Mohd. Yaqub, Etc.

Vs

The State of Jammu & Kashmir

Writ Petitions Nos. 109 to 114, 117, 118, 120, 121, 128 to 133, 142, 143, 186, 190 and 191 of 1967

(CJI K. N. Wanchoo, J. C. Shah, R. S. Bachawat, G. K. Mitter, K. S. Hegde, M. Hidayatullah JJ)

10.11.1967

JUDGMENT

WANCHOO, C.J. -

These twenty one petitions under Art. 32 of the Constitution for a writ of habeas corpus raise common questions of law and will be dealt with together. It is enough to set out the facts in one of the petitions (No. 142 of 1967), for the facts in other petitions are almost similar. The petitioner was arrested on November 11, 1966 and detained under an order passed under r. 30(1)(b) of the Defence of India Rules, 1962 (hereinafter referred to as the Rules). It appears that though the order was reviewed after the period of six months, no opportunity was given to the petitioner to represent his case before the reviewing authority. In consequences the detention of the petitioner became illegal after the first period of six months in view of the judgment of this Court in P. L. Lakhanpal v. Union of India [A.I.R. 1967 S.C. 1507. : [1967] 3 S.C.R. 114]. The State Government realising this defect, cancelled the order dated November 11, 1966 on August 3, 1967, and on the same day a fresh order of detention was passed and it is this order which is being challenged before us. It is not in dispute that in view of the judgment of this Court in Jadev Singh v. State of Jammu and Kashmir [[1968] 1 S.C.R. 197], it was open to the State Government, in view of the formal defect in making the review, to pass a fresh order of detention after revoking the earlier order, which in any case became ineffective after the first six months, if the circumstances which led to the detention originally still continued.

The main attack of the petitioners is on the order of the President passed on November 3, 1962, as amended on November 11, 1962, under Art. 359(1) of the Constitution. By this order the President declared that the right to move any court for the enforcement of the fundamental rights conferred by Art. 14, 21 and 22 of the Constitution would remain suspended for the period during which the Proclamation of Emergency issued under Art. 352(1), was in force, if any person was deprived of such right under the Defence of India Ordinance (No. 4 of 1962) or any rule or order made thereunder. The argument in support is put this way. The President is an "authority" within the meaning of Art. 12 and therefore is comprised within the definition of the word "State" and the order passed under Art. 359 is a law within the meaning of Art. 13(2) of the Constitution. Consequently an order passed by the President under Art. 359 is liable to be tested on the anvil of the fundamental rights enshrined in Part III of the Constitution. Secondly, it is urged that an order passed under Art. 359 is made in the context of the Emergency and therefore enforcement of only such fundamental rights can be suspended which have nexus with the reasons which led to the Proclamation of Emergency. In consequence, the President can only suspend the enforcement of fundamental rights under Art. 22 and Art. 31(2) under an order passed under Art. 359 and no others. Thirdly, it is urged that even if the President can suspend the enforcement of any fundamental right,

the order passed can still be tested under the very fundamental rights enforcement of which has been suspended. Fourthly, it is urged that an order passed under Art. 359 can in any case be challenged under Art. 14, and if so the order passed in the present case is violative of Art. 14 because some persons can be detained under the Defence of India Act, 51 of 1962 (hereinafter referred to as the Act) and the Rules while others can be detained under the Preventive Detention Act. As the Act and the Rules give more drastic powers for detention as compared to the powers conferred by the Preventive Detention Act, there is discrimination, for there is no indication as to when detention should be made under the Act and the Rules and when under the prevention law, and the matter is left to the arbitrary discretion of the executive. Fifthly, it is urged that in view of the language of the order under Art. 359, there should have been an express provision in the Act and the Rules to the effect that enforcement of fundamental rights under Arts. 14, 21 and 22 was suspended and in the absence of such an express provision, the Presidential order under Art. 359 cannot stand in the way of the detention order being tested under Part III of the Constitution. Sixthly, it is urged that Art. 22(5) provides that grounds of detention should be furnished to a detenu and the order of the President did not do away with the necessity of furnishing the grounds.

