Supreme Court of India
Ghulam Sarwar vs Union Of India & Ors on 15 December, 1966
Equivalent citations: 1967 AIR 1335, 1967 SCR (2) 271
Author: K S Rao
Bench: Rao, K. Subba (Cj)

PETITIONER:
GHULAM SARWAR

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT:
15/12/1966

BENCH:
RAO, K. SUBBA (CJ)
BENCH:
RAO, K. SUBBA (CJ)
HIDAYATULLAH, M.
SIKRI, S.M.
BACHAWAT, R.S.
SHELAT, J.M.

CITATION:
1967 AIR 1335 1967 SCR (2) 271
CITATOR INFO :
O 1968 SC 765 (8,9,11,19,20,21)
R 1972 SC2215 (2)
RF 1973 SC1461 (836)
RF 1980 SC1789 (106)
RF 1981 SC 728 (4,10,12)
E 1981 SC1621 (7,8)
R 1988 SC1531 (189)

ACT:
Practice--Order of High Court dismissing petition for issue of writ of habeas corpus--Petition to Supreme Court under Art. 32--Order of High Court if res judicata.
Constitution of India, 1950, Art. 359--If President can issue more than one order--Order--applicable only to foreigners--If violative of Art 14.
Foreigners Act (31 of 1946)., s. 3(2) (g)--Detention under for investigation into conspiracy to smuggle gold--If mala fide.
Supreme Court Rules, O.35, rr. 3 and 4 Scope of.

HEADNOTE:

After the President of India issued a Proclamation of Emergency under Art. 352(1) of the Constitution in October 1962, he issued two orders under Art. 359(1) which were subsequently amended. By one, as amended, the right of a foreigner to move any court for the enforcement of the rights conferred by Arts. 14, 21 and 22 of the Constitution was suspended during the period of emergency. By the other order, as amended, the right of any person to move any court for the enforcement of the rights conferred by Arts. 14, 21 and 22 was suspended among the per of emergency, if such person was deprived of any such 'rights under the Defence of India Ordinance, 1962, or any rule or order thereunder.

In 1964, the petitioner, who was a Pakistani national, was arrested for an offence under the Indian Customs Act, 1962. When he was about to be enlarged on bail he was detained by an order under s. 3 (2) (g) of the, Foreigners Act , 1946. According to the respondent, the petitioner was detained as investigation was in progress in respect of a case of conspiracy to smuggle gold, in which the petitioner was involved. Thereafter, he was tried and convicted for the offence under the Customs Act and sentenced to 9 months imprisonment. Before the expiry of the term of imprisonment he moved the High Court for the issue of a writ of habeas corpus, but the petition was dismissed. After serving the sentence he moved this Court, under Art. 32, again for the issue of a writ of habeas, corpus raising now contentions as to the validity of s. 3(2) (g) of the Foreigners Act and the President's order under Art.359(1), relating to foreigners.

HELD (Per Subba Rao, C. J. Hidayatullah, Sikri and Shelat, JJ.): (1) The order of the High Court does not operate as res judicata, either because it is not a judgment or because the principle is not applicable to a fundamentally lawless order, and this Court has to decide the petition on merits. [277 D]

In the case of a High Court, when it functions as a Divisional Bench it speaks for the entire court, and therefore, it cannot set aside the order made by another Divisional Bench in a petition for a writ of habeas corpus, except on fresh evidence. But when the person detained

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files an original petition for habeas corpus before this Court under Art. 32, the order of-the High Court will not operate as res judicata. If the doctrine of res judicata is applicable in such a case so would be the doctrine of constructive res judicata, and, if a petitioner could have raised a contention which would make the detention order 'fundamentally lawless, but did not do so in the High Court, it would be deemed to have been raised, and this Court, though enjoined by the Constitution to protect the right of a person illegally detained, may become powerless to do so. [276 F-H; 277 A-C]

Daryao v. State of U.P. [1962] 1 S.C.R. 574, referred to.

