K. Anandan Nambiar and Another

Vs

Chief Secretary, Government of Madras and Others

Writ Petitions Nos. 47 and 61 of 1965

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, R. S. Bachawat, V. Ramaswami - I JJ)

27.10.1965

JUDGMENT

GAJENDRAGADKAR, C.J. –

Mr. K. Ananda Nambiar, who is a Member of Parliament, has been detained by the Government of Madras since the 30th December, 1964. On the 29th December, 1964, an order was passed under Rule 30(1)(b) and (4) of the Defence of India Rules, 1962 in which it was stated that the Government of Madras were satisfied with respect to the petitioner K. Ananda Nambiar that with a view to preventing him from acting in any manner prejudicial to the defence of India and the public safety, it was necessary to make an order directing that he be detained. The said order further directed that the petitioner should be arrested by the police wherever found and detained in the Central Jail, Tiruchirapalli. Though this order directed the detention of the petitioner in the Central Jail, Tiruchirapalli, it is common ground that he has been detained in fact in the Central Jail, Cuddalore. By his present writ petition (No. 47 of 1965) filed under Art. 32 of the Constitution, the petitioner challenges the validity of the said order of detention mainly on two grounds. He contends that Rule 30(1)(b) under which the impugned order has been passed is invalid, and in the alternative, he argues that the impugned order is not valid, because it has been passed mala fide and is otherwise not justified by the relevant Rules.

Mr. R. Umanath, who is also a Member of Parliament, has been similarly detained by the order passed by the Government of Madras on the 29th December, 1964 and in the same terms. He has also been detained not in the Central Jail, Tiruchirapalli, as mentioned in the order, but in the Central, Cuddalore, since the 30th December, 1964. By his writ petition (No. 61 of 1965), the petition Umanath has raised the same points before us. Mr. Setalvad has argued the first point of law about the invalidity of the relevant Rule, whereas Mr. Chatterjee has argued the other point relating to the invalidity of the impugned orders, on behalf of both the petitioners. To these two petitioners are impleaded respondent No. 1, the Chief secretary, Government of Madras, respondent No. 2, the Superintendent' Central Jail, Cuddalore; and respondent No. 3, the Union of India.

Before proceeding to deal with the points raised by the petitioners, it is necessary to consider the preliminary objection which has been urged before us by the learned Additional Solicitor-General who has appeared for respondent No. 3. He contends that the writ petitions are incompetent in view of the Order issued by the President on the 3rd November, 1962. It will be recalled that on the 26th October, 1962, the President issued a Proclamation of Emergency in exercise of the Powers conferred on him by clause (1) of Art. 352 of the Constitution. This Proclamation declared that a grave emergency existed where by the security of India was threatened by external aggression. Thereafter, two Orders were issued by the President, one on the 3rd November, 1962 and the other

on the 11th November, 1962 in exercise of the powers conferred by clause (1) of Art. 359 of the Constitution. The first Order as amended by the later Order reads thus :-

> "In exercise of the powers conferred by clause (1) of Art. 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 Arts. 14, 21 and 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Art. 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".

It may be added at this stage that Ordinance No. 4 of 1962 later became an Act called 'The Defence of India Act, 1962 (No. 51 of 1962)'. The argument is that the petitioners are admittedly detained under Rule 30(1)(b) of the Defence of India Rules, and so the said Presidential Order is inevitably attracted; and that means that the petitioners' right to move this Court under Art. 32 is suspended during the pendency of the Proclamation of Emergency.

We are not impressed by this argument. In construing the effect of the Presidential Order, it is necessary to bear in mind the general rule of construction that where an Order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said Order must be strictly construed in favour of the citizens' fundamental rights. It will be noticed that the sweep of the Order is limited by its last clause. This Order can be invoked only in cases where persons have been deprived of their rights under Arts. 14, 21 and 22 under the Defence of India Ordinance or any rule or order made there under. In other words, if the said fundamental rights of citizens are taken away otherwise than under the Defence of India Ordinance or rules or orders made thereunder, the Presidential Order will not come into operation. The other limitation is that the Presidential Order will remain in operation only so long as the Proclamation of Emergency is in force. When these two conditions are satisfied, the citizen's right to move this Court for the enforcement of his rights conferred by Arts. 14, 21 and 22 is no doubt suspended; and that must mean that if the citizen wants to enforce those rights by challenging the validity of the order of his detention, his right to move this Court would be suspended in so far as he seeks to enforce the said rights.

