PATNA HIGH COURT

Brajnandan Sharma

Vs

State of Bihar

Misc. Judicial Case No. 29 of 1950

(Meredith, C.J. Shearer and Das, JJ.)

29.03.1950

JUDGMENT

Meredith, C.J.

1. This is an application on behalf of one Brajnandan Sharma under Article 226 of the Constitution of India for a writ preventing the Government from enforcing an order under clause (b) of sub-sections (1) of Section 2, Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950) restricting the petitioner's movements by forbidding him from going to any place in the districts of Singhbhum and Manbhum. The order is in the following terms :

> "Government of Bihar
> Political Department
> Special Branch
> Patna, 6th January 1949.
> ORDERS 3 No. C.E. Whereas the Governor of Bihar 62(4)/48 is satisfied with respect to the person known as Shree Brajnandan Sharma, son of Shree Ayodhya Prasad Sharma of village Dabaul P.S. Hilsa, district Patna at present Jamadova P.S. Jorapokhary, Dhanbad, that with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of the public order it is necessary to make the following order :
> Now, therefore, in exercise of the powers conferred by Clause (b) of sub-sections (1) of Section 2, Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950) the Governor of Bihar is pleased to direct that the said Shree Brajnandan Sharma shall not with effect from the date of service on him of this order be in any place in the district of Singhbbum and Manbhum.
> By order of the Governor of Bihar,
> Sd. B.K. Dutta.
> Under Secretary to Government."

2. This order is dated 6th January 1949, but that is obviously a clerical error for 6th January

1950, when in fact the order was passed. It was thus, passed before the New Constitution came into force on 26th January, and Mr. Awadhesh Nandan Sahay, who represents the petitioner, concedes that he could not successfully challenge the order before 26th January. His contention is, however, that on the Constitution coming into force, the restrictive provisions in Act III [3] of 1950 and also the order passed thereunder became void under Article 13 (1) of the Constitution read with Acts. 19 (1)(d) and 19 (5). Article 13(1) says :

> "13 (1). All laws in force in the territory of India Immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void."
> Article 19 (1) provides :
> 19 (1). All citizens shall have the right -
> * * * * *
> (d) to move freely throughout the territory of India." Article 19 (5) is in these terms :
> "19 (5). Nothing in sub-clauses (d), (e) and (f) of the said clause 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 the said sub-clauses either in the interests of the general public or for the protection of the interest of any scheduled tribe."

It is contended that the provision for restricting an individual's movements contained in Section 2 (1) (b) of the Act is not reasonable because it provides for order not on reasonable grounds, but on the satisfaction of the State Government which may be reasonable or unreasonable. But that, in any event is a subjective matter in regard to which upon the terms of the Act the Courts cannot apply on objective test of reasonableness. Moreover, the Act does not even make it obligatory on any particular individual to satisfy himself, and merely involves the satisfaction of some unknown individual official, purporting to represent the Government. The order purports to express the satisfaction of the Governor, but admittedly the Governor personally has nothing to do with it. It is the order of the Government in his name. (We are informed by the learned Advocate-General that in fact in such cases the satisfaction is that of the Chief Minister, who himself considers and approves the order). Next, the Act does not provide any opportunity to the petitioner to vindicate himself, or challenge the order, or even to learn the reasons for the order. It provides no remedy for an unreasonable order, and does not even provide for the service upon him of the grounds for the order as in the case of detenus. The order itself does not set out the grounds on which it was made and gives the petitioner no opportunity to challenge it in the Courts. The petitioner asked for the grounds on 19th January, but received no reply. The present application was made on 9th February and a rule was issued on the 14th. On the 10th February, directly after this application was filed, the petitioner received a letter stating that the grounds for the order were "Repeated incitement to violence." No particulars were given, but merely this vague and general statement.

3. Secondly, Mr. Sahay contends that whatever may be said about the Act, there were, in any case, no reasonable grounds for this order. The petitioner had not done anything to merit it. It was passed mala fide because the petitioner was the General Secretary of the Tatas Collieries Labour Association, which was registered as a Trade Union as far back as 1930 and duly recognised by

the employers, the Tata Iron and Steel Company Limited, and the Government was trying to support a rival Trade Union under the auspices of the Indian National Trade Union Congress (I. N. T. U. C.).

4. In my opinion, we are alone concerned with the validity of the restrictive provisions contained in the Act. We are in no way concerned with the merits of the particular order and cannot enter into them. The wording of the Act does not entitle the Courts to consider the order on its merits; nor do the provisions of Article 19 (5). The wording of Article 19 (5) makes it quite clear that the words "reasonable restrictions" refer to the law itself, and not to orders passed under the law. The clause speaks of any existing law in so far as it imposes reasonable restrictions, and the making of a law imposing reasonable restrictions. If the law is valid, there appears to be nothing anywhere in the Constitution, or in the particular Act itself, enabling the Courts to consider the merits of the order. The Courts, of course, on general principles, can always upset an order on the ground of mala fides. But when the Court is prevented from going into the merits, it is for all practical purposes impossible to consider whether the order is in fact *bona fide* or mala fide. On the other hand, if the restrictive provisions in the Act are void, quite obviously the order made thereunder is void, so that, in short, the sole question is the validity of Section 2 (1) (b) of the Act.

