Harpal Singh vs State on 17 March, 1950

Equivalent citations: AIR1950ALL562, AIR 1950 ALLAHABAD 562

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. This is an application under Section 491, Criminal P. C., by Harpal Singh, security prisoner in the Central Prison, Bareilly, in the following circumstances:

2. The applicant was arrested on 29th May 1949. The Provincial Government ordered on 6th Jane 1949 his detention for six months under Section 3 (1) (a), U. P. Maintenance of Public Order (Temporary) Act (IV [4] of 1947). He was transferred to the Central Prison, Bareilly, where he remained in detention till 6th December 1949. He was transferred to Aligarh on 6th December. There, on 6th December he was served with the order of the District Magistrate, Aligarh. This order, D/-4th December 1949, directed him under Section 3 (1) (d) of the Act not to disseminate any news or propagate any opinions prejudicial to the public safety and the maintenance of public order etc., etc., and under section 3 (1) (f) to keep the peace and to abstain from participating directly or indirectly in any activities, subversive of law and order etc., etc. The District Magistrate, Aligarh, further required him under Section 3, Sub-section (3) of the Act to enter into a bond in the sum of Rs. 2000 with two sureties in the sum of Rs. 1000 each for the due performance and enforcement of the restrictions and conditions specified in that order. The order was to remain in force for six months from the date of issue, which is to be presumed to be 4th December.

3. This order further provided that for failure to execute the bond and to furnish the sureties the applicant shall be committed to prison under Section 123A, Criminal P. C , or, if he be already in prison, be detained in prison until the period specified above expired or until he executed the bond and furnished the sureties in accordance with the order.

4. It appears that the applicant did not execute the bond and furnish the required sureties and that, therefore, he was detained in prison by virtue of the order made under Section 128A, Criminal P. C.

5. The detention of the applicant in prison under Section 123A, Criminal P. C., is alleged to be illegal on various grounds, which will be dealt with now.

6. The U. P. Maintenance of Public Order Act (IV [4] of 1947) as originally passed by the Legislature provided in Section 1, Sub-section (4):

> "It shall, in the first instance, remain in force for a period of one year, provided that if, before the expiry of the first period of one year or any extended period, a resolution to that effect is passed by the Legislature, it shall remain in force for a further period of one year commencing from the date of such expiry."

The Legislature passed the necessary resolution for extension at the proper time in 1948 and 1949, and the Act continued in force subsequent to 29th February 1948, when the Act completed its first year of enforcement. On 1st July 1949 the Governor of the United Provinces passed U. P. Ordinance II [2] of 1949. Section 2 of this Ordinance provided that for Sub-section (4) of Section 1 of U. P. Act IV [4] of 1917, the following shall be and be deemed always to have been substituted: "(4) it shall remain is force upto the 31st day of March 1950", and Section 3, clause (a) of the Ordinance was:

> "For removal of doubts, it is hereby declared that, notwithstanding anything contained in Sub-section (4) of Section 1 of the principal Act, as it existed immediately before the commencement o! this ordinance, the said Act shall not be deemed to have expired on 29th February 1948 or on any subsequent date on the ground that the duration of the Act had been extended otherwise than by an Act of the Provincial Legislature,"

7. Subsequently the U. P. Maintenance of Public Order (Proceedings Validation) Act, XI [11] of 1949 came into force on 12th August 1949. Its Section 2 and Section 8 (a) practically correspond to Sections 2 and 3 of the aforesaid Ordinance, with the exception that 1951 replaces 1950 in S. 1, sub-section (4)

8. It was contended for the applicant that the Ordinance and Act XI till of 1949 could not revive U. P. Act IV [4] of 1347, which originally expired on 29th February 1948. In view of the opinion formed about the legality of the detention it was not considered necessary to hear this point at length and to decide it, specially when in Cr. Misc. case no. 694 of 1949, it had been held by a Division Bench of this Court that the aforesaid Ordinance validated the continued enforcement of U. P. Act IV [4] of 1947 and if we had taken a different view, it would have been necessary to refer the questions to a larger Bench.

9. The next contention for the applicant is that the District Magistrate had no power to pass orders under Section 3 (1) (d) and (f) and Section 3 (3), U. P. Act IV [4] of 1947. The argument proceeds thus. Section 3(1) of the Act empowers the Provincial Government to make orders under the various clauses in that sub-section. District Magistrates have been empowered under Section 3 (2) to pass orders of detention under Section 3 (1) (a) for period not exceeding fifteen days. Section 11 of the Act empowers the Provincial Government to order that any power conferred on it under the Act be exercised by any officer or authority, the section being:

'The Provincial Government may, by order, direct that any power or duty, which is conferred or imposed on the Provincial Government under this Act shall in such circumstances and under such conditions, it any, as may be specified in the order, be exercised or discharged by any officer or authority, not being an officer or authority subordinate to the Central Government."

The Governor of the United Provinces passed an order on 13th April 1948 in these terms:

"In exercise of the powers conferred by Section 11, United Provinces Maintenance of Public Order (Temporary) Act, 1947 (IV [4] of 1947) as amended from time to time, the Governor is hereby pleased to direct that the power exercisable by her under

(i) clause (d) of Sub-section (1) of Section 3,

(ii) clause (f) of Sub-section (1) of Section 3,

(iii) sub-section (3) of Section 3, and

(iv) Section 4 of the said Act, shall also be exercisable by all District Magistrates within their respective jurisdiction."

Section 4 as it stood on 13th April 1948 was :

"An order made under Section 3 by the Provincial Government shall, unless revoked earlier, remain in force for a period not exceeding six months as may be specified in the order or if no period is specified, for six months from the date thereof:

Provided any such revocation shall not prevent the making under Section 3 of a fresh order, to the same effect:

Provided further that the period specified may be extended from time to time so as not to exceed six months."

10. Section 4 was amended by U. P. Act XI [11] of 1919. It came in force on 12th August 1949 and runs thus:

"An order made under Section 3 by the Provincial Government shall, in the first instance, remain in force for a period not exceeding six months, as may be specified from the date of its service on the person affected :

Provided that the period specified may, from time to time subject to the provisions of Section 5A be enlarged by the Provincial Government so however that any one enlargement shall not be for a period exceeding six months and the total period of the

> enlargements granted shall not in the aggregate exceed twelve months."

11. It is contended that in view of the change in the provisions of Section 4 of the Act a fresh delegation and notification of the powers of the Provincial Government to the District Magistrates was necessary, as the power delegated to the District Magistrate by the order dated 13th April 1948 was with respect to the powers which the Provincial Government could exercise then under Section 4. The difference between the powers then exercisable by the Provincial Government under Section 4 and on 4th December 1949, when the order in suit was passed by the District Magistrate relates to two matters. One is that the orders passed under Section 3 were later made to be in force from the date of their service on the person affected instead of from the date of the order. This is not a material change. The other was that the order made under Section 3 could remain in force for a further period of 12 months, if necessary orders of extending the period mentioned in the original order be made instead of a shorter period equivalent to the difference between 6 months and the period originally specified in the order. The argument really is that the order of delegation made by the Provincial Government on 13th April 1948 could not have delegated this larger power of making the order under Section 3 effective for a longer period than the period for which it could have been effective by virtue of Section 4 then existing.

12. It was argued by the learned Government Advocate that Section 4, U. P. Act IV [4] of 1947, as amended by U. P. Act XI [11] of 1949 does not in any way enhance the period for which orders under Section 3 (1) (b) to (f) could be passed by the Provincial Government and that therefore, there was no necessity for a fresh notification. The argument really is that the proviso to Section 4, as amended by Act XI [11] of 1949, applies only to orders which are passed under Section 3 (1) (a), U. P. Act IV [4] of 1947, because the proviso makes the enlargement o£ the periods specified in the order under Section 3 to be subject to the provisions of Section 5 (A), which deals with cases of orders of detention under Section 3 (1) (a). I do not agree. This may have been the intention of the Legislature in enacting the proviso to Section 4, as would appear from the statement of objects and reasons. It was mentioned there:

> "The bill also provides for the enlargement of the period of detention up to a maximum period of six months at a time, provided that total period of enlargement does not exceed 12 months."

