

PETITIONER:

ADDITIONAL DISTRICT MAGISTRATE, JABALPUR

Vs.

RESPONDENT:

S. S. SHUKLA ETC. ETC.

DATE OF JUDGMENT 28/04/1976

BENCH:

RAY, A.N. (CJ)

BENCH:

RAY, A.N. (CJ)

KHANNA, HANS RAJ

BEG, M. HAMEEDULLAH

CHANDRACHUD, Y.V.

BHAGWATI, P.N.

CITATION:

1976 AIR 1207 1976 SCR 172

1976 SCC (2) 521

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R 1977 SC1027 (12)

RF 1977 SC1361 (137)

R 1977 SC1496 (24)

RF 1978 SC 290 (3)

RF 1978 SC 489 (1,10,11,12,15,16,17,18,24,25,

RF 1978 SC 597 (5,11,15,19,21,196)

E 1978 SC 727 (55,57)

R 1978 SC 803 (14)

ACT:

Locus standi to move habeas corpus petition under Article 226 of the constitution of India-effect of the Presidential order dated June 27 1975- Constitution of India Articles 19 21 25, 226 and 359(1A).) read with Maintenance Of Internal Security Act (Act 26 of 1971),1971, section 3- Remedy way of writ petition to challenge the legality of an order of detention under the Maintenance of Internal Security Act is not open to a detenu during the emergency.

Maintenance of Internal Security Act (Act 26 of 1971), 1971 Section 16A(9) is a rule of evidence and constitutionally valid-Not open to challenge on the ground of any violation of Part III of the Constitution in view of the provisions of article 359(1A).

Maintenance of Internal Security Act (Act 26 of 1971), 1971-Section 18 applies to all orders of detention a valid piece of legislation and does not suffer from the vice of excessive delegation Not open to challenge on the ground of the theory of basic structure re.

Constitution of India-Article 21 is the sole repository of rights to life and liberty.

Constitution of India Articles 358 and 359-Distinction between.

Constitution of India Articles 20 and 21-Difference between.

Disclosure to court section 16A(9) of the Maintenance of Internal Security Act (Act 26 of 1971) 1971 is an exception and constitutes an encroachment on the

constitutional jurisdiction of the High Court.

Eclipse theory of-Applicability to the enforcement of Fundamental Rights under Art. 359(1).

Good return theory of-Not applicable to the practices of Indian courts.

Obiter dictum-When a decision] becomes an obiter dictum.

Constitution of India article 256-Non-compliance with Article 256 by the State-Grievance at the instance of a private party not entertainable by courts.

Rule Of Law-Constitution itself is the rule of law and the mandate.

Judicial review-scope of during the period of emergency.

Constitution of India Article 12-whether State Includes judiciary.

Constitution of India 372-Law in force whether includes laws included in Part 111 of the Constitution Construction of Article 372.

Maintenance of Internal Security Act (Act 26 of 1971) 1971 Section 16 Leaves open a remedy by way of a suit for damages for wrongful confinement scope of Section. 16 173

Basic structure theory-Constitution of India Article 368-Emergency provisions themselves are to be regarded as the basic structure of the Constitution.

objects of the Maintenance of Internal Security Act (Act 26 of 1971), 1971 and the Amending Acts 31 of 1975 and 14 of 1976 thereto

Presidential order under Art 359(1) and Martial Law under Articles 23 and 73 of the Constitution-Distinction

Constitution of India Art. 359(1) 359(1A) 53 and 73 read with Art. 355 scope of.

Constitution of India Article 226-extent of the powers of inquiry by the High Courts in a petition for writ of habeas corpus when once a prima facie valid detention order is shown to exist.

Rule of law Concept of is inapplicable to emergency provisions since the emergency provisions themselves contain the rule of law for such situations.

Separation of powers-Principles of-Preventive detention being placed exclusively within the control of the Executive authorities of the State for the duration ,. Of the emergency does not violate any principle of separation of powers. '

Basic structure theory is nothing more than a mode of construction of documents of the Constitution.

Jurisdiction of courts under Articles 136 and 226- Nature of.