5. It is apparent on the face of it that the provision does represent an interference with the fundamental right guaranteed by Article 19 (1) (d). A citizen (and it is not contended that the petitioner is not a citizen) is entitled to move freely throughout the territory of India. But under the provision in the Act, the Government can, and has, made an order preventing him from going into two districts. The freedom of movement is restricted to that extent. Therefore, there is no escape from the position that under Article 13 (1) this provision became void on 26th January unless it is saved by Article 19, Clause (5). During the existence of a state of emergency it might be saved under Article 358. But there has been no proclamation of an emergency, and Article 358 has no application to the present case.

6. This application, therefore, in my judgment, turns entirely upon the narrow point of the interpretation of the relevant Act and of Article 19 (5) of the Constitution. If we hold that the restrictive provision in the Act is not the imposing of reasonable restrictions on the exercise of the fundamental right in question, then the provision must go.

7. The learned Advocate-General has argued that it is not open to the Courts to consider the reasonableness or otherwise of the provision. The Legislature itself is the sole Judge of reasonableness, and if the Legislature makes a provision, the Courts must accept it as reasonable, I find it difficult to follow that argument. If this is correct, the word 'reasonable' in Clause (5) is rendered completely nugatory. The Constitution says the restrictions must be reasonable. Obviously, it is for the Courts to decide whether restrictive provisions are reasonable or not. But then, says the Advocate General, this amounts to substituting one subjective test for another, namely, the satisfaction of the Court hearing the case for the satisfaction of the executive official who makes the order. That argument, in my opinion, is also incorrect. The Courts do not apply any subjective test. It is well settled that there can be an objective test of reasonableness, and that is what the Courts apply. They do not ask themselves, do we, as individuals, feel satisfied that the restrictions are reasonable? But, would that fictitious individual, "the reasonable man," that is to say, the normal average man, regard them as reasonable ? That is a well recognised legal means

of examining the question of reasonableness, and it is essentially an objective test. If we hold that no normally constituted person of average intelligence could possibly regard the provision as reasonable, then our decision would be that it is an unreasonable provision, but not otherwise. For an authority for this proposition it is sufficient to cite one Privy Council decision, *Emperor v. Vimlabai Deshpande*[1], In that case the Privy Council were considering Section 129, Sub-Rule (1), Defense of India Rules, 1939, under which

> "any police officer .... may arrest without warrant any person whom he reasonably suspects of having acted .... in a manner prejudicial to the public safety or to the efficient prosecution of the war."

Were a police officer made an arrest under this provision the Privy Council held that the burden was on him to prove to the satisfaction of the Court before whom the arrest was challenged that he had reasonable grounds of suspicion. If he failed to discharge that burden, an order made by the Provincial Government under Sub-Rule (4) of Rule 129 for the temporary custody of the detenu was invalid.

8. In exactly the same way the State Government having acted under Act III [3] of 1950 to interfere with the petitioner's fundamental rights, the burden is on the Government to establish that the provision is valid, that is to say, that it is reasonable, for, under the Constitution, the only restrictions that can be placed upon this particular fundamental right must be of reasonable character. There has been a prima facie infringement of that right, and prima facie no law can infringe that right. Therefore, the burden is, in my opinion on the State to being that law within the exception contained in Article 19, Clause (5) which alone can save it.

9. Turning now to the question of fact whether the impugned provision imposes only reasonable restrictions the answer must, I think, be in the negative, for the power of restriction contained in the provision is based, not on any reasonable grounds, but upon the satisfaction of some individual who so far as the wording of the Act is concerned, is completely amurphous; and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all the Court can inquire into is the existence of the satisfaction. Quite clearly, such a provision might conceivably be used merely to exclude political opponents, or, as is suggested in the present case, (I do not mean to say I accept the suggestion. I am not considering it) to favour one of two rival Trade Unions and suppress the other, A law which enables such things to be done is not, in my judgment, a reasonable law. There can be no presumption that an executive official will always act reasonably. There may be presumption that he will act bona fide; but that is a different thing. The test is, in my opinion, not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. I use the word "only" advisedly because it appears to me that if the law enables unreasonable action in any case, then it cannot be saved by Article 19 (5). In my opinion, a law to satisfy the criterion imposed by Article 19 (6) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation. This law is not so framed.

10. A matter which was raised was the effect of Rule 28, Adaptation of Laws Order, 1950. That rule runs as follows :

"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 Schedule 7 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."

