S.M.D. Kiran Pasha vs Government Of Andhra Pradesh And Ors on 9 November, 1989

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Author: K.N. Saikia

Bench: K.N. Saikia, M. Fathima Beevi

PETITIONER:
S.M.D. KIRAN PASHA

Vs.

RESPONDENT:
GOVERNMENT OF ANDHRA PRADESH AND ORS.

DATE OF JUDGMENT09/11/1989

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1989 SCR Supl. (2) 105 1990 SCC (1) 328
JT 1989 (4) 366 1989 SCALE (2)1083

ACT:
Constitution of India, 1950: Articles 32 & 226--Life and personal liberty--Right to-'Enforcement' of right in Court--Whether Court can insist that person surrenders and then files habeas corpus petition--Post violation resort and pre violation of protection----Distinction between.

HEADNOTE:
The appellant is a Municipal Councillor of the Cuddapah Municipal Council. He was elected to the Council as an independent candidate. According to him, he enjoys popularity in his area and had previously held important positions

in the District. He states that the local leadership of the ruling Telugu Desam Party having failed to woo him into their fold, he was pressurised through the Excise and Police authorities foisting false cases upon him. Scenting a move to detain him under the provisions of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, the appellant filed a writ petition on 6.6.1988 in the High Court, averring inter alia that the successive actions initiated against him were a part of political vendetta. A learned Single Judge on 8.8.1988 was pleased to direct interim the respondents not to take the appellant into preventive custody for a period of 15 days on the basis of the cases already registered. However, on 10.6.1988 the appellant was served the detention order dated 3.6.1988 as well as the grounds of detention, and he was taken into custody, but was released after four days.

The appellant filed on 25.6.1988 in his pending writ petition a miscellaneous petition, as an additional affidavit. He assailed therein the order of detention on various grounds. A Division Bench of the High Court, on reference by the learned Single Judge, held that the prayer in the writ petition had become infructuous, and that there were no extraordinary or special reasons to depart from the normal rule, namely, that in such a case the appellant should first surrender and move for a writ of habeas corpus. The Division Bench accordingly, dismissed the writ petition.

Before this Court it was inter alia contended on behalf of the

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appellant that the High Court erred in holding that there were no extraordinary circumstances or special reasons to depart from the normal rule, thereby refusing to grant relief to the appellant against infringement of his fundamental right to liberty; that the detention order having not been approved by the State Government as required under Section 3(3) of the Prevention of Dangerous Activities Act and the appellant's case having not been placed before the Advisory Board as required under section 10 thereof, the detention order ceased to be in force and hence was liable to be quashed.

On behalf of the respondent, it was contended that the detention order having been passed before the writ petition was filed, the High Court was right in dismissing the writ petition following the court's practice and procedure, and that there were no extraordinary or special reasons to depart from the normal rule inasmuch as granting relief at such a stage would defeat the very purpose of the Act. Counsel, however, could not deny that the detention order was not approved by the State Government and that the appellant's case was not placed before the Advisory Board.

Allowing the appeal and quashing the order of detention, this Court,

HELD: (1) The position of a person who is actually under illegal detention and of a person who is in imminent jeopardy of illegal detention are not far dissimilar. Refusal to interfere in such a case may amount to denial of the fundamental right itself. [114A].

Jayantiial Bhagwandas Shah v. The State of Maharashtra, [1981] 1 Cr. L.J. 767, referred to.

(2) There could be no reason why in an exceptional and rare case, detention order already made, and either served or yet to be served, and the person is still free, could not be legally brought under challenge. [114F]

Vedprakash Devkinandan Chiripal v. State of Gujarat, AIR 1987 Gujarat 253.

A.K. Gopalan v. State of Madras, AIR 1950 SC 27; Addl. District Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207, referred to.

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(3) For enforcement of one's right to life and personal liberty resort to Article 226(1) has been provided for. The word 'enforcement' has also been used in Article 32 of the Constitution which provides the remedy for enforcement of rights conferred by Part III of the Constitution. The word 'enforcement' has not been defined by the Constitution. [115B]

(4) 'Enforce' means to compel obedience to laws; to compel performance, obedience by physical or moral force. [115C]

(5) Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or to do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. [115F]

(6) Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. [116B-C]

(7) Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with the violation and he approaches the court under Art. 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken these steps to appear and show cause why they should not be restrained from violating that right?

