

(1975) 09 MP CK 0003

In the Madhya Pradesh High Court

Case No : Misc Petition No. 138 of 1975

Laxminarayan Sheodayal Jaiswal

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 02-09-1975

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 22, 226

Criminal Procedure Code, 1973 (CrPC) — Section 107, 151, 401

Citation : (1976) JLJ 189

Hon'ble Judges : P.D. Mulye, J;G.L. Oza, J

Bench : Division Bench

Advocate : M.A. Khan, for the Appellant; G.S. Solanky, Dy. Govt. Advocate for State, for the Respondent

Final Decision : Dismissed

Judgement

G.L. Oza, J.—This and the other petitions, 28 in the number, have been filed by the respective petitioners against the orders of detention passed against them on various dates after the 25th of June, 1975. Except in Petition No. 138 of 1975, no counsel appeared. However, out of the petitioners, three of them, namely, Shilkumar Nigam, M.D. Chandwaskar and U.C. Porwal, happen to be lawyers and all the petitioners who were present in person submitted that they have nothing further to argue except what has been submitted by the three petitioners named above in connection with their own petitions.

2. Broadly speaking, the orders of detention of all those petitioners can be categorized into three categories :

(i) Initially they were arrested u/s 151 of the Code of Criminal Procedure and proceedings u/s 107 of the Code were launched and subsequently, after the amendment of the Maintenance of Internal Security Act, a declaration as contemplated by the amended Act was issued.

(ii) The orders were issued u/s 3 of the Maintenance of Internal Security Act

mentioning the grounds in some cases and subsequently after the amendment of the Act a declaration under the amended Act was issued.

(iii) The orders were passed after the amendment of Maintenance of Internal Security Act and declaration as contemplated under this Act were issued.

3. In all these petitions, preliminary objections have been raised on behalf of the State Government, and they are :

(1) That in view of the Proclamation of Emergency by the President on 25th June 1975 and in view of the subsequent order of the President under Article 359 of the Constitution, dated 27th June 1975, the rights guaranteed to the petitioners under Articles 14, 21, 22 and 19 of the Constitution are suspended. And because of the order of the President dated 27th June 1975, their right to move the Court also has been suspended and therefore these petitions cannot be entertained.

(2) The second objection raised by the State Government is that the Maintenance of Internal Security (Amendment) Ordinance, which subsequently was passed into an Act, by section 7 thereof, has suspended any right to liberty under any other law during the continuance of the Emergency and on this basis, therefore, it was contended that these petitions do not deserve to be considered on merits.

4. For the petitioner it was contended that although by Proclamation of Emergency the rights of the petitioners under Article 19 are in a state of suspension and by a subsequent order of the President under Article 359 of the Constitution their rights under Articles 14, 21 and 22 have been suspended and their rights to move the Court for enforcement of their rights under Articles 14, 21 and 22 has been suspended, still, the petitioners can come to the Court and pray that the orders passed against them are not in accordance with the Act under which they purport to have been passed. It was also contended that the Supreme Court in the decisions reported in *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, ; *Makhan Singh Vs. State of Punjab* (and connected appeals), and *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, , has considered this aspect of the matter at length and it has been held that even when the right to approach the Court for enforcement of rights under Articles 14, 21 and 22 is suspended, still the Court has jurisdiction to examine the orders and find out if they have been passed in accordance with the Act and are not a mere camouflage or an abuse of the process of law.

5. It was also contended that where an order of detention initially was issued u/s 3 of the Maintenance of Internal Security Act, the procedure contemplated under the different sections of the unamended Act has to be followed, the order could not be held to be valid. It was also contended that when an order is passed u/s 3, within twelve days it has to be approved by the State Government if the order initially passed is by an officer subordinate to the State Government, as contemplated in sub-clause (3) of section 3 of the Maintenance of Internal Security Act, and if it is not approved within the specified time the detention cannot be said to be valid.

6. It was also contended that The declaration made under the amended Act is a mechanical order indicating failure of application of mind and therefore the declaration could not be said to have been made after the authority, concerned is satisfied.

7. As regards section 7 of the Maintenance of Internal Security (Amendment) Act, it was contended that this section no doubt negatives any right to personal liberty under natural law or common law, if any; but this in no way could be considered to be sufficient to come in the way of jurisdiction of this Court under Article 226 of the Constitution for issue of a writ or order for any other purpose. Under Article 226 a petition in the nature of certiorary or mandamus could be issued for quashing the orders of an authority if the orders are beyond the jurisdiction of that authority, or directions to keep the authorities within the bounds of law. And it was therefore contended that section 7 of the Maintenance of Internal Security (Amendment) Act, 1975, would not debar the petitioners from challenging the orders of their detention before this Court.

8. On 25th June 1975 the President by an order quoted below proclaimed emergency :--

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

NEW DELHI

Sd/- F.A. Ahmed, President

The 25th June, 1975.

(Published in Extra Ordinary Gazette dated 26-6-75).