11. Bihar Act III [3] of 1950 has not been specifically adapted in the President's Order, but it might be argued that the Courts must adapt it under this Rule 28 so as to insert the word "reasonably" in the objective sense before the word "satisfied". It will suffice to deal with this very briefly because the learned Advocate-General does not rely upon any such argument or on this provision. It is enough to say that I agree entirely with the observations on this point made by the Calcutta Full Bench in *Criminal Misc. Case No. 51 of 1950, D/-27.2.1950 Sunil Kumar v. Chief Secy*[2]*.,* This rule purports to delegate legislative power to the Courts But the maxim delegata potestas non potent delegari clearly applies, and if the President can legislate under Article 372 in this regard, he cannot delegate his authority to the Courts. Moreover, I think the less said the better about a provision which directs that the final arbiter between two parties concerned in a case before the Courts shall be one of those parties, namely, the State Government. We must take the Act as we find it. and if the Act is in such terms that it prevents the Courts from applying the objective test of reasonableness, then the Act is not one imposing reasonable restrictions.

12. I hold accordingly that Section 2 (1) (b) of the Act became void on 26th January and it necessarily follows that the order made under that provision became void. I would accordingly give the petitioner a declaration to that effect. It has been suggested that the petitioner cannot be afforded any further relief, nor does he require it unless and until the Government take some action against him for disobedience of the order. But I fail to understand why, in circumstance like this, the petitioner should be put to the harassment of possible arrest for disobeying the Order and having to approach the Courts once more. I think Article 226, when it says that the High Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the
enforcement of any of the rights conferred by Part III and for any other purpose, means more than this and gives us full authority, and indeed a duty to issue necessary directions. If the direction does not conform exactly to one of the writs specifically mentioned that does not matter. We are given the widest powers of issuing directions, orders or writs, and in the present case, besides making a declaration that the order is void, I would issue a direction upon the State Government prohibiting it and any of its officers from taking any action for the enforcement of the order in question.

The petitioner, in my opinion, is entitled to his costs against the State, which I would assess at

five gold mohurs.

Shearer, J.

13. The fundamental rights in the exercise of which the petitioner has been restricted are the rights given to all citizens by Clause (d) of Article 19 (1) namely, the right "to move freely throughout the territory of India," and the right given by Clause (e), namely, the right "to reside.....in any part of the territory of India." It is patent that, from time to time, the legislature may find it necessary to restrain individuals or class of individuals in the enjoyment of their fundamental rights. A convicted criminal, for instance, who has been ordered to report his movements to the police cannot be allowed to move freely throughout the territory of India. The Constituent Assembly recognised this and in enacting Clauses (2) to (6) of Article 19 endeavoured to define the limits subject to which the Legislature might impose statutory restrictions on the exercise by citizens of their fundamental rights. The question that arises here is whether or not the Bihar Legislature has exceeded the limits imposed on it by the Constitution. In deciding this question it must be assumed that in certain areas in this province conditions exist or are likely to exist in which the public safety may be endangered and the maintenance of public order may become a matter of difficulty. It must also be assumed that, in exercising the powers conferred on it by this Act, the Provincial Government or other authority to whom the powers are entrusted will exercise them in good faith. Clause (b) of Section 2 (1) of the Act empowers the Provincial Government to exclude, either absolutely or subject to certain conditions, an individual from "any area or place." The area or place in question must, it is clear, be an area or place in which, if the person against whom the order is made is permitted to enter it subject to no conditions, the public safety and the maintenance of public order is likely to be endangered. An order excluding a person from any such area or place is an order which is to remain in operation for six months, although it may be renewed for a further period. Certain places or classes of place may, under the Act, be declared protected places and the public in general are not permitted to enter such places without authority. These, in brief, are the restrictions imposed by the Act on the exercise of the fundamental right of freedom of movement. The Act, it may be added, is a temporary Act to meet conditions arising during a period of transition and is to remain in force for two years. The words "reasonable restrictions ... in the interests of the general public" mean, in my opinion, restrictions which are reasonably necessary for the protection of the public. It seems to me impossible to say that in no circumstances can it be necessary to exclude particular individuals from areas or places in which the public safety and the maintenance of public order has been or is likely to be endangered. Also, it seems to me impossible to say that the extent to which the fundamental rights of such an individual have been interfered with is an unreasonable extent. He is entitled to move freely throughout the whole of the rest of the territory of India and is merely excluded from moving freely or residing in a particular local area or place, so that the restrictions imposed on him are the minimum restrictions necessary in the interests of the general public.

