CALCUTTA HIGH COURT

Sunil Kumar Bose

Vs

The Chief Secretary

(Sen C.J. K Chunder and Lahiri, JJ.)

27.02.1950

JUDGMENT

Sen C.J

1. These are 381 Rules issued in respect of 381 persons 370 of whom are under detention by orders passed under the Bengal Criminal Law Amendment Act, 1930, as amended by the Criminal Law Amendment (Amending Ordinance, 1949) and two of whom, namely, Purna Chandra Ghose and Dulal Bose; are under detention by orders passed under the West Bengal Security Ordinance, 1919. Of the persons who are subject to these rules, eight have been discharged and one has escaped from custody. So far as these persons are concerned, the rules have become infructuous and no further orders on these rules are necessary.

2. Most of these rules were issued before the Constitution of India came into force and they were under Section 491, Criminal P. C. Thereafter the Constitution Act came into force by which the High Courts were given powers to issue, inter alia, writs in the nature of habeas corpus by Article 226(1) and all the rules issued by this Court were treated in the alternative as being rules nisi for the issue of writs of habeas corpus, The learned Advocate-General accepted this alternative and waived any claim to fresh notice.

3. We shall deal first with the question of the legality of the detention of the persons who have been detained by orders passed under the Bengal Criminal Law Amendment Act, 1930. The first point for consideration is whether the aforesaid Act is a valid law or not. In the argument urged on behalf of the detenus it was contended, inter alia, that this Act is not an Act for preventive detention. With that argument we shall deal later. We shall assume for the present that the Act provides for preventive detention and decide whether the Act is valid having regard to its provisions and the provisions of the Constitution Act. Before going into details we would like to emphasise the powers given to the High Court by the Constitution Act as regards deciding whether a statute is valid or void. In England Parliament is supreme and it can pass any law,

however unreasonable it may seem, and to whatever extent it may curtail the liberty of the subject. Once the law is passed by Parliament the Courts are helpless. They must give effect to the law according to the recognised canons of interpretation of statutes. There is no power in the Courts to declare the law to be void or invalid. In this connection it would not be out of place to refer to certain observations made by Lord Wright in the well-known case of Liversidge v. Sir John Anderson, 1942 A. C. 206 at p. 260 : (1941-3 ALL E. R. 338).

"Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like Reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is ultra vires or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannuous conduct. But in the constitution of this country there are no guaranteed or absolute rights."

The position in the Republic of India is entirely different. Here, we have a written constitution in which certain fundamental rights are guaranteed to its citizens. These are mentioned in part III, Constitution Act. If Parliament or any State Legislature makes any law taking away these fundamental rights except in the manner and to the extent provided in Part III, then that law is void to the extent of its inconsistency with the provisions of part in (vide Article 13(1) . Thus Parliament and the State Legislatures are not supreme to the extent that Parliament in England is supreme. The legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution Act. If they pass an Act in excess of those powers, then that Act becomes void to that extent.

4. The rest question which arises is this; who is to decide the question whether a piece of legislation is void or not ? Under our Constitution the Courts i. e., the Judiciary are to decide this and nobody else. We thus see that the powers of the Judiciary in our country is in this respect far greater than the powers of the Judiciary of Great Britain. Many observations regarding the effect and interpretation of laws passed by the Parliament of Great Britain are coloured by the fact that Parliament there is supreme and they are not wholly applicable in this country. Here the power of the Judiciary is supreme in this respect. We realise that Parliament may amend the Constitution Act but that can only be done if the provisions of Article 368 of part XX, Constitution Act are complied with. However, until the Act is amended the powers of the Legislatures and of the

Judiciary are as stated above. The people of India have given us the power of interpreting the Constitution of India and of deciding whether any piece of legislation is or is not consistent with the provisions laid down in the Constitution of India.

5. As stated at the beginning of the last paragraph we shall assume that the Bengal Criminal Law Amendment Act is an Act providing for preventive detention and decide on this basis whether the Act is valid or whether it is void in whole or in part as being inconsistent with the provisions of part III, Constitution Act. Article 19(1), Constitution Act deals with the "Eight to Freedom." It specifies seven such rights and says that all citizens shall have these rights. We are concerned with the right mentioned in Article 19(1)(d), that is, the right "to move freely throughout the territory of India." That right is guaranteed to all citizens by Article 19(1)(d). Article 19(5) provides that nothing in Sub-clause (d) of Article 19(1).

"shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of (he rights conferred by the said Sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe."

We are not concerned in the present rules with the protection of "the interest of any scheduled tribe. If Article 19(1)(d) and Article 19 Clause (5) are read together, the meaning which can be deduced is this: every citizen shall have the right of moving freely from any part of the territory of India to any other part of such territory, but any law already passed before the Constitution Act came into force, or to be passed by the Legislatures established by the Constitution may curtail that right provided the curtailment or restrictions it imposes on that right are reasonable and in the interests of the general public. It is thus clear that, the right of free movement throughout the territory of India cannot be restricted unless (a) the restrictions are reasonable and (b) the restrictions are necessary in the interests of the general public. Both conditions must co-exist.

