THE

INDIAN LAW REPORTS

PUNJAB SERIES

FULL BENCH

CRIMINAL WRIT

Before Bhandari, Khosla and Harnam Singh, JJ.

AJAIB SINGH,—*Petitioner,*

versus

THE STATE OF PUNJAB,—*Respondent.*

1952

June 10th

Criminal Writ No. 144 of 1951.

Abducted Persons (Recovery and Restoration) Act, (LXV of 1949)—Whether ultra vires *of the Constitution of India—Constitution of India, Articles 14, 15, 19, 21 and 22—Abducted Persons (Recovery and Restoration) Act, Section 6—Tribunal constituted under—Whether subject to supervision of High Court—Constitution of Tribunal—Whether legal—Arrest—Meaning of—Interpretation of Statutes, Inconsistency between two Statutes—Test to determine—Treaties with foreign Powers—Whether vested with statutory authority in India.*

Held per Full Bench

That Abducted Persons (Recovery and Restoration) Act is inconsistent with the provisions of Article 22 of the Constitution and therefore the detention of the persons arrested under the Act is illegal, but that the Act is not inconsistent with the provisions of Articles 14, 15 and 21 of the Constitution of India.

That the expression "Arrest" appearing in Article 22 of the Constitution of India is a comprehensive term which is designed to cover all cases in which a person is apprehended by legal authority and is not confined to cases in which a person is apprehended by or under the orders of a Civil or Criminal Court. It covers not only cases of punitive or preventive detention but also cases of what may for convenience be called "Protective detention". It makes no difference that the Act does not use the word "arrest" but uses the expression "take into custody".

Ajaib Singh
v.
The State of Punjab

That an Act is said to be inconsistent with another when the two cannot stand together, i.e., when to obey one enactment is to disobey the other. Since it is impossible to obey the directions contained in sections 4 and 7 of the Act of 1949 without disobeying the directions contained in clauses (1) and (2) of Article 22 of the Constitution, the provisions of those sections are inconsistent with the provisions of Article 22 and are therefore *ultra vires*.

Held per Bhandari and Khosla, JJ.

That the Tribunal constituted under section 6 of the Act is subject to the general supervision of the High Court by virtue of Article 227 of the Constitution.

That the Tribunal which dealt with the cases of the Petitioners was not constituted in accordance with the provisions of law and the orders passed by it were wholly without jurisdiction.

Held per Bhandari, J.

That the Act is inconsistent with the provisions of Article 19 (1) (g) of the Constitution. It is a fundamental right of every citizen of an independent democratic State to move freely in any part of the State for the right of citizenship carries with it the corresponding rights of locomotion and residence and rights to carry on business and to practise a profession. These rights are based on the implied agreement of every member of the society that he shall have a right to live and move in the State which he in a sense helps to constitute and are inherent in all citizens of free governments. The right to practise any profession or to carry on any occupation, trade or business would be meaningless if it does not include a right to stay in the country, for a person cannot exercise this right in a country where he cannot live. To deport one who claims to be a citizen is to deprive him of a great privilege.

Held per Khosla, J.

That the Act is not inconsistent with the provisions of Article 19 of the Constitution. There is no provision in the Constitution against a citizen being sent out of India. Indeed, item 19 read with item 14 of list I of the Seventh Schedule to the Constitution would appear to indicate that the Union Parliament is competent to pass laws whereby the citizens of India may be expelled from the country in accordance with treaties and agreements with foreign countries. There is nothing in the Constitution whereby a citizen cannot be deprived of his rights as a citizen or deported from India.

Ajaib Singh
v.
The State of Punjab

Held per Harnam Singh, J.

That Article 19 of the Constitution has no application to the Act and the Court is not called upon to decide upon the reasonableness of the provisions of the Act under Article 19 (5).

Held per Khosla, J.

That the phrase "the procedure established by law" in Article 21 of the Constitution means procedure laid down by law or the procedure prescribed by Article 22. There is, therefore, nothing in the impugned Act which is contrary to the provisions of Article 21. The procedure governing the recovery and restoration of abducted women is set out in an Act of Parliament and as long as the procedure is not inconsistent with Article 22 it must be held to be valid and lawful.

Held per Harnam Singh, J.

That section 6 of the Act satisfies the requirements of Article 21 of the Constitution.

Held per Bhandari, J.

There is no provision in the Constitution of India which declares that all treaties to which the Government of India is a party shall be vested with statutory authority.

Dr. Bonham's case (1), *Hurtado* v. *California* (2), *Gopalan* v. *State of Madras* (3), *United States* v. *Wheeler* (4), *Allgeyer* v. *Louisiana* (5), *Meyer* v. *State of Nebraska* (6), *Coppage* v. *Kansas* (7), *Ng Fund Ho* v. *White* (8), *Fox* v. *Bishop of Chester* (9), *Morris* v. *Blackman* (10), *Ware* v. *Hyloon* (11), *Missoure* v. *Holland* (12), *A. L. A. Schechter Poultry Corporation* v. *United States* (13), *Attorney-General for Queensland* v. *The Attorney-General for the Commonwealth* (14), *R.* v. *Brishbane Licensing Court* (15),

---

(1) (1610) 8 Coke's Reports at 118.
(2) (1884) 110 U. S. 516.
(3) A. I. R. 1950 S. C. 27.
(4) (1920) 254 U. S. 281.
(5) (1897) 165 U. S. 578 589.
(6) (1923) 262 U. S. 390.
(7) (1915) 236 U. S. 1.
(8) 259 U. S. 276.
(9) (1824) 2 B and C 635, 655.
(10) 2 H. & C. 912 at p. 918.
(11) (1796) 3, Dall 199.
(12) (1920) 252 U. S. 416.
(13) 295 U. S. 495. 79 L. Ed. 1570.
(14) 20 C. L. R. 148.
(15) 28 C. L. R. 23.

Ajaib Singh
v.
The State of Punjab

Clyde Engineering Company, Ltd., v. *Cowbern* (1), *H. V. Mackay Pty, Ltd.*, v. *Hunt* (2), *Victoria* v. *The Commonwealth* (3), *The State of West Bengal* v. *Anwar Ali* (4), *Yick Wo* v. *Hepkins* (5), *State of Madras* v. *V. G. Row* (6), *Charanjit Lal* v. *Union of India* (7), *State of Bombay* v. *F. N. Balsara* (8), *Reetz* v. *Michigan* (9), Ex-parte *Walsh and Johnson* (10), *Ram Singh* v. *State of Delhi* (11), *Kutner* v. *Phillips* (12), referred to and relied on; *Shabbir Hussain* v. *The State of U. P. and another* (13), dissented.

A petition for habeas corpus *under Article 226 of the Constitution filed by Ajaib Singh on behalf of his alleged daughter Mukhtiar Kaur* alias *Sardaran alleging that the arrest and detention of Mukhtiar Kaur in a refugee camp under the Abducted Persons (Recovery and Restoration) Act was illegal as the said Act is* ultra vires *the Constitution of India and particularly Articles 14, 15, 19, 21 and 22. This petition along with some others came up for hearing before a Division Bench which referred them to a Full Bench.*

The counsel for the petitioners submitted that the Abducted Persons (Recovery and Restoration) Act of 1949, was *ultra vires* the Constitution of India, especially Articles 14, 15, 19 and 22. Section 4 of the Act was repugnant to Article 22 as the person arrested was not to be produced before a magistrate, no reasons were given for the arrest and he or she was not allowed to be defended by a counsel. There was no right given to the person arrested or her relatives to produce evidence, no rules had been framed to regulate the conduct of the enquiry by the Deputy Superintendent of Police or the Tribunal. Section 6 of the Act was repugnant because no procedure had been prescribed as to how the Tribunal was to act. The Muslim women who were born in

---

(1) (1926) 37 C. L. R. 466.
(2) 38 C. L. R. 308.
(3) 58 C. L. R. 618.
(4) A. I. R. 1952 S. C. 75.
(5) (1886) 118 U. S. 356.
(6) Case 90 of 1951.
(7) A. I. R. 1951 S. C. 41.
(8) A. I. R. 1951 S. C. 318.
(9) (1902) 188 U. S. 563.
(10) 37 C. L. R. 36.
(11) A. I. R. 1951 S. C. 270.
(12) (1891) 2 . Q. B. 267.
(13) A. I. R. 1952 All. 257.

India and continued to reside there, after partition, were citizens of India and the provisions of the Act providing for conveying such women to any place outside India were against the provisions of Article 19 of the Constitution. The Constitution nowhere provided for sending the citizens of India outside the country and sending a person out of India meant his civil death and a complete negation of the rights conferred by Article 19 (1) (*a*) to (*e*) of the Constitution. Article 10 of the Constitution afforded security to the citizens of India that they would continue to be such citizens and these abducted persons would lose their Indian citizenship when sent out to Pakistan. In order to determine whether a restriction was reasonable or not the Court should see the manner in which the restrictions were imposed. The Act violated the principles of natural justice which afforded to every person the right to cross-examine witnesses appearing against him. Under the Act the abducted person after arrest is not allowed to interview anybody or be defended by a counsel. No right has been given to her to cross-examine witnesses and no notice is sent to the abductors who are vitally interested in the abducted persons and the children born to them. Section 10 of the Act is, therefore, repugnant to the principles of natural justice as the Central Government has framed no rules for the purposes of the Act and the procedure actually followed by the Tribunal is not in consonance with the said principles. The Act also came in conflict with Article 15 of the Constitution as only Muslim women and children could be "abducted person" within the meaning of the Act and this discrimination was on the basis of religion only. Non-muslim women abducted in the same circumstances were not to be dealt with under the Act and were not to be deported out of India. The Act protects only Muslim women and is, therefore, *ultra vires*. It was next submitted that the Act came in conflict with Article 14 of the Constitution as well as it did not afford equality before the law to Muslim abducted persons and non-Muslim abducted persons. Under this Act the abductor goes scot free while the Muslim abducted

Ajaib Singh v. The State of Punjab

person is arrested and detained; in the case of non-Muslim abducted persons the abductor is punished and the abducted person is set free. Relying on A.I.R. 1952 S.C. 75, the counsel submitted that if two persons were in the same set of circumstances, they should be dealt with or tried in one and the same manner. The classification was, therefore, unreasonable.

Mr. C. K. Daphtary for the State submitted that reasonable restrictions, in the interest of general public, could be imposed on the rights given by Article 19 of the Constitution to the citizens of India to move and settle freely in any part of India. It had not been challenged that the Act was not in the interests of general public and the only question was whether the restrictions were reasonable.

Bhandari, J.: The argument is "it is not a restriction, it is a prohibition."

C. K. Daphtary: The Act provides "convey out" and not "deportation". The words are not interchangeable and they have different connotations. Conveyance out under the Act is not permanent. It is temporary and the person conveyed out can return to India in future if he or she so desires. If under circumstances of justifying necessity the legislature says that a person is to be sent out of India but that person can return to India in future, it is a reasonable restriction and not a prohibition.

Bhandari, J.: Is there any guarantee that the abducted person after return will not be arrested again?

C. K. Daphtary: It will be an abuse of the power under the Act as that person will no more be an "abducted person" within the definition of that phrase in the Act.

Harnam Singh J.: Has the legislature any power to convey a citizen out of India?

Khosla, J. : No citizen of India for any offence is to be sent out of India ; he may be hanged in India.

C. K. Daphtary : What about Extradition Law ? A citizen of India who returns to India after committing an offence outside India is liable to be extradited. The counsel further submitted that Article 19 of the Constitution did not apply where there was total deprivation of liberty in accordance with procedure established by law and Article 21 applied in such a case.

Khosla, J. : "Law" in Article 21 means good law or law in conformity with the Constitution and not any law.

C. K. Daphtary. : It is begging the question.

Khosla, J. : If the arrest is for some object, we have to see whether that object is consistent with the Constitution. The law is bad if it conflicts with any provision of the Constitution.

The counsel in reply referred to Gopalan's case and submitted that once there was a law, good or bad, and the liberty of the subject was deprived in accordance with that law, Article 19 would not stand in the way. The test to determine whether the Act violates the provisions of Article 19 or any other Article of the Constitution is the directness of the legislation to the object and pith and substance of the Act is to be seen. Further, the object, purpose and scope of the legislation is to be borne in mind. Article 19 guaranteed rights to a person while he was free and in India and it applied to inter-state restrictions only. As there was no such restriction in the Act it was not hit by Article 19. The impugned Act did not enact anything which took away the rights under Article 19. The legislature had the power to legislate extra-territorially and the scope of that legislation was to provide for the "conveyance out" of a citizen of India from the country. Items 18 and 19 in list I of the Seventh

Ajaib Singh v. The State of Punjab

Schedule to the Constitution of India give the power to the Parliament to legislate for extradition, emigration and expulsion from India.

Khosla, J.: These items empower the legislature to make laws on those subjects provided they are consistent with Article 19 of the Constitution. If they are against the Constitution the mere mention of these subjects in items 18 and 19 will not make them valid. Article 245 of the Constitution gives power to the Parliament to make laws "subject to the provisions of this Constitution". The reasonableness should be examined objectively, by itself and uninfluenced by any other consideration.

The counsel then argued that in Article 22 of the Constitution the word "person" meant a person who needed to be defended. In the impugned Act the words used are "taken into custody" and not "arrest".

Harnam Singh, J. Do not these words mean arrest?

The counsel replied in the negative and submitted that Article 22 implied that there were grounds for arrest and that it was a case which required defence. The person who is arrested is charged for an offence or something which he is to answer. It contemplates an arrest and a detention and not one. According to dictionary the word "arrest" means an apprehension to answer a charge which requires defence. He also referred to Corpus Juris Vol. 5, Page 385, for the meaning of the word "arrest" and submitted that arrest under the impugned Act was outside the scope of Article 22. There is no question of arrest as there was no intention to treat abducted persons as accused persons or persons guilty of any offence. Alternatively, the Act need not provide that the person taken into custody will have the right to be defended by a lawyer as the provisions of Article 22 are to be read in every Act which deals with arrest and detention.

Harnam Singh, J. : The Act is repugnant to Article 22 in another respect too. The Act provides that the abducted person after arrest should be taken to the officer in charge of the Camp while Article 22 says that she will be taken to a Magistrate. Obedience to both, is, therefore, not possible.

C. K. Daphtary : The law does not preclude an abducted person from being produced before a Magistrate within 24 hours. The production before a Magistrate, however, is not necessary as the arrested person does not require to be defended. The production before a Magistrate is necessary only if the person is arrested to face a charge. If it be possible to put two interpretations on the word " arrest, " then that interpretation should be preferred which is in conformity with the object of the Act and not the one which destroys it. The purpose and object of the Act is to remove the abducted persons from the atmosphere of fear and bring them to neutral atmosphere where they can make their choice freely. If they are produced before a Magistrate and released on bail, they go back to the abductors and are not enabled to make a free decision. Production before a Magistrate—an officer appointed to try criminal cases—goes to prove that " arrest " means arrest to answer a charge.

Harnam Singh, J. : Why not compare this provision with section 100, Cr. P. Code. Person who is confined is not an offender, still warrants are issued, confined person recovered and produced before a Magistrate. Therefore production before a Magistrate is not necessarily of a person who is arrested to answer a charge.

Ajaib Singh
v.
The State of Punjab

C. K. Daphtary : Section 100, Cr. P. Code, does not empower the Magistrate to order detention of the person who is brought before him. Article 22 does give that power.

Arguing on the working of the Tribunal appointed under the Act, the counsel submitted that the fact that there were no rules prescribed did not make the Tribunal bad. There was no prohibition against the appointment of a Pakistani national to the Tribunal. The Tribunal was not a court of law and therefore there was no need of witnesses or counsel. Principles of natural justice should be followed in order to see that substantial justice is done. In Gopalan's case it was held that in the Tribunal it is not necessary to examine, cross-examine or re-examine witnesses. The Act is an emergency legislation ; it is limited to a special class of persons and to a period of time. It is, therefore, necessary that the enquiry should be of a summary nature and not a protracted trial.

The Act did not come in conflict with Article 14 of the Constitution as it was restricted to a class of persons whose conditions were different from others and therefore it was a reasonable classification. Within that class the Act did not discriminate between one another. The Act did not discriminate against anyone. It bestowed benefits on some. It did not apply to abducted persons merely because they were Muslims but because of their circumstances. It was, therefore, not in conflict with Article 15 of the Constitution either.

