
(1983) 06 DEL CK 0001

In the Delhi High Court

Case No : Civil Writ Appeal No's. 832, 833 and 834 of 1980 and Letter Patent Appeal No. 108 of 1980

Indrajit Barua

APPELLANT

Vs

The State of Assam and Another

RESPONDENT

Date of Decision : 03-06-1983

Acts Referred:

Citation : AIR 1983 Delhi 513 : (1984) 1 ILR Delhi 1

Hon'ble Judges : Prakash Narain, J;B.N. Kirpal, J

Bench : Division Bench

Advocate : H.N. Salve, P.H. Parekh, Arun K. Sinha, Ashok Gupta, D.K. Chhaya, K. Prasaran and D.P. Wadhawa, for the Appellant;

Judgement

Prakash Narain, J.

(1) What is most precious to any man is his life. Next to that his personal liberty. "That is why life and liberty are two basic human rights which are ensured to every man, woman and child in any civilised society. This is recognised by our Constitution and is enshrined as a fundamental right in Article 21. Indeed on such a high pedestal have these two rights been placed by the Constitution that Article 21 is couched in a language which is by way of a direction or injunction to all and sundry, including the State, that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

(2) In any organized society it is a basic postulate that the rule of law is supreme. Therefore, it is only procedure established by law which could entitle the taking away of a person's life or personal liberty. "The power to deprive a man of his basic-human right of either" life or personal liberty is necessitated because of the imperative of an organized society, the need of the society to keep it duly organized, free of crime or offences against the society or persons Constituting the society. Indeed, it can hardly be disputed that such a need or power must take precedence over the individual's right to enforce his rights qua life and personal liberty. This social need, however, can only be met in one way

and that is that-the State representing the Society, arms itself with the power to deprive a person of life and liberty by enacting a valid law.

(3) The procedure established by law, however, cannot be arbitrary. This has been recognised by our Constitution by enacting provisions like Article 14, Article 19 and Article 21. It is a postulate of civilised society that all State action whether it be executive action or legislative action or even judicial action must stand the test of being just, reasonable and fair. In other words, it must not be oppressive, capricious, whimsical, unjust or unfair. In short, it should not be arbitrary. These are the fundamentals of any civilised society and on which our secular, democratic republic is founded. Thirty three years ago, Mukherjee, J. (as he then was) in Gopalan's case Diverting to this very aspect had to say this:

" THE question ,Therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he" pleases, to stay what he will. to go Where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrongdoer and if his property or possessions could be prayed upon by a thief or a marauder. The society, Therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, Therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

Likewise S. R. Dass, J (as he then was) opined:

"PERSONAL liberties may be compendiously summed up as the right to do as one pleases within the law. I say within the law because liberty is not unbridled license. It is what Edmund Burke called "regulated freedom"..... Therefore, putting restraint on the freedom of wrong doing of one person is really securing the liberty of the intended victims. To curb the freedom of the saboteur of surreptitiously removing the fish plates from the Railways lines is to ensure the safety and liberty of movement of the numerous innocent and unsuspecting passengers. Therefore, .restraints on liberty should be judged not only subjectively as applied to a few individuals who come within their operations but also objectively as securing the liberty of a far greater number of individuals.

social interest in individual liberty may well have to be subordinated to other greater social interests. If a law ensures and protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the liberty of some individuals, for, it will ensure for the greater liberty of the rest of the members of the society. At the same time our liberty has also to be guided against executive, legislative as well as judicial usurpation of powers and prerogatives."

(4) The petitioners before us contend that certain legislative actions of the State of Assam and the Parliament and consequent administrative actions of the Governor of the State of Assam, if tested on the touchstone of the above postulates would be found to be ultra vires. The two enactments challenged before us in C.W. 832 and 833 of 1980 are the Assam Disturbed Areas Act, Xix of 1955 enacted by the Assam legislature and the Armed Forces (Assam and Manipur) Special Powers Act, 28 of 1958 read with the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972 (No. 7 of 1972) enacted by the Parliament. The two orders of the Governor of Assam, challenged are Notification No. PLR-20/ 80/19 dated April 5, 1980 issued u/s 3 of the Assam Disturbed Areas Act, 1955 and Notification No. PLA-20/80/20 dated 5th April. 1980 issued by the Governor of Assam u/s 3 of the Armed Forces (Special Powers) Act. 1958 as amended. A challenge is also made to an order issued u/s 144 Criminal Procedure Code . on 28th March, 1-980 by .the District Magistrate (Kamrup) Gauhati.

