estate duty has been levied thereon and that the estate duty has been levied on the estate which passed or was deemed to pass on the death of Sadhu Ram. If the order of assessment is not in accordance with this rule, it shall have to be revised so as to bring it in accord therewith.

BAINS, J.—I agree.

N. K. S.

FULL BENCH

Before R. S. Narula, C. J., P. C. Jain, M. S. Gujral, S. C; Mital and B. S. Dhillon, JJ.

ATMA SINGH—*Petitioner.*

versus

STATE OF PUNJAB AND OTHERS.—*Respondents.*

Cr. W. 97 of 1975.

December 24, 1975.

Constitution of India (1950)—*Articles* 14, 19, 21, 22, 226, 352 *and* 359—*Conservation of Foreign Exchange and Prevention of Smuggling Activities Act* (52 *of* 1974 *as amended by* 35 *of* 1975)—*Sections* 3, 5-*A and* 12-*A*—*Maintenance of Internal Security Act* (26 *of* 1971) *Sections* 8 *and* 16-*A*—*Detention of a person under either of the said Acts*—*Whether can be challenged under Article* 226 *of the Constitution, in spite of the Presidential Order under Article* 359(1) *and clause* 1(*A*) *of the Article*—*Permissible pleas open to such detenu*—*Stated*—*Preventive detention law*—*Whether invalid without providing safeguards under Article* 22(5)—*Such Law itself providing the supply of the ground of detention to a detenu*—*Contravention of the provision*—*Whether makes the order of detention under the law invalid*—*section* 8, *Maintenance of Security Act*—*Whether in abeyance during the effectiveness of the declaration under section* 16-*A of the Act*—*Expression "For the purpose of clause* (5) *of Article* 22 *of the Constitution" in section* 3(3), *Conservation of Foreign Exchange Act*—*No declaration under section* 12-*A*—*Right contained in the section* 3(3)—*Whether suspended by the Presidential Order*—*Detenu*—*Whether can show the invalidity of the satisfaction of the detaining authority on the basis of the grounds supplied*—*Order of detention under Maintenance of Security Act revoked*—*Another order under the Conservation of Foreign Exchange Act passed on the same grounds*—*Period of detention suffered under the earlier order of detention*—*Whether can be taken into account for the purpose of the latter*

order—Detention Order challenged after the introduction of section 5-A in Conservation of Foreign Exchange Act—Whether can be justified even on one valid ground of detention—Date of the Order of detention—Whether of any consequence.

Held, that in spite of a Presidential Order made under clause 1 of Article 359 of the Constitution, the right of a detenu to challenge his detention is not barred at the threshold. No change is introduced by the Presidential Order and Clause (1-A) of Article 359 of the Constitution in the rights of the Detenues who have been detained either under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 or under the Maintenance of Internal Security Act, 1971. The High Court has the jurisdiction under Article 226 of the Constitution to consider the legality of the detention to the limited extent permissible. It is open to the detenu to raise the following grounds among other permissible pleas;-(i) that the challenge to the detention is outside Article 359(1) and the Presidential Order, (ii) that the detention is in violation of any independent mandatory provision of the Act under which the detention order is passed, (iii) that the order of detention has been passed in the exercise of powers *mala fide*, (iv) that the operative provisions of the law under which he is detained suffer from the vice of excessive delegation, (v) that the order has been passed by a delegate outside the authority conferred on him or that the power to pass the order has been exercised inconsistently with the conditions prescribed in that behalf and (vi) that the grounds of detention supplied to the detenu are irrelevant and there is no real and proximate connection of the grounds with the object which the Legislature had in view and that the grounds on which the subjective satisfaction is based are such that no rational human being can consider those grounds to be connected with the fact in respect of which the satisfaction is sought to be reached. In spite of the Presidential Order under Article 359(1) an order of detention is open to scrutiny on these grounds. The life or liberty of a person cannot be taken away without reference to any law. The suspension of enforcement of the right under Articles 21 and 22 of the Constitution does not absolve the State from showing that the detention is lawful. Order of the President under Article 359(1) of the Constitution is not intended for the purpose of authorising a patently illegal action of depriving a person of his life or liberty, even without reference to any law on the footing that such a right does not exist independently of Articles 14, 19, 21 and 22 of the Constitution. An executive action can also be challenged on the ground that it is not in conformity with the provisions of the enactment under which it is made or that it is not referrable to any law. Moreover the right to move the High Court under Article 226 of the Constitution is not barred by the Presidential Order where the challenge is posed to the law of the preventive detention on the strength of any other fundamental rights not covered by the Presidential order.

Held, that a preventive detention law is not invalid merely because it does not incorporate in its provisions the safeguards mentioned in Article 22(5) of the Constitution. The executive action, however, will be invalid if the safeguards are not observed and complied with except if saved otherwise by an appropriate Presidential Order under Article 359(1) of the Constitution. If a preventive detention law contains a provision requiring that the detenu should be supplied grounds of detention and should be afforded earliest opportunity of making a representation, such a statutory right is *de hors* the provisions of Article 22(5) of the Constitution and the contravention of this right will render the order illegal. Section 8 of the Maintenance of Security Act is such a provision and the statutory right contained in this section is *de hors* the provision of Article 22(5). This statutory right does not get suspended in spite of the Presidential Order under Article 359(1). This provision, however, is subject to the limitation contained in section 16-A of this Act and the right contained in section 8 will remain in abeyance as long as declaration under section 16-A is effective.

Held, that in spite of the expression "For the purpose of clause (5) of Article 22 of the Constitution" occurring in section 3(3) of the Conservation of Foreign Exchange Act, the right contained in this provision is not suspended by a Presidential Order under Article 359(1), because the introduction of section 12-A shows that the legislative intent was to keep the right under section 3(3) alive except in those cases where a declaration under section 12-A is made.

Held, that if there is no declaration under section 12-A of Conservation of Foreign Exchange Act in respect of a detenu, then in spite of the issuance of the Presidential order, the grounds of detention supplied to him can be made use of for the purpose of showing that the satisfaction could not have been validly arrived at on the basis of these grounds or for challenging the detention on pleas which are outside the scope of the Presidential order and fall within the limited "area of reviewability" available to the detenu.

Held, that in the case of a detenu who is first detained under the Maintenance of Security Act and on the revocation of that order is then detained under the Conservation of Foreign Exchange Act, the period of detention suffered by the detenu under the former Act cannot be taken into account for determining the date on which the order of detention is passed under the latter, even though the grounds of detention under both the Acts are the same.

Held, that section 5 of the Conservation of Foreign Exchange Act is applicable to the cases of the detenues where the challenge to the detention is posed after the introduction of section 5-A of the Act. It is of no consequence as to when the order of detention is

made. The applicability of section 5-A is not restricted to the orders of detention which were to be passed after the insertion of this provision. Hence if the order of detention can be justified on the basis of even one valid ground, it is not invalid.

Amended petition under Article 226 of the Constitution of India praying that a writ of Habeas Corpus be issued quashing the impugned order, dated 19th December, 1974, contained in Annexure P-1, detaining the detenu Atma Singh and said Atma Singh be ordered to be set at liberty.

Case referred by the Hon'ble Mr. Justice S. C. Mital, on 9th May, 1975 to a larger Bench for decision of an important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice Man Mohan Singh Gujral, Hon'ble Mr. Justice S. C. Mital and Hon'ble Mr. Justice Gurnam Singh further referred the case to the Larger Bench on September 1, 1975. The Full Bench consisting of Hon'ble the Chief Justice Mr. R. S. Narula, the Hon'ble Mr. Justice P. C. Jain, Hon'ble Mr. Justice Man Mohan Singh Gujral, Hon'ble Mr. Justice S. C. Mital and Hon'ble Mr. Justice Bhopinder Singh Dhillon finally decided the case on December 24, 1975.

H. L. Sibal and Mr. Sirinath Singh Advocate with him, *for the petitioner.*

I. S. Tiwana, Deputy Advocate-General, Punjab, for the *respondents.*

JUDGMENT

Judgment of the Court was delivered by:—

M. S. GUJRAL, J.—(1) Criminal Writ Petitions bearing Nos. 96, 97, 98, 106, 111, 112, 128, 130, 138, 140, 143, 191 and 192 of 1975 under Articles 226 and 227 of the Constitution of India will stand disposed of by this order. All these petitions relate to the detention of the detenues under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (No. 52 of 1974) (hereinafter called the COFEPOSA), and the challenge is posed to the orders of detention on the grounds which are common to all these petitions.

(2) These petitions had earlier come up before a Full Bench of three Judges, but as in a miscellaneous petition arising out of one of these petitions the correctness of the Judgment of a Division Bench of this Court was doubted and as in the petitions questions of interpretation of the Constitution and the Presidential Orders were involved, which questions were likely to arise in a large number of

cases, these petitions were referred to a larger Bench and that is how these are before us now.