This intention of the Legislature is not carried out in the language of the section. The words "period specified" in the proviso must refer to the period specified in the order made under Section 3 The main portion of Section 4 is not restricted to orders for detention only under Section 3 (1) (a). The mere fact that the enlargements of the periods are to be subject to the provisions of Section 5 (A) does not, to my mind restrict the enlargement to orders for mere detention only. There seems to be no good reason why enlargement should have been allowed with respect to orders for detention and not with respect to other orders under Section 3 of the Act. A person's conduct is governed by the orders passed under Section 3 for the future on account of his past conduct satisfying the Provincial Government that restrictions on his conduct were necessary in order to prevent him from acting in any prejudicial manner. If circumstances justify enlarging the period of these restrictions, they should justify enlargement for all types of orders. In fact, to my mind, there can be a greater reason

for providing for an enlargement of the period of restriction with respect to orders under Section 3 (1), (b) to (f) than for orders under Section 3 (1) (a). A person is free to act in any manner he likes when an order is passed against him under Section 3 (1), (b) to (f). It is possible that his continued conduct might necessitate enlarging the period of the restrictive directions against him. When a person is under detention he is not free to act and ordinarily the enlargement of the period of detention can be with respect to the situation in the province or district and with respect to the person's conduct prior to his original detention. In this view of the matter reasons for enlarging the period of detention could not be more weighty than reasons for enlarging the period of any restrictive order passed under Section 3 (1). I am, therefore, of opinion that the proviso to Section 4 of the Act, as amended by Act XI [11] of 1949, applies to all orders passed under Section 3 (1), Act IV [4] of 1947, and that, therefore, the powers which the Provincial Government could exercise under Section 4 on 13th April 1948 are enlarged by Section 4 as amended by Act XI [11] of 1949.

13. It was next contended by the learned Government Advocate that in the present case there has not been any enlargement of the period of the order under Section 3, and that, therefore, the order of the District Magistrate is not bad, even if there had been no fresh delegation of powers by the Government, if that was necessary. I do not agree. The learned Government Advocate contends that Section 4 provides for the original period of six months for any particular order and not an overall period for all such orders as could be passed at different times under Section 3 (1) within six months of the first order passed under that section. This is not consistent with what has been held by this Court in the cases reported in Zamir Qasim v. Rex, 1948 A. L. J. 169 : (A. I. R. (35) 1948 ALL. 285 : 49 Cr. L. J. 358) and Kumar Chandra Bajpai v. Rex, 1950 A. L. J. 176 : (A. I. R. (37) 1950 ALL. 376 : 51 Cr. L. J. 1020). In the former case Zamir Qasim's detention was ordered for three months. Before the expiry of the period a fresh order of detention was passed against him for another three months. It was held that under Section 4 as it is stood on 5th January 1948, the District Magistrate had no jurisdiction to extend the period of detention by passing such successive orders. It was observed by Wanchoo J. :

> "It seems to me, however, that a release for some time is necessary before a fresh order can be passed against the same person."

The argument that the detaining authority might consider the atmosphere in the district or province to be such that it would be prejudicial to public safety to release the man and would, therefore, be justified in passing the fresh order, was met by these observations :

> "It must not be forgotten that an order of detention is passed not only because of a certain atmosphere prevailing in the district or the province, but also on the ground that the particular person concerned is likely to act in a certain manner in that atmosphere. By ordering a further detention of the person by a fresh order without releasing him and giving him a chance to act normally and thus proving that the period for which the appropriate authority considered he should be detained in the first instance had the right effect on him, the authority concerned is merely looking to the atmosphere prevailing in the district or the province without giving due weight to the likely action of the parson detained. It seems to me, therefore, that it could not be

> the intention of the Act that the authority concerned should act in this manner rather unjustly towards a detenu and that is why no provision was made for extension of the period of detention."

This principle recognised in the latter case, can be applied to all cases of orders under Section 3 (1) of the Act and not merely to cases of detention only. Even a restrictive order for a certain period is bound to have some effect on the person concerned and his future mode of conduct could be influenced by that effect. It is to observe this effect that it was considered necessary that a person should be released first before any fresh order for detention be passed, specially when the Legislature itself did not specifically provide for the extension of the period. Otherwise, the period of six months provided in Section 4 could be infinitely prolonged by passing successive orders. In the latter case (Kunwar Chand Bajpai v. Rex, 1950 A. L. J. 176 : (A. I. R. (37) 1950 ALL. 376 : 51 Cr. L. J. 1020)) which was decided by a Bench of which I was a member, the detenu was ordered to be detained for six months. The restrictive orders were passed by the District Magistrate within the period of six months after the detention orders has been revoked. The detenu was also asked to furnish security and, on failure to do so, was directed to be kept in prison under Section 123A, Criminal P. C. After holding that such an order could be made, it was observed :

> "But this must, to our minds, be for the remaining part of the period of six months that might be left after the detention order . . . . The Act has to be strictly construed as it interferes with the liberty of the subject and the result of interpreting the Act differently would be that for the same prejudicial act done prior to his detention a person could be first detained for six mouths, then externed for six months and then successive orders passed against him under Cls. (c), (d), (e) and (f) which might ultimately mean interference with his liberties for a period of three years. It must be conceded that successive orders under Clause (a) of Sub-section (1) of Section 3 cannot be passed to extend the period of detention beyond six months. We do not see why any different principle should be applied for successive orders under Cls. (a) to (f) of Sub-section (1) of Section 3. 'This could not have been the intention of the Legislature when the Act was passed."

The learned Government Advocate concedes that even though the main portion of Section 4 means what he had contended, there cannot be successive orders of detention or restrictive orders of the same kind passed in continuation, as that would amount to an extension of the period of detention and restriction. He, however, argues that if orders of a different type are passed under Section 3 (1), the total period of all the restrictions directed against him can exceed the period or six months or the total period provided in Section 4. If Section 4 means what it is sought to be interpreted to mean by the learned Government Advocate, there should not be any illegality in successive orders of detention or of the same type. The desirability of passing successive orders cannot affect the meaning of a section. If these cases have been rightly decided, and I see no reason to think otherwise, it must be held that the words "an order under Section 3" in Section 4 means in effect all the orders which are passed against a person imposing restrictions on him, and that all such orders would be valid for a period of six months of the date of service of the first order under that section. In view of the proviso to Section 4, this period can be enlarged upto another 12 months.

14. The learned counsel for the applicant supports his contention by the general proposition that the grantor cannot make a giant of a higher interest or right than he possesses, or that a master cannot empower his agent with rights greater than he possesses. I do not think that these analogies can be helpful in the matter.

15. Section 24, U. P. General Clauses Act, I of 1904, is:

> "Where any enactment is repealed and re-enacted by a United Provinces Act with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, form or bye-law made or issued under the provisions so re-enacted."

16. Section 4 (14) U. P. General Clauses Act, I of 1904, is:

> "Enactment shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code, and shall also include any provisions contained in any Act or in any such Regulation as aforesaid."

17. It would follow from these provisions of the U. P. General Clauses Act that when any provision contained in any U. P. Act is repealed and re-enacted any notification or order issued under the repealed provision continues in force, in case the repealed provision is re-enacted, unless it be otherwise expressly provided, or it be inconsistent with the provisions re-enacted. Such notification or order is to be deemed to have been made or issued under the provision re-enacted. It would, therefore, follow that if the order of 13th April 1948, which authorised the District Magistrates to exercise all the powers of the Provincial Government under various provisions of this Act mentioned in that order, would continue in force even if the notification had been issued and order had been passed under Section 4 of the Act as it stood then in spite of the repeal and re-enactment of Section 4 by Act XI [11] of 1949. This, however, does not directly apply to the facts before us. The order of 18th April 1948 was not passed under Section 4 of the Act but was passed under Section 11 of the Act. Section 11 has not been repealed and re-enacted. It continues in its original form. No further order or notification under Section 11 could therefore be necessary. The order and notification issued by the Governor on 13th April 1948 provides that the powers exercisable by the Governor under the various sections and sub-sections of Act IV [4] of 1947 shall also be exercisable by all District Magistrates within their respective jurisdictions. Any further order after the amendment of Section 4, U. P. Act XI [11] of 1949 would have been in precisely the same terms. I do not imagine that any enactment would contemplate repetition of orders for the sake of repetition. A change of order and a fresh notification should be necessary only When the delegating authority does not want to delegate to the other person the additional powers it gets under the amended provision. If it does not want to curtail the power delegated, it should not be incumbent on the authority to pass a second order delegating its powers.