14. Mr. Awadhesh Nandan Sahai, for the petitioner, has not contended that it may not be necessary in certain circumstances to impose restrictions of this kind on the exercise by individuals of their fundamental rights to move freely and to reside in any part of the territory of India. The learned advocate for the petitioner has directed his attack on the Bihar Maintenance of Public Order Act to other features in it. It is pointed out that it is left to the Provincial Government to impose the restrictions and that, in practice, under the rules of business, orders

may be passed by a comparatively subordinate official. Orders of this kind must, however, in the nature of things, often be passed without delay and must be passed by or on the advice of officials who are in the best position to judge of the seriousness of the situation which has arisen or is likely to arise. The Constituent Assembly conferred on the executive a power of a much more extensive kind, namely, a power to deprive a citizen temporarily of his liberty. When this was pointed out to Mr. Awadhesh Nandan Sahai, the learned advocate for the petitioner said that a person against whom an order of preventive detention was made, was entitled to be informed of the grounds on which it had been made and to matte a representation against it, whereas a person, such as his client, against whom an order of externment had been made, was not entitled either to know the grounds on which it has been made or to make any representation against it. This, Mr. Sahai vehemently contended, is in the highest degree unreasonable. In other words, the validity of the Bihar Maintenance of Public Order Act, 1950, is challenged, not on the ground that the restriction which it imposes are not reasonable restrictions nor on the ground that these restrictions have not been imposed in the interest of the general public, but on the ground that the law is an unreasonable law.

15. The word "reasonable" which now appears in Clauses (3) to (5) of Article 19 of the Constitution is not to be found in the Draft Constitution. Under the Draft Constitution, it was left to the legislature, and to the legislature alone, to decide whether any restrictions which the Ministry of the day sought to impose were reasonable restrictions and as such ought to be imposed. I am inclined myself to think that the introduction at the last moment of the word "reasonable" was, perhaps, unfortunate. The result of inserting it clearly is that the judiciary is now empowered to review certain decisions of the legislature, decisions taken quite possibly, after a very full deliberation and with a knowledge of local conditions which the judiciary does not and cannot possess. There must be numerous statutes and statutory orders which in one way or another impose restrictions on the exercise of fundamental rights and I hesitate to subscribe to the proposition that it is now open to the judiciary to examine these statutes and statutory orders in detail and pronounce any of them to be void on the ground that they do not contain provisions which in the opinion of the judiciary, they ought to have contained. That, in the ultimate analysis, is what we are really invited to do here. What is the criterion to be adopted by the Courts in deciding whether legislation of this kind is or is not valid legislation? What is the question to which the Courts are bound to address themselves? The answer given by the Constitution is that the question is this: "Are the restrictions which have been or can be imposed reasonable restrictions in the interests of the general public? "That it seems to me, is equivalent to saying : Are the restrictions reasonably necessary in the interests of the general public?" or, to depart still further from the language used in the Constitution :

> "Is the extent to which the rights of individuals are, or are liable to be, interfered with no more than is reasonably necessary for the protection of the public?"

If that is the criterion to be adopted, then it is, I think, immaterial that there may be ancillary provisions in the statute which may lead to hardship in individual cases. Whether such provisions were reasonable or not was a matter for the legislature to determine, and the judiciary cannot now sit in review over what the legislature has done. My learned brothers, as I understand their judgments, are of opinion that the question to which the Courts should address themselves is this : "Are the restrictions reasonable restrictions?" and that restrictions which, imposed by one

authority and in one manner are reasonable restrictions may not be reasonable restrictions if imposed by another authority and in another manner. For more than one reason, however, I am of opinion that the criterion to be adopted is the former and not the latter criterion. In the first place, if the latter criterion is the correct one, then it is necessary to divorce the words "reasonable restrictions" from the words "in the interests of the general public," but these two sets of words must in my opinion, be read together. Secondly, the ordinary rule is that while it is for the judiciary to decide whether the legislature has exceeded the limits of its legislative jurisdiction, it is not open to the judiciary to pronounce on the reasonableness or otherwise of anything which has been done by the legislature within saoh limits : *Union Colliery Co. of British Columbia, Ltd. v. Bryden*[3], The framers of the Constitution have by inserting the word "reasonable", permitted the judiciary to encroach on the sphere of the legislature, but it ought, I think, to be assumed that their intention was that the encroachment should be confined within the narrowest possible dimensions. In other words, the Courts ought not to pronounce on the reasonableness of something that has been done by the legislature, still less render what has been done void and of no effect, unless it is quite cleat that it was intended that they should have power to do this under the Constitution. Thirdly-and this is a circumstance which weighs a great deal with me-when the validity of a law which has been duly passed after full discussion by both Chambers of the legislature and has received the assent of the President is challenged, the onus is, and is vary heavily, on the person who challenges it to show that it is an unconstitutional law. In this connect on I may refer to two American decisions. Strong, J., in the Legal Tender Cases, 12 wall at p. 531, said :

> "It is incumbent, therefore, upon those who affirm the unconstitutionality of an Act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." and Marshall, C.J., in *Fletcher v. Peck*[4], said :
> "It is not on slight implication and vain conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void.
> The opposition between the constitution and the law should be such that the
> Judge feels a clear and strong conviction of their incompatibility with each other." While, by the application of these fundamental principles I am driven to the conclusion that it was intended that the judiciary should be entitled to say that the extent to which restrictions can be imposed is or is not reasonable, I am not driven to the conclusion that it was intended that it should also be entitled to say that the manner in which the restrictions are to be imposed in individual cases is or is not a reasonable manner.