The counsel for the petitioners in reply submitted that the Act was bad because the object of the Act was to send the abducted persons out of India.

Khosla, J. : The object is restoration and sending out is the means to attain that object.

The counsel submitted that if the means employed to achieve that object deprive a citizen of the rights

guaranteed in Part III of the Constitution, the Act was bad and referred to A. I. R. 1951 S.C. 118 and Gopalan's case.

The counsel then submitted that the Act was a direct legislation on the right of the abducted persons to reside and move freely anywhere in India and was therefore covered by Article 19. It is said that the taking out is temporary and therefore the restriction is reasonable. That is not so because there is no provision in the Act which enables the abducted person to return to India.

Khosla, J. : Although the Act is temporary, the damage may be permanent.

The counsel then submitted that the words "taking into custody" and "arrest" meant the same thing and that every person taken into custody and detained had the rights conferred by Article 22 irrespective of the fact that he was or was not accused of a charge that he was to answer. Section 4 of the Act excluded the possibility of complying with Article 22 and the safeguards provided by Article 22 must find a place in the Act itself to sustain its validity. It cannot be said that the Act should be construed subject to Article 22 or that the provisions of Article 22 should always be read in every Act. The abducted person may be conveyed out of India under section 7 of the Act even if she had no relations there. Sections 4 and and 7 of the Act oust the jurisdiction of the Magistrate and as detention is not under the orders of a Magistrate, the sections are *ultra vires*.

Case was referred to the Full Bench consisting of Mr. Justice Bhandari, Mr. Justice Khosla and Mr. Justice Harnam Singh by the Division Bench consisting of Mr. Justice Bhandari and Mr. Justice Khosla—*vide* its order, dated the 26th November, 1951 for decision of certain points of law and was again returned to the above-noted Division Bench by the Full Bench—*vide* its order, dated 10th June, 1952, for final disposal.

Ajaib Singh
v.
The State of Punjab

Khosla J.

ORDER OF REFERENCE

KHOSLA, J. This is a petition by one Ajaib Singh under Article 226 of the Constitution. The petition is made on behalf of his alleged daughter Mukhtiar Kaur *alias* Sardaran who is at present being detained in the Muslim Girls Refugee Camp at Jullundur. The petitioner's contention is that he was married to Mukhtiar Kaur's mother about fourteen years ago and that Mukhtiar Kaur is not an abducted woman within the meaning of Act No. 65 of 1949 and she has therefore been wrongly taken away from his protection and confined in the Refugee Camp. It is further contended in the application that the authorities intend to send Mukhtiar Kaur away to Pakistan. A copy of the order passed by the Tribunal constituted under the abovementioned Act has been placed before us. The Tribunal has found as a matter of fact that Mukhtiar Kaur *alias* Sardaran is an abducted woman. This finding of the Tribunal is final and cannot be questioned in this Court. It is, however, contended on behalf of the petitioner that Act No. 65 of 1949 is *ultra vires* the Constitution. Mr. Doabia, who argued the case on behalf of the petitioner, has raised a number of points in support of his argument. He contended in the first place that Mukhtiar Kaur is a citizen of India as her case is covered by the definition of Indian citizen given in Article 5. It is only a Court of law that can determine whether a certain person is or is not a citizen of India and the powers of the Tribunal trespass on the right of a citizen to have his status declared by a competent Court of law. He further contends that the provisions of the Act violate the fundamental rights of Indian citizens set out in Article 19 of the Constitution. A citizen of India has a right to move freely throughout the territory of India and to reside and settle in any part of the territory of India, and, assuming that Mukhtiar Kaur is a citizen of India, her rights have been violated although her case does not fall under any of the Exceptions to Article 19. Moreover, a citizen of India cannot, under any law whatsoever, be sent out of the territory of India. It is further contended that the Act violates the provisions of Article

22 of the Constitution which deals with the case of all persons whether they are Indian citizens or not. And finally it is contended that the Tribunal does not follow any procedure consistent with natural justice. It makes no enquiry and merely endorses the recommendation of a subordinate officer. It is pointed out that no rules of procedure have been framed by the Central Government as contemplated by section 10 of the Act and that the Tribunal acts in every case and at any rate, has acted in this particular case in a wholly arbitrary and capricious manner. The Tribunal exercises *quasi* judicial functions and is therefore subject to the superintendence of this Court under the provisions of Article 227 of the Constitution.

These are matters of far reaching importance. There are several petitions of this type pending in this Court and similar petitions continue to be put in. It is desirable that these matters should be considered in detail by a larger Bench. I am, therefore, of the opinion that the case should be laid before my Lord the Chief Justice for the constitution of Bench of three or more Judges to consider the question of the validity of Act No. 65 of 1949. I would draw up the following provisional questions but the Bench constituted to consider the matter will not be obliged to confine itself within the narrow limits of the phraseology employed by me :—

(1) Is Central Act No. 65 of 1949 *ultra vires* the Constitution because its provisions with regard to the detention in refugee camps of persons living in India violate the rights conferred upon Indian citizens under Article 19 of the Constitution ?

(2) Is this Act *ultra vires* the Constitution because in terms it violates the provisions of Article 22 of the Constitution ?

(3) Is the Tribunal constituted under section 6 of the Act a Tribunal subject to the general supervision of the High Court by virtue of Article 227 of the Constitution ?

Ajaib Singh
v.
The State of Punjab

Bhandari J.

In Criminal Writs Nos. 137, 143, and 149 of 1951 a similar objection is raised and these may also be put up along with Ajaib Singh's petition before the Full Bench.

BHANDARI, J. I agree.

Petitioners by : HARBANS SINGH DOABIA, ANAND MOHAN SURI, HARBANS SINGH GUJRAL, D. K. KAPUR and SHAMAIR CHAND.

Respondent by : (State) Shri C. K. DAPHTARY, Solicitor-General of India, Shri S. M. SIKRI, Advocate-General, Punjab, Sardar KARTAR SINGH and Shri HAR PARSHAD, Assistant Advocates-General.

JUDGMENT OF THE FULL BENCH

BHANDARI, J. The only point for decision in the present case is whether the Abducted Persons (Recovery and Restoration) Act, 1949, is inconsistent with or violative of the Constitution of India.

In June 1951, the police entered the house of Ajaib Singh, petitioner, arrested Mst. Mukhtiar Kaur *alias* Sardaran under section 4 of the impugned Act and took her to the Muslim Girls Refugee Camp at Jullundur. On the 5th November, 1951, the petitioner, who claims to be Mukhtiar Kaur's father, put in a written application for a writ of *habeas corpus* in which he prayed that Mukhtiar Kaur be discharged from restraint as she was not an 'abducted person' and that she be not taken out of the territory of India. On the 17th November the Tribunal constituted by the Central Government under section 6 of the said Act came to the conclusion that she was an 'abducted person' within the meaning of the expression as defined in the Act of 1949 and recommended that she should be taken out of India and restored to her relations in Pakistan. They added, however, that the execution of the order should be held in abeyance until the petition for *habeas corpus* which was presented by Ajaib Singh is disposed of by this Court.

When the petition came up for hearing before my brother Khosla and myself, Mr. H. S. Doabia who appeared for the petitioner claimed on various grounds

that the Act of 1949 under which Mukhtiar Kaur was arrested and detained was in violation of the Constitution of India. As the objections to which our attention was invited gave rise to a number of questions of constitutional importance which are common to a number of similar petitions pending in this Court and are likely to arise in other cases, we decided to formulate a set of questions and to refer them for the decision of a larger Bench. These questions are as follows :—

"(1) Is the Central Act LXV of 1949 *ultra vires* the Constitution because its provisions with regard to the detention in refugee camps of persons living in India violate the rights conferred upon Indian citizens under Article 19 of the Constitution ?

(2) Is this Act *ultra vires* the Constitution because in terms it violates the provisions of Article 22 of the Constitution ?

(3) Is the Tribunal consituted under section 6 of the Act a Tribunal subject to the general supervision of the High Court by virtue of Article 227 of the Constitution?"

To these may be added three further questions which arose during the course of arguments, namely—

"(4) Does this Act conflict with the provisions of Article 14 on the ground that the State has denied to abducted persons equality before the law or the equal protection of the laws within the territory of India ?

(5) Does this Act conflict with the provisions of Article 15 on the ground that the State has discriminated against abducted persons who happen to be citizens of India on the ground of religion alone ?

(6) Does this Act conflict with Article 21 on the ground that abducted persons are deprived of their personal liberty in a manner which is contrary to principles of natural justice ?"

Ajaib Singh
v.
The State of Punjab

Bhandari J.

The petitions of Ajaib Singh and certain other persons have been placed before this Bench and have been argued with conspicuous ability by the learned counsel for the petitioners and by Mr. Daphtary Solicitor-General to the Central Government.

The Abducted Persons (Recovery and Restoration) Act, 1949, was enacted on the 28th December, 1949, in pursuance of an agreement between the Government of India and the Government of Pakistan for the restoration of abducted persons. It is to remain in force till the 31st October, 1952. According to section 2 an 'abducted person' means a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim and who, on or after that day and before the 1st day of January, 1949, has become separated from his or her family and is found to be living with or under the control of any other individual or family, and in the latter case includes a child born to any such female after the said date. Section 4 empowers a police officer to enter any premises and take into custody any person found therein who in his opinion is an abducted person and to deliver such person to the custody of the officer in charge of the nearest camp for the reception and detention of abducted persons. Section 6 provides that if any question arises whether a person detained in a camp is or is not an abducted person or whether such person should be restored to his or her relatives or handed over to any other person or conveyed out of India or allowed to leave the camp, it shall be referred to, and decided by, a Tribunal constituted for the purpose by the Central Government. The decision of this Tribunal in a case dealt by it is final but power has been reserved to the Central Government to review or revise any such decision. Section 7 declares that any officer or authority to whom the custody of any abducted person has been delivered shall be entitled to receive and hold the person in custody and either restore such person to his or her relatives or convey such person out of India. Section 8 declares that the detention of any

abducted person in a camp in accordance with the provisions of the Act shall be lawful and shall not be called into question in any Court. Section 10 empowers the Central Government to make rules for the purposes of the Act.

On behalf of the petitioners it is contended—

(a) that the provisions of section 4 of the Statute contravene the provisions of Article 22 as the procedural protection guaranteed by clauses (a) and (b) of the said Article has been abrogated ;

(b) that the provisions of sections 6 and 7 conflict with the provisions of Article 19 as they do not impose 'reasonable restrictions' on, but take away altogether, the right of an abducted person to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property, and to practise any profession or to carry on any occupation, trade or business ; and

(c) that the provisions of section 10 are repugnant to the principles of natural justice as the Central Government has framed no rules for the purposes of the Act and the procedure actually followed by the Tribunal is not in consonance with the said principles.

Subsidiary questions in regard to inconsistency with Articles 14 and 15 were also raised.

The origin of fundamental rights may be traced back to the year 1215 when the great barons of England, who had assembled at Runnymede, forced from the hands of the unwilling King John the glorious charter of popular liberties known as Magna Carta. The 39th Chapter of this great constitutional document contained the pledge that—

"no freeman shall be taken or imprisoned, or dispossessed or outlawed, or banished, or in any way destroyed.....except

Ajaib Singh
v.
The State of Punjab

Bhandari J.

by the lawful judgment of his peers and by the law of the land."

Magna Carta was reaffirmed from time to time by successive English monarchs, and in 1354 Edward III recognised the liberties and customs which the people had enjoyed in the past and declared in Chapter 3 of 28 Edward III that—

> "no man of what state or condition soever he be, shall be put out of his land, or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."

The expressions "law of the land" and "due process of law" which appear in these documents appear to be synonymous and to guarantee that the monarch shall not proceed against the life, liberty or property of a feudal lord except in conformity with the usages of ancient custom or the common law. The object of this chapter of Magna Carta was to prevent the King from acting against the person or property of a baron except by a prosecution or suit instituted or conducted according to the prescribed forms and solemnities for ascertaining the guilt or determining the title to the property. When the feudal system disappeared from England the procedural protection which was afforded to barons was extended to commoners and Magna Carta became a real charter of liberties for the people of England. In his famous Institutes, Sir Edward Coke expressed the view that Magna Carta had embodied certain fundamental principles of right and justice, and that the common law contained a further expression of the same principles. Magna Carta and the common law, he contended, were the supreme law of the land and controlled both the King and Parliament. In his commentary on *Dr Bonham's* case (1) the eminent jurist observed as follows :—

> "And it appears in our books, that in many a case, the common law will control Acts of Parliament, and sometimes adjudge them

(1) (1610) 8 Coke's Reports at 118.

to be utterly void ; for when an Act of Parliament is against common rights or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

Although Coke's Institutes and Commentaries were given wide currency in England, the only visible effect that they produced in that country was that their brilliant author was removed from the office of Chief Justice of the King's Bench in 1616 on the ground that he had expressed 'extravagant' opinions in his writings. The sovereignty of Parliament was affirmed and established by the Revolution of 1688 and produced the famous witticism that the English Parliament could do anything except change a man into a woman. The legal consequences which flowed from the establishment of supremacy were that Parliament had the right to make or unmake any law whatever and that no person or body was recognised by the law of England as having a right to override or set aside the legislation of Parliament.

But the public opinion in the United States was profoundly affected by the views expressed by Coke, and these views were quoted by the Colonists in justifying resistance to British Parliament. The colonists continued to adhere to the idea that a statute which is opposed to common right and reason is void and that it is the duty of the Judges to declare it to be so. In 1791 due process passed into the Federal Constitution with the adoption of the Fifth Amendment which provided that "no person shall.....be deprived of life, liberty, or property without due process of law". Before 1850 due process was interpreted by American Courts to mean that legislation involving the taking of life or property must do the taking in accordance with accustomed legal forms and practices, i.e., in accordance with the principles of common law. But the doctrine that due process must be tested by common law placed insuperable barriers in the enactment of measures which were necessary to meet the needs of a growing society and the Courts accordingly evolved the principle that new procedures were due process if

Ajaib Singh v. The State of Punjab

Bhandari J.

they served the ends of substantial justice. In *Hurtado* v. *California*, (1) the Supreme Court observed as follows :—

> "There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age ; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms....."

After the year 1890 the Courts developed a complex new law of substantive due process imposing substantive limitations on the police power of the State. When therefore a State enacts a measure or promulgates a statutory rule imposing any limitation upon the right of private property or free contract, an aggrieved person can immediately raise the question of due process of law. The Courts examine the constitutionality of statutes in the light of their own political, social or economic ideas.

It will be seen from the above that it is not within the power of the highest judicial Tribunal in England to declare an Act of Parliament void even though it is inconsistent with the principles of Magna Carta or the Petition of Rights. The term 'unconstitutional' in its application to statutes enacted by the British Parliament means merely contrary to general principles which are supposed to lie at the basis of the British Constitution. The expression does not signify that the Act is void, for a statute if passed by the British Parliament has absolute validity. But it is within the power of the Courts of United States to hold

(1) (1884) 110 U. S. 516.

that a statute passed by the Federal or a State Legislature constitutes an unreasonable and arbitrary interference with private rights. The Indian Constitution, on the other hand, has drawn upon the Constitutions of both England and United States and has adopted features of both. If an Act passed by an Indian Legislature is within the powers conferred by the Constitution, does not purport (except in certain cases) to have an extra-territorial operation beyond the geographical limits of India, and is not repugnant to the Constitution itself, it cannot be held to be unconstitutional or void. If, however, it encroaches upon the fundamental rights guaranteed by the Constitution,(for example Articles 14, 15, 17, 18, 19, 20 and 24) it is open to the Courts to declare it to be void and of no effect. The right of life and personal liberty (Article 21) subject to the limits imposed by Article 22, and the right to property (Article 31) have been left practically to the Legislature, and it is thus open to the Legislature to enact a measure depriving a person of his right to life, personal liberty and of his right to property. The American doctrine of due process has not been imported into India. As regards fundamental rights the Indian Constitution attempts a compromise between the doctrine of parliamentary supremacy and judicial supremacy.