18. Reference was made for the applicant to the case Emperor v. Rayangouda Lingangouda, A. I. R. (31) 1944 Bom. 259 : (47 Cr. L. J. 23). The case is distinguishable. It related to an order delegating powers under Defence of India Rules. It was held that Section 8, General Clauses Act, did not apply and that the delegation could not be deemed to cover the delegation of such powers with respect to orders as would be deemed to have been brought into existence by re-enactment of the rules. It follows, therefore, that the order of 13th April 1948 which referred to the various sections and sub-sections of U. P. Act IV [4] of 1947 would now refer to the same sections as they now stand, irrespective of the nature of changes in the provisions contained in those sections and would continue in force. I am, therefore, of opinion that no fresh notification or delegation of powers by the Provincial Government was necessary and that, therefore, the District Magistrate was competent to pass orders under Section 3 (1) (d) and (f), U. P. Act, IV [4] of 1947.

19. The next point is that the provisions of Section 128A, Criminal P. C. are void. The contention is based on various considerations.

20. Section 123A, Criminal P. C., was enacted by U. P. Act XLVI [46] of 1948 and as amended by U. P. Act VIII [8] 1949 runs thus:

> "If any person ordered to give security (or any specified period under any enactment for the time being in force for the due performance or enforcement of any restriction or condition which may lawfully be imposed under such enactment does not give such security on or before the date on which the security is required to be furnished he shall, if the failure to perform or enforce the restriction or condition is punishable with imprisonment under such enactment, be committed to prison, or if he is already in prison, be detained in prison until such period expires or until within such period he gives security in accordance with the order. Provided that the imprisonment shall be simple."

21. The first question to determine is whether this section is a law for preventive detention. I am of opinion that it is not. It is not a law for preventive detention.

22. There is nothing in the section to suggest that the person who is ordered to be committed to custody was so committed in order to prevent him from doing something. Preventive detention must mean detention for the sake of preventing a person from doing something which the Legislature does not want him to do, irrespective of the fact whether the doing of such thing amounts to an offence or not. Section 123-A does not show what the person proceeded against is not to do. If anything can be inferred from the provisions of the section, it is that he is to remain in custody so long as he does not do something, and that something is that he is to furnish security. It may be said to be a provision to make the person furnish security in order to secure his release, and not a provision for his not doing anything. In a way it can be said that an order under Section 123A, Criminal P. C., is a penalty for the person ordered to give security for having failed to give security and thus for not doing what he was ordered if do. What he was ordered to do was also on account of what he had done prior to the passing of the order and which had led the authority concerned to pass that particular order. In that way an order under Section 123A can be said to be a penalty for

what the man had done.

23. It was also argued by the learned Government Advocate that the order of detention under Section 123A, Criminal P. C., is passed just for further satisfaction of the authority concerned that his order directing the person concerned in a certain manner would be complied with. Imprisonment for not providing necessary satisfaction to the District Magistrate cannot be preventive detention. If the punishment of one year's imprisonment, which can be rigorous or not, with the punishment of fine is not sufficient to prevent contravention of the order by the person concerned, the additional order for the furnishing of security will be no greater deterrent. The amount of the personal bond is fixed while the amount of fine can be unlimited. Of course, if the sureties are furnished, the sureties also forfeit the amount for which they executed the bond. That is not a deterrent to the person concerned. That can only make those sureties exert their influence, if they like, over the person concerned. It would follow, therefore, that there is really very slender connection between an order for the furnishing of security and the consequential order of imprisonment for default of furnishing security and the preventive detention.

24. The authority who is to commit the person to prison has not to see at the time of passing the order under Section 123A whether the detention of the person is justified in order to prevent him from doing something. He has no such option at all. He has to commit the person to prison once he has passed an order under a different enactment requiring the person proceeded against to give security for the due performance or enforcement of any restriction or condition. It is to be presumed that at the time when he passed such an order requiring him to do something or to enforce some restriction or condition, the authority did not consider it necessary that the person concerned should be detained. If the authority had thought; detention necessary to prevent him from doing something whose doing was being prohibited, the authority would have directly ordered his detention if it could have done so under that particular enactment. If that enactment did not provide for detention in such circumstances, that law could not have been a law for preventive detention; and consequently its provision for requiring security could not have any connection with-preventive detention.

25. Even the Statement of Objects and Reasons in the Bill to amend the Code of Criminal Procedure by the introduction of Section 123A does not mention that the object of this legislation was to prevent the person concerned from doing something. On the other hand, it shows that it was provided that Section 123A was sought to be enacted for a different reason. The relevant portion from the statement of objects and reasons published in the U. P. Gazette, dated 18th September 1948, Part VII is:

> "It has been felt that when security is demanded for the performance or observance of certains condition or restrictions under any enactment other than the Code of Criminal Procedure there should be some provision by which the failure to furnish such security should, where the failure to perform or observe the conditions or restrictions is punishable with imprisonment, automatically lead to imprisonment for the prescribed period as has been laid down in Section 123, Criminal P. C. for failure to furnish security demanded under Sections 107 to 110, Criminal P. C. Accordingly

another Section 123A is proposed to be added after the existing Section 123, Criminal P. C."

It cannot, therefore, be said that the object of enacting this provision was prevention of the person concerned from doing something. It was just to provide for a person's commitment to custody for failure to furnish security as such was the provision of law in connection with the failure to furnish security ordered under Section 118, Criminal P. C. What led to this desire is not made clear.

26. It is true that Sections 107 to 110, Criminal P. C., relate to proceedings with respect to the prevention of offences and that Section 118, Criminal P. C., provides for a person's commitment to custody for failure to furnish security: but there are significant differences in the nature of the order passed under Section 118, Criminal P. C., and the order requiring the furnishing of security passed by an authority under any other enactment. The enactments to which Section 123A, Criminal P. C., would have application are not mentioned in the section, and it cannot really be said as to which particular enactments it can have application at any time. The main difference, however, is that orders under Section 118 are judicial orders by Courts and the orders requiring a person to furnish security which lead to an order under Section 123A are to be by authorities other than Courts. This difference itself should discourage the enactment of a provision about a person's being committed to prison for failure to furnish the necessary security.

27. It is not really necessary to determines whether the provisions of Section 123A are punitive. It is sufficient for the purpose of this case that they are not for preventive purposes. They may not be punitive in the sense that they provide for punishment for the commitment of offences. They are, however, punitive in the sense that the person is committed to prison for failure to give security and he is to undergo simple imprisonment. The expressions like 'committed to prison" and 'imprisonment shall be simple" imply a sentence of imprisonment against a person, which is something different from mere detention. These words in Section 123 A are practically identical with the provisions of Section 123, Sub-sections (1) and (5). Persons committed to prison under the provisions of chap. 8, Criminal P. G. which includes Sections 123 and 123A are treated as convicted criminal prisoners under Sections 3, Prisons Act of 1894. Even Sections 397, Criminal P. C., contemplates the orders under Section 123, Criminal P. C., to amount to sentences. Its second proviso refers to the person who has been committed to prison under Section 123, Criminal P. C., as a person who has been sentenced to imprisonment and as a person who is undergoing sentence. These expressions cannot mean punishment. It was held in Emperor v. Tula Khan, 30 ALL. 334 : (7 Cr. L. J. 427 F.B.), that a person detained in prison pending the orders of the Sessions Judge under Section 123, Criminal P. C., must be considered as & person undergoing a sentence of imprisonments, and not merely as an undertrial prisoner detained in custody.