(5) In C.W. 834180 the challenge is to a notification dated December 14, 1979 publishing a proclamation and order made by the President under Article 356 of the Constitution of India on 12th December, 1979." Another order dated 12th December . 1979 made by the President of India conferring on the Governor of the State of Assam certain powers and Assam Ordinance No. 3 of 1980 known as the Assam Preventive Detention. Ordinance 1980 promulgated by a notification dated April 18. 1980 legislating for preventive detention, in certain conditions and on certain postulates are also challenged. We may mention that the said Ordinance has been superseded by the Assam Preventive Detention Act, 5 of .1980 which repeals the aforesaid Ordinance. Act 5 of 1980 has not been challenged before us.

(6) L.P.A. 108180 is directed against an interim order passed by a learned single Judge in C.W. No. 832 of 1980.

(7) Before we proceed further it would be apt to notice how these petitions and appeal are being heard by us.

(8) Inderjeet Barua filed a petition under Article 226 of the, . Constitution of India in the Gauhati High Court which was registered as Civil Rule No. 182180. Rule nisi was issued by that High Court on April 7, 1980. An ex-parte stay of the operation of the aforesaid two notifications of the Governor of the State of Assam issued on April 5, 1980 was ordered. A similar petition under Article 226 of the

Constitution of India was filed by Hem Kant Sharma in the Gauhati High Court which was registered as Civil Rule 192[80. Rule nisi was issued and ex-parte stay orders with regard to the aforesaid two notifications were passed on 11th April, 1980.

(9) Jatin Goswami filed a petition under Article 226 of the Constitution of India in the Gauhati High Court which was- registered as Civil Rule No. 203; SO. He had challenged, inter alia, as noticed earlier, the proclamation and orders of the President dated December 12, 1979 and Ordinance No. 3 of 1980. Rule nisi was issued. The operation of the impugned ordinance was stayed ex-parte.

(10) The application for interim relief in Civil Rule No. 182180 came up for hearing before a learned single Judge of the Gauhati High Court when opposition was filed by the respondents. This was consequent to orders passed by the Supreme Court of India in SLP (Civil) No. 4377 of 1980. The original ex-parte stay was somewhat modified but the operation of section 4 of the Assam Disturbed Areas Act, 1955 and of section 4(a) of the Armed Forces (Special Powers) Act, 1958 was stayed. With regard to the two impugned notifications issued by the Governor of the State of Assam it was ordered that the two impugned notifications will take effect but no power shall be exercised under the provisions of section 4 of the Assam Disturbed Areas Act and Section 4(a) of the Armed Forces (Special Powers) Act, 1958; exercise of which powers was stayed. It was observed that adequate precaution shall be taken to prevent abuse of the provisions of clauses (c) and (d) of section 4 of the Armed Forces (Special Powers) Act, 1958. The writ petition was ordered to be heard and disposed of expeditiously. Against this order a writ appeal was filed by Union of India and the State of Assam.

(11) In Jatin Goswami's case the application for interim relief came up for hearing after notice on April 23, 1980. Inasmuch as the rule was ordered to be heard on May 2, 1980, the learned single Judge of the Gauhati High Court did not think it necessary to amend the earlier ex-parte stay orders. Thereafter the hearing was adjourned from time to time and the final hearing of the case could not be taken up.

(12) The Union of India and the State of Assam had filed SLP (Civil No. 4377180) in the Supreme Court of India, but the Supreme Court had not varied the ex-parte stay order given by the High Court. It had only directed that the stay application be disposed of on April 18, 1980 after hearing both parties. The High Court was further directed to treat the material placed before the Supreme Court in the SLP as material placed before it and also give liberty to the parties to produce such other material as they desire to produce. What happened thereafter has already been noticed by us earlier.