Constitution of India Articles 34 and 359, effect Whether powers of the courts to issue writ of habeas corpus during the period of Martial Law are taken away,.

Rule of construction-decision of the Supreme Court and the other high judicial authorities-constitution of India Article 141 explained.

Rights under s. 8 of the Maintenance of Internal Security Act (Act 26 of 1971), 1971-Nature of vis-a-vis rights under Constitution of India Article 22(5)-Rights under Article 22(5) do not bar the enforcement of right under

Reflection theory of is not applicable to s. 8 of the Maintenance of Internal Security Act (Act 26 of 1971), 1971.

Practice-Place of dissent in the court of last resort-
desirability of unanimity among judges Constitution of India
Article 141.

Fundamental Rights-object of guaranteed Fundamental
Right.

Natural justice Rules of law being on the same footing
as Fundamental Rights do not override the express terms of a
statute.

Maxims:

- (1) Expression "Facit cessare tacitum"-
Applicability to Art. 21 of the Constitution.
- (ii) Ut res magis valeat quam pereat .
- (iii) Salus populi est suprema lex.

Words and phrases:

- (a) Purported to be made under s. 3 in s. 18 of
the Maintenance of Internal Security Act (Act
26 of 1971), 1971.
- (b) For any other purpose in Art. 226 of the
Constitution-meaning of.
- (c) Conferred by Part III of the Constitution in
Art. 359(1)-Intent

HEADNOTE:

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In exercise of the powers conferred by Clause (1) of
Art. 352 of the Constitution The President of India, by
proclamation dated December 23, 1971 declared that a grave
emergency exists whereby the security of India is threatened
by external aggression and the Maintenance of Internal

Security Act (Act 26 of 1971), 1971 was published on July 2 1971, for effectively dealing with the emergency.

On November 16, 1974, the President of India, in exercise of the powers conferred by Clause (1) of Art. 359 of the Constitution declared: (a) that the right to move any court with respect to orders of detention which have already been made or which may hereafter be made under s. 3(1)(c) of the Maintenance of Internal Security Act, 1971 (as amended by ordinance II of 1974) for the enforcement of the rights conferred by Articles 14, 21 and Clauses (4) (5), (6) and (7) of Article 22 of the Constitution; and (b) All proceedings pending in any court or the enforcement of any of the aforesaid rights with respect to all orders of detention made under the said section 3(1)(c) shall remain suspended for a period of six months from the date of issue of the order. Or the period during which the proclamation of emergency issued under Clause II) of Art. 352 of the Constitution of India on December 3, 1971, is in force, whichever period expires earlier. the order stood extended to the whole of the territory of India.

On June 20, 1975, the President of India, amended the above order by substituting 12 months for '6 months' in the order.

On June 25, 1975, the President, in exercise of his powers conferred by Clause (2) of Article 352 of the Constitution declared that a grave emergency exists whereby the security of India is threatened by internal disturbances.

On June 27, 1975, in exercise of powers conferred by Clause (1) of Art. 359 the President declared that the right of any person (including a foreigner) to move any court for

the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamation of emergency made under Clause (1) of Art. 352 of the Constitution on December 3, 1971, and on June 25, 1975, are both in force. The Presidential order of June 27, 1975, further stated that the same shall be in addition to and not in derogation of any order made before the date of the aforesaid order under Clause (1) of Art. 359 of the Constitution. On June 29, 1975, by another order, the President made the ordinance of June 27, 1975, applicable to the State of Jammu and Kashmir as well. On September 25, 1975, the last paragraph in the Presidential order dated June 27, 1975, was omitted. The President promulgated the amending ordinances No. 1 and 7 of 1975, and replaced by the Maintenance of Internal Security (Amending Act) (No. 39 of 1975) Act introducing a new section 16A, and giving a deemed effect to s. 7 of the Act as on from June 25, 1975, while the rest having a deemed effect from June 29, 1975. By the same Act a new section 18 was also inserted with effect from June 25, 1975.