Now, what exactly is the nature, object and scope of the Act of 1949 and the end which the Legislature had in view in enacting this measure? The tragic circumstances in which the Act of 1949 came to be placed on the Statute Book of the country are well-known to students of contemporary history. Towards the latter part of 1946 communal disturbances broke out in Calcutta, Noakhli and Tippra in which thousands of Hindu houses were looted or burnt, a large proportion of the non-Muslim population was converted to Islam and a large number of Hindu women were disgraced or dishonoured. Harrowing tales of massacre, rape, arson and plunder which were carried to the neighbouring province of Bihar stirred up the feelings of the Hindus and a mass up-rising took place in October which was fortunately brought under control through the intervention of national leaders

Ajaib Singh
v.
The State of Punjab

Bhandari J.

like Mahatma Gandhi and Pandit Jawahar Lal Nehru. The sparks of communal bitterness flew to the Punjab and produced a conflagration of so great a magnitude that it destroyed not only the life and property of millions of people but also the very fabric of human society and relationship. Thousands of innocent women and children were slain, property worth millions was looted or destroyed, women of all ages were kidnapped, abducted and ravished and un-speakable atrocities were perpetrated in the name of religion. Countless streams of refugees who had lost all their worldly possessions flowed from Pakistan into India and from India into Pakistan. They lamented the loss of their friends and relations, the loss of their ancestral homes, the loss of movable and immovable property and the loss of everything that makes life worth living.

But there was no loss which the refugees felt more keenly than the loss of their women—their wives and sisters and daughters—who had been snatched away by the ruffians of an alien race. Recovery of abducted women became a problem of first importance and had to be tackled with zeal and energy. *Shrimati* Mridula Sarabhai who was appointed by the Government of India to organise the scheme for the recovery of abducted women has sworn an affidavit in which she has described the nature and magnitude of the problem with which her social workers were confronted and has given a graphic account of the insuperable difficulties which they had to surmount in the recovery of abducted persons.

Efforts were made to recover abducted women under the ordinary law to start with, but it was soon discovered that the provisions of the Penal Code and the Criminal Procedure Code were completely inadequate to meet the needs of the situation. The machinery of law could be moved either by the women themselves or their friends and relations or their neighbours or by the custodians of law and order. The women themselves were in a desperate plight for they were prisoners in the hands of their abductors and could do nothing to secure their own

release. They were kept in close confinement and had no contact with the outside world. They were told that most of their relations had been put to the sword, that the relations who had managed to escape with their lives had crossed the border into the other Dominion and were not likely to come to the rescue of the victims, that the police officers who belonged to the same community as the abductors would decline to interfere, that if they ever went back to rejoin their friends and relations in the other dominion they would be done to death as they had been polluted by contact with members of the opposite community and that, having regard to these facts, their release from custody was absolutely out of the question. The women did not possess the courage to leave the houses of their abductors for every attempt made by them to escape and every leakage of information of their desire to escape was punished with the utmost severity. They had no friends or relations who could report the matter to the police for they had either been killed or had gone across the border to save their own lives. The neighbours were not prepared to notify the police and the police themselves were not prepared to intervene for all of them were infected with the communal virus and were unable or unwilling to do anything which was likely to jeopardize the safety of their own brothers and to put them to trouble. Even if a conscientious police officer registered a case against an abductor, he was unable to obtain evidence in support of the charge as witnesses were afraid of gangsters and were not prepared to tell the truth. The women were overwhelmed by the tragedy by which they were overtaken and were unable to see a single ray of light in the gloom by which they were surrounded. Social workers were unable to locate them for want of information and thousands of unfortunate persons continued to languish in their private prisons amongst a hostile group of people who resisted all their efforts to escape. If an abducted person was ever contacted, her first reaction was to deny that she was even abducted. She could not believe that she could ever return to her own kith and kin, and firmly believed that she had to spend the rest of her days with her abductor.

Ajaib Singh
v.
The State of Punjab

Bhandari J.

It was only after she was kept in friendly surroundings that she dared disclose her identity and became eager to contact her own relations. The mental condition of abducted women was no better than that of a person who has been shell-shocked on the battle front.

As the normal machinery of criminal law was unable to meet the extraordinary situation which had arisen the Prime Ministers of India and Pakistan found it necessary to devise a method by which thousands of women and children who were in the clutches of their abductors and could see no possible means of escape should be restored to their friends and relations. On the 11th November 1948 an agreement was arrived at between India and Pakistan which led to the promulgation of the Abducted Persons (Recovery and Restoration) Ordinance, 1949 and on the 30th December the Abducted Persons (Recovery and Restoration) Act, 1949 was formally placed on the Statute Book of the country.

The Act of 1949 has been designed to secure that persons who are suspected of having been abducted during the communal disturbances should be removed into camps which are free from the atmosphere of coercion and threats and where they can feel assured that their real desires will be given effect to. The idea is to restore as far as possible the atmosphere in which they were brought up before they were abducted, to encourage them to give expression to their own feelings and desires and to enable them to decide for themselves voluntarily and of their own free will whether they wish to stay with their abductors or to go to their relations in the other country. As soon as an abducted person is brought into the friendly atmosphere of the camp and gives information in regard to the manner in which she was abducted and in regard to her relatives efforts are made to trace the relatives wherever they happen to be whether in India or Pakistan. After the abducted woman has had an opportunity of meeting her relations she is asked to make her own choice. If she wishes to go back to the abductor she is taken immediately to the abductor. If, on the other hand, she expresses a desire to go back to

her own relations, she is handed over to them and sent to Pakistan, if necessary. The Act is not a penal Act and was not intended to punish the abductor for his crime. It was enacted with the object of removing the fear complex from the victim and of enabling her to make her choice voluntarily and of her own accord. Police guards are usually placed outside the camp, but this is done not with the object of terrorising abducted persons or compelling them to make a choice which is contrary to their own feelings and desires but with the object of preventing abductors and gangsters from rescuing abducted women.

It will be seen from the above that the Act of 1949 was enacted with the laudable object of restoring abducted persons to their relations, that it was enacted under extraordinary circumstances in order to meet an extraordinary situation; that it was enacted as the result of an agreement between the two sister Dominions of India and Pakistan, that the means employed by the Legislature had a substantial relation to the end, and that having regard to the circumstances in which the measure was enacted it cannot be regarded as arbitrary, unreasonable or oppressive.

This brings me to the consideration of the first and perhaps the most difficult issue in the case, namely whether the provisions of the Act of 1949 are repugnant to the provisions of Article 19. This Article guarantees several rights of freedom to a citizen of India. Clause (*1*) declares the rights while clauses (*2*) to (*6*) declare the circumstances in and the extent to which each one of those rights may be limited or curtailed. Sub-clauses (*d*) to (*g*) of clause (*1*) declare that all citizens shall have the right to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business. Clauses (5) and (*6*) declare that nothing in sub-clauses (*d*) to (*g*) of clause (*1*) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the

Ajaib Singh
v.
The State of Punjab

Bhandari J.

rights conferred by the said sub-clauses, in the interests of the general public and clause (5) declares in addition that nothing in sub-clauses (*d*), (*e*) and (*f*) shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses, for the protection of the interests of any Scheduled Tribe.

But it may be argued that however laudable the objects of a measure might be it is likely to be declared void and of no effect if it is not consistent with the provisions of the Constitution. According to the learned counsel for the petitioners a statute cannot be said to impose 'restrictions' on the rights conferred by sub-clauses (*d*), (*e*), (*f*) and (*g*) when it authorizes a police officer to arrest, a person in charge of a refugee camp to detain and a Tribunal constituted under the Act to deport, an abducted person who has not contravened the provisions of any law and who is herself the victim of one of the most shameful of offences known to the law. Neither a person who is in custody nor a person who is deported can possibly exercise his right of locomotion and residence within the territory of India or the right to acquire property or the right to practise any profession or to carry on any occupation, trade or business. A statute which has the effect of depriving a person of his liberty or of expelling him from his own country cannot be regarded as a law which merely 'restricts' a person's right of locomotion and residence but constitutes in substance a 'deprivation' of the said right.

Two questions at once arise for consideration, viz., (1) can a citizen of India who is *detained* in a camp under section 4 or who is ordered to be *conveyed out of India* under section 7 complain that he has been deprived of the rights guaranteed by Article 19; and if so (2) does the Act of 1949 in so far as it authorises the detention and expulsion of citizens of India impose "reasonable restrictions" on the rights guaranteed by clauses (*d*) to (*g*) of Article 19?

The first contention put forward on behalf of the petitioners, namely that a person who is detained in a refugee camp is unable to exercise any of the rights conferred by Article 19, can be easily disposed of. The provisions of Article 19 are subject to the provisions of Article 21; the provisions of Article 19 (*1*) (*d*), (*e*) and (*f*) are subject also to the provisions of Article 19 (*5*) and the provisions of Article 19 (*1*) (*g*) are subject also to the provisions of Article 19 (*6*). In other words, the rights conferred by sub-clauses (*d*), (*e*), (*f*) and (*g*) can be interfered with *partially* if the appropriate Legislature decides to impose "reasonable restrictions" in the interest of the general public and *totally* if the person on whom the right is conferred is arrested and put in confinement according to procedure established by law. In his admirable treatise on Constitutional Law, Willis states at pages 747-748 that the common law imposes a duty upon everyone to forbear from imposing total restraint upon a person's freedom of locomotion *except in making a lawful arrest.* In *Gopalan* v. *State of Madras,* (1), Patanjali Sastri, J., observed as follows :—

> "Article 19 seems to my mind to presuppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests * * * * * where, as a penalty for committing a crime or otherwise, the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in clause (1). Deprivation of personal liberty in such a situation is not, in my opinion, within the purview of Article 19 at all but is dealt with by the succeeding Articles 20 and 21. In other words, Article 19 guarantees to the citizens the enjoyment of certain civil

(1) A. I. R. 1950 S. C. 27.

Ajaib Singh
v.
The State of Punjab

Bhandari J.

liberties *while they are free*, while Articles 20—22 secure to all persons—citizens and non-citizens—certain constitutional guarantees in regard to punishment and prevention of crime * * * * * * *."

Mahajan, J., expressed a similar view in regard to preventive detention when he observed in the same case that if a law conforms to the conditions laid down in Article 22 (7) it would be good law even though it does not conform itself to the provisions of Article 19 (5).

But can it be said that abducted persons who are languishing in prison have been arrested "according to procedure established by law"? It is contended on behalf of the petitioners that whereas punitive detention has been specially authorised by Article 20 and preventive detention by Article 22, there is no provision in the Constitution which authorises detention which may be designated as protective detention. According to the learned counsel persons are kept in refugee camps neither because they have violated the provisions of criminal law nor because they are likely to act in a manner prejudicial to the safety of the State, but solely because they had the misfortune to have become separated from their relations during the communal disturbances and to have been kidnapped or abducted by unruly elements of the opposite community. As the Constitution does not contemplate that innocent presons should be deprived of their liberty, the detention of abducted persons cannot be regarded as being in accordance with the procedure established by law. This contention appears to me to be wholly devoid of force. India is a Sovereign Democratic Republic and it is within the competence of the Union Parliament and the State Legislatures, in exercise of the powers conferred upon them, to make any law that they consider necessary or desirable for discharging the powers of sovereignty which has been vested in them. Subject to constitutional limitations, therefore, the Legislatures are authorised to determine not only what the interests of the public require

but also what measures are necessary for the promotion of such interests. If therefore an appropriate Legislature decides to enact a measure upon any subject which is within its jurisdiction to legislate upon, it is not within the competence of the Courts to see whether the measures should or should not have been enacted. It was within the competence of the Central Legislature in the year 1949 to enact the Abducted Persons (Recovery and Restoration) Act, and a measure of this kind can doubtless be enacted by Parliament today. This Act does not deal with punitive or preventive detention, but with a new kind of detention which may be called "protective detention". The Courts are at liberty to examine the various provisions of this "existing law" with the object of determining whether any of the provisions have encroached on the elementary rights guaranteed by Chapter III of the Constitution. I am of the opinion that a citizen of India who is detained in a camp under section 4 cannot complain that he has been deprived of the rights guaranteed by Article 19.

But is a citizen who is 'conveyed out' of India under the provisions of section 7 entitled to claim the protection of the Courts on the ground that he has been deprived of the rights guaranteed to him by Article 19? It is a fundamental right of every citizen of an independent democratic State to move freely in any part of the State, for the right of citizenship carries with it the corresponding rights of locomotion, and residence and rights to carry on business and to practise a profession. These rights are based on the implied agreement of every member of the society that he shall have a right to live and move in the State which he in a sense helps to constitute and are inherent in all citizens of free governments.

The right of free movement has been expressly recognised by the Constitutions of various civilised countries of the world. Article 75 of the Constitution of the Free City of Danzig runs as follows :—

> "All nationals shall enjoy freedom of movement within the Free City and shall have

Ajaib Singh
v.
The State of Punjab

Bhandari J.

the right to stay and to settle at any place they may choose, to acquire real property and to earn their living in any way. This right shall not be curtailed without legal sanctions."

A similar provision in slightly different language appears in the Constitution of the German Reich. Article 111 of the said Constitution is in the following terms :—

> "All Germans enjoy the right of change of domicile within the whole Reich. Everyone has the right to stay in any part of the Realm that he chooses, to settle there, acquire landed property and pursue any means of livelihood."

In the United States of America Article IV of the Articles of Confederation provided—

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in the Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State."

Article IV, section 2, of the Constitution which was drawn with reference to this Article of Confederation was designed to secure that such elementary rights in regard to residence as are granted by a State to its own residents must be granted to citizens of the United States who are citizens of other States. In *United States* v. *Wheeler* (1), Chief Justice White observed as follows :—

> "In all the States from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possess the

(1) (1920) 254 U. S. 281.

fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom with a consequent authority in the States to forbid and punish violations of this fundamental right." (*Corfield* v. *Coryell*, 4. C.C. 371, 380, 381, *Slaughter-House Cases*, 16 Wall 36, 76, *Paul* v. *Virginia* (1868) 8 Wall 168, 180; *Ward* v. *Maryland* (1870) 12 Wall 418, 430).

This was not the first occasion on which the right of locomotion and residence was stated to be a fundamental right of a citizen of United States for in *Allgeyer* v. *Louisiana* (1), the Supreme Court defining "liberty" said :—

> "The liberty mentioned in the Fourteenth Amendment means not only the right of a citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above-mentioned. In the privilege of pursuing an ordinary calling or trade, or of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

In *Meyer* v. *State of Nebraska* (2), the Supreme Court expressed the view that the expression "liberty"

(1) (1897) 165 U. S. 578, 589.
(2) (1923) 262 U. S. 390.

Ajaib Singh v. The State of Punjab

Bhandari J.

denotes the right of the individual to establish a home ".

It will be seen from these decisions as well as the decisions cited at page 193 of Willis on Constitutional Law that it is a privilege of the United States citizenship to remain in the United States so that deportation is illegal unless a person has first forfeited his citizenship.

It would appear at first sight that Article 19 of the Constitution of India has been enacted with the object of conferring the same fundamental rights on a citizen of India as have been conferred upon citizens of other independent democratic countries, for it declares that all citizens shall have the right to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold, and dispose of property, and to practise any profession, or to carry on any occupation, trade or business. These rights are subject to the provisions of clauses (5) and (6) of the said Article which empowers the State to make any law imposing reasonable restrictions on the exercise of any of the said rights in the interests of the general public. Sub-clause (*d*) of clause (*1*) of this Article came up for consideration in *Gopalan* v. *The State of Madras* (1), when their Lordships (Kania, C.J., Mukerjea and Das, JJ.) expressed the view that the words " throughout the territory of India " in Article 19 (*1*) (*d*) indicate that free movement from one State to another within the Union is protected so that Parliament may not by a law made under Entry 81 of List I of the Schedule 7 of the Constitution curtail it beyond the limits prescribed by clause (5) of Article 19. Its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an

(1) A. I. R. (37) 1950 S. C. 27.

independent *additional* right apart from the general right of locomotion emanating from the freedom of the person. According to their Lordships it is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian Union. In short, it is a protection against provincialism and has nothing to do with the freedom of person as such.