(3) It is not necessary for our purposes to go into the facts in each of these petitions and it would suffice to mention that the detenues in all these cases were detained by separate orders passed on December 19, 1974, under the COFEPOSA and that almost all of them had earlier been detained under the Maintenance of Internal Security Act (No. 26 of 1971) (hereinafter called the MISA) by orders passed between October 8 and November 18, 1974. To all these detenues grounds of detention were supplied at the time they were detained under the MISA and the allegation is that those very grounds were again made the basis of detention when fresh detention orders were passed under the COFEPOSA. The orders of detention have now been challenged on the basis that the grounds of detention are irrelevant, vague and non-existent and also that the same grounds could not be utilised for passing the orders of detention under the MISA as well as under the COFEPOSA.

(4) Before identifying and dealing with the questions that primarily arise for decision in these cases, it would be appropriate to briefly mention the historical background culminating in the passing of the COFEPOSA, as amended up-to-date, and the various Presidential Orders. Under the shadow of hostile relations between India and Pakistan, the Legislature enacted the MISA in July, 1971 and after the hostilities had broken out between the two countries, the President made the Proclamation of Emergency under Article 352 of the Constitution on December 3, 1971. This was followed by an Ordinance, dated September 17, 1974, whereby the MISA was amended so as to bring within its purview the activities relating to smuggling and those prejudicial to the conservation of foreign exchange. On November 16, 1974, another Presidential Order was made whereby the right to move any Court with respect to orders of detention which had already been made or which may be made thereafter under section 3(1)(c) of the MISA for the enforcement of the rights conferred by Articles 14, 21 and 22, clauses (4) to (7) was suspended. This was also made applicable to all pending proceedings. On December 13, 1974, the COFEPOSA was enacted by Parliament and it came into force on December 19, 1974. The Ordinance by which the MISA had been amended stood repealed as from the midnight of December 18, 1974. Thereafter another Presidential Order was issued on December 23, 1974 under clause (1) of Article 359 of the Constitution whereby the right to move any Court with respect to orders of detention already made or which may be made under

the COFEPOSA on the basis of Articles 14, 21 and 22, clauses (4) to (7), was suspended. This was also made applicable to pending proceedings. It was followed by the Proclamation of Emergency by the President on June 26, 1975, by which it was declared that a grave emergency existed whereby the security of India was threatened by International disturbance. Soon thereafter, on June 27, 1975, another Presidential order was made, whereby the right of any person to move any Court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution was suspended, and this was also made applicable to all pending cases. The order was to remain in force for the period during which the proclamations of Emergency under Article 352 of the Constitution made on December 3, 1971, and June 25, 1975, were to continue. On July 1, 1975, the COFEPOSA was amended by Ordinance 6 of 1975 which was replaced by Act 35 of 1975. By this Act, sections 5-A and 12-A were added to the COFEPOSA. The only other provision to which reference need be made in clause (IA), which was inserted in Article 359 of the Constitution by the Constitution of India (Thirty-eighth) Amendment Act, 1975, and it was further provided that this shall be deemed always to have been inserted.

(5) Having briefly described the steps which had led to the passing of the COFEPOSA as amended by Act 35 of 1975, the relevant provisions may now be set down for facility of reference:—

Ordinance dated September 17, 1974, *by which the following* sections were inserted in the MISA :—

"3(1) (c). If satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to the conservation of foreign exchange or with a view to preventing him from—

(i) smuggling goods, or

(ii) abetting other persons to smuggle goods, or

(iii) dealing in smuggled goods,".

"16A. *Special provisions for dealing with emergency.*—

(1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall

have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.

(2) The case of every person (including a foreigner) against whom an order of detention was made under this Act on or after the 25th day of June, 1975, but before the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereinafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this Act against any person (including a foreigner) after the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or, as the case may be, the State Government or the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned :

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

(4) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(5) In making any review, consideration or reconsideration under sub-section (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person the review of whose case is pending under that sub-section or in respect of whom a declaration has been made under that sub-section,—

(i) Sections 8 to 12 shall not apply; and

(ii) Section 13 shall apply subject to the modification that the words and figures "which has been confirmed under Section 12" shall be omitted.

(7) In the case of every person detained under a detention order to which the provisions of sub-section (3) apply, being a person in respect of whom a declaration has been made under that sub-section,—

(i) Section 3 shall apply subject to the modification that for sub-sections (3) and (4) thereof, the following sub-section shall be substituted, namely :—

"(3) When any order of detention is made by a State Government or by an officer subordinate to it, the State Government shall within 20 days, forward to the Central Government a report in respect of the order.";

(ii) Sections 8 to 12 shall not apply; and

(iii) Section 13 shall apply subject to the modification that the words and figures "which has been confirmed under Section 12" shall be omitted.

Presidential Order, dated November 16, 1974.

G.S.R. 659 (E):—In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that—

(a) the right to move any Court with respect to orders of detention which have already been made or which may hereafter be made under section 3(1)(c) of the Maintenance of Internal Security Act, 1971 as amended by Ordinance 11 of 1974, for the enforcement of rights conferred by Article 14, Article 21 and clauses (4), (5), (6) and (7) of Article 22, of the Constitution; and

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said section 3(1)(c), shall remain suspended for a period of six months from the date of issue of this order or the period during which the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd December, 1971, is in force, whichever period expires earlier.

2. This order shall extend to the whole of the territory of India.

Presidential Order, dated December 23, 1974 :—

G.S.R. 694 (E):—In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that :—

(a) the right to move any court with respect to orders of detention which have already been made or which may hereafter be made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), or with respect to any other action (including the making of any declaration under section 9 of the said Act) which has already been, or may hereafter be, taken or omitted to be taken in respect of detention under such orders, for the enforcement of the rights conferred by Article 14, Article 21 and clause (4), clause (5) read with clause (6), and clause (7) of Article 22 of the Constitution, and

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said Act or any other action (including the making of any declaration under the said Section 9) taken or omitted to be taken in respect of detention under such orders,

shall remain suspended for a period of six months from the date of issue of this Order or the period during whcih the Proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution on the 3rd December, 1971, is in force, whichever period expires earlier.

2. This order shall extend to the whole of the territory of India.

Presidential Order, dated June 27, 1975.

G. S. R. 361 (E):—In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending

in any court for the enforcement of the above-mentioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

The order shall extend to the whole of the territory of India.

Amendment of Article 359.

In Article 359 of the Constitution, after clause (1), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:—

"(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that part conferring those rights shall restrict the power of the State as defined in the said part to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

*COFEPOSA

(As amended by Act 35 of 1975)

3. *Power to make orders detaining certain persons* :—

(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in

any manner prejudicial to the conservation or argumentation of foreign exchange or with a view to preventing him from :—

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention.

5A. *Grounds of detention severable.*—Where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly—

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are—

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub-section (1) of section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds.

12-A. *Special provisions for dealing with emergency* :—

(1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.

(2) When making an order of detention under this Act against any person after the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Ordinance, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such consideration, the Central Government or the State Government or, as the case may be, the

officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned :

Provided that where such declaration is made by an officer, it shall be reviewed by the appropriate Government within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by that Government, after such review, within the said period of fifteen days.

(3) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(4) In making any consideration, review or reconsideration under sub-section (2) or (3), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and, accordingly, such period shall not be taken into account for the purposes of sub-section (3) of section 3.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing—

(i) The periods specified in clauses (b) and (c) of Section 8;

(ii) the periods of "one year" and "five weeks" specified in sub-section (1), the period of "one year" specified in sub-section (2) (i), and the period of "six months" specified in sub-section (3), of Section 9.

(6) Before proceeding to embark on the consideration of the main contentions of the parties it would be appropriate to deal with some of the subsidiary though important points raised by the learned Counsel for the petitioners. It was firstly contended by Mr. Sibal that the relevant provisions of the Constitution should be strictly construed and the construction should be such which should favour the subject and result in enhancing his liberty and not which would enlarge the powers of the State to place curbs on the fundamental rights of the citizens. On the other hand it is urged with equal vehemence that in construing the emergency provisions like Articles 358 and 359 of the Constitution, the considerations that these provisions have been enacted with a view to deal with a situation wherein grave threat is posed to the security of the country, have to be kept in the forefront and, therefore, the fundamental rights enshrined in Part-III of the Constitution have to be permitted to be regulated so as to avert danger to the security of the country itself. This argument is based on the concept that the security of the nation must have precedence over the liberty of the citizens. The broad question as to how the provisions of the Constitution are to be interpreted was considered by the Supreme Court in *A. K. Gopalan* v. *The State of Madras* (1) in these words :—

"There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by

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

necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."

Again in the case of *Makhan Singh* v. *State of Punjab* (2), the question of the Interpretation of the emergency provisions was considered at some length and both the view-points were specifically noticed. The controversy raised was that if Article 359 of the Constitution is capable of two constructions, one in favour of the fundamental rights of the citizens and the other in favour of the grant of power to the President to limit those rights, whether the Court should lean in favour of the grant of that power or in favour of the individual citizen's fundamental rights. The relevant case-law on the subject was noticed and discussed but ultimately the merits of the controversy were not gone into for the reason that Article 359 was held to be reasonably capable of only one construction. The observations of the Supreme Court in *A. K. Gopalan's case* (supra) are, therefore, available to us for guidance in interpreting the relevant constitutional provisions. Though in the aforesaid observations of the Supreme Court regarding the interpretation of the Constitution no specific reference was made to the Emergency provisions and the considerations relevant in interpreting these provisions, but nevertheless direction is available as to the manner

(2) A.I.R. 1964 S. C. 381:

in which these provisions are to be approached. Reference at this stage may also be made to the case of *I. K. Ananda Nambiar* v. *The Chief Secretary to Government of Madras and others* (3) wherein the question of the interpretation of the Presidential Orders made under Article 359 of the Constitution was considered and it was held that "in construing the effect of the Presidential Order it is necessary to bear in mind the general rule of construction that *where an order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said order must be strictly construed in favour of the citizens' fundamental rights*" (*emphasis supplied*). To this extent, therefore, the argument advanced by Mr. Sibal is well-founded.