[116 C-D]

(8) The difference of the two situations have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right. [116F-G]

(9) In the instant case, the appellant's fundamental right to

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liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement. [120D-E]

K.K. Kochunni v. The State of Madras and Ors., [1959] Supp. 2 SCR 316; Special Reference No. 1 of 1964, [1965] 1 SCR 413; M.C. Mehta v. Union of India, [1987] 1 SCC 395 referred to.

(10) As the detention order was already passed and served and the detenu was already taken into custody during the pendency of the writ petition, these subsequent events having being brought to the notice of the court by a Misc. application in the form of additional affidavit, the same ought to have been dealt with by the High Court..[113A-B]

(11) The detention order had not been approved by the State Government within 12 days of its being made, as enjoined under subsection (3) of section 3 of the Act. The result is that the order could not remain in force more than 12 days after making thereof and as such must be treated as to have ceased to be in force and non-existent thereafter. [122A]

(12) Even though the detenu was released, if the detention order was in force, his case was required to be placed before the Advisory Board. This being a mandatory provision and having not been complied with, the detention order even if otherwise in force, cannot be said to have been in force after three weeks. [122H; 123A]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 702 of 1989.

From the Judgment and Order dated 4.7.1988 of the Andhra Pradesh High Court in W.P. No. 8610 of 1988.

M.C. Bhandare and Ms. C.K. Sucharita for the Appellant. Ganesh, S. Muralidhar, T.V.S.N. Chari and Raghav for the Respondents.

The Judgment of the Court was delivered by K.N. SAIKIA, J. Special leave granted.

This appeal is from the Judgment and Order of the High Court of Andhra Pradesh at Hyderabad dated 4.7.1988 passed in Writ Petition No. 86 10 of 1988.

The appellant states that he enjoys popularity in his area and that he previously held several important positions in the Cuddapah District of Andhra Pradesh, such as organis- ing Secretary of the Andhra Pradesh Congress Committee for several years, a Municipal Councillor from 1982 to 1986 and a Vice-Chairman of Cuddapah Municipal Council. According to him in December 1985 he was elected as a Chairman of the Cuddapah Municipal Council for its residuary term and in March 1987 he was elected to the Municipal Council as an independent candidate defeating the Telugu Desam and Con- gress (I) candidates by a large margin. It is his case that the local leadership of the ruling Telugu Desam Party. having failed to woo him into their fold he was pressurised through the Excise and Police authorities foisting false cases upon him. On 13.11.1987, the police having summoned him to the Police Station for taking his photograph as was done in case of criminals, he moved the Andhra Pradesh High Court by Writ Petition No. 79038 of 1987 and the High Court was pleased to issue directions as prayed for, by its order dated 17.12.1987. Thereafter the excise authorities are stated to have registered some cases against the appellant who applied for and was granted bail on 10.5.1988 rejecting the Excise authorities' prayer for custody. Scenting a move to detain the appellant under the provisions of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, hereinafter referred to as 'the Act', the appellant filed Writ Petition No. 8610 of 1988 on 6.6.1988 in the Andhra Pradesh High Court averting, inter alia, that the successive actions initiated against him were a part of political vendetta. A learned Single Judge on 8.6.1988 was pleased to direct interim the respondents not to take the appellant into preventive custody for a period of 15 days on basis the cases already registered. However, on 10.6.1988 the appellant was served the detention order in S.No. 7/1988 dated 3.6.1988 as well as the grounds of deten- tion; and he was taken into custody and detained in Secun- derabad jail, but was released after four days. The deten- tion order stated that with a view to preventing him from acting in a manner prejudicial to the maintenance of public order, it was necessary to make an order directing that "he shall be de- tained." The grounds of detention as served upon the appel- lant contained altogether 13 grounds ranging a period from 23.11.1974 to 7.5.1988.

