PREVENTIVE DETENTION

CENTRAL ACT HELD VALID

SUPREME COURT'S DECISION

MADRAS DETENU'S PETITION FAILS

NEW DELHI, May 19.

The Supreme Court of India to-day declared by a majority of four to two the Central Preventive Detention Act, as valid. All the Judges, however, held that Section 14 of the Act, which prohibits a detenu from disclosing his grounds of detention to a court, was invalid but severable.

The judgment was delivered by the court while dismissing the *habeas corpus* petition of the Madras 'Red' detenu, Mr. A. K. Gopalan, whose case had been argued before the court in April last for more than two weeks.

All the judges delivered separate judgments. The Chief Justice, Sir Harilal J. Kania, Mr. Justice Patanjali Sastri, Mr. Justice B. K. Mookherjee and Mr. Justice S. R. Das delivered the majority judgment.

Mr. Justice Fazl Ali and Mr. Justice Mehr Chand Mahajan, who delivered the minority judgment, held that besides Section 14, Section 12 of the Preventive Detention Act, which provided the classes of cases and circumstances in which a detenu can be detained for more than three months without obtaining the verdict of an Advisory Board, as *ultra vires* of the Constitution. They accordingly ordered the release of Mr. A. K. Gopalan.

TWO OTHER PETITIONS DISMISSED

The court also dismissed two other *habeas corpus* petitions, the first by Mr. Ashutosh Lahiri, Hindu Mahasabha Working Committee member, and the second by Mr. Tej Narain Jha, a Bihar detenu. These two petitioners besides challenging the validity of the Preventive Detention Act, had also alleged that their detention was due to *mala fide* reasons. The court did not accept their contention as it felt that the *mala fide* reasons had not been proved.

The judgments, which are the first to be delivered under Article 32 of the Constitution, collectively runs into hundreds of pages and elaborately deals with the various interpretations of the articles in the fundamental rights chapter. During the course of arguments in the case, American and English authorities were profusely quoted while Constitutions of America, United Kingdom, Japan, the Free City of Danzig and Australia were frequently compared in an effort to get at the true import of the wordings in the Constitution.

PUBLIC INTEREST

The public throughout the case maintained a great interest and the court room was always packed to capacity. At one stage of the hearing the Law Minister, Dr. B. R. Ambedkar and members of Parliament, who had taken an active part in the framing of the Constitution were present in court to hear counsel on either side giving varying interpretations of the phraseology that had been used by them.

The judges to-day did not actually read the judgments but only gave a "broad scheme" of them. But even then they took nearly 100 minutes to deliver them.

Some of the sections of the Preventive Detention Act have been the subject of varying interpretations by different High Courts in the country and a large number of *habeas corpus* petitions are at present pending before different courts awaiting the verdict of the highest tribunal of the land on its validity.

INTENTION OF ARTICLE 19

The Chief Justice, Sir Harilal Kania, in his judgment dealt at the outset with the broad scheme of the constitution, the fundamental rights chapter and its provisions. Dealing with the contention of the counsel for A. K. Gopalan that the court could go into the reasonableness or otherwise of the Preventive Detention Act on the ground that it took away the right of free movement and thus came under the scope of Article 19 (1), Mr. Justice Kania said that Article 19 has to be read "without pre-conceived notions." The concept of right to move freely through the territory of India, provided for under Article 19, was entirely different from personal liberty. "The true construction of Article 19, it seems to me, is that both preventive and punitive detention are outside the scope of Article 19." Article 19, he said, did not purport to cover all aspects of liberty. If Article 19 was to be construed that it was the only article safeguarding personal liberty, other well-established rights like right to eat, drink etc., "will not be deemed protected under the constitution."

Referring to Article 21 which provides for deprivation of life or liberty only "according to procedure established by law", the Chief Justice held that the phrase could only mean a procedure established by State made law. "The only right given by Article 21", the Chief Justice said, "is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the court: it is the function of the Constitution".

After dealing with the omission of the word "due" and the use of the words "established" and "procedure", the Chief Justice said: "By adopting the phrase "procedure established by law" the constitution gave the legislature the final word to determine law".

Referring to the contention of the Attorney-General that preventive detention was not governed by Article 21, the Chief Justice said: "I am unable to accept that contention. The proper mode of construction will be that to the extent the procedure is prescribed by Article 22 the same is to be observed: otherwise Article 21 will apply".