6. Now, the question which arises is whether the detention which may be imposed upon a citizen by the Criminal Law Amendment Act amounts to restrictions on the right of free movement guaranteed by Article 19(1)(d). The learned Advocate-General argued that an order passed under the Bengal Criminal Law Amendment Act committing a person to custody in jail is not an order taking away the right "to move freely" throughout the territory of India which is mentioned in Article 19(1)(d). He contends that the words "throughout the territory of India" have been put in Sub-clause (d) for a particular purpose. The Sub-clause according to him relates only to liberty of movement from one particular State to another or from one particular area to another and it does not relate to liberty of movement in general. We are unable to see that the words "throughout the territory of India" which appear in Sub-Clause (d) and do not appear in the other sub clauses, except Sub-clause (e), have the significance sought to be attached to them by the learned

Advocate-General. In our opinion the words "throughout the territory of India" were used because the Constitution Act is not guaranteeing to the citizen any right of free movement outside its territories, in fact it could not give any citizen such right because that would result in infringing the sovereignty of a foreign State. This phrase was used also to indicate that the Constitution Act was not giving the citizen any absolute right to move from the Republic of India into some foreign State; in other words, it was saving passport restrictions. Further, those words were used to indicate that the Act was not giving a citizen any absolute right to enter the territory of India from outside. These, in our opinion, are the reasons why the words "throughout the territory of India" have been used. We are of opinion that if a person is committed to custody in jail, his right to move freely throughout the territory of India is being taken away. Now, the Bengal Criminal Law Amendment Act, 1930, by Section 2(1) (f) gives the Provincial Government the right to commit a citizen to custody in jail. We must therefore see whether the law giving such a right is one which imposes a restriction which is reasonable and which is in the interests of the general public.

7. It will now be necessary to reproduce Section 2 (1), Bengal Criminal Law Amendment Act which is as follows :

"Where, in the opinion of the Provincial Government, there are reasonable grounds for believing that any person--

(i) is or was at any time a member of an association of which the objects and methods include the commission of any offence included in Schedule I or the doing of any act with a view to interfere by violence or threat of violence, with the administration of justice; or

(ii) is being or was at any time instigated or controlled by a member of any such association with a view to the commission or doing of any such offence or act; or

(iii) is doing or did at any time any act to assist the operations of any such association: the Provincial Government may, by order in writing, give all or any of the following directions, namely, that such person.

(a) shall notify his residence and any change of residence to such authority as may be specified is the order;

(b) shall report himself to the police in such manner a"d at such periods as may be so specified:

(c) shall conduct himself in such manner or abstain from such Acts as may be so specified;

(d) shall reside or remain in any area so specified; (e) shall not enter, reside in, or remain in any area se specified;

(f) shall be committed to custody in jail; and may at any time add to, amend, vary or rescind any order made under this section:

Provided that such order shall be reviewed by the Provincial Government at the end of one year from the date of making of the order, and shall not remain in force for more than one year unless upon such review the Provincial Government directs its continuance."

8. We accept the argument of the learned Advocate. General that it is not open to us to decide whether the opinion of the Provincial Government is well founded or not. The words "where in the opinion of the Provincial Government there are reasonable grounds for believing etc." have been interpreted recently by a Special Bench of this Court in the case of Bhupendra De v. Chief Secretary, the Government of West Bengal, 53 C. W. N. 798: (A. I. R. (36) 1949 Cal. 633 : 51 Cr. L J. 169) and we have no hesitation in following that interpretation. The Provincial Government has to form the opinion that there are reasonable grounds and it is not for the Courts to decide whether the grounds are reasonable or not. That is a matter for the Provincial Government alone and the opinion of the Provincial Government is subjective and not justiciable. If the Provincial Government declares that in its opinion there are reasonable grounds for believing etc. this Court cannot investigate the grounds and say that the grounds are not reasonable. The reasonableness of the grounds is a matter for the decision of the Provincial Government alone and not for the Court. We are not now dealing with any question of mala fides. We thus see that the Provincial Government is constituted the sole and absolute arbitrator for the decision of the point whether there are reasonable grounds for believing etc. Now, what is meant by the terms 'Provincial Government.' According to the General Clauses Act (India), Section 43A the Government of the Province is the Governor. The Governor under the present constitution cannot act except in accordance with the advice of his ministers. Under the Government of India Act, 1935, the position was different. The Governor could do certain acts in his discretion, that is, without asking for the advice of any minister; be could do certain acts in his individual capacity, that is, only after consulting his ministers but he was not bound when acting in his individual capacity to follow the advice of his ministers. Under the present Constitution the power to act in his discretion or in his individual capacity has been taken away and the Governor therefore must act on the advice of his ministers. This is the constitutional position as explained to us by the learned Advocate General and we accept his view.