On 27th June 1975 another order was issued by the President under Article 359(1) of the Constitution which reads :

G.S.R. 361. (E).--In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any Court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in am Court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December 1971, and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India.

This order shall be in addition to and not in derogation of any order made before the date of this order under clause (1) of Article 359 of the Constitution.

It is clear from these two orders that because of the proclamation of emergency

Article 19 automatically stands suspended as contemplated under Article 358 of the Constitution. Article 358 reads :

358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in the Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

9. A perusal of this article makes it clear that during a proclamation of emergency the restriction on the power of State to take legislative or executive action in contravention of Article 19 is withdrawn. Consequently, the executive order or legislative action of any State or the Central Government cannot be challenged on the ground that it is in contravention of Article 19 of the Constitution. In *Makhan Singh v. State of Punjab* (supra), it was observed,--

It would be noticed that as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Article 19 during the pendency of the proclamation of emergency removes the fetters created on the legislative and executive powers by Article 19 and if the legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Article 19 is complete during the period in question and legislative and executive action which contravenes Article 19 cannot be questioned even after the emergency is over.

The President's Order issued under Article 359 provides that no action in a Court of law could be taken for enforcement of the rights conferred under Articles 14, 21 and 22. Apparently, therefore, the contention raised by the State Government is that the orders of detention passed against the petitioners could not be challenged on the ground that it is in contravention of Article 19 in view of the Proclamation of Emergency and they could not be challenged in respect of Articles 14, 21 and 22 as the President's Order under Article 359(1) is in force and suspends the right to approach the Court. It is no doubt true that the President's Order under Article 359(1) does not suspend the rights conferred under Articles 14, 21 and 22, but it suspends the right of the petitioners to move

a Court of law for enforcement of these rights.

10. Under Article 226 of the Constitution a petitioner can move this Court for enforcement of his rights under Part III or for any other purpose:

226 (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any government, within those territories 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.

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (i) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

It is, therefore, clear that "for any other purpose" should be referable to some right of the petitioners which has been taken away. In fact, the right to liberty is only available under Article 19 and if that article itself is suspended and the action of the State Government, legislative and executive both, is saved, even if it is in contravention of Article 19, there is hardly any other right which could be claimed by the petitioners as the right to liberty; and therefore, there is no right which could be said to have been infringed and the petitioners will have no locus standi to approach this Court by a petition for habeas corpus.

11. However, the petitioners have placed reliance on the decisions of the Supreme Court referred to above. In *Makhan Singh Tarsikka v. The State of Punjab* (supra) their Lordships considered the question and came to the conclusion:--

It still remains to consider what are the pleas which are now open to the citizens to take in challenging the legality or the propriety of their detentions either u/s 491 (b) of the Code, or Article 226(1) of the Constitution. We have already seen that the right to move any Court which is suspended by Article 359(1) and the Presidential Order issued under it is the right for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any Court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in

violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

Similarly, in *K. Ananda Nombiar v. Chief Secretary to Govt. of Madras (supra)*, it was observed--

Even on, this Court took the precaution of pointing out that as a result of the issue of the proclamation of Emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate Court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it was pointed out that if a detenu contend that the operative provisions of the defence of India ordinance under which he is detained suffer from the vice of excessive delegation, the plea thus raised by the detenu cannot, at the threshold, be said to be barred by the Presidential Order, because, in terms, it is not a plea which is relatable to the fundamental rights specified in the said order.

And in *Ram Manohar Lohia v. State of Bihar & another (supra)* it is held,--

The net result of the President's Order is to stop all claims to enforce rights arising from laws other than the Defence of India Act and the rules and the provisions of Article 22 at variance with the Defence of India Act and the Rules are of no avail. But the President's Order does not say that even if a person is proceeded against in breach of The Defence of India Act or the Rules he cannot move the Court to complain that the Act and the Rules, under colour of which some action is taken, do not warrant it. It was thus that this Court questioned detention orders by Additional District Magistrate who were not authorised to make them or detention orders by Additional District Magistrate who were not authorized to make them or detentions of persons who were already in detention after conviction or otherwise for such a long period that detention orders served could have had no relation to the requirements of the Defence of India Act or the Rules. Some of these cases arose under Article 226 of the Constitution but in considering the bar of Article 359 read with the President's Order, there is no difference between a petition under that article and a petition under Article 32. It follows, therefore, that this Court acting under Article 32 on a petition for the issue of a writ of habeas corpus may not allow claims based on other laws or on the protection of Article 22 but it may not and, indeed, must not, allow, breaches of the Defence of India Act or the rules to go unquestioned. The President's Order neither says so nor is there any such intendment.

