PATNA HIGH COURT

Ratan Roy

Vs

State of Bihar

(Sinha, J. On Difference of Opinion Between Meredith, C.J. and Sarjoo Prasad, J.)

14.03.1950

JUDGMENT

Meredith, C. J.

1.This rule has been issued upon an application under Article 226 of the Constitution of India for a writ of habeas corpus in favour of one Ratan Roy, who was in detention under an order dated 19th January 1950, made under the provisions of Bihar Act III [3] of 1950. This Bench held recently in the case of Brahmeshwar Prasad, (Cri. Misc. No. 977 of 1949, decided on 14th February 1960) : (AIR 1950 Patna 265) that the detention provisions of Act in [3] of 1950 had become void from 26th January 1960, on the coming into force of the New Constitution. Consequently, if the matter had rested there, we would, without more, have had to pass an order for the release of the petitioner. But it appears that on the day following that judgment, namely, 15th February 1950, an Ordinance (Bihar ordinance No. II [2] of 1950 - The Bihar Preventive Detention Ordinance, 1950) was made and promulgated by the Governor of Bihar under clause (1) of Article 213 of the Constitution, and a fresh detention order was made under this Ordinance on 16th and served on the petitioner the same day.

2. Mr. Basanta Chandra Ghosh on behalf of the petitioner objected that the promulgation of the Ordinance had not been established before us on the ground that he, and, he said, some other subscribers to the Gazette, had not received the Gazette notification. But the Bihar Gazette (Extraordinary) of 15th February containing the Ordinance has been placed before us and it has, therefore, been properly proved under Section 78, Evidence Act. Whether or not all the subscribers received their copies can make no difference.

3. The position, therefore, is that we have to examine whether the detention of the petitioner is legal under the order made under this Ordinance. It is satisfactory to note that the Ordinance does not contain the various objectionable features which we pointed out in Act III [3] of 1950 and held were inconsistent with the provisions of Article 22 of the Constitution. Under this Ordinance, no person is to be detained for a longer period than three months unless an Advisory Board has reported, before the expiration of that period, that there is, in its opinion, sufficient cause for such detention. The Government is to place the case before the Advisory Board within six weeks of the date of detention, and the Board is to report to the Government within ten weeks of the date of detention. The Government cannot ignore that report, but must pass orders in

accordance therewith. The provision preventing the Court from calling for and examining the report is gone, and the provision that the detention shall not become illegal by failure adequately to communicate the grounds has disappeared. Nevertheless Mr. Ghosh has very strenuously attacked both the Ordinance and the order thereunder on a number of grounds. We have been sensible of the immense responsibility resting upon us in making first interpretations of the new constitution and deciding points of first impression, and we have, therefore, examined the arguments on both sides with the utmost care and anxiety.

4. Mr. Ghosh's arguments fall under three heads : (A) those directed to showing that the Ordinance is void; (B) those directed to showing that the order is illegal; and (C) those directed to showing that both the Ordinance and the order have been made in bad faith as devices to circumvent the order of this Court and to deprive the petitioner of the fundamental rights guaranteed by the constitution. I shall deal with these heads of argument one by one.

5. (A) - (1). An Order of the President under clause (7) of Article 22 of the Constitution, made and issued on 26th January 1950, by the President, was placed before us in Brahmeswar Prasad's case : (AIR 1950 Patna 265) and is in the following terms :

"MINISTRY OF LAW

> New Delhi,26th January 1950
> No. C. O. 8 - The following Order made by the President is published for general information :

THE PREVENTIVE DETENSION (EXTENSION OF DURATION) ORDER, 1950.

> In exercise of the powers conferred by sub-clauses (a) and (b) of Clause (7) of Article 22 of the Constitution of India read with Article 373 thereof and of all other powers enabling him in that behalf, the President is pleased to make the following Order, namely :
>
> 1. (1) This Order may be called the Preventive Detention (Extension of Duration) Order, 1950.
> (2) It shall come into force at once.
>
> 2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such parson may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of Clause (4) of Article 22 of the Constitution.
>
> 3. The maximum period for which any such person, as is referred to in para. 2 may be detained, shall, in the case of a person in detention immediately before the

commencement of the Constitution, be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order.
RAJENDRA PRASAD,
President."

6. Mr. Ghosh's first argument is that the Ordinance should have been made consistent with the terms of this Order, and not with the terms of Article 22 (4) unmodified by this Order, and the Ordinance, not being in accord with Article 22 (4) as modified by the Order, is void under Article 13 (2) of the Constitution. In his Order the President said that the maximum period for which "any such person" may be detained shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and, in the case of a person detained in pursuance of an order made after such commencement, three months from the date of such order. The petitioner was in detention before the Constitution came into force, but under the Ordinance he is to be detained for three months from the date of the order (16th February) which exceeds three months from the date of the Constitution coming into force by 21 days. Under Article 22 (4), proviso to sub clause (a), nothing in the sub-clause is to authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of Clause (7) and the President acting for Parliament, as he was entitled, has in his Order fixed a maximum period which in a case like this is three months from 26th January. Therefore, Article 22 (4) (a) does not authorize a law providing for three months' detention from the date of the order.

7. The answer to this contention is, in my opinion very clear. The President has not made an Order modifying Article 22 (4) or fixing a maximum period of detention in all cases. He has made an Order governing only a very limited class of cases. It is quite apparent from the wording of Clause 2 of his order that he is dealing only with cases and circumstances where a person is in detention under a law in force at the commencement of the Constitution. He speaks of any person who was immediately before the commencement of the Constitution or at any time thereafter in detention in pursuance of an order made under a law pre-existing the Constitution. He is dealing with only such persons as were or are detained under a pre-Constitution law, as one might put it and he says in Clause 2 that such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board. Clause 3 expressly relates only to such persons, the words used being "any such person as is referred to in para. 2," and, therefore, a maximum is fixed only in the case of persons detained under a pre-Constitution law. He is not dealing at all with post Constitution laws or persons detained there under, and he does not purport to fix any maximum for such cases. Therefore, in my opinion, the Government was quite clearly right in framing the Ordinance in accordance with Article 22 (4), and not in accordance with the President's Order. The petitioner is not now a person detained under Act III [3] of 1950.