By the Constitution (Thirty-eighth Amendment) Act, 1975, Articles 123, 213, 239(b), 352, 356, 359 and 368 were amended. Clauses (4) and (5) were added in Art. 352 of the Constitution. Broadly stated, the Thirty-eighth Constitution (Amendment) Act renders the satisfaction of the President or the Governor in the relevant Articles final and conclusive and to be beyond any question in any court on any ground.

The power conferred on the President by Art. 352 shall

include the power. to issue different proclamations on different grounds being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance whether or not there is a proclamation already issued by the President By Constitution Thirty-Eight Amendment Act I '1975 new Clause (1A) was also added after Clause (1) of Article 359.

The Constitution Thirty-ninth Amendment Act was published on August 10 1975, amending Articles 71, 329 and 329(A) and added Entries after Entry 86 in the 9th Schedule and the Maintenance of Internal Security Act (Act 26 of 1971) 1971 as item 92 in the said Schedule.

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On October 17, 1975, an ordinance 16 of 1975 was issued making further amendments in s. 16A of the Maintenance of Internal Security Act introducing sub-Clause (8) and (9) to s. 16A. On November 16, 1975 ordinance 22 of 1975 was issued making certain amendments in the Maintenance of Internal Security Act inserting also sub-section 2A in s. 16A. All the amendments made by the ordinance were given retrospective effect for the purpose of validating all Acts done previously. The said ordinances were published as the Maintenance of Internal Security (Amendment) Act 1976 (Act 14 of 1976) on January 15, 1976.

The respondents detained under s. 3(IA)(ii) read with s. 3(2) of the Maintenance of Internal Security Act (Act 26 of 1971) as amended by the Maintenance of Internal Security Act (Amendment Act 39 of 1975), 1975 challenged in several High Courts, the vires of the ordinance issued on June 27, 1975, by the President of India as unconstitutional and inoperative in law and prayed for (a) the setting aside

of the said order and (b) for directing their release forthwith. In some cases, they challenged the validity of the Thirty-eight and thirty-ninth constitution Amendment Acts.

When these petitions came up for hearing, the appellant raised the preliminary objection to the maintainability on the ground that in asking for release by the issuance of a writ of habeas Corpus, the respondents were, in substance, claiming that they have been deprived of their personal liberty in violation of the procedure established by law, which plea was available to them under Art. 21 of the Constitution only and in view of the Presidential order dated June 27 1975, suspending the right to move for enforcement of the right conferred by that article, the petitions were liable to be dismissed at the threshold.

While the High Courts of Andhra Pradesh, Kerala and Madras have upheld the preliminary objection, this contention did not find favour with the High Courts of Allahabad, Bombay (Nagpur Bench), Delhi Karnataka, Madhya Pradesh, Punjab and Haryana respectively. In these High Courts broadly took the view that (a) despite the Presidential order it is open to the detenus to challenge their detention on the ground that it is ultra vires, as for example, by showing that the order, on the face of it, is passed by an authority not empowered to pass it or it is not in exercise of the power delegated to the authority or that the power has been exercised in breach of the conditions prescribed in that behalf by the Act under which the order is passed, or that the order is not in strict conformity with the provisions of the Act. Some of these High Courts have further held that the detenus can attack the

order of detention on the ground that it is mala fide, as for example, by showing that the authority did not supply its mind to the relevant considerations, or that the authority was influenced by irrelevant considerations or that the authority was influenced by improper motives. The Nagpur Bench of the Bombay High Court read down s. 16A(9) of the Maintenance of Internal Security Act, 1971¹ implying an exception in favour of disclosure to the Court. The High Court did not decide about the validity of the Thirty-eighth and Thirty-ninth Constitution Amendment Acts.

Accepting the States' appeals, some by certificates granted by the High Court and some by special leave, the Court by majority (Khanna, J. dissenting),

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HELD . (Per majority A.N. Ray C.J. M.H. Beg. Y.V. Chandrachud and P.N. Bhagwati JJ.)

(1) In view of the Presidential Order. Dated June 27, 1975, under Clause (1) of Art. 359. no person has any locus standi to move any writ petition under Art 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order. Of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations.

[477 E-F].

