf of the detenu will have to be tried in accordance with law. We ought to add that these categories of pleas have been mentioned by us by way of illustration, and so, they should not be read as exhausting all the pleas which do not fall within the purview of the Presidential Order.

There is yet another ground on which the validity of the detention may be open to challenge. If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea thus raised by the detenu cannot at the threshold be said to be barred by the Presidential Order. In terms, it is not a plea which is relatable to the fundamental rights specified in the said Order. It is a plea which is independent of the said rights and its validity must be examined. Mr. Chatterjee has urged before us that s. 3(2)(15)(i) as well as s. 40 of the Act are invalid, because they confer on the rule making authority power which is often described as excessive delegation. It is, therefore, necessary to consider this point. The Act which took the place of the Ordinance was passed, because it was thought necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith. Section 3(2)(15)(i) whose validity is challenged purports to confer on the Central Government power to make Rules. Section 3(1) reads thus :

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"The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community."

Section 3(2) provides that without prejudice to the generality of the powers conferred by sub-s. (1) the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters; then follow clauses (1) to (57), including several subclauses which provide for the matters that may be covered by the Rules. Amongst them is cl. (15)(i) which reads as under:—

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

The argument is that in conferring power on the Central Government to make rules, the legislature has abdicated its essentially legislative function in favour of the Central Government. In our opinion, this argument is wholly untenable. Right up from the time when this Court dealt with Special References in 1951, *In re The Delhi Laws Act,* 1912 *etc.*(1) the question about the limits within which

(1) [1951] S.C.R. 747.

the legislature can legitimately confer powers on its delegate has been examined on several occasions and it has been consistently held that what the legislature is prohibited from doing is to delegate its essentially legislative function and power. If it appears from the relevant provisions of the impugned statute that powers which have been delegated include powers which can legitimately be regarded as essentially legislative powers, then the legislation is bad and it introduces a serious infirmity in the Act itself. On the other hand, if the legislature lays down its legislative policy in clear and unambiguous terms and leaves it to the delegate to execute that policy by means of making appropriate rules, then such delegation is not impermissible. In *Harishanker Bagla* v. *The State of Madhya Pradesh*(1) where the validity of section 3 of the Essential Supplies (Temporary Powers) Act, 1946, was challenged, this Court in upholding the validity of the impugned statute held that the preamble and the body of the relevant sections of the said Act sufficiently formulate the legislative policy and observed that the ambit and the character of the Act is such that the details of that policy can only be worked out by delegating that power to a subordinate authority within the framework of that policy. The same view has been expressed in *Bhatnagars and Co., Ltd.*, v. *The Union of India*(2). In the present cases, one has merely to read s. 3(1) and the detailed provisions contained in the several clauses of s. 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule making authority. In our opinion, therefore, the contention that s. 3(2)(15)(i) of the Act suffers from the vice of excessive delegation must be rejected. What we have said about this section applies with equal force to s. 40. If the impugned sections of the Act are valid, it follows that Rule 30(1)(b) which is challenged by the appellants must be

(1) [1955] 1 S.C.R. 380. (2) [1957] S.C.R. 701.

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held to be valid since it is consistent with the operative provisions of the Act and in making it, the Central Government has acted within its delegated authority. This conclusion is, of course, confined to the challenge of the appellants based on the ground that the impugned provisions and the Rule suffer from the vice of excessive delegation.

If we had held that the impugned provision in the Act suffered from the vice of excessive delegation, it would have become necessary to consider what the effect of that conclusion would have been on the merits of the controversy between the parties in the present proceedings. If we had reached the conclusion that the impugned sections were invalid because they conferred power on the rule-making authority which suffers from the vice of excessive delegation, the question would have arisen whether in challenging the validity of the Order of detention passed against him the detenu is enforcing his fundamental right under Art. 21 of the Constitution. Art. 21 is one of the articles specified in the Presidential Order and if at any stage of the proceedings, the detenu seeks to enforce his right under the said Article, that would be barred. It may be urged that if the detenues had been able to show that the impugned provisions of the Act were invalid because they suffered from the infirmity of excessive delegation, the next step which they would have been entitled to take was to urge that their detention under such an Act is void under Art. 21, because the law referred to in that Article must be a valid law; and that would raise the question as to whether this latter plea falls within the ambit of Art. 359(1) and the Presidential Order issued under it. We do not propose to express any opinion on this question in these appeals. Since we have held that the Act does not suffer from the vice of excessive delegation as alleged, it is unnecessary to pursue the enquiry as to whether if the challenge had been upheld, the detenu would have been precluded from urging the said invalidity in support of his plea that his detention was illegal.

We must now turn to some other arguments which were urged before us at the hearing of these appeals. Mr. Sule contends that part of the Act containing the im-

pugned sections was a colourable piece of legislation. His argument was that since the Preventive Detention Act No. 4 of 1950 was already on the statute book, it was hardly necessary for the Legislature to have passed the impugned Act, and he urges that since the sole object of the Legislature in passing the impugned Act was to deprive the citizens of their fundamental rights under Arts. 21 and 22, it should be deemed to be a colourable piece of legislation. The legislative competence of the Parliament to pass this Act is not disputed. Entry No. 9 in List I in the Seventh Schedule confers on the Parliament jurisdiction to make laws in regard to the preventive detention for reasons connected with defence, foreign affairs, or the security of India as well as in regard to persons subjected to such detention. If the Legislature thought that having regard to the grave threat to the security of India posed by the Chinese aggression, it was necessary to pass the impugned Act notwithstanding the fact that another Act had already been passed in that behalf, it would be difficult to hold that the Legislature had acted *malafide* and that the Act must, therefore, be struck down as a colourable exercise of legislative power. It is hardly necessary to emphasise that a plea that an Act passed by a legislature competent to pass it is a colourable piece of legislation, cannot succeed on such flimsy grounds. Whether or not it was wise that this part of the Act should have been passed, is a matter which is wholly irrelevant in dealing with the plea that the Act is a colourable piece of legislation.

In this connection, we may refer to another aspect of the same argument which has been pressed before us. Before doing so, however, let us briefly indicate the effect of the relevant Articles. Article 14 guarantees equality before law. Article 21 provides, *inter alia,* that no person shall be deprived of his personal liberty, except according to procedure established by law, and Art. 22(4), (5) (6) & (7) lay down Constitutional safeguards for the protection of the citizen whose personal liberty may be affected by an order of detention passed against him. Article 22(4) requires that an Advisory Board should be constituted and that cases of detenues should be referred to the Advisory Board for its opinion as provided therein. Article 22(5)

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imposes an obligation on the detaining authority to communicate to the detenu grounds on which the order of detention has been passed against him with a view to afford him the earliest opportunity of making a representation against the order. Article 22(6) provides that in giving notice to the detenu under Art. 22(5), facts need not be disclosed which the detaining authority considers to be against public interest to disclose, and Art. 22(7) prescribes certain conditions which have to be satisfied by any law which the Parliament may pass empowering the detention of citizens. It is thus clear that the Constitution empowers the Parliament to make a law providing for the detention of citizens, but this power has to be exercised subject to the mandatory conditions specified in Art. 22(4), (5) & (7). It is common ground that the Preventive Detention Act of 1950 complies with these requirements inasmuch as it has enacted sections 7 to 13 in that behalf. It is also clear that these Constitutional safeguards have not been provided for by the impugned Act.