(7) Mr. Sibal then contends that the Presidential Order, dated June 27, 1975, does not provide any protective cover to the proceedings under the COFEPOSA and the rights conferred by section 3(3) of this Act are still available even though the said Presidential Order has suspended the enforcement of the fundamental rights conferred by Articles 14, 21 and 22 of the Constitution. The argument is based on the reasoning that as the Emergency was proclaimed because of the threat to the security of India from internal disturbance or from war or external aggression, the State is only allowed to make any law or take any executive action in violation of the fundamental rights conferred by Part III of the Constitution in respect of matters which have an integral connection with war, external aggression or internal disturbance and that the executive action under a law which only relates to economic stability cannot be protected from challenge on the ground that it violates any of the fundamental rights. Carrying the argument forward it was urged that having regard to the grounds mentioned in section 3 of the COFEPOSA on the basis of which an order of detention can be passed against a person under this provision, it ought to be inferred that the effect of the order would be to help in maintaining the economic stability and that this falls outside the scope of internal disturbance or war or external aggression, a threat to which alone attracts the proclamation of Emergency by the President.

(8) Under Article 352 of the Constitution the President on being satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, may issue a proclamation to that effect. Article 353 deals with the effect of

(3) A.I.R. 1966 S.C: 657:

such a proclamation. If instead of the security of India, the threat is to the financial stability or the credit of India and the President is satisfied that such a situation has arisen, he may make a Proclamation to that effect, under Article 360 and the consequences mentioned in that provision will then follow. Under Entry No. 9 of List I of the Seventh Schedule to the Constitution, Parliament can make law in respect of "preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subject to such detention." Under Entry 3 in List III of that Schedule, law can be made for "preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subject to such detention." The law relating to preventive detention can be made even when there is no Proclamation of Emergency in force. The COFEPOSA (Act 52 of 1974), with which we are concerned at present, was enacted "to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith". It is not the contention of Mr. Sibal that the COFEPOSA does not fall in the relevant entries under which a preventive detention law can be made, and in this situation, during the period the Proclamation of Emergency under Article 352 is in force, a Presidential Order made under Article 359 suspending the enforcement of the fundamental rights mentioned therein can be attracted in cases of detentions under the COFEPOSA. The result of operating the COFEPOSA effectively may be to help in stabilising the financial situation in the country, but from this it does not follow that the Presidential Order made under Article 359 is not attracted in respect of such a law of preventive detention. The only conditions necessary are that there ought to be a Proclamation of Emergency under Article 352 in operation and a declaration has been made by the President suspending the enforcement of the rights conferred by Part III of the Constitution. There is no indication in Article 359 that such a declaration is not to apply to detentions made under a law wherein the grounds of detention relate to financial irregularities or economic offences. In other words, the argument as put forward by Mr. Sibal runs counter to the plain language of Articles 352 and 359. Any other interpretation of these constitutional provisions would be in conflict with the well settled principles relating to the interpretation of the Constitution as noticed by the Supreme Court in *A. K. Gopalan's case* (supra) to which reference has already been made.

(9) Another infirmity in the argument is that it proceeds on a narrow and unrealistic approach to the question of threat to the security of India from internal disturbance. No doubt the expression "internal disturbance" as used in Article 352 of the Constitution has been interpreted to mean a rebellion or insurrection and not an ordinary breach of the public peace, yet the threat to the security of India by the creation of such a condition can arise not only from political factors including the activities of political parties and groups having violent and disruptive tendencies and owing allegiance to the idea of bringing about a change of Government by means other than peaceful, but also by the creation of economic chaos and financial instability, which may provide a breeding ground for conditions from which threat to the security of India from internal disturbance may arise. It is not difficult to visualise situations where large scale smuggling of gold or foreign currency may create conditions of financial chaos and economic instability to an extent that it may result in serious threat to the internal security bordering on internal disturbance. It is, therefore, not possible to interpret Article 352 of the Constitution in a manner so as to place any restriction on the power of the State to make laws or to take executive action under Articles 358 and 359 of the Constitution within the scope of these provisions during the operation of the Proclamation of the Emergency.

(9-A) The legislature was conscious of the challenge that is now being posed and to meet the same in the preamble to Act 52 of 1974, it was provided as follows:—

> "Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;"

A somewhat similar argument was examined by the Delhi High Court in *Smt. Manekben* v. *Union of India* (4) while considering the contention that Act 52 of 1974 was beyond the legislative competence as it did not fall within entry 9, List I or entry 3, List III of the Seventh Schedule. The following observations in this connection may be read with advantage:—

> "The concept of State today is far removed from what it was in the middle ages and the old concept of State is no longer

(4) Cr. W. 1/75 decided on 18-4-75.

valid. In the complexities of present-day national life and international relations, the security of the State cannot only be undermined but jeopardised as a result of activities having an adverse effect on its economic life. Political independence of yore is a byegone concept. Today political independence, even existence, is closely linked with economic stability. Money and goods are more and more being used in the world to wield political power internally and internationally. We cannot shut our eyes to it. Indeed we must be positively aware of it."

(10) Another subsidiary argument of Mr. Sibal may be noticed at this stage. It was canvassed on behalf of the petitioners that what was suspended by the Presidential Order, dated June 27, 1975, was the enforcement of the fundamental rights conferred by Articles 14, 21 and 22 of the Constitution and not the obligations placed on the respondents by Article 22. It is urged that when a person is detained in pursuance of an order of detention, Article 22(5) requires the authority making the order to communicate to such person as soon as may be the grounds on which the order has been made. The authority is to further afford him the earliest opportunity to make a representation against that order. The argument is that though after the proclamation of the Presidential Order, dated June 27, 1975, the person detained cannot enforce his right under Article 22(5) in any Court, but the obligation on the part of the detaining authority to comply with the requirements of this provision still subsists and a Mandamus can be issued requiring the detaining authority to make compliance of the constitutional safeguards.

(11) The argument as stated above disregards what the prayer of the petitioners in these petitions is and, strictly speaking, the question posed by the petitioners' learned counsel does not really arise in these petitions, for there is no demand by the petitioners for the issue of a writ of Mandamus compelling the detaining authority to discharge the aforesaid obligation or to give effect to the petitioners' fundamental rights. Reference to the breach of their fundamental rights is made by the petitioners not with a view to enforce these rights through this Court, but in order to lay foundation for canvassing that the detentions in violation of the fundamental rights mentioned above were illegal and that a writ of Habeas Corpus be issued under Article 226 of the Constitution. A similar argument was pressed before a Division Bench of the Gujarat High Court in

Haroobhai M. Mehta and others v. *State of Gujarat and others* (5) and was repelled on on these very grounds.

(12) A contention somewhat similar in nature was also advanced in *Makhan Singh Tarsikka* v. *State of Punjab* (2) by Mr. Parulekar who argued his own case. It was canvassed that a detenu cannot be prevented from disputing the validity of the Ordinance, the Act and the Rules under the Presidential Order if he did not ask for any consequential relief. This prayer, according to Mr. Parulekar did not fall within the mischief of the Order because he was not enforcing any of his rights when he asks merely for a declaration that the law is invalid. This argument was repelled in the following words:—

> "What Article 359(1) purports to do is to empower the President to make an Order by which the right of the detenu to move the Court to challenge the validity of his detention on the ground that any of his fundamental rights specified in the Order have been contravened, is suspended, and so, it would be unreasonable to suggest that what the detenu cannot do in order to secure his release, he should be allowed to do merely for the purpose of obtaining an academic declaration. A proceeding taken under section 491(1)(b) like a petition filed under Article 226(1) or Article 32(1) is intended to obtain relief, and the relief in such cases means the order for the release of the detenu. If the detenu is prohibited from asking for an order of release on the ground that the challenge to the validity of his order of detention cannot be made during the pendency of the Presidential Order, we do not see how it would be open to the same detenu to claim a mere declaration either under section 491 Cr. P.C. or Article 226(1) or Art. 32(1) of the Constitution. We do not think that it was open to the High Court to consider the validity of the impugned Act without relation to the prayer made by the detenu in his petition. The proceedings commenced by the detenu by means of his petition under S. 491(1)(b) constitute one proceeding and if the sole relief which the detenu seeks to obtain cannot be claimed by him by virtue of the Presidential Order, it would be unreasonable to hold that he can claim a different relief, viz., a mere declaration; such a relief is

(5) A.I.R. 1967 Guj. 229:

clearly outside the purview of the proceedings under S. 491(1)(b) and Articles 226(1) and 32(1)."

