

Right to Liberty: No Locus Standi for Anyone During Emergency

NEW DELHI, April 28.

The Chief Justice, Mr. A. N. Ray, to-day held that Article 21 of the Constitution was the sole repository of the rights to life and personal liberty against the State.

Any claim to a writ of habeas corpus was the enforcement of Article 21 and is, therefore, barred by the Presidential Order of June 27, 1975 under Article 359 (1) of the Constitution, he further held while delivering his judgment in the habeas corpus case.

The five-judge constitution bench of the Court which had heard the case for 37 working days from December 15, 1975 to February 25 last began delivering its verdict this morning in the packed Chief Justice's court room.

All the five judges on the Bench The Chief Justice, Mr. Justice H. R. Khanna, Mr. Justice M. H. Beg, Mr. Justice Y. V. Chandrachud and Mr. Justice P. N. Bhagwati delivered separate judgments.

The Chief Justice, who had headed the Bench was the first to deliver his judgment.

The Chief Justice also held that in view of the Presidential Order of June 27, 1975, under Clause one of Article 359(1) of the Constitution no person had a locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Maintenance of Internal Security Act (MISA) on the grounds that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or mala fide.

The Chief Justice, in his 70-page judgment, also declared Section 16 (a) (9) of the Act prohibiting disclosure of grounds of detention to detenus valid.

"It is rule of evidence and it is not open either to the detenu or to the court to ask for grounds of detention", he further declared.

The Chief Justice also held that no court was competent to go into questions of mala fide of the order of detention or ultra vires character of the order of detention or that the order was not passed to the satisfaction of the detaining authority.

The Chief Justice accepted a batch of 14 appeals—eight filed by Union of India and two by Uttar Pradesh, one each by Madhya Pradesh, Maharashtra, Rajasthan and Karnataka Governments against the decisions of the High Courts of Allahabad, Bombay (Nagpur Bench), Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan—rejecting preliminary objections raised by the State against the maintainability of habeas corpus petitions by MISA detenus. In all, about 43 detenus including four Opposition members of Parliament held under MISA are involved in these appeals.

Two main questions were involved in these appeals. First, whether in view of the Presidential Orders of June 27, 1975 and January 8, 1976 under Article 359(1), any writ petition under Article 226 before a High Court for habeas corpus to enforce the right to personal liberty of a person detained or under the Act on the ground that the order of detention or continued detention is for any reason not under or in compliance with the Act is maintainable.

Second, if such a petition is maintainable what is the scope or extent of judicial scrutiny, particularly in view of the Presidential Order, mentioning inter alia, Article 22 of the Constitution and also in view of Section 16a (9) of the Act.

Citing at length English and judicial authorities of other countries on the habeas corpus laws during peace and war times, the Chief Jus-

tice held that the effect of the Presidential Order suspending the enforcement of fundamental rights amounted to barring the locus standi of any person to move the court on the ground of violation of a fundamental right.

It was not the object of the Constitution makers, the Chief Justice said, that a person could not move this court for the enforcement of fundamental rights mentioned in the Presidential Order but could do so under Article 226.

"The bar created by Article 359 (1) applies to petitions for the enforcement of fundamental rights mentioned in the Presidential Order whether by way of application under Article 32 or by way of application under Article 226" he further said.

The Chief Justice said, "A person can enforce a fundamental right both in the case of law being made in violation of that right and also of the executive acts in non-compliance with valid laws or acts without the authority of law."

"It cannot be said that the scope of Article 359 (1) is only to restrict the application of the article to the legislative field and not to the acts of the executive. The reason is that any enforcement of the fundamental rights mentioned in the Presidential order is barred and any challenge either to the law or to any act of the executive on the ground that it is not in compliance with the valid law or without authority of law will amount to the enforcement of fundamental rights and will, therefore, be within the mischief of the Presidential order." Describing the Constitution as "the mandate" and "the rule of law above which no one can rise" the Chief Justice held that it was incorrect to say that the jurisdiction and powers of Supreme Court under Article 32 and of the High Courts under Article 226 are virtually abolished by the Presidential order without any amendment of the Constitution.