16. I have had the advantage of reading the judgment which has just been delivered by my Lord the Chief Justice and the judgment which is about to be delivered by my brother Das, and as the view which both of them take is diametrically opposed to my own, I have studied them with the care and attention which they deserve. My Lord the Chief Justice in summing up his conclusions observes

> "A law which enables such things to be done is not, in my judgment, a reasonable law."

With the greatest respect I submit that it is not open to any Court to pronounce a law to be an

unconstitutional law on such a ground. My brother Das at the commencement of his judgment observes

> "Where a Court his to decide whether a particular provision of law does or does not operate to impose reasonable restrictions on the right of free movement, the test must necessarily be what has been described, perhaps not very happily, as the objective test."

Reverting to the point again at a later stage in his judgment Das, J., observes :

> "I would give to the word 'reasonable' occurring in Clause (5) of Article 19 the full significance of its accepted connotations."

The word "reasonable" may have been used in the sense in which Das, J., now construes it in certain enactments in England, but where so used it has invariably qualified some such word as "cause" or "belief" or "suspicion." I cannot agree that where it qualifies such a word as restrictions this is or indeed can be one of its "accepted connotations." Certainly it is not to be found anywhere in the two columns devoted to the word "reasonable" in the Oxford Dictionary. The argument which has commended itself to my brother Das and which is. substantially the argument which has also commended itself to my Lord the Chief Justice, appears to me to be founded on the single word "reasonable" and further on the assumption that that word was used by the Constituent Assembly not in its ordinary dictionary meaning but in a highly esoteric sense. In *Liver side v. Sir John Anderson*[5], an argument based on the word "reasonable" was addressed to the House of Lords, and in repelling it Lord Wright observed :

> "I cannot accept that contention, which seems to me to subordinate the whole substance of the enactment to a single word which itself is ambiguous and inconclusive."

If ever there was a case in which it was not permissible, and was in the highest degree dangerous, to depart from the accepted canons of construction it is this case. We are here to construe the constitution, and narrow and technical constructions ought, if possible, to be avoided. Pomeroy in his Constitutional law, para. 18, quoted in Quic and Garran on the Constitution of the Australian Commonwealth, p. 794, says this :

> "In the practical application of legal principles in the common affairs of life, the written agreement, the deed, the testament, the statute, are construed by the aid of the same rules, simply because they are written. The written constitution, merely because it is written, can form no exception. The most that can be said is, that, as greater interests are involved which affect the state rather than the individual, all narrow and technical construction should, as far as possible, be avoided; the nature of the writing as an organic law should be allowed its full effect."

And the result in this case of putting what appears to me to be a highly unnatural and artificial meaning on the word "reasonable" is that a law duly enacted by the legislature of Bihar is pronounced to be void and the executive is deprived of a weapon, which if used in the manner in

which it is intended to be used may be of great benefit to the community and productive of comparatively little harm to individuals.

17. My difficulties in the way of accepting the view taken by my learned brothers by no means end here. We ware told by the learned Advocate-General that this order was made by and with the approval of the Hon'ble the Chief Minister. It is beyond the power of the Hon'ble the Chief Minister to establish by evidence in a Court of law what the state of his mind was when he made the order. It is equally beyond the power of the petitioner to disprove what according to the Hon'ble the Chief Minister, the state of his mind then was. But is it beyond the power of the Hon'ble the Chief Minister to satisfy a Court by legal evidence that the restriction imposed on the petitioner is a reasonable restriction? I will give a more striking illustration. The employees of a power-house or a water works go on strike. Tempers rise. Threats of sabotage are uttered, Sticks of dynamite disappear from a neighbouring colliery. The Hon'ble the Chief Minister makes an order under this Act declaring the power house or water-works and surrounding area a "protected place." A constable stops a citizen from exercising his fundamental right to move freely along a road within the area cordoned off. In the view taken by my learned brothers, the order of the Hon'ble the Chief Minister affords no protection to the constable. The constable, if called to answer in a Court of law must show that he had reason to suspect that the man had a stick of dynamite in his pocket. Yet, if what has to be demonstrated in a Court of law, was not the state of the constable's mind but the propriety c f the order, any jury would very probably intimate at an early stage of the proceedings that it did not wish to bear further evidence and would return a verdict in favour of the Hon'ble the Chief Minister without leaving the jury-box.