The argument is that even if the Parliament thought that during the period of emergency, citizens reasonably suspected to be engaged in prejudicial activities should be detained without affording them the benefit of the Constitutional safeguards guaranteed by Art. 22(4), (5) & (7), the Parliament need not have enacted the Act and might well have left the executive to take action under the Preventive Detention Act of 1950, and since Parliament has chosen to pass the Act under challenge and has disregarded the Constitutional provisions of Articles 14 and 22, the exercise of legislative power by Parliament must, in the context, be held to be a colourable exercise of legislative power. This argument seems to assume that if the Parliament had expected the executive to detain citizens under the Preventive Detention Act of 1950 without giving them the benefit of the Constitutional safeguards prescribed by Art. 22, their cases could have been covered if a Presidential Order had been issued under Art. 359(1) in respect of such detentions.

The question is: is this assumption well-founded? Assuming that the Presidential Order had suspended the citizens' right to move any court for enforcing their fundamental rights under Arts. 14, 21 and 22 and had made

the said Order applicable to persons detained under the Preventive Detention Act of 1950, could that Order have effectively prevented the detenues from contending that their detention was illegal and void? In such a case, if the detenu was detained under the Preventive Detention Act of 1950 and he challenged the validity of his detention on the ground that the relevant provisions of the said Act had not been complied with, would his challenge be covered by Art. 359(1) and the Presidential Order issued under it? In other words, can it be said that in making the said challenge, he was enforcing his fundamental rights specified in the Presidential Order? If it is held that he was challenging the validity of his detention because the mandatory provisions of the Act had not been complied with, his challenge may be outside Art. 359(1) and the Presidential Order. If, on the other hand, it is held that, in substance, the challenge is to enforce his aforesaid fundamental rights, though he makes the challenge by reference to the relevant statutory provisions of the Act themselves, that would have brought his challenge within the prohibition of the Presidential Order. Normally, as we have already held, a challenge against the validity of the detention on the ground that the statutory provisions of the Act under which the detention is ordered have not been complied with, would fall outside Art. 359(1) and the Presidential Order, but the complication in the hypothetical case under discussion arises because unlike other provisions of the Act, the mandatory provisions in question essentially represent the fundamental rights guaranteed by Art. 22 and it is open to argument that the challenge in question substantially seeks to enforce the said fundamental rights. In the context of the alternative argument with which we are dealing at this stage, it is unnecessary for us to decide whether the challenge in question would have attracted the provisions of Art. 359(1) and the Order or not. We are referring to this matter only for the purpose of showing that the Parliament may have thought that the executive would not be able to detain citizens reasonably suspected of prejudicial activities by taking recourse to the Preventive Detention Act of 1950, and that may be the genesis of the impugned Act. If that

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be so, it would not be permissible to suggest that in passing the Act, Parliament was acting *malafide*.

It is quite true that if the Act has contravened the citizens' fundamental rights under Arts. 14 and 22, it would be void and the detentions effected under the relevant provisions of the said Act would be equally inoperative; but it must be remembered that it is precisely in this set of circumstances that Art. 359(1) and the Presidential Order issued under it step in and preclude the citizen from enforcing his fundamental rights in any court. The said Article as well as the Presidential Order issued under it indicate that there may be cases in which the specified fundamental rights of citizens have been contravened by executive action and the impugned executive action may be invalid on that account. That is precisely why the said Article and the Presidential Order impose a ban against the investigation of the merits of the challenge during the period prescribed by the Order. Therefore, the alternative argument urged in support of the plea that the impugned provisions of the Act amount to a colourable piece of legislation fails.

Mr. Parulekar who argued his own case before us with remarkable ability, contended that a detenu cannot be prevented from disputing the validity of the Ordinance, Act and the Rules under the Presidential Order if he did not ask for any consequential relief. His argument was that the prayer made in his petition under s. 491(1)(b) consists of two parts; the first prayer is to declare that the impugned Act and the Order are invalid, and the second prayer is that his detention should be held to be illegal and his release should accordingly be ordered. The first prayer, says Mr. Parulekar, cannot fall within the mischief of the Order because he is not enforcing any of his rights when he asks merely for a declaration that the law is invalid, and he suggested that even if we take the view that he is precluded from challenging the validity of his detention by virtue of the said Order, we should not preclude him from challenging the validity of the law merely with a view to obtain a declaration in that behalf. In our opinion, this argument cannot be accepted. What s. 359(1) purports to do is to empower the President to make an Order by which the right of the detenue to move the Court

to challenge the validity of his detention on the ground that any of his fundamental rights specified in the Order have been contravened, is suspended, and so, it would be unreasonable to suggest that what the detenu cannot do in order to secure his release, he should be allowed to do merely for the purpose of obtaining an academic declaration. A proceeding taken under s. 491(1)(b) like a petition filed under Art. 226(1) or Art. 32(1) is intended to obtain relief, and the relief in such cases means the order for the release of the detenu. If the detenu is prohibited from asking for an order of release on the ground that the challenge to the validity of his order of detention cannot be made during the pendency of the Presidential Order, we do not see how it would be open to the same detenu to claim a mere declaration either under s. 491, Cr. P. C. or Art. 226(1) or Art. 32(1) of the Constitution. We do not think that it was open to the High Court to consider the validity of the impugned Act without relation to the prayer made by the detenu in his petition. The proceedings commenced by the detenu by means of his petition under s. 491(1)(b) constitute one proceeding and if the sole relief which the detenu seeks to obtain cannot be claimed by him by virtue of the Presidential Order, it would be unreasonable to hold that he can claim a different relief, *viz.*, a mere declaration; such a relief is clearly outside the purview of the proceedings under s. 491(1)(b) and Arts. 226(1) and 32(1).

During the course of the hearing of these appeals, it has been strenuously pressed before us by Mr. Setalvad that the emergency created by the Chinese act of aggression may last long and in consequence, the citizens would be precluded from enforcing their fundamental rights specified in the Presidential Order during the period that the Order is in operation. That, however, has no material bearing on the points with which we are concerned. How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crisis, such as our country is facing

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today. As Lord Wright observed in the case of *Liversidge*(1), "the safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency." The other aspect of Mr. Setalvad's argument was that during the operation of the Presidential Order, the executive may abuse its powers and the citizens would have no remedy. This argument is essentially political and its impact on the constitutional question with which we are concerned is at best indirect. Even so, it may be permissible to observe that in a democratic State, the effective safeguard against abuse of executive powers whether in peace or in emergency, is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion.

The appellants have also relied upon the observations made by Lord Atkin in the case of *Eshugbavi Eleko* v. *Officer Administering the Government of Nigeria*(2). "In accordance with British jurisprudence," said Lord Atkin, "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British Justice that Judges should not shrink from deciding such issues in the face of the executive." These noble sentiments so eloquently expressed by Lord Atkin as well as his classic minority speech in the case of *Liversidge* evoke a spontaneous response in the minds of all of us who have taken the oath to administer law in accordance with our Constitution and to uphold the fundamental rights of citizens guaranteed by the Constitution. This Court is fully conscious of the solemn duty imposed on it by Art. 32 which constitutes it the Custodian and Guardian of the citizens' fundamental rights. But we must remember that the democratic faith in the inviolable character of individual liberty and freedom and the majesty of law which sustains it must ultimately be governed by the Constitution itself. The Constitution is the law of laws—the paramount

(1) [1942] A.C. 206.
(2) A.I.R. 1931 P.C. 248.