(13) After the Assam High Court had passed orders in the application for interim relief, as noticed by us earlier, transfer petitions were moved by the Union of India and the State of Assam in the Supreme Court in regard to above noted four

matters and some other matters. Accepting the petitions various cases including the above four with which we are presently concerned were transferred to this court. In this Court Civil Rule 182/80 has been registered as C.W.P. 832180, Civil Rule 190180 has been registered as C.W.P. 833180, Civil Rule 203180 has been registered as C.W.P. 834180 and the Writ Appeal has been registered" as L.P.A. 108/80

(14) Although the above matters were transferred to this court and were taken up by us on July 16, 1980 hearing of the matters was adjourned from time to time on joint request of counsel for the parties. Finally the cases have been heard with consent of learned counsel for the parties in the last week and we now proceed to judgment.

(15) We may straight away dispose of C.W. 834180. The challenge to The Assam Preventive Detention Ordinance 1980 which has been replaced by the Assam Preventive Detention Act, 1980 alone is pressed. Section 17 of the Act repeals the Ordinance. The Act came into force on April 18, 1980. It has not been challenged before us. All actions, deeds, acts and things taken or done under provisions of the Ordinance are deemed to have been taken or done under the corresponding provision of the Act. Inasmuch as the virus of the Act is not challenged, though if the petitioner was so inclined he could have challenged the same by even moving an application for amendment of the petition, it will be an exercise in futility for us now to deal with the virus of the Ordinance. The petition is, Therefore liable to be dismissed.

(16) As far as L.P.A. 108180 is concerned, the contentions raised therein are of academic interest. We are disposing of the writ petition itself on merit and, Therefore, the decision in the writ petition would govern the decision to be arrived at in the L.P.A.

(17) We now proceed to take up the two remaining petitions, namely, C.W. 832 and C.W. 833 of 1980..

(18) The Assam Disturbed Areas Act, 1955 (hereinafter referred to as the Assam Act) was passed by the Legislature of Assam. It received the assent of the Governor of Assam on December 14, 1955. The long title of the Assam Act is, "An act to make better provision for the suppression of disorder and for the restoration and maintenance of public order in disturbed areas in Assam." The Preamble of the Assam Act reads: "Whereas it is necessary to make better provisions for the suppression of disorder and for the restoration and maintenance of public order in the disturbed area in Assam". Section 2 of the Assam Act defines "Disturbed area" to mean an area which is for the time being declared by notification u/s 3 to be a disturbed area. Section 3 of the Assam Act lays down that the State Government may, by notification in the official Gazette declare that the whole or any part of any district of Assam as may be specified in the notification to be a disturbed area. Sections 4 and 5 of this Act read as under:

"SECTION 4 : Power to fire upon persons contravening certain orders: Any

Magistrate or Police Officer not below the rank of Sub-Inspector or Havaldar in case of the Armed Branch of the Police or any officer of the Assam Rifles not below the rank of Havaldar, may, if in his opinion, it is necessary so to do for the maintenance of public order, after giving such warning, if any, as he may consider necessary, fire upon, or otherwise use force even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in a disturbed area, prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or fire-arms, ammunition and explosive substances.

"

SECTION5: Powers to destroy arms dump, fortified positions, etc. Any Magistrate or Police Officer not below the rank of Sub-Inspector or any officer of the Assam Rifles not below the rank of Jamadar may, if in his opinion, it, is necessary so to do destroy any arms dump, prepared or fortified positions or shelters from which armed attacks are made or attempted, structures used as training camps for armed volunteers or utilised as hideouts or shelters by armed gangs or absconders wanted for offences in connection with the disturbances."

(19) Section 6 lays down that no suit, prosecution or order legal proceedings shall be instituted against any person in respect of anything done or purported to have been done in exercise of the powers conferred by Sections 4 and 5 except with the previous sanction of the State Government. We may notice that the Assam Act repeals the Assam Disturbed Areas Ordinance, V of 1955. We may further notice that the Assam Act has never been placed before the President of India for his assent and none has been given.