This view was amplified and endorsed by Patanjali Sastri, J. His Lordship was of the opinion that sub-clause (*e*) was enacted with the same object and ought to be construed in the same manner as sub-clause (*d*). He observed as follows :—

> "Sub-clause (*d*) of clause (*1*) does not refer to freedom of movement *simpliciter* but guarantees the right to move freely 'throughout the territory of India'. Sub-clause (*e*) similarly guarantees the right to reside and settle in any part of the territory of India. And clause (*5*) authorises the imposition of 'reasonable restrictions' on these rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose."

Mukerjea, J., went a step further and held that sub-clause (*f*) should also be construed in the same manner as sub-clause (d). His Lordship observed as follows :—

> "The meaning of sub-clause (*d*) of Article 19 (*1*) will be clear if we take it along with sub-clauses (*e*) and (*f*), all of which have been lumped together in clause (*5*) and to

Ajaib Singh
v.
The State of Punjab

Bhandari J.

all of which the same restrictions including those relating to protection of the interests of any Scheduled Tribe have been made applicable. * * * * *
What the Constitution emphasised upon by guaranteeing these rights is that the whole of Indian Union in spite of its being divided into a number of States is really one unit so far as the citizens of the Union are concerned. All the citizens would have the same privileges and the same facilities for moving into any part of the territory and they can reside or carry on business anywhere they like ; and no restrictions either interstate or otherwise would be allowed to be set up in these respects between one part of India and another."

This is the decision of their Lordships of the Supreme Court and I am bound by it.

If sub-clauses (*d*) and (*e*) were enacted solely with the object of preventing provincialism and if sub-clause (*f*) was also presumably enacted for achieving the same object, it is obvious that the provisions of the Act of 1949 cannot be said to be in conflict with the provisions of any of these sub-clauses, for the Act of 1949 does not promote or have the effect of promoting provincialism in any shape or form.

But there is one sub-clause in regard to which their Lordships of the Supreme Court have made no pronouncement. Sub-clause (*g*) of Article 19 (*1*) declares that every citizen shall have the right to practise any profession, or to carry on any occupation, trade or business. The provisions of this clause have not been qualified by words such as " throughout the territory of India " or " in any part of the territory of India ". This clause has not been huddled together with sub-clauses (*d*) and (*e*) in clause (*5*) but reposes in dignified isolation in clause (*6*) which it has appropriated to itself. It is within the power of the State to impose reasonable restrictions on the exercise of the right conferred by this sub-clause for the

protection of the interests of the general public but not for the protection of the interests of any Scheduled Tribe. This clause declares that every citizen shall have a right to practise any profession or to carry on any occupation, trade or business. As the words of the Constitution are precise and unambiguous and must be construed in their ordinary and natural sense, it seems to me that it is the right of every citizen of India to stay inside the country and to exercise the right conferred by sub-clause (*g*).

Mr. Daphtary contends that although a citizen of India who is deported from the country may possibly complain that he has been deprived of his fundamental rights, an abducted person can have no such complaint. He gives several reasons in support of this contention. He submits, in the first place, that the taking away of a person in custody from India to Pakistan is analogous to taking a prisoner from one prison to another; secondly that an abducted person is not deported but merely "conveyed out of India"; thirdly that the conveying out of India contemplated by section 7 is not a permanent deportation or banishment but a temporary expulsion from the country; fourthly, that the abducted person who is conveyed to Pakistan is at liberty to return to India if and when he chooses to do so; fifthly, that the Legislature has power to expel a citizen from India as the Constitution has empowered Parliament to make laws in regard to "extradition" and "admission into, and emigration and expulsion from, India"; and, lastly, that the Act of 1949 has been enacted in pursuance of an agreement between the Governments of India and Pakistan and must therefore be deemed to be valid.

It is a fundamental right of a citizen of India to stay within the territory of India, for clause (*g*) of Article 19 (*1*) declares in express terms that he has a right to practise any profession or to carry on any occupation, trade or business. This right would be meaningless if it does not include a right to stay in the country, for a person cannot exercise this right in

Ajaib Singh
v.
The State of Punjab

Bhandari J.

a country where he cannot live. In *Coppage* v. *Kansas* (1), Pitney, J., observed as follows :—

> "Included in the right of personal liberty and the right of property—partaking of the nature of each—is a right to make contracts for the acquisition of property. Chief amongst such contracts is that of personal employment, by which labour and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense."

In *Ng Fund Ko* v. *White* (2), it was held that "to deport one who claims to be a citizen obviously deprives him of liberty. It may result also in loss of both property and life ; or of all that makes life worth living." Indeed, in such circumstances one well may say with the poet—

> "You take my house, when you take the prop
> That doth sustain my house ; you take my life
> When you do take the means whereby I live."

If the Constitution has stated expressly or by necessary implication that a citizen shall not be expelled from India it would not in my opinion be open to Parliament to frame a statute so as entirely to defeat the object of the Constitution by directing that he shall be expelled under escort of the police. Nor is it in my opinion open to Government to state that the taking away of a citizen from India to Pakistan is no worse than taking a prisoner from one prison to another. It is a well known legal maxim that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance. As pointed out by Abbott, C.J., in *Fox* v.

(1) (1915) 236 U. S. 1.
(2) 259 U. S. 276.

Bishop of Chestor (1), " the provisions of an Act of Parliament shall not be evaded by shift or contrivance ". A duty has been cast on the Courts to decline to uphold a transaction which is " a mere device for carrying into effect that which the Legislature has said shall not be done". (*Morris* v. *Blackman* (2)).

It is true that section 7 empowers the Tribunal to convey an abducted person out of India and not to deport him, but the fact that the Legislature has thought fit to use the word " convey " in preference to the word " deport " does not alter the fact that a person who is sent out of India is deprived of the rights conferred upon him by Article 19. If he is sent out of the country he cannot possibly practise any profession or carry on any occupation, trade or business. It would, in my opinion, be a mere quibble to say that the expulsion is not permanent and that it is open to such person to return to her own country; and. secondly, even if she does return to India she is liable to be apprehended again and to be sent back to Pakistan on the ground that she is an abducted person and ought to be restored to her relations. For all practical purposes therefore it seems to me that a person who is " conveyed out " of India under the provisions of section 7 is deprived of the rights guaranteed to her by Article 19 (*1*) (*g*) of the Constitution.

It is true that Entries 18 and 19 of the Union Legislative List empower Parliament to make laws in regard to " extradition " and " admission into and emigration and expulsion from India ", but these laws must be made in conformity with the provisions of Part III and must not be inconsistent with or repugnant to the fundamental rights guaranteed by the said Part. Article 245 which declares the extent of laws made by Parliament states clearly and in unambiguous language that the power to make laws must be exercised " subject to the provisions of this Constitution ". If therefore the Constitution declares expressly or by necessary implication that a citizen

(1) (1824) 2 B and C 635, 655.
(2) 2 H and C 912 at p. 918.

Ajaib Singh v. The State of Punjab

Bhandari J.

shall not be expelled from India it is not in my opinion open to a Legislature to authorise his expulsion on the ground only that power to expel has been conferred by one or other of the three Legislative Lists.

Mr. Daphtary's contention that the Act of 1949 must be deemed to be valid as it was enacted in pursuance of an agreement between the Governments of India and Pakistan is not worthy of serious consideration. Under the Constitution of United States even international agreements to which the executive Government is a party are the supreme law of the land, for clause 2 of Article VI of the said Constitution expressly declares :—

> " This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land* and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Even so it has been held that the Supreme Court has power to set aside treaties (*Ware* v. *Hyloon* (1), *Missoure* v. *Holland* (2). There is no provision in the Constitution of India which declares that all treaties to which the Government of India is a party shall be vested with statutory authority. Article 51 declares the directive principle that the State shall foster respect for every international law and treaty obligations and Article 253 empowers Parliament to make any law for the purpose of implementing the treaty obligations of India, but neither of these two Articles empowers Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him.

---

(1) (1796) 3 Dall 199.
(2) (1920) 252 U. S. 416.

After listening carefully to the arguments which have been addressed to us I am of the opinion that a citizen of India cannot be expelled from the country in view of the provisions of Article 19(1) (*g*) of the Constitution.

The question now arises whether the provisions of the Act of 1949 can be regarded as "reasonable restrictions", on the right conferred by sub-clause (*g*). Now what exactly is a "restriction" which cannot be imposed until and unless it is reasonable. According to Shorter Oxford Dictionary the expression "restrict" means "to confine (some person or thing) to or within certain limits", and the expression "restriction" means "a limitation imposed upon a person or thing." The expression "prohibit" means "to prevent, hinder, or debar" and the expression "prohibition" has a corresponding meaning. If, for example, a person who has a right to practise any profession in any part of the country is prevented from carrying on his practice in, say, the Province of Bombay, his right to practise is restricted to that extent. He would not be at liberty to practise in the particular province but would be at liberty to practise in the rest of the territory of India. That would be a restriction for his practice is confined to certain limits, that is, to the territory of India less the Province of Bombay. If on the other hand he is directed to leave the country altogether that would not be "restriction" on the exercise of the right of practice but a "prohibition" on the exercise of the said right. In *Gopalan* v. *State of Madras* (1), Kania, C.J., observed that the word "restriction" as distinguished from "deprivation" means partial control. Das, J., expressed the same view by saying that "restriction" implies that the right is not entirely destroyed but the rest of the right remains. Sastri, J., on the other hand, admitted that the words "restriction" and "deprivation" are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation, but his Lordship held that the word as it occurs in clauses (*2*) to (*6*) of Article

(1) A. I. R. 1950 S. C. 27.

Ajaib Singh v. The State of Punjab

Bhandari J.

19, having regard to the context, does not mean deprivation or total prohibition but means that the rights are still capable of being exercised. I find myself in respectful agreement with these views and must accordingly hold that in so far as the Act of 1949 authorises the deportation of abducted persons to Pakistan it cannot be said to impose "reasonable restriction" on the rights conferred by Article 19. Even extraordinary conditions do not create or enlarge constitutional powers and cannot justify governmental action outside the sphere of constitutional authority (*A. L. A. Schechter Poultry Corporation* v. *United States* (1)). Deportation of a citizen to a place outside the territory of India temporarily or permanently is tantamount to deprivation of the rights guaranteed by Article 19(1)(*g*). As the provisions of section 7 authorise the deportation of a citizen from India, these provisions must be deemed to be inconsistent with the provisions of Article 19 (*1*) (*g*) of the Constitution.

The second point for decision in the present case is whether the provisions of the impugned Act are inconsistent with the provisions of Article 22 of the Constitution. The relevant clauses of this Article are in the following terms :—

> "(*1*) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his own choice.
>
> (*2*) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

Section 4 of the Act of 1949 empowers a police officer to take into custody any person who, in his opinion, is an abducted person and to deliver such person to the

(1) 295 U. S. 495, 79 L. Ed. 1570.

custody of an officer in charge of the nearest camp with the least possible delay. Section 7 provides that an officer in charge of a camp shall deliver an abducted person to the custody of such officer as the Provincial Government may direct and that an officer to whom the custody of an abducted person has been delivered shall be entitled to receive and hold the person in custody and either restore such person to his or her relatives or convey such person out of India. It is argued on behalf of the petitioners that these two sections contravene the provisions of Article 22 as the Act of 1949 does not require that an abducted person should be informed of the grounds of her arrest, or that she should be produced before a Magistrate within a period of twenty-four hours, or that she should not be detained in custody beyond the said period without the authority of a Magistrate, or that she should be at liberty to consult and be defended by a counsel of her own choice. On the contrary, it is contended that a statutory obligation has been imposed upon the police to take an abducted person into custody and to deliver her to the custody of an officer in charge of a camp with the least possible delay and a similar obligation has been imposed upon an officer in charge of a camp to receive and hold the said person in custody for an unspecified period. As the express mention of one thing implies the exclusion of another the express mention of the fact that an abducted person should be made over to an officer in charge of a camp with the least possible delay appears to indicate that she need not be produced before a Magistrate at all, and the express mention of the fact that the officer in charge of a camp shall receive and hold her in custody and either restore her to her relatives or convey her out of India appears to indicate that she can be detained in camp for a period exceeding 24 hours without the orders of a Magistrate.

Mr. Daphtary repudiates the suggestion that the constitutional guarantees afforded by Article 22 have been taken away by the Act of 1949. He contends, in the first place, that the privileges conferred by Article 22 are available only to a person who is

Ajaib Singh v. The State of Punjab

Bhandari J.

"arrested" and cannot be claimed by a person who is not. According to him "arrest" consists in the taking under real or assumed authority custody of another person for the purpose of holding or detaining him to answer a *criminal charge* or a civil demand. An abducted person who is taken into custody under section 4 cannot be said to be arrested (*a*) because the Legislature has scrupulously avoided the use of the word "arrest" with reference to this apprehension and has stated merely that such person may be "taken into custody" and (*b*) because the liberty of an abducted person is restrained for purposes of protection and not for purposes of answering a criminal charge. If an abducted person is not "arrested" within the meaning of Article 22 she cannot be allowed to complain that she has been deprived of the facilities conferred by Article 22 for those facilities are available only to a person who is "arrested."

This contention cannot bear a moment's scrutiny. According to the Shorter Oxford Dictionary the expression "arrest" means "to apprehend by legal authority". According to Wharton's Law Lexicon the expression means "the restraining of the liberty of a man's person in order to compel obedience to the order of a Court of Justice, or to prevent the commission of a crime, or to ensure that a person charged or suspected of a crime may be forthcoming to answer it." Section 46 of the Code of Criminal Procedure requires that in making an arrest the Police officer making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. If a person can be deemed to be "arrested" when he is apprehended by legal authority or when he submits to custody by word or action, it follows that an abducted person who is apprehended under the provisions of section 4 for purposes of being delivered to the custody of an officer in charge of a camp, must also be deemed to be arrested. I am of the opinion that the expression "arrest" appearing in Article 22 is a comprehensive term which is designed to cover all cases in which a person is apprehended by legal authority

and is not confined to cases in which a person is apprehended by or under the orders of a civil or criminal Court. It covers not only cases of punitive and preventive detention but also cases of what may for convenience be called " protective detention ". Indeed, it seems to me that when a person is apprehended by legal authority he must be deemed to be arrested within the meaning of Article 22 even though the word " arrest " or " apprehension " has not been used in the statute or statutory rule under the authority of which he has been taken into custody. The fact, therefore, that the word " arrest " does not appear in the Act of 1949 and the fact that the police officer is merely empowered to take an abducted person into custody, do not alter the fact that the person who is so apprehended and taken into custody has in fact been arrested. I entertain no doubt in my mind that an abducted person is entitled to the protection of Article 22 even though she has committed no offence and is not alleged to have committed one. Nor is there any force in the contention that the procedural protection guaranteed by Article 22 is available only to a person who is being detained to answer a criminal charge, for the Code of Criminal Procedure is replete with provisions that the right to be produced before a Magistrate (sections 60-61, 100 and 167) and to be defended by a pleader (section 340) is available as much to a person who has committed no offence (section 100) or who is likely to commit an offence (sections 106 to 110) as to a person who is alleged actually to have committed an offence.

Mr. Daphtary contends, in the alternative, that as the Constitution of India is the supreme law of the country to which all other laws are subordinate, the provisions of Article 22 must be deemed to be impliedly incorporated in every statute made by a Legislature in this country, and consequently that if a person is placed under arrest it is the duty of the police officers and officers in charge of camps to follow the procedure laid down by the said Article. He contends further that if the directions of law contained in the Constitution are not complied with it is open to the Government to punish the delinquents and it is open to Courts

Ajaib Singh
v.
The State of Punjab

to release the abducted persons but that the Act itself cannot be held to be invalid on the ground that it is inconsistent with the provisions of Article 22.

Bhandari J.

Now what exactly is the meaning of the word "inconsistent" which appears in Article 13 of the Constitution. In Mr. Keith's well-known work on Responsible Government in the Dominions at pages 404 and 407 the learned author observes " inconsistency ", " repugnancy " and " contrariety " are interchangeable terms, and this view has been endorsed by Issacs, J.. in the *Attorney General for Queensland* v. *The Attorney General for the Commonwealth* (1). An Act is said to be inconsistent with another when the two cannot stand together, i.e., when to obey one enactment is to disobey the other. In case of inconsistencies between paramount and subordinate legislatures it is not the order of time that matters but the degree of authority and its source. There are three classes of cases in which, according to Australian cases, there is inconsistency :—

(1) where there is inconsistency in the actual terms of the competing statutes (*R* v. *Brishbane Licensing Court* (2) ;

(2) where although there is no direct conflict, the Court forms the view from the language of the paramount legislature that they intended their law to be a complete exhaustive code (*Clyde Engineering Company Ltd.* v. *Cowbern*, (3) *H. V. Mackay Pty Ltd.* v. *Hunt*, (4) ; and

(3) where, even in the absence of intention, a conflict may arise when both the paramount and the subordinate legislatures seek to exercise their powers over the same subject-matter (*Victoria* v. *The Commonwealth*, (5).

