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May 7

S. KRISHNAN AND OTHERS

v.

THE STATE OF MADRAS

(AND OTHER PETITIONS)

UNION OF INDIA—Intervener

[SHRI HARILAL KANIA C. J., PATANJALI SASTRI, MEHAR CHAND MAHAJAN, S. R. DAS and VIVIAN BOSE JJ.]

Preventive Detention (Amendment) Act, 1951, *ss.* 9, 10, 11, 12—*Indian Constitution*, 1950, *Arts.* 22(4) (*a*) & (*b*), 22(7)—*Detentions under earlier Act treated as detentions under new Act and continued for more than one year—Omission to fix maximum period—Infringement of fundamental rights—Contravention of Constitution—Validity of amending Act—Temporary Statutes—Order of detentions —Validity after expiry of Statute.*

The Preventive Detention (Amendment) Act of 1951 which extended the operation of the Preventive Detention Act of 1950 for a period of one more year, that is, up to 1st April, 1952, effected two material alterations by providing (i) that a reference to an Advisory Board shall be made in all cases within six weeks (s. 9) ; (ii) that every detention order in force at the commencement of the new Act shall continue in force and shall have effect as if had been made under the Act as amended (s. 12). The petitioners, who were on the date of the commencement of the amending Act in detention in pursuance of orders made under s. 3(1) (a) (ii) of the Preventive Detention Act of 1950, and who but for the amending Act would have been entitled to be released under the earlier Act on the expiry of one year from the date of the order of detention, applied for *habeas corpus* contending that ss. 9 and 12 of the amending Act which enacted the above mentioned provisions contravened the provisions of Art. 22(4) (a) of the Constitution and were consequently void under Art. 13(a) inasmuch as the combined effect of these sections was to keep the petitioners in detention for a period longer than three months without reference to an Advisory Board, and also to keep them in detention for a period of more than one year. The Act was also attacked on the ground that it did not fix any maximum period for detention :

Held, per KANIA C. J., PATANJALI SASTRI, MAHAJAN, S. R. DAS and BOSE JJ. :—that ss. 9 and 12 of the Preventive Detention (Amendment) Act, 1951, and not contravene Art. 22 (4) of the Constitution and were not void.

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Per KANIA C.J., and PATANJALI SASTRI J.—The amending Act could be regarded as a law made substantially in accordance with sub-clauses (a) and (b) of cl. (7) of Art. 22, and as such it satisfied the requirements of Art. 22(4) (b) and cannot be held to be unconstitutional or void.

Per MAHAJAN and DAS JJ.—The law enacted by the amending statute is not the same law as was declared by the original statute and to that extent the amended statute was in the nature of a new and independent statute; the effect of s. 12 was to make the detention of the petitioners a fresh detention under the new law; and there was nothing in the new law standing by itself which authorised detention of a person for more than three months without reference to an Advisory Board or for more than one year and there was thus no contravention of any of the provisions of Art. 22(4).

Held also per KANIA C. J., PATANJALI SASTRI, MAHAJAN and DAS *JJ.* (BOSE J. *dissenting*).—The Preventive Detention (Amendment) Act, 1951, was not invalid on the ground that it did not fix a maximum period for detention, inasmuch as the Act itself was to be in force only for a period of one year and no detention under the Act could be continued after the expiry of the Act. BOSE J.—Sub-section (1) of s. 11 of the impugned Act contravened Art. 22 (4) of the Constitution inasmuch as it did not fix any maximum period of detention, but on the other hand empowered the government in express terms to order that a detention shall continue "for such period as it thinks fit". The view that a detention which has been ordered under an Act would come to an end with the expiry of the Act is not sound.

ORIGINAL JURISDICTION.—Petitions Nos. 303, 617 to 619, 621 to 631, 567 to 571, 592, 594, 596 and 600 of 1950. Petitions under Art. 32 of the Constitution for writs in the nature of *habeas corpus*. The petitioners were detained in pursuance of orders for detention made under s. 3 (1) (a) (ii) of the Preventive Detention Act, 1950. On the 22nd February, 1951 while they were under detention the Preventive Detention (Amendment) Act, 1951, came into force and this Act by substituting the figures "1952" for "1951" in sub-sec. (3) of s. 1 of the Preventive Detention Act of 1950 continued the operation of the Act until 31st March, 1952. Since the maximum period of detention fixed by the Act of 1950 was one year the petitioners applied for writs in the nature of *habeas corpus* for their release. The material facts, the points raised by

the petitioners and the arguments of the counsel appear in the Judgment.

M. K. Nambiyar (*V. G. Raw,* with him) for the Petitioner in Petition No. 303 of 1950.

Bawa Shiv Charan Singh for the Petitioners in Petitions Nos. 618, 619, 621, 622, 624, 626, 627, 628, 629, 630 and 631 of 1950.

Basant Chandra Ghose (*amicus curiae*) for the Petitioners in Petitions Nos. 567, 568, 569, 570, 571, 592, 594, 596, and 600 of 1950.

V. K. T. Chari, Advocate-General, Madras, and *G. S. Swaminathan* (*R. Ganapathy Iyer* with them) for the Respondents in Nos. 618, 619, 621, 622, 624, 626, 627, 628, 629, 630 and 631 of 1950.

Fakhruddin Ahmed (*Nuruddin Ahmed* with him) for the Respondents in Petitions Nos. 567, 568, 569, 570, 571 592, 594, 596 and 600 of 1950.

Petitioner in person in Petition No. 617 of 1950.

M. C. Setalvad, Attorney-General for India (*R. Ganapathy Iyer,* with him) for the Union of India, Intervener.

1951 May 7. The following Judgments were delivered—

KANIA C. J.—I agree with the Judgment prepared by Sastri J. and have nothing more to add. *KANIA C. J.*

PATANJALI SASTRI J.—The common question which arises for consideration in these petitions is whether certain provisions of the Preventive Detention (Amendment) Act, 1951, purporting to amend the Preventive Detention Act, 1950, so as to authorise detention of the petitioners to be continued beyond the expiry of one year are *ultra vires* and inoperative. *Patanjali Sastri J.*

The amending Act (hereinafter referred to as the new Act) came into force on 22nd February, 1951, and by substituting the figures "1952" for "1951" in subsection (3) of section 1 of the Preventive Detention Act, 1950, (hereinafter referred to as the old Act), it

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continues the operation of the old Act till 31st March, 1952.