The appellant filed on 25.6.1988 in his writ petition a miscellaneous petition being W.P.M.P.S.R. No. 51830, as an additional affidavit, stating, inter alia, that the writ petition was filed by him seeking a direction to the re- spondents to refrain from making an order detaining him under the provisions of the Act and the same was admitted and interim direction issued. But thereafter the detention order in S.No. 7 of 1988 dated 3.6.1988 was served on him on 10.6.1988 and, therefore, he submitted the additional affi- davit with reference to the impugned order of detention. He assailed therein the grounds of detention as vague, stale, non-existent and, in any case, irrelevant bearing no reasons for the decision that his detention was necessary to prevent him from acting in a manner

prejudicial to the maintenance of public order. He also assailed the order on grounds of non application of mind by the respondent NO. 2 and absence of nexus between the grounds and maintenance of public order and of non-disclosure of any rational basis for formation of such an opinion. He refuted and denied each of the 13 grounds and prayed that the writ petition be amended by substituting the prayer so as to issue a writ, order or direction and more particularly one in the nature of writ of mandamus declaring the order of the Collector and District Magistrate respondent No. 2 herein in S.R. No. 7 of 1988 dated 3.6.1988 made under Act 1 of 1986 as illegal and void and to pass such other orders as are necessary in the inter- ests of justice. Admittedly no specific order was passed on this miscellaneous petition. It appears that a Counter Affidavit was filed in the writ petition on behalf of the respondents and the appellant filed a reply affidavit there- to.

A Division Bench of the High Court of Andhra Pradesh on reference by the learned Single judge heard the writ peti- tion analogously with another writ petition and observing, inter alia, that as an order of detention was made even before the writ petition was filed, held that the prayer in the writ petition had become infructuous; and that there were no extraordinary or special reasons to depart from the normal rule, namely, that in such a case the appellant should first surrender and move for a writ of habeas corpus, and accordingly dismissed the writ petition. Mr. M.C. Bhandare, the learned counsel for the appellant submits, inter alia, that the High Court erred in dismissing the appellant's writ petition holding that there were no extraordinary circumstance, or special reasons to depart from the normal rule that the appellant in such a case should first surren- der and then move a petition for habeas corpus thereby refusing to grant relief to the appellant against infringe- ment of his fundamental right to liberty; and that the grounds of detention were vague, irrelevant, stale and non- existent having no relation to the stated purpose of deten- tion, and there was mala fide exercise of power and complete non-application of mind on the part of the detaining author- ity for which the grounds of detention ought to have been rejected and the detention order set aside. Counsel relies on a decision of the Bombay High Court reported in 1981(1) Crl. L.J. 767 and one of the Gujarat High Court since re- ported in AIR 1978 Gujarat 253. Counsel further submits that the detention order having not been approved by the State Government as required under section 3(3) of the Act and the appellant's case having not been placed before the Advisory Board as required under section 10 the detention order ceased to be in force and hence is liable to be quashed. Mr. M.S. Ganesh, the learned counsel for the respondents submits that the detention order having been passed before the writ petition was filed, the High Court was right in dismissing the same following the court's practice and procedure; and that there were no extraordinary or special reasons to depart from the normal rule inasmuch as granting relief at such a stage would defeat the very purpose of the Act. Counsel however, could not deny that the detention order was not approved by the State Government and that the appellant's case was not placed before the Advisory Board. The first question to be decided therefore, is whether the High Court was right in dismissing the writ petition holding that the rule or practice of the High Court in such a case was to interfere only where there were extraordinary or special reasons and otherwise to leave the appellant to first surrender and then move a petition for habeas corpus. From a perusal of the Judgment of the High Court it appears that it analysed the question of maintainability of the writ petition from two view points, namely, of the High Court's power, and the High Court's rule or practice. The High Court correctly analysed the power of the High Court to interfere in such a case under Article 226 of the Constitu- tion of India concluding that the High Court had power to interfere. While tracing the High Court's

evolving rule or practice, the Bench took the view that it was but appropri- ate and proper that the court evolved and followed a practice and procedure where it would not ordinarily entertain a challenge to a preventive detention unless the person concerned submitted himself to the order and not to encourage persons against whom orders of preventive detention were made by the competent authority under a valid enactment to avoid the process of law and at the same time seek the protection of law from this Court. Relying on several decisions of its own, the Court observed:

> "There is no presumption that any and every order of detention is bad. The normal rule shall therefore be "surrender to the order first and then approach this Court." Only in extraordinary cases, where it appears that the State is exercising its power under a preven- tive detention statute for an oblique purpose, or in an outrageous and/or vindictive manner, or where the order of detention is ex facie invalid, would this Court depart from this rule. Now, what would be such extraordi- nary case cannot and, indeed, should not be defined or specified. It is better left to the sound judgment and decision of this Court."