8. Mr. Ghosh's next point under this head is one of great importance. His argument may be briefly put like this. Article 19 of the Constitution lays down the fundamental rights of citizens to freedom. It says that all citizens shall have the right, (d) to move freely throughout the territory of India, and (e) to reside and settle in any part of the territory of India. These rights involve personal liberty. The only limitation placed before them is that specified in Article 19 (5) which

says that nothing in sub-clauses (d), (e) and (f) of Clause (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by any of the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Therefore, these are the only restrictions on personal liberty. There may be such restrictions in the interests of the general public, but they must be reasonable. Therefore, any law which restricts the liberty of the subject must be a reasonable law, and it is open to the Courts in every case to apply the test of reasonableness and to hold the law void if they find it unreasonable. Judged by this test, the Ordinance is unreasonable and void because it provides for detention, not in reasonable circumstances, but when the Government is satisfied, and the Government may be either reasonably or unreasonably satisfied. If the Government expresses that it is satisfied, then that is the end of the matter. A person may be unreasonably detained under the Ordinance if the Government is unreasonably satisfied, and, therefore, the Ordinance is inconsistent with the fundamental rights laid down in Article 19.

9. It will be seen that the claim made is very sweeping indeed. It would mean that every law under which a person may be imprisoned, including all the provisions of the Penal Code, is open to examination by the Courts on the ground of reasonableness. It makes the Courts supreme arbiters in regard to any such legislation, and they can reject it or accept it in accordance with their ideas of whether it appeals to their reason. But ideas of reasonableness or otherwise are apt to vary widely. Take, for example, laws relating to prohibition ; or take such a matter as adultery which the Indian law regards as a crime punishable with imprisonment, but the English law does not. It is difficult to believe the framers of the Constitution ever intended to place so enormous a power in the hands of the Courts, and, in my opinion, if we read the Constitution as a whole, that is not the correct interpretation of Article 19 (f). I do not consider that Article 19 is concerned with personal liberty at all. It is not concerned with the right of every one to personal liberty, which is separately laid down for every person in Article 21. It is concerned only with the additional rights of citizens - rights described on the pre-supposition that they are at liberty. It is describing the rights of citizens who are legally at liberty, and not of those who may be imprisoned under a procedure established by law. Article 21 does not say that no person shall be deprived of his personal liberty except according to procedure established by a reasonable law. The limitation is in respect of laws, meaning all valid laws validly enacted, and not, in my opinion, merely such laws as the Courts decide to be in their opinion, reasonable. The various provisions of the Constitution must be read consistently, if possible. If we do not read Article 19 in the way I suggest, there are quite clear inconsistencies between it and the provisions in the Constitution which make certain laws non-justiciable. The power of the President to make Ordinances under Article 123 is not made to depend on reasonable necessity but on the President's satisfaction. Similarly with regard to the power of the Governor under Article 213. Or take Article 22 (4) : the criterion for the validity of detention for more than three months is not the existence of sufficient cause but the opinion of an Advisory Board that there is sufficient cause. It makes no difference under this Article whether that opinion is in the view of the Court reasonable or unreasonable. Article 19 (f) gives a fundamental right to acquire, hold and dispose of property, and the only restrictions on this are reasonable restrictions under Article 19 (5). But Article 31 (4) in certain cases makes laws non-justiciable in regard to acquisition of property without compensation, and similarly with regard to Article 31 (6). Again under Article 372 (2) the President may inter alia adopt and modify the existing laws which curtail personal liberty and such adoptions and modifications have been made non-justiciable. On Mr. Ghosh's interpretation

there are clearly inconsistencies in the Constitution, but on the interpretation I prefer those inconsistencies all disappear.

10. Mr. Ghosh's interpretation would involve another rather extraordinary result. Since the right to personal liberty for everyone is guaranteed by Article 21, with only a qualification that deprivation of it must be according to law, and, according to Mr. Ghosh, personal liberty is guaranteed to citizens under Article 19, with no restrictions save such as are held to be reasonable in the interests of the general public, it would follow that the reasonableness of a detention order can be challenged in the Courts in the case of a citizen but not in the case of anyone who is not a citizen. Could the framers of the Constitution have intended to qualify the jurisdiction of the Court in such a manner so as to make the powers of the Court depend on the character of the person before it? I repeat, that, in my opinion, on a true construction Article 19 was not intended to deal with personal liberty but only with certain additional freedoms of citizens on the pre-supposition that they are legally at large and I do not think the Ordinance can be successfully challenged on the ground put forward.

11. Mr. Ghosh's next argument is equally plausible and has equally required our anxious consideration. Under the Government of India Act, 1935, the subject of preventive detention was in the Provincial List, and though provisions in various Ordinances were frequently challenged on the score of being repugnant to provisions of the Criminal Procedure Code, the challenge always failed on this ground. But in the Indian Constitution preventive detention for reasons connected with the security of a State, maintenance of public Order, or the maintenance of supplies and services essential to the community, and persons subjected to such detention, has been removed from the State List to Concurrent List, and criminal law is also in the Concurrent List. The result is that when questions of repugnancy arise they have to be considered, not in the light of Article 246, which permits of the application of the rule of pith and substance, but under Article 254, which corresponds to Section 107, Government of India Act and is in similar terms. It was well settled that in cases of repugnancy falling under Section 107 the doctrine of pith and substance could not be utilised to validate a Provincial legislation conflicting with a Central legislation. The Privy Council in *Prafulla Kumar v. Bank of Commerce, Ltd., Khulna*[1], held that the pith and substance rule has no application to Section 107. That also was pointed out by a Calcutta Full Bench in *Jnan Prosanna v. Province of West Bengal*[2], See also *Megh Raj v. Allah Rakhia*[3], in deed the wording of Article 254, as was that of Section 107, is quite inconsistent with the application of the pith and substance rule. Article 254 (1) says in the clearest terms that if any provision of a law made by a state is repugnant to any provision of a law made by Parliament or any provision of an existing law with respect to one of the matters enumerated in the concurrent list, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the said law shall prevail, and the state law shall be void to the extent of the repugnancy. It deals not with laws as a whole but with particular provisions, and says in the plainest language that where any provisions conflict the provision in the state law shall be void. When the restriction is as to particular provisions, there is obviously no room for the doctrine of pith and substance which relates to the general purpose of the law. Moreover, there is no need for any such rule because Article 254, like Section 107, itself provides the means of avoiding the conflict. Under Article 254 (2) the state law is to be reserved for the consideration of the President, and, if and when the President gives his assent, it will prevail in the state, notwithstanding conflict with the central law or pre-existing law.