28. It may also be mentioned that an interim order under Section 117 (3), Criminal P. C., just speaks of the Magistrate's detaining a person in custody who fails to execute the bond for keeping the peace during the pendency of the inquiry against him, and the provisions of the Code of Criminal Procedure do not provide that the detection under Section 117 (3) would amount to simple imprisonment or rigorous imprisonment.

29. The expression "committed to prison" does not find place in Acts which provide for preventive detention. U. P, Act IV [4] of 1947 does not use such an expression. It says in Section 3 (1) (a) that the person be detained, and again in Section 3 Sub-section (5) that the person against whom an order of detention has been passed could be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as. the Provincial Government may from time to time, by general or special order, direct. It does not say that he will be detained in prison or that the detention would be treated as simple imprisonment. Similarly, the Preventive Detention Act, Act IV [4] of 1950, authorises the Central Government or the State Government to make an order directing that a certain person in certain circumstances be detained. Its Section 4 is practically similar to Section 5 of U. P. Act IV [4] of 1947.

30. I am, therefore, of opinion that even though a person committed to prison under Section 123A is not undergoing imprisonment for having committed an offence, his undergoing this imprisonment amounts to punishment.

31. It was contended by the learned Government Advocate that Section 123A should be read with U. P. Act IV [4] of 1947, as it has not been shown that there are other Acts which provide for orders to furnish security for the due performance or enforcement of the restrictions or conditions imposed against the person and also provide for punishment by imprisonment for the contravention of the orders against him. It is urged that the Legislature should be presumed to be conscious of the existence of only one such Act in connection with whose provisions orders under Section 123A, Criminal P. C., could be passed. I see no justification for interpreting the nature of the orders under Section 123A by reading it with the provisions of Act IV [4] of 1947. Section 123A is to be interpreted on its own provisions. Farther, if the Legislature was conscious of this fact and intended Section 123A, Criminal P. C., to be in operation with respect to the orders under Section 3 (3), U. P. Act IV [4] of 1947, I do not see why Section 123A is expressed in such general and wide terms which can make it applicable to all types of facts which can answer the conditions laid down in Sections 123A. iN fast, if the Legislature had considered it necessary to enact a provision like that of Section 123A for the purposes of U. P. Act IV [4] of 1947 alone, the proper place for the section would have been in that Act itself and not in the Code of Criminal Procedure. In the Statement of the Objects and Reasons the Legislature does not say that the necessity for enacting this provision arose on account of the demands of public safety on account of some lacuna in the provisions of U. P. Act IV [4] of 1947.

32. Even if Section 123A be read with U. P. Act IV [4] of 1947, it would appear that Section 123A did not provide for preventive detention. Section 3 of this Act provides that the Provincial Government, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order or communal harmony, it is necessary so to do, may make several types of order, including orders directing detention. It is to be observed first, therefore, that when the Government is considering taking action against a person under Section 3, U. P. Act, IV [4] of 1947, it has to decide whether the man is to be detained or some other order (short?) of detention can be passed against him to attain the same object, namely the object of preventing him from acting in any manner prejudicial to the public safety or the

maintenance of public order etc. If it decides on a restrictive order and not on detention, it means that detention of the person was not considered necessary. It would follow, therefore, that any subsequent order about detaining the person against whom a restrictive order has been passed, for any reason connected with the restrictive order, cannot be for purposes of preventive detention. Its purpose must be some-thing different and that something may be said to be to secure compliance of the orders issued against the person concerned.

33. Section 3, Sub-section (3), U. P. Act IV [4] of 1947, provides that an order made under Sub-section (1) may also require the person against whom the order is made to enter into a bond, with or without sureties for the due performance and enforcement of such restrictions and conditions as may be specified in the order. Sub-section (7) provides for punishment with imprisonment for contravention of the orders pissed under Section 3 and also for the forfeiture of the bond if it had been executed. Sub-section (4) of Section 3 of this Act, provides that the person against whom an order contemplated under Sections 3 (1) (b) and (c) is made contravenes that order, he could be removed from such area or place by any police officer or other authorised person if he be found in such area or place in contravention of these orders. These provisions, to my mind, indicate that the Legislature in enacting the various provisions of Section 3 did not consider the detention of a person against whom orders have been issued under Sections 3 (1) (b) to (f) necessary in order to prevent him from doing something which he was prohibited to do under any of those orders and considered that the safeguards, it had provided for the compliance of those orders would sufficiently meet the situation. It did provide sufficient safeguards. It made the contravention an offence It authorised the demanding of security from the person proceeded against. It authorised the authority to remove the person from the prohibited area in case the order related to his removing himself from such area. If the Legislature bad thought that detention in connection with these orders would also be necessary for the main purpose of preventing the person proceeded against from acting in any prejudicial manner, it could have provided that on the lines of Sub-section (4) of Section 3.

34. By enacting Sections 4 (A), 5 (A), 5 (B) and 5 (c) providing for certain safeguards in connection with the detention of a person proceeded against under Section 3 (1) (a), the Legislature can be supposed to have made a distinction between the cases of persons ordered to behave in a certain manner under Sections 3 (1), (b) to (f) and those under Section 3 (1) (a). No such safeguards were provided with respect to persons who had to be committed to prison by virtue of Section 123A, Criminal P. C., for failure to furnish security demanded from them under Section 3 (3), U. P. Act IV [4] of 1917. It would be unreasonable that persons said to be under preventive detention on account of their detention for failure to furnish security should not have been allowed the same safeguards as persons against whom detention orders were passed in the very beginning, if the Legislature had contemplated that Section 123A, Criminal P. C., was to apply to such cases only in which an order to furnish security is passed under Section 3 (3), U. P. Act IV [4] of 1947.

35. I am, therefore, of opinion that even if the provisions of Section 123A be read along with the provisions of U. P. Act IV [4] of 1947 it cannot be said that these provisions relate to preventive detention.

36. The learned Government Advocate has contended that the imprisonment ordered under Section 123A amounts to preventive detention because it is ordered by an authority other than the Court. This argument is based on the observation of the Federal Court in Lakhi Narayan Das v. Province of Bihar, A, I. R. (37) 1950 P. C. 59 : (51 Cr. L. J. 921). It was observed at p. 64 :

> "It is true that detention of a person without a judicial order in a sense goes against the provision of the criminal law, but that is the very essence of preventive detention."

The essence of preventive detention may be that detention is ordered by an executive authority, but it does not follow that every detention ordered by an executive authority amounts to preventive detention. It is true that the conception of preventive detention does not include detention ordered judicially by a Court of law.

37. I, therefore, hold that Section 123-A, Criminal P. C., is not a law for preventive detention.

38. The detention of the applicant under its provisions is illegal in view of Articles 21 and 23(1) and (2) of the Constitution of India. Article 21 is :

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Articles 32(1) and (a) prescribe procedure subsequent to the arrest of a parson and are :

> "22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be defended by a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such parson shall be detained in custody beyond the said period without the authority of a Magistrate."

There is no provision in Section 123-A, Criminal P. C., for furnishing the grounds for the arrest of the person concerned. It may be said, however, that the sole ground of his arrest is his failure to furnish security, and he is provided with that ground. Article 22(1) also provides that the person concerned will not be denied the right to consult or be defended by a legal practitioner of his choice. No such right is given to a person under Section 123-A, Criminal P. C. In fact, no hearing is given to him. Under Sub-article (2) the person arrested cannot be kept in detention after twenty-four hours of the arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate without the order of the Magistrate. It happens that the authority who passed the order against the applicant is a District Magistrate, but his orders under Section 123-A, Criminal P. C., are not passed as a Magistrate, and certainly not as a Magistrate acting as a Court, as would appear to be

necessary from the expressions used in Sub-article (2). It is argued that Article 22, Sub-article (2) just requires that no person shall be detained in custody beyond 24 hours without the authority of a Magistrate and that this does not necessarily mean that the order should be by a Magistrate acting as a Court. I do not agree. It is provided that the person arrested has to be taken to the nearest Magistrate and that the time necessary for the journey from the place of arrest to the Court of the Magistrate was to be excluded from the period of 24 hours for which the person arresting could keep a person in custody. It should follow, therefore, that the authority of the Magistrate contemplated in Article 22(2) is of the Court of a Magistrate and not of a Magistrate acting in any other capacity. Orders under Section 123-A, Criminal P. C., are passed by a District Magistrate not as a Magistrate, but as an authority authorised to take a security in accordance with the order. The order requiring the furnishing of security was passed by him as a persona, designata and as exercising the powers which were vested by Act IV [4] of 1947 on the Provincial Government and which were delegated to him by the Government. It follows that the detention has not; been ordered by a Magistrate and that the applicant has been deprived of his personal liberty by a process which is not in accordance with procedure established by law. The detention is consequently illegal.