The High Court on facts of the appellant's writ peti- tion, observed that the allegations that the entire adminis- trative machinery was being misused by the local MLA who happened to be a Cabinet Minister to hound the appellant and that the Collector and District Magistrate was being used as a tool were not correct and, therefore, said:

> "Once we are of the opinion that there are no extraordinary or special reasons to depart from the normal rule, we will not look into or examine the relevance or correctness of the grounds as we would do in a writ of habeas corpus."

The writ petition was accordingly dismissed. Mr. Bhandare submits that when the appellant's fundamen- tal right to liberty was threatened through the machination of a detention order, he approached the High Court for protection and when despite the interim order of the High Court his fundamental right was violated by detaining him, after serving the order of detention on vague, stale, irrel- evant and non-existent grounds, though he was released after four days, he ought not to have been denied relief on the ground of there having evolved a practice or procedure of the Court not to interfere in such a case except where there were extraordinary or special reasons and to leave the appellant to surrender and then move a petition for habeas corpus. We find force in this submis- sion. As the detention order was already passed and served and the detenu was already taken into custody during the pendency of the writ petition, these subsequent events having been brought to the notice of the court by a Misc. application in the form of an Additional Affidavit--the same ought to have been dealt with by the High Court. In Jayantilal Bhagwandas Shah v. The State of Maharash- tra, [1981] 1 Crl. L.J. 767, the challenge was directed towards orders of detention passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, but the intended detenus under those orders were not in detention. The State having raised a preliminary objec- tion to the maintainability of the petition on the ground that the habeas corpus jurisdiction under Art. 226 of the Constitution was exercisable only to examine the legality of a detention where there was a detention and in no other case, a Division Bench of the Bombay High Court took the view that though the writ of habeas corpus might be issued only when there was actual illegal

detention, that was not to say that an illegal order of detention could not be successfully challenged.

In para 11 of the report, the Court held:

> "Art. 226 is couched in language wide enough to protect a person against an illegal inva- sion of his fight to freedom by protecting him while still free and by regaining his freedom for him if he has already been wrongfully detained. We cannot countenance and do not accept the Advocate General's submission that the High Courts are impotent to give relief against the prospect of illegal detention and must first require the intended detenu to surrender to the illegal detention. We are satisfied that the High Courts may under the provisions of Art. 226 issue a direction, order and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by direction, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from execut- ing the threat."

Accordingly the Court held that it would intervene to strike down an illegal order of detention. If the court could in matters of personal liberty intervene on the strength of a mere post-card, they surely could intervene on the strength of a petition, though they may seek the wrong relief or be phrased in the wrong form. The position of a person who is actually under illegal detention and of a person who is in imminent jeopardy of illegal detention are not far dissimilar. We are inclined to agree with this view as we feel that refusal to interfere in such a case may amount to denial of the fundamental right itself. A Full Bench of the Gujarat High Court in Vedprakash Devkinandan Chiripal v. State of Gujarat, since reported in AIR 1987 Gujarat 253 where the petitioner was said to be detained under the provisions of Prevention of Blackmarket- ing and maintenance of Supply of Essential Commodities Act, 1980 and the petitioner having absconded, a notification was issued in the official gazette as provided under section 7(1)(b) of the said Act and the person moved the petition under Art. 226 of the Constitution of India praying a writ of habeas corpus or a writ of mandamus, the question was whether the petition would be maintainable before the detenu had been served with order of detention and had been de- tained in custody, answered the question in the affirmative. Relying on the decisions in A.K. Gopalan v. State of Madras, AIR 1950 SC 27 and Addl. District Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207, the Full Bench took the view "that before detention, if writ of mandamus is moved for challenging unauthorised detention order which is al- ready passed on the ground that the order is a nullity because it is passed (a) by an incompetent person or (b) it is a mala fide order or (c) it is contrary to the legal procedure prescribed for passing such order, or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable." We are inclined to agree inasmuch as it would be a challenge to an existing order of detention which is posing an imminent threat to a fundamental right of the named person guaranteed under Art.

