
(1977) 10 DEL CK 0005

In the Delhi High Court

Case No : Criminal Writ Appeal No. 39 of 1977

Eknath Laxman Choudhury

APPELLANT

Vs

Superintendent Central Jail and Others

RESPONDENT

Date of Decision : 11-10-1977

Acts Referred:

Citation : (1978) ILR Delhi 157

Hon'ble Judges : Prakash Narain, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : R.K. Jain, I.D. Ahluwalia, K.N. Kataria and Niranjana Alva, for the Appellant;

Judgement

Avadh Behari, J.

(1) Eknath Laxman Choudhury, petitioner in this petition, seeks a writ of habeas corpus challenging the validity of his detention.

(2) The Additional District Magistrate Delhi passed an order of detention on 21/04/1977 under sub-clause (i) of clause (a) of sub (1) of section 3 of the Maintenance of Internal Security Act (the Act) directing that the petitioner be detained on the ground that it was necessary so to do "with a view to preventing him from acting in any manner prejudicial to the security of India." Immediately he was served with the grounds of detention.

(3) The petitioner is the deputy marketing manager in the State Trading Corporation. In the grounds of detention it was alleged that he was passing secret information and classified documents to the agent of a foreign power. It was said that in a confessional statement made by him before the metropolitan magistrate on 14/02/1977 he had confessed his guilt. The grounds of detention are the following:

" ON receipt of information that Sh. E. L. Choudhury Dy marketing. Manager, Stc had been in conspiracy with the agent of a foreign power and had been collecting

directly or indirectly secret information and documents and passing on the same to the agent of the foreign power, a trap was laid and he was caught red handed while in transaction with the agent of the foreign power at the Oberoi Intercontinental Hotel, New Delhi on 26/01/1977. Case Fir No. 26 dated 26-1-77 u/s 3, 4, 5, 9 of Act read with Sec. 120-B Indian Penal Code was registered against him P.S. Srinivasपुरi. From his personal search a sum of Rs. 400/which he had received from the foreign agent in lieu of the sensitive documents, were recovered.

" IN his confession statement before Sh. Jaswant Singh. Metropolitan Magistrate, New Delhi on 14-2-1977 he has admitted that he came in contact with the agent of a foreign power in the year 1956-57 when he was in the Finance Ministry. The foreign agent used to come to his office and see the office pads and files available with him against small payments and gifts. In 1970 when he was serving in the Stc the foreign agent allured him to political, economic, defense and allied matters from his old colleagues and contacts from the Finance Ministry and other government offices against handsome payments .The agent had told him that these documents and information would be supplied to the foreigners. He was also assured a good job after his retirement from STC. Consequently he established contacts in the Ministries and collected classified documents and information which he supplied to the foreign agent against handsome payments from 1972 till the date of his arrest. In all he received Rs. 30,000 to Rs.35,000 during the period from 1972 onwards, out of which he paid Rs. 15,000 or so to his contacts in the various Ministries and government offices. He has also identified some of the documents recovered from the foreign agent's residence."

(4) The petitioner was arrested by the police on 26/01/1977 at the Oberoi Intercontinental Hotel, New Delhi in connection with case Fir No. 26 dated 26/01/1977 under sections 3, 4, 5, and 9, Indian Official Secrets Act read with section 120-B, Indian Penal Code registered against him at the police station Srinivasपुरi. On 11/02/1977 an order of detention under sub-clause (i) of clause (a) of sub-section (1) of section 3 of the Act was served on the petitioner in jail. On 11/02/1977 a declaration u/s 16-A of the Act was also made. u/s 16-A of the Act it was not necessary to serve the grounds of detention on the petitioner during the period of operation of the proclamation of emergency issued under clause (1) of Article 352 of the Constitution on the 25th day of June, 1975. On 14/02/1977, the petitioner made a confessional statement u/s 164, Code of Criminal Procedure before Shri Jaswant Singh, Metropolitan Magistrate, New Delhi. On 21/03/1977, the order dated 11/02/1977 was revoked and a fresh order of detention was made. Section 16-A of the Act had lapsed on the revocation of the proclamation of emergency by the President. The grounds of detention dated 21/03/1977 were communicated to the petitioner. In this order of detention there was a technical defect. Therefore, this order was revoked. On 21/04/1977, another order of detention was passed. Immediately the grounds of detention were served on the petitioner which we have set out above. It is this order which is now challenged before us .THE petitioner's case was referred to the Advisory