and supreme law of the country. It has itself enshrined the fundamental rights of the citizens in the relevant Articles of Part III and it is no doubt the duty of this Court as the Custodian of those rights to see that they are not contravened contrary to the provisions of the Constitution. But the Constitution itself has made certain emergency provisions in Chapter XVIII with a view to enable the nation to meet grave emergencies like the present, and so, in dealing with the question about the citizen's right to challenge the validity of his detention, we will have to give effect to the plain words of Art. 359(1) and the Presidential Order issued under it. As we have already indicated, the only reasonable construction which can be placed upon Art. 359(1) is to hold that the citizen's right to take any legal proceeding for the enforcement of his fundamental rights which have been specified in the Presidential Order is suspended during the prescribed period. It is, in our opinion, plain that the right specified in Art. 359(1) includes the relevant right, whether it is statutory, Constitutional or Constitutionally guaranteed, and the words "any court" refer to all courts of competent jurisdiction and naturally include the Supreme Court and the High Courts. If that be so, it would be singularly inappropriate for this Court to entertain an argument which seeks to circumvent this provision by suggesting that the right of the detenu to challenge the legality of his detention under s. 491(1)(b) does not fall within the scope of the said Article. The said argument concentrates attention on the mere form of the petition and ignores the substance of the matter altogether. In the context, we think, such a sophisticated approach which leans solely on unrealistic and artificial subtlety is out of place and is illogical, unreasonable and unsound. We must, therefore, hold that the Punjab and the Bombay High Courts were right in coming to the conclusion that the detenues before them were not entitled to contend that the impugned Act and the statutory Rule under which they were deained were void for the reason that they contravened Arts. 14, 21 and 22(4), (5) & (7).

Before we part with these appeals, we ought to mention one more point. At the commencement of the hearing of these appeals when Mr. Setalvad began to argue about

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the validity of the impugned provisions of the Act and the Rules, the learned Attorney-General raised a preliminary contention that logically, the appellants should satisfy this Court that it was open to them to move the High Courts on the grounds set out by them before the validity of the said grounds is examined. He suggested that, logically, the first point to consider would be whether the detenues can challenge the validity of the impugned Act on the ground that they are illegally detained. If they succeed in showing that the applications made by them under s. 491(1)(b) are competent and do not fall within the purview of Art. 359(1) and the Presidential Order, then the stage would be reached to examine the merits of their complaint that the said statutory provisions are invalid. If, however, they fail on the first point, the second point would not fall to be considered. We then took the view that since a large number of appeals were placed for hearing before us and they raised important issues of Constitutional Law, it would be better to allow Mr. Setalvad to argue the case in the manner he thought best, and so, Mr. Setalvad addressed us on the validity of the Act in the first instance and then dealt with the question about the competence of the applications made under s. 491(1)(b) of the Code. In the main, the same method was adopted by the learned Advocates who followed Mr. Setalvad on the appellants' side. Naturally, when the learned Attorney-General made his reply, he also had to address us on both the points. It appeared that as regards the validity of the impugned provisions of the Act and the Rules he was not in a position to challenge the contention of the appellants that the Act contravened Arts. 14, 21 and 22(4), (5) & (7). Even so, he strongly pressed before us his original contention that we would not reach the stage of expressing our opinion on the validity of the Act if we were to uphold the preliminary objection that the applications made by the detenues were incompetent. In our opinion, the learned Attorney-General is right when he contends that we should not and cannot pronounce any opinion on the validity of the impugned Act if we come to the conclusion that the bar created by the Presidential Order operates against the detenues in the present cases. In fact, that is the course which this Court

adopted in dealing with *Mohan Choudhury's case*(1), and we are satisfied that that is the only course which this Court can logically and with propriety adopt.

In the result, we hold that the Punjab and the Bombay High Court are right in coming to the conclusion that the applications made by the detenues for their release under s. 491(1)(b), Cr. P. C. are incompetent in so far as they seek to challenge the validity of their detentions on the ground that the Act and the Rule under which they are detained suffer from the vice that they contravene the fundamental rights guaranteed by Arts. 14, 21 and 22(4), (5) and (7). Since these appeals were placed before the Special Bench for the decision of the common questions of law raised by them, we do not propose to examine the other contentions which each one of the appellants seeks to raise in his appeal. Therefore, we direct that all the appeals included in the present group should now be set down before a Constitution Bench and each one of them should be dealt with in accordance with law.

Subba Rao, J.

SUBBA RAO J.—I have had the advantage of reading the Judgment of my learned brother, Gajendragadkar J. I regret my inability to agree with him wholly. I agree with his conclusion in regard to the applicability of Art. 359 of the Constitution to a right to move a court both under Art. 32(1) and Art. 226 thereof, but not with his conclusion in regard to the exercise of power by the High Court under s. 491 of the Code of Criminal Procedure.

These appeals raise questions of great importance touching apparently conflicting, but really harmonious, concepts of individual liberty and security of the State, for the former cannot exist without the latter. My only justification for a separate treatment of the subject even on questions on which there is general agreement is my conviction that on important questions I should express my thoughts in my own way. Broadly, two questions are posed for the consideration of this Court, namely (i) whether s. 3(2)(15)(i) of the Defence of India Act, 1962 (51 of 1962), hereinafter called the Act, and r. 30(1)(b) of the Rules made in exercise of the power conferred under the Act are constitutionally void; and (ii) whether the Order made by the President in exercise of the power conferred on him under Art. 359(1) of the Constitution would be a

(1) [1964] 3 S.C.R. 442.

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bar against the maintainability of any action in any court to question the validity of the detention order made under the Act.

I shall deal with the two questions in the said order. Before dealing with the first question it would be convenient to quote the impugned provisions of the Act.

Section 3.—(1) The Central Government may by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

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

(15) notwithstanding anything in any other law for the time being in force,—

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

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Rule 30.—(1) The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from

acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary so to do, may, make an order—

* * * * * * * * *

(b) directing that he be detained.

Rule 30A.—(2) Every detention order shall be reviewed in accordance with the provisions hereinafter contained.

(3) A detention order made by the Central Government or the State Government or the Administrator shall be reviewed by the Central Government or the State Government or the Administrator, as the case may be.

(4) A detention order made by an officer (who shall in no case be lower in rank than that of a District Magistrate) empowered by the State Government or the Administrator shall be reviewed :—

(a) in the case of an order made by an officer empowered by the State Government, by a reviewing authority consisting of any such two officers from among the following officers of that Government, that is to say, the Chief Secretary, a member of the Board of Revenue, a Financial Commissioner and a Commissioner of a Division, as may be specified by that Government by notification in the Official Gazette ;

(b) in the case of an order made by an officer empowered by the Administrator, by the Administrator himself.

Under the said provisions the Central Government or the State Government or an officer on whom the power to detain is delegated can direct the detention of any person if the detaining authority is satisfied that his detention is necessary for one or other of the reasons mentioned in r. 30. No grounds of detention need be served upon the detenu; no opportunity need be given to him to make representations or establish his innocence. The period of detention can be indefinite. The Central Government or the

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State Government or the Administrator of a Union Territory, as the case may be, is authorised to review the order of detention made by them. So too, a detention order made by an officer empowered by the State Government in that behalf can be reviewed by one or other of the officers mentioned in r. 30A (4).

It is contended that the said provisions infringe Art. 22(4) and (5) of the Constitution and, therefore, void. This Court in *Deepchand* v. *The State of Uttar Pradesh*(1) laid down the effect of a law made in infringement of fundamental rights; and observed :

> "The result of the aforesaid discussion may be summarized in the following propositions; (i) whether the Constitution affirmatively confers powers on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power; (ii) the Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constituion and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution; (iii) it follows from the premises that a law made in derogation or in excess of that power would be *ab initio* void wholly or to the extent of the contravention, as the case may be;....."

This view was accepted by a later decision of this Court in *Mahandra Lal* v. *State of U.P.*(2).