(2) Article 359 empowers the President to make an order for

the purpose mentioned therein, and as the singular includes the plural,, he can make different orders applicable to different groups of persons. There is nothing in the, Article which prevents the President from restricting the scope of an order to a class of persons, namely, foreigners. [280 A-C]

(3) There is a distinction between the President's order and the effect of that order. Under Art. 359(1) the President can only make an order which is valid. If the order does not violate Art. 14 it can validly take away the right to move the court to enforce Art. 14. But an order making an unjustified discrimination in suspending the right to move a court under Art. 14 itself, will be void at its inception. Therefore, the validity of the President's order issued under Art. 359(1) could be questioned if it infringed the provisions of Art. 14 of the Constitution. [280 F-H]

Sree Mohan Chowdhury v. Chief Commissioner, Tripura, [1964] 3 S.C R. 442, explained.

(4) There is however; a clear nexus between the classification into foreigners and citizens, and the object sought to be achieved by the President's orders. Therefore the making of two orders, one confined to foreigners and the other applicable to all persons including foreigners, does not violate Art. 14. The two orders are mainly intended to operate in different fields and their scope is different, though there is some overlapping. There was a greater danger from the subversive activities of foreigners, and therefore,. it was necessary to issue a special order, wider in scope and taking in other rights, than that which was confined only to persons who had been deprived of certain rights under the Defence of India Ordinance. [282 A-D]

(5) As the President's order suspending the right to move the court to enforce the right under Art. 14 is valid, the petitioner has no right to move the court subsequent to the inclusion of Art. 14 in the President's order relating to foreigners. The fact that he complained of his detention for a period earlier than the amendment has no-bearing on the question of maintainability of the petition. [282 H; 283 A]

(6) If the petitioner was in fact involved in a conspiracy to smuggle gold, there is no reason why the wide power conferred on the Central Government to detain him under s. 3(2)(g) of the Foreigners Act could not be invoked. Such a detention for the purpose of investigation was not mala fide. [283 F-G]

[The question whether this Court can ascertain whether the action of the Executive in declaring the emergency or continuing it is actuated by mala fides and is an abuse of its power, left open.] [278 E]

Per Bachawat, J : (1) The order of dismissal by the High Court does not operate as res judicata and does not bar the petition under Art. 32,

asking for the issue of a writ of habeas corpus on the same facts. The petitioner has the fundamental right to move this Court under Art. 32 and the petition must therefore be entertained and examined on merits. The order of the High Court is not a judgment; and the previous dismissal of such a petition by the High Court is only one of the matters which this Court may take into consideration under 0. 35, rr. 3 and 4 of the Supreme Court Rules, before issuing a rule nisi. The petitioner, however, would not have a right to move this Court under Art. 32, more than once on the same. facts. [283 H; 284 A-C]
(2) Assuming that the President's order under Art. 359(1) is "law" within the meaning of Art. 13(2), and can be pronounced invalid on the ground that it abridges or takes away the right conferred by Art. 14, the order in the present case is not discriminatory and is not violative of Art. 14.,[285 E-F]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition No. 155 of 1966. Writ Petition under Art. 32 of the Constitution of India for the enforcement of fundamental rights.

R. V. Pillai, for the petitioner.

N. S. Bindra and R. N. Sachthey, for respondents Nos. 1 to 3.

The Judgment of SUBBA RAO, C.J., HIDAYATULLAH, SIKRI and SHELAT, JJ. was delivered by SUBBA RAO, C.J. BACHAWAT, J. delivered a seperate Concurring Judgment. Subba Rao, C.J. This petition under Article 32 of the Constitution of India raises the question of validity of the detention of the petitioner under s. 3 of the Foreigners Act, 1946 (Act No. 31 of 1946) (hereinafter called the Act). The petitioner is a Pakistani national who entered India without any travel documents. On May 8, 1964, he was arrested in New Delhi by the Customs Authorities under S. 135 of the Indian Customs Act, 1962. On May 9, 1964, he was ordered to be enlarged on bail. On May 18, 1965, he was ordered to be released. When he was about to be released from jail, a detention order was served on him by the Central Government under S. 3(2)(g) of the Act. it was said that he had to be detained, as police investigation was in progress in respect of a case of conspiracy to smuggle gold of which he was a member. On May 29, 1965, he was convicted by the Magistrate, First-Class, Delhi, of an offence under the Customs Act and sentenced to undergo rigorous imprisonment for a period of 9 months and to pay a fine of Rs. 2,000/-. The appeal filed by him to the Sessions Judge against that order was dismissed. The petitioner underwent imprisonment and also paid the fine. Before his term of imprisonment expired, the petitioner filed a writ of habeas corpus in the Circuit Bench of the Punjab High Court at Delhi challenging his detention. That petition was dismissed by Khanna, J., on merits. Before the learned Judge the constitutional validity of s. 3(2)(g) of the Act was not canvassed. The Sup. CI/67-4 learned Judge held that the section authorised the Government to make the said order of detention on its subjective satisfaction and that the Court could not question

