Sree Mohan Chowdhury

Vs

The Chief Commissioner, Union Territory of Tripura

Habeas Corpus Petition No. 15 of 1963

(Raghuvar Dayal, K. Subha Rao, J. C. Shah JJ)

29.04.1963

JUDGMENT

SINHA C.J. –

On October 26, 1962, the President having been satisfied that a grave national emergency exists, whereby the security of India or any part of the territory thereof is threatened by the Chinese aggression, issued a Proclamation declaring the Emergency, under Art. 352 of the Constitution. That declaration of emergency was laid before both Houses of Parliament on November 8, 1962, and was approved by the Rajya Sabha on November 13, 1962, and by the Lok Sabha on November 14, 1962. After the Proclamation of Emergency, as Parliament was not in session, and as the President was satisfied that circumstances existed which rendered it necessary for him to take immediate action for exercise of the powers conferred by cl. (1) of Art. 123 of the Constitution, he promulgated the Defence of India Ordinance (1V of 1962) on the same date - October 26, 1962. By s. 3 of the Ordinance, the Central Government has been empowered to make rules as appear to be 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, by notification in the official gazette. In exercise of those powers, the Central Government promulgated the Defence of India Rules, 1962, by notification in the Official Gazette, Extraordinary dated November 5, 1962. The relevant portion of r. 30 is as follows :

> "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 or the efficient conduct of military operations, it is necessary so to do, may make an order :-
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> #X X X##
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> (b) directing that he be detained;
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> #X X X"##
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> During the operation of the Proclamation of Emergency the, President issued, on November 3, 1962, the following Order suspending the right to move any Court for the enforcement of rights conferred by Arts. 21 and 22 of the Constitution :

"In exercise of the powers conferred by clause (1) of article 359 of the Constitution, the President hereby declares that 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."

In exercise of the power conferred by r. 30 aforesaid of the Defence of India Rules, the Chief Commissioner of Tripura issued an order of detention in respect of the petitioner on November 20, 1962 :

#"No. F. 22(59)-PD/62TRIPURA ADMINISTRATIONOFFICE OF THE CHIEFCOMMISSIONER.Agartala,November 20, 1962.##

ORDER

WHEREAS, I am satisfied that Shri Bipul alias Mohan Chaudhri S/o Sri Bimala Charan Chaudhri of Sutarmura P. S. Bisalgarh should be detained with a view to preventing him/her from acting in any manner prejudicial to the defence of India and Civil defence, public safety, the maintenance of public order, India's relations with foreign powers and the maintenance of peaceful conditions in Tripura.

Now, therefore, in exercise of the powers conferred by Rule 30 of the Defence of India Rules, 1962 read with sub-rule (11) of Rule 2 of the aforesaid Rules and all other powers enabling in that behalf, I hereby direct that the aforesaid person be detained in the Central Jail at Agartala until further orders.

#Sd/-(S. P. Mukerjee)Chief Commissioner, Tripura."##

By a subsequent order dated December 3, 1962, of the Chief Commissioner Tripura, the petitioner was transferred from Agartala Central Jail to Hazaribagh Central Jail. The order is in these terms :

#"TRIPURA ADMINISTRATIONHOME DEPARTMENTNo. F. 22(59)-PD/62. Agartala, December 3, 1962. Agrayahana 12, 1884,##

ORDER

In exercise of the powers conferred by sub-rule (5) of Rule 30 of the Defence of India Rules, 1962 read with sub-rule (11) of Rule 2 of the said Rules and all other powers enabling in that behalf, I hereby direct that detenue Shri Bipul Chaudhury alias Mohan son of L. Bimala Charan Chaudhury of Sutarmura, Bishalgarh P.S. be transferred from Agartala Central Jail to Hazaribagh Central Jail, Bihar for detention in that Jail, until further orders.

2. The consent of the Government of Bihar has been obtained for the removal of the aforesaid detenue from this Territory to the place mentioned above (vide their telegram No. 940-Political Special, dated the 1st December 1962).