39. It was contended that Section 123. A was ultra vires of the U. P. Legislature in view of Section 18 (3), Indian Independence Act, 10 and 11 Geo. VI Ch. 30, which is:

> "Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

The contention really is that the Code of Criminal Procedure as it stood before the appointed day, that is, 15th August 1947, would continue in operation just as it stood immediately before the appointed day, that is, 15th August 1947, until other provision is made by competent legislation, and that therefore no new enactment could be made within the Code of Criminal Procedure. I do not agree With this contention. Section 18 (3), In- dependence Act, does not take away the legislative power of the Legislature. It only enables the law which was in force prior to 15th August 1947 to continue in force until it was supplanted by some other law. I do not, therefore, agree with the contention that on this ground Section 123A, Criminal P. C., is ultra, vires of the U. P. Legislature.

40. It has also been contended that Section 123A, Criminal P. C., is ultra vires of the U. P. Legislature even if it is a law providing for preventive detention. The U. P. Legislature could enact a law for preventive detention by virtue of the power conferred on it under item 1, List 2, Schedule VII, Government of India Act, 1938, for reasons connected with the maintenance of public order. The question then is whether the detention provided for in Section 128A, Criminal P. C. is preventive detention for reasons connected with the maintenance of public order. The question has to be answered in the negative for reasons which led the Federal Court to hold that the preventive detention provided for in Section 3 (1) (i), U. P. Prevention of Black-marketing (Temporary Powers) Act, 1947, was not preventive detention for reasons connected with the maintenance of public order.

Section 123A, Criminal P. C., itself makes no reference to the maintenance of public order. It is directed solely against persons who fail to furnish security required under any law, which itself need not be a law for preventive detention. It does not require the authority passing the order under Section 123A, Criminal P. C., to be satisfied before it passes the order of detention that the action of the person proceeded against was likely to disturb public order. It was observed by the Federal Court in Rex v. Basudeva, (A. I. R. (37) 1950 F. C. 67 : 51 Cr. L. J. 1011) :

> "It may be noted in this connection that under the U. P. Maintenance of Public Order (Temporary) Act (IV [4] of 1947) preventive detention could be ordered only where the Provincial Government is satisfied that it is necessary to make an order of detention with a view to preventing the person concerned from 'acting in any manner prejudicial to the public safety or the maintenance of public order.' This requirement is an important safeguard against the improper exercise of the power of preventive detention and usually marks valid legislation under entry 1 of List II. Any contention that would, in effect, do away with that safe-guard calls for a close examination."

I have already indicated that the authority ordering the detention under Section 123A, Criminal P. C., should be deemed to have thought at the time when it passed the order requiring the person concerned to furnish security that detention was not necessary to prevent him from acting in any manner prejudicial to the public safety or the maintenance of public order.

41. The mere fact that imprisonment under Section 123A, Criminal P. C. relates back, in cases where security was demanded under Section 3 (3), U P. Act IV [4] of 1947, to the initial order under Section 3 (1) (d) and (f), which order is passed in order to prevent a person from acting in any manner prejudicial to public safety or the maintenance of public order, will not make the detention under Section 123A, Criminal P. C., preventive detention for the purposes of maintenance of public order. Failure to furnish security which is primarily responsible for the imprisonment under Section 123A, is not directly connected with the question of the maintenance of public order. Its' such alleged connection is problematic, depending on the possibility of the order under Section 3 (1) Clauses (b) and (f), coupled with the penalty provided for the contravention of that order, proving an ineffective deterrent to the person and on the conduct of the person in contravention of the order to be of such a serious type that it was in all probability to lead to a disturbance of public order. In this connection I may quote what has been said by the Federal Court in Rex v. Basudeva, A.I.R. (37) 1950 F. C. 67 : 51 Cr. L. J. 1011 :

> "It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of entry 1 of list II. Preventive detention is a serious invasion of personal liberty, and the power to make laws with reaped to it is, in the case of Provincial Legislatures, strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order. The connection contemplated must, in our view, be real

and proximate, not far-fetched or problematical."

42. I need now say nothing more on this question. I hold that Section 123A, Criminal P. C., cannot be held to provide for preventive detention for reasons connected with the maintenance of public order. It is, therefore, ultra vires of the U. P. Legislature, even if it be considered to be a law for preventive detention.

43. It was argued as to whether the provisions of Section 123A, are void in toto or can be valid for. detention upto three months, if it be considered to be a provision for preventive detention for the maintenance of public order. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. It should follow therefore, that in such circumstances Section 123A would be void with respect to its providing for detention in excess of three months. There seems to be no reason why Section 123A, be void altogether.

44. The detention of the applicant would be illegal after he had been detained for a period of three months. Article 22(4) provides:

> "(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed, as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :
>
> Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under Sub-clause (b) or Clause (7); or
>
> (b) such person is detained in accordance with the provision of any law made by Parliament under Sub-clause (a) and (b) of Clause (7)."

Section 123A, or the U. P. Act IV [4] of 1947 does not provide for such an Advisory Board as contemplated under Article 22, Sub-article (4) Clause (a). It would follow, therefore, that the applicant could not be detained after three months of the detention.

45. It is, however, contended for the State that the order of the President under Article 22(7), read with Article 373 of the Constitution legalises the detention for the period in excess of three months. I do not agree.

45a. Article 22(7) read with Article 373 is :

> "President may by order prescribe (a) the circumstances under which, and the class, or classes of cases in which, a person may be detained for a period longer than three

> months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4) ;
>
> (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention."

46. Section 123A does not provide the period of detention. The period of detention under this section is the period for which the order requiring security was to be enforced. This period would depend upon the provisions of the enactment under which the order for furnishing the security was passed, and in this particular case this period was for six months. By virtue of Article 13(1) all laws in force in the territory of India immediately before the commencement of this constitution became void to the extent of the inconsistency between them and the provisions of part in of the constitution in which Articles 22 occurs. The constitution came into force on 26th January 1950, and in view of Article 367 of the Constitution and Section 5 (3), General Clauses Act, 1897, it came into force at midnight on the night between 25th and 26th January 1950. It follows that the law under Section 123A, Criminal P. C., became inconsistent with the provisions of Article 22(4) to the extent to which it allowed detention for a period larger than three months immediately when the constitution came into force at midnight. The President's order was made on 26th January 1950 and was certainly made after the President had entered upon his office. Article 60 of the Constitution provides that the President shall, before entering upon his office, make and subscribe an oath in the form prescribed. He did so at 10-15 A. M. on 26th January. It follows that this order of the President could not have been made up to 10-15 A. M. on 26th January, that is, could not be made till more than ten hours after Section 123A had become void with respect to its authorising detention for over three months. It has been argued by the learned Government Advocate that the President's order should also be deemed to have come into operation from midnight when the constitution came into force. This argument would be correct if Section 5 (3), General Clauses Act applied to the time from which the President's order was to take effect. Section 5 (3), General Clauses Act is:

> "Unless the contrary is expressed the Central Act or Regulation shall be construed as coming into operation immediately on the expiry of the day preceding its commencement."