The petitioners in all these cases were, at the commencement of the new Act, under detention in pursuance of orders made under section 3(1) (a) (ii) of the old Act and, save in a few cases where the detention was also attacked on some special grounds which have no substance, the legality of that detention was not open to question. But such detention having commenced more than a year before the date of hearing of these petitions the petitioners would have been entitled to be released had it not been for the provisions of the new Act which purport to authorise the continuance of their detention.

Mr. Nambiyar, on behalf of the petitioners, urged that these provisions contravened article 22(4) (a) of the Constitution and were, therefore, void under article 13(2). Article 22(4) (a) provides:

"No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)."

It will be seen that two conditions have to be fulfilled in order that a person can be detained for a longer period than three months; (i) his case must be referred to an Advisory Board constituted in the manner specified and (ii) that Board must make a report *before* the expiration of three months that there is sufficient cause for such detention. Section 12 of the old Act having provided that there was to be no review by an Advisory Board in cases falling within

section 3 (1)(a)(ii), the petitioners' detention in pursuance of orders made under the latter section fell under article 22 (4) (b), and there was no question, therefore, of such detention contravening article 22 (4) (a). The scheme of the new Act, however, was to extend the benefit of a review by an Advisory Board to all cases and to bind the detaining authorities to act conformably to the report of the Board. The method adopted to give effect to this scheme was to delete some of the provisions of the old Act and to substitute in their place new provisions.

The material provisions of the new Act are sections 9, 10, 11 and 12. Section 9 provides for a reference to an Advisory Board within six weeks from the date specified in sub-section (2) which says "The date referred to in sub-section (1) shall be—(a) in every case where at the commencement of the Preventive Detention (Amendment) Act, 1951, the person is under detention in pursuance of a detention order made under sub-clause (i) or sub-clause (ii) of clause (a) of sub-section (1) of section 3, the date of commencement of the said Act; and (b) in every other case the date of detention under the order". By section 10 the Advisory Board is required to submit its report within ten weeks from the date specified in sub-section (2) of section 9. Section 11 (1) authorises the appropriate Government to continue the period of detention for such period as it thinks fit in case the Advisory Board reports that there are sufficient grounds for the detention, while sub-section (2) provides that the Government shall revoke the detention order and release the person concerned if the Advisory Board reports the other way. Sub-section (1) of section 12 declares for the "avoidance of doubt" that every detention order in force at the commencement of the new Act "shall continue in force and shall have effect as if it had been made under this Act as amended" by the new Act, and sub-section (2) provides that nothing contained in sub-section (3) of section 1 or in sub-section (1) of section 12 of the old Act shall affect the validity or duration of any such order.

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It will be seen that although the object of the new Act was to liberalise the provisions of the old Act in the manner indicated above, section 12 had the effect of enlarging the period of detention of the petitioners who were under detention at the commencement of the new Act by enacting the legal fiction that detention in such cases shall have effect as if it had been made under the new Act. On that basis, the new Act seeks to bring detention orders in force at its commencement and more than three months old into conformity with article 22(4) (a) by prescribing a period of six weeks in section 9 for referring such cases to the Advisory Board and ten weeks in section 10(1) for the submission by the Board of its report, the period in each case being calculated from the commencement of the new Act. But this fiction cannot obscure the fact that in the case of the petitioners more than three months had elapsed from the date of their arrest without any Advisory Board making a report on their detention and it is, of course, not possible for the Advisory Board now provided for in such cases to submit its report before the expiration of that period, with the result that their detention contravened article 22(4) (a). No doubt the detention up to the commencement of the new Act was lawful under section 12 of the old Act, as it was in accordance with sub-clause (b) of clause (4) of article 22, but that could not make the petitioners' continued detention any the less a violation of article 22(4) (a) after the deletion of old section 12. It is a fallacy to treat what was a lawful detention under sub-clause (b) as being no detention at all for purposes of sub-clause (a). Detention is a hard physical fact, and the total period of detention of the petitioners having far exceeded three months without an Advisory Board having reported within three months that there were sufficient grounds therefore, it could not lawfully be continued under article 22(4) (a). Constitutional provisions regarding fundamental rights cannot be circumvented by resorting to legal fictions.

It was said that if the petitioners had been released on 22nd February, 1951, and re-arrested and detained

immediately thereafter under the new Act such detention would have been valid. But, for proceeding in that manner the enactment of section 9(2) (a) and section 12(1) would be unnecessary. Parliament has, however, adopted a different mode of proceeding by providing for the continuance of detention orders in force at the commencement of the new Act on the basis that they should have effect as if they had been made under the new Act. The resulting position must, therefore, be dealt with only on that basis and not on any other hypothetical footing.

The Attorney-General, however, contended in the alternative that the constitutional validity of section 9 (2) (a) and section 12 (1) of the new Act could be sustained under article 22(4) (b) which has been held by a majority of the Judges in *A. K. Gopalan* v. *The State of Madras* (1) to be a distinct and independent provision authorising preventive detention for a period longer than three months in accordance with a law made by Parliament under sub-clauses (a) and (b) of clause (7) of article 22. The Attorney-General claimed that the aforesaid provisions were such a law, none the less because Parliament may have intended to make a law within article 22 (4) (a) by providing for a review by an Advisory Board in all cases or preventive detention. On a question of *vires,* the intention of the Legislature is immaterial, and I agree that a provision for an Advisory Board is not a hall-mark which stamps a preventive detention law as one necessarily falling within sub-clause (a) of clause (4), so as to make its constitutional validity determinable exclusively with reference to the requirements of that sub-clause. The law could still be upheld if it fulfilled the conditions laid down in sub-clause (b) of clause (4). Mr. Nambiyar, however, submitted that the new Act did not fulfil those conditions, for it is not a law made under sub-clauses (a) *and* (b) of clause (7). The word "and" should be understood in its ordinary conjunctive sense, and the new Act neither prescribes the circumstances and classes referred to in sub-clause (a) nor the

