Lakhi Narayan Das And Ors. vs The Province Of Bihar on 30 March, 1950

Equivalent citations: [1950]SUPPSCR102

Bench: H.J. Kania, Meher Chand Mahajan, Saiyad Fazal Ali

JUDGMENT

Mukherjea, J.

1. These sixteen appeals arise out of as many applications presented by the different appellants under section 491 of the Criminal Procedure Code, complaining of illegal detention under section 2 (1) (a) of the Bihar Maintenance of Public Order Ordinance, 1949.

2. The appellants were originally arrested under the Bihar Maintenance of Public Order Act, 1947. That Act, which received the assent of the Governor-General on 15th of March, 1947, was to remain operative under section 1 (3) of the Act for a period of one year only from the date of its commencement, subject to a proviso engrafted upon the sub- section itself, which empowered the Provisional Government to extend it, with or without modifications, for a further period of one year, by means of a notification, on a resolution being passed to that effect by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council. On the 11th of March, 1948, the Provincial Government of Bihar, in exercise of their powers under the proviso mentioned above, extended the application of the Act for a further period of one year from 15th March, 1948, and it was during this extended period that the orders for arrest and detention against the appellants were initially made.

3. The competency of the provincial Government to extend the application of the Act by a notification, in the manner laid down in the proviso to section 1 (3) of the Act, was challenged in a number of analogous cases which came up to this court in May, 1949, JATINDRA NATH GUPTA v. THE PROVINCE OF BIHAR and others (1). By a judgment delivered on 28th May, 1949, this court held that the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act was ultra vires the Provincial Government as it amounted to a delegation of legislative function to an outside authority and consequently the extension of the operation of the act beyond the period of one year originally fixed was void and inoperative. It was further held that the Bihar Act V of 1949, which the Bihar Legislature had passed in the meantime, and which purported to amend the provision of section 1 (3) of the earlier Act was also invalid in law inasmuch as the enactment which it purported to amend was not legally in existence when this amending Act was passed. In view of the pronouncements of this court, the Governor of Bihar promulgated an Ordinance on the model of the Maintenance of the Public Order Act, on 3rd June, 1949, by which provisions were made inter alia for preventive detention in connection with public safety and maintenance of order in the Province of Bihar. On 21st June, 1949, this Ordinance was declared void and in operative by High Court of Patna on the

ground that as the Legislature of the Province of Bihar, though not actually sitting, was neither prorogued nor dissolved, the Governor could not promulgate an Ordinance under section 88(1) of the Government of India Act. On 22nd June following, a fresh Ordinance was passed, which is Ordinance No. IV of 1949 and which re-enacted in substance the provisions of the earlier Ordinance.. Under this Ordinance fresh orders of detention were passed and served on all the appellants. The appellants, along with other detenus filed applications before the Patna High Court under section 491 Criminal Procedure Code challenging the validity of the Ordinance itself and the propriety of the detention orders, made under it, on various grounds. The applications were heard in different batches by different Benches of the Patna High Court. There are altogether ten judgments which have been challenged in the appeals before us, the principals one being that of Ramaswami and Narayan, JJ. dated the 12th July, 1949. The High Court rejected the applications of all the appellants but granted certificates in each of the cases under section 205(1) of the Government of India Act. On the strength of these certificates, these sixteen appeals have come up to this court.

4. When the appeals were called on for hearing, the appellants appeared in person and were not represented by any lawyer. Mr. Umrigar, a learned Counsel of this court, however volunteered to assist us in this matter and he has said all that could be said in favour of the appellants. We are indebted to him for the assistance we received.

5. The main point convassed before us in support of these appeals is that the Ordinance, under which the appellants are detained, has been promulgated by the Governor in contravention of the provisions of section 88 of the Government of India Act, and consequently it is void and inoperative and any detention order passed under it must be held to be illegal.

6. Section 88 of the Government of India Act runs as follows :

> "(1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

Provided that the Governor shall not, without instructions from the Governor General, promulgate any such Ordinance if any Act of the provincial Legislature containing the same provisions would, under this Act, have been invalid unless, having been reserved for the consideration of the Governor General, it had received assent of the Governor General."