(1) 20 C. L. R. 148.
(2) 28 C. L. R. 23.
(3) (1926) 37 C. L. R. 466.
(4) 38 C. L. R. 308.
(5) 58 C. L. R. 618.

I have stated already the points on which the Act of 1949 is alleged to be inconsistent with the provisions of Article 22. I am of the opinion that it is impossible to obey the directions contained in sections 4 and 7 of the Act of 1949 without disobeying the directions contained in clauses (*1*) and (*2*) of Article 22. The two Legislative authorities give two different sets of commands. The Constitution says "Take her to a Magistrate within twenty-four hours". The Legislature ignores this order and gives a counter command "Take her to the nearest camp with the least possible delay". Again, the Constitution says "Do not keep her in custody for more than twenty-four hours without the order of a Magistrate". The Legislature directs "Keep her in custody as long as you like and then send her to Pakistan". One says "Do", the other "Don't". One is as emphatic as the other. The defiance is complete. I am accordingly of the opinion that the provisions of sections 4 and 7 of the Act of 1949 are inconsistent with the provisions of Article 22.

In regard to the other matters which have arisen in this case I am inclined to agree with my learned brother Khosla, J.

I would accordingly return the following answers to the questions which were agitated before the Full Bench :—

(*1*) The Act of 1949 is inconsistent with the provisions of Article 19(1)(*g*) of the Constitution ;

(*2*) The Act is inconsistent with the provisions of Article 22 ;

(*3*) The Tribunal constituted under section 6 of the Act is subject to the general supervision of the High Court by virtue of Article 227 of the Constitution ;

(*4*) The Act is not inconsistent with the provisions of Article 14 ;

(*5*) The Act is not inconsistent with the provisions of Article 15 ;

Ajaib Singh
v.
The State of Punjab

Bhandari J.

(6) The Act is not inconsistent with Article 21 on the ground that abducted persons are deprived of their personal liberty in a manner which is contrary to principles of natural justice ; and

(7) The Tribunal which has dealt with the cases of the Petitioners has not been constituted in accordance with the provisions of law, and the orders passed by it are wholly without jurisdiction.

As the Act of 1949 is inconsistent with the provisions of the Constitution, I am of the opinion that all the persons for whose release writs of *habeas corpus* have been moved are entitled to be set at liberty forthwith. Let the papers be sent back to the Division Bench for passing such orders as may be considered necessary or desirable.

Khosla J.

KHOSLA, J. In this case we have been called upon to consider the validity of the Abducted Persons (Recovery and Restoration) Act, 1949 (Act LXV of 1949) which will hereinafter be referred to as the Act. The matter came up originally before a Division Bench of this Court consisting of my brother Bhandari and myself in the form of a petition for a writ of *habeas corpus*. Owing to the importance of the issues involved we decided to refer the matter to a larger Bench and framed three questions which were intended more to guide than to restrict the scope of the enquiry provoked by our reference. The questions formulated by us were—

"(1) Is Central Act No. 65 of 1949 *ultra vires* the Constitution because its provisions with regard to the detention in refugee camps of persons living in India violate the rights conferred upon Indian citizens under Article 19 of the Constitution ?

(2) Is this Act *ultra vires* the Constitution because in terms it violates the provisions of Article 22 of the Constitution ?

(3) Is the Tribunal constituted under section 6 of the Act a Tribunal subject to the general supervision of the High Court by virtue of Article 227 of the Constitution ? "

At the time of framing these questions I observed that—

> " The Bench constituted to consider the matter will not be obliged to confine itself within the narrow limits of the phraseology employed by me. ".

My Lord the Chief Justice constituted the present Bench of three Judges to consider the matter arising out of the reference.

As anticipated the questions asked and the points raised before the Full Bench far exceeded the issues discussed before the Division Bench and no argument which was relevant to the main question, namely whether the Act is *ultra vires* the Constitution, was shut out. The field of enquiry was thus greatly widened but this procedure had the advantage of making the discussion and therefore our decision assume a most desirable degree of comprehensiveness.

I need not set out the circumstances which led to the passing of the Act in 1949 and the object sought to be achieved by it. " They have been narrated in vivid terms by my brother Bhandari and it will be sufficient if I merely repeat that the Act was passed " in pursuance of an agreement with Pakistan for the recovery and restoration of abducted persons ".

The Act was assailed on many grounds and its various provisions were subjected to criticism from various aspects. In order to appreciate the arguments advanced on behalf of the petitioners it is necessary to examine briefly the provisions of the Act and the procedure laid down for the recovery and restoration of abducted persons.

An " abducted person " is defined as a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim and who, on or after that day and before the 1st day of January, 1949, has be-

Ajaib Singh
v.
The State of Punjab
Khosla J.

come separated from his or her family and is found to be living with or under the control of any other individual or family, and in the latter case includes a child born to any such female after the said date (section 2(1)(a)). If any question arises whether a certain person is or is not an abducted person it must be referred to and decided by a Tribunal constituted for the purpose by the Central Government. The decision of this Tribunal is final though it may be revised or reviewed by the Central Government (section 6). The manner in which the recovery and restoration of abducted persons is to be made is set out in sections 4, 5 and 7 of the Act. Section 4 provides that if any police officer, not below the rank of an Assistant Sub-Inspector or a police officer specially authorised by the Provincial Government, has reason to believe that an abducted person is living in a certain place he can enter and search the place without a warrant, take the abducted person into custody and remove him to the nearest camp set up for the purpose. A camp in the context of this Act means any place established or deemed to be established for the reception and detention of abducted persons. After the completion of any enquiry which may be necessary into the question whether the person concerned is or is not an abducted person he or she is to be handed over to her relations or conveyed out of India. The Tribunal may decide that the person concerned may be allowed to leave the camp. Section 8 provides that the detention in a camp is not to be questioned in any Court.

This briefly is the scheme of the Act and Criminal Writ No. 144 of 1951 furnishes a concrete example of the manner in which its provisions are applied in any individual case. Mukhtiar Kaur, a girl aged 12 years, was taken into custody upon recovery from a house in village Sher Singhwala on the 22nd of June 1951 and removed to the Jullundur Camp of Muslim Refugee Girls. Her case was enquired into by two Deputy Superintendents of Police, one from India and one from Pakistan, who submitted their report to the Tribunal on 17th November 1951. The substance of their report was that Mukhtiar Kaur

was an abducted person. The Tribunal consisting of a Superintendent of Police (India) and a Superintendent of Police (Pakistan) gave its decision the same day and this decision was that Mukhtiar Kaur *alias* Sardaran was an abducted person and should be sent to Pakistan in order to be restored to her relations who were residing there. In the meantime, namely on 5th November 1951, an application for a writ of *habeas corpus* was made by Ajaib Singh who claimed to be Mukhtiar Kaur's father. He contended that Mukhtiar Kaur was not an abducted person. The facts in the other applications are somewhat similar, and in all of them the allegation is that the persons who are alleged to be abducted persons are in fact not abducted persons. The main argument, however, was that the Act was *ultra vires* the Constitution and therefore the detention of the persons concerned was wholly illegal and this is the only point which we have to consider.

For clarity of exposition I shall set out briefly the various criticisms levelled against the Statute and the main lines of attack pursued by counsel for the various petitioners. I shall then deal with each individual item in detail :

(*1*) The Act is inconsistent with Article 14 of the Constitution inasmuch as abducted persons are subject to special disabilities and do not enjoy the privilege of having their case examined by a Court of law in the same way as other persons detained in custody can. They are therefore deprived of the equal protection of the laws.

(2) The Act is inconsistent with Article 15 of the Constitution inasmuch as there is discrimination against the abducted persons on the ground of religion. Abducted persons are defined as male or female persons who were Muslims before the 1st of March 1947.

(*3*) The Act is inconsistent with Article 19 of the Constitution as its provisions take away from the abducted persons the rights

Ajaib Singh
v.
The State of Punjab

Khosla J.

conferred by Article 19(*1*) and in particular the rights (*d*) and (*e*) of this clause.

(4) The Act is inconsistent with Article 21 inasmuch as abducted persons are deprived of their personal liberty in a manner which is against all principles of natural justice.

(5) The Act is inconsistent with Article 22 inasmuch as the abducted persons on being arrested are not produced before a Magistrate within a period of twenty-four hours.

(6) The entire procedure relating to the recovery and restoration of abducted persons is contrary to the principles of natural justice; and

(7) The Tribunal which examines the cases of these persons is not properly constituted as its members were not appointed or nominated by the Central Government. The orders passed by the Tribunal therefore are without jurisdiction.'

With regard to Article 14 the argument of the learned counsel for the petitioners may be briefly stated thus. Persons taken into custody form one class, and such persons are entitled to enjoy equality before the law and equal protection of the laws. The impugned Act has, however, made a discrimination to the detriment of a portion of this class consisting of abducted persons. The classification is arbitrary and unjust. Therefore the Act in so far as it singles out the so-called abducted persons for special treatment is invalid. It was pointed out by Mukherjea, J., in *The State of West Bengal* v. *Anwar Ali*, (1) that Article 14 merely means that —

> "All persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed".

Das, J., pointed out in the same case—

> "It is now well established that while Article 14 is designed to prevent a person or class

(1) A. I. R. 1952 S. C. 75.

of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an 'abstract symmetry' in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting' clause has been construed as a guarantee against discrimination amongst equals only, and not as taking away from the State the power to classify persons for the purpose of legislation. The classification may be on different basis. It may be geographical or according to objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (*1*) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (*2*) that that differentia must have a rational relation to the object sought to be achieved by the Act.* * * * * In short while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to

Ajaib Singh
v.
The State of Punjab

Khosla J.

be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained ".

I may also quote the observation of Patanjali Sastri, C. J., which appears at page 79 of the report—

> " First, it has to be seen whether it observes equality between all the persons on whom it is to operate. An affirmative finding on the point may not, however, be decisive of the issue. If the impugned legislation is a special law applicable only to a certain class of persons, the Court must further enquire whether the classification is founded on a reasonable basis having regard to the object to be attained, or is arbitrary. "

The classification resulting from the definition of an abducted person cannot in any way be said to be arbitrary or unreasonable. No one can question the propriety of restoring abducted persons to their relatives and it was conceded on all sides that the objects of the Act were highly laudable. My brother Bhandari has pointed out the suffering and distress which the Act seeks to relieve and I cannot take the view that " abducted persons " as defined by the Act are a sub-class chosen arbitrarily from the main class of persons in detention. The classification is reasonable and fully justified. Every person who falls within this class is to be treated alike and the Act therefore does not in any way contravene the provisions of Article 14. It was pointed out in *Yick Wo* v. *Hopkins*, (1), that laws operate alike on all persons under like circumstances. It cannot be said that an " abducted person " defined by the Act is in the same circumstances as any other person taken into custody by the police, say a person arrested on a criminal charge or a person detained under preventive legislation.

(1) (1886) 118 U. S. 356.

With regard to Article 15 the argument of the learned counsel for the petitioners is that abducted persons suffer certain disabilities because they were Muslims before the 1st of March 1947 and therefore this discrimination is based on grounds of religion. Reliance was placed on a decision of the Madras High Court reported as A. I. R. 1951 Mad. 120. Article 15, however, deals with discrimination on grounds only of religion, race etc. The word "only" is important and it is clear that what Article 15 says is that a person shall not suffer merely because he belongs to a particular religion, race or caste *vis-a-vis* another person similarly circumstanced. The persons who come under the mischief of the Act have other qualifications besides the qualification of religion, e.g., they must have been separated from their relatives in the peculiar circumstances envisaged by the impugned legislation, and it cannot therefore be said that there is any discrimination on grounds only of religion. Mr. Daphtary argued with some force that there was no question at all of discrimination for the abducted persons as defined by the Act were to be restored to their relations and not treated unjustly in any way. He also contended that it is only the person discriminated against who can raise an objection on this score and not his relatives or friends. The objection is, however, effectively answered by the argument that religion alone is not the ground upon which the distinction is based. The abducted person may not even be a Muslim at the time of his or her being taken into custody. He must have been separated from his family between the 1st of March 1947 and the 1st of January 1949 and he must be living under the control of any other individual or family. These additional factors are a necessary incidence to the definition of an abducted person and thus there is no discrimination on grounds only of religion.

I shall now deal with the objection that the Act conflicts with the provisions of Article 19 of the Constitution. The argument advanced on behalf of the petitioners may be summarised as follows. Article 19 confers upon all citizens the right to move freely and

Ajaib Singh v. The State of Punjab

Khosla J.

to reside and settle in any part of the territory of India. An abducted person is summarily deprived of these rights and as the Act responsible for this deprivation is not exempted by the operation of clause (5) of Article 19 the Act is bad and *ultra vires* the Constitution. An abducted person is confined in a camp and may then be conveyed to a place outside India. This restriction on nay the total deprivation of, the freedom conferred by Article 19 is not reasonable and is not in the interests of the general public.

In order to determine the force of this argument it is necessary to examine the nature of the right conferred by Article 19, in particular Article 19(*1*) (*d*) and (*e*). The question was considered and discussed exhaustively by their Lordships of the Supreme Court in *A. K. Gopalan* v. *State of Madras* (1). The majority of the Judges constituting the Bench which dealt with that case laid down that the right given by Article 19(*1*)(*d*) is a very limited right. Their Lordships repelled the argument that this right was equivalent to the right of free movement or a right entitling a person to go wheresoever he pleased. Kania, C. J., observed at page 37 of the report—

> "Deprivation (total loss) of personal liberty, which *inter alia* includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression 'personal liberty' in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19(*1*)(*d*). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India * * * * Therefore, Article 19(5) cannot apply to a substantive law depriving a citizen of personal liberty".

(1) A. I. R. 1950 S. C. 27.

And again at page 35—

> "What is sought to be protected by that sub-clause is the right to freedom of movement, i.e., without restriction, throughout the territory of India. Read with their natural grammatical meaning the sub-clause only means that if restrictions are sought to be put upon movement of a citizen from State to State or even within a State such restrictions will have to be tested by the permissive limits prescribed in clause (5) of that Article. Sub-clause (*d*) has nothing to do with detention, preventive or punitive."

Patanjali Sastri, J., observed at page 69 of the report—

> "But the question is : Does Article 19, in its setting in Part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration. Sub-clause (*d*) of clause (*1*) does not refer to freedom of movement *simpliciter* but guarantees the right to move freely 'throughout the territory of India'. Sub-clause (*e*) similarly guarantees the right to reside and settle in any part of the territory of India. And clause (5) authorises the imposition of 'reasonable restrictions' on these rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose * * * * Article 19 seems to my mind to presuppose that the citizen to whom the possession of these fundamental rights is secured retains

Ajaib Singh
v.
The State of Punjab

Khosla J.

the sub-stratum of personal freedom on which alone the enjoyment of these rights necessarily rests ".

His Lordship then went on to point out that imprisonment or detention or confinement of any kind would not affect the right conferred by article 19.

Mukerjea, J., observed at page 95—

> " What the Constitution emphasised upon by guaranteeing these rights is that the whole of Indian Union in spite of its being divided into a number of States is really one unit so far as the citizens of the Union are concerned. All the citizens would have the same privileges and the same facilities for moving into any part of the territory and they can reside or carry on business anywhere they like ; and no restrictions either inter-State or otherwise would be allowed to set up in these respects between one part of India and another ".

Mukherjea, J., then gave instances of restrictions contemplated by clause (5), restrictions which may be placed on the movement of citizens for the avoidance of pestilence or spreading of contagious diseases or in order to close certain areas for military purposes, and concluding, his Lordship stated that detention does not come within the express language or within the spirit and intendment of clause (*1*)(*d*) of Article 19 of the Constitution which was intended to deal with a totally different aspect or form of liberty. His Lordship examined the contention that by reason of detention a man may be prevented from exercising the rights conferred on him by Article 19, but explained the apparent contradiction by saying that " the words used in Article 19 (*1*) (*d*) of the Constitution do not mean the same thing as the expression ' personal liberty ' in Article 21 does ".