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maximum period of detention required to be prescribed under sub-clause (b) of clause (7). The contention is devoid of substance. The new Act can, in my opinion, be regarded as a law made substantially in accordance with sub-clauses (a) and (b) of clause (7). According to the majority view in *Gopalan's case,* sub-clause (a) of clause (7) being an enabling provision, the word "and" should be understood in a disjunctive sense. The combined effect of sections 9(2) (a) and 12(1) is to provide, in a certain class of cases, namely, where detention orders were in force at the commencement of the new Act, that the persons concerned could be detained for a period longer than three months if an Advisory Board reports that there are sufficient grounds for detention within ten weeks *from the commencement of the new Act,* that is to say, without obtaining the opinion of an Advisory Board before the expiration of the three months *from the commencement of the detention* as provided in sub-clause (a) of clause (4). And, although the new Act does not in express terms prescribe in a separate provision any maximum period as such for which any person may in any class or classes of cases be detained, it fixes, by extending the duration of the old Act till the 1st April, 1952, an over-all time-limit beyond which preventive detention under the Act cannot be continued. The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires (Craies on Statutes, 4th Edition, p. 347). Preventive detention which would, but for the Act authorising it, be a continuing wrong, cannot, therefore, be continued beyond the expiry of the Act itself. The new Act thus in substance prescribes a maximum period of detention under it by providing that it shall cease to have effect on a specified date. It seems to me, therefore, that section 9(2) (a) and section 12(1) of the new Act substantially satisfy the requirements of sub-clause (b) of clause (4) of article 22, and cannot be declared unconstitutional and void.

The objection to the validity of section 11(1) can be disposed of in a few words. The argument is that the discretionary power given to the appropriate Government under that sub-section to continue the detention "for such period as it thinks fit" authorises preventive detention for an indefinite period, which is contrary to the provisions of article 22(4). But, if as already observed, the new Act is to be in force only up to 1st April, 1952, and no detention under the Act can continue thereafter, the discretionary power could be exercised only subject to that over-all limit. The objection therefore fails.

In the result the petitions are dismissed.

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MAHAJAN J.—The question to be decided in these petitions is whether the Preventive Detention (Amendment) Act, 1951, or any part thereof is invalid and whether the petitioners who have been detained are entitled to a writ in the nature of habeas corpus on the ground that their detention is illegal.

The Act was enacted by Parliament on the 27th February, 1951, and according to its express terms will cease to have effect on the 1st April, 1952, save as regards things done or omitted to be done before that date.

The point that has been canvassed before us is that sections 9(2) (a) and 12 of the Act are invalid as these infringe the fundamental rights conferred under articles 21 and 22 of Part III of the Constitution. Section 9 of the Act as amended reads as follows :—

"(1) In every case where a detention order has been made under this Act, the appropriate Government shall, within six weeks from the date specified in sub-section (2) place before an advisory board constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report made by such officer under sub-section (3) of section 3.

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(2) The date referred to in sub-section (1) shall be—

(a) in every case where at the commencement of the Preventive Detention (Amendment) Act, 1951, a person is under detention in pursuance of a detention order made under sub-clause (i) or (ii) of clause (a) of sub-section (1) of section 3, the date of commencement of the said Act ; and

(b) in every other case the date of the detention order."

Section 12 is in these terms :—

"For the avoidance of doubt it is hereby declared—

(a) every detention order in force at the commencement of the Preventive Detention (Amendment) Act, 1951, shall continue in force and shall have effect as if it had been made under this Act as amended by the Preventive Detention (Amendment) Act, 1951 ; and

(b) nothing contained in sub-section (3) of section 1, or sub-section (1) of section 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order."

Mr. Nambiar for the detenus challenged the *vires* of these sections on the following grounds : (1) That article 22(4) of the Constitution limits the legislative power of Parliament and State legislatures in respect of preventive detention laws in the matter of duration of the period of detention and provides that no law of preventive detention can authorise the detention of a person for a longer period than three months without the intervention of an advisory board and without obtaining its opinion within three months. The amending Act, 1951, by section 9 authorizes detention for a period longer than three months without the opinion of the advisory board having been obtained within the said period of three months from the date of the actual detention in respect of persons detained under Act IV of 1950 as it originally stood and it thus infringes the fundamental right conferred by article 22(4). (2) That Parliament in exercise of powers conferred on it under article 22(7) having prescribed in section 12 of Act IV

of 1950 a maximum period of one year for detention in certain classes of cases without obtaining the opinion of the advisory board, that period of one year became a part of the content of the fundamental right conferred under article 22(4) of the Constitution. Sections 9 and 12 of the amended Act contravene this fundamental right inasmuch as they authorize detention of persons who were detained under orders passed under section 3 (1) (i) and (ii) of Act IV of 1950 beyond the period of one year prescribed therein, and are therefore void. (3) That Parliament has no authority to alter the period of one year prescribed by it by virtue of authority given to it under article 22 (7) (b) of the Constitution so as to affect the cases of persons detained under Act IV of 1950. (4) That the Constitution does not envisage detention for an indefinite period and that inasmuch as the amended Act has failed to provide a maximum period for the detention of a person, it is repugnant to the Constitution and is void ; that it was obligatory on Parliament while making the law providing for preventive detention to fix the maximum period for such detention. (5) That the provisions of these sections infringe article 21 of the Constitution inasmuch as they authorize detention contrary to procedure established by law (Act IV of 1950) in respect of detentions under that Act, because under established procedure detention beyond a period of one year was void. For the reasons given above it was contended that as in the case of the petitioners the maximum period of one year under section 12 of Act IV of 1950 had expired on 27th February, 1951, they were entitled to their release.

For a proper appreciation of the points urged by the learned counsel and the manner in which they were combated by the learned Attorney-General, it is necessary to shortly state the nature of the relevant amendments introduced by the amending Act in the Preventive Detention Act, IV of 1950. In section 8 of Act IV of 1950, which concerns the constitution of advisory boards, the new Act has provided that the board shall consist of three persons instead of two except in cases

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where before the commencement of the amended Act reference had already been made to an advisory board. Section 9 of Act IV of 1950 has been substituted by section 9 of the amending Act and it gives the benefit of the advisory board to all classes and cases of persons, who under Act IV of 1950 were not entitled to that benefit. It makes it obligatory on government to place all these cases, like all other cases, within six weeks from a prescribed date before an advisory board. In section 10 the amended Act makes it obligatory on the advisory board to submit its report to the government within ten weeks of the date specified under section 9 and it also authorizes the advisory board to call for such information as it deems necessary from government and from the person concerned and it empowers it to give a hearing to the detenu if in any particular case it considers it essential. Section 11 makes the opinion of the advisory board binding on government. It also authorizes government to continue the detention of persons for such period as it thinks fit in cases where the opinion of the board is in favour of the continuance of detention. Section 12 provides that orders of detention in force at the commencement of the amended Act will be deemed to have been made under this Act. A new section, 14, has been introduced in Act IV of 1950 and it authorizes temporary release of persons detained.