But it is obvious that what the last clause of the Presidential Order postulates is that the Defence of India Ordinance or any rule or order made thereunder is valid. It is true that during the pendency of the Presidential Order, the validity of the Ordinance, rule or order made thereunder cannot be questioned on the ground that they contravene Arts. 14, 21 and 22; but this limitation will not preclude a citizen from challenging the validity of the Ordinance, rule or order made thereunder on any other ground. If the petitioner seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Arts. 14, 21 and 22, the Presidential Order cannot come into operation. In this connection, we ought to add that the challenge to the Ordinance, rule or order made thereunder cannot also be raised on the ground of the contravention of Art. 19, because as soon as a Proclamation of Emergency is issued by the President, under Art. 358 the provisions of Art. 19 are automatically suspended. But the point still remains that if a challenge is made to the validity of the Ordinance, rule or order made thereunder on a ground other than those covered by Art. 358, or the presidential Order issued under Art. 359(1), such a challenge is outside the purview of the Presidential Order; and if a petition is filed by a citizen under Art. 32 on the basis of such a challenge, it cannot be said to be barred, because such a challenge is not covered by the Presidential Order at all.

In Makhan Singh Tarsikka v. The State of Punjab ([1964] 4 S.C.R. 797.) a Special Bench of this Court has had occasion to consider the effect of the Proclamation of Emergency issued by the President and the Presidential Order with which we are concerned in the present writ petitions. In that case, it was held that the sweep of Art. 359(1) and the Presidential Order issued under it is 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 specified fundamental rights and that means the fundamental rights under Arts. 14, 19, 21 and 22. Even so, this Court took the precaution of pointing out that as a result of the issue of the Proclamation of Emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it was pointed out that if a detenu contends that the operative provisions of the Defence of India Ordinance under which he is detained suffer from the vice of excessive delegation, the plea thus raised by the detenu cannot, at the threshold, be said to be barred by the Presidential Order, because, in terms, it is not a plea which is relateable to the fundamental rights specified in the said order.

Let us refer to two other pleas which may not fall within the purview of the Presidential Order. If the detenu, who detained under an order passed under Rule 30(1)(b), contends that the said Order has been passed by a delegate outside the authority conferred on him by the appropriate Government under s. 40 of the Defence of India Act, or it has been exercised inconsistently with the conditions prescribed in that behalf, a preliminary bar against the competence of the detenu's petition cannot be raised under the Presidential Order, because the last clause of the Presidential Order would not cover such a petition, and there is no doubt that unless the case falls under the last clause of the Presidential Order, the bar created by it cannot successfully invoked against a detenu. Therefore, our conclusion is that the learned Additional Solicitor-General is not justified in contending that the present petitions are incompetent under Art. 32 because of the Presidential Order. The petitioners contend that the relevant Rule under which the impugned orders of detention have been passed, is invalid on grounds other than those based on Arts. 14, 19, 21 & 22; and if that plea is well-founded, the last clause of the Presidential Order is not satisfied and the bar created by it suspending the citizens' fundamental rights under Articles 14, 21 and 22 cannot be pressed into service.

That takes us to the merits of Mr. Setalvad's contention that Rule 30(1)(b) of the Defence of India Rules is invalid. The Rule in question has been framed under s. 3(2)(15) of the Defence of India Act, and in that sense it can be said, prima facie, to be justified by the said provision. But Mr. Setalvad argues that in so far as it permits a Member of Parliament to be detained, it contravenes the Constitutional rights of Member of Parliament. According to Mr. Setalvad, a Member of Parliament, like a Member of any of the State Legislatures, has constitutional rights to function as such Member and to participate in the business of the House to which he belongs. He is entitled to attend every Session of Parliament, to take part in the debate, and to record his vote. So long as a Member of Parliament is qualified to be such Member, no law can validly take away his right to function as such Member. The right to participate in the business of the legislative chamber to which he belongs, is described by Mr. Setalvad as his constitutional right, and he urges that this constitutional right of a legislator can be regarded as his fundamental right; and inasmuch as the relevant Rule authorises the detention of a legislator preventing him from exercising such right, the Rule is invalid. In the alternative, Mr. Setalvad contends that the Rule should be treated as valid in regard to persons other than those who are Members of Legislatures, and in that sense, the part of it which touches the Members of Legislature, should be severed from the part which affects other citizens and the invalid part should be struck down. This argument again proceeds on the same basis that a