(13) The next contention of Mr. Sibal is that as in law the grounds on which detention under the MISA, as amended by Ordinance 11 of 1974, could be ordered are the same as those on which a detention order under section 3 of the COFEPOSA can be passed, and further that as in the case of all the petitioners the same facts have been utilised to pass the detention orders both under the MISA and the COFEPOSA, the detention should be held illegal where the period of detention under both the Acts taken together exceeds one year. The facts necssary for the consideration of this argument are not in dispute. All the petitioners were earlier detained under the MISA as amended by Ordinance 11 of 1974 on various dates between October 8 and November 18, 1974, and all of them were then susequently detained under the Orders passed under the COFEPOSA which came into force on December 19, 1974. It is also not disputed that the grounds served under the MISA were the same which were served under the COFEPOSA and, therefore, the same facts relating to the activities of the petitioners were pressed into service for passing both the orders of detention.

(14) By Ordinance 11 of 1974, in section 3 of the MISA, which relates to the grounds and the circumstances under which a person could be detained on the satisfaction of the appropriate authorities, clause (c) was inserted after clause (b) of sub-section (1), which authorised the detention of a person "with a view to preventing him from acting in any manner prejudicial to the conservation of foreign exchange or with a view to preventing him from ..... (i) smuggling goods, or (ii) abetting other persons to smuggle goods, or (iii) dealing in smuggled goods". The Ordinance by which the above clause was inserted in the MISA was repealed by section 14 of the COFEPOSA, and in the latter Act similar provisions were introduced. From a comparison of the provisions of section 3 of the MISA as amended by Ordinance 11 of 1974, and section 3 of the COFEPOSA, it would clearly emerge that under both the provisions a person could be detained if the detaining authority was satisfied, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling goods, or abetting the smuggling of goods, or dealing in smuggled goods, that his detention was necessary. It is also the accepted case of the parties that the grounds on which the petitioners were detained under the MISA

were covered by similar provisions contained in the COFEPOSA and that the same facts indicating the activities of the petitioners were utilised for passing the orders of their detention under both the Acts. The question that is posed is whether in the above circumstances it is permissible to continue detention for a period in excess of the one provided under section 13 of the MISA by incorporating some of the clauses of section 3 of that Act into a separate Act.

(15) Article 22(7) of the Constitution provides that Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention. In view of this constitutional provision each of the two enactments, i.e., the MISA and the COFEPOSA, has made provision for indicating the maximum period for which a person can be detained under it. The detention under one of these two enactments has no connection with the detention under the other. There is no basis either in authority or law for holding that when an order of detention under the COFEPOSA is passed, the period of detention spent by the detenu under the MISA has to be added for determining the date of expiry of the order of detention passed under the former Act, or for concluding that the order of detention passed under the COFEPOSA should be deemed to have been passed on the date on which the original detention order under the MISA was passed. The case law cited by the petitioners' learned counsel, as will be discussed hereafter, does not support his contention in any manner.

(16) Reference was first made to the case of *Masood Alam etc.* v. *The Union of India and other* (6). The question under consideration in that case was entirely different. There the order of the District Magistrate, dated June 14, 1972, passed under section 3(1)(a)(i) and (ii) of the MISA was not approved by the Government as required by section 3(3) of that Act, and at about noon time on June 26, 1972, the detenu was informed that he was released on June 25, 1972 at 23.50 hours by the order of the District Magistrate Aligarh, dated June 25, 1972, on account of non-receipt of approval from the State Government, but that he was detained in jail as an undertrial under sections 107/117, Criminal Procedure Code, and was permitted to inform his relations or lawyer if he wanted to arrange his bail. A fresh order of detention was passed on that very date by the Governor of Utter Pradesh under section 3(1) of the

(6) A.I.R. 1973 S.C. 897.

MISA and was served on the detenu on June 26, 1972 at 3.30 P.M. In view of these facts the argument raised was that on the expiry of the order of detention passed by the District Magistrate a fresh order of detention could not be passed unless fresh grounds had arisen after the date of expiry of the first detention order and the appropriate authorities were satisfied that such an order was necessary to be made. This contention was accepted by their Lordships with the following observations at page 902 of the report :

> "In our opinion, this submission does possess merit and deserves to be accepted. Section 14 speaks of revocation or expiry of a detention order. The principle underlying this section has its roots in the vital importance attached to the fundamental right of personal liberty guaranteed by our Constitution. The Act fixes the maximum period of detention to be 12 months from the date of the detention with the proviso that the appropriate Government can revoke or modify the detention order at any earlier time : Section 13. It is to effectuate this restriction on the maximum period and to ensure that it is not rendered nugatory or ineffective by resorting to the camouflage of making a fresh order operative soon after the expiry of the period of detention, as also to minimise resort to detention orders that section 14 restricts the detention of a person on given set of facts to the original order and does not permit a fresh order to be made on the same grounds which were in existence when the original order was made. The power of preventive detention being an extraordinary power intended to be exercised only in extraordinary emergent circumstances the legislative scheme of sections 13 and 14 of the Act suggests that the detaining authority is expected to know and to take into account all the existing grounds and make one order of detention which must not go beyond the maximum period fixed. In the present case it is not urged and indeed it is not possible to urge that after the actual expiry of the original order of detention made by the District Magistrate, which could only last for 12 days in the absence of its approval by the State Government, any fresh facts could arise for sustaining the fresh order of detention. The submission on behalf of the State that the petitioner's

activities are so highly communal and prone to encourage violent communal activities that it was considered absolutely necessary to detain him in the interest of security of the State and maintenance of public order cannot prevail in face of the statutory restrictions and the guaranteed constitutional right which is available to all persons. The rule of law reigns supreme in this Republic and no person on the soil of free India can be deprived of his personal liberty without the authority of law."

A reference was then made to the case of *Chotka Hembram* v. *State of West Bengal and others* (7). In this case an order under section 3(2) of the MISA was passed by the District Magistrate on 3rd of July, 1972, but the detenu was released on April 28, 1973. In the meantime another order of detention was passed on April 26, 1973, and it was under this detention order that the petitioner in that case was being detained when he challenged his detention. The fresh order of detention was made on the very same grounds on which the earlier order of detention had been passed. The earlier order of detention had been revoked in view of the judgment of the Supreme Court in *Sambhu Nath Sarkar* v. *State of West Bengal* (8). On these facts the provisions of section 14(2) of the MISA were considered and it was held that after the actual expiry of the original order of detention, which could only be for 12 days in the absence of approval by the State Government, no fresh facts had arisen for sustaining the fresh order of detention. Another argument was pressed into service, which was based on section 13 of the MISA, and it was ruled as under :—

"The matter can also be looked at from another angle. Section 13 of the Act provides that the maximum period for which any person may be detained in pursuance of any detention order, which has been confirmed under section 12, shall be 12 months from the date of detention. It is, therefore, plain that the maximum period for which a person can be detained on account of specified acts should not exceed 12 months. If for the same acts repeated orders of detention can be made, the effect would be that

(7) A.I.R. 1974 S.C. 432.
(8) A.I.R. 1973 S.C. 1425.

for the same acts a detenu would be liable to be detained for a period of more than 12 months. The making of a subsequent order of detention in respect of the same acts, for which an earlier order of detention was made, would run counter to the entire scheme of the Act. It would also set at naught the restriction which is imposed by section 13 of the Act relating to the maximum period for which a person can be detained in pursuance of a detention order."

Similar was the position in the case of *Pradip Kumar Das and others* v. *State of West Bengal and others* (9) *and Bablu Hembram and others* v. *State of West Bengal and others* (10).

(17) In all these cases both the orders of detention were passed under the same Act and the ratio of decision of these cases is, therefore, not applicable to a case where separate orders were passed under the provisions of two different laws relating to preventive detention. The observations of the Supreme Court in *Chotka Hembram's case* (supra) that if for the same acts repeated orders of detention can be made, the effect would be that for the same acts a detenu would be liable to be detained for a period of more than 12 months, and that the making of a subsequent order of detention in respect of the same acts would, therefore, run counter to the entire scheme of the Act, are confined to a case of detention under one Act relating to preventive detention and not under two different Acts wherein independent provisions regarding maximum period of detention exist. No support is, therefore, available from these decisions to the argument of Mr. Sibal.

(18) There is also another aspect of the matter. Under Article 22(7) of the Constitution, Parliament can by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention. The only requirement of this constitutional provision is that the maximum period has to be prescribed by Parliament under a preventive detention law, but there is no bar as to the length of

(9) A.I.R. 1974 S.C. 2151.

(10) A.I.R. 1974 S.C. 2279.

the period which can be prescribed. The maximum period prescribed under this provision may be to the extent of two years or more. If the contention of the petitioners that their detention under the COFEPOSA be taken to be in continuation of their earlier detention under the MISA and that their detention cannot exceed the period prescribed under section 13 of the MISA is accepted, then it can also plausibly be urged from the other side that section 10 of the COFEPOSA by which the maximum period of detention is fixed should be taken to be an implied amendment of section 13 of the MISA, so as to extend the period of detention from one year to two years in respect of the grounds common to both the enactments. While enacting section 10 of the COFEPOSA Parliament would be presumed to be aware that in cases of persons who are already under detention under the MISA before the repeal of the MISA Amendment Ordinance (11 of 1974) in respect of the grounds on which their detention order under section 3 of the COFEPOSA was subsequently based, the maximum period of detention would exceed the period prescribed under section 10 of the COFEPOSA and section 13 of the MISA taken separately. From the fact that in section 10 of the COFEPOSA no mention was made of the period of detention already suffered by the detenu under the MISA, the legislative intent could be inferred to be to add to the period provided under section 10 of the COFEPOSA the period of detention which the detenu may have suffered under the MISA before the repeal of Ordinance 11 of 1974. Looked at from this stand point also I find that there is no force in the contention raised by Mr. Sibal.