9. Next, on enquiries made by this Court from the Advocate General he stated that orders of detention under the Bengal Criminal Law Amendment Act were passed, in fact, not by the Governor nor by any minister nor by the Chief Secretary but by the Deputy Secretary. This was done according to certain Rules of Business formulated by the Governor. The net result of these circumstances is that these persons have been detained because a Deputy Secretary has formed a

certain opinion the justness or validity of which cannot be questioned by the Courts of law. In our opinion this provision of the law is neither reasonable nor in the interests of the general public. The right to personal liberty given to citizens by the Constitution Act is a fundamental and a precious right and it seems to us that it is not reasonable and not in the interests of the general public to empower an executive officer of the rank of the Deputy Secretary, who is not responsible to the Legislature, to take away such a fundamental right in the manner provided in the Bengal Criminal Law Amendment Act; in other words, it is neither reasonable nor in the interests of the general public that an executive officer of this kind should be empowered to send a man to custody in jail on an opinion formed by him on grounds which cannot be investigated by anybody. In this connection we would observe that the Bengal Criminal Law Amendment Act is not an emergency measure. It is "an Act to supplement the ordinary criminal law in Bengal." Nowhere is it stated in the Act or suggested that it is an emergency measure. The Act is a permanent one and not enacted for any particular period and it has been in force since 1930. During times of emergency extraordinary measures may be taken and extra-ordinary legislation may be passed. Such legislation may be considered to be reasonable and in the interests of the general public having regard to the emergency then prevailing, but an Act which is not an emergency measure but merely an addition to the ordinary criminal law cannot be viewed in the same manner when it deprives a citizen of his fundamental right of freedom.

10. Next, let us consider in further detail the provisions of Section 2, Bengal Criminal Law Amendment Act. Section 2 (1) (i) renders a person liable to committal to custody in jail if he was at any time a member of an association of the kind described in the section or is at the moment a member of such an association. The section does not say that the person who is to be so committed should know or even have reason to believe that the association had the objects and methods described in the section; nor does it say that these objects and methods should be the avowed objects of the association. Thus, a person who joins an association without knowing that it has the objects and methods mentioned in the section is liable to be confined in jail. Again, if a person many years ago joined such an association and thereafter left it as he disagreed with its objects he is also liable to be confined to jail. He may be, at the time the order is passed on him a person who is bed-ridden or a paralytic, nevertheless he is liable to be subjected to an order committing him to custody in jail. It seems to us that this provision is wholly unreasonable.

11. Let us next examine Section 2 (1) (ii), Bengal Criminal Law Amendment Act. It discloses a more preposterous state of affairs. It says that if a person was at any time instigated or if he is being instigated by a member of an association of the description mentioned in the section he may be committed to jail. Here, again there is no provision that there should be any reasonable .cause to believe that the person instigated was inclined to carry out the object of the person instigating him. If the person is investigated and he refuses to accede to the request of the

instigator, he is still liable to be committed to jail. Again, if he was instigated say 20 years ago and then refused to carry out the object of the instigator, he is still liable to be committed to jail. We find it difficult to conceive how such a provision of law can be considered to be reasonable and in the interests of the general public. It may be said in certain circumstances that it is reasonable to commit the instigator to custody in jail if he is instigating the commission of a crime, but it passes our comprehension how it can be reasonable to enact that a person, merely because he was instigated is liable to be detained in custody in jail. The learned Advocate General argued that it should be presumed that the Act would be reasonably administered. We are not at all concerned with the question whether the person operating the Act will be reasonable or not. We are concerned with the sole question whether the provisions of the Act are reasonable and in the interests of the general public. If they are not, then the Act is void and no person however reasonable can be left to exercise powers under such an Act.

12. Again, if one were to consider all the provisions of the Act one would find that there is no period fixed during which a person may be detained. The proviso to Section 2, Bengal Criminal Law Amendment Act says that the order shall be reviewed by the Provincial Government at the end of one year from the date of making it and shall not remain in force for more than one year unless upon such review the Provincial Government directs its continuance; in other words, the Provincial Government which in the present case means the Deputy Secretary may order the continuance of the detention for an unlimited period. It is true that Section 9 of the Act provides that the order shall be submitted to two Judges with the qualifications described therein in order to obtain their opinion whether or not there is lawful and sufficient cause for such an order, but this provision does not place any limitation on the Provincial Government for the continuance of the order for an indefinite period. In the first place, there is no time fixed within which the Judges are to give their opinion. Secondly, by virtue of Section 9, Sub-section (2) the Provincial Government may sit upon that opinion for an indefinite period and pass no orders upon it. Lastly, the Provincial Government is not bound to accept such opinion or report of the Judges. It is given power to pass such order upon their report as to the Government appears just or proper. We would point out also that by virtue of the provisions of Sub-section (3) of Section 9 of the Act the person against whom an order under Section 2 (1) has been passed is not entitled to appear before the Judges either in person or by pleader, and the proceedings and report of the said Judges are made confidential. It is obvious that the safeguards to wrongful custody in jail which are pretended to be laid down in Section 9 are purely illusory. The order of the two Judges need never be accepted by the Government. No one except the Government is permitted to know what the report of the two Judges is, nor is any one permitted to know what transpired in the proceedings before the two Judges. We thus see that the Government is again being made the only authority to decide whether its order is lawful or not. The Government is also the only

authority to decide whether the detention should continue or not. Can it be said that it is reasonable and in the interests of the general public to give the Government, that is, the Deputy Secretary such absolute and unlimited powers ? In our opinion it cannot.

13. There is another point of great importance. Under Article 22, Sub-article (4), Constitution Act, it is laid down that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons having certain judicial qualifications has reported before the expiry of the said three months that there is in its opinion sufficient cause for such detention. The Bengal Criminal Law Amendment Act is in direct conflict with these provisions laid down in the Constitution Act. We shall deal later with the latest order passed by the President of the Republic of India whereby these rights given to the citizens under Article 22(4) are sought to be whittled down and we shall endeavour to show that this order is of no legal effect.