12. The learned Government Advocate has sought to escape from the position by pointing out that in the Concurrent List (List III) criminal procedure is item 2, and preventive detention is item 3, so that the framers of the constitution wish the two to be regarded as separate subjects. These, he says, are different fields of legislation and therefore, conflict between legislation in one field and legislation in the other can be dealt with on the pith and substance rule. But, in the first place, we have to decide for ourselves whether they are really different fields. They are not made different fields merely by the fact that they have been placed under separate headings. In point of fact, the Criminal Procedure Code also in Chap. 8 deals with preventive detention in certain circumstance?. In the second place, having regard to the wording of Article 254, it makes, in my opinion, absolutely no difference whether the two laws fall under the same item or under separate items so long as they are both in the Concurrent List.

13. Mr. Ghosh next points out that wherever a state law or provision therein would be void under Article 254 for not having been reserved for the President's assent, so also would an Ordinance made by the Governor in the same circumstances if it is made without instructions from the President. There is a proviso to Article 213 (1) which says that the Governor shall not, without instructions from the President, promulgate any such Ordinance if (a) a bill containing the same provisions would under this constitution have required the previous sanction of the President for the introduction thereof into the legislature; or (b) he would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President; or (c) an Act of the legislature of the State containing the same provisions would under this constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

14. It is quite apparent that, since it is not claimed that this Ordinance was made under instructions from the President, it would be void if it contains provisions repugnant to the Criminal Procedure Code. Mr. Ghosh confidently claims that there are repugnancies. The ordinance provides for arrest in circumstances other than those in
which a police officer is entitled to arrest under Section 54 or Section 55 of the Criminal Procedure Code and it also conflicts with the provisions of Sections 60 and 61, under which a police officer making arrest without warrant has to produce the person arrested before a Magistrate within twenty-four hours. It also provides for proventive detention in circumstances other than those allowable under Sections 117 and 123 of Chap. 8 of the Code. Mr. Ghose has the support of a Full Bench of the Calcutta High Court in *Jnan Prosanna v. Province of West Bengal*[4], where at p. 8, para. 34, the learned Sir Trevor Harries, C.J., has expressed the opinion that not only is there repugnancy but it would be impossible to frame a preventive detention ordinance without repugnancy.

15. The learned Government Advocate replies, in the first instance that, with regard to Sections 60 and 61, they must be taken to be overridden by the provisions of the constitution itself, which abrogate these safeguards in the case of a person detained under a law for preventive detention. Therefore, the repugnancy, if any does not matter, because Sections 60 and 61 must be read as qualified by the constitution. The provision in the constitution is Article 22 (3). Clauses (1) and (2) of Article 22 give an arrested person the right to be informed as soon as may be of the grounds of his arrest, the right to consult and be defended by a lawyer of his choice, and the right to be produced before the nearest Magistrate within twenty-four hours and not to be detained in custody beyond that period without the authority of a Magistrate. But Clause (3) says that

nothing in these clauses shall apply "(b) to any person who is arrested or detained under any law providing for preventive detention."

16. This argument is, in my opinion, correct, so we need not concern ourselves with any apparent repugnancy between the ordinance and Sections 60 and 61.

17. Next, with regard to Section 54, he points out that the ordinance contains no provision for arrest of persons to be detained. There may be a lacuna in the Ordinance in this regard. But, as it stands, it is perfectly consistent with the provisions regarding arrest in the Criminal Procedure Code. It may be that owing to the lacuna the arrest of a detenu by a police officer would be illegal as contravening Section 54, but the Ordinance provides for no such arrest and the illegality of the arrest would not make the subsequent detention under the Ordinance illegal.

18. I consider this argument unsound, because a provision for detention contains, by necessary implication, a provision for arrest on the grounds for which detention has been provided. I apprehend that the only reason why there are not specific provisions for arrest of the detenu in the Ordinance is because that has been left to be settled by order under Section 2 (3) of the Ordinance, which says that so long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the State Government may, from time to time, by general or special order, specify. For all practical purposes this is a provision for arrest of everyone against whom a detention order has been made. Moreover sub-sections (4) contains provisions for dealing with such a person who absconds or conceals himself,
and provides for the application to him of the processes of proclamation and attachment under Sections 87, 88 and 89, Criminal Procedure Code, despite the fact that under the Criminal Procedure Code such processes can only be used where a warrant has previously been lawfully issued and cannot be served. Therefore, in my opinion, this answer to Mr. Ghosh must be rejected.

19. But thirdly the learned Government Advocate suggests that there is actually no repugnancy, that the provisions of the Criminal Procedure Code were never intended to be exhaustive with regard to procedure for arrest, just as the Penal Code was never intended to be exhaustive with regard to offences, and numerous additional offences have been created under local or special laws. Therefore, the provisions in the Ordinance are to be regarded not as repugnant to those in the Criminal Procedure Code but as supplemental.

20. I must naturally attach the greatest weight to the opinion of the learned Chief Justice of the Calcutta High Court. But, nevertheless, with all respect to that opinion, I have after the most anxious consideration, come to the conclusion that it is not correct, and that, in the true view, there is (no?) repugnancy and, consequently, that this attack on the Ordinance must also fail.

21. It is to be noticed that Section 7 of the Ordinance says that its provisions shall be in addition to and not in derogation of, any other law for the time being in force. In view of this, the Government clearly does not contemplate or intend anything repugnant to the Criminal Procedure Code, and this might almost be called a provision that, if any repugnancy does inadvertently creep in, the Ordinance will automatically give way to the Criminal Procedure

Code in this respect.
22. Repugnancy can arise only when one law says "shall" and the other says "shall not." It does not arise when one law says "may in certain circumstances" and the other says "may also in certain other circumstances." The latter, in my opinion, is the true position as between the Criminal Procedure Code and the Ordinance. Section 5 (2), to my mind, clearly shows that just as the Penal Code was never intended to be exhaustive of offences, so the Criminal Procedure Code was never intended to be exhaustive of criminal procedure; for, it says that all offences under any law other than the Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. It is clear that under this provision a special law creating offences may also create special procedure for dealing with them, and I see no reason why the same principle should not be applied in regard to the procedure for preventive action contained in Chap. 8. Criminal Procedure Code. Section 114 empowers a Magistrate in certain cases to issue a warrant for the immediate arrest of a person who has not committed or is not suspected of having committed any offence. It relates only to cases where there is a danger of a breach of the peace. But it neither suggests not implies that there can be no other law providing for such action upon additional grounds. The same remarks apply to the provision for detention in custody contained in Section 117 (3) and the provisions for detention in Section 123. Section 55 enables a police officer to arrest for preventive purposes, and does not forbid such arrest in other circumstances under the provisions of some other law for preventive detention. Section 54 says that a police officer may arrest without warrant in certain circumstances. No doubt by implication it forbids him to arrest in other circumstances, though it does not expressly say so. But that is obviously only if and so long as there is no special or local law laying down additional circumstances in which he may arrest.