7. It is admitted that the Bihar Legislature was not in session when this Ordinance was passed. It was urged, however, in the court below, and the argument was repeated before us, that no circumstance existed as is contemplated by section 88(1) which could justify the governor in promulgating this Ordinance. This obviously is a matter which is not within the competence of courts to investigate. The language of the section shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test. It may be noted here that

under the Government of India Act the Governor-General has powers to make Ordinances in case of emergency (vide section 42 of the Government of India and section 72 of Schedule IX which is now omitted); and it was held by privy Council in King Emperor v. Benoarilal and Bhagat Singh v. The King Emperor that the emergency which calls for immediate action has to be judged by the Governor- General alone. On promulgating an Ordinance, the Governor-General is not bound as a matter of law to expound reasons therefore, nor is he bound to prove affirmatively in a court of law that a state of emergency did actually exist. The language of section 88 postulates only one condition, namely, the satisfaction of the Governor as to the existence of justifying circumstances, and the preamble to the Ordinance expresses in clear terms that this condition has been fulfilled. The first contention of the appellants must therefore be rejected.

8. The next and the more serious contention raised by the appellants is that the Ordinance in question contains provisions which, if they were contained in an Act of the Provincial Legislature, would have been invalid without the assent of the Governor-General. In these circumstances, it is argued, that under section 88(1) of the Government of India Act, previous instructions of the governor General were necessary to validate this Ordinance and as admittedly there were no such instructions in the present case, the ordinance must be deemed to be one which is beyond the competence of the Governor to promulgate. To appreciate this contention of the appellants, it would be necessary to advert to a few material provisions of the Constitution Act. Under sections 100(1) of the Government of India Act, the Provincial Legislature is incapable of legislating on any of the matters enumerated in List 1 of the Seventh Schedule to the Act which has been described as the Federal Legislative List and which is reserved exclusively for the dominion Legislature. Sub-section (3) of the section empowers the Provincial Legislature to make laws for a province or any part thereof with respect to any of the matters enumerated in List II (the Provincial Legislative List), and the Dominion Legislature is forbidden to legislate on such matters for any province or part of a province. As regards other parts of India which is outside the provinces as defined in the Act, the dominion Legislature has been given the authority under sub-section (4) of the section to legislate on any matter specified in the Provincial List. Sub-section (2) of section 100 deals with what has been called the Concurrent Legislative List, and both the dominion Legislature and the provincial Legislature can legislate upon the items enumerated therein. When both the Legislatures can operate on the same field, conflict is likely to arise and section 107 of the Government of India Act lays down rules as to how repugnancy is to be avoided when it arises between Provincial and Dominion Legislation. Section 107 of the constitution Act is in these terms :

> "(1) If any provision of a Provincial Law is repugnant to any provision of Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List then, subject to the provisions of the sections, the Dominion law, whether pass before or after the Provincial law, or, as the case may be, the existing law, shall prevail and the provincial law shall, to the extent of the repugnancy, be void.
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> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an

> earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General have received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter :
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> Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General."

9. The contention of the appellants is that the impugned Ordinance is in conflict with certain provisions of the Criminal Procedure Code and has created new offences for the first time, and these matters are clearly included under Items (1) and (2) of the Concurrent Legislative List. Had this been an Act of the Provincial Legislature, there would have been a conflict between these provisions and those of the existing law contained in Criminal Procedure Code and other Acts and under sub-section (2) of section 107, the assent of the Governor- General would have been necessary to validate such provisions. Under the proviso to section 88(1) of the Government of India Act, therefore, the Governor could not promulgate such Ordinance without instructions from the Governor-General. The contention does not appear to us to be sound. In order to succeed in their contention and attract the operation of section 107, read with section 88(1) of the Government of India Act, two things have got to be established by the appellants. In the first place, the provisions of the impugned Ordinance and those of an existing law must be in respect of the same subject-matter and that subject-matter must be covered by one of the items in the Concurrent List. In the second place, there must be repugnancy between the two provisions.

10. This leads us to enquire first of all whether the impugned Ordinance is in respect to matters enumerated in the Provincial or in the Concurrent List? It is settled by the decision of the Judicial Committee in Meghraj v. Allarakhia (4) that when the province acts solely within its power under the Provincial List without relying on any power conferred by the Concurrent List, no question of repugnancy under section 107 of the Government of India Act would arise. The point raised in that case was whether the Punjab Restitution of Mortgaged Lands Act (Act IV of 1938) was void under section 107(1) of the Government of India Act to the extent that it conflicted with certain provisions of the Civil Procedure Code and other existing Indian law. What that statute enacted, in substance, was to set aside the normal procedure for redemption in the case of mortgages of land with possession and empower the Collector, on an application by the mortgagor, to extinguish the mortgage in certain circumstances or declare it extinguished and restore possession. The matter came up on appeal to this court and this court held that the Act was not void inasmuch as there was no repugnancy between its provisions and those of the Civil Procedure Code or the Indian Contract Act by reason of the exceptions expressly provided for in the latter enactments. Against this judgment there was an appeal taken to the Privy Council and their Lordships of the Judicial Committee affirmed the decision of the Federal Court but on different grounds. Their Lordships held that the impugned Act was by its very language confined exclusively to agricultural lands, and mortgage of agricultural land as well as the procedure for its enforcement were wholly within the