its validity in the absence of any mala fides. He negatived the contention raised before him that an order under that sub-section could not be made for the purpose of completing an investigation in a conspiracy case, as no such limitation was found therein. In short, he dismissed the petition on merits.

The present petition was filed in this Court under Article 32 of the Constitution on May 12, 1966 for issue of a writ of habeas corpus against the respondents directing them to set him at liberty on the ground that the provisions of the Act were invalid. Before we consider the various contentions raised by Mr. R. V. Pillai in support of the petition, we would at the outset deal with a preliminary objection raised by Mr. N. S. Bindra, learned counsel appearing for the respondents. Mr. N. S. Bindra, contended that the order made by Khanna, J., dismissing the writ of habeas corpus filed in the Circuit Bench of the Punjab High Court operated. as res judicata and barred the maintainability of the present application. The decision of this Court in Daryao v. The State of U. P.(1) was relied upon in support of the said contention. There, the High Court dismissed a writ petition under Art. 226 of the Constitution after hearing the matter on merits, on the ground that no fundamental right was proved or contravened and that its contravention was constitutionally justified. The petitioner therein did not prefer an appeal against that order to this Court; but he filed an independent petition under Art. 32 of the Constitution in this Court on the same facts and for the same reliefs. This Court held that the petition in this Court would be barred by the general principles of res judicata. That decision related to a right claimed by the petitioners therein. The petitioners in that case sought to enforce their fundamental right to property which had been negatived by the High Court in its order made on an application presented by them under Art. 226 of the Constitution. While upholding the plea of res judicata, this Court made the following observations in the context of the said plea vis-a-vis the writ of habeas corpus :

> "In England, technically an order passed on a petition for habeas corpus is not regarded as a judgment and that places the petitions for habeas corpus in a class by them selves. Therefore, we do not think that the English analogy of several habeas corpus applications can assist the petitioners in the present case when they seek to resist the application of res judicata to petitions filed under Art. 32. Before we part with the topic, we would, however, like to (1)[1962] 1 S.C.R. 574,590-
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> add that we propose to express no opinion on the question as to whether repeated applications for habeas corpus would be competent under our Constitution. That is a matter with which we are not concerned in the present proceedings."

A decision which expressly leaves open a question cannot obviously be an authority on the said question. 'the said question, which was so left open, now falls to be decided. Conversely, the correctness of that decision does not call for any reconsideration in the present petition, for that is outside the scope of the question now raised before us. This leads us to the consideration of the scope of a writ of habeas corpus. The nature of-the writ of habeas corpus has been neatly summarized in Corpus Juris Secundum, Vol. 39 at p. 424 thus "The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place, with the day and cause of his caption and detention, to do, submit to, and

receive whatsoever the court or judge awarding the writ shall consider in that behalf".

Blackstone in his Commentaries said of this writ thus It is a writ antecedent to statute, and throwing its root deep into the genius of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I".

This writ has been described by John Marshall, C.J., as "a great constitutional privilege". An eminent judge observed "there is no higher duty than to maintain it unimpaired". It was described as a magna carta of British liberty. Heavy penalties are imposed on a judge who wrongfully refuses to entertain an application for a writ of habeas corpus. The history of the writ is the history of the conflict between power and liberty. The writ provides a prompt and effective remedy against illegal restraints. It is inextricably intertwined with the fundamental right of personal liberty. "Habeas Corpus" literally means "have his body". By this writ the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the AngloSaxon jurisprudence.

We need not go into the history of this writ in India, for it is now incorporated in Art. 226 and Art. 32 of the Constitution.