18. England has a longer legal history than any other country in the world. When England was covered with forests and men moved slowly on horse back or in stage coach, the only safeguard which a man had in the enjoyment of personal liberty was the common law and the verdict of a jury. That was why the Barons at Runnymede in 1215 stipulated that no freeman should be arrested or imprisoned "nisi vel per legem terree vel per judicium parium" But the right to personal liberty and the right to move freely from one place to another are rights of a somewhat different character and are in fact dealt with in separate and distinct articles of the Constitution. The Barons who extorted the Great Charter from King John were as much Frenchman as they were Englishmen and they demanded and obtained the right to move from their estates in England to their estates in Normandy whenever they chose. But, when the Great Charter was renewed in the reign of King Henry III, this right was not conceded. For centuries thereafter the Crown continued to issue the writ ne exeat regno and eventually statute law prohibited any Englishman from leaving the realm except under a license which it was in the discretion of the Crown to grant or to withhold. (Vide Blackstone, Vol. I, p. 265). Even today an Englishman refused a passport does not and cannot turn to the Courts. His grievance, it is perfectly well understood, is one to be ventilated elsewhere -on the floor of the House of Commons or the public platform or in the press. In 1944 and 1945, when the invasion of the continent by British and American troops was impending large numbers of Englishmen were compelled by executive order to leave, or were prevented from entering, certain areas on the south coast. These orders could not be, and so far as I am aware, were never sought to be, challenged in the Courts. It is true that the orders were made in exercise of powers conferred by emergency legislation. But the Bihar Maintenance of Public Order Act, 1950, is a piece of emergency legislation. The emergency may be less grave and less apparent than was the emergency in England in 1941-1945, but as I said at the outset, it is not for us to question the existence of it and it would be rash

to do so when yesterday, in a neighboring province, something very much in the nature of martial law was proclaimed. It is the duty and privilege of the Courts to protect citizens in the exercise of their fundamental rights and when a citizen complains that some fundamental right of his bag been invaded the Courts may - and indeed, if a prima facie case is made out, must - call on the person or authority responsible to justify what he has done under the law of the land. But when that person or authority can point to a duly enacted law which, on the face of it, affords him complete justification and it is contended that the apparent justification is no real justification as the law is not a law at all, the position materially alters. The onus is no longer on the defendant. It is and is very heavily on the plaintiff. It can make no difference that the question at issue is not whether the Legislature of the State has trespassed into a field of legislative activity reserved for the centre but whether it has trespassed into a field in which neither it nor Parliament itself has any legislative jurisdiction at all. The canons of interpretation which must be applied are the same. The Constituent Assembly met in the middle of the twentieth century and the citizen of India as much as the citizen of England, who has been refused a passport, has other protections besides the Courts. The framers of the Constitution, in express words, themselves conferred on the executive power to deprive a man of his personal liberty, and I cannot be persuaded that they intended that the power of a State Legislature to authorize the executive to place restrictions on the exercise by individual citizens of fundamental rights for less vital to them than their right to personal liberty should be so circumscribed a power as my learned brothers would have it to be. In my opinion the only ground on which an order of this kind can be challenged here is that it was not made in good faith and as that has not been urged or successfully urged. I would accordingly dismiss the application.

Das, J.

19. I have reached the same conclusion as my Lord the Chief Justice that Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950) in so far as it operates to restrict freedom of movement of a free citizen, became void by reason of Article 13 (1), read with Article 19 of the Constitution of India, which came into force on 26th January 1950. In view of the constitutional importance of the question raised, I think that I should state, briefly, my reasons for reaching the same conclusion, avoiding at the same time a repetition of the reasons already stated by my Lord the Chief Justice.

20. Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949, is in the following terms :

> "2 (1) The Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, make an order -
> * * * * *
> (b) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or persons as may be specified therein, he shall not be in any such area or place in the Province of Bihar as may be specified in the order;"

Article 19 of the Constitution of India, so far as is relevant to this case, states :

> "19 (1) All citizens shall have the right -

* * * * *

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India."

Article 13 (1) of the constitution states :

"13 (1). All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency be void."

It is not in dispute that the Bihar Maintenance of Public Order Act, 1949, was a law in force in the territory of India immediately before the commencement of the Constitution, within the meaning of the definition of the expression 'laws, in force' in Clause (3) of Article 13 of the Constitution. If the provisions in Section 2 (1) of the Bihar Act and the provisions in Article 19 (1) (d) and (e) of the Constitution are juxtaposed, the inconsistency between the two at once strikes the reader. sub-Clause (d) of Article 19 (1) of the Constitution guarantees to all citizens of India the right to move freely throughout the territory of India, and sub clause (e) gives the right to reside and settle in any part of India. Section 2 (1) (b) of the Bihar Act authorises the issue of an order imposing restrictions on such free movement or on the right of residence in any area or place in the State of Bihar on the satisfaction of the Provincial Government, that is, the State Government. This inconsistency at once attracts the operation of Article 13 (1) of the Constitution and the Bihar Act is rendered void to the extent of the inconsistency under the said article there is, however, Clause (5) of Article 19 of the Constitution which, amongst other things, saves the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of the right conferred by sub clause (d) and sub clause (e). Clause (5) of Article 19 is in the following terms :

"(5) Nothing in sub-clause (d), (e) and (f) of the said clause 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 the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

Therefore, the crucial question in this case is if the operation of Section 2 (1) (b) of the Bihar Act is saved by Clause (5) of Article 19 of the Constitution.