legislator cannot be validly detained so as to prevent him from exercising his rights as such legislator while the legislative chamber to which he belongs is in session. On the same basis, Mr. Setalvad has urged another argument and suggested that we should so construe the Rule as not to apply to legislators. It would be noticed that the common basis of all these alternative arguments is the assumption that legislators have certain constitutional rights which cannot be validly taken away by any statutory rule.

In support of this argument, Mr. Setalvad has referred us to certain constitutional provisions. The first Article on which he relies is Art. 245(1). This Article provides that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. The argument is that the power to make laws is subject to the provisions of the Constitution and that being so, if there are any constitutional rights which the legislators can claim, no law can be validly passed to take away the said rights. In other words, just as the validity of any law can be challenged on the ground that it contravenes the fundamental rights guaranteed by Art. 19, so can the validity of the impugned Rule be challenged on the ground that it contravenes the constitutional-cum-fundamental rights of the legislators.

These constitutional rights, according to Mr. Setalvad, are to be found in several Articles of the Constitution. Mr. Setalvad's argument begins with Art. 79. This article deals with the constitution of Parliament; it provides that Parliament of the Union shall consist of the President and two House to be known respectively as the Council of States and he House of the People. Article 85(i) provides, inter alia, that the president shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit. In accordance with the provisions of this article, when the president decides to call for the session of Parliament summons are issued under his directions asking all Members of Parliament to attend the ensuing session. The petitioner Ananda Nambiar received such a summons issued on the 9th January, 1965 Article 86(i) gives the President the right to address either House of Parliament or both Houses assembled together; and it provides that for that purpose, the President shall require the attendance of members. Mr. Setalvad argues that when a summons is issued by the President requiring the member to attend the ensuing session of Parliament, it is not only his right, but his constitutional obligation to attend the session and hear the speech of the President. Article 100(i) refers to the voting in the Houses, and it provides that save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the House shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker. Article 101(4) provides that if for a period of sixty days a member of either House of Parliament is, without permission of the House, absent from all meetings thereof, the House may declare his seat vacant. It is common ground that if a member is detained or otherwise prevented from attending the session of the House for personal reasons, as asks for permission of the House and usually, such permission is granted. Article 105 deals with the powers, privileges and immunities of Parliament and its Members. Mr. Setalvad strongly relies on the provisions of sub-articles (1) & (2) of Art. 105 which deal with the freedom of speech inside the House of Parliament, and confer absolute immunity on the Members of Parliament in respect of their speeches and votes. If the order of detention prevents a Member of Parliament from attending the session of Parliament, from participating in the debate and from giving his vote, that amounts to a violation of his constitutional rights; that, in substance, is Mr. Setalvad's argument.

Mr. Setalvad also relied on the fact that this right continues to vest in the Member of Parliament during the life of the Parliament unless he is disqualified under Art. 102 or under s. 7(b) of the Representation of the People Act, 1951 (No. 43 of 1951). Article 84 deals with the qualification for

membership of Parliament. With the provisions of this article we are not concerned in the present proceedings, because we are dealing with the rights of persons who have already been elected to the Parliament - in other words, who possess the qualifications prescribed by Art. 84. Article 102 prescribes disqualifications for membership; it provides, inter alia, that a person shall be disqualified for being a member of either House of parliament if his case falls under any of its clauses (a) to (e). This disqualification applies for being chosen or for being a member of either House of Parliament. In other words, if a person incurs the disqualification prescribed by the relevant clauses of Art. 102(1) after he is elected to either House of Parliament, he will cease to be such a Member as a result of the said disqualification. If a disqualification is not incurred as prescribed by Art. 102(1), he is entitled to continue to be a member of the House during its life. Section 7 of the Representation of the people Act prescribes disqualifications for membership of Parliament or of a State Legislature. S. 7(b) is relevant for our purpose. It provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if, whether before or after the commencement of the Constitution, he has been convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. The argument based on the provisions of s. 7 is the same as the argument based on the provisions of Art. 102. If a Member of Parliament incurs a disqualification, he may cease to be such member, but if he continues to be qualified to be a member, his constitutional rights cannot be taken away by any law or order.