The provisions of the amended Act are thus a great improvement on the original Act inasmuch as they provide a greater opportunity to the detenus of proving their innocence than they had under the original Act. The detention of a person without the case being referred to the opinion of an advisory board constituted of independent persons has been completely done away with, except for a period of three months provided for in article 22(4) of the Constitution. What the amended Act has in substance done is that instead of the cases of persons preventively detained being considered by ordinary courts of law, a special tribunal designated as an advisory board and consisting of men of high judicial experience has been given authority

to examine their cases within a prescribed period and the decision of that authority has been made binding on government. This tribunal is obviously no substitute for a court of law but a provision like this is in the nature of a substantial solatium in cases of preventive detention wherein ordinarily the detaining authority is the judging authority as well.

Shortly stated, Mr. Nambiar's attack on these beneficial provisions and concerning their *vires* is based principally on the method adopted by the draftsmen of the Act for switching over the detentions which were being continued under section 12 of Act IV of 1950 and which were valid by virtue of the constitutional provisions contained in article 22(4) (b) of the Constitution to the constitutional provisions contained in article 22(4) (a) so that they may be given the benefit of an advisory board's opinion. His grievance is that in doing so the amended statute has enlarged the period of three months provided under article 22(4) for a report of the advisory board and has extended the period of one year mentioned in section 12 of Act IV of 1950. This argument is based on the assumption that the period of one year mentioned in section 12 of Act IV of 1950 was an immutable and unalterable one and that Parliament could not amend section 12 of the Act in any manner whatsoever once having enacted it. I am unable to accept this contention. It seems to me, that it was open to Parliament to amend section 12 and substitute another maximum for the period of one year mentioned therein. If Parliament had recourse to that alternative, then in my opinion, the petitioners could have no possible grievance as regards the *vires* of the new legislation. As regards the period of three months, it was essential to fix some date from which that period had to be calculated in respect of cases which were previously governed by section 12 of Act IV of 1950. Under that section they did not have the benefit of the advisory board and when the new law gave them that benefit, a *terminus quo* had to be fixed for the period of three months during which the advisory board had to submit its report. The amended Act

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achieved this by prescribing in these specified classes of cases the date of the commencement of the amended Act as the date from which this period was to begin and by section 12 it provided that all detentions continuing at the date of the commencement of the amended Act shall be deemed to be detentions under the amended Act.

After a careful consideration of the argument of Mr. Nambiar I have reached the conclusion that there is considerable force in the reply made to it by the learned Attorney-General. He contended that article 22(4) provides that no law providing for preventive detention shall authorize detention of a person for a longer period than three months and that the amended Act has not in any manner infringed this provision; on the other hand, it provides that the advisory board must make its report to the government within ten weeks. It was urged that in order to judge the *vires* of the amended Act it was not relevant to take into consideration detention of persons validly detained under a different statute and that its *vires* must be adjudged on its own provisions and not with reference to what has actually happened under another law. It was frankly conceded that if Parliament or a State legislature passed legislation in a manner which amounted to a fraud on the Constitution inasmuch as those enactments were passed with the purpose of defeating the constitutional provisions, then those laws could be attacked on that ground but not on the ground of their *vires,* that in the present case no such argument had been taken or could be taken and that being so, the contention of Mr. Nambiar was not justified.

In my opinion, the statute as framed does not in any way contravene or abridge either the provisions of article 21 or of article 22. It was open to Parliament, as already observed, to alter the maximum period of detention mentioned in section 12 of Act IV of 1950 and to enhance it. It was also open to government to release these detenus after the expiry of one year and to serve fresh orders of detention on them after their revise under the amended Act. If that

had been done, no question could possibly be raised that the period of three months provided for in article 22(4) of the Constitution had in any way been affected. Instead of going through that form of ceremony, Parliament by section 12 of the amended Act provided that all detention orders in force under Act IV of 1950 be treated as detention orders under the amended Act. By the effect of this section the detention of all such persons becomes a fresh detention under the new law, with the result that nothing in the amended statute can be said to abridge the fundamental right conferred by article 22(4) of the Constitution. It was argued that the amended statute is not a new and an independent statute and that in spite of the amendments it remains the same statute as was passed in 1950, and that the detention of the petitioners is under the same law of preventive detention and it therefore offends against article 22(4) of the Constitution and that it virtually amounts to tacking of the period of detention under one Act to the period of detention under another Act and as such amounts indirectly and substantially to an infringement of the fundamental right. In my opinion, this contention, though attractive, is without force. Technically speaking, an amended statute remains the same statute as originally enacted but from that proposition it does not follow that the law contained in the amended statute is the same law as was contained in the original one. Section 9 of the original Act has been substituted by section 9 of the amended Act and declares a new law and it is not a re-enactment of the law as was contained in the earlier statute. Section 12 of the original statute has been completely repealed and no longer exists. The law declared by that section has been abrogated. The law declared by section 12 of the amended Act is in the nature of a substituted provision. It seems to me that the law declared by the amended statute is not the same law as was declared by the original statute and to that extent the amended statute is in the nature of a new and independent statute. The petitioners are being detained today by

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force of the provisions contained in sections 9 and 12 of the amended Act and not under the law that was passed in 1950, as by repeal of section 12 of that Act their detention under it technically terminated. The new law admittedly standing by itself does not authorize detention of any person beyond a period of three months except in the manner provided by article 22(4) of the Constitution. No question whatever arises of tacking of the period of detention under one law to the period of detention under another law, inasmuch as the detention under the earlier law automatically terminates with the repeal of section 12 of Act IV of 1950. For the reasons given above, the first contention of Mr. Nambiar fails.

In view of the above decision it is unnecessary to consider the alternative argument of the learned Attorney-General to the effect that in case it is held that section 9 contravenes article 22(4) (a) of the Constitution, it is a valid law under article 22(4) (b) of the Constitution and hence the order of detention is legal. Mr. Nambiar's contention to the effect that in case the petitioners' detention is regarded as a fresh detention under the amended Act, then it is necessary to serve them with fresh grounds of detention does not appear to me to be well founded. The point was not raised in the petitions and no argument was addressed to us that any right under article 22(5) had been infringed. Moreover, as at present advised, I think the contention has not got much force because of the clear provisions of section 12 of the amended Act which treats every detention order having force at the commencement of the amended Act as being deemed to continue under it. When detention is not on any fresh grounds but on grounds already served, any default in observing the formality of again serving those very grounds on the detenu cannot be said to be an infringement of the fundamental right under article 22(5) of the Constitution.