Continuing he said: "If the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of part three or Article 22 (4) to (7) the Preventive Detention Act must be held valid notwithstanding that the court may not fully approve of the procedure prescribed under such Act".

POWERS TO INTERPRET CONSTITUTION

The Chief Justice then dealt with the powers of the court in interpreting a constitution, and said: "It is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights".

Mr. Justice Kania then dealt with the various sections of the Act which were challenged. Referring to the contention

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PREVENTIVE DETENTION

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that under Section Three no objective standards of conduct had been provided for, he said that the very purpose of preventive detention was "to prevent the individual not merely from acting in a particular way but, from achieving a particular object. For preventive detention, action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period" He held therefore that Section Three was valid.

Referring to Secton 11 of the Act, the Chief Justice said for purposes of Article 22 (7) it would be enough if either "classes of cases or circumstances" in which a person can be detained for a period longer than three months without the advice of the advisory board was specified

SECTION 14 HELD ULTRA VIRES

Dealing with Section 14 of the Act, which he held *ultra vires* of Parliament's powers, the Chief Justice said it prevented the detenus from disclosing the grounds of detention of the court and prevented the latter from calling upon any officer to disclose those grounds. The courts were thus prevented from even ascertaining whether the alleged grounds of detention had anything to do with the circumstances or class or classes of cases mentioned in Section 12.

"Section 14 appears to be a drastic provision in the Detention Act". If the detained person was prevented from putting the grounds before the court, the latter would be prevented from considering whether the requirements of Article 22 (5) had been complied with. "It seems to me therefore that the provisions of Section 14 abridge the right given under Article 22 (5) and is therefore *ultra vires*".

The Chief Justice, however, held that Section 14 was severable from the rest of the Act which could, therefore, remain unaffected.

SECTION 12 HELD VALID

Justices Patanjali Sastri, Mookherjee and Das in separate judgments agreed with the view of the Chief Justice that excepting Section 14, the Preventive Detention Act was valid.

Mr. Justice Mookherjee said that the argument that 'law' in Article 21 meant principles of natural justice though attractive at first sight was not sound. The word 'law' had been used in the sense of State-made law and not in the general sense. Referring to Section 12 of the Act which had been challenged, Mr. Mookherjee said that though he did not think that the section had been framed "with regard to the object which the Constitution had in view", he was unable to say that the section was *ultra vires of* the Constitution. The Constitution having given "unfettered powers" to Parliament to make classifications it was open to Parliament to adopt any method or principle it liked. Holding Section 12 to be valid, he said: "I must say that Section 12 has been drafted in rather clumsy manner and certainly it could have been framed in better and more proper way".

He also held that Section 14 took away the right to move the Court under Article 32 "rendering the entire proceedings (in the court) ineffective and entirely illusory" and was hence *void*.

Mr. Justice Das in his judgement pointed out that the Indian Constitution unlike the English constitution, recognised the Supreme Court's supremacy over the legislature in limited spheres but did not recognise the absolute supremacy of the court over the legislature as in the United States.

They could not overlook the basic fact that "it is not for the court to question the wisdom and policy of the constitution which the people have given upto themselves." He held that preventive detention did not come under Article 19 and that Article 21 only defined the substantive fundamental right to which protection had been given and it did not purport to prescribe any procedure at all.

The Constitution having accepted the supremacy of the Legislature with certain limitations which had been made justiciable they had to accept the vagaries of that legislative authority. "Our protection against legislative tyranny, if any, lies, in the ultimate analysis, in a free and intelligent public opinion which must eventually assert itself."

DISSENTING JUDGMENTS

Both Justices Fazl Ali and Mahajan who delivered the dissenting judgments held that both Sections 12 and 14 of the Preventive Detention Act were invalid.

Mr. Justice Mahajan in his judgment dealt with facts of the case and said: "The matter is one of great importance both because the legislative power expressly conferred by the seventh schedule has been impugned and because the liberty of the citizens, is seriously affected."

"Preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the democratic countries of the world," he said.