On the question of res judicata, the English and the American Courts agreed that the principle of res judicata is not applicable to a writ of habeas corpus, but they came to that conclusion on different grounds. It was held in England that a decision in a writ of habeas corpus was not a judgment, and therefore it would not operate as res judicata and on that basis it was thought at one time that a person detained could file successive applications before different judges of the same High Court. But subsequently the English courts held that a person detained cannot file successive petitions for a writ of habeas corpus before different courts of the same Division or before different Divisions of the same High Court on the ground that the Divisional Court speaks for the entire Division and that each Division for the entire Court, and one Division cannot set aside the order of another Division of the same Court [See Re Hastings (1) (No. 2) and Re Hastings (2) (No. 3)]. The Administration of Justice Act, 1960 has placed this view on a statutory basis, for under the said Act no second application can be brought in the same court except on fresh evidence. The American Courts reached the same conclusion, but on a different principle. In Edward M. Fay v. Charles Nola (3) the following passage appears : "As put by Mr. Justice Holmes in Frank v. Mangum (4) : If the petition discloses facts that amount to loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of law. It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that res judicata is inapplicable in habeas proceedings." The same view was expressed in Wong Doo v. United States (5) Harmon Metz Waley v. James A. Johnston (6) : Salinger v. Loisel (7) United States v. Shaughnessy (8): and others. But coming to India, so far as the High Courts are concerned, the same principle accepted by the English Courts will equally apply, as the High Court functions in Divisions not in benches. When it functions as a Division, it speaks for the entire court, and, therefore, it cannot set aside the order made in a writ of habeas corpus earlier

by another Division Bench. But this principle will not apply to different courts. The High Courts of Allahabad, Bombay, Madras, Nagpur and Patna and East Punjab have accepted this view, though the Calcutta High Court took the view that successive applications of habeas corpus could be filed. But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a court other than the High Court, namely, this Court. The order of the High Court (1) [1958] 3 AII.E.R. 625. (2) [1959] 1 All. E.R. 698. (3) 9 L. Ed. 859. (4) 237 U.S. 348.

(5) 68 L.E.D. 999. (6) 86 L. E.d. 1302.

(7) (1925) 265 U.S. 224. (8) [1954] 347 U.S. 260.

in the said writ is not res judicata as held by the English and the American Courts either because it is not a judgment or because the principle of res judicata is not applicable to a fundamentally lawless order. If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive res judicata cannot also govern the said application, for the rule of constructive res judicata is only a part of the general principles of the law of res judicata, and if that be applied, the scope of the liberty of an individual will be considerably narrowed. The present case illustrates the position. Before the High Court the petitioner did not question the constitutional validity of the President's order made under Art. 359 of the Constitution. If the doctrine of constructive res judicata be applied, this Court, though it is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

We, therefore, hold that the order of Khanna, J., made in the petition for habeas corpus filed by the petitioner does not operate as res judicata and this Court will have to decide the petition on merits.

It was suggested that the declaration of Emergency under Art. 352 of the Constitution in the year 1962 and the continuation of the emergency for 4 long years after the cessation of the hostilities with China is mala fide and is an abuse of powers conferred on the President under Part XVIII of the Constitution. The question raised involves two points : (1) whether the declaration of emergency or the continuation of it is vitiated by mala fides or abuse of power, and (2) whether such a question' justiciable in a court of law. Our Constitution seeks to usher in a Welfare State where there is prosperity, equality, liberty and social justice. It accepts 3 concepts for bringing about such a State: (1) Federalism; (2) Democracy; (3) Rule of Law, in which fundamental rights and social justice are inextricably integrated. Under Part XVIII when the emergency is declared both the Legislative and the Executive powers of the Union are extended to States. The Federal Government is practically transformed into unitary form of Government. The fundamental rights of the people under Art. 19 are abrogated and the Executive is empowered to suspend the right to move the court for the enforcement of any other fundamental right. The executive is also empowered to direct that all or any other provisions relating to distribution of revenue be suspended during that period. Part XVIII appears to bring down the grand edifice of our Constitution at one stroke, but a little reflection discloses that the temporary suspension of the scheme of the Constitution is really intended to preserve its substance. This extra ordinary power is unique to our Constitution. It reflects the