23. I am of opinion, that, just as the Penal Code does not prevent the creation of additional offences, so also the Criminal Procedure Code does not prevent the creation of additional procedures. As the Penal Code is not exhaustive of offences, so also Chap. 8, Criminal Procedure Code is not exhaustive of preventive detention, and, therefore, no question of repugnancy arises.

24. (4) Mr. Ghosh's next argument is based on the provisions in the Ordinance which create offences. He says that these are an integral part of the scheme of the Ordinance, and they have to go because the State Government has got no power to create offences against laws in respect of preventive detention. Therefore, the entire Ordinance has to go. Why has the State Government no such power ? Because both the Central and the State Lists contain an item covering offences against laws with respect to any of the matters in the respective Lists, but there is no such item in the Concurrent List. The item in List I (Union List) is item 93. The item in List II (State List) is item 64. Why, Mr. Ghosh argues, is there no corresponding item in the Concurrent List? Its omission shows that the framers of the Constitution did not intend that the State should be entitled to create offences under the Concurrent List. The idea was that these should be dealt with by the Centre under the residuary Article (Article 97 of List I) and Article 248 of the Constitution which reserves the residuary legislative powers to Parliament.

25. This argument, plausible as it is at first sight, is, in my opinion, unsound. I think it is sufficiently clear that items 64 and 93 were only inserted ex abundante cautela. The reason is that a number of the items in the Concurrent List are such that they obviously contemplate the

creation of offences; for example item 14 (Contempt of Court), item 17 (Prevention of cruelty to animals), item 18 (Adulteration of foodstuffs and other goods). How can these items in the Concurrent List be dealt with at all without the creation of offences ? The items in the Lists are to be given a broad and liberal interpretation and each item regarded as including ancillary matters; see *United Provinces v. Mt. Atiqa Begum*[5], Item 1 of the Concurrent List is Criminal Law. Surely, that must mean the creation of offences ? Moreover, a second feature about this item 1 is that it includes the Indian Penal Code, but excluding offences against laws with respect to any of the matters specified in List I or List II. Why is there is no provision excluding also offences against laws with respect to any of the matters specified in List III ? If Mr. Ghosh is correct, one would except those to have been excluded also.

26. I am unable to accept Mr. Ghosh's argument that the State Legislature and, consequently the Governor by Ordinance has no power to create offences, and, in any event, I am of opinion that the portions of the Ordinance creating offences are
severable from the portions providing for detention.

27. (5) Mr. Ghosh next attacks the Ordinance because it provides for detention for three months, and in certain circumstances for a longer period, if the Advisory Council so recommends. But, he says, such provisions are not only unnecessary, but also illusory, because the Ordinance could, in any event, last only for six weeks. Under Article 213 (2), an Ordinance like this ceases to operate on the expiration of six weeks from the reassembly of the Legislature. The Governor framed the Ordinance on 15th February. He knew then that the Legislature would meet next day, the 16th, for he had already summoned both Houses to meet, He knew, therefore, that the Ordinance would lapse after six weeks. What was the good of making provisions for three months or more?

28. Here again, in my opinion, it is merely a case of ex abundante cautela. Some unexpected crisis might conceivably prevent the Legislature from meeting. Mr. Ghosh replies that the Governor can always frame another Ordinance at the end of six weeks; but difficulties might arise with regard to successive Ordinances. This argument ignores the fact that, if for any reason the Legislature did not meet, the Ordinance would not expire at the end of six weeks, but would continue and it was, therefore, only right and proper to frame it in such a way as to be suitable for its continuance in such circumstances. Even if we hold that there was in fact no justification for making provisions of this kind, that would not make the Ordinance invalid or void so long as the Governor was satisfied, however mistakenly, that the circumstances required such provisions, and said so.

29. (6) I now come to the ground of attack which has caused me personally most difficulty and anxiety. It is that the Preamble to the Ordinance does not show that the necessary conditions for its promulgation, as required by Article 213, really existed. The conditions for the promulgation of an Ordinance as set out in Article 213 (1) are :

> "If at any time, except when the Legislative. Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

30. The Preamble to the Ordinance is in these terms :

> "Whereas the Houses of the Legislature of the State of Bihar are not in session ;
> and whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to provide for the preventive detention in connection with the public safety.... and maintenance of public order is in the State of Bihar :

Now, therefore, in exercise of the powers conferred by Clause (1) of Article 213 of the Constitution of India, the Governor is pleased to make and promulgate the following Ordinance."
31. For a valid Ordinance, two conditions are necessary under Article 213; (1) that the Governor is satisfied that circumstances exist which require immediate action, and (2) that in his opinion the circumstances require such an Ordinance as he promulgates. The preamble makes it clear that the first of these conditions is satisfied. It is stated that the Governor is satisfied of the necessity of immediate action. But the second condition is not satisfied. The Governor has not stated, as he should have done, that in his opinion the circumstances required an Ordinance in these terms. The preamble should have been : "And whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to provide for preventive detention in connection with the public safety and maintenance of public order in the State of Bihar; and whereas these circumstances, in the opinion of the Governor, requires the promulgation of an Ordinance in the following terms; now, therefore etc., etc."

32. This point at first glance may appear highly technical or even trivial. Yet, in my opinion, this is the rock upon which this Ordinance must founder. A slender pinnacle of rock is sometimes the sharpest and most effective in sinking the ship. We are apt to lose sight of the importance of the point simply because we almost inevitably think of the matter in the light of the existing circumstances and the existing Ordinance, and find it difficult to ignore the fact that the present Ordinance is quite clearly one appropriate to the circumstances. That, however, is a wrong line of approach. We have to consider the question in the light of all possible circumstances and all possible Ordinances, for we have to give an interpretation of the Constitution which is equally valid for all circumstances.