(19) The interpretation of section 5A of the COFEPOSA, which was inserted by the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act (No. 35 of 1975), is the subject-matter of another argument raised on behalf of the petitioners. The precise argument is that this section does not apply to cases in which detention had been ordered prior to the coming into force of this provision as it is not retrospective in its operation. According to this provision, if a detention order under sub-section (1) of section 3 of the COFEPOSA has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds, and the Government or officer making the order shall be deemed to have made the order after being satisfied with respect to the remaining ground or grounds in case

one or more of such grounds are found to be invalid for the reasons mentioned in sub-section (a) of section 5A. There is no indication in this provision whatsoever that it is applicable only to those detentions which were ordered after the coming into force of Act 35 of 1975. On the other hand the opening words of this section—"Where a person has been detained in pursuance of an order of detention"—are indicative of the intention that it would be attracted in the case of those persons also who were under detention under sub-section (1) of section 3, at the time of coming into force of Act 35 of 1975. This provision was introduced to protect the orders of detention even if one ground of detention was valid, and the use of the expression "has been" in the opening line would show that it would be applicable even to persons in whose cases orders of detention had already been passed. Had the intention been to restrict the applicability of section 5A to future orders of detention only, a clear indication would have been available in the language of this provision as is available in sub-section (2) of section 12-A, which was also inserted by this very amending Act 35 of 1975. Having regard, therefore, to the language in which section 5A is couched, it is not possible to accept that its applicability is restricted to the orders of detention which were to be passed after the insertion of this provision. The question of the validity of the grounds would only arise when a detention order is challenged and it is only at that time that section 5A would come into operation. For the applicability of section 5A, it is immaterial as to when the order of detention was passed.

(20) Having cleared the ground, the stage is now set for considering the principal argument in its various aspects. It is canvassed on behalf of the petitioners that the grounds of detention supplied to them were vague, indefinite and had no connection and relevance with the object of section 3 of the COFEPOSA and were wholly incapable of rationally providing the basis on which the detaining authority could have the satisfaction for passing the impugned order, and as the pre-requisite for passing the order of detention was missing, the detenus are entitled to be released. To this argument a serious objection is taken on behalf of the respondents and it is asserted that after the Presidential Order, dated June 27, 1975, and the Thirty-eighth Amendment of the Constitution, no writ petition under Article 226 of the Constitution lies to challenge the detention so long as the Proclamation of Emergency is in force, that the right

contained in section 3(3) of the COFEPOSA stands suspended, and therefore, even if the grounds have been supplied, they cannot be looked into and that, in any case, even if one ground is relevant and good and is immune from attack on any basis, the order of detention is valid in view of the provisions of section 5-A of the COFEPOSA as inserted by Act 35 of 1975.

(21) So far as the last part of the argument of Mr. Tiwana, appearing on behalf of the State of Punjab, is concerned, it is unexceptionable, as it has already been concluded that section 5-A of the COFEPOSA would be applicable to the case of the petitioners. According to this provision an order of detention made on two or more grounds will be deemed to have been separately made on each such ground. It is further provided in this section that even if it is found that one or more of the grounds, on which the order of detention is based, is or are vague, non-existent, not relevant, not connected or not proximately connected with such person, or invalid for any other reason whatsoever, and it is not possible to hold that the detaining authority would have been satisfied with reference to the remaining ground or grounds, the order will not be deemed to be invalid, and that the detaining authority shall be deemed to have made the order after being satisfied with reference to the remaining ground or grounds. The implication of this provision is that even if one ground is found to be valid, the order cannot be set aside and the conclusion would have to be that the order of detention had been made on that ground alone and that that ground was sufficient to provide the basis of satisfaction as required by sub-section (1) of section 3 of the COFEPOSA.

(22) In order to appreciate the remaining argument of Mr. Tiwana it would be relevant to consider the true scope and meaning of Articles 21 and 22 of the Constitution in so far as these constitutional provisions have a bearing on the laws made in respect of prepentive detention, especially the provisions of the COFEPOSA, before the Presidential Order, dated 27th June, 1975 and the Thirty-eighth Amendment of the Constitution, and then to examine what change has been brought about by these provisions in the rights conferred and the constitutional safeguards provided by Articles 21 and 22 in the light of Articles 352 and 358. Articles 21 and 22 of the Constitution have come up for interpretation before the Supreme

Court in a number of cases. Article 21 provides that 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 interpreted by the Supreme Court in *A. K. Gopalan* v. *State of Madras* (11) as meaning "procedure prescribed by the law of the State". It was further observed that Article 21 was to be read as supplemented by Article 22 in that to the extent the procedure is prescribed by Article 22 the same is to be observed, otherwise Article 21 will apply. To the extent the procedure is provided under Article 22 and the matters are dealt with in that Article, it is a complete code, but in regard to procedural matters which either expressly or impliedly are not covered by Article 22, those will fall within the ambit of Article 21. Article 22(1) and (2) relate to arrest and detention but these safeguards are not applicable in the case of preventive detention by virtue of Article 22(3). So far as the preventive detention is concerned, the necessary procedural safeguards are contained in clauses (4) to (7) of this Article. These safeguards are vitally important, as legislation in respect of preventive detention in India is also envisaged in normal times and not only in times of national emergency. The provisions of Article 22(4) to (7) are the only restrictions on the power of legislation on the subject of preventive detention which would otherwise have been unrestricted in the sense that the Parliament by law could have provided for detention without any safeguards whatsoever. Dealing with this aspect, it was observed in *A. K. Gopalan's case* that "if the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or Article 22(4) to (7), the Preventive Detention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act."

(23) Article 22(4) provides that a law which authorises detention for a period longer than three months must provide for establishing an Advisory Board which has to report that there is sufficient cause for such detention. Proviso to this clause makes it clear that in spite of the report of the Advisory Board that there was sufficient cause for detention beyond the period of three months, detention is

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

not permissible beyond the maximum period prescribed by Parliament under Article 22(7)(b). The opinions of the Advisory Board are, however, not necessary if a person is detained under any law made by Parliament under Article 22(7)(a). Article 22(5) then provides a procedural safeguard by enacting that when any person is detained in pursuance of an order made under a preventive detention law, the authority making the order shall as soon as may be communicate to such person grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against that order. Article 22(6) merely allows the detaining authority to withhold the disclosure of facts, to disclose which would be against the public interest. Article 22(7) permits detention beyond a period of three months and even excludes the necessity of report by an Advisory Board. The maximum period of detention is to be fixed under clause (7)(b) of Article 22, but there is no constitutional requirement that the maximum period must be fixed or what that period should be.

(24) While considering the requirements of Article 22(4) to (7) and the content and the extent of the safeguards provided by these provisions, it was observed in *A. K. Gopalan's case* (supra) as follows :

> "In my judgment as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in Article 22(4) to (7). There is no limitation as regards the substantive law. Therefore, a preventive detention law which provides some procedure and complies with the requirements of Article 22(4) to (7) must be held to be a good law, however odious it may appear to the Court to be."

Similarly in State of *Bombay* v. *Atma Ram Sridhar Vaidya* (12), while construing Articles 21 and 22, the following observations were made :—

> "In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution,

(12) (1951) S.C.R. 167.

article 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be in accordance with procedure established by law" and infringes the fundamental right of the detenue guaranteed under articles 21 and 22(5) of the Constitution."

(25) In *Makhan Singh Tarsikka* v. *State of Punjab* (2), the detention was ordered under rule 30(1)(b) of the Defence of India Rules made under the Defence of India Ordinance, 1962, which was replaced by the Defence of India Act, 1962. On October 26, 1962, the President issued a proclamation under Article 352 of the Constitution. On November 3, 1962, the President issued an order under Article 359(1) suspending the rights of citizens to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution for the period during which the proclamation of emergency issued on October 26, 1962, would be in force. By another Presidential Order, the rights conferred under Article 14 were also suspended by including this Article in the first Presidential Order. While considering the various contentions raised on behalf of the detenus in that case, the Supreme Court construed Article 358, and Article 359(1) and the Presidential Order issued under this provision in relation to the fundamental rights contained in Articles 21 and 22. These provisions have already been set out above and their perusal would show that as soon as a Proclamation of Emergency is issued under Article 352, it has the effect of suspending Article 19, with the result that any law made or executive action taken which is inconsistent with the rights guaranteed by this Article, cannot be assailed during the Emergency or even after it has ceased to be operative. As against it, Article 359 authorises the President to issue a declaration to the effect that the right to move any Court for the enforcement of such of the fundamental rights as may be mentioned in the order would be suspended for the period during which the proclamation is in force.