apprehensions of the makers of the Constitution and their implicit confidence in the parties that may come into power from time to time. Two expressions indicate the extra ordinary situation whereunder this Part was intended to come into force. The expression 'grave emergency' in Art. 352(1) and the expression 'imminent danger' in Art. 352(3) show that the existence of grave emergency or imminent danger is a pre-condition for the declaration of emergency. Doubtless, the question whether there is grave emergency or whether there is imminent danger as mentioned in the Article is left to the satisfaction of the Executive, for it is obviously in the best position to judge the situation. But there is the correlative danger of the abuse of such extra ordinary power leading to totalitarianism. Indeed, the perversions of the ideal democratic Constitution i.e. Weimar Constitution of Germany, brought about the autocratic rule of Hitler and the consequent disastrous World War. What is the safeguard against such an abuse? The obvious safeguard is the good sense of the Executive, but the more effective one is public opinion. A question is raised whether this Court can ascertain whether the ,action of the Executive in declaring the emergency or continuing 'it is actuated by mala fides and is an abuse of its power. We do /not propose to express our opinion on this question as no material has been placed before us in that regard. It requires a careful research into the circumstances obtaining in our country and the motives operating on the minds of the persons in power in continuing the emergency. As the material facts are not placed before us, we shall not in this case express our opinion one way or other on this all important question which is at present agitating the public mind. Mr. Pillai then contended that the power of the President under Art. 359(1) to suspend the right to move any court for the ,enforcement of fundamental rights must have a real nexus to the security of India, and that the impugned order had no such nexus. The President's order under Art. 359(1) of the Constitution reads "GSR-1418/30-10-62 : In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person who is-

(a) a foreigner, or

(b) to move any court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962 is in force.

GSR 1276/27-8-1965 : In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby makes the following further amendment in Order No. GSR-1418 dated 30-10-1962 namely :

In the said orders for the word and figure 'Article 21' the words and figures 'Article 14, Article 21' shall be substituted."

Under Article 352 an emergency could be declared only when the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, or when there is an imminent danger thereof; and any order issued under Art. 359 must have some correlation to the security of India, external aggression or internal disturbance. But the impugned order, the argument proceeded, was so wide as to deprive a foreigner of his fundamental rights though there was no connection between such deprivation and the security of India etc. To state it

differently, the argument was that the scope of the order under Art. 359(1) should be confined only to the scope of the reasons on the basis of which an emergency could be declared. In the instant case, it was said that the said order empowered the Executive to detain the petitioner to await investigation in regard to smuggling of gold which could possibly have no relation to the security of India. We do not propose to express our opinion on this important question, as we are not satisfied on the material placed before us that the detention of the petitioner has no nexus to the emergency. The next contention was that the President under Art. 359(1) could not make orders suspending the right to moveany court in respect of different categories of persons for the enforcement of the same fundamental right. To appreciate this contention, it may be mentioned that apart from the order dated 30-10-1962 relating to foreigners whichwe have already noticed,the President passed an order dated 3-11-1962. It was subsequently amended on 11-11-1962. The order as amended declares that the right of any person to move any court for the enforcement of the rights conferred by Arts.14,21 and 22 of the Constitution shall remain suspend for the period during which the Proclamation of Emergency issued under clause (1) of Art.352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder. It will be seen that the order dated 30-10-1962 was confined to foreigners and the order dated 3-11-1962 was confined to persons who had been deprived of their rights under the Defence of India Ordinance, 1962. Reliance was placed upon the terms of Art. 359 and a contention was raised that the said Article did not countenance orders on different groups of persons. It is true that Article 359 does not speak of persons but only speaks of a right to move any court and also to a period, or a part or whole of the territory. But Article 359 empowers the President to make an order for the purpose mentioned therein and as the singular includes plural he can certainly make different orders. But the question is : can he make an order or orders in respect of different groups of persons such as foreigners and persons governed by the Defence of India Rules ? It is true that the scope of his order shall be confined to whole or a part of the territory of India and during certain periods. But there is nothing in the Article which prevents the President from restricting the scope of the order to a class of persons, provided the operation of the order is confined to an area and to a period. The impugned orders apply to the entire country and the fact that only the persons who are affected by that order could not move the Court for the enforcement of their right, cannot make them any the less valid orders. The learned counsel then contended that Art. 359(1) did not authorise the President to make an order meting out discriminatory treatment to foreigners, and even if it did, not the order made in the instant case violated Art. 14 of the Constitution as there was no nexus between the classification of foreigners and citizens and the object for which the said order was made.