Das, J., at page 109 observed—

> " The very first question that arises, therefore, is as to whether the freedom of the person which is primarily and directly suspended

or destroyed by preventive detention is at all governed by Article 19(*1*)*.

The answer to this question is given at page 111 —

> "There are indications in the very language of the Article 19(*1*)(*d*) itself that its purpose is to protect not the general right of free movement which emanates from the freedom of the person but only a specific and limited aspect of it, namely, the special right of a free citizen of India to move freely throughout the Indian territory, i.e., from one State to another within the Union. In other words, it guarantees, for example, that a free Indian citizen ordinarily residing in the State of West Bengal will be free to move from West Bengal to Bihar or to reside and settle in Madras or Punjab without any let or hindrance other than as provided in clause (*5*). It is this special right of movement of the Indian citizen in this specific sense and for this particular purpose which is protected by Article 19 (*1*)(*d*)".

I have been at some pains to quote these passages from the judgments of their Lordships of the Supreme Court because a cursory reading of Article 19 might lead the uninitiated to think that Article 19 was intended to enumerate the principal freedoms which in their sum total constitute the right of a free citizen and that if any one or more or all of them are taken away by law, the law must be declared void unless it is saved by the various clauses of the Article. And therefore (so it might be argued as indeed Fazl Ali, J., argued in his judgment) a law which takes away the liberty of the citizens also deprives him of the various freedoms conferred by Article 19. It is, however, clear from the interpretation given by a majority of their Lordships of the Supreme Court that the right conferred by sub-clauses (*a*), (*d*) and (*e*) is a very limited right and that the question of personal liberty is dealt with in Article 21. The right conferred by sub-clause (*d*) has been expressly defined by

Ajaib Singh v. The State of Punjab

Khosla J.

their Lordships, but it is clear from their judgments and the extracts quoted by me that the right under sub-clause (*e*) is also a restricted one and this right will not be affected by depriving a citizen of his total liberty. Therefore imprisonment, detention or confinement will not be treated as having taken away any of the seven rights enumerated in clause (*1*) of Article 19.

The next question to consider is whether the provisions of the Act take away that restricted right conferred by sub-clauses (*d*) and (*e*). Kania, C. J., pointed out the distinction between laws which directly take away the fundamental rights of a free citizen and laws which deprive a citizen of personal liberty by operation of punitive and preventive detention. He observed at page 35—

> "If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life."

All that the impugned Act does is to deprive the abducted person of his personal liberty from the moment he is taken into custody and taken to the camp up to the time when he is allowed to go away or is conveyed outside India. The law, therefore, does not directly take away any of the fundamental rights, but even if it were conceded that the abducted person is deprived of the right of free residence, the Act will not be declared invalid because the right of residence

conferred by sub-clause (*e*) is a very narrow right as explained by me above and confinement in a camp deprives the abducted person of his personal liberty and not of the smaller right to reside and settle in any part of the territory of India. This is clear from the interpretation placed upon the expression "territory of India" by their Lordships of the Supreme Court. Since the Act does not come within the ambit of Article 19(*1*) the question whether the restrictions imposed are reasonable or are in the interests of general public does not arise, and we need not consider the application of clause (5).

The only other point raised in connection with Article 19 was that when the abducted person is conveyed out of India he or she loses all her rights of citizenship and indeed is deprived of the status of a citizen. There is no provision in the Constitution against a citizen being sent out of India. Indeed, item 19 read with item 14 of List I of the Seventh Schedule would appear to indicate that the Union Parliament is competent to pass laws whereby the citizens of India may be expelled from the country in accordance with treaties and agreements with foreign countries. There is nothing in the Constitution whereby citizen cannot be deprived of his rights as a citizen or deported from India. This is perhaps a surprising but nevertheless a significant omission and I can find nothing in the Constitution which forbids an abducted person from being conveyed out of India in accordance with the provisions of the Act.

The argument arising out of Article 21 need not delay us long. Under this Article "no person shall be deprived of his life or personal liberty except according to procedure established by law." The expression "procedure established by law" was considered and explained by their Lordships of the Supreme Court in *Gopalan's case* to which a reference has already been made. It was laid down that "procedure established by law" is not synonymous with "due process of law" which finds a place in the American Constitution, nor is it synonymous with law in the sense of *jus*, i.e., the principles of natural justice.

Ajaib Singh v. The State of Punjab

Khosla J.

The procedure, therefore, means procedure laid down by law or the procedure prescribed by Article 22. There is, therefore, nothing inconsistent in the impugned Act which is contrary to the provisions of Article 21. The procedure governing the recovery and restoration of abducted women is set out in an Act of Parliament and as long as this procedure is consistent with Article 22 it must be held to be valid and lawful.

The argument arising out of article 22 is that every person who is arrested and detained in custody must be produced before the nearest Magistrate within a certain time. The Act does not make any provision for the production of an abducted person before a Magistrate. Indeed it expressly lays down that the abducted person must be delivered to the custody of the officer-in-charge of the nearest camp with the least possible delay. He or she is kept in that camp and is not allowed to consult a legal practitioner. It is clear that the impugned Act is not a law providing for preventive detention and therefore, it is not exempted by operation of clause (3) of the Article. The abducted person is undoubtedly arrested and detained. Mr. Daphtary tried to argue that taking into custody does not amount to arrest. I am, however, unable to accept this contention. As pointed out by Bhandari, J., "arrest" means apprehension by legal authority and is in no way different from taking into custody. The taking into custody of the abducted person, therefore, amounts to arrest and he must be produced before a Magistrate within the time specified in article 22(2). It is argued that there is nothing in the Act which expressly forbids the production of an abducted person before a Magistrate and that we must, therefore, read the provisions of Article 22 into the Act. I am, however, unable to accept this view. The reading of the Act as a whole shows that the abducted person is not to be produced before a Magistrate but is to be taken without delay to the nearest camp and handed over to the officer-in-charge. The scheme of the Act and the necessary intendment as indicated by its

terms clearly preclude the production of an abducted person before a Magistrate. Also there is nothing in the Act which permits an abducted person to consult a legal practitioner of his or her choice. It is clear therefore, that in this respect the Act is inconsistent with the provisions of Article 22. It follows as a result that the detention of an abducted person after the period specified in Article 22 has expired becomes illegal and he or she must be set at liberty. This Court will, therefore, order that the petitioners before us are entitled to be set at liberty forthwith.

It was next contended that the procedure prescribed by the Act was contrary to the principles of natural justice inasmuch as an abducted person was not given an opportunity to consult a legal practitioner or to prove that he or she was not in fact an abducted person. Indeed such a person was at a great disadvantage and the opinion of the police officer was sufficient to deprive him or her of the rights of citizenship. This argument in so far as it had relation to the provisions of article 22 has considerable force, but I am not prepared to hold that the entire procedure is unjust or improper. The case is examined by a Tribunal consisting of a Superintendent of Police of India and a Superintendent of Police from Pakistan who may be expected to deal with the question of the abducted person's status justly and impartially. There is nothing fundamentally wrong or improper in entrusting the decision of this question to a Tribunal of this nature, and the prohibition in regard to interference by Law Courts is not by itself contrary to the principles of natural justice. Reliance was placed on a recent decision of the Supreme Court in *State of Madras* v. *V. G. Row*, (1) in which their Lordships examined the validity of the law in its procedural aspect from the view point of reasonableness. In the present case apart from the conflict with Article 22 there appears to me nothing unreasonable in the procedure laid down for the recovery and restoration of abducted women.

(1) Case No. 90 of 1951.

Ajaib Singh
v.
The State of Punjab

Khosla J.

One last point of comparatively minor importance remains, namely whether the Tribunal was properly constituted. Section 6(*1*) provides that the Tribunal must be constituted by the Central Government. The Tribunal consists of two Superintendents of Police, one from India and one from Pakistan. A notification appointing the Indian member was brought to our notice. There is, however, no notification appointing the Pakistan member. Mr Daphtary was unable to meet this argument and it is clear that the Tribunal has not been constituted by the Central Government as only one of its members has been appointed by that authority. It follows that the decision declaring the abducted persons concerned in the petitions before us is void and inoperative.

I would accordingly answer the reference as follows :—

Q. (*1*) The Act is not inconsistent with the provisions of Article 19 of the Constitution.

Q.(*2*) The Act is inconsistent with the provisions of Article 22 as it does not provide for the production of an abducted person before a Magistrate after he or she has been taken into custody. Indeed it appears to exclude such production. It is also inconsistent with Article 22 as it does not permit an abducted person to consult a legal practitioner of his choice. It cannot, however, be said that the entire Act is *ultra vires* for its remaining provisions are in no way inconsistent with Article 22. Had the Act provided for the production of an abducted person before a Magistrate and his being able to consult a legal practitioner of his choice as contemplated by Article 22, it (the Act) would have been *intra vires*.

Q.(*3*) Was not seriously agitated before us, but I shall say that inasmuch as the Tribunal performs *quasi* judicial functions for it makes an enquiry into the status of

an individual, it is subject to the supervision of this Court.

Lastly the Tribunal is not a properly constituted Tribunal under the Act, so orders passed by it were without jurisdiction.

Khosla J.

In the result all the abducted persons whose relatives or representatives have moved this Court for writs of *habeas corpus* are entitled to be set at liberty forthwith.

The case will now be remitted for final disposal to the Division Bench which referred the question of law to this Bench.

Harnam Singh J.

HARNAM SINGH, J. In Criminal Writs Nos. 137, 143, 144, 149, 161, and 162 of 1951 and Criminal Writs Nos. 1, 8, 9D, 22, 28, 29, 33, 35, 39 and 41 of 1952 the question that arises for decision is whether the Abducted Persons (Recovery and Restoration) Act, 1949, hereinafter referred to as the Act, has wholly or in part become void, being inconsistent with the provisions of Part III of the Constitution of India.

In Criminal Writ No. 169 of 1951 and in Criminal Writs Nos. 2, 20, 21, 23, 25, 27, 30 and 31 of 1951 an identical question arose, but those cases have become infructuous as the 'abducted persons' in those cases have been *conveyed out of India*.

In Criminal Writ No. 144 of 1951 the following questions were referred to the Full Bench for decision :—

(1) Is the Central Act (LXV of 1949) *ultra vires* the Constitution because its provisions with regard to the detention in camps of 'abducted persons' violate the rights conferred upon the Indian citizens under Article 19 of the Constitution ?

(2) Is this Act *ultra vires* the Constitution because it violates the provisions of Article 22 of the Constitution ?

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

(3) Is the Tribunal constituted under section 6 of the Act a Tribunal subject to the general supervision of the High Court by virtue of Article 227 of the Constitution?

In the reference order Khosla, J. (Bhandari, J. concurring) said :—

> "I would draw up the following provisional questions but the Bench constituted to consider the matter will not be obliged to confine itself within the narrow limits of the phraseology employed by me."

In these proceedings no arguments were addressed on the point covered by question No. 3. This was presumably so for in such cases High Courts have plenary jurisdiction under Article 226 of the Constitution and the point covered by question No. 3 has no practical bearing on the cases before us.

Now, the Act was made on the 28th of December 1949. Section 1 (2) of the Act provided that the Act shall extend to the United Provinces, the Provinces of East Punjab and Delhi, the Patiala and East Punjab States Union and the United States of Rajasthan and shall remain in force up to the 31st of October, 1951. In the exercise of the powers conferred by Article 372 (2) of the Constitution the President of India by the Adaptation of Laws Order, 1950, made adaptations and modifications and provided that the Act shall, as from the 26th day of January, 1950, have effect subject to the adaptations and modifications so made. On the 30th of October, 1951, the President of India in exercise of the powers conferred by clause (1) of Article 123 of the Constitution promulgated Ordinance No. VII of 1951 whereby subsection (2) of section 1 of the Act was substituted by the following subsection :—

> "1 (2). It extends to the States of Punjab and Uttar Pradesh, Patiala and East Punjab States Union, Rajasthan and Delhi and shall remain in force up to the *31st day of October, 1952.*"

On the 23rd of February, 1952, the Parliament of India made Act No. VII of 1952, whereby Ordinance No. VII of 1951 was repealed but the provisions of the Ordinance were re-enacted. The main provisions of the Act are to be found in sections 1(2), 2 (1) (a), 4, 6, 7 and 10.

Section 1 (2) of the Act defines the territorial operation of the Act and provides that the Act shall remain in force up to the 31st of October, 1952. Section 2 (1)(a) of the Act defines the expression 'abducted person'. Section 4 of the Act provides that if any police officer, not below the rank of an Assistant Sub-Inspector or any other police officer specially authorised by the State Government in that behalf, has reason to believe that an 'abducted person' resides or is to be found in any place, he may, after recording the reasons for his belief without warrant, enter and *take into custody* any person found therein who, in his opinion, is an 'abducted person', and deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp with the least possible delay. Section 6 of the Act makes provision for the determination of the questions whether a person detained in a camp is or is not an 'abducted person' or whether such person should be restored to his or her relatives or handed over to any other person or *conveyed out of India* or allowed to leave the camp. Section 7 of the Act declares that any officer in charge of a camp may deliver any 'abducted person' detained in the camp to the custody of such officer or authority as the State Government may, by general or special order, specify in that behalf, and that any officer or authority to whom the custody of any 'abducted person' has been delivered shall be entitled to hold such person in custody and either restore such person to his or her relatives or *convey such person out of India*. Section 10 of the Act empowers the Central Government to make rules to carry out the purposes of the Act.

From the preamble of the Act it appears that with the previous consent of the Governors of the United Provinces and East Punjab and the *Rajpramukhs* of Patiala and the East Punjab States Union and the

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

United States of Rajasthan under subsection (*1*) of section 106 of the Government of India Act, 1935, the Act was made in pursuance of an agreement with Pakistan for the recovery and restoration of 'abducted persons' as defined in section 2 (*1*) (*a*) of the Act.

That the Legislature possessed competency to make the law is plain from entries Nos. 3 and 17 in List I of the Seventh Schedule read with sections 100 and 106, Government of India Act, 1935. The relevant portions of entries Nos. 3 and 17 are in these terms :—

(*3*) "the implementing of treaties and agreements with other countries".

(17) "admission into and emigration and *expulsion* from India including in relation thereto the regulation of the movement in India of persons who are not British subjects domiciled in India, subjects of any Federated States or British subjects domiciled in the United Kingdom."

Entries Nos. 14 and 19 in List I of the Seventh Schedule, Constitution of India, correspond to entries Nos. 3 and 17 in List I, Seventh Schedule, Government of India Act, 1935. In these proceedings it is not disputed that the Act is covered by entries Nos. 3 and 17 in List I, Seventh Schedule, Government of India Act, 1935.

In the several cases that are before us it is objected that the provisions of sections 1 (*2*), 2 (*1*) (*a*) and 6 of the Act are inconsistent with Article 14 of the Constitution, that section 2 (*1*) (*a*) of the Act is inconsistent with Article 15 of the Constitution, that the provisions of section 7 of the Act in so far as they authorise that an 'abducted person' may be *conveyed out of India* are inconsistent with the provisions of Article 19 (*1*) (*d*) and (*e*) of the Constitution, that section 6 of the Act is inconsistent with Article 21 of the Constitution and that section 4 of the Act is inconsistent with Article 22 (*1*) and (*2*) of the Constitution.

In approaching the applications themselves, I preface my opinion with the remarks made by Lord Macnaghten in *Vacher and Sons, Limited* v. *London Society of Compositors* (1) :—

> "But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

In order to appreciate the rival contentions it is useful to bear in mind the provisions of section 552 of the Code of Criminal Procedure, hereinafter referred to as the Code, which provide for the recovery and restoration of 'abducted females'. That section reads :—

> "Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or another person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary."

Section 552 of the Code was in force in India when the Act was made on the 28th of December, 1949, and continues to be in force in India so far as the cases not falling within the Act are concerned. That being so, the vital issue under Article 14 of the Constitution is whether the exception engrafted by

(1) 1913 A. C. 107.

Ajaib Singh v. The State of Punjab

Harnam Singh J.

the Act upon section 552 of the Code does not '*rest upon reasonable grounds of distinction*'.

Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The first part of Article 14 of the Constitution is an adaptation of Article 40 (*1*) of the Irish Constitution, 1937, and the latter part of Article 14 is an adaptation of the concluding part of the Fourteenth Amendment of the American Constitution made in 1868. In Constitutional Law of the United States, 1936 edition, Professor Willis dealing with the Fourteenth Amendment of the Constitution sums up the law as prevailing in that country in these words at p. 579 :—

> "*Meaning and Effect of the Guaranty.* The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.'"

In India the meaning and the scope of Article 14 of the Constitution came up for consideration in *Charanjit Lal* v. *Union of India* (1). In that case Mukherjea, J., said :—

> "The Legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of

(1) A. I. R. 1951 S. C. 41.

denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made *without any substantial basis* should be regarded as invalid."

In *State of Bombay* v. *F. N. Balsara* (1), the principles laid down in A. I. R. 1951 S. C. 41 were stated to be as follows :—

"1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

(1) A. I. R. 1951 S. C. 318.

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

6. If a law deals equally with members of well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

With these principles in view I have to decide whether Article 14 of the Constitution conflicts with sections 1 (*2*), 2(*1*) (*a*) and 6 of the Act. Section 2 (*1*) (*a*) of the Act reads :—

"2 (*1*) (*a*) 'abducted person' means a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim and who, on or after that day and before the 1st day of January 1949, has become separated from his or her family and is found to be living with or under the control of any other individual or family, and in the latter case includes a child born to any such female after the said date."

As stated above, the Act was made for the implementing of agreement with Pakistan with regard to the recovery and restoration of 'abducted persons' and conveying such persons out of India, if necessary. *Shrimati* Mridula Sarabhai, who is in charge of organising the recovery of *abducted persons* and is in constant touch with that work has placed on the record an affidavit sworn by her on the 20th of April, 1952. In that affidavit it is said :—

"These abductions which took place in 1947 and a little later were not normal crimes committed by individuals here and there but were part of a programme of planned

retaliations. In the name of religion and for the purpose of retaliation, women and children were bing abducted, humiliated and made victims of heinous crimes. * * * * * * * * Before the passing of the Act efforts were made to recover these women under the ordinary procedure of law but since it was found impossible to recover such women, either in India or Pakistan, the victim was left behind amongst the hostile group of people who would resist her efforts to escape. * * * * * * Nobody registered a case against the abductor or took any proceedings. * * * * A conference was held on the 6th of December, 1947 at Lahore and Special Recovery Police Escorts and social workers began functioning jointly in India and Pakistan, but the recovery of 'abducted persons' was not successful because representatives of one country could not be effective in the other country. Therefore on the 11th of November, 1948, an inter-Dominion Agreement between India and Pakistan was arrived at to recover ' abducted persons ' which resulted in the promulgation of the Abducted Persons (Recovery and Restoration) Ordinance, 1949. A similar legislation was effected in Pakistan. On the 30th of December, 1949, the Central Legislature passed the Abducted Persons (Recovery and Restoration) Act, 1949 ".

In these circumstances it cannot be maintained that the definition of the expression ' abducted person ' occurring in section 2 (*1*) (*a*) of the Act does not rest upon reasonable grounds of distinction. Indeed, in deciding to make the Act it was considered by India and Pakistan that the law contained in section 552 of the Code was not effective to meet the situation that arose on the partition of the country and that the recovery and restoration of persons abducted during the

Ajaib Singh v. The State of Punjab

Harnam Singh J.

period stated in section 2 (*1*) (*a*) of the Act required special treatment. The circumstances set out in the affidavit of *Shrimati* Mridula Sarabhai are not denied and no attempt is made to show that those circumstances do not afford *reasonable basis* for the classification made in section 2 (*1*) (*a*) of the Act. In such cases one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis.

Section 6 of the Act is impugned on the ground that the constitution of special Tribunals for the determination of the questions arising under that section does not conform with the guarantee of the equal protection of the laws given by Article 14. Put shortly, the objection seems to be that the questions that may arise under section 6 of the Act call for a judicial decision with which no Tribunal other than a regularly constituted Court could be empowered to deal and that the constitution of special Tribunals under the Act is open to the charge of the denial of equal protection on the ground that the Act discriminates against 'abducted persons' falling within section 2 (*1*) (*a*) of the Act by denying to them the procedural protection given to 'abducted females' by section 552 of the Code. In my judgment, the mere fact that section 6 of the Act has constituted *special Tribunals* for the determination of the questions that arise under the Act is not sufficient to justify the conclusion that section 6 of the Act is inconsistent with Article 14 of the Constitution. Article 14 guarantees to persons within the territory of India that they shall not by State law be precluded from the enjoyment of privileges which other persons similarly circumstanced enjoy, or they may not have imposed upon themselves burdens which others similarly circumstanced are free from. Class legislation discriminating against some and favouring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, does not come within Article 14. In delivering

the opinion of the Court in *Reetz* v. *Michigan* (1), Brewer, J., said :—

> " We know of no provision in the Federal Constitution which forbids a State from granting to a Tribunal whether called a Court or a Board of registration, the final determination of a legal question. * * * Due process is not necessarily judicial process. * * * Neither is the right of appeal essential to due process of law."

In my opinion, the ' abducted persons ' falling within section 2 (*1*) (*a*) of the Act are a well-defined class requiring treatment different from that provided in section 552 of the Code.

Section 1 (*2*) of the Act which was enacted on the 23rd of February, 1952, provides that the Act shall extend to the States of Punjab and Uttar Pradesh, Patiala and East Punjab States Union, Rajasthan and Delhi and shall remain in force up to the 31st of October, 1952. The objection raised is that the territorial basis of classification underlying section 1 (*2*) of the Act infringes the rights conferred by Article 14 of the Constitution. That there is a territorial basis of classification in the Constitution itself is apparent from the fact that the Constitution itself contemplates the possibility of different laws being made for different States by their separate legislatures. In this connection the provisions of Chapter I, Part XI of the Constitution may be seen. As stated by Professor Willis in the passage cited above the guarantee of the equal protection of the laws does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. In any case it is not possible to proceed upon the assumption that conditions in States other than those to which the Act extends are identical with conditions to be found in the States enumerated in section 1 (*2*) of the Act.

For the reasons given above, I find that the objection under Article 14 of the Constitution fails.

(1) (1902) 188 U. S. 563.

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

Article 15 of the Constitution provides, *inter alia,* that the State shall not discriminate against any citizen on grounds *only of religion*, race, caste, sex, place of birth or any of them. Counsel for the applicants maintain that section 2(1)(a) of the Act discriminates against citizens of India on *grounds only of religion.*

Now, the ingredients of the definition of the expression 'abducted person' occurring in section 2 (1) (a) of the Act are :—

(*a*) the person must be a male child under the age of sixteen years or a female child of whatever age ;

(*b*) the person is, or immediately before the 1st day of March, 1947, was, a Muslim ;

(*c*) the person has, on or after the 1st day of March, 1947, and before the 1st day of January, 1949, become separated from his or her family ; and

(*d*) the person is found to be living with or under the control of any other individual or family.

In the concluding clause of section 2 (1)(a) of the Act it is provided that a child born to a female 'abducted person' after the 1st day of March, 1947, is also an 'abducted person' within that definition.

Clearly, the mere fact that the person abducted is a Muslim does not bring the case within the definition given in section 2 (1)(a) of the Act. In order to bring the case within that definition the conditions set out at (*a*) *to* (*d*) above should be satisfied, or the case should come within the concluding clause of section 2 (*1*)(*a*) of the Act. If so, the definition of the expression 'abducted person' does not discriminate on grounds *only of religion.* In these circumstances I find that section 2 (*1*)(*a*) of the Act is not open to the charge of discrimination against citizens of India on grounds *only of religion.*

Then it is said that the provisions of section 7 of the Act have become void, because they are inconsistent with the provisions of Article 19 (*1*)(*d*) and (*e*) of the Constitution. I do not accept the validity of the objection.

In order to appreciate the objection under Article 19 (*1*) (*d*) and (*e*) of the Constitution, the scope of Article 19 (*1*) (*d*) and (*e*) has to be seen. In defining the meaning and scope of Article 19 (*1*) (*d*) of the Constitution in *A. K. Gopalan* v. *State of Madras*, (1) Kania, C. J., said :—

> "What is sought to be protected by that sub-clause is the right to freedom of movement, i.e., without restriction, throughout the territory of India. Read with their natural grammatical meaning the sub-clause only means that if restrictions are sought to be put upon movement of a citizen from State to State or even within a State such restrictions will have to be tested by the permissive limits prescribed in clause (5) of that Article. Sub-clause (*d*) has nothing to do with detention, preventive or punitive."

Dealing with the same matter Patanjali Sastri, J. (now Chief Justice of India) said in A. I. R. 1950 S. C. 27 at p. 69 :—

> "Sub-clause (*d*) of clause (*1*) does not refer to freedom of movement *simpliciter* but guarantees the right to move freely 'throughout the territory of India'. Sub-clause (e) similarly guarantees the right to reside and settle in any part of the territory of India. And clause (5) authorises the imposition of 'reasonable restrictions' on these rights in the interests of the general

(1) A. I. R. 1950 S. C. 27.

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

public or for the protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose."

In considering the same point in A. I. R. 1950 S. C. 27 at p. 95, Mukherjea, J., said :—

"The meaning of sub-clause (*d*) of Article 19(*1*) will be clear if we take it along with sub-clause (*e*) and (*f*), all of which have been lumped together in clause (5) and to all of which the same restrictions including those relating to protection of the interest of any Scheduled Tribe have been made applicable. To an alien or foreigner, no guarantee of any such right has been given. Normally all citizens would have the free right to move from one part of the Indian territory to another. They can shift their residence from one place to any other place of their choice and settle anywhere they like. The right of free trade, commerce and intercourse throughout the territory of India is also secured. What the Constitution emphasised upon the guaranteeing *these* rights is that the whole of Indian Union in spite of its being divided into a number of States is really one unit so far as the citizens of the Union are concerned. All the citizens would have the same privileges and the same facilities for moving into any part of the territory and they can reside and carry on business anywhere they like; and no restriction either inter-State or otherwise would be allowed to be set up in these respects between one part of India and another."

In the following passage occurring at page 111 of the report, A. I. R. 1950 S. C. 27, Das J. expressed his opinion on the point under consideration :—

> "There are indications in the very language of Article 19 (*1*)(*d*) itself that its purpose is to protect not the general right of free movement which emanates from the freedom of the person but only a specific and limited aspect of it, namely, the special right of a free citizen of India to move freely throughout the Indian territory, i.e., from one State to another within the Union."

In construing Article 19 (*1*)(*d*) Fazal Ali, J., said at page 54 in A. I. R. 1950 S. C. 27 :—

> "I am confirmed in view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Article 19 (*1*)(*d*) must be construed according to this universally accepted legal conception."

For the opinion of Mahajan, J., on the point under consideration page 83 of the report, A. I. R. 1950 S. C. 27, may be seen. That opinion is expressed in these terms :—

> "Preventive detention in substance is a negation of the freedom of locomotion guaranteed under Article 19 (*1*)(*d*), but it cannot be said that it merely restricts it. Be that as it may, the question for consideration is whether it was intended that Article 19 would govern a law made under the provisions of Article 22. Article 19 (*5*) is a saving and an enabling provision. It empowers Parliament to make a law imposing reasonable restrictions on the rights of freedom of movement while Article 22 (*7*) is another enabling provision empowering Parliament to make a law on the subject of

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

preventive detention in certain circumstances. If a law conforms to the conditions laid down in Article 22 (7), it would be good law and it could not have been intended that that law validly made should also conform itself to the provisions of Article 19 (5)".

From what I have said above, it follows that the majority view in A. I. R. 1950 S. C. 27 was that Article 19 (*1*) (*d*) protects *free movement of citizens from one State to another within the Union so that Parliament may not by a law made under entry No. 81 in List I of Schedule 7 curtail it beyond the limits prescribed by clause* (5) *of Article 19.* In other words, Article 19 (*1*) (*d*) of the Constitution guarantees *protection against provincialism and has nothing to do with personal liberty.*

Article 19 (*1*)(*d*), (*e*), (*f*) and (*g*) of the Constitution corresponds to Article 75 of the Constitution of the Free City of Danzig reading :—

> "All nationals shall enjoy freedom of movement within the Free City and shall have the right to stay and to settle at any place they may choose, to acquire real property and to earn their living in any way. *This right shall not be curtailed without legal sanctions.*"

Article 76 of the Constitution of the Free City of Danzig provides that every national shall be entitled to emigrate to other countries. That Constitution, however, does not guarantee that no national of the Free City shall be expelled from the territory of the Free City. Article 44 of the Swiss Constitution, 1874, declares, *inter alia,* that no Swiss citizen shall be *expelled* from the territory of the Confederation or from his canton of origin while Article 45 of that Constitution guarantees that every Swiss citizen has the right to settle in any part of Switzerland, subject to the production of a certificate of origin or similar document. Entry 17 in List I, Seventh Schedule, Government of India Act, 1935, gave power to the Federal Legislature

to make laws for *admission* into, and *emigration* and *expulsion* from India. That *expulsion* and banishment of people from a country is not emigration in the ordinary and usual significance of the words was stated by Starke, J., in *Ex-parte Walsh and Johnson*, (1).

That the conclusion reached by me is the correct conclusion is plain from what appears in A. I. R. 1950 S. C. 27 at page 35. In that passage Kania, C. J., said :—

> "The Article has to be read without any preconceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. *If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peacably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise.. If,* however, the legislation is not directly in respect of any of these subjects but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of detenu's life."

Indeed, the rule of law stated in the preceding paragraph was reaffirmed in *Ram Singh* v. *State of* Delhi, (2). In reaffirming the rule, Patanjali Sastri, J. said :—

> "It follows that the petitioners now before us are governed by the decision in *Gopalan's case*, notwithstanding that the petitioners'

(1) 37 C. L. R. 36 at p. 136.
(2) A. I. R. 1951 S. C. 270.

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

right under Article 19 (*1*)(*a*) is abridged as a result of their detention under the Act. The anomaly, if anomaly there be in the resulting position is inherent in the structure and language of the relevant Articles, whose meaning and effect as expounded by this Court by an overwhelming majority in the cases referred to above must now be taken to be settled law, and Courts in this country will be serving no useful purpose by discovering supposed conflicts and illogicalities and recommending parties to re-agitate the point thus settled."

Now, the Act does not directly attempt to control the fundamental right conferred upon the citizens of India by Article 19 (*1*)(*d*) of the Constitution. Clearly, the Act is a law within entry No. 19 in the Union List and not within entry No. 81 of that List. That being the position of matters, the quesion whether the Act is saved by Article 19(*5*) of the Constitution does not arise.

That the considerations which arise under Article 19 (*1*)(*d*) of the Constitution also arise under Article 19 (*1*)(*e*) of the Constitution is plain from the opinions expressed by Patanjali Sastri and Mukherjea, JJ. in *Gopalan's case* in the passages cited hereinbefore. In these circumstances I hold that the objection raised under Article 19 (*1*)(*e*) of the Constitution also fails.

Relying on the decision in *Shabbir Husain* vs. *The State of U. P. and another*, (1) counsel for the applicants maintained that the provisions contained in the concluding clause of section 7(2) of the Act have become void. In A.I.R. 1952 Allahabad 257 Raghubar Dayal, J., said :—

"As a citizen of India, the applicant has the right given to a citizen under the Constitution. Article 19, sub-section (*1*), clauses (*d*) and (*e*) give to all citizens the right to move freely throughout the territory of

(1) A. I. R. 1952 Allahabad 257.

India and reside and settle in any part of the territory of India. This should mean that a citizen of India cannot be denied such rights. An order of deportation or removal of a person from the territory means that the person against whom the order is passed is denied the right of residence and settling in any part of the territory of India. It should follow that a law allowing the removal from the territory of India of any citizen would be in contravention of Article 19, sub-section (*1*), clauses (*d*) and (*e*) of the Constitution and will therefore be void in view of Article 13 (*1*) of the Constitution."