(20) The Armed Forces (Assam and Manipur) Special Powers Act, 1958 (hereinafter referred to as the Central Act) was enacted by. the Parliament in September, , It was. amended by "the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972 which was enacted in April, 1972. This Act will hereafter be referred to by us as the Central Amending Act.

(21) The long title of the Central Act reads, "An act to enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the State of Assam and the Union Territory of Manipur". By the Central Amending Act the words "in the "State of Assam and the Union Territory of Manipur" have been substituted by the words, "in the States of Assam, Manipur, Meghalaya, Nagaland and Tripura and the Union Territories of Arunachal Pradesh and Mizoram" in the long title of the Central Act. Section 2(a) of the Central Act reads as under:

"SEC. 2(a): "armed forces" means, the military forces and the air forces operating as land forces, and include any other armed forces of the Union so operating"

Section 2(b) reads as under :

"SEC.2(b): "disturbed area", means an area which is for the time being declared by notification u/s 3 to be a disturbed area".

Section 3 of the Central Act as amended by the Central Amending Act lays down that the Governor of the States to which the Central Act is applicable or the Chief Commissioner or Administrator of the Union Territories to which the Central Act is applicable may, if they are of the opinion, that the whole or any part of their respective State or Union Territory, as" the case may be, "is in such a disturbed or dangerous condition that the use of armed force in the aid of civil power is necessary, he may, by notification in the Official Gazette, declare the whole or any part of the State or Union Territory to be a disturbed area."

(22) Section 4 of the Central Act reads as under : 4. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area

(A)If he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of .death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons" or of fire-arms, ammunition or explosive substance.

(B)if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence;

(C)Arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(D)Entry and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully suspected to be stolen property .or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary."

(23) Section 5 of the Central Act lays down that any person arrested and taken into custody under the Act shall be made over to the officer in charge of the nearest police station with the least possible delay together with the report of the circumstances occasioning the arrest. Section 6 provides that no prosecution, suit or other legal proceedings shall be instituted against any person in respect of anything done or purported to have been done in exercise of the powers conferred by the Act except with the previous sanction of the Central

Government. Section 7 of the Central Act repeals the Armed Forces (Assam and Manipur) Special Powers Ordinance, 1958. ;

(24) On April 5, 1980 the Governor of Assam issued two notifications bearing Nos. Pla 20/80/19 and No. Pla 20180120. The former was issued u/s 3 of the Assam Act while the latter was issued u/s 3 of the Central Act. By the two notifications the.. whole of the State of Assam was declared to be "disturbed area" except North Cachar Hills district under the respective Acts. The North Cachar Hills District had already been notified to be "disturbed .area" by earlier notification under the two Acts issued on 27th February 1980. The effect of the issue of the two notifications was that the relevant provisions of the Assam Act and the Central Act became applicable and powers" could be exercised by the persons and authorities mentioned in the said Acts to the extent conferred by the two Acts. The petitioners challenge not -only the virus of the two Acts as being vocative of Articles 14, 19 and 21 of the Constitution but also the legislative competence of the Assam legislature and the Parliament in .respect of the respective legislation enacted by the two legislatures. Their contention in regard .to the impugned notifications" issued by the Governor are that the same have been issued without application of mind, without any proper material being before the Governor and in a manner which can only regarded as not being a just, fair and reasonable exercise of power, even if power is assumed to be there in the Governor to issue the impugned declarations. It is further submitted that inasmuch as the term "disturbed area" has not been defined, the act of declaring an area to be "disturbed area" is without any basis and irrational. In other words, it is whimsical and fanciful amounting to arbitrariness.

(25) The contention on behalf of the Central Government and the State of Assam, on the other hand, is that the challenge as made is misconceived. It is the respondents case that the respective legislatures had the power to enact the laws and the same are not liable to be struck down either for want of legislative competence or being in alleged violation of Articles 14, 19 and 21 of the Constitution. The exercise of power by the Governor is defended by inviting our-attention to the circumstances necessitating the issue of the two notifications on April 5, 1980. With regard to the scope of the term "disturbed area" it is submitted that sufficient guideline is to be found in the long titles and preambles and sections of the .two enactments as to what is "disturbed area".