Board u/s 9 of the Act. The Board held its meeting on 16/05/1977. The petitioner appeared before the Board. He was heard. He also submitted a representation in writing to the Board. The Advisory Board sent its opinion on 21/05/1977 to the Delhi Administration. The Board held that the detention of the petitioner was justified. On 19/07/1977, the petitioner sent to this court a home made application for writ of habeas corpus from jail.

(5) Mr. R. K. Jain appearing amicus curiae on behalf of the petitioner challenged the order of detention before us on four main grounds. Firstly, he submitted that the order of detention is ex facie bad as it does not afford to the petitioner an opportunity of making a representation against the order. Sub-section (1) of section 8 says:

8. Grounds of order of detention to be disclosed to persons affected by the order.-
(1) When a person is detained in pursuance of a detention order, "the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

The "appropriate government" has been defined in the Act. The "appropriate Government" in the case of Union territory of Delhi is the Administrator. S. 2(a) read with section 2(d) of the Act].

SECTION 8(1) of the Act lays down two requirements : (1) the detaining authority shall communicate to the person detained the grounds on which the order has been made. (2) "and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government."

(6) Mr. Jain says that the order of detention is bad as it does not comply with the second requirement. The order sets forth the ground of detention and stops there. It does not tell the detainee that he can make a representation to the Government (In this case Administrator) against the order of detention. We think this contention is well founded. The above two conditions are the basic minimal safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby deprive him of his right of personal liberty in the name of security. These are procedural safeguards. But procedural requirements are as important as matters of substance.

(7) Counsel for the Delhi Administration argued that it was not necessary for the detaining authority to state in the order that the detainee can make a representation against the order. He said that the two conditions are interlinked and it is enough for the detaining authority to communicate the grounds of detention so that the detainee may make a representation we were referred to *Khudiram Das Vs. The State of West Bengal and Others*, . We are unable to agree with the counsel for the Administration. It is true, as the Supreme Court has

said, that the order of detention must be communicated so that the detenu may have an opportunity of making an effective representation against the order. But this in our opinion does not mean that the detenu has not to be afforded an opportunity of making a representation. As we read the statute the two conditions are separate and distinct. That both lead to the same result is not a ground for non-observance of the second condition. The second condition is an independent obligation laid on the detaining authority. "And shall afford" and words of imperative mood. They have a positive content. The obligation is worded in active voice. It is a positive duty laid upon the detaining authority. The word "afford" is a critical word. Its dictionary meaning is to give, furnish, offer, bestow, grant. Here it means an obligatory act or duty of giving opportunity. How is a detenu to be given an opportunity unless the authority making the order tells him that he can make a presentation against the order to the appropriate Government if he is so advised. It is a valuable right of the detainee. Correlatively there is a duty on the detaining authority to afford an opportunity. That the detainee may not avail of the preferred opportunity is another thing. It is entirely up to him. The giver of the opportunity is the detaining authority. The detenu is the beneficiary. The Act restricts citizens' personal liberty which is a fundamental right under the Constitution. It has, therefore, to be construed strictly, so far as possible in favor of the citizen and in a manner that does not restrict that right to an extent greater than is necessary to effectuate that object. (Shaik Hanif and Others Vs. State of W.B.,). So the canon of construction is that all matters affecting the liberty of the subject are to be strictly construed.

(8) We must adhere closely to the words of the statute. In matters of individual liberty the law insists upon the literal performance of a procedural requirement. A literal performance of a condition one which complies exactly with its terms. Before a person can be deprived of his personal liberty, all the requirements of the Constitution and of any law that may be applicable to the case, must be strictly complied with. In *Thomas Pelham Dale's* case (1881) 6QB 376:

IT is a general rule which has always been acted upon by the Courts of England that if any person procures the imprisonment of another, he must take care to do so by steps all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment to continue .