14. We now propose to summarise the grounds of our opinion that the restrictions imposed by the Bengal Criminal Law Amendment Act upon the free movement of citizens throughout the territory of India are not reasonable and are not in the interests of the general public. They are as follows : (1) The Act gives the Provincial Government, that is to say, the Deputy Secretary, the power to detain persons if he forms a certain opinion and neither the Courts nor any other authority is entitled to question the reasonableness or the validity of such opinion. In this connection we would repeat again that the Bengal Criminal Law Amendment Act is not an emergency measure but a measure to supplement the ordinary criminal law. This fact is one which governs our determination of the question of the reasonableness and the public benefit in all its aspects ; (2) The Act renders a citizen liable to commitment to custody in jail even though he has no sinister object or motive and merely because he was at any time or is a member of an association the objects of which are not known to him ; (3) The Act provides for the commitment to prison of a citizen merely because he is a subject of instigation although he may not have any inclination to do the act instigated; (4) By the Bengal Criminal Law Amendment Act a person may be kept in custody for an indefinite period. The length of that period is left to the sole discretion of the Government, that is to say, of the Deputy Secretary ; (5) Although the order of Government is to be submitted for opinion and report to two Judges the Government is not bound in any way to accept that opinion or report; (6) The person detained has no right to place his case before these two Judges either in person or by pleader, nor is he or any one else given the right to know anything about the proceedings before the Judges or the report furnished by them; and (7) The Bengal Criminal Law Amendment Act is in direct conflict with the provisions of Article 22^(4)~CONSTITUTION OF INDIA~^ , Constitution Act.

15. The learned Advocate General argued that even if some portions of the Act are considered to

be void on the ground that they are inconsistent with the provisions of part III of the Constitution Act, the Court should give effect to those portions of the Act which are not in conflict with the Constitution Act, in other words, he asks us to split up the Act and give effect to such portions of it as are not in conflict with the Constitution Act. We are of opinion that this cannot be done having regard to our finding regarding the illegality of certain provisions of the Bengal Criminal Law Amendment Act. The illegalities which we have pointed out cannot be severed from the rest of the Act. They are fundamental illegalities and they taint the whole of the Act and are inextricably mixed up with the other provisions of the Act. The doctrine of severability can only be applied where a particular provision of an Act can be isolated from the rest of the Act and yet the Act can be worked.

16. In the present case no such severance can, be made. The whole Act is vitiated by the illegalities pointed out above and it is impossible to isolate those illegalities and pronounce that the rest of the Act is legal. In this connection we would refer to the observations of the Chief Justice of the High Court at Patna in the case of Brahmeshwar Prasad v. The State of Bihar , a report of which has been furnished to us by the learned Advocate General. This is what the learned Chief Justice says:

"I now come to the second line of reply of the learned Government Advocate, namely severability.

Put crudely the argument comes to this. If a law provides for detention for six months, but the Constitution says that no law shall provide for detention for more than three months, then that law is not wolly void, but can be regarded as a good law as regards detention up to three months. The fallaciousness of such an argument is at once apparent. It would mean, not severing? the bad portion of the law from the good and leaving the latter, but substituting a new and different law in place of the old. In fact it would mean legislation by the Court and the abolition of one law and the substitution for it of a new and different law."

17. In the present case the difficulties ace still greater because the Bengal Criminal Law Amendment Act has been found by us to be void not merely because it provides for detention for a longer period than is permissible under the Constitution Act but for certain other more fundamental reasons. It is not for us to legislate. We are merely to interpret an Act and discover whether it is void or not. We are not to substitute a new and more reasonable Act in the place of the Bengal Criminal Law Amendment Act. We thus hold that the entire Act is void for the reasons stated above and that the detention of the persons who obtained these Rules is illegal.

18. We shall now deal with these. Rules on the footing that the Act is not void. In our opinion, if this assumption is made, the order of detention is bad inasmuch as the provisions of the Act have

not been followed. We would refer again to the provisions of Section 2 (1), Bengal Criminal Law Amendment Act. In our opinion this section means that the Provincial Government must come to a definite opinion before it can pass an order of detention. Section 2 (1) (i) says that where in the opinion of the Provincial Government there are reasonable grounds for believing that any person is or was at any time a member of an association with objects and methods etc. may pass an order committing that person to jail or placing certain other restrictions on him as are mentioned in Section 2 (1) (iii) (a) to (f). We would point out that the words used are "is or was at any time a member." The orders of Government in all these cases except those which have been passed under the West Bengal Security Ordinance of 1949 are in the following form :

"Whereas in the opinion of the Provincial Government there are reasonable grounds for believing that Sri Sunil Kumar Basu, son of late Jatindra Nath Basu of p. 43, New Shambazar Street, (Bhupendra Basu Avenue), Calcutta,

(i) is or was a member of an association of which the objects and methods include the commission of offences included in Schedule 1 to the Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930)

(ii) is doing or did acts to assist the operations of an association of which the objects and methods include--

the commission of offences included in Schedule 1 to the Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930).