21. I do not think that there is any doubt that it is for this Court to consider and decide whether the operation of Section 2 (1) (b) of the Bihar Act is or is not saved by Clause (5) of Article 19 of the Constitution. The rights guaranteed under Part III of the Constitution are justiciable rights, for the enforcement of which there are remedies including the remedy guaranteed by Article 32. Article 256 of the Constitution also provides a remedy, and gives this Court power to issue directions, orders or writs to any person or authority, including in appropriate cases any Government, for the enforcement of any of the rights conferred by Part III. If, therefore, this Court is to decide whether the operation of Section 2 (1) (b) of the Bihar Act is saved by Clause (5) of Article 19 of the Constitution, it would follow, ex-hypothesi, that this Court must also

determine whether Section 2 (1) (b) of the Bihar Act imposes or operates to impose reasonable restrictions on the exercise of the right conferred by sub-clauses (d) and (e) of Clause (1) of Article 19 of the Constitution. Where a Court has to decide whether a particular provision of law does or does not operate to impose reasonable restrictions on the right of free movement or residence, the test must necessarily be what has been described, perhaps not very happily, as the objective test. Since the decision of the House of Lords in the now famous case of *Liversidge v. Sir John Anderson*[6], the distinction between the objective and subjective tests has frequently been the subject of judicial consideration in the Courts in India and England. The words 'objective' and 'subjective' have a philosophical flavour; but put in ordinary language-e.g., the language used by Lord Wright in Liversidge's case, 1942 AC 206 : (1941-3 All England Reporter 338) the objective test merely means an "external standard to be applied by some one other than the authority imposing the restriction, namely by a judge"; whereas, the subjective test excludes an external yardstick and means the decision of the person who acts - may be reasonably; but still it is his decision and not the decision of any one else. As Lord Wright said in Liversidge's case, (1942 AC 206 : 1941-3 All England Reporter 338) the word 'reasonable' "connotes a quality or characteristic. Who is to decide on reasonableness is a different matter, which depends on the circumstances." Under Article 19 (5) of the Constitution, the Court is to decide on reasonableness : this cannot be disputed. The position, therefore, reduces itself to this : under Clause (6) of Article 19 this Court is to determine whether the relevant provisions of the Bihar Act impose or operate to impose reasonable restrictions on the right of free movement or residence of a citizen; but the relevant provisions of the Bihar Act make it quite cleat that the only prerequisite for such imposition is that the Provincial Government (which will mean the Governor under the General Clauses Act, though under the rules of Executive Business the matter may be dealt with by some other person; may be the Chief Minister as is stated by the learned Advocate-General in this case) is satisfied that a restriction should be imposed on the free movement or residence of a citizen. Thus, while Clause (5) of Article 19 of the Constitution requires the Court to consider the reasonableness of the restrictions, the law which is to be saved under clause (5) states that the satisfaction of the Provincial Government, and not reasonableness by any external standard is the only pre-requisite for imposing the restrictions. In my opinion, this, at once, demonstrates that the relevant provisions of the Bihar Act are not saved by Clause (5) of Article 19 of the Constitution. To hold otherwise would mean that the right of free movement or residence guaranteed by Article 19 can be taken away by any law irrespective of the consideration whether that law imposes or operates to impose reasonable restrictions or not.

22. It has been contended by the learned Advocate-General that reasonableness, expediency, public policy are matters for the Legislature and not for the Court. That is so, where no constitutional limitation is imposed on the power of legislation. The Constitution of India, however, imposes certain constitutional limitations one of such limitations being embodied in Article 13 of the Constitution. Then, it is contended that all that the Court can examine under clause (5) of Article 19 is whether the restrictions imposed are in themselves, as to their nature and extent, reasonable or not. It is pointed out that the adjective "reasonable" qualifies "restrictions"; therefore, so the argument proceeds, the Court should not go into the question as to which authority imposes the restrictions, which authority is to be satisfied, etc. It is argued that these are matters for the Legislature, and ideas such as are involved in the application of subjective or objective tests are irrelevant for the purpose of construing Clause (5) of Article 19 of the Constitution. I agree that the adjective "reasonable" goes with the word "restrictions" I do not accept, however, the argument that only the territorial or external extent of the restrictions

imposed need be considered under Clause (5) of Article 19. If the Court is to consider the nature of the restrictions, for determining whether they are reasonable or not, the question at once arises whether the law operating to impose the restrictions allows a Court to consider their reasonableness. I concede that, as a matter of fact, the satisfaction of the Governor or of the Chief Minister or, for that matter, of any other officer need not necessarily be unreasonable; and we should not presume that they will act unreasonably. But the test is not the operation of a particular order passed against a particular person; the test is what does the law imposing or operating to impose the restrictions authorise. If that law says that no other prerequisite is necessary except the satisfaction of one person, however perfect that person may be, then the test of reasonableness as applied by Courts is taken away, and the law to that extent ceases to be a law imposing or operating to impose reasonable restrictions within the meaning of Clause (5) of Article 19 of the Constitution. In other words, the law which imposes or operates to impose restrictions on the free movement or residence of citizen must not exclude an external test of reasonableness; if it does that law is not saved by Clause (5) of Article 19.

