

CONSTITUTION OF INDIA

ADDITIONAL DISTRICT MAGISTRATE, JABALPUR

Vs.

S. S. SHUKLA ETC.

*Citations: AIR 1976 SC 1207, 1976
SCR 172*

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PARTIES INVOLVED

Petitioner: ADDITIONAL DISTRICT MAGISTRATE,
JABALPUR

Vs

Respondent: S. S. SHUKLA ETC.

DATE OF JUDGEMENT

- 28/04/1976

BENCH:

RAY, A.N. (CJ),
KHANNA, HANS RAJ,
BEG, M. HAMEEDULLAH,
CHANDRACHUD,
Y.V., BHAGWATI, P.N.

INTRODUCTION

- 1- 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.
- 2- 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.
- 3- 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.
- 4- 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. 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.

5 - On October 17, 1975, on ordinance 16 of 1975 was issued making further amendments to 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 to 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 5, 1976.

- 1- The respondents detained under s. 3(IA)(ii) read with s. 3(2) of the maintenance- of Internal Security Act. The act was 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

- 2- (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 I thirty-ninth constitution Amendment Acts.

- 1- 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.

- 2- 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.

The state and the central govt. being aggrieved by the decision of various HC's, filed an appeal before the hon'ble supreme court.

ISSUE:

1 : WHETHER A WRIT PETITION UNDER ART. 226 BEFORE A HIGH COURT IS MAINTAINABLE TO ENFORCE THE RIGHT TO PERSONAL LIBERTY DURING AN EMERGENCY DECLARED UNDER CLAUSE (1) OF ART. 359 OF THE CONSTITUTION?

2 : IF SUCH A PETITION IS MAINTAINABLE, WHAT IS THE SCOPE OF JUDICIAL SCRUTINY IN VIEW OF PRESIDENTIAL ORDER?

LEGAL PROVISION:

[Article 359\(1\) in The Constitution Of India 1949](#)

[The Indian Evidence Act, 1872](#)

[Article 226 in The Constitution Of India 1949](#)

[Article 359 in The Constitution Of India 1949](#)

LEGAL PROVISIONS:

[Maneka Gandhi vs Union Of India on 25 January, 1978](#)

[N.A. Chidambaram Chettiar Firm By ... vs The Government Of Tamil Nadu ... on 20 August, 1976](#)

[Unni Krishnan, J.P. And Ors. Etc. ... vs State Of Andhra Pradesh And Ors. ... on 4 February, 1993](#)

[K. Karunakaran vs T. V. Eachara Warriar on 16 November, 1977](#)

[Tony Electronics Ltd. vs on 17 December, 2012](#)

ARGUMENTS :

APPELLANT:-

1. The State does not release a detenu despite the opinion of the Advisory Board that there is no sufficient cause for his detention and thus keeps him in detention in flagrant violation of the provisions of article 22, no habeas corpus petition would be maintainable and this would be so even though article 22 itself is a fundamental right. The right to move a court for enforcement of a right under article 19 has now been suspended by the President under an order issued under article 359(1).
2. Suspending the right of a person to move any court for the enforcement of right to life and personal liberty is done under a constitutional provision and therefore it cannot be said that the resulting situation would mean the absence of the rule of law.

RESPONDENT:-

1. According to the respondents, the limited object of Article 359(1) is to remove restrictions on the power of the legislature so that during the operation of the emergency it would be free to make laws in violation of the fundamental rights specified in the Presidential order.
2. The argument proceeds, there being a valid law regulating preventive detention, namely the MISA, every order of detention passed by the Executive must conform to the conditions prescribed by that law.
3. The respondents' argument that Article 21 is not the sole repository of the right to life and personal liberty.
5. Finally, it was urged that the Preamble to the Constitution speaks of a Sovereign Democratic Republic and, therefore, the Executives which is subordinate to the Legislature cannot act to the prejudice of the citizen save to the extent permitted by laws validly made by the Legislature which is the chosen representative of the people.

JUDGEMENT:

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 male fide. 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. [Queen v. Halliday Ex Parte Zadiq \[1971\] 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. 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 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. Article 359(1) makes no distinction between the threat to security of India by war or external aggression on one hand and threat to security of India by internal disturbance on the other hand. Powers of President U/A 352(1) and 359(1) of our constitution are immune from challenge in courts even when the emergency is over. Section 16A(9) of Maintenance of Internal Security Act (MISA), 1971 is not unconstitutional on the ground that it constitutes an encroachment on the writ jurisdiction of High Court under Art. 226. Section 16A(9) of MISA enacts a genuine rule of evidence and it does not detract from or effect the jurisdiction of the High Court under Article 226 of the constitution and hence cannot be successfully assailed as invalid. Further section 18 of the MISA does not suffer from the vice of excessive delegation and is a valid piece of legislation. Part III of the constitution confers fundamental rights in positive as well as in negative language. The limits of judicial review have to be co-extensive and commensurate with the right of an aggrieved person to complain of the invasion of his rights.

The theory of the basic structure of the constitution can not be used to build into the constitution an imaginary part which may be in conflict with the constitutional provisions.

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