In *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, Patanjali Sastri C.J. observed as follows :

PREVENTIVE detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.

(9) See what has happened in this case. The detenu did not make any representation to the Administrator. Probably he never knew of this procedural right. Before the Advisory Board he made a representation in writing when he

appeared before them on May 16, 1977. But that is an entirely different thing. The right of representation to the appropriate Government is a valuable right. The Government has to consider the representation as soon as it is made, apply its mind to it and if necessary take appropriate action. Apart from the procedure of reference to the Advisory Board, the State Government has ample power u/s 13 of the Act to revoke any order of detention at any time. The Legislature is anxious to see that the detaining authority affords the "earliest opportunity" to the detenu of making a representation against the order to the appropriate Government and the Government in its turn consider the representation as soon as it is made. No time is to be lost. Why should a person be detained even for a single day has to be considered by the appropriate Government. What is at stake is the issue of personal freedom.

(10) The obligation of the detaining authority to consider the representation is different from the obligation of the Advisory Board to consider the representation later on at the time of hearing the reference. So under clauses (6) and (5) of Art. 22 of the Constitution there is a dual obligation on the Government and a dual right in favor of the detenu, namely, (1) to have his representation considered by the appropriate Government, and (2) to have once again the representation considered by the Advisory Board before it gives its opinion. The appropriate Government is not relieved of its constitutional obligation to consider the representation even if it is made by the detenu after his case had been referred to the Advisory Board. [See Pankaj Kumar Chakrabarty and Others Vs. The State of West Bengal, and Sk. Abdul Karim and Others Vs. State of West Bengal, . But the question is : How is the representation of the detenu to be considered unless the detaining authority affords him the earliest opportunity of making a representation against the order to the appropriate Government? In this case the result is that there has been an erosion of the "opportunity of making a representation against the order".

(11) The grant of opportunity for making a representation is infact the application of the principle of natural justice. The statute embodies it in section 8. It abrogates it in section 16A during the emergency. Section 16A expressly says that : "notwithstanding anything contained in this Act or any rules of natural justice. -." the appropriate Government can pass an order of detention without communicating the information and material in its possession and without affording the detenu any opportunity of making a representation against the order of detention [Section 16A(1) and (5)]. Before us a detention order of the West Bengal Government was produced as a model where it is said:

YOU are hereby informed that you may make a representation to the State Government against the detention order and that such representation shall be addressed to the Assistant Secretary Home (Special) "Department, Government of West Bengal and forwarded through the Superintendent of Jail in which you have been detained as early as possible.

We find a similar form in use in Shaik Hanif and Others Vs. State of W.B., . We

know that the form is not the law. The statute is the law. But this shows how detaining authorities in other States view their obligation or duty. They specify clearly the authority to which the representation is to be made .

(12) We, Therefore, reach the conclusion that an independent obligation to give opportunity to the detenu for making a representation flows from the words of section 8(1) of the Act as from Article 22(5) of the Indian Constitution. In the present case no opportunity was afforded. An essential step in procedure was omitted. This is a fatal flaw. As the Supreme Court has said in Abdul Karim's case (supra) :

PREVENTIVE detention is a serious invasion of personal liberty, and ,Therefore, the Constitution has provided procedural safeguards against the improper exercise of the power of preventive detention. All the procedural requirements of Article 22 are in our opinion mandatory in character and even if one of the procedural requirements is not complied with, the order of detention would be rendered illegal .

(page 1034).