Besides these main contentions, three subsidiary contentions have also been raised in one petition or another and they are - (1) that the fresh order had not been communicated to the detenues and was therefore of no avail; (ii) that the order was not in the form as required by Art. 166 of the Constitution and it is therefore for the State Government to prove that it was passed by the authority which had the power to do so; and (iii) that the fresh order was mala fide.

The petitions have been opposed on behalf of the State Government. It is unnecessary to set out in detail the contentions in reply to the main points raised on behalf of the petitioners. It is enough to say that the contention on behalf of the State is that once the President has passed an order under Art. 359 suspending the enforcement of any fundamental right, it is not open to rely on that fundamental right for any purpose, so long as the order under Art. 359 stands and such an order cannot be tested in any manner by the very fundamental right the enforcement of which it has suspended. Further as to the subsidiary points, the State contends that the fresh order of detention was communicated to each detenu and that the order was in the form required by the Constitution of Jammu and Kashmir and that Art. 166 has no application to the State of Jammu and Kashmir. It was finally denied that the order was mala fide in any of the cases.

Part XVIII deals with Emergency Provisions and begins with Art. 352 which provides for making a declaration that "a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance", if the President is so satisfied Arts. 353 and 354 provide for the effect of the Proclamation of Emergency; but it is unnecessary to refer to them for present purpose. Article 358 lays down that during the period that a Proclamation of Emergency is in operation, Article 19 shall remain suspended. Article 359 with which we are particularly concerned lays down that 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." The order made under Art. 359 may extend to whole or any part of the territory of India and has to be laid, as soon as may be after it is made, before each House of Parliament.

It will be seen from the terms or Art. 359 that it gives categorical powers to the President during the

period when a Proclamation of Emergency is in operation to suspend the enforcement of any of the fundamental rights conferred by Part III. It is for the President to decide the enforcement of which of the fundamental rights should be suspended during the operation of the Proclamation of Emergency. There is nothing in Art. 359 which in any way limits the power of the President to suspend the enforcement of any of the fundamental rights conferred by Part III. It is to our mind quite clear that the President has the power to suspend the enforcement of any of the fundamental rights conferred by Part III and there is nothing thereunder which makes any distinction between one fundamental right or another. As Art. 359 stands, it seems to us, it clearly envisages that once a Proclamation of Emergency has been issued, the security of India or any part of the territory thereof may require that the President should suspend the enforcement of any of the fundamental rights conferred by Part III. There is in our opinion no scope for inquiry into the question whether the fundamental right the enforcement of which the President has suspended under Art. 359 has anything to do with the security of India which is threatened whether by war or external aggression or internal disturbance, for Art. 359 posits that it may be necessary for the President to suspend any of the fundamental rights in Part III for the sake of the security of India. There is thus a basic assumption in Art. 359 that it may be necessary for the President to suspend the enforcement of any of the fundamental rights conferred by Part III in the interest of the security of India. If he considers that necessary, it is unnecessary in the face of that basic assumption to inquire whether enforcement of a particular fundamental right suspended by the President has anything to do with the security of India, for that is implicit in Art. 359. It follows therefore that it is open to the President to suspend the enforcement of any of the fundamental rights conferred by Part III by an order under Art. 359 and this Article shows that wherever such suspension is made it is in the interest of the security of India and no further proof of it is necessary.