(2) Section 16A(9) of the Maintenance of Internal Security Act, 1971 is constitutionally valid. [477 F]

(3) Section 18 of the Maintenance of Internal Security Act, 1971 is not invalid. [240 A-D, 342 F-G, 414 D]

(4) Article 21 of the Constitution is the sole repository of rights to life and personal liberty against State. [246 B]

Per A. N Ray J

In view of the Presidential order dated June 27, 1975, under Clause (1) of Art. 359, no person has locus standi to move writ petitions under Art. 226 of the Constitution before a High Court for habeas corpus or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Maintenance of Internal Security Act, 1971 on the grounds that the order of detention or the continued detention is for any reason not in compliance with the Act or is illegal or mala fide [245 H, 246 A]

Article 21 is the sole repository of rights to life and personal liberty against a State. Any claim to a writ of habeas corpus is enforcement of Art. 21 and is, therefore, barred by the Presidential order. [246 B]

Girindra Nath Banerjee v Birendra Nath Lal ILR 54 Cal. 727; King Emperor v. Shib Nath Banerjee 1972 Indian Appeals 241 and Makhan Singh v. State of Punjab [1964] (4) SCR 797 referred to.

Scope of judicial review in emergency.

In times of emergency the executive safeguards the life of the nation and, therefore, its actions either on the ground that these are arbitrary or unlawful cannot be challenged in view of the fact that considerations of security forbid proof of the evidence upon which the detention was ordered. [219 B-E]

Liversidge v. Sir John Anderson [1942] AC 206. Greene v. Secretary of State for Home Affairs [1942] AC 284; Mohan

Chaudhary v. Chief Commissioner Union Territory of Tripura [1964] 3 SCR 442 and Makhan Singh v. , " State of Punjab [1964] 4 SCR 797 followed.

Queen v. Halliday Ex Parte Zadiq [1917] AC 210, referred. to.

Liberty is confined and controlled by law, whether common law or statute. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved. If extraordinary powers are given, they are given because the emergency is extraordinary and are limited to the period of emergency. Liberty is itself the gift of the law and may by the law forfeited or abridged. [222 D, G]

Zamora's case [1916]2 Ac 107 and Liversidge v. Sir John Anderson [1942] AC 206, referred to.

The vital distinction between Arts. 358 and 359 is that Art 358 suspends the rights only in Article 19 to the extent that the Legislature can make laws contravening Art. 19 during the operation of a Proclamation of emergency and the Executive can take action which The Executive is competent to take under such laws Article 358 does not suspend any Fundamental Right. While a proclamation of emergency is in operation the Presidential order under Art. 359(1) can suspend the enforcement of any or all Fundamental Rights. Article 359(1) also suspends any pending proceedings for the enforcement of such Fundamental Right or Rights. Another important distinction between the two Articles is that Art. 358 provides for indemnity. whereas Article 359(1) does not: Article 359(1A) is on the same lines as Art. 358, but Article 359(1A) includes all Fundamental Rights which may be mentioned in a Presidential

order and is, therefore, much wider than Art. 358 which includes Art. 19 only. [223 E-G]

The purpose and object of Art. 359(1) is that the enforcement of any Fundamental Right mentioned in the Presidential order is barred or it remains suspended during the emergency. The scope of Art. 359(1) is not only to restrict the application of the Article to the legislative field, but also to the acts of the Executive.

The object of Article 359(1) is not only that the right

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to move this Court only is barred but also the right to move any High Court. The bar created by Art. 359(1) applies to petitions for the enforcement of Fundamental Rights mentioned in the Presidential order whether by way of an application under Art. 32 or by way of application under Art. 226. An application invoking habeas corpus under s. 491 of the Code of Criminal Procedure cannot simultaneously be moved in the High Court. [223 H, 224 D]

Shri Mohan Chaudhary v. Chief Commissioner Union Territory of Tripura [1964] 3 SCR 442. *Makhan Singh v. State of Punjab* [1964] 4 SCR 797 and *Dr. Ram Manohar Lohia v. State of Bihar & ors.* [1966] 1 SCR 709, applied.