A Central Act is defined under Section 3 (8) (a) as amended by the Adaptation of Laws Order, 1950, as an Act of Parliament and as including Acts of the Dominion of India or of the Central Legislature before the enactment of the Constitution and an Act made before the Constitution of India by the Governor-General acting in legislative capacity. 'Regulation' is defined under Section 3 (46) as a regulation made by Parliament under Article 243 of the Constitution and as including regulations previously made. 'Central Government' means 'president' by virtue of Section 3 (8) (ab). Article 367(2) provides that any reference in the Constitution to Act, or laws of, or made by Parliament, shall be construed as including a reference to an Ordinance made by the President. Article 22(7) of the Constitution authorises Parliament to prescribe by law what is mentioned in its Sub-clauses (a) and (b). As the President made the order under Article 22(7) read with Article 373, it is argued that the order should be deemed to be a law made by Parliament. I do not consider this possible. The

effect of Article 373 is that the order of the President is not a law at all. It is merely an order. If the Constituent Assembly had contemplated treating the order of the President as law made by Parliament, it could have said so in Article 367(2), and any way it should not have provided in Article 373 that the word 'order' will be substituted for the word 'law' in Article 22(7). If no such substitution had been made, Article 22(7) would have provided that the 'President may by law prescribe'. In that case the order of the President would be law, and it might have been possible to say that it should be deemed to be law made by Parliament, as the President was just doing what really the Parliament was authorised to do. As it is, the President's order is not an Act of Parliament. It is also not an Ordinance made by the President. The legislative powers of the President are provided, in Article 123, which empowers the President, in certain circumstances, to promulgate such Ordinances as appeared to him to be necessary. It is these Ordinances of the President which by virtue of Article 367(2) are included among the Acts or laws of, or made by, Parliament. When the President's order does not amount to an Act of Parliament, it does not come within the definition of a Central Act. Of course, it is not Regulation as regulation means a Regulation made by Parliament under Article 243 of the Constitution. It would follow, therefore, that Section 5 (3), General Clauses Act 1897, can be of no help in determining the time from which the President's order was to come into effect.

47. Even if Section 5 (3), General Clauses Act, applied, I am of opinion that the President's order, by virtue of its terms, would not have come into operation from midnight on the night between 25th and 26th January. The President's order prescribes in Clause (1), Sub-clause (2) that it shall come into force at once. This should mean that the order was to come into force immediately after it was made. In fact any order or law must come into force after it is made and not before, unless the law itself provides so or any special rules of construction make it enforceable from an earlier period of time. When the order itself says that it shall come into force at once, it means that the order states in express terms that it was to come into force immediately from the moment it was made. Section 5 (3), General Clauses Act, relates back the operation of the Central Act to the moment of time immediately on the expiration of the day preceding its commencement unless the contrary is expressed. It is not necessary, in my opinion, that unless an order mentions the precise time by the clock from which it would come into force, it cannot be said to state in express terms that it was not to come into force immediately on the expiration of the day preceding its commencement. The expression that it shall come into 'force at once is sufficient to rule out the operation of the order from any time other than the time of its being made by the President.

48. It has been argued that though it can be said that the President's order could not have been signed before the President entered upon his office at 10.15 A. M. on the 26th January, it cannot be said as to at what precise moment the order was signed and that to hold that the President's order came into operation from the moment of its being signed by him would make it impossible to determine the precise moment of its being signed and of its consequent enforcement. It may be so. But if in any case it is essential to find this moment of time, there appears to be no bar for admitting evidence on the point and to decide the matter according to law in accordance with the proof or non-proof of the precise moment of its being signed and coming into force. The question, however, does not arise in the present case because the two material points of time are the midnight of the 25th January and 10.15 A. M. on the 26th January 1950.

49. The President's order having come into existence long after the provisions of Section 123A, Criminal P. C. had become void with respect to detention is excess of three months, the order cannot make the void law valid.

50. The validity of the President's order is also questioned on the ground that it does not do what Article 22(7), Sub-clauses (a) and (b) require. It does not specify the classes of cases and the circumstances in which the provision of the Constitution of an Advisory Board for reporting about detention for a period longer than three months could be avoided, and that it does not fix the maximum period for which the detention orders could be made. Reliance is placed on the judgment of the Special Bench of the Calcutta High Court as repotted in Sunil Kumar v. Chief Secretary to the Government of West Bengal, 54 C. W. N. 394: (A. I. R. (37) 1950 Cal. 274: 61 Cr. L. J. 1110). Clauses (2) and (3) of the President's order are:

> "(2) Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the previsions of Sub-clause (a) of Clause (4) of Article 22 of the Constitution.
>
> (3) The maximum period for which any such person, as in referred to in para. 2, may be detained, shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order."

This order applies to all classes of cases and all circumstances in which a certain law providing for preventive detention allows the detention of persons. It does not make a selection of certain classes of cases and certain circumstances in which the provisions of Clause (2) of this order could apply. It was considered foe this reason by the Calcutta High Court that such an order does not comply with the provisions of Article 22(7)(a) of the Constitution. I am of opinion that it does not necessarily follow from the provisions of Article 22(7)(a) of the Constitution that the President's order must make a selection out of several classes of cases and the circumstances justifying detention under any particular law. There seems to be no good reason why it should be incumbent on the President or the Parliament to make a selection out of all the classes of cases and circumstances in which a certain law allows preventive detention. In the absence of any such restrictive words in the article, I am not prepared to say that this order of the President is not in conformity with the provisions of Article 22(7)(a) of the Constitution. I am, in fact, inclined to agree with the contention of the learned Government Advocate that it may be said that the President selected out of infinite types of classes of cases and circumstances those particular classes of cases and circumstances for his order which were mentioned in any particular law providing for particular detention.

51. Clause (3) of the order provides that the maximum period for detention of a person who was in detention immediately before the commencement of the constitution would be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement be three months from the date of such order. This provision has been considered by the Calcutta High Court to be a provision fixing various periods, with respect to various persons depending upon the actual period of detention they had already undergone prior to the commencement of the Constitution. This is true. The order should have provided that the maximum period for detention in any class or classes of cases will be such a fixed period. It would be then within that maximum period that any particular law providing for preventive detention would have to fix the period of detention, and if any each law has fixed a longer period than the maximum period so specified, it will be inconsistent with respect to the duration in excess of the maximum fixed by the President in the order. I have to repeat that the order of the President is not law providing for preventive detention. It is just an order fixing certain conditions. The law for detention is to be found in separate enactments. The fixing of a period which may vary with respect to individual detenus could not certainly be in accordance with what was contemplated by Article 22(7)(b). It has been argued by the learned Government Advocate that the period fixed by the President is the maximum and that a detenu whose period of detention is to expire within three months of the commencement of the constitution will not, by virtue of the order of the President, be kept in detention after the expiry of the period in the detention order issued against him, This is correct. But all the same the period of detention varies for each detenu.

52. With respect to orders for detention to be passed in future, Clause 3 of the President's order provides that in the case of a person detained in pursuance of an order made after such commencement the maximum period would be three months from the date of such order. This, to my mind, does not in effect enlarge the period of detention for which even without the President's order any law providing for preventive detention could operate in view of Article 22(4), which says that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months. An order under any law providing for preventive detention can be good for three months by virtue of this provision and requires no further sanction for its effectiveness. The President's order fixes the maximum period to be three months from the date of the order. This maximum period of three months will not go beyond the period during which the order for detention under any preventive law could have teen effective.

53. It would follow, therefore, that Clause 3 of the President's order is not in accordance with the provisions in Article 22(7)(b).

54. It was also contended that the President's order does not and could not have provided against the provisions of Article 22(5), and that the law enacted under Section 123A Criminal P. C. does not provide for the furnishing of grounds to the detenu. This is true, but Article 22(5) provides for the furnishing of grounds for arrest to the person who is detained under any law providing for preventive detention and does not provide that such law should have a provision to that effect. If grounds are not furnished to a person detained under this section within a reasonable time, that may lead to his detention being held illegal, but should not make the detention illegal from the beginning or the law providing for such detention illegal. I do not therefore, consider that Section

123A, Criminal P. C., can be said to be bad on this ground. The learned Government Advocate informs us that the applicant has been furnished the grounds for detention shortly after the coming into force of the Constitution.