(26) Mr. Harish Salve, learned counsel for the petitioner, has put his case thus : Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty except according to the procedure established by law. - Further even the procedure prescribed for deprivation of life or personal liberty cannot be arbitrary, excessive, oppressive or unjust. Reliance has been placed on Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .

(27) Learned counsel proceeded to urge that any law or procedure which leads to inhumane or degrading treatment, as according to him is permitted or contemplated by Section 4 of the Assam Act and Section 4 of the Central Act,

cannot stand the test of reasonableness and absence of arbitrariness and as such will not constitute procedure established by law within the meaning of Article 21 of the Constitution. He relied on *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others* Air 1981 Sc 746 (2).

(28) On the constitutional validity of the two Acts Mr. Salve's principal attack has been to invite our attention to the & width of the power conferred. He contended that in relation to rights of personal liberty, a provision which confers wide powers which are capable of abuse have been held to be vocative of Article 21 of the Constitution in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, . Therefore, in matter of taking away life the width of power as conferred would certainly make the provision of the impugned laws vocative of Article 21 of the Constitution.

(29) It was further submitted by the learned counsel that in the context of the width of the power conferred by the impugned enactments, that it would be relevant to examine the wide ranging discretionary powers given to low ranking officials with out there being adequate safeguards for preventing misuse of such powers. Consequently a statute which confers such powers would be liable to be struck down as it will fail to "stand the test of absence of arbitrariness as" contemplated by Article 14 of the Constitution. The counsel added that the rank of repository of power has to be judged with reference to the likelihood of his exercising due farness and caution in exercise of power. To sup port this contention reliance was placed on *Gurbachan Singh v. State of Bombay and another and Pannalal Binjraj Vs. Union of india (UOI)*, .

(30) The width of the power according to Mr. Salve had also to be examined in another way. Section 3 of the Assam Act or the similar provision in the Central Act read with the Preamble and" the long title of the Acts could be determinative of the areas w which the provisions of the Act were to apply. In that view of the matter the Acts could be extended to all areas where there is breakdown or likelihood of breakdown of public order. Once an area has been declared as a disturbed area then more or less every act which may otherwise constitute merely a break down of law and order can fairly be construed to constitute a breach of public order as there is no qualitative difference between actions which amount to a breach of law and order and which amount to a breach of public order. Therefore, it was submitted, the wide powers conferred by Section 4 of the Assam Act or the similar provisions in the Central Act to fire upon or to use force even to the extent of causing death on Sub Inspectors or District Magistrates is bad as the District Magistrate and Sub Inspectors and Magistrates have more controlled powers for dealing with breaches of law and order. Reliance was placed on the observations in *Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others*, .

(31) AMPLYFYING- the above submissions the learned counsel submitted that the situations in which Section 4 of the Assam Act or similar provision of the Central Act are attracted are only two, namely, where any person contravenes any law or

order for the time being in force, (a) prohibiting the assembly of five or more persons or (b) carrying of weapons or things capable of being used as weapons of fire-arms-ammunition explosive substances. As far as the situation at (a) is concerned there is ample provision with regard to it in the Code of Criminal Procedure, Sections 129 and 131 of the Code of Criminal Procedure give power to order dispersal of any unlawful assembly or any assembly of five or more persons likely to cause disturbance of public peace. Section 144 of the Criminal Procedure Code confers power to direct any person or group of persons, persons residing in a particular place or the public generally who visit a particular place, to abstain from doing, any act where it is necessary to do so to prevent, inter-alia, disturbance of public tranquility. These powers are, however, exercisable with safeguards. These powers though providing for use of force, it & also provided that the force used has to be minimum force necessary for discharging or dispersing the assembly and arresting or detaining persons Constituting a prohibited assembly. Section 4 of the Assam Act and the similar provision in the Central Act, however, confers blanket power to fire upon or use force even to the causing of death in identical situations. Therefore, the width of the power conferred is arbitrary and does not stand the test of being just, fair and reasonable. The powers conferred actually amount to conferment of powers which can be called excessive, oppressive and capable of wanton abuse. To stress the point the learned counsel contended that it would be strange case that whereas after, a trial and conviction for such offences as murder causing breach of public order, death penalty could be awarded in the arrest of rare cases but under the impugned Acts death could be caused by a low ranking official on mere apprehension and suspicion On the basis of his subjective satisfaction. There being no safeguard to possible abuse in exercise of power of Section 4 of the Assam Act and the similar provision in the Central Act are both liable to be struck down. Reference was made to the decision of the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, , where a similar power capable of wanton abuse u/s 3(3) of the National Security Act to preventively detain in scimitar circumstances was struck down. The "argument proceeded that if for personal liberty such possibility of wanton abuse makes a provision bad surely in the case of life, a more sacred right, giving of such power would be bad.