21. There could, therefore, be no reason why in such an exceptional and rare case, detention order already made, and either served or yet to be served, and the person is still free could not be legally brought under challenge. Article 226(1) of the Constitution of India notwith- standing anything in Article 32, empowers the High Court throughout the territories in relation to which it exercises

jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territo- ries directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other pur- pose; and it also envisages making of interim orders, whether by way of injunction or stay or in any other manner in such a proceeding. Article 21 giving protection of life and personal liberty provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. For en- forcement of one's right to life and personal liberty resort to Article 226(1) has thus been provided for. What is the ambit of enforcement of the right? The word 'enforcement' has also been used in Article 32 of the Constitution which provides the remedy for enforcement of fights conferred by Part III of the Constitution. The word 'enforcement' has not been defined by the Constitution. According to Collins English Dictionary to enforce means to ensure observance of or obedience to a law, decision etc. Enforcement, according to Webster's Comprehensive Dictionary, means the act of enforcing, or the state of being enforced, compulsory execu- tion; compulsion. Enforce means to compel obedience to laws; to compel performance, obedience by physical or moral force. If enforcement means to impose or compel obedience to law or to compel observance of law, we have to see what it does precisely mean. The right to life and personal liberty has been guaranteed as a fundamental right and for its enforce- ment one could resort to Article 226 of the Constitution for issuance of appropriate writ,' order or direction. Precisely at what stage resort to Article 226 has been envisaged in the Constitution? When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corre- sponding duty on the rest of the society, including the State, to observe that fight, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the fight on a citizen involves the compulsion on the rest of the society, includ- ing the State, not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the fight be made effective only after the right is violated or in other words can there be enforcement of a fight to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violat- ed, but is threatened with violation can the citizen move the court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaran- teed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-viola- tion resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation pro- tection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restrain- ing potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take

action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threat- ened with that violation and he approaches the court under Art. 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case when the writ petition was pending in court and the appellant's right to personal liberty happened to be violat- ed by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have difference legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restora- tion of the right.

In K.K. Kochunni v. The State of Madras and Ors., [1959] Suppl. 2 SCR 316, where the grievance of the petitioner was that the Madras Marumakkathayam (Removal of Doubts) Act, 1955 (Act 32 of 1955), provided in section 2 of the Act that notwithstanding any decision of court any Sthanam which fulfilled the conditions stated in the section shall be deemed to be and shall be deemed always to have been properties belonging to the tarwad to which the provisions of the Madras Marumakkathayam Act, 1932 shall apply, and thus, unlike other Acts that contemplated some further action to be taken by the State after the enactment had come into force, automatically took away or abridged a person's fundamental right (as right to property then was) immediately it came into force, a Consti- tution Bench of this Court speaking through Das C.J. held that there was no reason why the aggrieved person should not immediately be entitled to seek the remedy under Art. 32 of the Constitution. The argument that an application under Art. 32 could not be maintained until the State had taken or threatened to take any action under the impugned law which again, if remedy to be taken would infringe the petitioner's fundamental rights, was negatived by this Court holding that in cases arising under those enactments the proprietors could invoke the jurisdiction of this Court under Art. 32 when the State did or threatened to do the overt act, (emphasis supplied). It was observed that quite conceivably an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms and without any further overt act being done. The impugned Act was said to be an instance of such enactment. In such a case, it was held, the infringement of the funda- mental right was complete eo instanti the passing of the enactment and, therefore, there could be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Art. 32. It was also observed that to say that a person, whose fundamental right had been infringed by the mere operation of an enactment, was not entitled to invoke the jurisdiction of this Court under Art. 32, for the en- forcement of his fight would be to deny the benefit of a salutary constitutional remedy which was itself his funda- mental right. The same reasoning is applicable to the facts of the instant case inasmuch as the detention order was already passed and served and the appellant was already

taken into custody and though released after 4 days the Government could at any time cancel his release under sec- tion 15 of the Act.

In the Special Reference No. 1 of 1964, reported in [1965] 1 SCR 413 the Constitution Bench speaking through Gajendragadkar, C.J. held (at page 493):

> "If a citizen moves this Court and complains that his fundamental fight under Art. 21 had been contravened, it would plainy be the duty of this Court to examine the merits of the said contention, and that inevitably raises the question as to whether the personal liberty of the citizen has been taken away according to the procedure established by law. In fact, this question was actually considered by this Court in the case of Pandit Sharma, [1959] Supp. 1 SCR 806."