In dealing with the same matter Bhargava, J., said in A. I. R. 1950 Allahabad 257 :—

"As a citizen of India, the applicant has, no doubt got the right to move freely throughout and to reside in any part of the territory of India, and particularly in his ancestral home in Village Kalyanpur in the district of Bijnor in U. P. At the present moment, the applicant is in India and although he had gone to Pakistan, he returned from there under a valid permit. Rule 19 of the Permit System Rules, 1949, imposes a restriction upon the applicant's stay in India, that is to say, he cannot even reside in his ancestral home ; as such the rule directly infringes the applicant's right to reside in India and is inconsistent with the provisions of Article 19 (*1*)(*e*) of the Constitution."

Now, *Gopalan's case* was decided by the Supreme Court of India on the 19th of May 1950, whereas *Shabbir Husain* v. *The State of U. P. and another*, was decided on the 26th September 1951. In A. I. R. 1952 Allahabad 257 the scope of Article 19 (*1*)(*d*) and (*e*) of the Constitution, as explained by the Supreme Court, is not considered. Clearly, the decision in

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

A. I. R. 1952 Allahabad 257, runs counter to the principles laid down in *Gopalan's case.*

In an earlier part of this order I have stated that it is not disputed that the Act is covered by entries Nos. 3 and 17 in List I of the Seventh Schedule, Government of India Act, 1935. Article 372 (*1*) of the Constitution provides, *inter alia,* that all laws in force in the territory of India immediately before the 26th day of January, 1950, shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. That being so, the provision contained in the concluding clause of section 7 (*2*) of the Act is open to challenge only on the ground that the provision is inconsistent with the provisions of Part III of the Constitution. As stated above, no such inconsistency exists.

Article 19(*1*)(*d*) and (*e*) guarantee rights to the citizens of India which are conferred on Swiss citizens by Article 45, but no provision is made in Part III of the Constitution of India corresponding to that contained in Article 44 of the Federal Constitution of the Swiss Confederation, 1874. *Prima facie*, the power to make laws for the expulsion of Indian citizens from India was given to the Federal Legislature by entry No. 17 in List I of the Seventh Schedule, Government of India Act, 1935, and that power is given to the Parliament of India by entry No. 19 in List I of the Seventh Schedule, Constitution of India, read with Article 248.

In 37 Commonwealth Law Reports, page 36, Isaacs, J., said at page 94 :

> "I agree with the Solicitor-General—and indeed, Dr *Evatt* did not contest this—that deportation as a means of self-protection in relation to constitutional functions is within the competency of the legislative organ of the Australian people. This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit, to

eliminate from their communal society any element considered inimical to its existence or welfare. We have only to imagine, as I suggested during the argument, some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor. It matters not, as I conceive, whether he is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia, the national danger is the same."

In these proceedings I do not, however, think it proper to pass upon the validity of the objection for the objection was not taken in the applications that have been placed before us for disposal, no arguments have been addressed on the objection, and the cases before us can be disposed of on objections arising under subclauses (*1*) and (*2*) of Article 22 of the Constitution. In these circumstances I reserve my right to give my considered opinion on the objection in a case which cannot be properly disposed of in some other way.

In arguments it was said that the Act provides for the deprivation of personal liberty *not in accordance with the procedure established by law*. That there is no substance in the objection is clear from the provisions of sections 6 and 10 of the Act. Section 6 of the Act makes provision for the determination of questions whether any person detained is an abducted person and whether such person should be restored to his or her relatives or handed over to any other person or conveyed out of India or allowed to leave the camp and section 10 of the Act authorises the Central Government to make rules, *inter alia*, to provide for the constitution and procedure of any tribunal appointed under section 6 of the Act. In my judgment section 6 of the Act satisfies the requirements of Article 21 of the Constitution. The objections that the decision of the questions that arise under section 6 of the Act is not entrusted to Courts under section 552 of the Code and that the decision of the Tribunal is final have no substance for there is ample

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

authority for the view that the requirement of a judicial trial does not prevail in every case and that the right of appeal is not essential to due process of law. The right to make a defence may be admitted and that right is given under section 6 of the Act. That being so, it cannot be sustained that section 6 of the Act is inconsistent with Article 21 of the Constitution. The Constitution by Article 21 requires a procedure and the Act provides for that procedure. To add to that procedure is not to interpret the Constitution but to recast it.

And this brings me to the examination of the objection that section 4 of the Act is not consistent with Article 22 (*1*) and (*2*) of the Constitution. Article 22 (*1*) and (*2*) reads :—

> "22 (*1*) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice.
>
> (*2*) Every person who is arrested and detained in custody *shall be produced before the nearest magistrate within a period of twenty-four hours* of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person *shall be detained in custody beyond the said period without the authority of a magistrate.*"

Section 4 (*1*) of the Act reads :—

> 4 (*1*) *Powers of Police Officers to Recover Abducted Persons.* (*1*) If any police officer, not below the rank of an Assistant Sub-Inspector or any other police officer specially authorised by the State Government in this behalf, has reason to believe that an abducted person resides or is to be found in any place, he may after recording

the reasons for his belief, without warrant, enter and search the place and take into custody any person found therein who, in his opinion, is an abducted person, and deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp with the least possible delay."

In examining the objection that the provisions of section 4 (*1*) of the Act are inconsistent with Article 22 (*1*) and (*2*) of the Constitution, the first question to be seen is what are the rights given by sub-clauses (*1*) and (*2*) of Article 22, for silence of the Act on points on which the *Constitution itself* is silent will not make the Act void. On this point what is said in A. I. R. 1950 S. C. 27 at page 41 may be seen.

Clauses (*1*) and (*2*) of Article 22 lay down the procedure that is to be followed when a person is arrested and detained. Clauses (*1*) and (*2*) of Article 22 guarantee to the person arrested and detained the rights stated hereunder :—

(1) right to be informed regarding the grounds of arrest ;

(2) right to consult and to be defended by a legal practitioner of his choice ;

(3) right to be produced before the nearest magistrate within a period of twenty-four hours of his arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate ; and

(4) freedom from detention beyond the period stated in the preceding sub-paragraph without the authority of a magistrate.

Section 4 of the Act on the other hand provides that the police officer who has recovered an abducted person shall deliver or cause such person to be *delivered to the custody of the officer in charge of the nearest camp with the least possible delay.* Section 7 of the

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

Act then provides that the officer in charge of a camp may deliver any 'abducted person' detained in the camp to the custody of such officer or authority as the State Government may, by general or special order, specify in that behalf. Section 7 (2) of the Act enacts that the officer or authority to whom the custody of any 'abducted person' has been delivered under the provisions of subsection (1) shall be entitled to receive and hold the person in custody and either restore such person to his or her relatives or convey such person out of India. Clearly, the Act does not contain any provision giving to the 'abducted person' the right to consult and to be defended by a legal practitioner of his choice, nor does the Act contain any provisions requiring the production of the 'abducted person' before a magistrate within the period mentioned in Article 22 (2) of the Constitution or any provision requiring that grounds of arrest shall be supplied to the person arrested and detained.

Mr. Daphtary gave a double-barrelled answer to the objection raised. In the first place it was said that there is no arrest under section 4 of the Act and in the second place it was said that the provisions of Article 22 (1) and (2) of the Constitution must be deemed to be incorporated in section 4 of the Act. I am unable to accede to the view presented.

In the Shorter Oxford Dictionary the expression 'arrest' is defined to mean 'to lay hold upon or apprehend by legal authority'. In Wharton's Law Lexicon the word "arrest" is defined to mean :—

> "The restraining of the liberty of a man's person in order to compel obedience to the order of a Court of Justice, or to prevent the commission of a crime, or to ensure that a person charged or suspected of a crime may be forthcoming to answer it."

Basing himself on the definition of the word 'arrest' appearing at page 385, Corpus Juris, Vol. 5, and the language used in clauses (1) and (2) of Article 22, Mr. Daphtary argues that clauses (1) and

(2) of Article 22 confer rights on a person who is *arrested to answer a criminal charge*. The definition of the word ' arrest ' given at page 385 in Corpus Juris, Vol. 5, reads :—

> " An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to *answer a criminal charge* or civil demand".

Section 46 (*1*) of the Code provides :—

> "46 (*1*) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action ".

In the clearest possible terms section 46 (*1*) of the Code provides that ' arrest ' is made when there is a submission to the custody of a police officer by word or action and that persons other than those accused of offences may be arrested.

Mr. Daphtary argues that the right to consult and to be defended by legal practitioner of his choice and the right to be produced before a magistrate show that the rights guaranteed by clauses (*1*) and (*2*) of Article 22 are rights conferred upon a person arrested to answer a criminal charge.

That the argument raised has no validity is apparent from the provisions of sections 60, 61, 100 and 167 of the Code. Indisputably, the procedural requirements guaranteed by Article 22 (*1*) and (*2*) are very much similar to the requirements of the procedural due process of law as enumerated by Willis at page 662, Constitutional Law, and by Willoughby at page 756, Constitution of the United States. In India, the safeguard dealing with the right to be produced before a magistrate is to be found in sections 60, 61, 100 and 167 of the Code. Clearly, the status of persons dealt with under section 100 of the Code is very much similar to the status of ' abducted persons ' recovered under section 4 of the Act. Section 100 of

Ajaib Singh v. The State of Punjab

Harnam Singh J.

the Code requires that persons wrongfully confined, if found, shall be immediately taken before a magistrate who shall make such order as may be proper in the circumstances of the case. Section 552 of the Code contemplates the production of 'abducted females' before a magistrate to be dealt with according to law.

Again, section 340 of the Code provides that any person accused of an offence before a criminal court or *against whom proceedings are instituted under the Code in any court, may of right, be defended by a pleader.* From the provisions of the Code it appears that the persons proceeded against under Chapters VIII and XII of the Code are not persons accused of an offence before a criminal court but they may of right be defended by a pleader. In these circumstances, I think that clauses (*1*) and (*2*) of Article 22 of the Constitution confer rights on persons arrested and detained notwithstanding the fact that these persons have not been arrested and detained to answer a criminal charge.

Mr. Daphtary then argues that the provisions of Article 22 (*1*) and (*2*) of the Constitution have to be read in section 4 of the Act. In considering whether the provisions of section 4 of the Act are inconsistent with the provisions of Article 22 (*1*) and (*2*) of the Constitution, section 4 of the Act and Article 22 (*1*) and (*2*) of the Constitution are to be read together to find out whether the two provisions can stand together at the same time. In *Kutner* v. *Phillips* (1), Smith, J., said :—

> "Now, a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the *two cannot stand together*, in which the maxim "*Leges posteriores contrarias abrogant*" applies. Unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied."

(1) (1891) 2 Q. B. 267

Ajaib Singh v. The State of Punjab

Harnam Singh J.

In *Clyde Engineering Co., Ltd.* v. *Cowburn* (1), Higgins, J., said :—

> "When is a law inconsistent with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other."

In *Clyde Engineering Co., Ltd.* v. *Cowburn*, (1), Knox, C.J., and Gavan Duffy, J., said :—

> "Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties : they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it."

That being the law, the question that arises for decision is whether section 4 of the Act conforms to the provisions of Article 22 (*1*) and (*2*) of the Constitution. The Act was passed on the 28th of December, 1949, whereas clauses (*1*) and (*2*) of Article 22 of the Constitution came into force on the 26th of January, 1950. Reading section 4 (*1*) of the Act and clause (*2*) of Article 22 together it is plain that the two provisions cannot co-exist in that effect cannot be given to both at the same time. Section 4 (*1*) of the Act requires that the police officer who takes into custody an 'abducted person' shall deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp with the least possible delay while clause (*2*) of Article 22 guarantees that such a person should be produced before the nearest magistrate with the least possible delay.

---

(1) 37 C. L. R. 466.

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

In dealing with the procedure that has to be followed when a person is arrested and detained section 4 (*1*) of the Act attempts to occupy the field covered by clause (*2*) of Article 22 of the Constitution and in that attempt there arises a conflict for the two provisions cannot co-exist.

For the reasons given above, I find that the concluding clause of section 4 (*1*) of the Act conflicts with the provisions of Article 22 (*2*) of the Constitution. That clause reads :—

> "and deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp with the least possible delay."

In this connection I wish to mention that the words "to the extent of such inconsistency" occurring in Article 13 (*1*) of the Constitution indicate that it is not essential that the whole Act, nor even a whole section, must be declared to be void, but that it is necessary to ascertain exactly how much of it is void on account of inconsistency.

Again, the Act does not contain any provision giving to an "abducted person" the right to consult and to be defended by a lawyer of his choice. That being so, the question that arises for decision is whether the silence of the Act on matters provided for in Article 22 (*1*) makes the Act void. In A. I. R. 1950 S. C. 27 Kania, C.J., said at page 41 :

> "Article 22 (*4*) opens with a double negative. Put in positive form, it will mean that a law which provides for preventive detention for a period longer than three months *shall contain a provision* establishing an advisory board, consisting of persons with the qualifications mentioned in sub-clause (*a*)".

Indeed, the provisions of the Act are exhaustive on the procedure to be followed in the matter of the recovery and restoration of 'abducted persons'. Clearly, by necessary intendment the Act denies to an 'abducted person' the right to consult and to be

defended by a legal practitioner of his choice. In proceedings under section 552 of the Code that right is given by section 340 of the Code.

That being the law, the silence of the Act on matters provided for in Article 22 (*1*) of the Constitution makes the Act void to the extent of the inconsistency between the Act and Article 22 (*1*) of the Constitution, and I refuse to recognize it and decide the cases on the basis that the Act has no application.

In proceedings in this Court the validity of the constitution of the Tribunal under section 6 of the Act was challanged on the ground that the two members of the Tribunal have not been appointed by the Central Government as required by section 6 of the Act. This objection was not taken in any one of the applications that have been placed before us for disposal and the relevant notifications were not produced before the Court. Finding as I do that section 4 (*1*) of the Act conflicts with clause (*2*) of Article 22, I do not consider it necessary to express any opinion on the validity of the constitution of the Tribunal.

Section 10 (*1*) of the Act gives power to the Central Government to make rules to carry out the purposes of the Act, and section 10 (*2*) of the Act empowers the Central Government to make rules providing, *inter alia*. for the constitution and procedure of any Tribunal appointed under section 6 of the Act. No rules have been framed so far by the Central Government under section 10 of the Act. For the reasons given in the preceding paragraph, it is wholly unnecessary to discuss the effect of the failure of the Central Government to make rules under section 10 of the Act.

No other objection was pressed in these proceedings. Briefly summarised, my conclusions are :—

(1) that the Act is covered by entries Nos. 3 and 17 in List I. Seventh Schedule, Government of India Act, 1935 ;

(2) that sections 1 (*2*), 2 (*1*) (*a*) and 6 of the Act do not conflict with Article 14 of the Constitution ;

Ajaib Singh
v.
The State of Punjab

Harnam Singh J.

(3) that section 2 (*1*) (*a*) of the Act does not discriminate against citizens of India *on grounds only of religion;*

(4) that Article 19 of the Constitution has no application to the Act and the Court is not called upon to decide upon the reasonableness of the provisions of the Act under Article 19 (5);

(5) that section 6 of the Act satisfies the requirements of Article 21 of the Constitution;

(6) that the concluding clause of section 4 (*1*) of the Act, being inconsistent with the provisions of clause (2) of Article 22 of the Constitution has become void; and

(7) that to the extent that the Act does not give to the 'abducted persons' the procedural protection guaranteed by clause (*1*) of Article 22 the Act is void.

Finding as I do, that the concluding clause of section 4 (*1*) of the Act, being inconsistent with the provisions of clause (2) of Article 22 of the Constitution has become void, and that the Act is void to the extent of the 'inconsistency' between the Act and clause (*1*) of Article 22, I think, that the 'abducted persons' in the several cases mentioned in the first paragraph of this order would have to be set at liberty. The fact that there are no prohibitive words in the Act on matters dealt with in Article 22 (*1*) does not effect the decision. The 'abducted persons' are being illegally detained in custody without the authority of a magistrate as required by clause (2) of Article 22 of the Constitution and each one of them has been denied the right to consult and to be defended by a legal practitioner of his or her choice guaranteed by Article 22 (*1*) of the Constitution.

In these circumstances, the cases will now be put up for final disposal before the Division Bench which referred the question of the validity of the Act to this Bench.

1200 HC—600—31-12-52—CP & S Punjab Simla.