The next contention of Mr. Nambiar that Parliament having fixed the maximum period of detention in section 12 of Act IV of 1950 under its powers contained

in article 22(7) of the Constitution, that maximum became a part of the content of fundamental right and sections 9 and 12 of the amended Act contravene this fundamental right inasmuch as these authorize detention of the petitioners for a period beyond one year again, in my opinion, is not sound. In other words, the argument of the learned counsel amounts to this; that as soon as Parliament by law under article 22(7) prescribed a maximum period for which any person may be detained under any law providing for preventive detention, then that period becomes a part of the fundamental right conferred on a person under Part III of the Constitution. The only method of adding to or subtracting from those rights is by an amendment of the Constitution in the manner provided therein. By clause (7) of article 22 Parliament has not been authorized to add to the fundamental rights. The contention of the learned counsel is based on an erroneous assumption that article 22 in clause (7) confers a fundamental right on a person; in its true concept it restricts to a certain degree the measure of the fundamental right contained in clause 4 (a) of the article.

The argument that Parliament has no authority to alter the period of one year prescribed by it under article 22(7) (b) of the Constitution is again founded on an erroneous assumption that the clause confers legislative power on Parliament. The ambit of the legislative powers of Parliament is contained in article 245 of the Constitution read with the entries in the Seventh Schedule. Article 22 of the Constitution restricts those powers to a certain extent. It does not enlarge them. Clause (7), however, cuts down these restrictions to a certain extent. Parliament having power to make the law has also the power to alter or amend it, if it so chooses. It is difficult to assent to the proposition of the learned counsel that if a person is detained according to a law that existed at the time of his detention, then in regard to him it is that and that law alone which matters and any change in the

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law, even if it has retrospective effect, cannot affect him in any manner whatever.

The next point canvassed before us was that the Constitution does not envisage detention for an indefinite period and that it is obligatory on Parliament to provide a maximum period for detention of a person under a law of preventive detention. In my opinion, this argument again is not sound. Emphasis was laid on the proviso to article 22(4) (a) which enacts that nothing in the sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7), and it was urged that the word "may" in article 22(7) must be read in the sense of "must" and as having a compulsory force inasmuch as the enactment authorizes Parliament to prescribe by law a maximum period for detention, for the advancement of justice and for public good, or for the benefit of persons subjected to preventive detention. Reference was made to Maxwell on "Interpretation of Statutes" (9th Edn., page 246) and to the well-known case of *Julius* v. *Bishop of Oxford*(1). Lord Cairns in that case observed as follows :—

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons that power ought to be exercised."

In my opinion, clause (7) of article 22, as already pointed out, in its true concept to a certain degree restricts the measure of the fundamental right contained in clause (4) (a) and in this context the rule referred to by Maxwell has no application whatever. Moreover, the provision in the Constitution is merely an enabling one and it is well settled that in an enabling Act words of a permissive nature cannot be given a compulsory meaning. (*Vide* Craies on Statute law, p. 254). Be that as it may, the point is no longer open as it has been concluded by the majority decision in *Gopalan's case*(2). The learned Chief Justice at p. 119 of the report observed as follows :—

(1) 5 App. cas. 214. (2) [1950] SCR 88.

"Sub-clause (b) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) itself and the court cannot help in the matter."

Nothing said by Mr. Nambiar is sufficient to persuade me to take a different view of the matter than was taken in *Gopalan's* case(1). It may be pointed out that Parliament may well have thought that it was unnecessary to fix any maximum period of detention in the new statute which was of a temporary nature and whose own tenure of life was limited to one year. Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them. The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law.

The last point urged by Mr. Nambiar that the provisions of the amended Act contravene the provisions of article 21 of the Constitution does not impress me. The expression "procedure established by law" was considered by the majority in *Gopalan's case*(1) as meaning procedure prescribed by law. The petitioners have been detained in accordance with the procedure prescribed by the amended statute and their detention therefore is in accordance with procedure prescribed by law. The contention of Mr. Nambiar that they are governed by the procedure contained in section 12 of Act IV of 1950 as that was the procedure at the time when initially they were detained is, in my opinion, unsound. It is open to Parliament to change the procedure by enacting a law and that procedure becomes the procedure established by law within the meaning

(1) [1950] S.C.R. 88.

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of that expression in article 21 of the Constitution. Further, the present detention of the petitioners being by virtue of section 12 of the amended Act a new detention under the amended Act, the procedure prescribed by the amended Act is the procedure established by law within the meaning of article 21.

For the reasons given above, in my opinion the Preventive Detention (Amendment) Act, 1951, is a valid statute and the provisions impugned by Mr. Nambiar do not contravene the Constitution and the petitioners are not entitled to their release merely on the ground that the period of one year mentioned in section 12 of Act IV of 1950 has expired.

On the merits of the petitions it was urged (1) that the grounds supplied to then were vague and insufficient to enable them to make a proper representation, and (2) that their detention was *mala fide* and on political and party considerations. There is no force whatever in these contentions.

The result is that all these petitions are dismissed and the rules are discharged. This order will have force in the case of petitioners who have so far not been released by Government.

S. R. Das J.

S. R. DAS J.—I agree that the petitions should be dismissed and I do so substantially on the grounds stated by my learned brother Mahajan.

Bose J.

BOSE J.—With the utmost respect I am unable to accept the majority view. In my judgment, section 11 (1) of the amending Act is *ultra vires*. The ground on which I hold it to be so was suggested by me in the course of the arguments. It was, however, not very fully dealt with possibly because I expressed my view at a late stage and possibly because I did so somewhat sketchily. But as I am ploughing a lonely furrow that, fortunately, will not much matter.

Articles 21 and 22 confer the fundamental right of personal liberty. The first is general, and as the meaning of the words "procedure established by law" has

been thoroughly discussed in *Gopalan's* case(1), I do not intend to cover that ground. But so far as article 22 (4) is concerned, my opinion is that it confers a fundamental right not to be kept under preventive detention beyond a certain period. The extent of that period can vary but it can only be extended beyond three months within certain fixed limits and subject to specified conditions.

Article 246 read with item 9 in List I and item 3 in List III of the Seventh Schedule confers jurisdiction upon the Union Parliament and the State Legislatures to make laws for preventive detention, but article 22 (4) imposes restrictions. It says that—

"No law providing for preventive detention shall authorise the detention of a person for a longer period than three months,"

unless certain conditions are fulfilled.