It will be noticed that in substance the claim made is one of exemption from arrest under a detention order and, prima facie, such a claim would normally and legitimately fall under Art. 105(3) of the Constitution. Art. 105(3) deals with the powers, privileges and immunities of Parliament and its Members, and it provides that in other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution. But Mr. Setalvad expressly stated before us that he did not rest his case on the provisions of Art. 105(3) and that obviously is for the very good reason that freedom from arrest under a detention order is not recognised as a privilege which can be claimed by Members of House of Commons in England. It is because such a claim cannot be based on the provisions of Art. 105(3) that Mr. Setalvad has been driven to adopt the ingenious course of suggesting that the rights of the Members of Parliament to participate in the business of Parliament is a constitutional and even a fundamental right which cannot be contravened by any law. The narrow question question which thus falls to be considered on this contention is : if a claim for freedom from arrest by a detention order cannot be sustained under the privileges of the Members of Parliament, can it be sustained on the ground that it is a constitutional right which cannot be contravened ? Before dealing with this point, it is necessary to indicate broadly the position about the privileges of the members of the Indian Legislatures, because they will materially assist us in determining the validity of the contention raised before us by Mr. Setalvad. It is common ground that the privileges, powers and immunities of the members of the Indian Legislatures are the same as those of the members of the House of Commons as they existed at the commencement of the Indian Constitution. Let us, therefore, see what was the position about the privileges of the members of the House of Commons in regard to freedom from arrest by a detention order ?

The position about the privileges of the Members of the House of Commons in regard to preventive detention is well settled. In this connection, Erskine May observes : "The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of

criminal justice or emergency legislation." (Erskine May's Parliamentary Practice, 7th Ed. p. 78.)

In early times the distinction between "civil" and "criminal" was not clearly expressed. It was only to cases of "treason, felony and breach (or surety) of the peace" that privilege was explicitly held not to apply. Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanors, in the growing list of statutory offences, and particularly, in the case of preventive detention under emergency legislation in times of crisis, there was a debatable region about which neither House had until recently expressed a definite view. The development of privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character. This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641 : "Privilege of Parliament is granted in regard of the service of the Commonwealth and is not to be used to the danger of the Commonwealth".

The last statement of May is based on the report of the Committee of Privileges of the House of Commons which dealt with the case of the detention of Captain Ramsay under Regulation 18B of the Defence (General) Regulations, 1939. Cap. Ramsay who had been detained under the said Regulation, urged before the Committee of Privileges that by reason of the said detention, a breach of the privileges of the House had been committed. This plea was rejected by the Committee of Privileges. The Committee found that Reg. 18B under which Cap. Ramsay had been detained, had been made under section 1(2)(a) of the Emergency Powers (Defence) Act, 1939. It examined the question as to whether the arrest and detention of Cap. Ramsay were within the powers of the Regulation and in accordance with its provisions; and it was satisfied that they were within the powers of the Regulation and in accordance with its provisions. The Committee then examined several precedents on which Cap. Ramsay relied, and it found that whereas arrest in civil proceedings is a breach of privilege, arrest on a criminal charge for an indictable offence is not. The Committee then examined the basis of the privilege and the reason for the distinction between arrest in a civil suit and arrest on criminal charge. It appeared to the Committee that the privilege of freedom from arrest originated at a time when English Law made free use of imprisonment in civil proceedings as a method of coercing debtors to pay their debts; and in order to enable the Members of Parliament to discharge their functions effectively, it was thought necessary to grant them immunity from such arrest, because they were doing King's business and should not be hindered in carrying out their business by arrest at the suit of another subject of the King. Criminal acts, however, were offences against the King, and the privilege did not apply to arrest for such acts. In this connection, the Committee emphasised the fact that consideration of the general history of the privilege showed that the tendency had been to narrow its scope. The Committee recognised that there was a substantial difference between arrest and subsequent imprisonment on a criminal charge and detention without trial by executive order under the Regulation or under analogous provisions in the past. It, however, observed that they have this in common that the purpose of both was the protection of the community as a whole, and in that sense, arrest in the court of civil proceedings, on principle, was wholly different from arrest on a criminal charge or arrest for the purpose of detention. It is on these grounds that the Committee came to the conclusion that the detention of Cap. Ramsay did not amount to any infringement of his privilege of freedom of speech.