This brings us to the main ground raised on behalf of the petitioner that an order under Art. 359 is a law made by the State within the meaning of Art. 13(2) and has therefore to be tested under Part III of the Constitution. We may assume for present purposes that the President is comprised within the word "State" in Art. 12. We may also assume that the order made by the President under Art. 359 is a law in its widest sense. The question however is whether such an order can be considered to be a law for the purpose of Art. 13(2) and tested thereunder. Article 13(2) and Art. 359 being parts of the same Constitution stand on an equal footing and the two provisions have to be read harmoniously in order that the intention behind Art. 359 is carried out and it is not destroyed altogether by Art. 13(2). It follows that though an order under Art. 359 may be assumed to be law in its widest sense, it cannot be law within the meaning of Art. 13(2), for if that were so, Art. 359 would be made nugatory. The Constitution through Art. 359 says that the President may suspend the enforcement of any of the fundamental rights in Part III where a Proclamation of Emergency is in force and that means that during the period of Emergency the fundamental rights, enforcement of which is suspended, cannot be enforced. If the order is a law within the meaning of Art. 13(2), the result would be that though the order says that the enforcement of a particular fundamental right is suspended during the period of Emergency the order can still be tested with the aid of Art. 13(2) on the anvil of the same fundamental right, the enforcement of which it suspends. That would in our opinion result in making Art. 359 completely nugatory, for then a declaration made there-under that the enforcement of certain fundamental rights is suspended during the period of Emergency would have no meaning whatsoever. Therefore, applying the principle of harmonious construction we are of opinion that an order passed under Art. 359 cannot be law for the purpose of Art.13(2), assuming it to be law in its widest sense. It follows therefore that an order under Art. 359 derives its force from Art. 359 itself and takes effect in accordance with its tenor and cannot be affected by Art. 13(2) and cannot be tested under any of the provisions of Part III of the Constitution which it

suspends.

Reliance in this connection is placed on the judgment of this Court in Ghulam Sarwar v. Union of India [[1967] 2 S.C.R. 271], where the majority made a distinction between the President's order itself under Art. 359 and the effect of that order. In that case it was observed that "there is clear distinction between deprivation of fundamental rights by force of a constitutional provision itself and such deprivation by an order made by the President in exercise of a power conferred on him under a constitutional provision." It was further observed that "Article 359(1) does not operate by its own force. The President has to make an order declaring that the right to move a court in respect of a fundamental right or rights in Part III is suspended. He can only make an order which is a valid one." It was further observed that an order making an unjustified discrimination in suspending the right to move a court under Art. 14, would be void at its inception and would be a still born order.

We must say with greatest respect that it is rather difficult to understand how an order under Art. 359 which suspends the enforcement of a fundamental right can be tested under that very fundamental right. It is true that there is a distinction between Art. 358 and Art. 359(1). Article 358 by its own force suspends the fundamental rights guaranteed by Art. 19; Art. 359(1) on the other hand does not suspend any fundamental right of its own force but it gives power to the President to suspend the enforcement of any fundamental right during the period of Emergency. But that cannot mean that an order passed under Art. 359(1) suspending the enforcement of a particular fundamental right has still to be tested under the very fundamental right which it suspends. That would in our opinion be arguing in a circle and make Art. 359 compeltely nugatory. It seems that the majority in Ghaulam Sarwar's [[1967] 2 S.C.R. 271] case was also conscious of the fact that the reasoning on which it came to the conclusion that an order made under Art. 359 could be tested under Art. 14, though it suspended that Article, was open to the criticism that it was an argument in a circle. The argument was however met by making a distinction between the order and the effect of that order and it was observed that if the order did not violate Art. 14 it could validly take away the right to enforce the fundamental right under Art. 14. With greatest respect it is difficult to appreciate this reasoning and the distinction on which it is based. It seems to us that if Art. 359 is to have any meaning at all and is not to be wiped out from the Constitution an order passed thereunder suspendoing a fundamental right cannot possibly be tested under that very fundamental right which it suspends. If that were permissible no order under Art. 359 could really be passed. If Art. 359 is not to be rendered nugatory, it must be held that an order passed thereunder cannot be tested under the very fundamental right the enforcement of which it suspends. We must therefore respectfully differ from the view taken in Ghulam Sarwar's case [[1967] 2 S.C.R. 271] and hold that an order passed under Art. 359(1) cannot be tested with the aid of Art. 13(2) under that very fundamental right the enforcement of which it suspends. There is therefore no force in the first point raised on behalf of the petitioners.