26. The above distinctive features of the provisions of Articles 358 and 359(1) were noticed by the Supreme Court in *Makhan Singh Tarsikka's case* (*supra*) and it was further stated as follows :—

"In other words, Articles 359(1) and the Presidential Order issued under it may constitute a sort of moratorium or a

> blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order".

(27) It was further pointed out that "the suspension of Article 19 for which Article 358 provides continues so long as the proclamation of Emergency is in operation, whereas the suspension of the right to move any court which the Presidential Order under Article 359(1) brings about can last either for the period of the proclamation or for a shorter period if so specified by the Order". It is worthy of mention here that under Article 358, the legislative and executive action which contravenes Article 19 cannot be questioned even after the Emergency is over while under Article 359(1) of the Constitution the position could be different and this aspect was highlighted in the following words :—

> It would be noticed that the Presidential Order cannot widen the authority of the legislature or the executive; it merely suspends the right to move any court to obtain a relief on the ground that the rights conferred by Part III have been contravened if the said rights are specified in the Order. The inevitable consequence of this position is that as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law and the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order. If at the expiration of the Presidential Order, Parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the executive in that behalf, the validity and the effect of such legislative action may have to be carefully scrutinised."

Another distinction brought out between the two provisions of the Constitution is that whereas "the suspension of Article 19 for which provision is made under Article 358 applies to the whole of the country, and so, covers all legislatures and also States", "the order issued under Article 359(1) may extend to the whole of India or may be confined to any part of the territory of India."

(28) The question as to what is the nature of the proceedings which are barred by the Presidential Order issued under article 359(1) was also examined in *Makhan Singh Tarsikka's case* and it was ruled ——— "what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed as the substance of the matter", but to consider "whether before granting the relief claimed by the citizen, it would be necessary for the court to enquire into the question whether any of his specified fundamental rights have been contravened." It was stated that "the sweep of Article 359(1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance seeking to enforce any of the said specified fundamental rights." While bringing out the peculiar features of fundamental rights guaranteed by the Constitution, it was pointed out in *Makhan Singh Tarsikka's case,* that before the date of the Constitution it may have been open to the detenu to challenge the detention on the ground that the law under which he was detained was beyond the legislative competence of the legislature or the operative provision of the law suffered from the excessive vice of delegation or even that the mandatory provisions of the Act under which he had been detained had not been complied with, but it was not open to the detenu to challenge the validity of the law on the ground that it contravened his fundamental rights. It was further stated that "the right to challenge the validity of a statute on the ground that it contravenes the fundamental rights of the citizens has accrued to the citizens of this country only after and as a result of the provisions of the Constitution itself, and so, there can be no doubt that when in the present proceedings the detenus seek to challenge the validity of the impugned statutory provision and the Rule, they are invoking their fundamental rights under the Constitution."

(29) Having examined the scope and effect of Articles 358 and 359(1) of the Constitution in the light of the fundamental rights

guaranteed by Part III of the Constitution, it now remains to be considered as to what pleas, if any, are available to the petitioners to take while challenging the legality of their detention under the preventive detention law after the proclamation of Emergency and a Presidential Order under Article 359(1). It may be stated at the outset that while examining the categories of pleas which can be advanced by the detenus the Supreme Court made it clear in *Makhan Singh Tarsikka's case* that the categories mentioned in that judgment were only illustrative and should not be read as exhausting all the pleas which do not fall within the purview of the Presidential Order. In that case, the Supreme Court considered the following pleas by way of illustration :—

(1) If in challenging the validity of a detention order the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended because it is outside Article 359(1) and consequently outside the Presidential Order itself.

(2) If a detenu has been detained in violation of the mandatory provisions of the Act, it would be open to the detenu to contend that the detention is illegal for the reasons that the mandatory provisions of that Act have been contravened and that such a plea was outside Article 359(1).

(3) The exercise of powers *mala fide* is wholly outside the scope of the Act conferring the power and can always be successfully challenged. The allegation of *mala fide* would have to be substantiated, but if there is an allegation of *mala fide* the detenu cannot be precluded from establishing this plea on the ground of the bar created by Article 359(1) and the Presidential Order.

(4) If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea which is raised by the detenu cannot at the threshold be said to be barred by the Presidential Order, as it is a plea which is independent of the fundamental rights mentioned in the Order.

(30) In *K. Ananda Nambiar* v. *Government of Madras* (3), a reference was made to the ratio of the decision in *Makhan Singh Tarsikka's case* with regard to the interpretation of Article 359(1)

and the Presidential Order, and accepting that ratio, it was observed that if a petitioner seeks to challenge the validity of the Ordinance, Rule or Order made on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. To the pleas referred to in *Makhan Singh Tarsikka's case*, two other pleas were added in the following words and it was held that the contention that the petitions were incompetent under Article 32 because of the Presidential Order was not justified :

> "Let us refer to two other pleas which may not fall within the purview of the Presidential Order. If the detenu, who is detained under an order passed under R.30(1)(b), contends that the said Order has been passed by a delegate outside the authority conferred on him by the appropriate Government under S. 40 of the Defence of India Act, or it has been exercised inconsistently with the conditions prescribed in that behalf, a preliminary bar against the competence of the detenu's petition cannot be raised under the Presidential Order, because the last clause of the Presidential Order would not cover such a petition, and there is no doubt that unless the case falls under the last clause of the Presidential Order, the bar created by it cannot be successfully invoked against a detenu."

(31) The question was again considered in *Ram Manohar Lohia* v. *The State of Bihar* and another (13) as an argument was advanced that the Presidential Order under Article 359(1) created a bar to move the Court under Article 32. While repelling this assertion it was pointed out that this argument would be correct if the Presidential Order took away all rights to personal liberty under Articles 21 and 22. The view adopted was that the Presidential Order had only taken away the right to move the Court in certain circumstances and the enquiry whether the Court has been moved in one of those circumstances is not barred by the Presidential Order.

(32) It would be pertinent at this stage to examine one of the contentions raised by Mr. Tiwana on behalf of the respondents, which is based on the following observations in *Ram Manohar Lohia's case* :—

> ".....it is well settled that Courts cannot enquire into the grounds on which the Government thought that it was

(13) A.I.R. (1966) S.C. 740.

satisfied that it was necessary to make an order of detention. Courts are only entitled to look at the face of the order. This was stressed on us by learned counsel for the respondent State and the authorities fully justify that view. If, therefore, on its face an order of detention is in terms of the rule, a Court is bound to stay its hands and uphold the order."

Basing himself on these observations, it is urged by Mr. Tiwana that no other pleas are open to the petitioners and the Court is only entitled to see if on the face of the order of detention any defect or invalidity appears. The argument as stated is wholly unwarranted by the view taken by the Supreme Court in various cases to which reference has already been made and is even not supported by *Ram Manohar Lohia's* case. While making the observations to which reference has been made above, it was further stated as follows :—

"I am leaving here out of consideration a contention that an order good on the face of it is bad for reasons dehors it, for example, because it had been made *mala fide*. Subject to this and other similar exceptions—to which I have earlier referred and as to which it is unnecessary to say anything in the present context and also because the matter has already been examined by this Court in a number of cases—a Court cannot go behind the face of the order of detention to determine its validity."

The above words leave no manner of doubt that no departure is sought to be made from the view taken in *Makhan Singh Tarsikka's* case in respect of the pleas which are available to a detenu in the face of Article 358 and the Presidential Order under Article 359(1). It was also stated in *Ram Manohar Lohia's case* that the Presidential Order does not provide that even if a person is proceeded against for breach of the Defence of India Act or the Rules, he cannot move the Court on the ground that the action is not warranted by the Act and the Rules under which he was detained. In this connection, the following observations are also relevant :—

"It was thus that this Court questioned detention orders by Additional District Magistrates who were not authorised to make them or detentions of persons who were already in detention after conviction or otherwise for such

a long period that detention orders served could have had no relation to the requirements of the Defence of India Act or the Rules. Some of these cases arose under Article 226 of the Constitution but in considering the bar of Article 359 read with the President's Order, there is no difference between a petition under that article and a petition under Article 32. It follows, therefore, that this Court acting under Article 32 on a petition for the issue of a writ of habeas corpus may not allow claims based on other laws or on the protection of Article 22, *but it may not and indeed, must not, allow breaches of the Defence of India Act or the Rules to go unquestioned. The President's Order neither says so nor is there any such intendment.*" (Emphasis Supplied).

32.A. The question whether the plea of want of good faith could be raised in these circumstances was also examined and in this connection the following observations may be read with advantage :—

"If a person, under colour of exercising the statutory power, acts from some improper or ulterior motive, he acts in bad faith. The action of the authority is capable of being viewed in two ways. Where power is misused but there is good faith the act is only *ultra vires* but where the misuse of power is in bad faith there is added to the *ultra vires* character of act, another vitiating circumstance. Courts have always acted to restrain a misuse of statutory power and the more readily when improper motives underlie it. The misuse may arise from a breach of the law conferring the power or from an abuse of the power in bad faith. In either case the Courts can be moved for we do not think that Article 359 or the President's Order were intended to condone an illegitimate enforcement of the Defence of India Act."