A similar question had arisen in India in 1952. It appears that in the early hours of the morning of the 27th May, 1952. Mr. V. G. Deshpande, who was then a Member of Parliament, was arrested and detained under the Preventive Detention Act, 1950; the House was then in session; and a question was raised that the said arrest and detention of Mr. Deshpande, when the House was in session,

amounted to a breach of the privilege of the House. The question thus raised was referred to the Committee of Privileges for its report. On the 9th July, 1952, the report made by the said Committee was submitted to the House. The majority view of the Committee was that the arrest of Mr. Deshpande under the Preventive Detention Act did not constitute a breach of the privilege of the House. In coming to this conclusion, the majority view rested itself primarily on the decision of the Committee of Privileges of the House of Commons in the case of Cap. Ramsay. It is thus plain that the validity of the arrest of the petitioners in the present proceeding cannot be effectively challenged by taking recourse to any of the provisions of Art. 105. That is why Mr. Setalvad naturally did not and could not press his case under the said Article.

What then is the true legal character of the rights on which Mr. Setalvad has founded his argument ? They are not rights which can be properly described as constitutional rights of the Members of Parliament at all. The Articles on which Mr. Setalvad has rested his case clearly bring out this position. Article 79 deals with the constitution of Parliament and it has nothing to do with the individual rights of the Members of Parliament after they are elected. Articles 85 and 86 confer on the President the power to issue summons for the ensuing session of Parliament and to address either House of Parliament or both Houses as therein specified. These Articles cannot be construed to confer any right as such on individual Members of impose any obligation on them. It is not as if a Member of Parliament is bound to attend the session, or is under an obligation to be present in the House when the President addresses it. The context in which these Articles appear shows that the subject-matter of these articles is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue a summons for the ensuing session of Parliament or to address the House or Houses.

Then as to Art. 100(1) : what it provides is the manner in which questions will be determined; and it is not easy to see how the provision that all questions shall be determined by a majority of votes of Members present and voting, can give rise to a constitutional right as such. The freedom of speech on which Mr. Setalvad lays considerable emphasis by reference to Art. 105(1) & (2), is a part of the privileges of the Members of the House. It is no doubt a privilege of very great importance and significance, because the basis of democratic form of Government is that Members of Legislatures must be given absolute freedom of expression when matters brought before the Legislature are debated. Undoubtedly, the Members of Parliament have the privilege of freedom of speech, but that is only when they attend the session of the House and deliver their speech within the chamber itself. It will be recalled that in Cap. Ramsay's case, what had been urged before the Committee of Privileges was that the detention of Cap. Ramsay had caused a breach of privilege of his freedom of speech, and this plea was rejected by the Committee. We are, therefore, satisfied that on a close examination of the articles on which Mr. Setalvad has relied, the whole basis of his argument breaks down, because the rights which he calls constitutional rights are rights accruing to the Members of Parliament after they are elected, but they are not constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all. It may be that sometimes in discussing the significance or importance of the right of freedom of speech guaranteed by Art. 105(1) & (2), it may have been described as a fundamental right; but the totality of rights on which Mr. Setalvad relies cannot claim the status of fundamental rights at all, and the freedom of speech on which so much reliance is placed, is a part of the privileges falling under Art. 105, and a plea that a breach has been committed of any of these privileges cannot, of course, be raised in view of the decision of the Committee of Privileges of the House of Commons to which we have just referred. Besides, the freedom of speech to which Art. 105(1) and (2) refer, would be available to a Member of Parliament when he attends the session of the Parliament. If the order of detention validly prevents him from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of

speech and no complaint can be made that the said right has been invalidly invaded.