(13) This takes us to the second ground of challenge. Mr. Jain says that the detaining authority in this case was overawed by the orders of the Home Ministry contained in the letter dated 11/02/1977 and the Communication made to her by the Superintendent of Police dated 22/03/1977. All this, he says, shows that the detaining authority was influenced by extraneous considerations and its own subjective satisfaction did not constitute the foundation for the exercise of the power of detention. It is necessary to read at this stage the letters of the Home Ministry and the Superintendent of Police :

S. C. Vaish Director (IS)Tele: 375670. Government of India Ministry of Home Affairs New Delhi-110001. the 11/02/1977. Dear Shri Sushil Kumar, This is in continuation of my D.O. letter No. D 591"/77-T. dated the 7/02/1977. regarding the detention of a Cia network in India. 2. Pending further investigation of Si"nivaspuri P.S. Case No. 26 dated 26/01/1977 u/s 3 and 9 of the Official Secrets Act read with Section 120-B, the following persons involved in this case "may be detained under Misa :-(i).....(ii) E. L. Choudubry, Deputy Marketing Manager, State Trading Corporation. (iii)(iv) (v).....For obvious reasons it will not be possible to disclose the grounds of detention and hence Section 16-A of the Act have to be invoked We may be informed after the action is taken. Yours sincerely, Sd/ (S. C. Vaish Shri Sushil Kumar, Chief Secretary, Delhi Administration Delh no. D. 641/77-T, dated 11-2-1977. Copy forwarded to Shri B. K. Goswami, Deputy Commissioner, Delhi ,for information and accessory action. Sd/ (S. C. Vaish Director (IS))."The record of the detaining authority shows that on 22/03/1977 the Superintendent of Police Cid wrote a letter to the District Magistrate. The following is the text : - "Confidential. Criminal Investigation Department. Special

Branch Delhi, dated the 22/03/1977. No. 905/Z" The following 8 accused persons were "arrested in case Fir No. 26 dt. 26-1-77 u/s 3, 4, 5, 9 Ios Acts and 120-B Indian Penal Code of Police Station S. N. Puri, South Distt., N. Delhi. They were also detained under MISA Since the emergency has been lifted, their previous, orders of detention stand revoked automatically. Their detention under Misa, is however, absolutely necessary for the security and defense of the country. Therefore, detailed notes giving grounds of detention of each (in triplicate) are enclosed herewith for issue of their detention orders afresh : 1. 2. E. L. Choudhury, s/o Lakshman Choudhury, r/o 6/1, South Patel Nagaft-, New Delhi. 3. 4. 6. 7. 8. sd/- (K. S. Bajwa) Superintendent of Police, Cid S. N. Delhi 22-3-77." Shri B. K. Goswami, D.M" Delhi. To this letter were attached the grounds of detention which were adopted by the detaining authority almost word for word with slight verbal changes here and there.

(14) Now what does the law requires? As we read the statute the subjective opinion of the detaining authority is the foundation of the order of detention. It follows that the opinion must be the opinion of the detaining authority and not of some one else. The Authority has to form its opinion. It is not to be guided or controlled by the opinion of another person or authority. If the detaining authority commits a person to jail at the bidding or behest of a superior authority it cannot be said to be a detention for the purposes recognized by the Act. Such an order is a pretence. As Bhagwati J. has said:

THE satisfaction must be a satisfaction of the authority itself, and Therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and the officer of the Ministry of Labour and National Service did in Simms Motor Units Ltd. v. Minister of Labour and National Service (1946) 2 All Br 201 the exercise of the power would be bad." (Khudiram's case, supra).

In Bhut Nath Mete Vs. The State of West Bengal, Krishna Iyer J. said:

THE important point is that the satisfaction of the public functionary though subjective, must be real and rational, not colourable, fanciful, mechanical or unrelated to the objects enumerated in S. 3(1) of the Act.

Where the Authority has not applied its mind at all : in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied : See AIR 1943 75 (Federal Court) . This means that satisfaction is not grounded on "material which is of rationally probative value . (Machinder v. King Air (1950 Fc 129. It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorised purpose. (See Smith v. East Elloe Rural District Council 1956 Ac 736 per Lord Redcliffe). In Req. v. Governor of Brixton Prison Ex parte Soblem Sublime (1963) 2 Qb 243 Lord

Denning laid down the test. He said:

IT seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful .If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object ,it was unlawful.

(15) Apply these principles to this case. In her order dated 21/04/1977 which we find on her file the Additional District Magistrate Mrs. Meenakshi Datta Ghosh says:

HOWEVER, on consideration of the material before me, supplied by Supdt. of Police Cid (SB) it is considered necessary to redetain the said Sh. E. L. Choudhury under s.3(l)(a)(i) of Misa with a view to preventing him from acting in a manner prejudicial to the security of India.