Mr. Bindra, learned counsel contended that Art. 359 con- ferred an absolute power on the President subject to the limitations found thereunder to make an order declaring that the right to move any court for the enforcement of one or more of the rights conferred by Part III should remain suspended, and, therefore, any order made thereunder could not be declared void on the ground that it infringed any of the fundamental rights suspended by the said order. It was said that the contrary view would amount to an argument In a circle.

There is a clear distinction between deprivation of fundamental rights by force of a constitutional provision itself and such deprivation by an order made by the President in exercise of a power

conferred on him under a constitutional provision. A comparison of the provisions of Art. 358 and Art. 359 justifies this distinction. Under Article 358, by the force of that Article itself, Article 19 is put out of the way. Article 359(1) does not operate by its own force. The President has to make an order declaring that the: right to move a court in respect of a fundamental right or rights, in Part III is suspended. He can only make an order which, is a. valid one. An order making an unjustified discrimination in suspending the right to move a court under Art. 14 itself, will be void at its inception. It is a still born order. It cannot be said that this involves an argument in a circle. This argument ignores the distinction between the order and the effect of that order.

If the order does not violate Art. 14, it can validity take away the right to move the court to enforce Art. 14. So viewed, the order of the President must satisfy the requirements of Art. 14. Mr. Bindra relied upon the decision of this Court in Sree Mohan, Chowdhury v. The Chief Commission, Union Territory of Tripura (1) in support of his argument that the order of the President was untrammelled by the provisions of Art. 14. The passage relied upon reads : "It was also contended that the President's order of Novem- ber 3, 1962, is subject to the condition precedent that there is a valid Ordinance and the rules framed or the orders made thereunder are valid. In other words, it is contended that it is open to the petitioner to canvass the validity of the Ordinance. This is arguing in a circle. In order that the Court may investigate the validity of a particular ordinance or Act of a legislature, the person moving the Court should have a locus standi. If he has not the locus standi to move the Court, the Court will refuse to entertain his petition questioning the vires of the particular legislation. In view of the President's order passed under the provisions of Article 359(1) of the Constitution, the petitioner has lost his locus standi to move this Court during the period of emergency as already pointed out. That being so, the petition is not maintainable". This passage has nothing to do with the validity of the order made under Art. 359(1). What this Court said was that, as under the Ordinance the petitioner therein had no right to move the Court to enforce his fundamental right, he had no locus standi to question the validity of the Act, for, he could question the validity of the Act only if he could move the Court in regard thereto. We, therefore, hold that the validity of the President's order issued under Art. 359(1) could be questioned if it infringed the provisions of Art, 14 of the Constitution, The next question is whether it infrigned Article 14. Mr Pillai put his arguments in two ways : (1) The President has made two orders under Art. 359(1); (i) GSR 1418 dated 30-10- 1962 in respect of foreigners; and (ii) GSR 164 dated 3-11- 1962 in respect of all, including foreigners. The terms of the order in regard to foreigners are without any limitations. But the order dated 3-11-1962 only affects persons who have been deprived of any of the fundamental rights referred to in the order under the Defence of India Ordinance, 1962 or any rule or order made thereunder., These two orders permit the authorities concerned at their discre- tion to rely upon the order which is more prejudicial or drastic in respect of same persons. (2) The order of the President relating to foreigners is discriminatory as the fact that a person is a foreigner has no nexus to the object sought to be achieved, i.e., the security ,of the State. (1) [1964] 3 S.C.R, 442, 451.