There is another aspect of this problem to which we would like to refer at this stage. Mr. Setalvad has urged that a Member of Parliament is entitled to exercise all his constitutional rights as such Member, unless he is disqualified and for the relevant disqualifications, he has referred to the provisions of Art. 102 of the Constitution and s. 7 of the Representation of the People Act. Let us take a case falling under s. 7(b) of this Act. It will be recalled that s. 7(b) provides that if a person is convicted of any offence and sentenced to imprisonment for not less than two years, he would be disqualified for membership, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. If a person is convicted of an offence and sentenced to less than two years, clearly such conviction and sentence would not entail disqualification. Can it be said that a person who has been convicted of an offence and sentenced to suffer imprisonment for less than two years, is entitled to claim that notwithstanding the said order of conviction and sentence, he should be permitted to exercise his right as a legislator, because his conviction and sentence do not involve disqualification ? It is true that the conviction of a person at the end of a trial is different from the detention of a person without a trial; but so far as their impact on the alleged constitutional rights of the Member of Parliament is concerned, there can be no distinction. If a person who is convicted and sentenced, has necessarily to forgo his right of participating in the business of the Legislature to which he belongs, because he is convicted and sentenced, it would follow that a person who is detained must likewise forgo his right to participate in the business of the Legislature. Therefore, the argument that so long as the Member of Parliament has not incurred any disqualification, he is entitled to exercise his rights as such Member cannot be accepted.

Besides, if the right on which the whole argument is based is not a fundamental right, it would be difficult to see how the validity of the Rule can be challenged on the ground that it permits an order of detention in respect of a Member of Parliament and as a result of the said order the Member of Parliament cannot participate in the business of Parliament. It appears that a similar question had arisen before the Madras and the Calcutta High Courts, and the decisions of these High Courts are in accord with the view which we are inclined to take in the present proceedings. In Pillalamarri Venkateswarlu v. The District Magistrate, Guntur and Another (I.L.R. [1951] Mad. 135), it was held by a Division Bench of the Madras High Court that a Member of the State Legislature cannot have immunity from arrest in the case of a preventive detention order. Similarly, in the case of K. Ananda Nambiar (I.L.R. [1954] I. Cal. 272), it was held by the Madras High Court that once a Member of a Legislative Assembly is arrested and lawfully detained, though without actual trial, under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. The true constitutional position, therefore, is that so far as a valid order of detention is concerned, a Member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained under it as any other citizen.

In Ansumali Majumdar v. The State (I.L.R. [1954] I. Ca;. 272.), the Calcutta High Court has elaborately considered this point and has held that a member of the House of the Central or State Legislature cannot claim as such Member any immunity from arrest under the Preventive Detention Act. Dealing with the argument that a Member of Parliament cannot, by reason of his detention, be prevented from exercising his rights as such Member, Harries, C.J. observed that if this argument is sound, it follows that persons convicted of certain offences and duly elected must be allowed to perform their duties and cannot be made to serve their sentence during the life of a Parliament. We ought to add that in all these cases, the learned Judges took notice of the fact that freedom from

criminal arrest was not treated as constituting a privilege of the members of the House of Commons in England. Therefore, we are satisfied that Mr. Setalvad is not right in contending that R. 30(1)(b) is invalid.

It now remains to consider the other grounds on which Mr. Chatterjee has challenged the validity of the impugned orders of detention. The first contention raised by Mr. Chatterjee is that the Presidential Order itself is invalid. This Order has been issued in accordance with the provisions of Art. 77(2) of the Constitution. Mr. Chatterjee, however, contends that the Order issued by the President by virtue of the power conferred on him by Art. 359(1) is not an executive action of the Government of India and as such, Art. 77 would not apply. We are not impressed by this argument. In our opinion, Art. 77(2) which refers to orders and other instruments made and executed in the name of the President is wide enough to include the present Order.

Besides, it is significant that Art. 359(3) itself requires that every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament; and it is not alleged that this has not been done. In fact, Mr. Chatterjee did not seriously press this point.