33. The Courts are the guardians of the fundamental rights of the people. Where a Constitution contains provisions curtailing the fundamental rights previously set out therein in general terms, it is absolutely vital for the Courts to see that any law embodying the curtailment is most strictly in accord with the constitutional provisions for such curtailment, and that every safeguard which the constitution does contain is most rigidly insisted upon and enforced. That is all the more so when the Court is debarred from examining the reasonableness of the law, and is allowed only to apply formal safeguards within a rigidly limited field. Such is the case here. Quite certainly the framers of the constitution did not contemplate under Article 213 that in certain circumstances of emergency the Governor, that is to say the Government should be at liberty to frame any sort of Ordinance he pleased. For example, suppose an emergency arises owing to flood, and taking advantage of the existence of this emergency the Governor frames an ordinance to the effect that all blue-eyed babies shall be strangled at birth. Such an ordinance would be wholly unreasonable, but the Courts are debarred from declaring it void on the ground of unreasonableness. Yet the

Courts are not wholly debarred from questioning it. A slender safeguard is provided for the existence of the emergency, and a second slender safeguard is provided to ensure that the ordinance will be appropriate to that emergency; to ensure that the Governor shall not take advantage of the existence of an emergency of one kind to issue an ordinance which the circumstances do not at all require. The safeguard in each case is that the Governor, that is again to say, the Government the Governor being constitutional shall have honestly applied his mind in both respects, and shall say so, so that the Courts may have some means of verifying that the mind of the Governor has in fact been applied. In other words, there must be a certificate by the Governor - a certificate which shows that he has applied his mind to the matter and has honestly formed an opinion - a *bona fide* opinion, that not only do the circumstances require immediate action, but the circumstances also require such an ordinance as he promulgates.

34. It may be said that the Government will be composed of reasonable beings, and would not be likely to frame an ordinance irrelevant to the circumstances. We can make no such assumption. The fact that we may have at this particular time or at any time a Government composed of reasonable men is no warrant for assuming that that always will be so. We have to bear in mind the possible case of a Government of unreasonable tyrants which might take advantage of the existence of an emergency to issue a tyrannical and unjust ordinance, not at all required. But then, it may be said in such circumstances there is no safeguard for such a Government might falsely say that in its opinion the circumstances required the action taken. The safeguard may be slender, but it is not nugatory because the Courts can always enquire if mala fides have become apparent, and it might well be that a Government unscrupulous enough to make an emergency an excuse for unjust action might yet hesitate and the Governor at the head of it, however constitutional, might even more hesitate, to give a formal certificate implying honest examination of the circumstances and the formation of an honest opinion. Moreover, the more slender the safeguard, the more rigorously must the Courts examine it and apply it.

35. To all this the learned Government Advocate replies that the preamble in this case does embody the second safeguard also because the Governor says that he is satisfied not only that circumstances exist requiring immediate action, but requiring immediate action to provide for preventive detention in connection with the public safety and maintenance of public order. That, in my opinion, is not enough and is not a compliance with Article 213. It shows that the Governor is satisfied that a preventive detention Ordinance is necessary, but not that he is satisfied that this particular preventive detention Ordinance is necessary - that an Ordinance in these particular terms is required; for example, that provisions for three months' detention are required rather than six weeks.

36. An example will make this clear, if we are to test the validity of the preamble. We must clearly consider below if not this particular preventive detention Ordinance, but any possible preventive detention Ordinance we can think of. Suppose the preamble had been followed by an Ordinance to the effect that all persons wearing beards would be detained. This is by no means so absurd as it sounds. Such a measure has not always been too ridiculous for Government to contemplate; for example. Peter the Great of Russia put a tax upon beards, and every bearded man in his dominions had to wear a disc attached to the beard to show that he had paid his tax. If this is the Ordinance before us, must we uphold it on the terms of this particular preamble? Quite obviously not. It would be a proper case for declaring the Ordinance void because the certificate was not there that in the opinion of the Governor the circumstances required it. If that is so, we

must reject the present Ordinance, however reasonable it may appear, upon the very same grounds. As I have said, it is our duty to give an interpretation of the Constitution in most general terms. In the light of all possible cases, and in my opinion, it is vital when the safeguards are so slender that we should adopt the interpretation I have indicated, it is vital in the interests of the preservation of the fundamental liberties of the people, and the Courts must not swerve from their duty merely because it may involve nullifying provisions which in the particular case before them may happen to be reasonable and proper.

37. As I have now held the Ordinance is void as not satisfying the conditions laid down in Article 213 for its promulgation, it will suffice to deal very briefly with Mr. Ghosh's remaining points.

38. (b) Mr. Ghosh has argued that the order has not been properly authenticated because it is only signed by an under-Secretary and under Article 166 (2) of the Constitution, orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. When Mr. Ghosh made this point no such rules had been placed before us and we were asked to rely upon the old rules under Section 59, Government of India Act. But during the hearing, a gazette notification of 26th January, containing new rules for authentication under Article 166 was placed before us and under those new rules the authentication is in order, so there is nothing in this point.

39. (c) Mr. Ghosh attacks both the Ordinance and the order on the ground of mala fides. He argues that the State of Bihar cannot by the device of making successive laws or orders, each lasting three months, deprive a citizen of the right given under Article 22 (4) (a). I am prepared to hold that in some circumstances successive laws or orders might have to be declared illegal as colourable devices to evade constitutional provisions, but I am clearly of opinion that there is nothing of the sort in the present case. It is quite patent that this Ordinance was framed in view of the fact that this Court had just declared that Act in [3] of 1950 had become void. Had such action not been taken, a large number of persons might have had to be released whom Government considered it necessary to detain in the interest of public order and safety. Such being the object of the Ordinance, its effects are irrelevant. For in considering the question of *bona fides* or mala fides we are concerned only with the motive and not the results. It is necessary also to point out that in framing an Ordinance or a detention law it has to be made suitable for dealing with fresh detenus. So far as the law is concerned, there is another aspect of the matter. There is no question here of successive laws or successive Ordinances because this is the first occasion on which an Ordinance has been issued under the new Constitution. Article 22 (4) embodies a substantive right; it is not only a matter of procedure. Therefore, it is not retrospective in the absence of any express provision, to that effect. Therefore, anything which may have happened before the Constitution came into force is irrelevant. There is, therefore, no question of any mala fides so far as the Ordinance is concerned. As for the order it is true that the petitioner has been in detention under successive orders for a long time. But it would be too much to hold that all that has occurred in his case is the result of dishonest machinations to deprive him the benefit of consideration of his case by the Advisory Council. From an affidavit filed by Government it appears that his case was referred to an Advisory Council. The Council submitted a report which was certainly not a proper one. Instead of expressing a specific opinion on his case, it merely laid down a general rule, suggesting that the Government should deal with his and other cases in accordance with the rule in the light of the materials they had in each case. The Government then sent the case back for a definite report regarding each detenu. There was

nothing at all wrong with that. Before a fresh report could be submitted, the Advisory Council ceased to exist, either by resignation of some of its members : becoming ineligible under the new provisions of Act III [3] of 1950. There is no reason to suppose that Government was not taking steps to form a new Advisory Board as quickly as possible and to refer his case to it, and it may be assumed that Government would under the new Ordinance have taken steps as promptly as possible to see that his case was again referred to an Advisory Council. It seems to me that the petitioner has merely been a victim of circumstances. Circumstances mainly resulting from the facts that the original Act was declared ultra vires by the Federal Court, then an Ordinance was declared invalid and had to be replaced, and finally Act III [3] of 1950 was declared void. There is nothing in the case sufficient to establish any bad faith on the part of Government.