Much to the same effect is her affidavit filed before us. There she says :

Issued detention orders of the petitioner after perusing and discussing the evidence brought forth against the petitioner during investigation of the case above noted against the petitioner and others and on receiving reports against him from higher authorities which I had no reason to disbelieve.

(Para 4).And

the case for issuing detention orders was very thoroughly and minutely examined not only by me but also by the Ministry of Home Affairs ,Government of India and S.P.,C.I.D. (S.B.). Since the same were also conveyed to me by higher authorities, I had no reason to disbelieve the same .

(Para 6).

(16) It appears that the authority has not exercised its personal judgment .The authority has purported to act under the dictation of a superior .It has acted on expediency rather than its own subjective opinion .From the Home Ministry it was a command to her. From the Superintendent of Police it was an authoritative direction peremptory in character. The Superintendent said that "their (accused persons")detention under Misa is absolutely necessary for the security and defense of the country. Therefore, detailed notes giving ground of each(in triplicate) are enclosed herewith for issue of their detention order as fresh determaing authority, it appears to us, did not address itself independently to the matter for consideration. It accepted instructions from above. "The Additional District Magistrate went by the instructions of the "higher authorities", to use her own expression. She surrendered her individual judgment. She mechanically adopted the view of an outside authority. The detaining authority entrusted with power of discretion to detain or not to detain did not exercise the statutory discretion independently .The exercise of discretion of the detaining authority has been subject to pressure. Therefore, the order is sham. [See R. v.Governor of Brixon ex parte Soblen (supra).]On the material we are unable to conclude that

there was any application of mind on the part of the detaining authority and that she had not acted upon someone else's opinion.

(17) On this material another division bench to which one of us (Prakash Narain J.) was a party reached the same conclusion. It was held in that case that the order of detention is sham as the detaining authority acted mechanically and in obedience to the orders she had received for detention from the Ministry of Home Affairs. (See *RajPrakash Varashney v. The Additional District Magistrate, Criminal Writ No .13 of 1977*(14) decided on 5/08/1977 by Prakash Narain and P. S. Safer JJ). On the facts of this case we are of the same view .

(18) This brings us to the third ground of challenge. As we have seen the first requirement u/s 8(1) is that the detaining authority must within the time laid down therein communicate to the deten on the grounds on which the order of detention has been made. The reason of this requirement is twofold. Firstly, the requirement of communication of grounds is a check against arbitrary exercise of power . "Absolute discretion is a ruthless master. It is more destructive of freedom than of any man's other inventions" (Douglas J in *United States v. Wondulich* (1951) 342 Us 98. Unlimited power to detain any man at will is too dangerous to deposit in any ruler, official or bureaucrat.

(19) Those who won our independence valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. These words of Pericles uttered at the Funeral Oration reverberated in their ears. The founding fathers were themselves soldiers of freedom. They knew, as Burke had said, that law and arbitrary power are in eternal enmity. And as Woodrow Wilson had said:

THE history of liberty is a history of resistance .The history of liberty is a history of limitations of government power, not the increase of it.

The framers of the Constitution were aware that though they were giving a Constitutional status to preventive detention yet its whole theory was sinister and strangely out of place in a democratic constitution conceived in liberty, A.K. Gopalan Vs. The State of Madras, . The constitution makers, Therefore, PROVIDED that the detaining authority must communicate grounds which weighed with it in making the decision that a given person must be detained. This was intended to serve as a limitation on the vast powers of preventive detention which the legislature was confounding in the executive.

(20) Secondly, the detenu has to be afforded an opportunity of making a representation against the order of detention. But if the grounds are not communicated to him, how will he make an effective representation? The right of representation under Article 22(5) of the Constitution is a valuable right and not mere formality. It is a matter of substance and not of form- If the right of representation is to be real and not only illusory the grounds of detention must be communicated. Otherwise ,the right of representation conferred by Article 22(5) would be rendered nugatory.