The conditions are set out in sub-clause (a) and sub-clause (b). Under the former, a law can provide for preventive detention over three months provided (1) there is an advisory board of a certain character, (2) the board is of opinion that there is sufficient cause for longer detention, and (3) the board reports before the expiration of the three months. Then follows a further restriction which is contained in the proviso to sub-clause (4). This states that—

"nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)."

Sub-clause (b) of clause (7) reads as follows :—

"(7) Parliament may by law prescribe—

* * *

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention."

The second set of conditions is given in sub-clause (b) of clause (4). This sets out that a person can also be detained beyond three months provided—

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"such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)."

I venture to underline the "and" because, in my opinion, a lot turns on it. But I shall deal with that later.

Sub-clause (a) of clause (7) empowers Parliament to prescribe—

"the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an advisory board in accordance with the provision of sub-clause (a) of clause (4)."

In my opinion, these provisions confer a fundamental right not to be detained beyond a certain period. The extent of that period can vary but the maximum period of detention cannot exceed certain fixed limits. Those limits are (a) in the first instance, three months: if not, (b) the maximum prescribed by Parliament under sub-clause (7) (b). In my opinion, no law can be made authorising detention either under sub-clause (4) (a) or (4) (b) unless maximum period of detention is prescribed by Parliament under sub-clause (7) (b).

I do not agree with the contention that the word "may" in clause (7) means "must". I am not prepared to depart from the usual meaning of words unless compelled to do so for overwhelming reasons. In my opinion, Parliament is free to prescribe or not to prescribe a maximum period under clause (7) (b). It cannot be compelled to do so. But equally neither Parliament nor a State Legislature is compelled to authorise preventive detention beyond three months. If, however, either wishes to do so, then it is bound to conform to the provisions of either sub-clause (a) or sub-clause (b) of clause (4) or both; and in the case of sub-clause (a) the proviso is as much a part of the sub-clause as its main provision. If no maximum limit is fixed under clause (7) (b), then the proviso cannot operate and if it cannot operate, no legislative action

can, in my opinion, be taken under clause (4) (a). If A is told by B that he may go to a bank and withdraw a sum of money not exceeding such limit as may be fixed by C, it is evident that until C fixes the limit no money can be withdrawn. C cannot be compelled to fix a limit but if he chooses not to do so, the money cannot be withdrawn. Equally, if A is told that he may withdraw money not exceeding a limit which he himself may fix, there can, in my opinion, be no right of withdrawal until he fixes the limit.

Look at it another way. A British General is told by the Indian Government that he may travel from India to Burma quickly and easily by plane. He is also told that he may in addition drive by car over the hills and through the jungles provided he does not go beyond the confines of any road made by the Burmese Government; and the Burmese Government is told that it may, if it so chooses, put in a road at India's expense. It is fairly obvious that the Burmese Government is not bound to make the road and it is equally obvious that under these conditions the General will not be able to go by car unless the road is made.

I realise that analogies are often inaccurate and may be misleading. But these examples serve to illustrate the line of my reasoning. In my opinion, the Constitution (a) tells the State Legislatures that they may legislate for preventive detention beyond three months but not beyond a limit which Parliament may fix and (b) tells Parliament that Parliament itself may do the same thing provided the detention does not exceed a maximum which it may itself fix. There is no need to fix a maximum in either event but if that is not done, then there can be no legislation under clause (4) (a). Until the road is built there is no right of way.

The same limitation attaches to clause (4) (b). Legislative action cannot be taken under this unless, first, the law is made by Parliament and, second, it is made "under sub-clauses (a) and (b) of clause (7)". I again venture to underline the "and" because, in my opinion, "and" means and should mean "and" unless there is

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compelling reason to make it mean "or". To my mind, not only is there no compelling reason here but, on the contrary, there are powerful reasons why it should be construed in its usual and normal sense. The reasons are these.

Articles 21 and 22 confer a fundamental right and give a fundamental guarantee. It is therefore the duty of the Court to see that the right is kept fundamental and that the fullest scope is given to the guarantee. It is our duty to ensure that the right and the guarantee are not rendered illusory and meaningless. Therefore, wherever there is scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the subject must always be used because the right has been conferred upon him and it is the right which has been made fundamental, not the fetters and limitations with which it may be circumscribed by legislative action. It is true the full scope and content of the right cannot be determined without examining the boundaries within which it is to be confined, and I agree that in interpreting these provisions equal weight must be given to all the clauses; also that no one part can be treated with greater sanctity than the rest. But if, when all that is done, doubt still remains, then the doubt must, in my judgment, be resolved in favour of the subject and not of the State.

Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" "or", or "may" and "must". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score.

I hold it therefore to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on Fundamental Rights, to resolve it in favour of the freedoms which have been so solemnly stressed. Read the magnificent sweep of the preamble :—

"We, the people of India, having solemnly resolved to constitute India into a Sovereign *Democratic* Republic and to secure to all its citizens : Justice, Liberty, Equality, Fraternity."

Read the provisions of the chapter on Fundamental Rights :—

"All citizens shall have the right etc."

* * *

"No person shall be deprived of his life or personal liberty *except* according to procedure established by law."

* * *

"No person who is arrested shall be detained in custody *without* etc."

* * *

'No law providing for preventive detention shall authorise etc. *unless*—"

Read the provisions which circumscribe the powers of Parliament and prevent it from being supreme. What does it all add up to ? How can it be doubted that the stress throughout is on the freedom conferred and that the limitations placed on them are but regrettable necessities ?

I do not doubt that in construing the Constitution we must do so according to all the usual well recognised canons of construction. I do not doubt that when the language is plain, full effect must be given to it whatever the implications. All I insist on is that when there is ambiguity or doubt and it is possible to take either this view or that, then we must come down on the side of liberty and freedom; and I err in good company in so holding. Lord Romer said as much in *Liversidge's* case (1) though he made an exception in the

(1) [1942] A.C. 206 at 280.

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case of war legislation. How can it be said that in this case there is no ambiguity and that there is no room for doubt? When I am asked to hold that "and" means "or" and that "may" means "must", how can it be said that there is no room for difference of opinion? When I am old that—

"no law providing for preventive detention shall authorise the detention of a person for a longer period than three months"

unless there is an Advisory Board etc., and even then not beyond

"the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)"

how can it be said that there is no doubt about the intention and that this clearly and unambiguously means that the detention can be for an indefinite period even under a State law if Parliament does not choose to act under clause (7)(b)? To my mind, there is ambiguity and there is room for doubt.