The same law applies to a High Court moved under Article 226 of the Constitution of India against similar contravention. In M.C. Mehta v. Union of India, [1987] 1 SCC 395, the Constitution Bench speaking through Bhagwati, C.J. said:

> "We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2), the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The Power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha case. 1984 2 SCR 67. If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can injunct such violation but if the violator is quick enough to take action infringing the fundamen-
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> tal right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile."
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> "Despite the power of the State" says Jean Dabin, "there are always smart people who contrive to violate the laws without incurring the rigours of compulsion; or, again, certain rules are psychologically or technically awkward to apply, so that the machinery of compulsion lends them but insufficient aid. In any case, actual inefficacy or impo- tence of compulsion can affect the validity of the rule even less than disobedience; that validity binds, and continues to bind, by virtue of the very disposition made by the rule."

Analytical positivist concept of right has been differ- ently analysed. Hohfeld writing on fundamental legal con- cepts as applied in judicial reasoning analysis four ideas. One of those is that a right may be claim-right. P has a right to do X, it means to indicate that Q or everyone else has a duty to let P do X. The existence of such a duty gives P some sort of claim against Q. Claim-rights may be either in personam or in rem. A claim-right in personam co-relates to a duty of a person, while claim-rights in rem co-relate to duties in principle incumbent on everyone. A right en- joyed by one thus co-relates to a duty on the part of oth- ers.

In Hans Kelsen's analysis it is usual to oppose the concept of right to the concept of obligation and to cede priority of rank to the former as we speak of rights and duties. The behaviour of one individual that corresponds to the obligated behaviour of the other is usually designated as a content of a 'right'-as an object of a 'claim' that corresponds to the obligation. "The behaviour of the one individual that corresponds to the obligated behaviour of the other, particularly the claiming of the obligated beha- viour, is designated as exercising a right." In case of an obligation to tolerate something, the behaviour of the one corresponding to the obligation of the other is spoken of as 'enjoyment' of the right. According to Kelsen the 'right' or a 'claim' of an individual, is merely the obligation of the other individual or individuals. When we speak of a right as a legally protected interest, in the words of Kelsen, it refers to a right as the "reflex of a legal obligation". Right is often understood as a will power conferred by law. A 'right' in the sense is present if the conditions of the sanction that constitutes a legal obligation includes a motion, normally of the individual in relation to whom the obligation exists; the motion is aimed at the execution of the sanction and has the form of a legal action brought before the law applying organ. Then this organ may apply the general norm to effectuate the fight, which is the reflex of the legal obligation by executing the sanction. The right which is the reflex of legal obligation is equipped with the legal power of the entitled individual to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation whose reflex is his right; or as it is sometimes called, the enforcement of the fulfilment of this obligation. To make use of this legal power of motion is exercise of the right. In this sense each right of an individual contains a claim to the behaviour of another individual-namely to that behaviour to which the second individual is obligated toward the first; the beha- viour that constitutes the content of the legal obligation identical with the reflex right. If an individual, towards which another indi- vidual is obligated to a certain behaviour, does not have the legal power to bring about by a legal action the execu- tion of a sanction as a reaction against the non-fulfilment of the obligation, then the act by which he demands fulfil- ment of the obligation has no specific legal effect; the act is legally irrelevant, except for not being legally prohib- ited. Therefore, a 'claim' as legally effective act exists only when a law exists, which means that an individual has the legal power. The subject of a right may be not only one individual but two or several individuals, including the State.

In the language of Kelsen the right of an individual is either a mere reflex right--the reflex of a legal obligation existing towards this individual; or a private right in the technical sense--the legal power bestowed upon an individual to bring about by legal action the enforcement of the ful- filment of an obligation existing toward him, that is, the legal power. From the above analysis it is clear that in the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring

about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement.

We, therefore, proceed to consider the merits of this case instead of remanding to the High Court to avoid further delay.