(33) In *Durgadas Shirali* v. *Union of India and another* (14), the effect of Articles 358 and 359(1) on the pleas available to a person detained under the Preventive Detention Act was considered and it was stated that the petitioner can challenge the validity of the Ordinance, Rule or Order made thereunder on grounds other than those

(14) A.I.R. 1966 S.C. 1078.

covered by Article 358 or the Presidential Order under Article 539, as such a challenge was outside the purview of the Presidential Order. While quoting instances, it was mentioned that a citizen was not deprived of his right to move an appropriate Court for a writ of habeas corpus on the ground that his detention had been ordered *mala fide* or on the ground that any of the grounds given in the order of detention was irrelevant and there was no real and proximate connection between the grounds given and the object which the Legislature had in view.

(34) From the ratio of the decisions in the above cases, the conclusion is inescapable that in spite of the Presidential Order, 1962, and the suspension of Article 19 because of the proclamation of emergency, a petition under Article 226 challenging the detention of a person is not barred. In all these cases, the decision proceeded on the assumption that certain pleas were still available to the detenus. Having stated the legal position as to the effect of the Presidential Order under Article 359(1) issued on October 26, 1962, the stage has arrived for examining the position under the Presidential Orders dated December 23, 1974 and June 27, 1975, in the backdrop of clause (1A) of Article 359.

(35) In order to proceed with the above enquiry, a comparison of the Presidential Order dated October 26, 1962, as amended by Ordinance No. 6 of 1962, with the Presidential Order, dated December 23, 1974, is necessarily called for so as to meet the objection that the Presidential Order of 1962 as amended (hereinafter referred to as the 1962 Order) was conditional and was, therefore, materially different from the Presidential Order dated December 23, 1974 (hereinafter referred to as the 1974 Order). The 1962 Order reads as under :—

> "In exercise of the powers conferred by clause (1) of Article 359 of the Constitution the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962, is in force if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

If analysed, the above order provides that if any person is deprived of his rights under Articles 14, 21 and 22 by the Defence of India Ordinance or any order made thereunder, the enforcement of such rights

is suspended for the period during which the Proclamation of Emergency is in force. So far as the 1974 Order is concerned, it also provides that when a person is detained under Act 52 of 1974, the enforcement of his rights under Articles 14, 21 and 22 of the Constitution is suspended. To me the conclusion seems obvious that there is no difference between the two Orders and that in either case if a detention is under a particular statute or Order, the remedies available to the detenus under Articles 14, 21 and 22 are barred in that situation, and therefore I find that substantially both the Orders have the same purport and effect. Having settled this position, it would necessarily follow that the pleas available to a detenu under the 1962 Order would still be available under the 1974 Order and that the interpretation placed on the scope and extent of the 1962 Order by the Supreme Court in various cases including the *cases of Makhan Singh Tarsikka, Atma Ram, Sridhar Vaidya* and *Ram Manohar Lohia*, is equally relevant in respect of the 1974 Order.

(36) Another limb of the argument of Mr. Tiwana may be considered at this stage. It is contended that the satisfaction required under section 3(1) of the MISA is only the subjective satisfaction of the detaining authority and can be only vitiated if it is found to be based on *mala fides* and for no other reason. As against this, Mr. Sibal, vehemently stressed that from the ratio of the decisions of the Supreme Court, it clearly follows that if there is no valid statutory satisfaction, the order of detention would be bad and that to show that the requisite satisfaction was lacking, it is open to the detenu to bring out that there was non-application of mind, that irrelevant matters had been taken into consideration, that the satisfaction had been based on stale and remote grounds or no ground at all, or that it was based on non-existing facts. It was further contended that if the satisfaction was based on arbitrary exercise of power, on circumstances from which no reasonable person could arrive at the conclusion reached by the detaining authority, or an grounds which were indefinite, imprecise or vague, it could be vitiated. In appreciating the rival contention it may be observed that under our Constitutions the right of personal liberty has been placed on a high padestal so much so that it has been guaranteed by the Constitution and enshrined as a fundamental right. No doubt in times of national peril the executive has been clothed with the power to divest a person of his personal liberty without trial, but this power has not been left absolute. As has been noticed earlier, the power can only be exercised under the law providing for preventive detention and its mandatory provisions have to be complied with. Under Act 52 of 1974, detention is no

doubt allowed on the subjective satisfaction of the executive, but this subjective satisfaction is open to judicial scrutiny however limited that scrutiny may be. Some aspects of the extent of this power of the Court have been mentioned earlier and some others may be noticed, which we deduce from the judgments of the Supreme Court. In *Rameshwar Lal* v. *State of Bihar* (15) and *Moti Lal Jain* v. *State of Bihar* (16), it was held that the grounds of detention should not be vague, indefinite or irrelevant, otherwise the detention would not be legal. *In Khudiram Das* v. *The State of West Bengal and others* (17), the matter was considered at some length. After noticing that the requisite satisfaction under sub-sections (1) and (2) of Section 3 of the MISA has of necessity to be subjective, it was observed that it had to be so because the power of detention was only a preventive measure and generally proceeds on suspicion or anticipation as distinct from proof. The following observations of Lord Finlay in *Rex* v. *Halliday* (17-A) were noticed :

> ".....the Court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based."

It was then observed that "this being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of clause (1) of sub-section (1) of section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards." It was further observed that as they are matters which have to be administratively determined for the purpose of taking administrative action, and these matters were said to constitute the foundation for the exercise of the power of detention, it was not open to the Courts to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority was based. Having noticed this aspect of the nature of the satisfaction required, Bhagwati, J., who spoke for the

(15) A.I.R. 1968 S.C. 1303.
(16) A.I.R. 1968 S.C. 1509.
(17) A.I.R. 1975 S.C. 550.
(17-A) 1917 A.C. 260.

Court, proceeded to examine the case-law in order to show that there was nothing like unfettered discretion immune from judicial review, and observed that in a Government under law, there can be no such thing as unreviewable discretion. As to what emerged from a review of the case-law was stated thus :

> "But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The Courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny.
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> There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. *Emperor* v. *Shibnath Banerji,* AIR 1943 F.C. 75 at p. 92 is a case in point. Then there may be a case where the power is exercised dishonestly or for an improper purpose, such case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in *Commissioner of Police* v. *Gordhandas Bhanji* (18), and the officer of the Ministry of Labour and National Service did in *Simms Motor Units Ltd.* v. *Minister of Labour and National Service* (19), exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said

(18) 1952 SCR 135 (AIR 1952 S.C. 16).
(19) (1946) 2 ALL. E.R. 201.

to have been arrived at by the authority would also be bad where it is based on the application of a wrong test on the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again the satisfaction must be grounded 'on materials which are of rationally probative value. '*Machinder* v. *King,* (22-A). The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider.

There is also one other ground on which the subjective satisfaction reached by an authority can successfully be challenged and it is of late becoming increasingly important. The genesis of this ground is to be found in the famous words of Lord Halsbury in *sharpe* v. *wakefield* (20) :

".....when it is said that something is to be done within the discretion of the authorities.....that something is to be done according to the rules of reason and justice, not according to private opinion.....according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular."

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"If, to use the words of Lord Greene, M. R., in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury, Corporation* (21) words which have found approval of the House of Lords in *smith* v. *Rest Ellor Rural District Council* (22),

(20) 1891 A.C. 173. p. 179.

(21) (1948) IKB 223.

(22) 1956 AC 736.

(22-A) A.I.R. 1950 F.C. 129.

and *Fawceet Properties Ltd.* v. *Buckingham County Council* (23), "the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere." In such a case, a legitimate inference may fairly be drawn either that the authority did not honestly form that view or that in forming it, he could not have applied his mind to the relevant facts. "*Ross* v. *Papadopollos*, (1958) 1 WLR 546."

With the above background I now proceed to examine the Presidential Order, dated 27th June, 1975 (hereinafter called the 1975 Order) and the argument of Mr. Tiwana based thereon. The order has been set out in the earlier part of the judgment and paraphrased it would mean (i) that the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 is suspended, and (ii) that this suspension is to remain in force for the period during which the Proclamations of Emergency made on December 3, 1971, and June 25, 1975, are both in force. A bare perusal of this Presidential Order would show that in this there is no reference to any law of preventive detention under which an order of detention may have been passed. The result would be that the 1975 Order would be attracted when any order of detention is passed and the detenu claims the enforcement of his rights under Articles 14, 21 and 22 in any Court. In view of this difference between the 1975 Order and the earlier orders of 1962 and 1974, it was canvassed by Mr. Tiwana that the order of detention under the 1975 Order need not be passed under any law and if ever any order of detention is passed, it is not open to scrutiny on any ground including the ground that it is contrary to the provisions of the preventive detention law under which it is passed. Carrying the argument to its logical conclusion, it was urged that even if the liberty of a person was taken away by an executive action without there being any order of detention, the detention could not be challenged, as such a challenge would be based on rights contained in Articles 14, 21 and 22, which a detenu is not entitled to press into service in view of the Presidential Order dated June 27, 1975. It is thus asserted by Mr. Tiwana that after the 1975 Presidential Order no petition under Article 226 lies, as this Order introduces non-reviewability at the threshold.

(23) 1961 AC 636.