Citing Article 22 of the constitution, he said: "It seems that the subject of preventive detention became the particular concern of the Constitution because of its intimate connection with the deprivation of personal liberty to protect which certain provisions were introduced in the chapter on fundamental rights and because of the conditions prevailing in the newly born Republic. Preventive detention means a complete negation of freedom of movement and of personal liberty and is incompatible with both those subjects and yet it is placed in the same compartment with them in Part III of the Constitution Though the Constitution has recognised the necessity of laws as to preventive detention it has also provided certain safeguards to mitigate their harshness by placing fetters on legislative power conferred on this subject.

"Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by Clause (5) of Article 22

Mr. Justice Mahajan said that by this Clause the right has been conferred to enable a detained person to establish his innocence and to secure justice, and no justice could be said to have been secured unless the representation was considered by some impartial person. He said: "The interpretation that I am inclined to place on Clause Five of Article 22 is justified by the solemn words of the declaration contained in the preamble to the Constitution. It is this declaration that makes our Constitution sublime and it is the guarantee mentioned in the chapter on fundamental rights that makes it one of the greatest charter of liberty and of which the people of this country may well be proud. This Charter has not been forced out of unwilling hands of a sovereign like the Magna Carta but it has been given to themselves by the people of the country through their Constituent Assembly. Any interpretation of the provisions of Part Three of the Constitution without reference to the solemn declaration is apt to lead one into error."

Continuing, he said the Constitution had further curtailed the rights given in Clause (5) by providing in Clause (6) a privilege on the detaining authority of withholding facts which the said authority considered not in public interests to disclose. "This privilege has been conferred for the security of the State and possibly for the security of the Constitution itself, but in view of these stringent provisions no additional clogs can be put on the proper consideration of representation of the detained person by presuming that the detaining authority itself will properly consider the representation."

Referring to Article 22 Mr. Justice Mahajan said: "I am satisfied on a review of the whole scheme of the Constitution that the intention was to make Article 22 self-contained in respect of the laws on the subject of preventive detention." He added: "It was next contended that a law of preventive detention encroaches on the right of freedom of movement within the territory of India guaranteed to a citizen under Article 19 (1) (d) and that being so, by reason of the provisions of subclause five of Article 19 it was justiciable on the ground of reasonableness. It is true, as already pointed out, that a law of preventive detention is wholly incompatible with the right of freedom of movement of a citizen. Preventive detention, in substance, is a negation of the freedom of locomotion guaranteed under Article 19 (1) (d), but it cannot be said that it merely restricts it. Be that as it may, the question for consideration is whether it was intended that Article 19 would govern a law made under the provision of Article 22."

PERIOD OF DETENTION

He then referred to the provision of Article 22 that no detention could last longer than three months without the necessity of such detention being examined by an Advisory Board. He also referred to Sub-Clause (b) of Clause (7) of Article 22 enabling Parliament to fix maximum period of detention, and asked: "Can it be said that in view of this express provision of the Constitution such a law was intended to be justiciable by reason of Article 19 (5)?"

Mr. Justice Mahajan then considered the classification of cases under Section 12 of the Act and said: "The question is whether it can be said that a mere selection of all or any of the categories of the subjects for reasons connected with which a law of preventive detention could be made under the 7th schedule amounts to a classification of cases as contemplated in Clause Seven of Article 22 Entry 9 of the Union List and entry three of the Concurrent List of the seventh schedule lay down the ambit of legislative power of Parliament on the subject of preventive detention on six subjects."

"Section 12 had dispensed with the Advisory Board in five out of the six subjects and the compulsory procedure of an Advisory Board laid down in clause four of Article 22 had been relegated to one out of these six subjects. This had been achieved by giving a construction to the phrase "circumstances under which and the classes of cases in which" so as to make it co-extensive and co-terminous with the "subjects of legislation."

"In my opinion this construction of Clause seven is in contravention of the clear provisions of Article 22, and makes clause 4 of Article 22 to all intents and purposes nugatory. Such a construction of the clause would amount to the constitution saying in one breath that a law of preventive detention cannot provide for detention for a longer period than three months without reference to an Advisory Board and at the same breath and moment saying that Parliament, if it so chooses can do in respect of all or any of the subjects mentioned in the legislative field."