It is, therefore, manifest that if the Act and the rules framed thereunder infringed the provisions of Art. 22(4) and (5) of the Constitution, they would be *ab initio* void ; they would be stillborn law and any detention made thereunder would be an illegal detention. Articles 21 and 22 enshrine fundamental rights relating to personal liberty. Clauses (4) to (6) of Art. 22 specifically deal with preventive detention. This Court has held in *A. K. Gopalan* v. *State of Madras*(3) that the word "law" in Art. 21 means State-made law or enacted law and that Art. 22 lays down only the minimum procedural conditions which such a

(1) [1959] Supp. 2 S.C.R. 8, 40.
(2) A.I.R. 1963 S.C. 1019. (3) [1950] S.C.R. 88.

a statutory law cannot infringe in the matter of preventive detention. The minimum conditions are as follows: (1) Parliament may make a law prescribing the maximum period for which any person may be detained; (2) he shall not be detained for a period more than 3 months unless an Advisory Board constituted for that purpose reports before the expiry of three months that there is sufficient cause for detention; and (3) the authority making the order shall communicate to such person the grounds on which the order has been made and afford him the earliest opportunity of making representations against the order. At the same time cl. (7) enables Parliament to make a law prescribing the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board. Clause (6) of Art. 22 enables an authority not to disclose facts to the detenu which it considers to be against the public interest to disclose. While cls. (4) to (6) of Art. 22 provide for the minimum safeguards for a detenu in the matter of preventive detention, cl. (7) removes them enabling Parliament to make a law for preventive detention ignoring practically the said safeguards. The only outstanding safeguard, therefore, is that Parliament can only make a law in derogation of the said safeguards by defining the circumstances under which and the class or classes of cases in which a person may be so detained. Parliament did not make such a law.

Neither the Act nor the rules made thereunder satisfy the conditions laid down in that clause. The Act and the rules do not provide for the maximum period of detention, for the communication to the detenu of the grounds of detention, for affording him an opportunity of making representations against his detention, or for an Advisory Board consisting of persons with the requisite qualifications. The power to review given to the detaining authority cannot conceivably satisfy the condition of an Advisory Board provided for under cl. (4)(a) of Art. 22. It is, therefore, a clear case of Parliament making a law in direct infringment of the relevant provisions of Art. 22 of the Constitution, and therefore the law so made is void under the said Article.

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In this context a relevant aspect of the argument advanced by the learned Attorney-General may be noticed. He contends that, on a true construction of Art. 359(1) of the Constitution, if the requisite order is made by the President, a law can be made in infringement of Art. 22 of the Constitution. Under Art. 359, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order shall remain suspended for the period during which a Proclamation of Emergency is in force or for such shorter period as may be specified in the order. It is contended that when remedy is suspended in respect of infringement of Art. 22, the right thereunder also falls with it. It is said that right and remedy are reciprocal; and if there cannot be a right without a remedy, there cannot also be a remedy without a right. In "Salmond on Jurisprudence", 11th Edn., the following interesting passage is found, at p. 531, under the heading *"Ubi Jus Ibi Remedium"*;

> "Whenever there is a right, there should also be an action for its enforcement. That is to say, the substantive law should determine the scope of the law of procedure, and not *vice versa*. Legal procedure should be sufficiently elastic and comprehensive to afford the requisite means for the protection of all rights which the substantive law sees fit to recognize. In early systems this is far from being the case. We there find remedies and forms of action determining rights than rights determining remedies. The maxim of primitive law is rather, *Ubi remedium ibi jus.*"

I understand this passage to mean that a right pertains to the substantive law and the remedy, to procedural law; that where a right is provided by a statute a remedy, though not expressly provided for, may necessarily be implied. But the converse, though obtained in primitive law, cannot be invoked in modern times. To put it in other words, the suspension of a remedy cannot abrogate the right itself. Indeed, a comparative study of Arts. 358 and 359 of the Constitution indicates that it could not have been the intention of the makers of the Constitution, for Art. 358 expressly suspends the right whereas Art. 359 suspends the remedy. If the contention of the learned Attorney

General be accepted, both have the same effect: if that was the intention of the makers of the Constitution, they would not have expressed themselves in different ways in the two articles. Where they intended to suspend the right, they expressly said so, and where they intended only to suspend the remedy, they stated so. We cannot, therefore, accept this contention.

At this stage I may also notice the argument of the learned Attorney General that Art. 359, by enabling the President to suspend the right to move for the enforcement of the fundamental rights mentioned therein, impliedly permitted Parliament to make laws in violation of those fundamental rights in respect whereof the right to move the court is suspended. I cannot appreciate this argument. It is one thing to suggest that in view of the amplitude of the phraseology used in Art. 359, the right to move for the enforcement of fundamental rights infringed by a void law, even deliberately made by Parliament, is suspended but it is a different thing to visualize a situation when the Constitution permitted Parliament under the shelter of executive fiat to make void laws. Indeed, a comparison of Art. 358 and Art. 359—I shall deal with them in detail later on—indicates the contrary. I cannot for a moment attribute to the august body, the Parliament, the intention to make solemnly void laws. It may have made the present impugned Act *bona fide* thinking that it is sanctioned by the provisions of the Constitution. Whatever it may be, the result is, we have now a void Act on the statute book and under that Act the appellants before us have been detained illegally. To use the felicitous language of Lord Atkin, in this country "amid the clash of arms, the laws are not silent; they may be changed, but they speak the same language in war as in peace". The tendency to ignore the rule of law is contagious, and, if our Parliament, which unwittingly made a void law, not only allows it to remain on the statute book, but also permits it to be administered by the executive, the contagion may spread to the people, and the habit of lawlessness, like other habits, dies hard. Though it is not my province, I venture to suggest, if I may, that the Act can be amended in conformity with our Constitution without it losing its effectiveness.

This leads us to the question whether the appellants,

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who are illegally detained, can move this Court under Art. 32 of the Constitution or the High Court under Art. 226 thereof or under s. 491 of the Code of Criminal Procedure, hereinafter called the Code. It would be convenient at this stage to read the relevant provisions of the Constitution.

Article 32.(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

* * * * *

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article. 226 (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Article 358. While a Proclamation of Emergency is in operation nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in the Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate,

except as respects things done or omitted to be done before the law so ceases to have effect.

Article 359 (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

Article 33 confers power on Parliament to modify the rights conferred by Part III in their application to Armed Forces or the Forces charged with the maintenance of public order; Art. 34 enables Parliament to impose restrictions on the rights conferred by Part III while martial law is in force in any area.

The contention of learned counsel for the appellants on the construction of the said provisions may be classified under the following heads: (1) Art. 358 permits the State to make laws only in infringement of Art. 19 of the Constitution, and Art. 359 suspends only the right to move the enforcement of the fundamental rights specified in the President's Order and, therefore, Art. 359 cannot be so construed as to enlarge the legislative power of Parliament beyond the limits sanctioned by Art. 358 and, therefore, it should be confined only to executive infringements of the said rights. (2) Article 359 does not permit the executive to commit fraud on the Constitution by doing indirectly what Parliament cannot do directly under Art. 358 and Art. 13(2) of the Constitution. (3) For invoking Art. 359 two conditions must be complied with, namely, (i) the party shall have a right to move any court, and (ii) only for the enforcement of the rights conferred by Part III. Such a right to move for such a relief is expressly conferred by the Constitution under Art. 32. Therefore, the President's order under Art. 359 would only suspend the right to move under Art. 32 and not for approaching the Court under Art. 226 of the Constitution. In any view, those words are inappropriate to a pre-existing statutory right under s. 491 of the Code.