The next contention raised by Mr. Chatterjee is that the present detention of the two petitioners is valid inasmuch as the orders of detention passed in both the cases directed that the petitioners should be detained in the Central Jail, Tiruchirapalli, whereas both of them have been detained throughout in the Central Jail, Cuddalore. Mr. Chatterjee's grievance is that it is not shown that a proper order had been passed changing the place of detention of the petitioners from Tiruchirapalli to Cuddalore.

This plea has been met by the counter-affidavit filed on behalf of the Government of Madras on the ground that the original orders of detention indicating that the petitioners should be detained in the Central Jail, Tiruchirapalli, were modified by Government by a later Order fixing the venue of detention as the Central Jail, Cuddalore, for reasons of security. The counter affidavit did not indicate the date on which this Order was passed, and that left an element of ambiguity. At the hearing of these petitions, however, the learned counsel appearing for the Government of Madras has produced before us an abstract from the Madras Government Gazette giving all the details about this order. It appears that this later Order was passed on December 30, 1964, and it purported to modify all the orders stated in the preamble; amongst these orders are the orders of detention passed against both the petitioners. Therefore, it is clear that by virtue of the powers conferred on it by Rule 30(4), the Government of Madras had changed the venue of the petitioners' detention; and so, there is no substance in the argument that their detention in the Central Jail, Cuddalore, is illegal.

Mr. Chatterjee's main contention against the validity of the orders of detention, however, is in regard to the alleged mala fides in the said orders. He argues that the impugned orders have been passed by the Government of Madras mala fide for the purpose of stifling the political activities of the petitioners which appeared to the Government of Madras to be inconvenient. These orders have been passed for that ulterior purpose and not for the purpose set out in the orders of detention. Besides, it is urged that the Chief Minister of Madras passed these orders without satisfying himself that it was necessary to issue them. He was influenced by what the Union Home Minister had already decided in regard to the petitioners. It is not as a result of the satisfaction of the Chief Minister himself that the petitioners had been detained; the orders of detention have been passed against the petitioners solely because the Union Home Minister was satisfied that they should be detained. That, in substance, is the grievance made before us by Mr. Chatterjee against the validity of the impugned orders of detention.

It appears that the Union Home Minister made certain statements in his broadcast to the Nation from the All India Radio on January 1, 1965, and in reply to a debate on the Budget Demands of the Ministry of Home Affairs in the Lok Sabha on April 27, 1965. This is what the Union Home Minister is reported to have said in his broadcast :-

> "As you are aware, a number of leaders and active workers of the Left Communist Party of India have been detained during the last three days. We have had to take this step for compelling reasons for internal and external security of the country. It is painful to us to deprive any citizen of this free country of his liberty and it is only after the most careful thought that we have taken this action."
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> "This very disagreeable decision was taken after giving the most serious thought to all that was at stake".
>
> 'We came to the conclusion that we would be taking a serious risk with the external and internal security of the country if we did not act immediately".

This is what the Union Home Minister is reported to have said in the Lok Sabha :-

> "It is a matter of regret to me that I have had to make myself responsible for throwing into prison a fairly large number of citizens of this country".
>
> "I look into the cases personally. I may say that it may be that some error may have occurred here and there; that test has to be satisfied. We have to make sure that it is because of our clear appreciation of the activities which we may call pro-Chinese, disloyal activities, subversive activities, one way or another, that we have to resort to this kind of action. If on any person, any detenu on his part, it can be said that there was a mistake made, that he actually is not pro-Chinese and he is a loyal citizen of the country, I personally am prepared to look into each case and again satisfy myself that no wrong has been done or no injustice has been done".

For the purpose of dealing with the present petitions, we are assuming that the petitioners can rely upon these two statements. The learned Additional Solicitor-General no doubt contended that these statements were not admissible and relevant and had not been duly proved; besides, according to him, some of the statements produced were also inaccurate; even so, he was prepared to argue on the basis that the said statements can be considered by us, and so, we have not thought it necessary to decide the question about the relevance or admissibility or proof of these statements in the present proceedings.