12. In view of this observations made by their Lordships of the Supreme Court it was contended on behalf of the petitioners that their Lordships contemplated a right of the petitioner, other than any right under Part III of the Constitution, to come to the Court and challenge the order of detention on a ground that the

order is not passed in accordance with the law or that the authority passing the order has not acted bona fide and has not applied its mind. It appears that the observations of their Lordships do indicate that apart from part III there is some other right available to the petitioner and to enforce that right the petitioner can approach the Court under Article 226 of the Constitution as in addition to the rights under Part III it talks of "for any other purpose," and the Court will have jurisdiction to examine the order on the basis of the tests referred to above. It appears that it is to meet this contingency that in the amendment of the Maintenance of Internal Security Act, section 7 has been enacted. In fact, while considering the question in *Makhan Singh Tarsikka v. The State of Punjab* (supra) their Lordships of the Supreme Court considered the impact of section 491 of the Code of Criminal Procedure even before the Constitution came into force as their Lordships observed,--

The right to challenge the validity of a statute on the ground that it contravenes the fundamental rights of the citizens of this country only after and as a result of the provisions of the Constitution itself, and so, there can be no doubt that when in the present proceedings the detenus seek to challenge the validity of the impugned statutory provisions and the Rule, they are invoking their fundamental rights under the Constitution. If section 401 is treated as standing by itself and apart from the provisions of the Constitution, the plea raised by the detenus cannot be entertained in the proceedings taken under that section, it is only when the proceedings taken under the said section are dealt with not only in the light of section 491 and of the rights which were available to the citizens before 1950, but when they are considered also in the light of the fundamental rights guaranteed by the Constitution that the relevant plea can be raised. In other words, it is clear that the content of the detenus right to challenge the legality of his detention which was available to him u/s 491 (1) (b) prior to the Constitution, has been enlarged by the fundamental rights guaranteed to the citizens by the Constitution, and so whenever a detenu relies upon his fundamental rights even in support of his petition made u/s 491 (1) (b) he is really enforcing the said rights and in that sense, the proceedings inevitably partake of the character of proceedings taken by the detenu for enforcing these rights; that is why the argument that Article 359(1) and the Presidential Order issued under it do not apply to the proceedings u/s 491 (1) (b) cannot be sustained. The prohibition contained in the said article and the Presidential Order will apply as much to proceedings u/s 491 (1)(b) as to those under Article 226(1) and Article 32(1).

It was therefore felt that some right to liberty is contemplated, which has not been covered under Part III of the Constitution and which was protected u/s 491 of the Code of Criminal Procedure even before the Constitution came into force and Part III thereof was enacted. Such a right, it appears, has been considered in section 7 of the Maintenance of Internal Security (Amendment) Act, 1975, where in it talks of "right to personal liberty by virtue of natural law or common law, if any". In this view of the matter, therefore, even if there is any right to

personal liberty available to a citizen apart from Part III, that too is suspended by section 7 of the Amending Act which incorporates a new section 18 in the Maintenance of Internal Security Act :

7. Section 18 of the Principal Act shall be renumbered as section 19 thereof and before that section as so renumbered, the following section shall be inserted, namely:--

8. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law if any.

Apparently therefore, in face of this provision the petitioners can hardly have any locus standi to file these petitions.

13. It was contended that initially in case of some petitioners action was taken u/s 151 and section 107 of the Code of Criminal Procedure and it is only subsequently that action has been taken under the amended provisions of the Maintenance of Internal Security Act. But it cannot be doubted that when these petitions are being considered, these petitioners are under detention by virtue of an order passed under the amended Maintenance of Internal Security Act. If there is any scope for challenging the detention during the intervening period, it is hardly of any consequence now before us when a valid order under the amended provision is already in existence.

14. Similarly, it was contended that initially some of the petitioners were detained by an order u/s 3 of the Maintenance of Internal Security Act before the amendment and it was contended that it had to be approved by the State Government within twelve days. But the approval in terms of the amended Act has come subsequently. Section 6 of the Amending Act which incorporates section 16A in the Maintenance of Internal Security Act considers this question in sub-clause (2) :

16A. (1).....

(2) The case of every person (including a foreigner) against whom an order of detention was made under this act on or after the 25th day of June 1975, but before the commencement of this section, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the proclamations referred to in subsection (1) have been issued (hereinafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

This sub-clause gives fifteen days" time to the State Government for reviewing the case of such a detenu and issuing a declaration if it feels satisfied under this

sub-clause. Consequently, it could not be contended that the declaration under this sub-clause by the State Government ought to have come within twelve days as after the amendment the detention was to be considered by the State Government sub-clause (2) of section 16A rather than sub-clause (3) of section 3 before the amendment. The contention advanced by the petitioners cannot, therefore, be accepted.

15. As has already been discussed earlier that in view of section 7 of the amending Act which incorporates section 18, a new section in the Maintenance of Internal Security Act, and in view of the Proclamation of Emergency and the President's Order under Article 359(1) of the Constitution, there is no right available to the petitioners to approach this Court by a petition for habeas corpus. In our opinion, therefore, these petitions cannot be entertained.

16. In view of the fact that at present, as discussed above, the petitions have no locus standi to file these petitions, these petitions are hereby dismissed. However, if after the declaration of Emergency ceases to have effect and the order of the President under Article 359(1) ceases to have effect, and the petitioner's detention continues, they may if they so choose, approach this Court for a suitable order or direction. No order as to costs.