#Sd/-(S. P. Mukerjee)Chief Commissioner, Tripura."##

In the meantime, the Petitioner had made a petition under Art. 32 of the Constitution for a writ of Habeas Corpus against his detention, as aforesaid. This petition is dated November 30, 1962, while the petitioner was still in the Agartala Central Jail. It appears the petition under Art. 32 of the Constitution was not immediately forwarded to this Court by the authorities of the Tripura Administration. Hence, the petitioner sent a petition from the Hazaribagh Central Jail in Bihar, dated December 15, 1962/December 18, 1962 for initiating proceedings for contempt of Court against the Chief Commissioner, the Union Territory of Tripura. In that petition, after stating the facts of his detention, he stated that while in detention in the Agartala Central Jail, the petitioner had submitted a petition under Art. 32 of the Constitution for a writ of Habeas Corpus and that the same had not been sent to this Court and had been withheld. He further stated that the Jailor, Agartala Central Jail, had informed the petitioner that the petition had been sent to Tripura Administration for ascertaining whether actually a writ petition lay under the Defence of India Rules. When this petition was put up before this Court on January 28, 1963, this Court directed the issue of notice to the opposite party. In obedience to the notice Shri S. C. Mazumdar, Judicial Secretary, Union Territory of Tripura, made an affidavit to the effect that he had attended to the matter which was the subject of the notice and that he had not the slightest intention to disregard or disobey the authority of this Court. He further tendered, on his own behalf and on behalf of the Chief Commissioner, Tripura, an unconditional apology. He also produced the original petition under Art. 32, dated November 30, 1962, and went on to state that when the petition was placed before him, on a consideration of the Defence of India Rules, and the President's Order aforesaid dated November 3, 1962, he took the view that the petition was not maintainable and that, therefore, "nothing need be done". He admitted his mistake, and realised after consultation with the Government counsel that the Government should not have taken upon itself to decide whether the petition was maintainable or not and that the same should have been forwarded to this Court. He further stated that the advice tendered to the Tripura Administration was bona fide and that he extremely regretted that the action on his part "should have resulted in a wrongful act on the part of our administration". When the matter was placed before this Court, the Division Bench, by its order dated February 18, 1963, accepted the unconditional apology on behalf of Mr. S. C. Mazumdar and further directed that the Habeas Corpus petition be posted for preliminary hearing. The Constitution Bench thereafter, by its order dated March 27, 1963, directed the issue of Rule, and hearing of the case within 10 days. As the petitioner had appeared at the hearing, it was further directed that he be detained in Delhi Jail till the disposal of the writ petition. When the matter came up before us for final hearing, we directed that in view of the important constitutional issues involved it would be more convenient if the petitioner was represented before us by counsel. Mr. R. K. Garg has taken great pains over this case and has placed all possible considerations before us for which the Court is obliged to him. The learned Additional Solicitor-General appeared to show cause on behalf of the respondent, the Chief Commissioner, Union Territory of Tripura. We have fully heared counsel for both parties. There was an intervention petition on behalf of one Shri Raj Kumar Vohra, detained by District Magistrate, Saharanpur, in a similar writ petition under Art. 32 of the Constitution. As the points to be raise in his petition were said to be similar to those in the present petition, we allowed the intervention.

The learned counsel for the respondent has taken the preliminary objection to the hearing of the writ petition on merits, on the ground that the President having suspended the enforcement of the rights under Arts. 21 an 22 of the Constitution, by his Order dated November 3, 1962, quoted above in extenso, the petitioner cannot move this Court under Art. 32 to enforce the right claimed by him. In answer to this preliminary objection, Mr. Garg has vehemently argued that the right guaranteed by Art. 32 cannot be suspended under Art. 359, because, it is said, that Article does not authorise the suspension of the exercise of the rights. He further contended that the right to move this Court under

Art. 32 itself being a guaranteed right has not been suspended by the Order aforesaid of the President and that the order suspending the right to move this Court depended on the condition precedent that there was a valid Ordinance and rules framed and order made thereunder. The contention further is that the condition precedent is not fulfilled because the Ordinance (IV of 1962) apart from being invalid for want of legislative competence, has spent its force on its being repealed by Act (LI of 1962). It is contended, in other words, that the immunity from attack would be available, if at all, only in respect of something done under the Ordinance, but as there was no fresh Order by the President under Art. 359, after the Ordinance had been replaced by the Act at aforesaid, the petitioner was entitled to go into the merits of the controversy and could show that the Defence of India Act was unconstitutional and that the Rules framed thereunder were equally so. In our opinion, the preliminary objection is well-founded. We accordingly intimated to the parties that the Court having accepted the validity of the preliminary objection did not propose to hear the merits of the case and that our reasons for coming to that conclusion will be given later. We now proceed to state our reasons for that conclusion.