The Governor, in exercise of the powers conferred by Section 2, Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930), is pleased to make the following order :"

It is quite clear from this order that the Government has come to no definite conclusion. Section 2 (1), so to speak, offers the Government a choice of matters on which it is required to form an opinion. If the Government is of opinion that a person is a member of an association etc., it may pass the orders mentioned in Section 2 (1). Similarly, if the Government is of opinion that a person was at any time a member of an association etc., it may pass all or any of the orders mentioned in the section. The Government must make its choice. What the Government in this case has done is to make no choice. It uses the words "was at any time or is." In other words, what the Government is saying is this : "I an not sure if the person was at any time a member, nor am I sure that he is at present a member. Nevertheless I order him to be detained because I am of opinion that he was at any time or is a member." We would say with great respect that in our opinion this statement in the order does not make sense. The only inference from this order, is that the Government has formed no opinion at all. It has merely repeated the very words of the

section. There is a danger in merely repeating the very words of a section in an order. The alternatives given in a section of a statute may be reasonable. We do not say that in this particular case these alternatives are even reasonable. But an order of Government stating that in his opinion both alternatives are present is clearly meaningless. When a section distinguishes between a person who was at any time a member and a person who is a member of an association it means that it is dealing with persons of two distinct types; otherwise there would be no sense in mentioning these alternatives in the section. It follows from this that the Government must make up its mind as to the-category to which a person it is proposing to detain belongs. The Government here has done no such thing. We hold therefore that the order of Government is not in accordance with the provisions of the Bengal Criminal Law Amendment Act and that it indicates that the Government has formed no opinion at all. In this-connection the learned Advocate General drew our attention to the case of King Emperor v. Shibnath Banerjee, 1944-6 F. C. R. 1: (A. I. R. (30) 1943 F. C. 76 : 46 Cr. L. J. 341). In that case the Central Government expressed its opinion in the very words of the section which contained certain alternatives. Two of the learned Judges Zafrulla Khan and Srinivasa Varadachariar JJ. held that such an order was bad whereas Sir Patrick Spens C. J., held that the order was valid. The view of Sir Patrick Spens wax upheld by the Judicial Committee but it expressed no definite opinion on this point. We are of opinion, however, that the contention of the learned Advocate General cannot be given effect to inasmuch as the phraseology of the Acts in that case and the phraseology of the present Act are quite different. Rule 26 of the Defence of India Rules is what was being construed. The relevant portion of that rule is in the following terms:

"The Central Government or the Provincial 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, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order

(a) .....

(b) directing that he be detained."

Here, the Central Government could detain a particular person with a view to prevent him from doing one or other of several acts. In such a case it was held by the Chief Justice that an order which mentioned that the Government was detaining a person with a view to prevent him from doing all or any of those acts was perfectly justifiable. The present cases are quite different. The Bengal Criminal Law Amendment Act, Section 2 (1) does not say that the Government may detain a person with a view to prevent him from doing one or all of several Acts. What it says is that if the Provincial Government is of opinion that a person belongs to one category or another

he may be detained. The distinction is obvious. Before you can detain a person under such a provision of the law you must be satisfied that he belongs to one or other of those categories. Under Rule 26, Defence of India Rules, all that the Government has to do is to form an opinion that it is necessary to detain a person in order to prevent him from doing one or other of certain acts. In this rule it was not necessary for the Government to form an opinion definitely as to which act such person may do. He may be a person who is prone to do one or other of such acts. Under the Bengal Criminal Law Amendment Act, Section 2 (1), the Government has to form an opinion as to whether a person sought to be detained was at any time a member of an association or whether he is at present a member of an association. We are of opinion, therefore, that as the Provincial Government has formed no opinion at all on the matter, it had no authority to pass the orders of detention, that it has passed and that consequently the orders are bad.

19. We have already dealt with these Rules on the footing that the Bengal Criminal Law Amendment Act is an Act providing for preventive detention and have shown that even if it were so, the detention orders which are the subject-matter of these Rules are bad. We are of opinion, however, that the Bengal Criminal Law Amendment Act does not deal with preventive detention. The law regarding preventive detention, as we understand it is directed to wards preventing a person from doing something which the Legislature thinks should not be done. Nowhere in the Act do we find any expression which indicates that the law is designed for the purpose of preventing a person from doing any thing. We have set out the preamble in the earlier part of the judgment and it contains nothing which would indicate that the law is a preventive measure. Section 2 of the Act, which is the most important section in the Act and which gives powers of detention to the Provincial Government does not say that these powers are given for the purpose of preventing anything being done. It merely lays down that a person may be detained or dealt with in certain other ways if he is or was a member of a certain kind of association or if he is or was being instigated, or controlled by a member of a certain kind of association or if he is doing or did at any time any act to assist the operation of such association. It nowhere says that a person may be detained or otherwise dealt with in order to pre vent him from doing anything. If you detain a person if he is a member of an association you are not detaining him in order to prevent him from being a member of the association but you are restricting his liberty because he is a member of such association, a fortiori, if you detain or otherwise restrict the liberty of a person because he was a member of an association, you are not doing anything in order to prevent him from being such member. The same arguments would apply to the provisions contained in Section 2 (1) (ii) and (iii). The law does not lay down that the authority detaining a person or other wise restricting his liberty should be satisfied that the detention is necessary for the prevention of anything. That being so, we are of opinion that the Bengal Criminal Law Amendment Act is not a law of preventive detention. The learned Advocate-General drew our

attention to a certain passage in Dicey's Law of the Constitution, Edn. IX at page 231 where a certain Irish Act was described as an Act which gave the executive absolute-power of arbitrary and preventive arrest. We do not think it will serve any useful purpose to discuss this passage of the Irish law referred to. It is dangerous to interpret one law by reference to another unless the terms are identical or so similar as to justify a common deduction. It would be safe and more correct to ascertain the nature of the Bengal Criminal Law Amendment Act by reference to its own provisions. Having regard to those provisions we have no hesitation in saying that the law is not a law providing for preventive detention.