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To appreciate the contentions from a correct perspective it is necessary at the outset to notice the nature of the fundamental rights enshrined in the Constitution and the remedy or remedies provided for their enforcement. It would be pedantic to go into the question whether fundamental rights provided for under our Constitution are natural rights or primordial rights: whatever their origin might have been and from whatever source they might have been extracted, they are enshrined in our Constitution in Part III and described as fundamental rights. The constitution declared under Art. 13(2) that the State shall not make any law taking away or abridging the said rights and any law made in contravention of this clause shall be void to the extent of the contravention. After declaring such a law void, it proceeds to provide for the mode of enforcement of the said rights. Article 32(1) makes the right to move the Supreme Court by appropriate proceedings for the enforcement of the said rights a guaranteed right. Appropriate proceedings are described in cl. (2) thereof, that is to say, a person can move the said Court for directions, orders, or writs in the nature described thereunder for the enforcement of any of the said rights. The right to move, therefore, is regulated by the procedure prescribed thereunder. Article 226, though it does not find a place in Part III of the Constitution, confers a power on every High Court throughout the territories in relation to which it exercises jurisdiction to issue such directions, orders, or writs in the nature described thereunder for the enforcement of any of the rights conferred by Part III. There is a material difference between Art. 32 and Art. 226 of the Constitution, namely, while in Art. 32 the right to move the court is guaranteed, under Art. 226 no such guarantee is given. But a fair construction of the provisions of Art. 226 indicates that the right to move, though not guaranteed, is necessarily implied therein. As I have pointed out, under Art. 32 the right to move the Court is given a practical content by the provision indicating the different modes open to the person who has the said right to approach the Supreme Court. Article 226 employs the same procedure for approaching the High Court and that procedure must necessarily be for the exercise of the right to move that

court. When a power is conferred upon the High Court and a procedure is prescribed for a party to approach that court, it is reasonable to imply that the person has a right to move that court in the manner prescribed thereunder. The only difference between Art. 32 and Art. 226 is that the Supreme Court cannot say, if it is moved in the manner prescribed, that it will not decide on merits, but the High Court, in exercise of its jurisdiction can do so. The decision on merits is left to its discretion, though the exercise of that discretion is regulated by convention and precedent. Further, Art. 32(3) also enables Parliament to make a law empowering any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under cl. (2) thereof. One thing to be noticed is that Parliament can only empower any other court to exercise any of the powers exercisable under cl. (2) ; it cannot confer the guaranteed right mentioned in cl. (1) on any person to move that court. That is to say, the court or courts to which such powers are given would be in the same position as the High Court in respect of the enforcement of the fundamental rights. To put it shortly, no person will have a guaranteed right to move any such other court for the enforcement of fundamental rights. A discretionary jurisdiction similar to that of the High Court can only be conferred on them. For the same reason given in the case of the High Court, an aggrieved party will also have a right to move those courts in the manner prescribed.

This analysis leads us to the following position : Under the Constitution every person has a right to move, for the enforcement of a fundamental right, the Supreme Court, the High Courts or any other court or courts constituted by Parliament by law in the manner prescribed *i.e.*, by one or other of the procedural writs or directions or orders described thereunder.

With this background let me have a close look at the provisions of Art. 359. The expressions used in Art. 359 are clear and unambiguous. Three expressions stand out in bold relief, namely, (i) "right to move", (ii) "any Court", and (iii) "for the enforcement of such of the rights conferred by Part III". "Any Court" implies more

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than one court, but it cannot obviously be any court in India, for it must be a court where a person has a right to move for the enforcement of the fundamental rights. It can, therefore, be only the Supreme Court, High Court or the courts or courts constituted by Parliament under Art. 32(3). If the contention of learned counsel for the appellants be accepted, the expression "court" should be confined to the Supreme Court. But the Article does not say either Supreme Court or that the right to move is the guaranteed one under Art. 32(1). The next question is, what do the words "right to move" mean? The right to move is qualified by the expression "for the enforcement of such of the rights conferred by Part III". Therefore, the right to move must be a right to move the Supreme Court or the High Court in the manner prescribed by Art. 32(2) or Art. 226(1) of the Constitution for the enforcement of the fundamental rights. The words in the second limb of the Article *viz.*, that "all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended" only relate to the proceedings instituted in exercise of the said right : they do not throw any light on the scope of the "right to move". This construction gives full meaning to every expression used in the Article. If so construed, it can only mean that the temporary bar that can be imposed by an order of the President is not confined only to the guaranteed right of a person to move the Supreme Court for the enforcement of his fundamental rights, but also extends to the right of a person to move the High Court or the Court or Courts constituted by Parliament for the enforcement of such of the fundamental rights as mentioned in the order. I would, therefore, hold that the President's order under Art. 359 suspending the right to move any court in respect of specified fundamental rights includes not only the right to move under Art. 32 but also that under Art. 226.

The more difficult question is whether Art. 359 can be so construed as to empower the President to suspend all actions which a person may take under a statute or common law, if he seeks thereby to protect his liberty against unlawful encroachment by State or its officers. To put it in other words, can a person, who is illegally

detained under a void law, approach the High Court under s. 491 of the Code or file a suit in a civil court for damages for illegal confinement or take any other legal proceedings open to him? Learned Attorney General contends that "any court" in Art. 359 means any court in India and that the expression "enforcement of fundamental rights" implies any relief asked for by a party if the granting of such relief involves directly or indirectly a decision on the question whether any of the fundamental rights specified in the President's order has been infringed. This argument, if I may say so, completely ignores the scheme of the Constitution. Under the Constitution, a person may have three kinds of rights, namely, (i) fundamental rights, (ii) constitutional rights, and (iii) statutory or common law rights. Under Art. 32(1) a person has a fundamental right to move the Supreme Court for enforcement of his fundamental rights; under Art. 226, a person has a constitutional right to move the High Court for the enforcement of the said rights. Parliament, by law, in exercise of its powers conferred on it under Art. 245, may confer a right on a person to move any court for a relief wider in scope than that provided by Art. 32 or Art. 226 of the Constitution. Though Parliament may not have power, except in the cases specified to circumscribe the fundamental rights enshrined in Part III, it can certainly make a law enlarging the content of the substantive and procedural rights of parties beyond those conferred by Part III. Under this category there may also be laws made by competent authority before the commencement of the Constitution, but continued under Art. 372, which do not any way infringe the fundamental rights created by the Constitution. Section 491 of the Code is one of the pre-Constitution statutory provisions continued under Art. 372 of the Constitution. It does not in terms posit any right to move the High Court for the enforcement of fundamental rights. Therefore, the argument of the learned Attorney General involves considerable strain on the express language of Art. 359, for, he in effect asks us to equate the expression "a right to move for the enforcement of fundamental rights" with any relief asked for in any proceedings in any court, whether initiated at the instance of the party affected or not,

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or whether started *suo motu* by the court, if it involves a decision on the question whether a particular law was void for the reason that it infringed the fundamental rights mentioned in the President's order. In support of this contention he presses on us to hold that in days of stress and strain *i.e.,* when there is a threat of war and consequently an emergency is declared, a court has to adopt the principle of "strained construction" which will achieve the object behind Art. 359 of the Constitution and the order issued by the President. I shall briefly examine the decisions cited by him to ascertain whether any such novel doctrine of construction of statutes exists.