The right to move this Court for the enforcement of the fundamental rights guaranteed under the Constitution is itself a guaranteed right. But cl. (4) of Art. 32 itself provides that the right so guaranteed could be suspended in accordance with the provisions of the Constitution. We have stated in a positive form what has been provided for in the negative form by cl. (4), which runs as follows :

> "The right guaranteed by this article shall not be suspended except as otherwise provided for by the Constitution."

Now what is the provision made by the Constitution in view of the said clause of Art. 32 ? On the Proclamation of Emergency by the President on October 26, 1962, as aforesaid, the provisions of Art. 19, setting out the different freedoms which all citizens have the right to enjoy, are suspended with the result that the power to make any law or to take any executive action is not fettered so long as the Proclamation continues to operate (Art. 358). Secondly, during that period the President is empowered by Art. 359(1), by order to suspend the right to move any Court for the enforcement of the Fundamental Rights contained in Part III of the Constitution. The Order of the President dated November 3, 1962, already set out, in terms, suspends the right of any person to move any Court for the enforcement of the rights conferred by Arts. 21 and 22 of the Constitution, during the period of the Emergency. Prima facie, therefore, the petitioner's right to move this Court for a writ of Habeas Corpus, as he has purported to do by this petition, will remain suspended during the period of the Emergency. But even then it has been contended on behalf of the petitioner that Art. 359 does not authorise the suspension of the exercise of the right guaranteed under Art. 32 of the Constitution, and that, in terms, the operation of Art. 32 has not been suspended by the President. This contention is wholly unfounded. Unquestionably, the Court's power to issue a writ in the nature of habeas corpus has not been touched by the President's Order, but the petitioner's right to move this Court for a writ of that kind has been suspended by the Order of the President passed under Art. 359(1). The President's Order does not suspend all the rights vested in a citizen to move this Court but only his right to enforce the provisions of Arts. 21 and 22. Thus, as a result of the President's Order aforesaid, the petitioner's right to move this Court, but not this Court's power under Art. 32, has been suspended during the operation of the Emergency, with the result that the petitioner has no locus standi to enforce his right, if any, during the Emergency.

It was also contended that the President's order of November 3, 1962, is subject to the condition precedent that there is a valid ordinance and the rules framed or the orders made thereunder are

valid. In other words, it is contended that it is open to the petitioner to canvass the validity of the Ordinance. This is arguing in a circle. In order that the Court may investigate the validity of a particular ordinance or act of a legislature, the person moving the Court should have a locus standi. If he has not the locus standi to move the Court, the Court will refuse to entertain his petition questioning the vires of the particular legislation. In view of the President's Order passed under the provisions of Art. 359(1) of the Constitution, the petitioner has lost his locus standi to move this Court during the period of Emergency as already pointed out. That being so, this petition is not maintainable.

But it has been argued in the alternative that assuming that the Ordinance is valid and the President's Order operates against the petitioner, the words of the last clause in the President's Order, beginning with "if such person" are not fulfilled because the Ordinance has been repealed by the Act (LI of 1962), as aforesaid. The question, therefore arises : What is the effect of those words ? The learned Solicitor-General has put his argument in two alternative ways. Firstly he argued, that those words were descriptive of the person who has been detained and not that they lay down a condition precedent, as contended on behalf of the petitioner. Prima facie it is difficult to accept this argument but we need not pursue it in view of the conclusion we have reached on the alternative argument to be presently dealt with. Alternatively he contended, that, under s. 8 of the General Clauses Act (X of 1897), s. 48 of the Act (LI of 1962), which repeals Ordinances 4 an 6 of 1962 and which saves anything done or any action taken under those Ordinances has to be construed in such a way as to continue the Detention Order made under r. 30 of the Defence of India Rules, even after the repeal of the Ordinance under which they were promulgated. Section 48 is in these terms :

> "48(1). The Defence of India Ordinance, 1962 and the Defence of India (Amendment) Ordinance 1962, are hereby repealed.
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> (2) Notwithstanding such repeal, any rules made, anything done or any action taken under the Defence of India Ordinance, 1962, as amended by the Defence of India (Amendment) Ordinance, 1962 shall be deemed to have been made, done or taken under this Act as if this Act had commenced on the 26th October 1962."