40. Mr. Ghosh argues that from the point of view of Criminal law, under Section 52, Penal Code, nothing can be said to be done in good faith which is not done with due care and attention. Admitting that to be so, I am still of opinion that bad faith has not been established. I do not think it shows want of due care and attention in the sense of bad faith that Government did not foresee the fate of the various Acts and Ordinances. In the case of Act III [3] of 1950 it was not for anything done by the local Government but for a defect in the procedure adopted by the Centre that we declared it void.

41. The fact that in this Ordinance Government took steps to remove all the objectionable features pointed out by this Court in Act III [3] of 1950 is itself indicative of *bona fides* and not of anything to the contrary.

42. Holding however as I do that the detention is under an invalid Ordinance, I would order the immediate release of the petitioner.

Sarjoo Prasad, J.

43. I have examined the judgment prepared by my Lord the Chief Justice with all the care and attention which his judgment pre-eminently deserves. I am glad to find myself in complete agreement with him on all the other points discussed in that judgment except one, on the basis of which his Lordship has held that the Ordinance is invalid, and, in consequence, the order of detention passed thereunder is illegal. It is hardly necessary for me to mention that all the various lines of argument advanced at the Bar or arising in course of our discussion have been lucidly formulated, comprehensively examined and satisfactorily answered, and I feel that I cannot improve upon the discussions contained in the judgment of my learned brother on these points. I will, therefore, content myself with a consideration of the point on which the difference has arisen, namely, the point of promulgation of the Ordinance, that is, Bihar Ordinance II [2] of 1950, under which the present order of detention has been passed against the petitioner. I regret to have to say that I cannot persuade myself to hold that the Ordinance is invalid because it has not been properly promulgated.

44. The Ordinance in question has been promulgated by the Governor of the State of Bihar in the exercise of the powers conferred on him by Clause (1) of Article 213 of the Constitution of India. Article 213 provides that when the Legislative Assembly of a State is not in session, or where there is a Legislative Council in a State when neither of the Houses of the Legislature are in session, the Governor is entitled to promulgate Ordinance; but before he does so, there are two

conditions necessary: first is that the Governor should be satisfied that circumstances exist which render it necessary for him to take immediate action, and second is that he may promulgate such Ordinances as the circumstances appear to him to require. It is argued that in order that this promulgating power be exercised by the Governor both the circumstances must be found to exist. He should be satisfied not only that the circumstances render it necessary for him to take immediate action but also that the Ordinances promulgated by him are such as the circumstances appear to him to require. A reference is accordingly made to the preamble of the Ordinance in question and it is argued that the preamble does not fulfil both the aforesaid requirements of Section 213 of the Constitution Act. The argument is that the preamble only mentions that the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action" to provide for preventive detention but the preamble does not show that the Governor considered that the circumstances appeared to him to require the promulgation of this Ordinance. I am afraid this argument does not commend itself to me. Reading the preamble as a whole, it is quite clear that it fulfils the requirements of Article 213 of the Constitution of India. It says, in the first place, that the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action. If it had only stopped with this observation, and thereafter proceeded to say that in exercise of the powers conferred under Article 213 of the Constitution of India, the Governor is pleased to make and promulgate the Ordinance, there might have been something to be said in support of the argument. But it does not stop there; it proceeds to say in the second place that the immediate action is necessary "to provide for preventive detention in connection with the public safety and maintenance of public order in the State of Bihar" and then it goes on to say that the Governor is pleased to make and promulgate the following Ordinance, - the terms whereof are for preventive detention. From this it is quite clear that the Governor was satisfied in regard to both the factors and considered that the circumstances appeared to him to require the promulgation of this Ordinance. Even if something more is to be added to the preamble in question, it would not, in my opinion, improve the situation or make any substantial difference. On the other hand, it might lead to tautological inaccuracies. Considering the preamble in its entirety, it appears to me that both the requirements of Article 213 have thus been completely fulfilled.

45. It must be, however, remembered that even if the preamble had been defectively worded, it could not be said that the terms of the Ordinance would be rendered nugatory, provided always that the conditions required by Article 213 existed for the promulgation of the Ordinance. Article 213 does not require that the conditions which render it necessary for the Governor to act in promulgating the Ordinance must be specifically stated in the preamble, or that it must be incorporated in the body of the Ordinance itself. The preamble might have only mentioned that in promulgating the ordinance the Governor purported to act under Article 213 of the Constitution of India, and thereafter the terms of the Ordinance may have been mentioned. Even then, in my opinion, it could not be said that the legislation was invalid, or that the promulgation of the Ordinance was illegal provided as I have said the circumstances which rendered it necessary for the Governor to act did exist. The Judicial Committee of the Privy Council when dealing with an ordinance promulgated by the Governor-General under para. 72 of Schedule IX, Government of India Act, 1935 observed that

> "the paragraph does not require the Governor-General to state that there is an emergency or what the emergency is, either in the text of the Ordinance or at all and assuming that he

> acts *bona fide* and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists." See *Emperor v. Banaori Lal*[6].

The power which is vouchsafed to the head of the State to act for purposes of emergency in promulgating an Ordinance cannot be affected merely because he does not state in clear terms in the Ordinance itself the circumstances which have rendered it necessary for him to act in the exercise of that power. In all such cases it is for the Governor alone to decide in the forum of his conscience whether he has reasonable cause to be satisfied of the necessity of promulgating an Ordinance of the nature promulgated by him. I may refer in this connexion to a passage in the judgment of the then Chief Justice Sir Clifford Agarwala where he says: "The true meaning of the observation relied upon by the learned Advocate is that when an enactment requires an offices to be satisfied about the existence of a particular state of things before taking action, his satisfaction i.e., his mental state, must be accompanied by an element of reasonableness, determined however by himself i.e., the officer's mind to him a kingdom is Roma locuta causa finita est." *Basanata Chandra v. Emperor*[7], The circumstances which are required to exist within the meaning of Article 213 might, if necessary, properly be considered in determining whether an emergency has arisen. But as it has been pointed out, in several cases the question whether an emergency exists at the time when an Ordinance is made or promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Judicial Committee in *Bhagat Singh v. King-Emperor*[8], and has been affirmed and reiterated in subsequent decisions.