He held that no amendment of the Constitution is necessary because no jurisdiction and power either of this court or of the high court is taken away.

"When a Presidential order takes away the locus standi of the detenus to move any court for the enforcement of fundamental rights for the time being the jurisdiction and powers of this Court and of High Courts remain unaltered. It is directed against an individual and deprives him of his locus standi," the Chief Justice further held.

UNCONDITIONAL ORDER

Referring to earlier rulings of the Supreme Court in various cases, notably in Mohan Chowdhury's Case, Makhan Singh's Case and Dr. Ram Manohar Lohia v State of Bihar, cases relating to right to liberty, the Chief Justice further held that the Presidential order in the present case is, on the face of it, an unconditional order and as such there is the vital and telling difference between the effect of the Presidential Order of 1962 and the present Presidential Order.

He also held that decisions in Makhan Singh's case (supra) and subsequent cases following it have no application to the present cases where the suspension is not hedged in with any condition of enforcement of any right under Articles 21 and 22. The conclusion is that Presidential Order is a bar at the threshold.

Holding that Article 21 is the sole repository of rights of life and personal liberty, the Chief Justice said that fundamental rights including the right to personal liberty, are conferred by the Constitution. "Any pre-Constitution rights which are included in Article 21 do not, after the Constitution, remain in existence which can be enforced, if Article 21 is suspended."

"If it be assumed that there was any pre-Constitutional right to

liberty included in Article 21 which continued to exist as a distinct and separate right then, Article 359 (1) will be an exercise in futility," the Chief Justice said.

NO COMMON LAW RIGHT

The Chief Justice held that Article 21 relating to personal liberty is not a common law right.

There was no pre-existing common law remedy to habeas corpus, he said, and added, no common law right which corresponds to a fundamental right can exist as a distinct right apart from the fundamental right.

He said, "If there is a pre-Constitution right which is expressly embodied as a fundamental right under our Constitution, the common law right has no separate existence under our Constitution. If any right existed before the commencement of the Constitution and the same right with its same content is conferred by part III as a fundamental right the source of that right is in part III and not in any pre-existing right."

MISA A VALID LAW

The Chief Justice also held that the MISA is a valid law and it has laid down the procedure of applying the law. He said the validity of the Act has not been challenged and cannot be challenged. The Legislature has competence to make the law, and its procedure cannot be challenged because Articles 21 and 22 cannot be enforced.

The contention of the respondents that the power of the executive is widened is equally untenable, the Chief Justice said.

On the question whether rule of law overrides the Presidential order the Chief Justice said "the Presidential order does not alter or suspend any law".

"Rule of law is not a catchword or incantation. Rule of law is not

a law of nature consistent and invariable at all times and in all circumstances" he said.

Pointing out that the rule of law is not identical with a free society, the Chief Justice further held that the suspension of right to enforce fundamental right has the effect that the emergency provisions in part 18 are by themselves the rule of law during the times of emergency.

"There cannot be any rule of law other than the Constitutional rule of law. There cannot be any pre-Constitution or post-Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the Constitutional provisions during the times of emergency", the Chief Justice said.

COURT'S POWER UNAFFECTED

Dealing with the validity of Sec. 16A (9) of MISA which provides for the non-disclosure of grounds of detention to detenus, the Chief Justice held that this provision cannot be said to be an amendment to Article 226 relating to powers of high courts. The jurisdiction to issue writs is neither abrogated nor abridged, he said.

Mr. Justice Ray said that a claim to privilege arises in regard to documents or information where a party to a suit or proceeding is called upon to produce evidence. Section 16A(9) enacts provisions analogous to a conclusive proof of a presumption. Such a provision is a genuine rule of evidence. It is in the nature of an explanation to Sections 123 and 162 of the Evidence Act. Section 16 A(9) is a rule of evidence.

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