20. Now, if it is not such a law, then it is impossible to justify the orders passed in these cases. Article 21, Constitution Act says this : "No person shall be deprived of his life or personal liberty except according to procedure established by law." There can be no doubt that in these cases the detenus have been deprived of their personal liberty. The order depriving them of such liberty can be upheld Only if it is an order passed according to the procedure established by law. Article 22 (1) and (2), Constitution Act, provides some portion of such procedure. It says this :

22. (1) "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

(2) "Every person who Is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

It is admitted that in these cases the detenus have not been produced before any Magistrate within twenty four hours of their arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Thus the detenus have been deprived of their personal liberty without complying with one of the most important items of procedure laid down in the Constitution Act regarding such deprivation. In the circumstances the order of detention cannot be upheld.

21. We shall now deal with the two cases in which persons have been detained under the West Bengal Security Ordinance, 1949. This Ordinance is clearly an Ordinance providing for preventive detention, but in our opinion this Ordinance is void because it is inconsistent with the provisions of the Constitution Act. The Ordinance in Section 22 provides for the detention of a person for a period not exceeding nine months. Under Article 22(4), Constitution Act, it is provided that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board has reported that there is in its

opinion sufficient cause for such detention. The West Bengal Security Ordinance, 1949, does not provide for any Advisory Board of the nature contemplated by the Constitution Act. It says that the Provincial Government may place before a Judge of the High Court the grounds on which the order of preventive detention is made. The section is clearly not mandatory. The Government if it so chooses need not place before the aforesaid Judge its order of detention.

22. Next, we would point out that reference to a Judge of the High Court is only to be made where an order is passed under Clause (a) of Sub-section (1) of Section 21 of the aforesaid Ordinance, that is to say, in the case of an order directing detention. Section 21 (1) of the said Ordinance deals with several other restrictions on the liberty of the subject. In the case of those other restrictions there is no provision whatsoever for any reference being made to a High Court Judge. On the contrary, the provision in Section 22 of the Ordinance, empowers the Government in those cases to renew its orders from time to time after the expiry of each period of nine months. The other reasons which we have given for holding that the Bengal Criminal Law Amendment Act does not impose restrictions which are reasonable and are in the interests of the general public apply to the West Bengal Security Ordinance, 1949. We hold therefore that the order as passed on the two persons Purna Chandra Ghose and Dulal Bose under the West Bengal Security Ordinance, 1949, is void as it is inconsistent with the Constitution Act.

23. We shall now deal with the Preventive Detention (Extension of Duration) Order, 1950, made by the President of the Indian Republic. We are of opinion that it can have no effect so far as the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949 are concerned and our reasons are as follows: The Constitution came into force at midnight on 35th January 1950. The President was not sworn as President until 10-15 A. M. on 26th January 1950. In other words, he was not President until the Constitution came into force. As soon as the Constitution came into force the two abovementioned laws became void by reason of the provisions of Article 13(1) for the reasons which we have already given. The Preventive Detention (Extension of Duration) Order, 1950, provides that the maximum period for which a person may be detailed shall be, in the case of a person detained immediately before the commencement of the Constitution, three months; and in the case of persons detained in pursuance of an order made after such commencement for a period of three months from the date of such order. If these two provisions could be given effect so far as the Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, are concerned, then some at least of the reasons given for declaring these measures void would disappear, but we find that there is an insuperable difficulty to apply the Preventive Detention (Extension of Duration) Order, 1950 to the above mentioned two Acts. The Acts having become void they cannot be vivified or revived by such an order which purports to have been passed in the exercise of powers conferred by Sub-clause (a) and (b) of Clause (7) of Article 22, Constitution Act read

with Article 373 of the said Constitution Act. In this connection we can do no better than quote the observations of the Chief Justice of the Patna High Court in the case of Brahmeswar Prasad v. The State of Bihar, .

24. The learned Chief Justice says this: "In my judgment no such order made by him under Clause (7) could in any way prevent an Act becoming void under Article 13(1) and this for two reasons. The first and primary reason is that under Article 13(1) quite clearly provisions become void, if they become void at all directly and instantaneously with the Constitution coming into force whereas an order by the President can only originate and become valid after the Constitution has come into force. There can be no such order of the President except as a consequence of the Constitution having come into force and given him power to make it. That is to say such order must be logically subsequent to the voidability which the coming into force of the Constitution itself affects. That, in my opinion follows directly and logically from the laws of cause and effect. But it is in fact not necessary to enter into philosophical questions of the infinite divisibility of time and the nature of simultaneity, because in fact we are here concerned with a time lapse of over ten hours. The Constitution came into force on the midnight of 25th and the Act, if it became void at all, became void then. But the President did not enter upon his office until he took the oath on 26th at 10-15 A. M.