(21) Now "grounds" mean all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which the order of detention is based (Khudiram Das (supra) at p. 554). It would include any information or material which influenced the detaining authority in making the order of detention. It would include facts except those which the detaining authority considers to be against the public interest to disclose (s. 8(2)). What do we find in this case? Has the detaining authority satisfied the constitutional and statutory requirements? Did it communicate to the detenu the grounds, those basic facts and material particulars, which were considered by Mrs. Ghosh in making the order of detention. Now in her affidavit dated 4/08/1977 she says:

THE material brought out against the petitioner on which my orders of detention were passed are reproduced not only in the confessional statement of the petitioner above noted but also in evidence procured by the police during investigation and all these things were the basis of my subjective satisfaction .

(22) The materials which are avowedly the foundation of her order of detention are two-fold: (1) the confessional statement, and (ii) the evidence in the police record. But in the grounds she has referred only to the confessional statement. The evidence procured in the police investigation has not been mentioned in the grounds of detention at all nor communicated to the detenu. The Additional District Magistrate herself says that this evidence also had effect on her mind and weighed with her in reaching the requisite satisfaction. The detention order must, Therefore, be held invalid as it does not give "all the facts and materials" on which the order is based. Orders based on uncommunicated materials are unfair and illegal Bhut Nath Mete Vs. The State of West Bengal, . "It is elementary" to quote Bhagwati J.:

that the human mind does not function in compartments. When it receives impressions from different sources IT is the totality of the impressions which goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the making process "(Khudiram's case (supra) (page 561)).

We must, Therefore, hold the order of detention bad, both on the ground that all basic facts and materials which influenced the subjective satisfaction of the Additional District Magistrate were not communicated to the detenu as also on the ground that the detainee was denied an opportunity of making an effective representation against the order of detention.

(23) We now take up the fourth ground on which the order of detention was attacked. Section 3(3) of the Act says:

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State Government to which

he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government.

Section 3(4) then provides:

WHEN any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order.

(24) Now the record of the Administrator shows that he approved the order of detention on 29/04/1977. But the question is : What was the information and material placed before him at the time of seeking the approval? The section says that the detaining authority to submit together with the grounds on which the order has been made "such other particulars as authority has in his opinion have a bearing on the matter .The object of sub-section (3) is to see that the appropriate Government serves as a supervisory authority on the Additional District Magistrate to decide whether the power of detention has been properly or improperly exercised. If the appropriate government is to effectively discharge its function as an overseeing superior authority in determining whether to grant or withhold its approval to the order of detention made by the Additional District Magistrate it must a fortiori have before it all the basic facts and materials on which the detention order is based. For this purpose the basic minimums that the detaining authority places before the appropriate government the entire record of the case which was before it. Only then can the appropriate government take the decision to approve or not to approve the order of detention, Counsel for the Administration frankly conceded that all that was sent to the Administrator in this case were the grounds. This shows that the Administrator did not have before him the full confessional statement of the detenu which he could read for himself nor the evidence of the police investigation which he could peruse to satisfy himself that the order has been made on good grounds i.e." on material which is of rationally probative value", to use the words of Patanjali Sastri J. in *Machinder's* case (supra). If all the basic facts and materials and other particulars having a bearing on the matter are not placed before the Administrator how can he find whether the detaining authority grounded its satisfaction on materials relevant to the purposes of the Act. If the appropriate Government does not apply its mind and approves the order in mechanical routine it has not discharged the function assigned to it by the legislature. It then abdicates its function, so to say.

(25) Similarly, to the Central Government the particulars of Thecae "having a bearing on the necessity for the order" were never submitted .Only the order and the grounds were sent. This is what we were given to understand in the course of the hearing when we pointedly drew the attention of the counsel for the

Central Government and the Administration. On behalf of the Central Government and the Administrator no affidavit was filed. Of the Central Government even the record was not produced. If the Central Government did not have before it the material having a bearing on the "necessity" for the order it could not exercise its judgment. Under the Act the Central Government has the last word .It has to apply its mind. It can revoke a detention order of the State Government as of itself. (See John Martin Vs. State of West Bengal, . If it finds that the State Government is misusing the power vested in it by the Act and .is detaining persons out of animosity or pique it can revoke the order. It has the overriding power (See s. 14 of the Act). But if the Central Government is merely informed of the order and is not informed of the facts leading to the "necessity for the order" that is not a strict compliance of sub-section (4) of section 3- If the Central Government cannot inform its mind about the "necessity" for the order as no material is placed before it, it effaces itself virtually.