The argument that jurisdiction and powers of this Court under Art. 32 and of the High Courts under Art. 226 are virtually abolished by the Presidential order without any amendment of the Constitution is incorrect. No amendment to the Constitution is necessary because no jurisdiction and power either of this Court or of the High Court is taken away. When a Presidential order takes away the locus standi of the detenu to move any court for the enforcement of Fundamental Rights for the time being, the jurisdiction and

powers of this Court and of the High Courts remain unaltered. [224 E-F]

Article 359(1) is not directed against any court, it is directed against an individual and deprives him of his locus standi. If courts will in spite of the Presidential order entertain the applications and allow the detenu to enforce to start or to continue proceedings or enforce Fundamental Rights, Article 359(1) will be nullified and rendered otiose. [224 F, 227 C-D]

Unlike the 1962 Presidential order, in the 1975 order, the suspension is not hedged with any condition of enforcement of any right under Articles 21 and 22. The Presidential order is, therefore, a bar at the threshold. [228 D-E]

Makhan Singh v. State of Punjab [1964] 4 SCR 797 and State of Maharashtra v. Prabhakar Pandurang Sangzgiri & Anr. [1966] 1 SCR 702, distinguished.

There are no natural rights. Fundamental Rights in our Constitution are interpreted to be what is commonly said to be natural rights. [229 C-D]

H. H. Kesvananda Bharti Sripadagalavaru v. State of Kerala [1973] SUPP. I SCR 702. followed.

Law means law enacted by the State. Law means positive State made law The phrase "Procedure established by law" in Art. 21 includes substantive and procedural law. A law providing for the procedure depriving a person of liberty must be a law made by statute. [229 D-E]

A K. Gopalan v. State of Madras [1950] SCR 88; P. D. Shamdassani & ors v. Central Bank of India Ltd. [1952] SCR 391; Smt. Vidya Verma through next friend R. V. S. Mani v. Dr. Shiv Narain Verma [1955] 2 SCR 983, applied.

There is no difference between the expression "except according to procedure established by law" in Art. 21 and the expression "save by the authority of law" in Art. 31(1) or the expression "except by authority of law" in Art. 265. It is incorrect to suggest that when Art. 21 was enacted, the founding fathers only enshrined the right to personal liberty according to procedure and did not frame the constitutional mandate that personal liberty could not be taken except according to law. [232 B-D]

Part III of our Constitution confers Fundamental Rights in positive as well as negative language. A Fundamental Right couched in negative language accentuates by reason thereof the importance of that right. The negative language is worded to emphasize the immunity from State action as Fundamental Right. Fundamental Rights have the texture of Basic Human Rights.

[229 G, 230 A-B]

State of Bihar. v. Maharaja Dhiraja Sir Kameshwar Singh of Dhrbhanga & Ors. [1952] SCR 889 at 988 989; A. K Gopalan v. State of Madras [1950] SCR 88; Rustom Cavasjee Cooper v. Union of India [1970] 3 SCR 578 571 and 576 to 578; Shambhu Nath Sarkar v. The State of West Bengal & Ors. [1974]

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1 SCR; Haradhan Saha & Anr. v. State of West Bengal [1975]

1 SCR 778 and Khudiram Das .v State of West Bengal & ors.

[1975] 2 SCR 832, referred to.

Article 21 is our Rule of Law regarding life and liberty. No other Rule of Law can have separate existence as a distinct right. The negative language of Fundamental Right incorporated in Part III imposes limitations on the power of

the State and declares the corresponding guarantees of the individual to that fundamental Right. Limitation and guarantee are complementary. The limitation of State action embodied in a Fundamental Right couched in a negative form is the measure of the protection of the individual.

[230 C-D]

Rustom Cavasji Cooper v. Union of India [1970] 3 SCR 568, applied.

Personal liberty in Article 21 includes all varieties of rights which go to make personal liberty other than those in Art. 19(1)(d). [230 C-C]

Kharak Singh v. State of U.P. and ors. [1964] 1 SCR 332 and Rustom Cavasjee Cooper v Union of India [1970] 3 SCR 530, referred to.

If any right existed before the commencement of the Constitution and the same right with its content is conferred by Part III as a Fundamental Right the source of that right is in Part III and not in any pre-existing right.