Mr. Bhandare's submission is that the detention order having not been approved by the State Government under sub- section (3) of section 3 it had ceased to be in force after 12 days of its being made. We find force in this submission on the facts of the case. Section 3 of the Act provides the power to make detention orders. Sub-section (1) thereof empowers the State Government to make a detention order. Sub-section (2) empowers the State Government to authorise a District Magistrate or a Commissioner of Police to exercise the powers conferred by sub-section (1) during such period as may be specified in the order not exceeding three months at the first instance with power to extend such period from time to time by any period not exceeding three months at any one time. Admittedly, the impugned detention order was passed by the District Magistrate in exercise of powers under section 2. Sub-section (3) is to the following effect:

> "When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the Govern- ment together with the grounds on which the order has been made and such other particulars as in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the Government."

Examining the records we find that before the High Court in the Misc. case W.P.M.P.S.R. 51830 in the form of an Additional Affidavit at para 11 it was urged:

> "Apart from the infirmities stated above which vitiate the order, statutory requirement of reporting to the Government and obtaining approval of the Government within the pre- scribed time has not been complied with."

In the counter affidavit filed by the Collector and District Magistrate in the High Court to the writ petition as well as the W.P.M.P., there was no reply to para 11 of the W.P.M.P. and it was nowhere stated that the detention order was approved by the State Government. In this Court in the Special Leave Petition Ground No. V is as follows:

> "The Hon'ble High Court has erred in not noting the infirmity in the order of detention inasmuch as the approval of State Government of Andhra Pradesh for the order of the deten- tion made by the District Magistrate, Cuddapah was not obtained within the period of 12 days as enjoined under sub-section (3) of section 3 of the Act. The order is therefore non est in law."

In the Counter Affidavit of the Collector and District Magistrate there was not even a whisper in denial of this fact.

The learned counsel for the respondents at the heating could not deny before us that the detention order had not been approved by the Government within 12 days. On his request time was granted to produce materials. He has now filed reply affidavit on behalf of the respondents to the rejoinder affidavit filed by the appellant. Scanning this affidavit also we do not find any statement that the deten- tion order was approved. Though the learned counsel submits that it was approved, in view of the above affidavits it cannot be acted upon. We have, therefore, no other alternative than to hold that the detention order had not been approved by the State Government within 12 days of its being made. The result is that the order could not claim in force more than 12 days after making thereof and as such must be treated as to have ceased to be in force and non-existent thereafter. Mr. Bhandare then submits that the case of the appellant was not at all referred to the Advisory Board under section 10 of the Act. This too has not been denied by the learned counsel for the respondents. Section 10 of the Act provides for reference to the Advisory Board and says:

> "In every case where a detention order has been made under this Act, the Government shall within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by them under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of section 3."

Section 11 of the Act prescribes the procedure for the Advisory Board. Under sub-section (1) of section 12, in any case where the Advisory Board has reported that there is, in his opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of person concerned for such period not ex- ceeding the maximum period specified in section 13 as they think fit. Under sub-section (2) thereof in any case where the Advisory Board has reported that there is, in his opin- ion, no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith. Thus section 10 makes it mandatory for the Government to place the ground on which the order has been made and the representation, if any made by the person affected by the order and in the case where the order has been made by an officer also the report by officer under sub-section (3) of section 3. This section prescribes a period of 3 weeks from the date of detention irrespective of whether the person continues to be in deten- tion or not. Therefore, even though the detenu was released, if the detention order was in force, his case was required to be placed before the Advisory Board. This being a manda- tory provision and having not been complied with the deten- tion order even if otherwise it was in force, cannot be said to have been in force after three weeks. Under Article 22 of the Constitu- tion of India a person cannot be kept in detention beyond three months without referring his case to an Advisory Board under the appropriate law. In either case the appellant's case having not been referred to an Advisory Board the detention order cannot be said to have remained in force after the statutory period. It is, therefore, not necessary to go into the validity or otherwise of the grounds of detention.

In the result we set aside the impugned Judgment of the High Court and hold that the detention order ceased to be in force after 12 days of making thereof and even if it was in force it ceased to be in force for failure to refer the appellant's case to Advisory Board within the time pre- scribed by law; and accordingly we quash the same. The appeal is accordingly allowed.

After the Judgment was finalised, another affidavit on behalf of the respondents affirmed by one belonging to the office of the Advocate-on-Record has been circulated. This affidavit is not acceptable. Even if it was accepted it would not affect the ultimate legal position.

R.S.S. Appeal allowed.