Rex v. *Halliday*(1) is a decision of the House of Lords made in 1917 *i.e.,* during the First World War. Regulation 14B of the Defence of the Realm (Consolidation) Regulation, 1914, empowered the Secretary of State to order the internment of any person of hostile origin or associations, where on the recommendation of a competent naval or military authority it appeared to him expedient for securing the public safety or the defence of the realm. This regulation was authorized by the Defence of the Realm Consolidation Act, 1914, s. 1, sub-section 1. The House of Lords, by a majority, held that the Act conferred upon the King-In-Council power, during the continuance of the war, to issue regulations for securing the public safety and the defence of the realm and, therefore, the regulation was valid. It was urged there that no such restraint of personal liberty should be imposed except as a result of judicial enquiry. It was also contended that if the Legislature intended to interfere with personal liberty it should have provided for suspending the right of the subject as to the writ of *heabeas corpus.* The argument was negatived. Lord Atkin observed:

> "The subject retains every right which those statutes confer upon him to have tested and determined in a Court of law, by means of a writ of *Habeas Corpus,* addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or

(1) L.R. 1917 A.C. 260, 272.

interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires,* do not infringe upon the *Habeas Corpus* Acts in any way whatever, to take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land."

This decision does not lay down any new rule of construction. Parliament is supreme in England. It its wisdom it did not take away the *habeas corpus,* but empowered the executive to issue regulations for public safety and defence of the nation. The regulation made did not exceed the power conferred by the Parliament. The House of Lords held that the detention was in accordance with law.

Nor does the controversial decision in *Liverside* v. *Sir John Anderson*(1), which was the subject of servere criticism in later years, lay down any such new rule of construction. There, the Secretary of State, acting in good faith under reg. 18B of the Defence (General) Regulations, 1939, made an order in which he recited that he had reasonable cause to believe a person to be of hostile associations and that by reason thereof it was necessary to exercise control over him and directed that that person be detained. The validity of the detention turned upon the construction of the express provisions of reg. 18B of the said Regulations. In that regulation the expression used was "reasonable cause to believe any person to be of hostile origin". The House of Lords, by a majority, held that the expression meant that "the Secretary of State thinks fit to be reasonable". There was a powerful dissent by Lord Atkin on the question of construction. With the correctness of the construction put upon by the majority on the said provision we are not concerned; but none of the learned law Lords laid down in their speeches any new rule of construction peculiar to war conditions. Viscount Maugham observed:

"My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its

(1) L.R. 1942 A.C. 206, 219, 251.

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meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention."

Lord Atkin, in his dissenting judgment, protested against the strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. Then he proceeded to observe :

"The words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them."

These observations by the dissenting Lord may at the most indicate that the majority in fact put a strained construction on the express words used in the regulation; but they do not show that they have laid down any such rule of construction. This is made clear by Lord Macmillan when he stated:

"In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of

all statutes or statutory regulations in peace time as well as in war time."

These observations should be understood in the background of the earlier observation :

"I do not agree that the critical phrase in the context in which I find it is susceptible only of one meaning, namely that for which the appellant contends. Were it so it would be strange that several learned Judges should have found it to possess quite a different meaning."

This judgment, therefore, is no authority for the position for which it is relied upon. The decision in substance says that the rule of construction of a statute is the same both in peace time and in war time and that when there is an ambiguity in the expressions used, the court may give such meaning to the words used which are capable of bearing that meaning as would promote rather than defeat the object of the legislation. Indeed, the Privy Council, in *Nakkuda Ali* v. *Jayaratna*(1), confined the interpretation put upon reg. 18B of the Defence (General) Regulations, 1939, by a majority of the House of Lords to the particular cricumstances of that case and they did not accept that construction when similar words were used in the Regulation 62 of the Defence (Control of Textiles) Regulations, 1945. I cannot, therefore, hold that the said decisions suggested a new rule of construction peculiar to war measures. The rules of construction are the same in war time as well as in peace time. The fundamental rule of construction is that the courts have to find out the expressed intention of the Legislature from the words of the enactment itself. Where the language is unambiguous, no more is necessary than to expound those words in their natural and ordinary sense. But where the words are ambiguous and reasonably capable of bearing two meanings, the court may be justified in adopting that meaning which would further the intention of the Legislature rather than that which would defeat it.

In the present case we are not dealing with a war measure, but a constitutional provision which was designed to govern the affairs of our country for all times so

(1) L.R. 1 [1951] A.C. 66.

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long the Constitution remains in force; and it cannot certainly be strained to meet a passing phase in a country's life. A strained construction put upon a statutory provison to meet a particular emergency may be rectified by a subsequent enactment. But such a construction put upon a constitutional provision might entail serious consequences. Even if *Liversidge's case*(1) had laid down a new rule of construction, that construction cannot be invoked in the case of a constitutional provision.

In *Gibbons* v. *Ogden*(2) the following rule of construction of a constitutional provision is stated:

> "That which the words declare is the meaning of an instrument; and neither Courts nor legislatures have the right to add or to take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of all human writings those which ordain the fundamental law of states, the rule rises to a very high degree of significance. It must be very plain, nay absolutely certain, that the people did not intend what the language they have employed in its natural signification, imports, before a Court will feel itself at liberty to depart from the plain reading of a constitutional provision."

No doubt a constitution should receive a fair, liberal and progressive construction so that the true objects of the instrument may be promoted; but such a construction could not do violence to the natural meaning of the words used in particular provision of the Constitution.

The relevant provisions of s. 491 of the Code read:

> (1) Any High Court may, whenever it thinks fit, direct—
>
> (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
>
> (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
>
> * * * * * *

Bearing in mind the said rules of construction, I ask myself the question whether the exercise of the power un-

(1) [1942] A.C. 206. (2) (1824) 6 L.Ed. 23.

der s. 491 of the Code can be equated with a right to move the High Court to enforce such of the fundamental rights conferred by Part III of the Constitution as may be mentioned in the order of the President. It is necessary to ascertain the correct scope of the section to answer the question raised before us. The section is framed in wide terms and a discretionary power is conferred on the High Court to direct one or other of the things mentioned therein "whenever it thinks fit". Unlike Art. 32 and Art. 226, the exercise of the power is not channelled through well recognized procedural writs or orders. With the result the technicalities of such procedural writs do not govern or circumscribe the court's discretion. A short history of this section reinforces the said view. Originally, the Supreme Courts in India purported to exercise the power to issue a writ of *habeas corpus* which the Kings' Bench Division in England exercised. In 1861 Parliament passed Acts 24-25 Vict. Ch. 104 authorising the establishment of High Courts of Judicature in India. The Letters Patents issued under that Act in 1865 were expressly made subject to the legislative powers of the Governor-General in Council. The courts were given the same jurisdiction, power and authority which the Supreme Courts possessed but subject to the legislative power of the Governor-General in Council. Pursuant to the power so conferred, the Governor-General in Council passed successive Codes of Criminal Procedure in the years 1872, 1875, 1882 and 1898, and in 1923 by the Criminal Law (Amendment) Act, some of the provisions of the Code of 1898 were amended. The High Courts Act of 1861 authorized the Legislature, if it thought fit, to take away the powers which the High Courts exercised as successor to the Supreme Courts, and Acts of Legislatures passed in 1872 and subsequent years had taken away the power of the High Courts to issue prerogative writs ; and instead a statutory power precisely defined was conferred upon the High Courts. That statutory power underwent various changes and finally took the form of s. 491 of the Code, as at present it stands. The attempt to resuscitate the prerogative writs was rejected by the Calcutta High Court in *Girindra Nath Banerjee* v. *Birendra Nath Pal*(1) and

(1) (1927) I.L.R. 54 Cal. 727.