(32) With regard to situation (b) above, viz., carrying of arms etc., it was urged that Section 20 of the Arms Act confers adequate powers to" arrest and Section 22 of the Arms Act gives" power for search and seizure of arms and ammunition likely to be used to disturb public peace and safety but exercise of these powers is hemmed in with safeguards. No such safeguards are available in the provisions of the impugned statutes. Therefore, the same are liable to be struck down.

(33) On the legislative competence of the Assam legislature in enacting the Assam Act, and of the Parliament in enacting the Central Act, Mr. Salve contended that reading, entry 2 of list II, which provides for legislation with respect to criminal procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution and a reading of

entry I of list II would show the entry 2 of list III is a specific entry and would prevail over entry I of list II. Reliance was placed on *Maru Ram and Others Vs. Union of India (UOI) and Others*, . Therefore, the power given in the Assam Act to disperse an assembly of five or more persons which is also given in the Code of Criminal Procedure would be bad as lacking in legislative competence. Entry I of List II of the 7th Schedule, as was in force in 1955 when the Assam Act was enacted read asunder :

"PUBLIC order (but not including the use of naval, military or air force or any other armed force of the Union in aid of the civil power) ".

(34) By the 42nd amendment this entry was amended to read :

"PUBLIC order (but not including the use of any naval, military or air force or any other armed force" of the Union or any other force subject to the control of the Union or of any contingent or unit thereof), in aid of civil power".

(35) Entry 2 of List III of the Seventh Schedule reads as under :

"Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution".

(36) Referring to entry 5 of the list I which reads, "arms, fire arms, ammunition and explosives" it was urged, that the Arms Act deals with these subjects is" a Central legislation. Section 4 of the Assam Act to the extent it confers powers to fire upon or use force against persons carrying weapons, fire arms, ammunition and explosives" is in pith and substance a law dealing with arms and explosives and consequently is ultra virus of the legislative powers of the Assam legislature. The same argument was contended to apply to Section 5 of the Assam Act making it ultra virus the Assam legislature. In any case, it was submitted, Sections 4 and 5 of the Assam .Act are repugnant to the provisions of law made by Parliament and to that extent would be void. It was also urged that if these provisions are held to be supplementary to the provisions of the Code of Criminal Procedure the argument of legislative competence would apply with double force.

(37) Reference was also made by learned counsel for the petitioners to Article 359 of the Constitution to contend that the only situation in which enforcement of Article 21 of the Constitution can be suspended is the situation contemplated by Article 359 under which the President may by order suspend the right to move any court for enforcement of the right conferred by Article 21 of the Constitution during the period when a proclamation of emergency is in force. In no other situation can Article 21 of the Constitution be abrogated. By the impugned legislation, it was urged. Article 21 of the Constitution has virtually been abrogated. Indeed a situation akin to martial law has been brought into existence without any warrant for it.

(38) No exception can be taken in principle, to the legal propositions propounded by Mr. Salve in a most able and commendable manner. These propositions, however, have to be applied to a given situation on "well accepted and judicial

principles. We have, Therefore, to examine the arguments on the facts and circumstances of the present cases.