23. I need not repeat what my Lord the Chief Justice has stated regarding the absence of any provisions in the Bihar Act for giving a person, whose movement is restricted, an opportunity of vindicating his position etc The whole scheme of the Bihar Act is that the satisfaction of the Provincial Government is the only test, and nobody else can question that satisfaction on any ground whatsoever. That has also been the view consistently expressed by this Court, before the Constitution Act came into force : see *Nek Muhammad v. Province of Bihar*[7]*,*

24. It is to be observed that Clause (5) of Article 19 of the Constitution refers not merely to the operation of an existing law, but also to the making of any law in future by the State under which restrictions can be imposed on the exercise of the right conferred by sub-clauses (d) and (e) of Article 19 (1) of the Constitution. If the view for which the learned Advocate-General contends is accepted as correct, it would mean that the State can make a law imposing restrictions on the fundamental right of free movement and residence laying down in that law that the only prerequisite for the imposition of the restrictions is the satisfaction of the Executive, and the person whose freedom is restricted will have no remedy to get the curtailment or abridgment of his right tested on the touchstone of reasonableness by a Court of law. It would mean that what the Constitution gives with one hand under Article 19 (1) is taken away by the other hand under Article 19 (5). I am unable to subscribe to the view that Clause (5) of Article 19 was intended to make the right given by Article 19 (1) so illusory. I would give to the word "reasonable" occurring in Clause (5) of Article 19 the full significance of its accepted connotation. It is to be observed that there are other Articles where the test of reasonableness has not been incorporated; see Article 25 (2) which is in similar terms but without the word "reasonable." Even in Clause (2) of Article 19, the word "reasonable" does not occur. I do not think that the word "reasonable" which did not occur in the relevant clause of the Draft Constitution was inserted either inadvertently or without meaning.

25. There has been some argument before us on the footing that if the test of reasonableness does not enter into a law made for preventive detention under Article 22, a fortiori that test should not enter into the lesser matter of a restriction on free movement or residence. The reply to this argument is that the two matters are separately dealt with, and the mechanism of safeguards provided is different in respect of the two matters. The learned Advocate-General referred us to a large number of decisions on the question that this Court cannot sit in appeal over the

Legislature, and that the reasonableness of a particular piece of legislation is not for the Courts to determine. All those decisions relate to legislation on which there is no constitutional limitation, and I do not think that any useful purpose will be served by
examining those decisions in detail. The question here is not one of legislative theory or practice, but the true scope and effect of Clause (5) of Article 19.

26. There has been some argument before us as to whether Article 226 of the Constitution provides the appropriate remedy in this case. In view of the very wide terms of that Article, I think that the petitioner is entitled to ask us for an order against the State Government prohibiting that Government from enforcing the order which must be declared to be void after 26th January 1950. The order infringes a fundamental right of the citizen, and Article 226 provides the appropriate remedy.

27. In conclusion I must make it clear that this decision must not be understood in the sense that the State cannot make any law imposing or operating to impose restrictions on freedom of movement of a citizen. The State can do so, and in so doing may authorize any person or even the Executive to take action; but the law imposing or operating to impose such restrictions must fulfill the test of Clause (5) of Art 19, viz., the test of reasonableness as distinct from the mere satisfaction of one individual or authority, with or without reason. My learned brother Shearer, J., has referred to what is reported to have taken place in a neighboring province. I do not know, and it is not for me to say, that circumstances have not arisen or may not arise, which necessitate the imposition of restrictions on personal freedom. But our duty is to interpret the law as it is, leaving it to the proper authority to change the law or enforce the emergency provisions in Part XVIII of the Constitution, if necessary. As long as the law is what it is, it must "speak the same language" (to quote the words of Lord Atkin) for all-in times of stress as in times of quiet.
Application allowed.

Cases Referred.

[1]73 IA 144 : (AIR 1946 PC 123 : 47 Cr LJ 831)
[2] Govt. of West Bengal, 54 CWN 394 : (AIR 1950 Calcutta 274 : 51 Cr LJ 1110 (SB)
[3]1899 AC 530 at p. 585 : (68 LJ PC 118)
[4]6 Cranch 87
[5]1942 AC 206 at p. 268 : (1941-3 All England Reporter 338)
[6]1942 AC 206 : (1941-3 All England Reporter 338)
[7] AIR 1949 Pat 1 : (50 Cr LJ 44)