55. The learned Government Advocate referred us to Rule 28, Adaptation of Laws Order 1950 made by the President of India. This rule is:

> "Any Court' Tribunal or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall, notwithstanding that this order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose: Provided that if any question arises regarding the adaptations with which such law should be construed for the said purposes, the question shall be referred to the Central Government if the law relates to a matter enumerated in list I or list III in the seventh Schedule to the Constitution and to the State Government concerned in any other case and the decision of that Government on any such reference shall be final."

The Adaptation of Lawa Order, 1950, does not appear to contain any provision to make the provisions of Section 123A, of Criminal P. C., in accord with the provisions of the Constitution. Such an order could have been passed by the President under Article 372(2) which is:

> " For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expendient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and an such adaptation or modification shall not be questioned in any Court of law."

Rule 28 can simply mean that where any law in force is not in accord with the provisions of the Constitution, the Court should stay its hands, refer the matter to the Central Government or the State Government so that the law in force be made in accordance with the provisions of the Constitution and then abide by its decision. If the Government concerned be of opinion that there is no inconsistency, the Court is bound to hold so. Such a conduct on the part of the Court does not fit in with its duty to interpret the law as it is at the time of its adjudication or to decided according to its own opinion. To say that a law inconsistent with the provisions of the Constitution should be interpreted with all the necessary adaptations does not amount to the President's making the necessary adaptations and modifications of the law. Article 372(2) contemplates the President's exercising his discretion and deciding how far and in what respects the law in force should be adapted in order to make it consistent with the provisions of the Constitution. It is for him to make the adaptations and for the Court to bold even then that the adaptations do or do not make the law in accord with the Constitution. I, therefore, hold that this rule does not adapt Section 123A, Criminal P. C., to make it in accord with the Constitution and is therefore of no help in determining

the question before us.

56. Lastly, it was argued that Section 12 Preventive Detention Act (Act IV [4] of 1950), may be taken to be the law made by the Parliament under Article 22(7)(b) as providing the maximum of twelve months for detention under the law providing for prevention detention and that, therefore, the detention of the applicant having not exceeded the period of one year is not illegal and in contravention of the provisions of the constitution. I do not agree. Section 12 of this Act is:

> " 12. Duration of detention in certain cases. --(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person had been detained with a view to preventing him from acting in any manner prejudicial to --
>
> (a) the defence of India, relations of India with foreign powers ; or
>
> (b) the security of a State or the maintenance of public order."

It does not provide that detention under any law providing for preventive detention could be for a period up to one year. This provision is made just for the purposes of Central Act IV [4] of 1950, and the detention referred to therein is detention ordered under that particular Act. It cannot, therefore, be taken to be an enactment under Article 22(7), Clauses (a) and (b) of the Constitution.

57. These are my reasons for holding that the detention of the applicant is illegal and for having ordered his release after the conclusion of the arguments.

P.L. Bhargava, J.

58. I agree with the reasons given by my learned brother Dayal J. for holding the detention of the applicant, Harpal Singh, illegal and have not much to add.

59. The applicant was arrested on 29th May 1949. On 6th June 1949, the Provincial Government made an order for his detection for a period of six months under Section 3 (1) (a) of the United Provinces Maintenance of Public Order (Temporary) Act (IV [4] of 1947). He was detained, in Central Prison, Bareilly, up to 5th December 1949, when he was transferred to Aligarh. There, on 6th December 1949, an order made by the District Magistrate of Aligarh, imposing certain restrictions and conditions under Section 3 (1) (d) and (f) of the Act, was served upon him. The order was to remain in force for six months from the date of issue, which was 4th December 1949. Cinder Section 3 (3) of the Act, he was further ordered to execute a bond and furnish two sureties for the due performance and enforcement of the restrictions and conditions specified in the order and, upon his failure to do so, he was to be committed to prison and, if already in prison, was to be detained there, under Section 123A, Criminal P. C. He did not execute the bond or furnish sureties and being already in prison was detained there under a warrant issued under Section 123A of the

Code. It appears that the applicant was again transferred to Central Prison, Bareilly, from where he baa submitted to this Court an application under Section 491, Criminal P.C., challenging the validity of his detention.

60. The main contention put forward on behalf of the applicant was that Section 123A, Criminal P. C., under which he was being detained was void, inasmuch as it was inconsistent either with Article 21, read with Article 22(1) and (2), or with Article 21 read with Article 22(4) and (5) of the Constitution of India. Learned counsel for the applicant proceeded to argue on the point raised by him on the assumption that the detention of the applicant was in the nature of preventive detention and the learned Government Advocate also maintained that the applicant's detention was preventive. During the course of arguments we pointed out to the learned counsel that the detention of the applicant, under Section 123A, Criminal P. C., on account of his failure to furnish security, did not appear to be preventive ; and, after hearing the arguments on both sides, our opinion was confirmed.

61. The expression "preventive detention" in its literal sense conveys the idea of detaining a person in order to prevent him from doing something which the detaining authority has forbidden or does not want him to do; and in the laws providing for preventive detention the expression seems to have been used, as would be evident from the wordings of Section 3, Preventive Detention Act IV [4] of 1950, to mean detention with a view to prevent a person from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India, the security of the State, the maintenance of public order, the maintenance of supplies and services essential to the community or other similar matters. Whether we interpret the said expression in its literal sense or in the sense in which it is ordinarily used in the laws providing for preventive detention, there can be little doubt that the applicant's detention was not of such a nature.

62. A persual of the provisions contained in Section 123A, Criminal P. C., would show that the section merely provides for detention for failure to give security and not with a view to prevent the detenu from doing something. Learned Government Advocate wanted us to interpret Section 123A with particular reference to the provisions contained in D. P. Act IV [4] of 1947. He contended that the Provincial Government is empowered, under Section 3 (1) (a) of U. P. Act IV [4] of 1947, to detain a person straightway, in order to prevent him from acting in any manner prejudicial to the public safety or the maintenance of public order or communal harmony, or to postpone his detention and, under Section 3 (1) (b) to (f) of the Act, to impose upon him certain restrictions and conditions for the same purpose; and that he is required to furnish security for the due performance and enforcement of the restrictions and conditions imposed upon him, and, on his failure to furnish security, he is detained in prison for the same purpose, that is, in order to prevent him from acting in a particular manner. Consequently, such a detention would be in the nature of preventive detention.

63. Section 123A, Criminal P. C., which was enacted and incorporated in the Code, by the Code of Criminal Procedure (U. P. Amendment Act) (U. P. Act VIII [8] of 1949), is in these terms :

> "If any person ordered to give security for any specific period under any enactment for the time being in force for the due performance or enforcement of any restriction or condition which may lawfully be imposed under such enactment does not give such security on or before the date on which the security is required to be furnished, he shall, if the failure to perform or enforce the restriction or condition is punishable with imprisonment under such enactment, be committed to prison or, if he is already in prison, be detained in prison until such period expires or until within such period he gives security in accordance with the order "

The words, which I have underlined (here italicised) in the section, would show that it was not enacted with reference to U. P. Act IV [4] of 1947 alone; it refers to any enactment containing similar provisions and in force at the time the detention is ordered. If the legislature intended that the section should apply only to the cases covered by U. P. Act IV [4] of 1947, it must have been incorporated in that Act. The Statement of Objects and Reasons accompanying the Bill by which Section 123A was introduced in the Code of Criminal Procedure makes the position further clear. It goes to show that the section was enacted as it was felt that, when security was demanded for the performance or observance of certain conditions or restrictions under any enactment other than the Code of Criminal Procedure, there should be some provision by which the failure to furnish such security, should, where the failure to perform or observe the conditions or restrictions was punishable with imprisonment, automatically lead to imprisonment for the prescribed period as has been laid down in Section 123, Criminal P. C., for failure to furnish security demanded under Sections 107 to 110, Criminal P. C. Consequently, the section has to be interpreted independently of U. P. Act IV [4] of 1947.