As to these propositions, there can be no question, Article 394 of the Constitution provides that certain Articles with none of which we are concerned, shall come into force at once, and the remaining provisions shall come into force on 26th January 1950. Article 367(1) makes the General Clauses Act, 1897, applicable and the General Clauses Act provides in Section 5 (3) that where an Act is to come into force on a certain day, it shall come into force at midnight of the preceding day. Under Article 60 the President must make and subscribe an oath before entering upon his office. The same thing is apparent from the Constitution (Removal of Difficulties) Order No. 1 published with Notfn. No. 1 in the Gazette of India (Extraordinary) of 7th January 1950, which prescribes that such person as the Constituent Assembly shall have elected as President shall, before entering upon his office, make and subscribe the oath or affirmation prescribed in Article 60. Notification No. F35/4/49 Public, published in the Gazette of India (Extraordinary) on 26th January 1950) shows that the Governor General proclaimed the new Constitution at 10-15 A.M. on 26th January. After that the President took the oath, and took his seat as President of India and assumed the office. Quite clearly the President could make no valid order until after 10 15 A.M. on 26th whereas those provisions in Act III [3] of 1950 repugnant to the Constitution became void directly after midnight on 25th. It is quite apparent that the subsequent order of the President could not restore an Act which had already become void and ceased to exist. Nor does his order purport to do so."

25. We set forth further reasons for holding that the Preventive Detention Order of 1950 is of no effect.

26. Article 22, Sub-article (7) (a) and (b) are in the following terms:

22 (7). Parliament may by law prescribe--

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4).

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention."

It is quite clear that these two Sub-clauses contemplate the taking out of a certain class of persons from the operation of the law laid down in Sub-clause (4) by which the maximum period of three months is prescribed. Parliament should therefore when enlarging the maximum period of detention set forth what class or classes of persons are to be detained for a period longer than three months. In this case the President has not done any such thing. He has made no selection of any class or classes but he has extended the period of preventive detention to all cases of persons preventively detained. Further, Article 22, Sub-article (7) (a) states that the Parliament may prescribe the circumstances under which the detention should be extended for a period longer than three months. Here no such circumstances are mentioned. Rule 2 of the Preventive Detention (Extension of Duration) Order, 1950 begins thus: "Where in any class of cases or under any circumstances specified in any law providing for preventive detention etc." Such an order is not one which complies with the provisions of Article 22, Sub-article (7) (a) Constitution Act. Next, Clause (b) of Sub-article (7) of Article 22 says that the Parliament may prescribe the maximum period for which any person in any class or classes of cases may be detained under any law providing for preventive detention. Although the words "the maximum period" are mentioned in Rule 3, Preventive Detention (Extension of Duration) Order 1950, as a matter-of fact no maximum period is provided. The words "the maximum period" connote the fixation of a particular period which is the maximum. Rule 3 of the aforesaid order would have the effect of fixing various periods. In the case of a person in detention before the commencement of the Constitution the period is three months from the commencement of the Constitution. Now a person may have been in detention for four months before the commencement of the Constitution. Under the Order passed by the President the maximum period for him would be three additional months or seven months. Another person may have been in detention one month before the commencement of the Constitution. For him the maximum period would be four

months. Thus no fixed maximum period has been prescribed and the Preventive Detention (Extension of Duration) Order, 1950. is therefore void. We would repeat again that the order would also be void because of the view we have taken namely that the Bengal Criminal Law Amendment Act, 1930, is not an Act providing for preventive detention.

27. Having regard to all these circumstances we must hold that the detention of the petitioners in all these cases is illegal and we direct that they be set at liberty forthwith.

28. After we have completed our judgment we were sent a copy of a Rule of an order by the President of the Republic of India entitled "Adaptation of Laws Order, 1950". The Rule of the aforesaid Order of which we were sent a copy is Rule 28 and it runs as follows:

"38. Any Court, Tribunal or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall, notwithstanding that this order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose:

Provided that, if any question arises regarding the adaptations with which such law should be construed, for the said purpose, the question shall be referred to the Central Government if the law relates to a matter enumerated In List I or List III in the Seventh Schedule to the Constitution and to the State Government concerned in any other case, and the decision of that Government on any such reference shall be final."

29. Although the learned Advocate General wanted an appointment to make his submissions on the rule when questioned by us he stated that he had nothing to say on it. We must frankly confess that we find it difficult to put any reasonable construction upon it. It directs this Court as well as certain Tribunals and other authorities to construe the law in a certain manner. We are quite unaware of any provision of law or any principle or practice regarding legislation which would, justify any legislature to direct a Court regarding the manner in which it has to construe the law. A Court construes a law in accordance with definite rules or canons of interpretation. It has to decide the meaning which a law bears. The jurisdiction of the Court in this respect must be unfettered. No Court can submit to an order from any authority directing it to construe a law in a particular manner. Such an order will be contrary to all principles and will result in making the Court a mere tool of the legislature or other authority which makes such an order. All that the legislature can do is to define certain terms but it must leave the Court to interpret the law according to those definitions, This order purports to be a law passed in accordance with the provisions of Article 372(2), Constitution Act. In Our opinion although the order is garbed in such a way as to simulate a legislative enactment, it is nothing of the kind. It is a direction pure