In appreciating the effect of these two statements, it is necessary to refer to the statements made on affidavit by the Chief Minister of Madras and the Chief Secretary to the Government of Madras respectively. This is what the Chief Minister of Madras has stated on oath :-

> "Consequent upon the outbreak of hostilities between China and India and declaration of Emergency it was necessary for the Government of India and the various States to watch carefully the movements and activities of those persons, who either individually or as part of any group, were acting or likely to act in a manner prejudicial to the safety of India and the maintenance of public order. The Communist Party of India was rift into two factions and the faction known as the Left Communist Party of India, which came to be known as the Pro-Peking faction,

had particularly to be watched. The question of detaining persons belonging to this faction and who were also active, was engaging the attention of the Governments and was also discussed at the Chief Ministers' Conference. Our sources of intelligence continued to maintain a watch over the movements and activities of these individuals. The Communist Party of India being an All-India Organisation with a wide net work, the question of detention had necessarily to be considered on a Notional level, so that a coordinated and concerted action may be taken. It was in this context that the Central Government communicated with the State Government".

"I submit that I ordered the petitioners in the above petitions to be detained, on the 29th December, 1964. The petitioners are also known to me and their detention was ordered on my personal satisfaction that it was necessary. My satisfaction was both on the general question as to the need for detaining persons like the petitioner and on the individual question namely whether the petitioner was one such, whose detention was necessary".

The Chief Secretary's affidavit is on the same lines.

On these statements, the question which falls to be decided is : is it shown by the petitioners that the impugned orders of detention were passed for an ulterior purpose, or they have been passed by the Chief minister of Madras without satisfying himself, merely because the Union Home Minister thought that the petitioners should be detained. It is not disputed that if the Union Home Minister wanted to make an order detaining the petitioners, he could have made the order himself. But the contention is that the orders, in fact, have been made by the Government of Madras, and it is, therefore, necessary to consider whether the Chief Minister or Madras satisfied himself or not.

In dealing with these pleas, we cannot ignore the fact that the question about detaining the petitioners formed part of a larger question about the attitude which the Government of India and the State Government should adopt in respect of the activities of the Party to which the petitioners belong. This party is known as the Left Communist Party of India which came to be known as the Pro-Peking faction of the Communist Party. It is, therefore, not surprising that this larger issue should have been examined by the Union Home Minister along with the Chief Ministers of the States in India. The sources of intelligence available to the Government of India had given it the relevant information. Similarly, the sources of information available to the Governments of different States had supplied to their respective States the relevant information about the political activities of the Left Communist party of India. Having considered these reports, the Union Home Minister and the Chief Ministers came to certain decisions in regard to the approach which should be adopted by them in respect of the Left Communist Party in view of the Emergency prevailing in the country. This general decision naturally had no direct relation to any particular individuals as such. The decision in regard to the individual members of the Left Communist Party had inevitably to be left to the State Governments or the Union Government according to their discretion. It is conceded that the Union Government has in fact issued orders of detention against as many as 140 members of the Left Communist Party of India, whereas different orders of detention have been passed by different State Government against members of the Left Communist Party in their respective States. It is in the background of this position that the statements of the Union Home Minister as well as those of the Chief Minister of Madras have to be considered.

Thus considered, we do not see any see any justification for the assumption that the detention of the petitioners was ordered by the Chief Minister of Madras without considering the matter him self.

Indeed, it is not denied that the Chief Minister known both the petitioners and he has stated categorically that he examined the materials in relation to the activities of the petitioners and he was satisfied that it was necessary to detain them. We see no reason whatever why this clear and unambiguous statement made by the Chief Minister of Madras should not be treated as true. As the Chief Minister states in his affidavit, his satisfaction was both on the general question as to the need for detaining persons like the petitioners, and on the individual question of each one of them. In this connection, it is obvious that when the Union Home Minister spoke in the first person plural, he was speaking for the Union Government and the State Government as well, and when he spoke in the first person singular, he was referring to cases with which he was concerned as the Union Home Minister, and that would take in cases of persons whose detention has been ordered by the Union Government. There is, therefore, no inconsistency or conflict between the statements of the Union Home Minister and the affidavit of the Chief Minister of Madras. That being so, we are satisfied that there is no substance in the grievance made by Mr. Chatterjee that the impugned orders of detention passed against the petitioners were made either mala fide or without the proper satisfaction of the detaining authority.

In the result, both the writ petitions fail and are dismissed.

Petition dismissed.

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