competence of the Provincial Legislature being covered by Items Nos. (21) and (2) of List II. As agricultural land was expressly excluded from Items (7), (8) and (10) of List III, the whole of the Act fell within the powers given to the province by the Provincial List without any necessity to invoke powers from the Concurrent List. In these circumstances, no question of repugnancy under section 107 of the Constitution Act did at all arise or fall for consideration. It will be seen that while this Court based its decision in Meghraj's case on the ground that there was no real conflict between the provisions of the impugned Act and those of any existing Indian law and kept open the question as to whether the impugned Act extended to property other than agricultural lands, the Judicial Committee held definitely that the Act related exclusively to agricultural lands and that the question of repugnancy was not material at all. Keeping in view this pronouncement of the Judicial Committee, it seems to us that the Province of Bihar is right in their contention that the matters dealt with by the impugned Ordinance fall entirely within Items (1) and (2) of the Provincial List and that there has been no legislation on any item in the concurrent List.

11. Items (1) and (2) of the Provincial List are worded as follows :

> "1. Public Order but not including the use of his Majesty's naval, military or air forces in aid of the civil power; the administration of justice, constitution and organisation of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance or public order; persons subjected to such detention.
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> 2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts."

12. The expression "Public Order" with which the first item begins is, in our opinion, a most comprehensive term and it clearly indicates the scope or ambit of the subject in respect to which powers of legislation are given to the province. Maintenance of public order within a province is primarily the concern of that province and subject to certain exceptions which involve the use of His Majesty's forces in aid of civil power, the Provincial Legislature is given plenary authority to legislate on all matters which relate to or are necessary for maintenance of public order. Preventive detention for reasons connected with the maintenance of public order and persons subjected to such detention are expressly mentioned as being included in this item, whereas preventive detention for reasons of State and connected with Defence, External Affairs and relations with acceding States have been placed separately under Item No. (1) of the Federal List.

13. Looking now to the specific provisions of the Ordinance we see that the preamble states in clear words that the Governor is satisfied that the circumstances exist which render it necessary for him to take immediate action and provide for preventive detention, imposition of collective fines and control of meetings and processions etc. in connection with public safety and maintenance of public order in the Province of Bihar. Section 2 gives power to the Provincial Government to make orders restricting the movements or action of or detaining a certain person with a view to preventing him from acting in any manner prejudicial to public safety and he maintenance of public order. Section 3 specifies the duration of the order made under section 2. Section 4 lays down that the grounds of the

order of detention are to be disclosed to the person affected by the order and the latter would have a right of representation by way of reply to the allegations made against him. The grounds and the representation are then to be placed before any Advisory council constituted in a particular manner and on the report of the Advisory Council, the final order is to be passed by the provincial Government. Section 5 provides for imposition of collective fines on the inhabitants of any area who are concerned in commission of offences affecting public safety or public order. Sub- section (5) of this section lays down that the portion of fine payable by person may be recovered from him in the manner provided for in section 386, Criminal Procedure Code or the Provincial Government may make special rules for the purpose. Section 6 relates to control of processions and meetings and sections 7 and 8 to imposition of Press censorship and control of documents printed outside the province. Section 9 deals with requisitioning of property and sections 10 and 11 with unlawful drilling and use of unofficial uniforms. Under Section 12, an officer authorised in that behalf may require the assistance of any male person in any area to assist him in the maintenance of law and order. Under section 13 any place can be declared to be a protected place and under section 15 orders may be passed for controlling or regulating the admission of persons to and the conduct of persons in and in the vicinity of such place. It is to be noted that violation of the orders passed under all the above sections are made criminal offences for which certain punishments have been provided. The other material sections of the Ordinance are sections 21 to 24. Under section 21 any police officer may arrest without without warrant any person who is reasonably suspected of having committed an offence punishable under the Ordinance. Section 22 lays down how cognizance has to be taken of any alleged contravention of the provisions of the Ordinance and sub-section (2) provides that any Magistrate or bench of Magistrates who are empowered to try cases summarily under section 160 (1) of the Code of Criminal Procedure could try any contravention of the provisions of the Ordinance or any, order passed under it as the Provincial Government may be a notification direct. Section 23 repeals the Bihar Maintenance of Public Order Act 1947, the Amending Act V of 1949 and also the previous Ordinance passed on 3rd June 1949. Section 24 saves all proceedings commenced or acts done under the earlier Ordinance.