46. I have approached the problem purely from the legal stand point, and I have also purorted to act upon the assumption that if there are two interpretations possible of a provision in the Constitution Act, the one which leans in favour of the liberty of the people should be adopted in preference to the one which purports to curtail that liberty. I am not forgetful of the fact that Courts are guardians of the fundamental rights of the people, and that the fundamental rights guaranteed to the people under the Constitution must be scrupulously upheld and safeguarded. But it must be remembered that Article 213, Constitution Act is intended to deal with emergency legislations where the Governor finds immediate action is necessary. In such cases of emergency, where the security of the State is in danger and the maintenance of public order is essential the head of the executive in every country has been allowed a certain amount of latitude, and the ordinary rules of interpretation which apply to legislations in general are not so freely applied. I may in this connexion quote from a decision of Viscount Maugham of the House of Lords in the famous case of *Liversidge v. Anderson*[9], The quotation runs as follows :

> "Before dealing with the consideration of the regulation it is desirable to consider how the matter should be approached. The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to the Magna Carta and the Bill of Rights and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown. Adopting the language of Lord Finlay, L. C. in this House in *Rex v. Halliday*[10], I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is invovled. My Lords, I think we should approach the construction of Regulation 18B of the General Regulations without any general presumption as to its meaning except the universal presumption, applicable to orders in

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

47. This shows that (in?) the cases of such emergency legislations the safety of the State is the primary consideration and a construction should be given to the legislation which may have the effect of carrying out the purpose of the legislation and not defeating that purpose.

48. There is no presumption against the *bona fides* of the head of the State. On the contrary the Constitution Act itself has vested him with these emergency powers, and by reason of his position he is entitled to public confidence in his capacity and integrity. Besides, as my learned brother has himself pointed out the Governor is not a despotic Governor, he has to act upon the advice of his ministers who in turn are the representatives of the people. He is, in promulgating this legislation, answerable to the legislature. In fact the Ordinance has no effect and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, vide Article 213 (2) (a). That being so, as Lord Wright stated in the same famous case of *Liversidge v. Anderson*[11] already mentioned above,

> "If the sense of the country was outraged by the system or practice of making detention orders or indeed, by any particular order, it could make itself sufficiently felt in the Press and Parliament to put an end to any abuse and Parliament can always amend the Regulation" in my opinion, this argument
> applies with equal force to the powers exercisable by the Governor under
> Article 213 of the Constitution of India, and I do not see how the Governor can act as a despot even if he intended to do so.

49. The Constitution appears to have provided a further safeguard in that it has placed preventive detention for reasons connected with the security of the State and maintenance of public order, etc., in the Concurrent List. The Indian Parliament, therefore, or the President of the Indian Union may also act to frame laws in connection with this matter and may continue to exercise wholesome check upon the Governor of the State or States concerned. In any case it seems to me that even if a particular Governor exercising his powers under Article 213 chose to act as a despot and if the checks suggested above are ineffective, there would be nothing to prevent him from falsely asserting in the preamble that in his opinion he was satisfied that circumstances appear to him to require the promulgation of an Ordinance of a particular character. I do realise that the interpretation which we are giving to Article 213 has a far reaching effect, and in giving our interpretation we are not to consider whether a particular Governor or a particular Government is reasonable or unreasonable. But speaking for myself, I have absolutely no mis-givings on the point that if the Governor happens to act grossly and manifestly in an unreasonable and unjust manner. Courts would be so powerless as not to check the wrong or to protect the liberty of the people.

50. I have of course held that under Article 213 it is for the Governor to be satisfied that

circumstances exist which render it necessary for him to act immediately, and that the circumstances require the promulgation of a certain kind of Ordinance. It is true that where the Governor is so satisfied, it may not be open to a Court of law to examine the basis of such satisfaction. In other words, it may be true that Courts could not apply any objective test to the reasonableness of the cause, and it may not be open to us, therefore, to examine the sufficiency of the Governor's reasons but only the fact of his satisfaction. The object of precluding Courts from applying an objective test is quite obvious. In many cases the Governor may be acting on information of the most confidential character which may not be disclosed on grounds of public policy. This privilege of Government cannot be doubted and in fact such a privilege has always been conceded and must be conceded to high officers of State when they are acting in public interest. As I have said there is certainly no presumption in favour of bad faith, dishonesty or fraud, least of all when they are attributed to an Officer of the State, and above all the head of the State as in the present case. The law presumes that ordinary standards of truth and honesty have been observed until the contrary is shown by evidence incompatible with such standards.

51. But it must also be remembered at the same time that wherever a legislation uses the word "satisfied," it must mean reasonably satisfied. I again quote for my authority the decision of the House of Lords in *Liversidge v. Anderson*[11], In that case Lord Wright pointed out "satisfied" must mean "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. It is, therefore, quite obvious that if it is found on the very face of an Ordinance that it is an irrational and an unreasonable
piece of legislation, a Court of law would certainly be entitled to hold that the legislation is invalid and pronounce against its being enforceable. My learned brother himself points out : "Courts can always enquire if mala fides have become apparent." It might well be that a Government may be unscrupulous enough to make an emergency an excuse for unjust action and may promulgate an Ordinance which may be on the very face of it inconsistent and unwarranted by the emergency in question and may be on the face of it so unreasonable as not to appeal to any rational individual. In those cases, in my opinion, the Court would be always entitled to declare that the Ordinance is illegal. The illustrations, therefore, suggested in the judgment of my learned brother do not cause me any embarrassment as I am not prepared to go to the length of holding that even though a particular Governor may act quite unreasonably and in complete violation of the terms of Article 213 of the Constitution, the Court of law may yet sit quietly over it and see that injustice being done. In my opinion, that is never the purpose of Article 213 of the Constitution. Such a legislation would be declared void on the ground of mala fides and as being wholly unreasonable on the very face of it.

52. For these reasons I cannot bring myself to hold that the promulgation of the Ordinance is illegal, and in my opinion, therefore, the Ordinance is not void.