We also see no force in the second point raised by the petitioners. As we have already indicated Art. 359 envisages that an order passed thereunder for suspension of the enforcement of particular fundamental right is for the sake of security of India. It is therefore not necessary to enquire whether there is any nexus between a particular fundamental right suspended and the security of India. Article 359 itself posits that it may be necessary in the interest of the security of India to pass an order suspending the enforcement of any fundamental right thereunder. This is clear from the fact that Art. 359(1), provides for the suspension of the enforcement of the fundamental rights in Part III of the Constitution only during the period of Emergency meaning thereby that suspension of the enforcement of any of the fundamental rights which the President considers necessary is for the security of India. We fail to see why only fundamental rights under Art. 22 or under Art. 31(2) can

be suspended under Art. 359; Article 359 clearly shows that any fundamental right in Part III can be suspended during an Emergency and we cannot limit Article 359 in the face of the unambiguous and express words thereof and say that only the enforcement of fundamental right under Article 22 and 31(2) can be suspended. It may be that prima facie these two fundamental rights appear to have a clearer nexus with security of India; but it does not follow that other fundamental rights may not in an Emergency have such a nexus. In any case Art. 359 itself proceeds on the basis that the suspension of the enforcement of all or any of the fundamental rights is for the sake of security of India and so gives the power to the President to suspend such enforcement if he considers it necessary for that purpose. The second contention raised on behalf of the petitioners must also be rejected.

As to the third contention, we have already indicated that an order passed under Art. 359(1) suspending the enforcement of a particular fundamental right cannot be tested under that very fundamental right. We cannot see how if the order under Art. 359 suspends Art. 14 its validity can still be tested under that very Article. We have already expressed our respectful dissent from the view taken in Ghulam Sarwar's case [[1967] 2 S.C.R. 271] and must reject this contention.

As the enforcement of the fundamental right under Art. 14 was suspended by the President's order under Art. 359, no question of that order being bad under that Article can arise even if we assume that the provisions for detention under the Act and the Rules are more stringent than the provisions for detention under the Preventive Detention Act. The fourth contention also fails.

As to the Fifth contention it is urged that on the words of the order passed by the President suspending the enforcement of fundamental rights under Arts. 14, 21 and 22, there had to be a provision in the Act and the Rules expressly to the effect that these fundamental rights would not be enforceable. We cannot understand how any provision could have been made in the Act and Rules to this effect. Such a provision in the Act or the Rules would be clearly unconstitutional. It is only because Art. 359(1) provides that the President may suspend the enforcement of a particular fundamental right that it is possible for the enforcement of any fundamental right to be suspended during the Emergency. What the President has provided in the present case is that the enforcement of fundamental rights under Arts. 14, 21 and 22 would be suspended if any person has been deprived of such right under the Defence of India Ordinance (later replaced by the Act) or the Rules or Orders made thereunder. It is necessary to emphasise that the President's order speaks of suspension under the Ordinance (later replaced by the Act) or the Rules or orders made thereunder. It does not say that the enforcement of such right is suspended if any person is deprived of it by the Ordinance the Rules or orders made thereunder. Therefore it was not necessary that there should be any express provision in the Act or the Rules suspending the enforcement of fundamental rights under Arts. 14, 21 and 22. The clear intendment of the President's order is that if any fundamental right of any person under Arts. 14, 21 and 22 was invaded by any action taken under the Ordinance (later replaced by the Act), or any rule or order thereunder, that action could not be tested on the anvil of those fundamental rights. It was therefore not necessary to make any express provision in the Act or the Rules for the suspension of the enforecement of the fundamental rights under Arts. 14, 21 and 22. The fifth contention must also fail.

The sixth contention is that Art. 22(5) which lays down that grounds of detention must be communicated to the person detained must still be applicable. We have not been able to understand this argument at all. If the President's order is validly made - as we hold it to be - and if it suspends Art. 22 - as it does - we fail to see how clause (5) continues, for it is only a part of Art. 22 which has been suspended. There is no question therefore of furnishing any ground under Art. 22(5) to the

detenu if the detention is under the Act on the Rules, for the entire Art. 22 has been suspended. The argument under this head is also rejected.

This brings us to the subsidiary points raised on behalf of the petitioners. It is first said that the fresh order was not communicated to the detenues. This has been denied on behalf of the State. We see no reason why the fresh order which was passed on the same day on which the earlier order was cancelled would not have been communicated. Nothing has been shown to us to disbelieve the statement on behalf of the State that the fresh order was communicated in each case and therefore any argument based on its not being communicated must fail.