14. Thus all the provisions of the Ordinance relate to or are concerned primarily with the maintenance of public order in the Province of Bihar and provide for preventive detention and similar other measures in connection with the same. It is true that violation of the provisions of the Ordinance or of orders passed under it have been made criminal offences but offences against laws with respect to matters specified in List II would come within Item (37) of List II itself, and have been expressly excluded from Item (1) of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the conferring of jurisdiction on certain courts for that purpose would be covered completely by Item (2) of List II and it is not necessary for the Provincial Legislature to invoke the powers under Item (2) of the Concurrent List. It is argued on behalf of the appellants that the provision of section 21 of the Ordinance which empowers any police officer to arrest without warrant any person suspected of having committed any offence punishable under the Ordinance really amounts to legislation on Criminal Procedure and conflicts with the provision of section 54 of the Criminal Procedure Code. In our opinion, if the Provincial Legislature can create offences in respect to matters which are exclusively within List II, it can also provide for arrest and trial of the offenders who violate such laws. This seems to be the clear implication of Item (37) of List II and Item (1) of the Concurrent List.

15. It was laid down by this court in United Provinces v. Mussamat Aliqua Begum (5) that "none of the items in the lists is to be read in a narrow or restricted sense and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it." The three legislative lists in the Constitution Act are not always mutually exclusive. As the Judicial Committee observed in a recent case Profulla Kumar Mukherji v. Bank of Commerce, (6) "the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdiction. Subjects must still overlap and when they do, the question must be asked what is pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found." 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 invasions but for determining what is the "pith and substance" of the Act. Judged by the test, it can scarcely be argued that the impugned Ordinance is a legislation not on public order or preventive detention for reasons connected with it but on criminal procedure. 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 Ordinance lays down what in the opinion of the legislative authority is essential for the maintenance of public order in the province. That is the true nature and character of the legislation which unquestionably brings it within Item (1) of List II. The offence that have been created and the procedure that have been laid down for arrest and trial of the offenders are only ancillary things without which no effective legislation would have been possible. We have, therefore, no hesitation in holding that the Ordinance is covered entirely by Items (1) and (2) of the Provincial List and as for no part of this provisions it is necessary to have recourse to the concurrent powers provided for in List III, the question of repugnancy under section 107(1) of the Government of India Act does not arise at all.

16. Even assuming for argument's sake that the provisions relating to arrest without any warrant, by a police officer, of persons suspected of committing offences under the Ordinance as contained in section 21, or that relating to trial of such persons by Magistrates empowered to try cases summarily, are matters of Criminal Procedure and come within the purview of Item (2) of the Concurrent List, we do not think that it will help the appellants in any way. The Concurrent List is not a forbidden field to the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of section 107 of the Government of India Act. There must be repugnancy between such legislation and an existing law prevail unless the procedure laid down in sub-section (2) of section 107 was followed. In our opinion, there is no repugnancy between the provisions of the impugned Ordinance and those of the Criminal Procedure Code. Section 54 of the Criminal Procedure Code does not purport to be exhausted or unqualified and various provisions for arrest without warrant are to be found in other Acts e.g., Police Act, Arms Act, Explosives Act, Indian Railways Act, etc.; and section 1 (2) of the Criminal Procedure Code expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for the time being in force. The provision of section 21 of the Ordinance cannot be said therefore to be

repugnant to section 54 of the Criminal Procedure Code. Similarly, the investing of certain Magistrates with powers to try offences under the Ordinance does not affect or touch in the least any provision of the Criminal Procedure Code. As there is no repugnancy, section 107 of the Government of India Act cannot have any application to the present case.