64. The indirect result, which the Government Advocate has pointed out is likely to follow from the enforcement of the provisions contained in Section 123A, Criminal P. C., is too remote to be taken into consideration while determining the object with which the section was enacted. It is settled law that for this purpose we must consider mainly the primary object; and recently the Federal Court has pointed out in Lakhi Narayan Das v. Province of Bihar, A.I.R. (37) 1950 P. C. 59 at p. 64: (51 Cr. L. J. 921) :

> "To ascertain the class to which a particular enactment really belongs, we are to look to the primary matter dealt with by it, its subject-matter and essential legislative feature. Once the true nature and character of a legislation determine its place in a particular list, the fact that it deals incidentally with matters appertaining to other lists is immaterial. The Judicial Committee made it perfectly clear in the case mentioned above that the extent of invasion by a Provincial Act into subjects enumerated in other lists-is an important matter not because the validity of an Act can be determined by discriminating between degrees of invasion but for determining what is the 'pith and substance' of the Act."

65. Now, let us see what was the primary object of enacting Section 123A, Criminal P. C. That would be clear from the following words of the section:

> "If any person ordered to give security for any specified period . . . . does not give such security . . . . he shall. . . . be committed to prison . . . . until' such period expires or until within such period he gives security . . . ."

66. A person is ordered to give security; he does not comply with that order; he is penalised for non-compliance of the order; he can get rid of that penalty by furnishing security; and there is the end of Section 123A as far as he is concerned. Section 123A instead of preventing him from doing something compels him to do something, in other words to furnish security. Obviously, therefore, the primary object is to compel a person to furnish security or in default suffer detention in prison.

67. The statement of Objects and Reasons, to which reference has already been made, goes to show that it was intended to place Section 123A, Criminal P. C., at par with Section 123 of the same Code. Ordinarily, a person is sentenced to imprisonment for committing some offence; but in view of the proviso to Section 397 of the Code, even the imprisonment in default of furnishing security under Section 123 or Section 123A is to be treated as a sentence. The latter section lays down that the detention in prison under that section will be simple imprisonment. The sentence of simple imprisonment will, therefore, be a sort of punishment, although it will not be punishment in the sense in which the term has been used in the Penal Code.

68. In my opinion, therefore, the detention of the applicant was punitive and not preventive.

69. Clauses (1) and (2) of Article 22 of the Constitution relate to a detention, which is not in the nature of preventive detention. They are in these terms :

> "22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate." Article 13, Clause 1 of the Constitution reads thus:
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> "13. (1) All laws in force in the territory of India, immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

We have, therefore, to see whether the provisions contained in Section 123A, Criminal P. C., are in any manner inconsistent with the provisions of part III of the Constitution and, if so, to what extent. Article 22(1) provides that the person arrested shall be informed of the grounds for his arrest as soon as possible after the arrest. It farther provides that the person arrested shall have the right to consult and to be defended by a legal practitioner of his choice. Section 123A lays down that the

detention under that section is on account of the failure to give security under some enactment for the time being in force and the warrant issued under the said section has to say so. Therefore, it is possible to argue that Section 123A also contains a provision for the supply of grounds of arrest to the person arrested; but we do not find any provision in Section 123A enabling the person arrested and detained thereunder to consuls or to be defended by a legal practitioner of his choice and to that extent Section 123A is inconsistent with the provisions contained in Article 22(1) of the Constitution.

70. Clause (2) of Article 22 of the Constitution provides that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate, and it further provides that no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Clauses (1) and (2) of Article 22 read together clearly contemplate that the person arrested and detained shall be produced in the Court of the Magistrate having jurisdiction. There is no corresponding provision in Section 123A. The failure of the person concerned to furnish security has merely to be brought to the notice of the authority, which made the order imposing restrictions and conditions and requiring security to be furnished, and the warrant of detention would be issued committing him to prison or, if already in prison, to be detained there.

71. The learned Government Advocate has pointed out that the order detaining the applicant was passed, by the District Magistrate. Section 3 of U. P. Act IV [4] of 1947 empowers the Provincial Government to make the order of detention and the District Magistrate merely exercises the authority delegated to him by the Provincial Government under Section 11 of the said Act. Consequently, even though the District Magistrate is a Magistrate of the first class, he does not make an order under Section 3 of the Act or under Section 123A as Court of the Magistrate or as a Magistrate. Thus, the provisions of Section 123A are wholly inconsistent with the provisions of Clause (2) of Article 22 of the Constitution.

72. The provisions of Section 123A, Criminal P. C., being inconsistent with the provisions of Article 22, Clauses (1) and (2) of the Constitution became void under Article 13(1) of the Constitution when the Constitution came into force on the midnight of 25th January 1950. On 26th January 1950, the President of India made an order descrided as the Preventive Detention (Extension of Duration) Order, 1950; but that could not save the provisions of Section 123A from becoming void. The President's Order was made with special reference to Sub-clause (a) of Clause (4) of Article 22 of the Constitution and has reference to preventive detention only.

73. As has been stated above, learned counsel for the applicant has further contented that the provisions of Section 123A, Criminal P. C., are also inconsistent with the provisions of Clause (4) and (5) of Article 22 of the Constitution. Clause (4) of Article 22 lays down that:

> "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless"

an Advisory Board constituted in the manner provided therein "has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention."

There is a proviso which restricts the detention of any person beyond the maximum period prescribed by any law made by the Parliament under Sub-clause (b) of Clause (7) of Article 22. Clause (5) of Article 22 provides that :

> "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

74. The provisions of Section 123A are inconsistent with those contained in Clause (4) of Article 22 in so far as they provide for detention for a period longer than three months and do not provide for constitution of any Advisory Board. They are also inconsistent with Clause (5) of Article 22 in so far as they make no provision for affording any opportunity to the person detained for making a representation against the order.

75. Under Article 13(1) of the Constitution the provisions of Section 123A so far as they were in consistent with the provisions of Clauses (4) and (5) of Article 22 of the Constitution became void when the Constitution came into force on the midnight of 25th January 1950. Learned Government Advocate has relied upon the Preventive Detention (Extension of Duration) Order, 1950 to which reference has already been made above. This Order was made by the President under Clause (7) of Article 22 of the Constitution, which empowers the Parliament (and under Article 373 the President) by law to prescribe the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4) of Article 22, and also to prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention. The order, however, could not have been made by the President until he assumed his office in the manner prescribed by the Constitution at 10.15 A.M. on 26th January 1950. The Order was to come into force "at once."

76. Learned Government Advocate has contended that, in view of the provisions of Section 5, Sub-section (3). General Clauses Act, the Order, which was made on 26th January 1950, and which contains nothing to show when it was to come into force, mast be construed to mean that the order was to come into operation on the midnight of 25th January 1950. Even if we were to assume for the sake of argument that Section 5 (3), General Clauses Act was applicable to the Order, it is not possible to hold that the Order came into operation on the midnight of 25th January 1950, as it did not come into existence prior to 10.15 A.M. on 26th January 1950 that is to say, before the president-elect actually assumed the office of the President. Apart from it, the expression "at once" connotes a particular idea of time. It denotes the time when that expression was used and the future. It cannot possibly refer back to the time prior to its being used. The order could not, therefore, save

the inconsistent provisions of Section 123A becoming void as soon as the Constitution came into force that is on the midnight of 25th January 1950.

77. As I have already stated, the provisions of Section 123A, Criminal P. C., are also inconsistent with the provisions contained in Clause (5) of Article 22 of the Constitution; consequently, they became void under Article 13(1) of to Constitution. The President's Order, which makes no reference to Clause (5) of Article 22, could not, in any case, save the provisions of Section 123A from becoming void.

78. Therefore, in any view of the matter, whether the applicant's detention was in the nature of punitive or preventive detention, after the Constitution came into force, Section 123A, Criminal P. C., having become void, the detention became illegal. The applicant was, therefore, entitled to be set at liberty.

79. By the Court.--This is an application under Section 491, Criminal P. C., by Har Pal Singh. We have heard the learned counsel for the applicant and the Government Advocate and are of opinion that his detention is illegal. We shall give reasons for the decision arrived at in a separate order hereafter. We direct that the applicant be released from custody forthwith.

80. This order will be communicated to the Superintendent, Central Jail, Bareilly.