The formula underlying the doctrine of classification has become so crystallised that it is unnecessary to refer to decisions. The principle is stated thus : "The classification must be found on intelligible differentia which distinguishes persons or things that are grouped from those left out of the group and that the differentia must have rational relation to the object sought to be achieved by the statute in question." What was the object of the order GSR 1418 issued by the President on

30-10-1962. There was a grave emergency. The Chinese attacked India and Pakistan was poised for an attack. There was a danger of internal sabotage. So, it was necessary to screen the foreigners, and to guard against their acts of sabotage and espionage. It was, therefore, necessary to issue a special order wider in scope than that of GSR 164 dated 3-11-1962 which was confined only to persons that had been deprived of certain rights under the Defence of India Ordinance. There was a greater danger from foreigners, and, therefore, a more drastic order only could meet the requirements of national ,security. Compared to foreigners, nationals, with some un- fortunate exceptions, can be relied upon to support the country's integrity and security. There is, therefore, a clear nexus between the classification of foreigners and the citizens and the object sought to be achieved thereby. Nor can we appreciate the argument that the making of two orders, one confined to foreigners and the other confined to all persons, including foreigners, violates Art. 14. Though GSR 164 may also deprive foreigners, along with the citizens, of their right to move the Court in respect of their rights deprived under a particular Act, the scope of the said order (GSR 164) is not sufficient to guard against the subversive activities of foreigners. It is confined only to rights deprived under the Defence of India Ordi- nance. GSR 1418 has a greater sweep and it takes in other rights. Though there is some overlapping, the two categories of persons foreigners and citizens-offer different security and other problems. Both the orders are mainly intended to operate in different fields and their scope is different. We, therefore, do not see any merit in this contention also.

It is then argued that the President's order GSR 1276 dated 27-8-1965 has no retrospective effect and, therefore, the petitioner is entitled to move the court. GSR 1276 was issued on 27-8-1965 .amending the earlier order by including Art. 14 therein. After 27-8-1965, therefore, no foreigner has the right to move the Court though his fundamental right under Art. 14 of the Constitution is violated. In that sense, the order is not retrospective but prospective. It only operates on the right of a person to move the Court.As the petitioner in the present case filed his petition on 12th May, 1966, that is subsequent to the promulgation of the order, he has ceased to have any right to move this Court. The fact that he complained of his detention for a period earlier to that date has no bearing on the question of the maintainability of the petition. This contention has also no merits.

Lastly, it was contended that the order detaining him was vitiated by mala fides. The argument of mala fides was put thus : The petitioner was prosecuted and tried for an offence under the Sea Customs Act. He was sentenced to 9 months imprisonment and to fine. He paid the fine and served his sentence. He was arrested pending the criminal case. He was let on bail on 18-3-1965, but before he left the jail he was detained under the Foreigners Act. It was said that the detention was not for any purpose connected with the security of the State, but only with a view to make investigation in respect of a case of conspiracy of smuggling gold into India of which, it is alleged, the petitioner was one of the conspirators. As there are other effective provisions of the Code of Criminal Procedure to conduct the said investigation, the argument proceeded, the detention of the petitioner in the said circumstances was an abuse of powers under the Foreigners Act. It was further contended that s. 3 of the Foreigners Act was intended for regulating the entry and the exit of foreigners into and out of India, that it had nothing to do with the investigation of cases, and that therefore, the detention under that Act for the sole purpose of investigation was mala fide. The order of detention dated 18th September, 1964 reads: "In exercise of the powers conferred by sub-section (1) read with clause (g) of sub-section (2) of section 3 of the Foreigners Act, 1946 (31 of 1946) the Central Government

hereby orders that Shri Ghulam Mohuddin a Pakistani National shall be arrested and detained until further orders." Clause

(g) enables the Central Government to make an order detaining a foreigner. The clause does not narrate the reasons for which he can be detained. If, as the respondent says, the petitioner is involved in a serious case of conspiracy to smuggle gold and on that account his detention in India was necessary to make further investigation with regard to his conduct, we do not see why the wide power conferred on the Central Government to detain him under clause (g) could not be invoked. There is no merit in this contention also.

In the result, the petition is dismissed.