I feel that the people of India chose for themselves the free way of life and that they entrusted to Parliament, which represents their will, the duty of satisfying itself that any limitations hereafter to be placed on the freedoms conferred are necessary and essential and that these limitations will not exceed such limits as Parliament itself shall determine solemnly and deliberately, after anxious scrutiny and dutiful care. I cannot bring myself to believe that the framers of our Constitution intended that the liberties guaranteed should be illusory and meaningless or that they could be toyed with by this person or that. They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject.

I am not hampered here by considerations of war necessity or emergency legislation where some authorities hold that the canons of constructions are different

and that allowance must be made in favour of the State for the imperfections of language used in legislation which had to be drafted and enacted in a desperate hurry with the State in dire and immediate peril. I am construing a Constitution which was hammered out solemnly and deliberately after the most mature consideration and with the most anxious care. I feel bound, therefore, when there is ambiguity or doubt, to resolve it in favour of what I conceive to be the free way of a Sovereign *Democratic* Republic. After all, who framed the Constitution and for whose benefit was it made?—not just for those in brief authority, not only for lawyers and dialecticians but for the common people of India. It should therefore be construed, when that can be done without doing violence to the language employed, in a simple straightforward way so that it makes sense to the man in the street, so that the common people of the land can follow and understand its meaning. To my mind, the whole concept of the Constitution is that after years of bitter struggle the citizens of India are assured that certain liberties shall be guaranteed to them and that these liberties shall not be curtailed beyond limits which they and all the world can know and which can only be fixed by the highest authority in the land, Parliament itself, directly and specifically after affording opportunity for due deliberation in that august body. I would struggle hard against any interpretation which permitted evasion of those important limitations and which permitted those hardwon liberties to be curtailed by some accidental side wind which allows virtual delegation of the responsibility for fixing the maximum limits which Parliament is empowered to fix to some lesser authority, and worse, for fixing them *ad hoc* in each individual case, for that, in my opinion, is what actually happens, whatever the technical name, when Parliament fixes no maximum and lesser authorities are left free to decide in each case how long the individual should be detained. I am clear that these are not matters which should be viewed technically or narrowly but in the broad and liberal spirit in which they were conceived. Bearing this in mind, I will

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proceed to examine the impugned provisions of the amending Act.

In my judgment, section 9 is good because it confers a benefit and a privilege. It takes away nothing. It gives all detenus the right to go before an Advisory Board for review of their cases. It confers this right not only on those who may be detained in the future but also on those already under detention. And further, it confers this right on those who had no such right before. This is not an infringement of any fundamental right nor does it contravene any article of the Constitution; therefore Parliament was free to legislate as it pleased regarding that. It was free artificially to alter the starting point of the order of detention which is what it has done in sub-section (2)(a). That section, in my judgment, is *intra vires.*

So also is new section 12 which continues in force existing detentions despite the expiry of the old Act and states that the passing of the new Act shall not affect either the validity or *duration* of orders passed under the old Act. It will be remembered that the detentions we are considering in these cases were good under the old Act. That Act prescribed a maximum limit, namely one year, for this class of detention. In my opinion, Parliament had the right to say in this particular manner, for the purpose of removing doubts, that detentions already in force under that Act should continue in force for the maximum period already prescribed. That, to my mind, is the force of the words "continue," "validity" and "*duration.*" That would have been the result in any event but section 12 is there to remove possible doubts.

Section 11(2) is also good because here again a benefit is conferred. Detenus who had no right to release on the advice of an Advisory Board are here given this privilege. Therefore, this also *intra vires.* But sub-section (1) is, to my mind, *ultra vires.* It is here that we find an infringement of article 22(4). It reads:—

"In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may

confirm the detention order and continue the detention of the person concerned for such period as it thinks fit".

This is word for word the same as section 11 of the old Act. It does not prescribe a maximum limit.

Now section 11 replaces sections 11 and 12 of the old Act. The amending Act directs that new section 11 be substituted for old sections 11 and 12. Old section 12 had prescribed a maximum limit of one year in certain classes of cases. That is done away with in the new Act As regards the rest, neither the old Act nor the new prescribes any limit for other classes of detention. That, in my opinion, not only contravenes article 22(4) but in effect shifts the responsibility for prescribing a maximum to the executive authorities of each State and allows them to do it *ad hoc* in each case. I am not speaking technically at the moment. I am viewing it broadly as the man in the street would. I am placing myself in the position of the detenu and looking at it through his eyes. The niceties of the law do not matter to him. He does not care about grammar. All that matters to him is that he is behind the bars and that Parliament has not fixed any limit in his kind of case and that local authorities tell him that they have the right to say how long he shall remain under detention. I cannot bring myself to think that this was intended by the Constitution. The powers given to Parliament are ample. The Safeguards for the safety of the State are all there. In the last resort, immediate action can be taken under the emergency provisions. Therefore, when Parliament and the State Legislatures are told that they cannot authorise preventive detention beyond three months unless Parliament does this and that, I am of opinion that the responsibility to do these things is on Parliament itself and that in this particular matter there can be no delegation of authority. The Constituent Assembly has entrusted this particular matter to the care of Parliament itself and has made this Parliament's special responsibility. The country is therefore entitled to receive the benefit of the mature judgment, wisdom and patriotism of that august body.

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I am not doubting Parliament's general powers of delegation. But, in my opinion, these powers are circumscribed and each case must be judged upon its own circumstances. As this matter is under consideration in another case and as mine is a dissenting voice here, all I need say in this case is that in my judgment this is not one of the matters which can be delegated.

It was said that all this is irrelevant because a maximum limit has in fact been fixed in the present instance. It was argued that the life of this Act has only been fixed for one year and that the life of the old Act was also only one year and that this in effect fixes a maximum. I am aware that there is high authority for this view and I venture to dissent with the utmost reluctance, but with the greatest respect I find myself unable to agree.

In the first place, I cannot agree that the maximum limit which Parliament is authorised to fix can be fixed in this indirect way. What Parliament is empowered to do under article 22(7)(b) is to prescribe—

"the maximum period for which any person may in any class or classes of cases be detained."

It cannot do this by saying that no person shall be detained beyond the 26th of February, 1952, because that means that persons arrested on the 27th of February, 1951, can be kept under detention for a year while those arrested on the 25th of February, 1952, can only be detained for one day. That, in my judgment, is not what is meant by prescribing a maximum period.