Such pre-constitutional rights have been elevated in Part III as Fundamental Rights. If there is a pre-constitution right which is expressly embodied as a Fundamental Right under our Constitution, the common law right has no separate existence Under Our Constitution. If there be any right other than and more extensive than the Fundamental Right in Part III, such right may continue to exist under Art. 372.

[230 F-H]

Dhirubha Devi Singh Gohil v. State of Bombay [1955] 1 SCR 691-693, referred to.

B. Shankara Rao Badami and ors. v. State of Mysore and Anr. [1969] 3 SCR 1 @ 11-13, applied.

Apart from the remedy under the common law of torts, by

way of suit for false imprisonment and claim for damages, there was no civil remedy for unlawful infringement of the right to personal liberty in India before the Constitution. Even this remedy, after the amendment of s. 491 of the Code of Criminal Procedure became a statutory right in the nature of a habeas corpus. The provisions of s. 491 of the Criminal Procedure Code have been repealed by Act II of 1974 as being superfluous in view of Art. 226. [231 C-D]

Waghela Rajsanji v. Sheik Masludin and ors. 14 I.A. 89
1) 96. Satish Chandra Chakravarti v. Ram Dayal De I.L.R. 48
Cal. 388 @ 407-10, 425-426. Baboo S/o Thakur Dhobi v. Mst.
Subanshi w/o Mangal Dhobi AIR 1942 Nagpur 99; Makhan Singh
v. State of Punjab [1964] 4 SCR 797; District Magistrate
Trivandrum v. K. C. Mammen Mappillai I.L.R. [1939] Mad. 708;
Matthen v. District Magistrate Trivandrum L.R. 66 I.A. 222.
Girindranath Banerjee v. Birendranath Pal ILR 54 Cal. 727
and King Emperor v. Sibnath Banerjee 72 I.A. 241, referred
to.

There was no statutory right to enforce the right to personal liberty other than that in s. 491 of the Criminal Procedure Code before the commencement of the Constitution which could be carried over after its commencement under Art. 372. Law in Art. 21 will include all post-constitutional statute, law including Maintenance of Internal Security Act, 1971 and by virtue of Art. 372 all pre-constitutional statute law, including the I.P.C. and the Cr.P.C. [231 F-G]

The present appeals do not touch any aspect of Art. 20. Article 20 is a constitutional mandate to the judiciary and Art. 21 is a constitutional mandate to the Executive. The expression "no person shall be prosecuted for the same

offence more than once" in Art. 20 would apply only to the executive. It is

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incorrect to say that "State" in Art. 12 will also include the Judiciary and Art. 20 is enforceable against the Judiciary in respect of illegal orders.

[232 E-F, G-H]

Makhan Singh v. State of Punjab [1964] 4 SCR 797 and Narayan Singh v. State of Delhi and ors. [1953] SCR 652 not applicable.

Articles 256, 265 and 361 have no relevance to displace the proposition that Art. 21 is the repository of rights to life and liberty. Nor does an appeal in a criminal proceedings have anything to do with Art. 21. [233 C-D]

Garikapatti Veerayya v. N. Subbiah Choudhury [1957] SCR 488 and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahal Ramnand and ors. [1973] 1 SCR 185, referred to.

The right arising from a decree is not a Fundamental Right and, therefore, will not be prima facie covered by a Presidential order under Art. 359(1)

[233 G]

Fundamental Rights including the right to personal liberty are conferred by the Constitution. Any pre-constitution rights which are included in Art. 21 do not after the Constitution remain in existence which can be enforced, if Art. 21 is suspended. If it be assumed that there was any pre-constitutional right to personal liberty included in Art. 21 which continued to exist as a distinct and separate right then Art. 359(1) will be an exercise in futility. [234 A-B]

Makhan Singh v. State of Punjab [1964] SCR 797

explained.