17. It is then argued by Mr. Umrigar, though somewhat faintheartedly, that the promulgation of the impugned Ordinance is not a bona fide act on the part of the Governor. It is difficult to see on what materials this contention can be seriously pressed. It is to be noted that Bihar Maintenance of Public Order Act, 1947 itself contained a provision under which the Provincial Government, with the assent of both Houses of legislature, could, by a notification, prolong its life for one year more after the 15th of March, 1948. Then again in March 1949 an Amending Act was passed, by which the original Act was further extended till 31st March 1940. On 28th May 1949 this court held that the extension of the Act by means of notification of the Provincial Government as well as the subsequent amending Acts were ultra vires and void. In this circumstances, the Governor of Bihar promulgated an Ordinance on the 3rd of June 1949 which incorporated, in substance, the provisions of the Maintenance of Public Order Act. It is admitted that at that time the Legislature was not actually sitting though no formal order of prorogation was made. On this ground the Ordinance was held to be inoperative by the Patna High Court, and on the very next day after the decision of High Court was given, the present Ordinance (which is Ordinance No. IV of 1949) was promulgated. It might have been a mistake on the part of those who advised the Governor, not to take into account the fact that the Legislature has not been prorogued when the Ordinance of 3rd June 1949 was passed. But it would be idle to suggest that there was anything mala fide or dishonest in the steps that were taken.

18. The fourth and the last contention raised by Mr. Umrigar is that sections 23, 24 and the proviso to section 4 (1) of the Ordinance are illegal and ultra vires and as they are not severable from the rest of the Ordinance, the entire Ordinance is bad on account of these offending provisions.

19. For the purpose of testing the soundness of his argument, it will be convenient, we think, to examine the three impugned provisions separately. So far as section 23 of the Ordinance is concerned, it purports, to repeal the Bihar Maintenance of public Order Act as extended by the notification of the Provincial Government and amended by subsequent Acts and also the earlier Ordinance passed on 3rd June 1949. All the enactments referred to in the section had been already pronounced to be invalid by competent courts and it is difficult to see why it was necessary to repeal them at all. As a superfluity, the section can certainly be ignored but it will not affect the validity of the Ordinance itself in any way.

20. Section 24 is in the nature of a saving provision and seeks to keep alive all proceedings commenced or orders made or sentences passed under Ordinance II of 1949 which was declared invalid by the Patna High Court. It was argued that if the Ordinance itself had been pronounced to be illegal and ultra vires, how could anything done under it be regarded as valid. For our present purpose, this question is acedemic, for the detention of any of the appellants before us is not sought to be justified by the provisions of Ordinance II of 1949; and whether or not any order made or proceedings started under the old Ordinance could be kept at all, need not be considered in the present case. The only question to be decided by us is whether, assuming the provision to be bad, it

is so inextricably woven in to the scheme of the whole Ordinance and so inseparably connected with its other provisions that this invalid section would make the whole Ordinance invalid. To this question, the answer must certainly be in the negative. There is no necessary and inseparable connection between this section and the rest of the Ordinance and none of the material provisions of the latter depend upon it any way. If the section is struck out, the rest of the Ordinance will certainly survive as an effective piece of legislation fulfilling the identical object for which the Ordinance was passed.

21. The main attack of Mr. Umrigar is, however, directed against the proviso to section 4 (1) of the Ordinance and it was strenuously argued by him that this clause was beyond the capacity of any Provincial Legislature to enact and it was not a matter included in any of the items in the Provincial List. Now section 4 (1) of the Ordinance runs as follows :

> "When an order is made in respect of any person under clause (a) of sub-section (1) of section 2, as soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby, so far as such communication can be made without disclosing facts which the said authority considers it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order and such person may, within fifteen days of the receipt of such communication, make a representation in writing to such authority against the order and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practicable opportunity of doing so."

22. To this sub-section a proviso is added which lays down that :

> "Where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order, neither the said order nor the detention of the said person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness on insufficiency of the communication made to such person under this section."