In the next place, when Parliament is authorised to do this, it is expected to do so consciously and deliberately after giving the matter due and mature consideration. It is not possible to say that Parliament had this provision in mind and intended to act under it when it merely fixed the duration of the Act. Had the matter been properly discussed and placed before Parliament in the way it should have been, it is conceivable that it might have considered that the maximum period of detention should not exceed, say, six months though the duration of the Act should be one

year. In other words, that person could continue to be arrested so long as the Act was in force but they could not be kept under detention for more than six months. With the utmost respect, I cannot agree that functions so solemnly entrusted to the care of Parliament under these fundamental clauses can be discharged unconsciously.

In the third place, I cannot agree that these detentions would come to an end with the expiry of the Act. The rule in the case of temporary Acts is that—

"as a *general rule, and unless it contains some special provision to the contrary,* after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be *prosecuted and punished* before the Act expires." (Craies on Statute Law, 4th edition, page 347).

But transactions which are concluded and complete before the Act expires continue in being despite the expiry. See Craies on Statute Law, page 348, and 31 Halsbury's Laws of England (Hailsham Edition), page 513. I take this to mean that if a man is tried for an offence created by a temporary Act and is found guilty and sentenced to, say, five years' imprisonment, he would have to serve his term even if the Act were to expire the next day. In my opinion, the position is the same in the case of detentions. A man, who is arrested under a temporary detention Act and validly ordered to be detained for a particular period, would not be entitled to claim release before his time just because the Act expired earlier.

Then again. The Act we are considering has special provision to the contrary. Section 11(1) empowers either a State or the Union Government to order the detention of a person "for such period as it thinks fit". If this provision is not *ultra vires,* then the Act in express terms permits the appropriate Government to order a detention which shall endure beyond the life of the Act itself, and unless the fundamental provisions of the Constitution can be called in aid, there is nothing to prevent Parliament from enacting such a

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law. Therefore, the mere fact that the Act under consideration is to expire on the 26th of February, 1952, does not, in my opinion, mean that detentions under it must necessarily come to an end on that date. That in turn means that no maximum period has been prescribed even indirectly.

Looked straight in the face, what does the decision of the majority upholding the validity of section 11 (1) import if it is pushed to its logical conclusion? To me it spells just this. The Constitution tells all persons resident in the land—

"Here is the full extent of your liberty so far as the length of detention is concerned. We guarantee that you will not be detained beyond three months unless Parliament otherwise directs, either generally or in your particular class of case; but we empower Parliament to smash the guarantee absolutely if it so chooses without let or hindrance, without restriction. Though we authorise Parliament to prescribe a maximum limit of detention if it so chooses, we place no compulsion on it to do so and we authorise it to pass legislation which will empower any person or authority Parliament chooses to name, right down to a police constable, to arrest you and detain you as long as he pleases, for the duration of your life if he wants, so that you may linger and rot in jail till you die, as did men in the Bastille."

In the absence of restrictions Parliament undoubtedly has these powers, for it can legislate about preventive detention. But if you remove the restrictions, what is left of the fundamental right? My concept of a fundamental right is something which Parliament cannot touch save by an amendment of the Constitution. The full content of the right can be as small or as narrow as you please, but unless there is a residue which can answer that test, there is to my mind nothing fundamental. Now, I have no doubt that a fundamental right regarding the length of detention was intended to be conferred, It would be pointless to make the provision about three months and place it in the chapter on Fundamental Rights if that were not so; so also there would be no point in the

elaborate provisions regarding this in clauses (4) and (7). A simple clause saying that no detention shall exceed three months *"unless Parliament otherwise directs"* would have met the case. It is therefore clear to my mind that something fundamental regarding the length of detention which Parliament could not touch save by amendment of the Constitution was intended to be conferred. But if section 11 (1) is upheld, what is there left which is beyond the reach of Parliament? Parliament has here in effect said that there need be no general limit to the duration of detentions and that lesser authorities can fix the duration in each individual case and are free to detain for as long as they please. If that is so, then what is there left of anything fundamental regarding the maximum length of detention? To my mind, the whole object of the elaborate provisions in clauses (4) and (7) is to place restraints on powers regarding the length of indefinite and arbitrary detentions which would otherwise be absolute.

For these reasons, I am of opinion that section 11 (1) is *ultra vires*. My only hesitation has been on the score of *Gopalan's* case (1). I have searched long and anxiously to see whether this question is concluded there and whether my hands are tied. After considerable study of the decision, I have reached the conclusion that I am not bound.

There were six Judges there. The present Act, the amending Act of 1951, was not under consideration, but section 11 of the old Act, which corresponds to section 11(1) of the new, was considered. But only two Judges, namely, my Lord the Chief Justice and my brother Mahajan, dealt with this section directly. Their views are directly counter to mine. They expressly hold that section 11 of the old Act is *intra vires*. That means that section 11(1) of the present Act would also have to be upheld on their view. But the other four Judges did not discuss the *vires* of section 11 at all. They concentrated their attention on sections 12 and 14 of the old Act. It is true my

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brother Das made a general observation at the end of his judgment that in his view "the impugned Act is valid law except as to section 14" but he did not expressly consider section 11. In the circumstances, I do not think *Gopalan's* case concludes the matter.

It is perhaps ironical that I should struggle to uphold these freedoms in favour of a class of persons who, if rumour is to be accredited and if the list of their activities furnished to us is a true guide, would be the first to destroy them if they but had the power. But I cannot allow personal predilections to sway my judgment of the Constitution. As Lord Justice Scrutton remarked in *Rex.* v. *Home Secretary* (1) :—

"It is, indeed, one test of belief in principles if you apply them to cases with which you have no sympathy at all."

and as Mr. Justice Holmes of the United States Supreme Court said, speaking of the American Constitution,

"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

I respectfully dissent from the majority view and consider that section 11 (1) is *ultra vires.* It follows, in my view, that the present detentions are bad. I am of opinion that the petitioners in these cases are entitled to immediate release.

Petitions dismissed.

Agent for the petitioner in Petition No. 303 : *Subrahmanyam.*

Agent for the Petitioners in Petitions Nos. 618, 619, 621, 622 and 624 to 631 : *V. P. K. Nambiyar.*

Agent for the State of Madras : *P. A. Mehta.*

Agent for the State of Assam : *Naunit Lal.*

Agent for the Union of India : *P. A. Mehta.*

(1) (1923) L.J.K.B. 797