It is contended on behalf of the petitioner that by virtue of sub-s. (2) of s. 48, quoted above, the detention order passed against the petitioner will be deemed to have been made under the Defence of India Act, 1962, and that, therefore, the President's Order of November 3, 1962 which has reference to the detention order passed against the petitioner under the Defence of India Ordinance and the Rules thereunder, was wholly inoperative. The Ordinances aforesaid had been promulgated by the President when Parliament was not in session. They had the same force and effect as an Act of Parliament, but they would cease to operate at the expiration of 6 weeks from the re-assembly of Parliament. Of necessity, therefore, the Act had to take the place of the Ordinances within that period if the special measures in the interest of public safety had to be continued. Hence, the Parliament had to enact the very same provisions, with the consequential additions and alternations, of the Ordinance 4 and Ordinance 6 aforesaid. The Defence of India Act (LI of 1962) itself, in the preamble recites the Proclamation of Emergency by the President and the necessity to provide for special measures to ensure public safety and interest. The Act came into force on December 12, 1962. By operation of s. 48 of this Act, the Ordinances aforesaid have been repealed, but all action taken and all rules made thereunder have been continued in operation by introducing the fiction that they shall be deemed to have been made or taken under the Act, which is deemed to have commenced on October 26, 1962, the date Ordinance 4 was promulgated. The President's Order of November 3, 1962, suspending the petitioner's rights under Arts. 21 and 22 of the Constitution, was

made when Ordinance 4 of 1962 was in operation, and, therefore, had to take note of the facts as they then existed. Section 8(1) of the General Clauses Act, which applies to the construction of Act (LI of 1962), is in these terms :

> "8(1) where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

Are the provisions set out above applicable to the construction of the Order of November 3, 1962, passed by the President suspending the petitioner's right to move this Court ? It has not been contested that those provisions applied to the construction of the Act (LI of 1962), which repeals and re-enacts the provisions of the Ordinance aforesaid. But then the question arises whether they are available in construing the following words of the President's Order :

> "If any such person has been deprived of any such rights under the Defence in India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

Is the President's Order in question an "instrument" within the meaning of the section ? The General Clauses Act does not define the expression "instrument". Therefore, the expression must be taken to have been used in the sense in which it is generally understood in legal parlance. In Stroud's Judicial Dictionary of Words and Phrases (Third Edition, Volume 2, page 1472), "instrument" is described as follows :

> "An 'instrument' is a writing, and generally imports a document of a formal legal kind. Semble, the word may include an Act of Parliament.... (11) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 2(xiii), 'instrument' includes deed, will, inclosure, award and Act of Parliament.....".

The expression is also used to signify a deed interpartes or a charter or a record or other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an Order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory authority. We have no doubt in our mind that the expression "instrument" in s. 8 was meant to include reference to the Order made by the President in exercise of his constitutional powers. So construed, the President's Order would, even after the repeal of the Ordinance aforesaid continue to govern cases of detention made under r. 30 aforesaid under the Ordinances. It must therefore, be held that there is no substance in the contention that the petitioner's detention originally made under the rule under the Ordinance would not be deemed to have continued under the Act (LI of 1962). Equally clearly, there is no substance in the contention that the same Order should have been repeated by the President after the enactment of the Act. It would have been a sheer act of supererogation and the legal fiction laid down in s. 8 is meant to avoid such unnecessary duplication of the use of the constitutional machinery. A proper construction of the provisions of s. 48 of the Act, which has replaced the Ordinances aforesaid, read in the light of the provisions of s. 8 of the General Clauses Act leaves no room for doubt that the detention order passed against the petitioner was intended to be continued even after the repeal of the Ordinances which were incorporated in the Act (LI of 1962). That being so, the Order of the President must have the effect of suspending the petitioner's right to move this Court for a writ of habeas corpus under Art. 32 of the Constitution. After the

petitioner had been deprived, for the time being, of his right to move this Court, it is manifest that he cannot raise any questions as regards the vires of the Ordinances or of the Rules and Orders made thereunder. In the result, the application is held to be not maintainable, and, is therefore, dismissed.

Petition dismissed.

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