Mr. Justice Mahajan went on to say: "It can hardly be said that all cases of preventive detention for reasons connected with the maintenance of public order stand on the same footing in the degree of gravity and deserve the same duration of detention and all cases connected with the maintenance of supplies and services essential to the life of the community stand in the matter of their gravity on such a footing as to require a lenient treatment. It is true that in a sense all persons who act prejudicially to the defence of India may be comprehensively said to form one group and similarly persons who act prejudicially to the maintenance of supplies and services essential to the life of the community may form another class but the question is, whether it was in this comprehensive sense that 'classification was intended by the constitution in clause seven or was it intended in a narrower and restricted sense. It has to be remembered that the law under Clause seven was intended to provide detention for a longer period and such a law very seriously abridges personal liberty and in this situation, giving a narrower and restricted meaning to this expression, will be in accordance with well established canons of construction of statutes".

Concluding his remarks on Section 12 of the Detention Act, Mr Justice Mahajan said that the Section "treats the lamb and the leopard in the same class because they happen to be quadrupeds". Such a classification could not have been in the thoughts of the constitution makers when Clause Seven was introduced in Article 22. He said the section is void and by reason of it the detention of the petitioner cannot be justified. There is no other provision in this law under which he can be detained for any period whatsoever".

Referring to Section 14 of the Detention Act, Mr. Justice Mahajan said: "This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention". In conclusion he said: "Sections 12 and 14 of the Detention Act are void and the decision of the detenu's case has to be made by keeping out of sight these two provisions in the act. If Sections 12 and 14 are deleted from the impugned legislation, then the result is that the detention of the petitioner is not legal. The statute has not provided for detention for a period of three months or less in such cases as it could have done under Article 22 (4) of the constitution and that being so, the petitioner cannot be justifiably detained even for a period of three months. I would accordingly order his release".

FREEDOM OF MOVEMENT

Mr. Justice Fazl Ali, in his judgment, held the view that preventive detention or deprivation of personal liberty did abridge the right of free movement guaranteed under Article 19 (1).

Freedom of movement, he said, was the essence of personal liberty. In the last analysis, the word "throughout the territory of India" had been used in that Article to give the widest scope to that freedom of movement. After dealing with his contention that freedom of movement could not but include personal liberty also, and after quoting the various texts and authorities, Mr. Justice Fazl Ali said that those judges who had dealt with the question seemed to have been influenced by the argument that if the contention was accepted any conviction under the Indian Penal Code would be subject to judicial review on the ground of reasonableness. Mr. Fazl Ali said he agreed with the remarks of one of the Calcutta Judges that no calamitous or untoward results will follow even if the provisions of the Penal Code become justiciable.

"It seems to me", he said, "that this court should not be deterred from giving effect to a fundamental right granted under the consitution merely because of a vague and unfounded fear that something catastrophic may happen".

Also on the basis of law the Indian Penal Code did not come within the ambit of the words "law imposing restrictions on the right to move freely" in the Article 19. Punitive detention, which is imposed after a regular trial, could not be put on the same footing as preventive detention.

Referring to the argument that if this contention was accepted a citizen was given more right of personal liberty than a non-citizen, Mr. Justice Fazl Ali said: "If a citizen has been granted certain other additional protections under Article 19 (1) (d) there is no anomoly involved in the discrimination".

A person before he was detained must have been a free man. "Why can't he say to those who detained him: "As a citizen I have the right to move freely and you cannot curtail or take away my right beyond the limits imposed by clause (5) of Article 19. This is the only question that arises in this case and it should not be obscured by any abstruse or metaphysical considerations.

"In these circumstances I am strongly of the view that Article 19 (1) (d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under that Article is really a right to personal liberty and that preventive detention is a deprivation of that right".

He added: "The law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). Considering that the restrictions imposed are on a most valuable right, there is nothing revolutionary in the legislature trusting the Supreme Court to examine whether an Act which infringes upon that right is within the limits of reason".

Referring to Article 21, Mr. Justice Fazl Ali, after quoting numerous English and American decisions, held that the word "law" there must mean the four principles of natural justice, namely, notice, opportunity to be heard, an impartial tribunal and orderly course of procedure. These were not rigid principles but were adaptable to the circumstances of each case within certain limits.