(39) Let us first examine what is the scope and content of Article 14, 19 and 21 of the Constitution.

(40) The view taken by the majority in A.K. Gopalan Vs. The State of Madras, that Articles 19 and 21, or for that matter the various Articles in Part III of the Constitution, are not complementary to each other but deal with separate and distinct rights has undergone a considerable change by the pronouncement of the judgment of a Constitution Bench of seven Judges in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and the full court decision in Rustom Cavasjee Cooper Vs. Union of India (UOI), . It has been held that the minority view in Gopalan's case must be regarded as correct and the majority view must be held to have been overruled. Therefore, it is settled law that the fundamental rights conferred by Part III are not all distinct and mutually exclusive rights. Each freedom may have different dimensions and-merely because the limits" of interference with one freedom are specified, law is not freed from the necessity to meet the challenge of another guaranteed freedom.

(41) The interrelation between Article 21 on the one hand and Articles 14 and 19 on the other has to be kept in view to test the -validity of the Statute. As was observed by Bhagwati, J. in Menaka Gandhi's case. "Now, if a law depriving a person of "personal liberty" and prescribing procedure for that purpose within the meaning of Article 21 has" to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation ex- hypothesis ,, it must also be able to be tested with reference to Article 14."

(42) On the scope of Article 14 of the Constitution in Menaka Gandhi's case it is laid down, "there can be no doubt that it is a founding faith of the Constitution. It is, indeed the pillar on which rests securely the foundation of our democratic republic and, Therefore, it must not be subjected to narrow, pedantic or flexographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits". We must reiterate here what was pointed out by the majority in E.P. Royappa Vs. State of Tamil Nadu and Another, namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies : one belongs to the rule of law in a republic, while the other, to the whim and, caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, Therefore, violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential "element of equality or no arbitrariness pervades Article 14 like a brooding omnipresence."

(43) The law prescribing a procedure, as postulated by Article 21 of the Constitution, has, Therefore, to be tested on the above principle enunciated in the Menaka Gandhi's case, contended the learned counsel for the petitioner. We agree. Indeed, the learned Solicitor General, appearing on behalf of the respondents, stated that he would himself strongly urge that this is the correct approach in law.

(44) Now what does Article 21 postulate ? It says that no person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law, according to the content of Article 21 in the light of the law propounded in Menaka Gandhi's case and explained by the Constitution Bench of the Supreme Court in Bachan Singh v. State of Punjab. The learned Chief Justice accepting the exposition in Menaka Gandhi's case observed :

"IN the converse positive form, the expanded Article will read as below : "A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law." Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the Founding Fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law."

(45) What is, Therefore, just, fair and reasonable procedure established by reasonable law as opposed to procedure which can be called arbitrary or discriminatory is a question to be answered in the facts and circumstances of a case.

(46) Article 19 of the Constitution gives fair indication of how to test it. The power given by Sections 4 and 5 of the Assam Act and the Central Act could be regarded as placing restrictions on the freedoms guaranteed by Article 19(1)(b) and (d). The enforcement of the rights contemplated by Article 19(1)(b) and (d) can, however, be restricted only in the interest of maintaining, inter alia, public order or in the interest of general public as provided by clauses 3 and 5 respectively of Article 19 of the Constitution.

(47) There is another way in which restrictions affecting rights guaranteed by Article 21 can be tested. As we noticed earlier. Article 21 is couched in negative language, the positive form of which would be as propounded by Chandrachud, C. J. Further the injunction not to deprive a person of his life and liberty except in accordance with fair, just and reasonable procedure established by valid law is primarily addressed to the State. Therefore, if to save hundreds lives one life is put in peril or as Das, J. expounded or B. K. Mukherjee, J. put it, if a law ensures and protects the greater social interest than such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals : it will ensure for the liberty of the greater number of the members of the society at the cost of one and a few. In any organized society, - claiming to be civilised and

governed by the rule of law, social imperatives for the greater good must take precedence over individual rights. If that is the correct understanding of the constitutional provisions we have to test the arguments advanced on behalf of the petitioners from this approach.