(26) Counsel for the Administration argued that the petitioner had not raised these points in the petition and, Therefore, they had no opportunity to meet them. We cannot accept this contention. The onus to show that a detention has taken place in due course of law is upon the detaining authority. In the nature of things the prisoner will seldom be able to do more than raise a prima facie case, or alternatively to sow much substantial and disquieting doubts in the mind of the court about the bona fides of the order he is challenging that the court will consider that some answer is called for. (See Rules of the Punjab High Court Ch. 4F(a) Rules 8 and 10). Lord Atkinhas said that:

EVERY imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify the act."(Liversidgev. Anderson (1942) A.C. 206 .

(27) A detention becomes unlawful not only where there is no law to justify it, but also where "procedure established by law" which authorises the detention has not been followed. (Article 21 of theConstitution).In A.K. Gopalan Vs. The State of Madras, the Supreme Court said:

Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and must not be departed to the disadvantage of the persons affected.

These words recall to mind the famous words of Lord Atkin in the Privy Council in Eshugbayi Eleko v. Government of Nigeria, 1928A.C. 459 :

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action, before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding the issues in the face "of the executive .

In the troubled times of war Lord Atkin made the celebrated speech in the House of Lords:

In this country, amid the clash of arms, the laws are not silent .They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, THAT the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.

(Liversidge v. Anderson (1942) A.C. 206 .Whenever individual freedom has come under attack judges and lawyers have: remembered these words and found comfort in them. The Supreme Court has said that it is for the State to satisfy the Court about the legality of the detention. It is incumbent upon the State to show that the detention of the petitioner was legal and inconformity not only with the mandatory provisions of the Act but is also in accord with the requirements implicit in clause (5) of Article 22 of the Constitution (Shaik Hanif's case, supra). So placing the burden on the respondent follows the fundamental assumption which underlies the law of habeas corpus, namely, that the restraint of freedom should only be permitted where the party restraining can clearly show justification. (Sharp : The Law of Habeas Corpus(1976) p. 88).

(28) The writ of habeas corpus brings prisoners before the Court and requires the jailor to show the basis of his custody. It has traditionally held a special place in the history of the protection of personal freedom in English law as well as in our law. It is, however, no greater a protector of that freedom than the judges' view of what constitutes lawful custody. "The difference between a constitutional order and an authoritarian regime lies in the court's power and willingness to evaluate for itself the stated basis for custody, under legal principles to which the custodian and committing authorities are subject".(Legal Values in Western Society-Stein & Shand (1974) p.149).Ultimately the efficacy of the writ will depend upon the independence of the courts and other bodies charged with ensuring that the law prevails. "Independence" is indeed almost too bland a word to describe the quality required of them, for they must if necessary, standing opposition to the Government or any other organ of the State even in the throes of crisis. Yet the true judicial character is a thing of spirit rather than law and, like a star, though always present, shines most in darkness.

(29) For these reasons we accept the petition and make the rule absolute against respondents 1, 2, 3 and 4. We discharge the rule against respondents 5, 6 and 7 as it has not been shown to us that they have had anything to do with this matter. At the conclusion of the hearing we announced the judgment, issued the writ and ordered respondents 1, 2, 3 and 4 to set the petitioner at liberty forthwith. Now we have given our reasons.

(30) We were informed by the petitioner at the hearing that in connection with his arrest in the investigation of Fir 26 of 1977dated 26/01/1977 Police Station Srinivaspuri, New Delhi, he had already been granted bail and that he had furnished the bail bond and the surety which the court had accepted. That being so we directed that the petitioner be set at liberty at once.

(31) Before we conclude we would like to record our thanks to Mr. R. K. Jain, Advocate who appeared amicus curiae on behalf of the petitioner and argued the case with great ability.