JURISDICTION OF ADVISORY BOARD

Mr Fazl Ali then dealt with Clause 7 of Article 22 and its effect on Section 12 of the Preventive Detention Act. Though the Article permits Parliament to provide for classes of cases and circumstances in which an Advisory Board need not be consulted, His Lordship said: "I do not think it was ever intended that Parliament could at its will treat the normal as the abnormal or the rule as the exception." The classes of cases and circumstances must be exceptional. All the subjects of preventive detention in List one and two and subjects of List three have been put under Section 12 of the Act by Parliament. "In my opinion the Constitution never contemplated that Parliament should mechanically reproduce all or most of the categories (a) to (f) almost verbatim and not apply its mind to decide in what circumstances and in what class or classes of cases the safeguard of an Advisory Board is to be dispensed with."

Mr. Fazl Ali also said that both the classes of cases and the circumstances must be provided for by Parliament in the enactment and not either of them. Section 12 of the act did not conform to this provision of the Constitution. "There can be no escape in my opinion from the conclusion that Section 12 of the Act by which a most important protection or safeguard conferred on the subject by the Constitution has been taken away, is not a valid provision, since it contravenes the very provision in the Constitution under which Parliament derived its competence to enact it."

Mr. Fazl Ali then compared the Preventive Detention Act with other similar enactments in England in war-time and said that they had all provided for an elaborate advisory board in all cases without an exception.

Concluding he said: "I hope that in pointing out the shortcomings of the Act I will not be misunderstood. I am aware that both in England and in America and also in many other countries there has been a reorientation of the old notions of individual liberty which is gradually yielding to social control in many matters. I also realise that those who run the State have very onerous responsibilities and it is not correct to say that emergent conditions have altogether disappeared from this country. Granting that private rights must often be subordinated to the public good, is it not essential in a free community to strike a just balance in the matter? The balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence, and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just Government."

MR. LAHIRI'S PETITION DISMISSED

The full bench of the Supreme Court dismissed the *habeas corpus* petition filed on behalf of Mr. Ashutosh Lahiri, member of the Working Committee on the All-India Hindu Mahasabha. He had contended that the Preventive Detention Act under which he was detained in Delhi on the first of April 1950 was *ultra vires* of the Constitution and that the order of detention was a *mala fide* order.

Two judgments reaching the same conclusion were delivered by Mr. Justice Mookerjee and Mr. Justice S. R. Das. Mr. Justice Mahajan concurred with Mr. Justice Mookerjee while the Chief Justice, Mr. Justice Sastri and Mr. Justice Fazl Ali concurred with the judgment of Mr. Justice Das.

Mr. Justice Mookerjee said in his judgment that the petitioner's first contention could not be accepted in view of the verdict given in the case of A. K. Gopalan that the Preventive Detention Act was not *ultra vires* of the constitution. As regards the second ground, Mr. Justice Mookerjee said that in the absence of any evidence to the contrary, he would assume that the facts in regard to the grounds of detention as stated in the detention order were all true. The petitioner did give an exaggerated version of the happenings in East Bengal at the press conference held on March 27, although no report of this conference was allowed to be published.

Mr. Justice Mookerjee, however, said that a "doubt legitimately arises in one's mind as to the necessity or propriety of making use of the provisions of the Preventive Detention Act against the petitioner". He said: "There could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which the ordinary law is quite sufficient. Though I am unable to hold definitely that there is want of good faith on the part of the authorities, the cause is certainly not free from suspicion".

Mr. Justice Das in his judgment, while dismissing the petition, observed that the fact and circumstances set forth in the petition and in the affidavit in reply "are calculated to give rise to a certain amount of suspicion in the mind of the court. The recourse to a drastic order for detention rather than to a preventive order under Section 144 of the Criminal Procedure Code lends some colour to the petitioner's contention. Suspicion, however, is not proof and I am not convinced that the act of the District Magistrate was actuated by any improper or indirect motive".—PTI.

RELEASED FROM DETENTION

(FROM OUR CORRESPONDENT.)

HYDERABAD (Dn.), May 18.

Khan Bahadur Abdul Karim Babu Khan, a businessman of Secunderabad, who had been arrested under the Preventive Detention Act, following the escape of Mir Laik Ali in the first week of March, was released this evening, under orders of the Hyderabad Government.

It may be mentioned that a *Habeas Corpus* petition was filed on behalf of Mr. Babu Khan in the Hyderabad High Court recently and his case is pending before the Division Bench.