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by the Madras High Court in *District Magistrate, Trivandrum* v. *Mammen Mappillai*(1). The Privy Council in *Matten* v. *District Magistrate, Trivandrum*(2) approved the said decisions and held that the said Acts have taken away the power of the High Courts to issue prerogative writs and thereafter the only power left in the High Court was that conferred by the statute. By reason of Art. 372 of the Constitution, the Code of Criminal Procedure, including s. 491 thereof, continued to be in force until altered, repealed or amended by the competent Legislature or other competent authority. Article 225 of the Constitution expressly preserved the High Courts' powers and jurisdiction, subject to other provisions thereof. Admittedly, Parliament has not made any law repealing s. 491 of the Code. The statutory power conferred on the High Courts under that section is not inconsistent either Art. 32 or with Art. 226 or with any other Article in Part III or any other Chapter of the Constitution. So, it cannot be held that s. 491 of the Code has been impliedly superseded by Art. 226 even to the extent it empowers the High Court to give relief to persons illegally detained by the State. Now what is the scope of that section? Though s. 491 of the Code is remedial in form, it postulates the existence of the substantive right. In India, as in England, the rule of law was the accepted principle. No person can be deprived of his liberty except in the manner prescribed by the law of the land. If a person is illegally or improperly detained in violation of the law of the land, the High Court can direct his release "whenever it thinks fit" so to do. The section *prima facie* does not predicate a formal application ; nor does it insist that any particular person shall approach it. The phraseology used is wide enough for the exercise of the power *suo motu* by the High Court. Nor does the section introduce an antithesis between the exercise of jurisdiction on application and that exercised *suo motu ;* that is to say, even if an application was filed before the High Court and for one reason or other, no orders could be passed thereon, either because of procedural defect or because it was not pressed,

(1) I.L.R. 1939 Mad. 708.
(2) L.R. (1939) 66 I.A. 222.

nothing prevents the High Court from acting *suo motu* on the basis of the information brought to its notice. It is said that various High Courts framed rules regulating the procedure of the respective High Courts, but that fact is not much relevance in the matter of construing the section. Shortly stated, the High Court is given an absolute discretion to direct a person, who has been illegally detained, to be released, whenever that fact is brought to its notice through whatever source it may be. This jurisdiction existed long before the Constitution was made and long before the fundamental rights were conferred upon the people under the Constitution. The rights, substantive as well as procedural, conferred under Part III and Art. 226 on the one hand and under s. 491 of the Code on the other, are different. Under Arts. 32 and 226, an affected party can approach the Supreme Court or the High Court, as the case may be, only in the manner prescribed under Art. 32(2) or Art. 226 *i.e.*, by way of writs and orders mentioned therein: he must ask the court for the enforcement of this fundamental right. The relief implies that he must establish that he has a fundamental right, that his fundamental right has been infringed by the State and, therefore, the Court should give the appropriate relief for the enforcement of that right. Both the right as well as the procedure are the creatures of the Constitution. Whereas s. 491 of the Code assumes the existence of the "rule of law" and confers a power on the High Court to direct persons in illegal detention to be set at liberty. It is not bound by any technical procedures envisaged by the Constitution. If a person approaches the High Court alleging that he or some other person has been illegally detained, the Court calls upon the detaining authority to sustain the validity of the action. The onus of proof lies on the custodian to establish that the person is detained under a legal process; but if it fails to establish that the person is detained under law, the said person may be released. It is true that the detaining authority will have to satisfy the court that the law under which the detention is made is a valid one. It may also be true that in scrutinizing the validity of that law the court has to go into the question whether the law offends any of the fundamental rights mentioned

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in Part III of the Constitution. But that circumstance does not by any process of involved reasoning make the said proceeding one initiated in exercise of the right to move the High Court for the enforcement of the petitioner's fundamental right. The distinction between the two lies in the fact that one is an enforcement of a petitioner's fundamental right and the other, a decision on the unconstitutionality of a law because of its infringement of fundamental rights generally.

Further, the right and the relief have a technical and specific significance given to them by the Constitution. They cannot be equated with the mode of approach to the High Court under s. 491 of the Code or with the nature of the relief that can be given thereunder. The expression "whenever it thinks fit" confers an absolute discretion on the court to exercise its power thereunder or not to do so, having regard to the circumstances of each case. While the word "may" used in a statute was sometimes construed as imposing a duty on the authority concerned on whom a power is conferred to exercise the same if the circumstances necessitated its exercise, the expression "whenever it thinks fit" does not warrant any such limitation on its absolute discretion. Though ordinarily a High Court may safely be relied upon to exercise its powers when the liberty of a citizen is illegally violated by any authority, the said unlimited discretion certainly enables it in extraordinary circumstances to refuse to come to his rescue. The absolute discretionary jurisdiction conferred under s. 491 of the Code cannot be put on a par with the jurisdiction conferred under Art. 226 of the Constitution hedged in by constitutional limitations. A brief reference to decided cases on the scope of s. 491 of the Code will make my meaning clear.

In *Alam Khan* v. *The Crown*(1), the Full Bench of the Lahore High Court has defined the scope of s. 491 of the Code. Ram Lall, J., who spoke for the majority, stated, after quoting the relevant part of the section :

> "The language of the section places no limit on the class of person or persons who can move a High Court with relation to a person in custody and if the

(1) (1947) I.L.R. 28 Lahore 274, 303.

> High Court on hearing the petition thinks fit to do so, may make an order that he be dealt with according to law."

In *Ramji Lal* v. *The Crown*(1), a Full Bench decision of the East Punjab High Court, Mahajan, J., as he then was, defined the wide scope of the section thus :

> "Whatever may be the state of English law on the subject so far as section 491 of the Criminal Procedure Code 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 *suo 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 of the Criminal Procedure Code."

In *King Emperor* v. *Vimlabai Deshpande*(2), a police officer made an arrest of the respondents under sub-rule 1 of r. 129 of the Defence of India Rules, 1939, which read : "Any police officer ..... may arrest without warrant any person whom he reasonably suspects of having acted ..... (a) in a manner prejudicial to the public safety or to the efficient prosecution of the war." The Judicial Committee held that the burden was upon the police officer to prove to the satisfaction of a court before whom the arrest was challenged that he had reasonable grounds of suspicion and that if he failed to discharge that burden, an order made by the Provincial Government under sub-rule 4 of r. 129 for the temporary custody of the detenu was invalid. As the police officer failed to discharge the onus, the Privy Council held that the High Court was right in ordering the release of the person from custody under s. 491 of the Code of Criminal Procedure. This shows that when a person is detained by a police officer, the burden of establishing that the detention is valid is on him.

These authorities well establish that s. 491 of the Code does not contemplate any right to move a court by any affected party, but the court can exercise the

(1) I.L.R. (1949) II E.P. 28, 54.
(2) (1946) L.R. 73 I.A. 144.

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statutory power whenever it thinks fit, if the fact of illegal detention of a person is brought to its notice.

The problem may be approached from a slightly different perspective. Three questions may be posed, namely, (1) has any person the right to move the High Court under s. 491 of the Code to enforce his fundamental right? (2) would it be necessary for a person detained or any other on his behalf to allege that the detenu has a fundamental right and that it has been infringed by State action and seek a relief for enforcement of that right? (3) would it be obligatory on the Court to enforce the right if the said right had been established? All the questions must be answered in the negative. Under s. 491 of the Code there is neither a right in the person detained to move the High Court for the enforcement of the fundamental right nor there is an obligation on the part of the High Court to give the said relief. It is only a discretionary jurisdiction conceived as a check on arbitrary action.