53. I have already said that I respectfully agree with the decision on all the other points referred to in the judgment of my learned brother. I would only wish to add just a few words on the attack made against the Ordinance and the order of detention on the ground of mala fides which rested on the contention that the making of successive laws or orders was a device to defeat the fundamental rights guaranteed under Part III of the Constitution of India. I am doing so because I hold rather stronger views on the question. I consider that it is not open to any State to play with the life and liberty of its citizens and in providing legislation for preventive detention it must always pay due care and attention so that the legislation so enacted or promulgated is beyond

exceptions. A State must, therefore, exercise due care and attention in framing all such laws and legislations lest it may be accused of bad faith on account of any hasty or ill-advised move taken in that direction. Successive legislations and orders of detention passed under legislations which have ultimately to be abandoned as found to be defective and void on technical grounds may in most cases lead to the unfortunate result of detaining a person for a period much beyond that contemplated by Article 22 of the Constitution of India. A state must, therefore, guard against any such unfortunate action. I am, however, satisfied that in the present case for the reasons assigned in the judgment of my learned brother, there are no mala fides at all, either in regard to the promulgation of the Ordinance or in regard to the order of detention passed against the petitioner.

54. There is only one other fact to which I think I must refer before I conclude my judgment. It has been pointed out that criminal law including all matters included in the Penal Code is item 1 in the concurrent list, whereas preventive detention for reasons connected with the security of the State and the maintenance of public order, etc., is item 3 in the concurrent list. Both these items, therefore, are in one and the same list. A question arose whether the rule of pith and substance could be applied to such a case where the fields of legislations are undoubtedly distinct and separate, yet they come under the same list, namely the concurrent list. The term "pith and substance" is not a term of art but a term of convenience, and speaking for myself, I do not see why this rule cannot be applied to a case where the two fields of legislation are distinct and separate though in regard to certain incidental matters a legislation which in pith and substance deals with a particular field may casually encroach upon a different subject-matter. It is however unnecessary to decide the matter for the purposes of this case. We find here that Section 5, Penal Code shows that it is not exhaustive and it makes a saving in respect of any special or local law; so is the case with the Code of Criminal Procedure under Section 5 (2). The Ordinance itself under Section 7 provides that it shall be in addition to, and not in derogation of, any other law for the time being in force. In my opinion, therefore, as it has been already held by my learned brother, there is no scope for the application of Article 254, Constitution Act in this case.

55. In the result, I find that the Ordinance has been validly promulgated. I also find, in agreement with the decision of my learned brother, that there is no other illegality in the Ordinance or in the order of detention passed against the petitioner. That being so, in my opinion, this application fails, and the rule issued in favour of the petitioner must be discharged. [On a difference of opinion between Meredith, C.J., and Sarjoo Prasad, J., on the question whether the Bihar Ordinance II [2] of 1950 was validly promulgated, the matter was placed before Sinha, J.]

Sinha, J.

56. The Bench consisting of the Chief Justice and Sarjoo Prasad, J., which heard the application, a writ of habeas corpus, having differed on the question whether, in promulgating the Bihar Preventive Detention Ordinance (Bihar Ordinance II [2] of 1950), the Governor had complied with the terms of Clause (1) of Article 213 of the Constitution of India, the matter has been placed before me as the third Judge. His Lordship the Chief Justice is of the opinion that the conditions laid down in the said article had not been satisfied, and that, therefore, the Ordinance was void. His Lordship Sarjoo Prasad, J., on the other hand, is of the contrary opinion. On all other questions raised on behalf of the petitioner, their Lordships agreed. Hence, the only question which was referred to me is "whether the Ordinance has been validly promulgated."

57. Mr. B.C. Ghosh, appearing on behalf of the petitioner, expressed his intention of arguing the whole case before me, and not only the particular question on which their Lordships had differed. I stopped him from doing so, and informed the counsel for the parties that I proposed to hear them only on the question referred to me. Hence the arguments before me have been confined to the question of the validity of the Ordinance with reference to the preamble.

58. The terms of the preamble to the Ordinance have been quoted in extenso in the judgment of his Lordship the Chief Justice. Hence, it is not necessary to repeat them here. The learned Chief Justice has held that the preamble is defective in so far as it does not state that, in the Governor's opinion, 'the circumstances require the Ordinance to be promulgated in the particular terms in which it has actually been made. Sarjoo Prasad, J., on the other hand, has taken the view that the preamble, read as a whole, was enough to satisfy the conditions laid down in Article 213 (1) of the Constitution of India. I have gone through the judgments of their Lordships more than once, and, in my opinion, the view taken by Sarjoo Prasad, J., is the correct one. In the first place, the article does not require that the Ordinance to be promulgated by the Governor has to state in so many words that the Governor was satisfied as to a certain state of affairs. In the second place, all the paragraphs of the preamble read together would show that the Governor was satisfied in terms of Article 218 (1) of the Constitution of India. In my opinion, his Lordship the Chief Justice omitted to consider the full force of the word '"therefore" in para. 3 of the preamble, which word incorporate the matters on which the Governor was satisfied, namely, (1) the existence of circumstances necessitating immediate action, and (2) provision for preventive detention leading up to the making of the Ordinance, in exercise of the powers conferred by Clause (1) of Article 213 of the Constitution of India. If the word "therefore" were given its full force, it becomes absolutely clear beyond a shadow of doubt that the Governor was promulgating the Ordinance in question being compelled by the necessity of the circumstances to do so. As I agree generally with the reasons given by his Lordship Sarjoo Prasad, J., it is not necessary for me to repeat them over again.

Rules discharged.

Cases Referred.

[1]74 IA 23 at p. 38 : (AIR 1947 PC 60)
[2] AIR 1949 Cal1 Para 45 at p. 10" (50 Cr LJ 1 FB)
[3]1942 FCR 53 at page 58 : (AIR 1942 PC 27)
[4] AIR 1949 Cal 1 : (50 Cr LJ 1 FB)
[5] AIR 1941 FC 16 : (ILR (1941) Kar FC 72)
[6] AIR 1945 PC 48 : 72 IA 57 : (46 Cr LJ 589)
[7]23 Pat 968 at p. 980 : (AIR 1945 Pat 44 FB)
[8]68 IA 169 : (AIR 1931 PC 111 : 32 Cr LJ 727)
[9]1942 AC 206 : (1941-3 All England Reporter 338)
[10](1917 App Cas 260, 271) 11(1942 AC 206 : 1941-3 All England Reporter 338)
[11]1942 AC 206 : (1941-3 All England Reporter 338)