Bachawat, J. The order of Khanna, J. dismissing the Writ petition filed by the petitioner in the Punjab High Court challenging the legality of the detention order passed by the Central Government under s. 3(2)(g) of the Foreigners Act, 1946 and asking for H the issue of a writ of habeas corpus is not a judgment, and does not operate as res judicata. That order does not operate as a bar to the application under Art. 32 of the Constitution asking for the issue of a writ of habeas corpus on the same facts. The petitioner has fundamental right to move this Court under Art. 32 for the issue of a writ of habeas corpus for the protection of his right of liberty. The present petition must, therefore, be entertained and examined on the merits. Order 35, Rule 3 of the Supreme Court Rules provides that a petition for a writ of habeas corpus under Art. 32 shall state whether the petitioner has moved the High Court concerned for similar relief and if so, with what result. This rule is a salutary safeguard against an abusive use of a petition for the issue of a writ of habeas corpus under Art. 32. The previous dismissal of a petition for a writ of habeas corpus by a High Court is one of the matters which this Court may take into consideration at the preliminary hearing of the writ petition under Art. 32 in forming the opinion whether a prima facie case for granting the petition is made out, and if on a consideration of all the materials the Court comes to the conclusion that a prima facie case is not made out, the Court may refuse to issue a rule nisi under 0 . 35. r. 4.

The petitioner did not previously move this Court for the issue of a writ of habeas corpus challenging the legality of the order of detention under s. 3(2)(g) of the Foreigners Act. He has, therefore, the right to move this Court for the issue of the writ. But he has not right to move this Court under Art. 32 more than once on the same facts. Having heard the petitioner fully on the merits once, the Court will not hear him again on the same facts. It is to be noticed that the present petition does not challenge the validity of an order of, imprisonment passed in a criminal trial. I must not be understood to say that the remedy of a writ of habeas corpus is available to test the propriety or legality of the verdict of a competent Criminal Court.

The petitioner challenges the legality of the order, GSR 1418 dated October 30, 1962 in respect of foreigners passed by the President under Art. 359(1) of the Constitution on the ground that it is discriminatory and violative of Art.

14. The argument is this : Article 359(1) does not operate of its own force. The President has to make an order under it declaring that the right to move a Court in respect of a fundamental right in Part

III is suspended. The order of the President under Art. 359(1) is a law within the meaning of Art. 13(2). An order under Art. 359(1) which takes away or abridges a fundamental right is void under Art. 13 (2). Therefore, the validity of an order under Art. 359(1) may be questioned if it abridges or takes away a fundamental right other than the right under Art. 19 which is already suspended under Art. 358.

On the other hand, the respondent's argument is this.- An ,order of the President under Art. 359(1) suspending the right to move this Court for the enforcement of any right conferred by Part III necessarily abridges the right conferred by Art. 32. If the order of the President under Art. 359(1) is a law within the meaning of Art. 13(2), the President can never make a valid order under Art. 359(1). This is reductio ad absurdum. It is impossible to hold that the President can never make a valid order under Art. 359(1). The conclusion must be that an order of the President under Art. 359(1) is not a law within the meaning of Art. 13(2). Again, an order of the President suspending the right to move any Court for the enforcement of the right conferred by Art. 14 substantially abridges the right conferred by Art. 14.If the remedy is totally suspended, the right is temporarily abridged.If the President's order under Art. 359(1) is a law within the meaning of Art. 13(3)(a) the President can never make an order under Art. 359(1) suspending the right to move any Court for the enforcement of the right under Art. 14. This is an impossible conclusion, because by the very terms of Art. 359(1), the President is given the right to pass an order suspending the right to move any Court for the enforcement of the right conferred by Art. 14. An order which by the express words of Art. 359(1) can abridge or take away a right albeit temporarily cannot be held to be void on the ground that it infringes that right. The context of Art. 359(1) requires that an order of the President cannot be a law within the meaning of Art. 13(2).

I do not propose to decide in this petition which of the two opposing contentions should be accepted. Even assuming for the purpose of this case that the President's order under Art. 359(1) is a law within the meaning of Art. 13(2) and can be pronounced to be invalid on the ground that it abridges or takes away the right conferred by Art. 14, 1 am of the opinion, for the reasons given by the learned Chief Justice, that the President's order is not discriminatory and is not violative of Art. 14.

I agree with the conclusions of the learned Chief Justice on other points and the order proposed by him. V. P. S.

Petition dismissed