23. Mr. Umrigar argues that word "all" occurring in the proviso is obviously used in the sense of "any" and under the proviso, therefore the Provincial Government is not bound to disclose to the detenu any ground whatsoever in support of the order of detention. The result is that the only safeguard which was provided for in section 4 (1) and which entitled a detenu to make an effective representation by way of reply to the allegations made against him is wholly taken away. We may state here that we are not called upon to determine in the present case whether a proviso of this description which practically nullifies the main section upon which it is engrafted, would prevail over the section itself. This is a question of construction which can be raised on a proper occasion and we do not express any opinion upon it. The point which we have to decide is the legislative competency of the Governor which in this respect is the same as that of the Provincial Legislature to enact this proviso at all. Mr. Umrigar's contention is that once the safeguard available to a detenu

under section 4 (1) of the Ordinance is whittled down and rendered illusory by the proviso, the detention is no longer a "preventive detention" which Item (1) of the Provincial List contemplates; it degenerates into "arbitrary detention" and in respect of such a matter no power of legislation has been given to the province by the Government of India Act. As a part of his argument Mr. Umrigar laid considerable stress upon the following observations made by a Full Bench of the Patna High Court in Murat Patwa v. The Province of Bihar (7) "In our opinion, the phrase "preventive detention" means detention, not, as in the case of ordinary imprisonment, in respect of the actual commission of an illegal act, but detention in reasonable anticipation that some illegal act or acts may otherwise be committed and in the context of Item 1 of List II in the Seventh Schedule to the Government of India Act, the illegal act must be one connected with the maintenance of public order. A further limitation upon the nature of the illegal act or acts in question is provided by section 2 (1) of the Act which requires that they must be such as are not only prejudicial to the maintenance of public order but prejudicial also to the public safety. What distinguishes preventive from arbitrary detention, an entirely different subject matter of legislation, is the existence of the reasonable anticipation that some illegal act or acts may otherwise be committed. It is obvious, therefore, that anything that weakens the fair and proper determination of the existence of such reasonable anticipation automatically tends to convert what would otherwise be preventive detention into a purely arbitrary detention and at some point in that weakening process the question will arise whether an Act which purports to deal with preventive detention does, in pith and in substance, in fact so deal, or whether it has not over- stepped the bounds and become ultra vires the Provincial Legislature in that it constitutes in effect an Act conferring upon the Executive a power of arbitrary detention."

24. It is clear from the reported judgment that this point was not argued before the learned Judges and they are not rest their decision on it. It was not held by the Full Bench that the Legislature exceeded its powers in enacting the provision of section 2 (1) (a) of the Bihar Maintenance of Public Order Act. The only point decided would that section 4 of the Act was mandatory and a detention would become illegal if the grounds for the detention were not communicated to the detenu within a reasonable time. The observations, therefore, cannot rank higher than obiter dicta. But even then they would have had their due weight but for the fact that there seems to be some amount of loose thinking involved in them. The learned Judges appear to have proceeded on the footing that there is an antithesis between "preventive" and "arbitrary" "detention" and that "arbitrary detention" is itself a separate subject-matter of legislation. Now preventive detention can properly be contrasted with punitive detention, one having reference to the apprehension of wrong doing and the other coming after the illegal act is actually committed. The word "arbitrary" connotes want of reasonable or proper justification. if a particular piece of legislation is entirely within the ambit of the Legislature's authority, there could be nothing arbitrary in it so far as a court of law is concerned. The courts have nothing to do with the policy of the Legislature or the reasonableness or unreasonableness of the legislation. As was observed by Lord Watson in Union Colliery company of British Columbia Ltd. v. Bryden (8) "in so far as they possess legislative jurisdiction the discretion committed to the Parliaments whether of the Dominion or of the Provinces is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not."

> "Preventive detention" for reasons connected with the maintenance of public order is one of the subjects upon which the provinces have been given the authority to legislate under the Government of India Act. The court has got to decide on a consideration of the true nature and character of legislation whether it is really on the subject of preventive detention or not. Once that point is decided in favour of the legislative authority, and it is held that is has not trespassed beyond the limits of its assigned powers, it is not for the courts to criticise the wisdom and policy of the Legislature. We desire to point out that quite a correct view on this matter was taken by a Bench of the Calcutta High Court in Sushil Kumar v. Government of West Bengal. The contention of Mr. Umrigar, therefore, cannot be accepted as sound.

25. These are the constitutional points which were raised on behalf of the appellants and pressed for our consideration in these appeals. Application have been filed by some of the appellants under section 205(2) of the Government of India Act craving our permission to raise grounds other than those upon which certificates under section 205(1) were granted. Learned Counsel, however, very frankly admitted that he was unable to say that any substantial error of law was involved in any of these cases or there has been any irregularity in the procedure which led to miscarriage of justice. This being the position, we declined to enter into questions of fact which were discussed elaborately in the judgments of the High Court. The result is that the appeals fail and are dismissed.