(48) No one can dispute that the States or Union Territories to which the provisions of the impugned Statutes are made applicable are border States in the North East part of our country. China and Nepal in the North and North West, Burma in the East and Bangladesh (formerly E. Pakistan) in the South have common borders with these territories of India. Assam particularly has been a region not free from difficulties. for centuries. To quote from the Encyclopedia Britannica Vol. II

"PHYSICAL Geography Assam proper comprises the valley of the Brahmaputra as far as the foothills of the Himalayas on the north where lies the frontier with Bhutan occupying the Himalayas to the West. The North East Frontier Agency covers the Himalayas in the northern and north-western part of the State. The valley is roughly 500 ml. from east to west and 50 to 100 ml. wide and is bounded on the south by a succession of hill masses the Garo, Khasi and Jaintia hills beyond which lies Pakistan the Barail range on the Manipur border and the Patkai hills on the Burmese border. The agency has a long frontier with Tibet and China. Near the head "of the valley a number of rivers unite to form the Brahmaputra (q.v.) proper : by far the most important is the Tsangpo (often called Brahmaputra in western maps), which after flowing eastward through Tibet for hundreds of miles turns south through the main Himalayan ranges in great gorges to fall in a series of rapids to the Assam valley where 100 ml. from the sea, it is only 400 ft. above sea level. From there it follows a sluggish course meandering, dividing and reuniting, frequently many miles wide so that periodic flooding renders much of the Assam valley of little use. The various hill areas round the valley are named after the hill tribes inhabiting them; at the far eastern end the great mountain barrier became known during the early part of World II as "The Hump" over which supplies were flown to western China then resisting the Japanese invasion."

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"From remote antiquity the valley was occupied by a Tibeto-Burman speaking people. This stock still forms the bulk of the indigenous population. Indo-Aryan settlement in the valley must have begun before the opening of the Christian era. Three lines of kings are known "to have ruled from the 6th to the 12th century. In the 13th century the first Muslim invasions broke up the old kingdom ; about 1515 a Koch dynasty carved out lands and now comprise the district of Cooch-Bihar (q.v.) and lower Assam, and which soon split into an eastern and a western kingdom. Meanwhile the Burmese Shans, known as Ahoms, who were to give their name to the country and rule it for centuries, had crossed the low ranges at the head of the valley and were consolidating their power in upper Assam. The traditional date of the Ahom invasion according to

their chronicles is A.D. 1228, but students of Burmese history consider a date in the late 15th or early 16th century more probable (see AHOM). They at once came into conflict with the Kacharis, whose leaders retreated down the south bank of the Brahmaputra. In 1527 Muslim marauders from Gaur (q.v.) invaded the Ahom kingdom for the first time and were defeated. The Ahoms, pressing west against the kacharis, sacked Dimapur, their capital, and forced them into the north Cachar Hills, where they built a new capital at Maibang. Surviving ruins show that the Kacharis at this period had attained a considerably higher state of civilization than their conquerors. Wars with the Muslims occupied much of the 17th century, and in 1662 lower Assam was ceded to the Mughal emperor Aurangzeb. In 1706 the Kacharis were driven out of Maibang and established their last capital at Khaspur in the plains of Cachar. About this time the Ahom king Rudra Singh became an orthodox Hindu, and in the reign of his successor Sib Singh (1714-44) Hinduism became the predominant religion. The country had frequently been distracted by rebellions in which both sides showed appalling brutality, and by 1792 such was the state of affairs that the king, Gaurinath, sought and received aid from the British in Bengal. This aid was soon withdrawn, however, and in 1816 a claimant to the throne called in the Burmese, who plundered the country and returned the following year. After further disorder and a period of direct British rule (1826-32) Assam was in 1838 incorporated in Bengal (q.v.) and remained a part of that province until a separate chief commission was set up in 1874. This arrangement continued, with one interval, until 1919, when Assam became a governor's province. During World War II the Naga Hills especially the area around Kohima, were the scene of bitter fighting between the British 14th army and the Japanese forces which had occupied Burma in 1942.