The theory of eclipse is untenable. The theory of eclipse refers to pre-constitutional laws which were inconsistent with Fundamental Rights. By reason of Art. 13(1) such laws did not become void but became devoid of legal force. Such laws became eclipsed for the time being. The theory of eclipse has no relevance to the suspension of the enforcement of fundamental Rights under Art. 359(1). The constitutional provisions conferring Fundamental Rights cannot be said to be inconsistent with Art. 13(1). [234 B-D]

P. D. Shamasani v. Central Bank of India Ltd. [1952] SCR 391 and Smt. Vidya Verma through next friend R. V. S. Mani v. Dr. Shiv Narain Verma [1955] 2 SCR 983, reiterated.

The Act in the present case is valid law and it has laid down procedure of applying the law. The validity of the Act has not been challenged and cannot be challenged. The Legislature has competence to make the law. The procedure, therefore, cannot be challenged because Art. 21 and 22 cannot be enforced. The suggestion that the power of the Executive is widened is equally untenable.

[235 E-F]

The fact that s. 491 of the Criminal Procedure Code has been abolished in the new Code establishes that the pre-existing right was embodied as a Fundamental Right in the Constitution. The right to personal liberty became identified with Fundamental Right to personal liberty under Art. 21. [236 A]

The Presidential orders do not alter or suspend any law. The rule of law is not a mere catchword or incantation. The certainty of law is one of the elements in the concept of the rule of law. The essential feature of rule of law is

that the judicial power of the State is, to a large extent, separate from the Executive and the Legislature. [236 B-C]

It is not correct to argue that if pre-existing law is merged in Art. 21, there will be conflict in the Article 372. The expression "law in force" in Art. 372 cannot include laws which are incorporated in the Constitution, viz. in Part III. The expression "law" in Articles 19(1) and 21 takes in the statute law. [235 B]

The Presidential order under Art. 359(1) is not a law. The order does not repeal any law either. The contention that permanent law cannot be repealed by temporary law is misplaced. [235 C]

The entire concept in Art. 21 is against Executive action. There is no question of infringement of Fundamental Right under Art. 21 where the detention

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complained of is by a private person and not by a State or under the authority or orders of a State. [235 D]

The Executive cannot detain a person otherwise than under valid legislation. The suspension of any Fundamental Right does not affect this rule of the Constitution. Article 358 does not detract from the position that the Executive cannot act to the prejudice of a person without the authority of law. [237 A-F]

Rai Sahib Ram Jawaya Kapur & ors. v. The State of Punjab [1955] 2 SCR 225; MP. State v. Bharat Singh [1967] 2 SCR 454; Dy. Collector v. Ibrahim & Co. [1970] 3 SCR 498. Bennet Coleman & Co v. Union of India [1973] 2 SCR 757 and Meenakshi Mills v. Union of India [1974] 2 SCR 398, discussed and distinguished.

The Constitution is the mandate. The Constitution is

the rule of law. No one can arise above the rule of law. The suspension of right to enforce Fundamental Rights has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency. There cannot be any rule of law other than the constitutional rule of law. 'There cannot be any pre-constitution or post-constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency. [224 B, 238 D-E]

Eshugbayi Eleko v. Officer Administering the Govt. Of Nigeria [1931] AC 662 and Christie and Anr. v. Leachinsky [1947] AC 573. not applicable.

The expression "for any other purpose" in Art. 226 means for any purpose other than the enforcement of Fundamental Rights. A petition for habeas corpus by any person under Art. 226 necessarily invokes a question whether the detention is legal or illegal. An executive action if challenged to be ultravires a statute cannot be challenged by any person who is not aggrieved by any such ultra vires action. [239 D-E]

The expression "purported to be made under s. 3 of the Act" in s. 18 will include an Executive act made by the District Magistrate within the scope of his authority as District Magistrate even if the order is made in breach of the section or is mala fide. [240 A-B]

Hari Ram Singh v. The Crown [1939] F.C.R. 159. Bhagchand Dagadusa v. The Secretary of State for India L.R. 54 I.A. 338 @ 352; Albert West Meade v. The King AIR 1948 P.C. 156 at 157-59; Animistic v. Foreign Compensation etc. [1969] 1 All E.R. 208 at 212, 213 and 237 and Dakshina

Ranjan Ghosh v. Omar Chand Oswal I.L.R. SO Cal. 992 at 995
1003, applied.