and simple by the Executive to the Court to construe a law not necessarily in accordance with justice or legal principles but in accordance with the desire of the Executive. Obviously this Court cannot submit to an Adaptation Order of this kind. Apart from the fact that the Order conflicts with all principles of judicial independence we would further point out that it is something which is contrary to the express provisions of Article 372(2), Constitution Act. That Sub-clause empowers the President to. make adaptations and modifications of any law in force in the territory of India. It does not empower the Court to make such adaptations or modifications and indeed it would be very surprising if any Constitution Act were to impose upon the Court the duty of legislating. The Courts are meant to interpret legislation and not to make it. What the President has done is to throw upon the Court a burden which is exclusively his. He is to adapt or modify and he has no authority to ask the Court to do something which he alone is expressly empowered to do. We would further point out that by that Article the Constitution Act has delegated certain powers to the President. He in turn cannot delegate those powers to any other authority. The principle delegatus non delegare potest would apply. Article 872 (1), Constitution Act states that notwithstanding the repeals by this Constitution of the enactments referred to in Article 395 and subject to the other provisions of this Constitution, all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority. Article 395 refers to the repeals of the Indian Independence Act and the Government of India Act together with all enactments amending or supplementing the latter not including the abolition of Privy Council Jurisdiction Act, 1949. The Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, have nothing to do with the Acts mentioned in Art, 395. Article 372(1) says that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue to be in force, but there is a necessary and important provision in the Article which cannot be lost sight of. It says that those laws shall be in force subject to the other provisions of this Constitution. Article 13(1), Constitution Act says that all laws in force in the territory of India before the commencement of the Constitution in so far as they are inconsistent with the provision of part III shall to the extent of such inconsistency be void. Thus Article 372(1) does not preserve the effect of all laws in force in the territory of India before the commencement of the Constitution. It keeps only such laws in force as are not inconsistent with the provisions of Part III. We have held that the Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, are inconsistent with the provisions of part III. They became therefore void from 12 midnight of 25th January 1950, when the Constitution came into force. That being so, we are of opinion that even the President or the Legislature cannot make any adaptations or modifications of those laws in order to bring them in accord with the provisions of this Constitution. Those laws are dead and we fail to see how a dead law can be brought back to life by modification or adaptation.

30. We have something further to say with respect to Rule 28, Adaption of Laws Order, 1960. Not only has the Order tried to convert the Court into a legislative body but in doing so it has by a proviso reduced this newly created legislative body to a position of subordination and inferiority. The proviso says that if the Court makes any such adaptation as is contemplated in the first part of the rule, if the adapted law relates to matters enumerated in List I or List III in Schedule 7 to the Constitution it shall be subject to adjudication by the State Government concerned. It adds that the decision of the Government on any such reference shall be final. In other words what this Order purports to do is this: It converts the Central or State Executive into judicial authorities with the power of revising the decisions of the Courts of law and makes their decision on the point final. Taken as a whole the effect of the Order is this: The Judiciary is converted into a Legislature with limited powers, and the Executive is converted into a Judiciary whose decisions are to be final. In this confusing state of affairs, the only thing for us to do is to act in accordance with the oath which we took when we assumed office when we swore to bear true faith and allegiance to the Constitution of India and to perform our duties of office duly and faithfully without fear or favour and affection or ill will and where we also swore to uphold the Constitution and the laws. In our opinion we would be false to our oath if we gave effect to this Adaptation of Laws Order, 1950, even though this Order may have emanated from the President of the Indian Republic our respect for whom is no less than that of anybody else.

31. The Advocate-General has next brought to our notice a new Act called the Preventive Detention Act, 1950, passed by Parliament on 26th February 1960, and he says that the orders for detention under the Bengal Criminal Law Amendment Act, 1950, and the West Bengal Security Ordinance, 1949, have been cancelled but that the detentions have been continued under the Preventive Detention Act, 1950. He suggests that in the circumstances the Rules have become infructuous. We cannot agree with this view. We issued these Rules upon the State on the footing that the detention was under the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949. The detention under these legislative measures was sought to be justified by the State. We must therefore pronounce upon the validity of such detention irrespective of the what new legislative measures have now been introduced. Our decision, if correct, may have the effect of giving the detenus valuable rights both under the criminal law and the civil law. We do not propose to deprive them of these rights by not pronouncing our judgment. Whether the detenus are now detained under any valid law is not a matter for consideration in the disposal of these Rules. We pronounce no opinion on the validity of such detention or upon the propriety of the conduct of the authorities in continuing a detention which we have pronounced to be illegal or upon the risks which the detaining authority may be taking upon themselves by detaining the petitioners under this new law in spite of our orders. That is a matter which may form the subject of further proceedings the results of which we

cannot anticipate.

32. It may be that in spite of all our efforts the petitioners will be re-arrested and sent back to custody. That is a matter with which we are not now concerned. Our duty is that of right action, the result and fruits of our action are not for us to consider. That must be left to that divine providence which controls the destiny of us all.

33. The citizens of the Republic have given great powers to the Judiciary. We recognise that great powers necessarily involve grave responsibilities, but we are not dismayed. It has always been the proud tradition of this Court to stand between the subject and any encroachment on his liberty by the executive or any other authority however high. It is a great tradition which we have inherited and we believe that this Court will be worthy of this inheritance. Amidst the strident clamour of political strife and the tumult of the clash of conflicting classes we must remain impartial. This Court is no respecter of persons and its endeavour must be to ensure that above this clamour and tumult the strong calm voice of justice shall always be heard. Fiat justitia ruat coelum.

34. Leave to appeal is granted under Article 132, Constitution Act.