There is another aspect of the question. Article 359 has nothing to do with statutory powers conferred by Parliament. Article 359 expressly deals with the constitutional right to move a court and the constitutional enforcement of that right. So far as ordinary laws are concerned, Parliament can always amend the law, having regard to the circumstances obtaining at a particular point of time ; for instance, Parliament could have amended s. 491 of the Code by repealing that section altogether or by suitably amending it. Briefly stated, Art. 359 provides for the suspension of some constitutional rights in the manner prescribed thereunder. The statutory rights are left to be dealt with by the appropriate Legislature in exercise of the powers conferred on them. The argument that the intention of the makers of the Constitution in enacting Art. 359 would be defeated, if s. 491 of the Code was salvaged, does not appeal to me. If Parliament had amended s. 491 of the Code, which it should have done if it intended to do so, this alleged anomaly pointed out by the learned Attorney General could not have arisen. I would, therefore, hold that the expression "right to move any Court for the enforcement of such of the rights conferred by Part III" could legitimately refer

only to the right to move under Art. 32 or Art. 226 of the Constitution for the said specific relief and could not be applied without doing violence to the language used to the exercise of the statutory power conferred on the High Courts under s. 491 of the Code. If that be so, the expression "all proceedings pending in any Court for the enforcement of the rights" used in the second limb of Art. 359 must also necessarily refer to proceedings initiated in exercise of the right to move envisaged in the first limb of the article.

I shall now proceed to consider some of the minor points raised at the Bar. Another argument advanced on behalf of the respondents may also be briefly noticed. It is said that while Art. 358 maintains the legislative incompetency to make laws in derogation of fundamental rights other than those enshrined in Art. 19, Art, 359 enables the President by an indirect process to enlarge the said legislative competency and, therefore, Art. 359 must be so read as to confine its scope only to executive acts. I cannot agree. Article 359 does not *ex facie* enlarge the legislative competency of Parliament or a State Legislature. It does not enable them to make laws during the period covered by the order of the President infringing the fundamental rights mentioned therein. It does not empower the Legislatures to make void laws ; it only enables the President to suspend the right to move the Court during the period indicated in his order. Once that period expires, the affected party can move the Court in the manner prescribed by the Constitution. Despite Art. 358 it may happen that void laws are made and executive actions are taken inadvertently or otherwise ; and Art. 359 is really intended to put off the enforcement of the rights of the people affected by those laws and actions till the expiry of the President's order. The invalidity of the argument would be clear if it was borne in mind that Art. 358 also saved executive acts infringing Art. 19, but nonetheless Art. 359 gave protection against the exercise of the right to move any court in respect of such acts not saved by Art. 358. If the infringement of fundamental rights by executive action not saved by Art. 358 could not be a basis for the exercise of a right to move during the period of suspension,

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by the same token, laws not saved by Art. 358 could not equally be the basis for such an action during the said period. Be it as it may, the phraseology of Art. 359 is wide enough to comprehend laws made in violation of the specified fundamental rights.

Another argument advanced is, while Art. 358 read with Art. 13(1) and (2), maintained the constitutional position that all laws infringing fundamental rights other than that enshrined in Art. 19 would be void during the emergency, the President by issuing the order he did, indirectly, in effect and substance, validated the laws infringing Arts. 14, 21 and 22, and, therefore, the issuing of the said order must be held to be a fraud on his powers. This argument has no merits. It is based upon a misapprehension of the doctrine of fraud on powers. In the context of the application of the doctrine to a statutory law, this Court observed in *Gullapally Nageswara Rao* v. *Andhra Pradesh Road Transport Corporation*(1) thus :

> "The legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The legislature cannot overstep the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact it has power to make the law, its motives in making the law are irrelevant."

To the same effect are the observations in *Gajapati Narayan Deo* v. *The State of Orissa*(2). On the same analogy, the President cannot overstep the limits of his power defined under Art. 359 of the Constitution. So long as he does not exceed his power, the effect of his order made within bounds could not conceivably sustain the plea of fraud on powers. Fraud on power implies that a power not conferred is exercised under the cloak of a power conferred. But if an act can legitimately be referred to a power conferred, the intention of the person exercising

(1) [1959] Supp. 1 S.C.R. 319, 329. (2) [1954] S.C.R. 1.

the power or the effect of his exercise of the power is irrelevant. Now, on the construction placed by me on Art. 359, the President has clearly the constitutional power to suspend the aforesaid right. The fact that Parliament by taking shelter under that order may enforce void laws cannot make a valid exercise of a power of the President one in fraud of his power.

The next argument is that the order issued by the President is in excess of the powers conferred under Art. 359 of the Constitution. Under Art. 359, the argument proceeds, the order made by the President can relate to a period or the whole or a part of the territory of India and cannot be confined to a class of persons. As the order is restricted to persons that have been deprived of their rights under the Defence of India Ordinance, it is said that it is not sanctioned by the provisions of Art. 359. There are no merits in this contention. Under the order the right to move for the enforcement of the rights mentioned therein is suspended during the period of emergency and it applies to the entire country. The fact that only persons, who are deprived of their rights under the Defence of India Ordinance, cannot exercise their right to move the Court does not make the order one confined to a class of persons. The Ordinance has force throughout India and *ex hypothesi* only persons affected would move the Court. That does not mean that the order is confined only to a class of persons.

The next contention is that the impugned section suffers from the vice of excessive delegation and that in any view the relevant rules framed are in excess of the power conferred upon the Government by the said Act. I cannot agree with either of the two contentions. On this aspect I have nothing more to add to that found in the judgment of my learned brother.

But the order made by the President still leaves the door open for deciding some questions even under Art. 32 or Art. 226 of the Constitution. The order is a conditional one. In effect it says that the right remains suspended if such person has been deprived of any such right under the Defence of India Ordinance, 1962, or under any rule or order made thereunder. The condition is that the person should have been deprived of a right under the

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Defence of India Ordinance or under any rule or order made thereunder. If a person was deprived of such a right not under the Ordinance or a rule or order made thereunder, his right would not be suspended. If the order was made in excess of the power conferred upon the Government by the said Ordinance, it would not be covered by that order. If the detention was made *mala fide,* it would equally be not an order made under the Ordinance.

My view on the basis of the aforesaid discussion may be stated thus : (1) The detenus cannot exercise their right to enforce their fundamental rights under Arts. 21, 22 and 14 of the Constitution, during the period for which the said right was suspended by the President's order. (2) This does not preclude the High Court to release the detenus in exercise of its power under s. 491 of the Code of Criminal Procedure, if they were imprisoned under a void law, though the voidness of the law arose out of infringement of their fundamental rights under Arts. 14, 21 and 22 of the Constitution. (3) The President's order does not preclude, even under Art. 32(1) and Art. 226 of the Constitution, the petitioners from proving that the orders of detention were not made under the Defence of India Ordinance or the Act either because they were made, (i) outside the provisions of the Ordinance of the Act, or (ii) in excess of the power conferred under them, or (iii) the detention were made *mala fide* or due to a fraudulent exercise of power.

I would close with a few observations. In the view I have taken, there are three courses open to Parliament : either it can make a valid law without infringing the fundamental rights other than those enshrined in Art. 19 or amend s. 491 of the Code in order to maintain the enforcement of void laws, or do both. It is not for me to suggest the right course.

In the result, the petitions will now go to the Constitution Bench for disposal on the said questions.

ORDER BY COURT

In accordance with the opinion of the majority the constitutional points raised in the Appeals are dismissed. Appeals to be set down individually before a Constitution Bench for dealing with the other contentions raised in each one of them.