Poona Municipal Corporation v. D. N. Deodhar [1964] 8
SCR 178; Kala Bhandar v. Municipal Committee [1965] 3 SCR
489 and Indore Municipality v. Niyamultulla AIR 1971 SC 97
and Joseph v. Joseph [1966] 3 All. E.R. 486 not applicable.

There is no question of excessive delegation in s. 18
which lays down the law. To contend that s. 18 applies only
to post-detention challenge is wrong. Section 18 applies to
all orders of detention. Section 18 of Maintenance of
Internal Security Act, 1971 is only an illustration of the
Act by the officers authorised by the Act. [240 C-E]

Section 16A(9) of the Act is valid. It is a rule of
evidence and it is not open either to the detenu or the
Court to ask for the grounds of detention.

[246 C]

Materials and information on which orders of preventive
detention are passed necessarily belong to a class of
documents whose disclosures would impair the proper
functioning of Public service and administration. [242 D]

Liversidge v. John Anderson [1942] AC 206 at 221, 253,
254, 266, 267, 279, 280 and Roger's case [1973] AC 388 @
400, 401, 405, applied.

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Legislature has enacted s. 16A(9) providing for a
general exclusion from evidence of all such material as
would properly fall within the classification instead of
forcing the State to claim in individual cases privilege
under ss. 123, 162 of the Evidence Act or under Art. 22(6)
of the Constitution. [242 E-F]

Section 16A cannot be said to be an amendment to Art.

226. The jurisdiction to issue writs is neither abrogated nor abridged. Section 16A(9) enacts provisions analogous to a conclusive proof of presumption. Such a provision is a genuine rule of evidence. It is in the nature of an explanation to ss. 123 and 162 of the Evidence Act. Section 16A(9) is a rule of evidence. When the detaining authority is bound by s. 16A(9) and forbidden absolutely from disclosing such material no question can arise of adverse inference against the authority. [242 G-H]

Section 16A(9) cannot be read implying an exception in form of disclosure to the Court. Such disclosure to the Court alone and not to the detenu will introduce something unknown to judicial procedure and will bring in an element of arbitrariness and preclude both the parties from representing their respective cases. The view of the detaining authority is not to be substituted by the view of the court. [243 A-C]

State of Bombay v Atma Ram Sridhar Vaidya [1951] SCR 167; Shiban Lal Saksena v. State of Uttar Pradesh and ors. [1954] SCR 418; Rameshwar Shaw v. District Magistrate Burdwan and Anr. [1964] 4 SCR 921; Jaichand Lal v. W. Bengal [1966] Supp. SCR 464 and Dr. Ram Manohar Lohia v. State of Bihar [1966] I SCR 709, referred to.

The theory of good return mentioned in the English decisions is based on the language of Habeas Corpus Act and the Rules of the Supreme Court of England. The practice of our Court is different. [243 C-D]

M. M. Damnoo v. J. K. State [1972] 2 SCR 1014 and A. K. Gopalan v. State of Madras [1952] SCR 391, distinguished.

It is not competent for any court to go into questions of malafides of the order of detention or ultra vires

character of the order of detention or that the order was not passed on the satisfaction of the detaining authority.

Section 16A of the Act contains definite indications of implied exclusion of judicial review on the allegations of mala fide. The reason why s. 16A has been enacted is to provide for periodical review by Government and that is the safeguard against any unjust or arbitrary exercise of power. The production of the order which is duly authenticated constitutes a peremptory answer to the challenge. [243 G-H, 244 A, 245 B]

In view of the inability of the court to grant any relief on the basis whether order of detention is the result of malice or ill will, the detention of malafides is not only ineffective but also untenable. [244 DE]

Lawrence Joachim Joseph D's Souza v. The State of Bombay [1956] SCR 382 @ 392, 393; Smith v. East Elloc Rural District Council & ors. [1966] AC 736 at 776 and Dr. Ram Manohar Lohia v. State of Bihar and ors. [1966] 1 SCR 709, referred to.

A decision on a point not necessary for the purpose or which does not fall to be determined in that decision becomes obiter dictum. [227 F]