Then it is argued that the order is not in the form as required by Art. 166. It is enough to say that Art. 166 does not apply to the State of Jammu and Kashmir. We have to look to the Constitution of Jammu and Kashmir to see whether the form of the order is in accordance therewith. It is clear that the order is in the form required by s. 45 of the Constitution of Jammu and Kashmir. The presumption must therefore be made that it was passed validly unless the petitioners can show that it was not passed as required by law. No attempt has been made on behalf of the petitioners to show that. The contention on this head must therefore also be rejected.

Lastly, it is urged that the orders in these cases were mala fide. This has been denied on behalf of the State. No grounds have been shown which may lead us to the conclusion that the fresh orders which were passed were mala fide. The necessity for fresh orders arose because the review was not made in accordance with the manner indicated by this Court in Lakhanpal's case [A.I.R. (1967) S.C. 1507 : [1967] 3 S.C.R. 114]. The fresh order that was made was on the same facts and must in the circumstances be held to be valid in view of the judgment of this Court in Jagdev Singh's case [[1968] 1 S.C.R. 197].

The petitions therefore fail and are hereby dismissed.

Hidayatullah, J.I agree that the petitions be dismissed. As I was a member of the Constitution Bench which decided Ghulam Sarwar's [[1967] 2 S.C.R. 271] case I wish to say a few words in explanation. The judgment of Subba Rao, C.J. to which I was a party has expressed itself somewhat unhappily on the point on which it has been overruled in the judgment just delivered. The former Chief Justice upheld the extension of G.S.R. 1418/30-10-62 (which suspended the benefits of Arts. 21 and 22 to a foreigner) by G.S.R. 1275/27-8-1965. The latter order suspended Art. 14 in addition to the two articles already suspended. This suspension was upheld on the ground that there was a clear classification between citizens and foreigners and in a state of war and emergency foreigners could be treated as a class. In other words, the order was tested on the ground of Art. 14 itself which the order of the President sought to suspend.

In the judgment just delivered it has been said that the reasoning in Ghulam Sarwar's [[1967] 2 S.C.R. 271] case is difficult to understand and that the suspension of Art. 14 precludes examination of the order under that article. I should have thought that I had sufficiently explained my position during the discussion of the draft judgment in Ghulam Sarwar's [[1967] 2 S.C.R. 271] case but it appears that in spite of my doubts about the width of language in that judgment, the decision to which I became a party continued to bear the meaning now attributed to it. If I may say with great respect, the judgment just delivered also suffers from a width of language in the other direction. The truth lies midway.

Although a suspension of a fundamental right under Art. 359(1) may be made either for the whole

of India or any part of the territory of India, Ghulam Sarwar's [[1967] 2 S.C.R. 271] case points out that there is nothing to prevent the President from restricting the scope of the order to a class of persons provided the operation of the order is confined to an area and to a period. As the order was applicable to the whole of India and for the duration of the emergency although it affected a class, namely, foreigners, it was upheld. This was not the application of Art. 14. This was said because the argument was that the order could only be with reference to the whole or a part of the territory of India and not with respect to a class such as foreigners. That meant that the order was considered in relation to the words of Art. 359(1). Room was, however, to be left for the play of Art. 14 for those theoretically possible (and fortunately only theoretically possible) cases in which the exercise of the power itself may be a cloak for discrimination, in other words, cases of mala fide action and clear abuse of the power for some collateral purpose. This strict reservation only was intended to go into the judgment in Ghulam Sarwar's [[1967] 2 S.C.R. 271] case but if a wider meaning can be spelled out from that judgment I dissent from it and say that I never intended to be a party to such a wide statement. The examination under Art. 14 of the suspension of the article itself, as expressed in the judgment of Subba Rao C.J. gives a very different impression. For the same reason I cannot subscribe to the width of language in the judgment just delivered which apparently does not make any reservation at all. Therefore I agree to the order proposed but reserve my reasons.

#R.K.P.S. Petitions dismissed.##

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