(37) In order to demonstrate the hollowness of such an argument it would suffice to mention that Article 21 not only speaks of the liberty of a person but also of his life and if the view of Mr. Tiwana was to prevail, it would be open to the executive to take away the life of a person without recourse to any law or a valid order of any authority empowered to pass such an order, and the person whose life is in jeopardy through an executive order would not be able to complain that he was being deprived of his life without a valid order having the authority of law, as such a plea would fall under Article 21 which he is debarred from invoking. Keeping such a result in view, it can be unhesitatingly said that this could not have been the intention of the framers of the Constitution in enacting clause (1) of Article 359. Leaving this aspect apart, it is not possible to conclude that even if the rights under Articles 21 and 22 are suspended and their protection cannot be claimed, the State is absolved from showing that its action is lawful in the sense that it has the authority of some law. It may also be noticed that if the enforcement of the rights contained in Article 21 is suspended, what falls in abeyance is the right to get protection from procedure established by law and not the right to be governed by law in the sense that the duty of the State to relate its action to some law is not suspended. A similar view was taken by the Delhi High Court in *Smt. Mankbhen* v. *Union of India*, (4) wherein the following observations appear :—

> "Suffice it to say that even if rights under Article 21 cannot be enforced, it does not absolve the State from showing that its action is lawful. We cannot persuade ourselves to agree with the learned Additional Solicitor-General that if the enforcement of rights under Article 21 is suspended a person deprived of his liberty cannot call upon the State to justify that its action is lawful."

In the same judgment the argument was examined from another stand point in the following words:—

> "One may look at it from another point of view also and that is this. Article 21 in terms does not confer any rights, it injuncts the state not to deprive any one of life or liberty except according to procedure established by law. The assurance postulated by Article 21 may be taken as creating a corresponding right in person living in India, but that is quite another thing. Now Article 21 as such

(4) Cr. W. 1 of 1975 decided on 18-4-1975.

has not been suspended. The enforcement of what we have called the corresponding rights stands suspended. So though a citizen or other person will not be able to enforce the corresponding right, the State is still under an obligation to act in consonance with the injunction placed on it by Article 21."

Reference in this connection can also be made to the following observations of Hidayatullah, J. in *Makhan Singh Tarsikka's* case:—

"When the President suspended the operation of Article 21 it took away from any person dealt with under the terms of this order, the right to plead in court of law that he was deprived of his life and personal liberty otherwise than according to the procedure established by the law of the country. In other words, he could not invoke the procedure established by ordinary law. But *President* did not make lawless action lawful."

(emphasis supplied).

Another argument which appealed to the Judges who decided *Smt. Manekbhen's case* was that if the executive were to take action in detaining persons without authority of any law, where was the necessity of enacting Act 52 of 1974 or for that matter any preventive detention law whatsoever. The fact that such an Act had been enacted was held to indicate that the State was conscious that "it had to have sanction of law before attempting to detain persons on suspicion." It was further stated that "the necessity for the State to act in accordance with law does not stand suspended", and that "the State must show the sanction of law despite the fact whether the person detained can complain of violation of any fundamental right or not."

(38) The argument that the executive action in ordering detention need not be referable to any express provisions of law was repelled by the Supreme Court in *State of Madhya Pradesh* v. *Bharat Singh* (24), and in this connection the following observations can be read with advantage :—

"All executive action which operates to the prejudice of any person must have the authority of law to support it, and

(24) A.I.R. 1967 S.C. 1170.

> the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emerging subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid."

The same is the ratio of decision of the Supreme Court in *District Collector, Hyderabad* v. *Ibrahim and Co.* (25) wherein it was ruled that "on the issue of the proclamation of emergency the State is, for the duration of the emergency, competent to enact legislation or take executive action by virtue of the provisions of Article 352— But the executive order immune from attack under Article 358 is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack merely because a proclamation of emergency is in operation when it is taken."

(39) On a review of the case-law on the subject, a Full Bench of the Andhra Pradesh High Court in *P. Vankata-seshamma* v. *The State of Andhra Pradesh and others* (26) held that even during the period of Emergency all executive action must be supported by the authority of law, and that it was difficult to envisage that the declaration of the President could ever have been intended for the purpose of authorising such patently illegal action of depriving a person of his liberty even without reference to any law on the footing that such a right does not exist independent of Articles 14, 19, 21 and 22. In this authority it was further ruled as under:—

> "When the executive purports to arrest a person in exercise of a power vested under any particular enactment and

(25) A.I.R. 1970 S.C. 1275.

(26) W.P. 3381/75 decided on 22nd August, 1975.

such an order of arrest could be challenged on the ground that it is not in conformity with the provisions of that enactment, the executive action cannot be immune from attack when it is an unabashed exercise of arbitrary power which is not even pretended to be in pursuance of any law,

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We would, however, like to make it clear that where a detention is ordered in purported exercise of power vested under a particular statute and that order is shown to be in violation of the provisions of that statute or is *mala fide* or constitutes a colourable exercise of power, then notwithstanding the declaration under Article 359(1) such a detention could be challenged in a Court of law."

While dealing with the argument that since under the Presidential Order, the right to move any Court for the enforcement of the rights conferred by Article 21 has been suspended, the detention order cannot be challenged on any ground whatsoever while the Presidential Order is in force, it was ruled as under :—

"Even before the enactment of the Constitution, people enjoyed a measure of personal liberty under the rule of law. Rule of law means that people are governed by law and law alone, and not by caprice. Under the rule of law no one can be deprived of his personal liberty by anyone, including the Government, except under the authority of law; and the provisions of the Constitution cannot be so construed as to curtail the measure of liberty enjoyed by the people even before the enactment of the Constitution.

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— — — — — — — It would be erroneous to assume that, but for this article in the Constitution, the State authorities would have been free to interfere with the liberties of the people without the authority of any law. Thus, even where the right to move any Court with respect to an order of detention for the enforcement of the rights under Article 21 of the Constitution has

been suspended the order of detention cannot be sustained unless it has been made under some authority of law."

(40) This now brings us to the question whether there is anything in Article 359(1A) which authorises the detention of any person otherwise than in accordance with law. This article introduces similar restrictions in respect of other fundamental rights as are contained in Article 358 in respect of Article 19. According to Article 359(IA) while a Presidential Order under Article 359(1) is in operation, the power of the State to make any law or to take executive action which, but for the provisions contained in Part III of the Constitution, it would be competent for any legislature or executive to make or take, is not restricted by anything in Part III. In other words, whereas under Article 358 only the enforcement of Article 19 had been suspended, under Article 359(IA) the other rights referred to in Part III could also be suspended. The effect of Thirty-eighth amendment of the Constitution was considered by the Delhi High Court in *Mrs. Bharati Nayyar* v. ***Union of India and*** *others* (27) and the argument urging "non-reviewability at the threshold" of the executive action was repelled in these words:—

> "The 38th Amendment, inserting Article 359(IA) into the Constitution, has only this effect, namely, that in addition to rights under Article 19, already provided for as per Article 358, the other rights also enshrined in Part III cannot, during the subsistence of the emergency, invalidate legislative or Executive action; but this does not dispense with the need to justify executive action in an emergency by a valid law. The respondents cannot, therefore, derive any assistance in this respect from the 38th Amendment. The legislature must be taken to have been, and indeed appears to have been, aware of this position when in its wisdom section 18 of the MISA provided that natural law rights and common law rights also, in addition to the rights under Part III of the Constitution, which had been dealt with in the aforesaid manner, would be put an end to by reason of orders passed under the MISA."

(27) Cr. W. 121/75 decided on 15th September, 1975.

(41) Having regard to the ratio of the decisions in all these cases, the conclusion is clear that an order of detention passed on the basis of executive action alone is not protected unless it has legislative support and can be justified on the basis of some valid provision of law and is in strict compliance with those provisions. The only restriction on this requirement is that the provision of law under which the order of detention has been made is not open to challenge on the basis that it is violative of any of the fundamental rights contained in Articles 14, 19, 21 and 22. No finality, therefore, attaches to the orders of detention passed in these cases and they are not completely beyond the pale of review and the bar claimed is not available. I am consequently clearly of the opinion that the position under the Presidential Order of June, 1975, is no different, so far as the right of the detenu to challenge the order of detention is concerned, from what was the position under the 1962 Presidential Order. The pleas which were available under the Presidential Orders of October, 1962, and December, 1974, are still available. The argument of Mr. Tiwana to the contrary is, therefore, without merit. The bar of non-reviewability at the threshold having been cleared, it would now be relevant to examine the principal argument raised by the learned counsel for the petitioners.

(42) The solitary basis on which Mr. Sibal mounts his attack relates to the grounds of detention supplied to the detenu and it is urged that in all these cases either the grounds are irrelevant or non-existent or not related to the objects of section 3(1) and that for these and other reasons valid satisfaction could not have been arrived at on the basis of those grounds. To meet this challenge, Mr. Tiwana again pleads the bar of the Presidential Order of June 27, 1975, and the 38th Amendment of the Constitution though for somewhat different reasons. The reason advanced is that the basic facts and the material which led to the passing of the detention order in all these cases had been supplied to the detenus in order to comply with the requirements of Article 22(5) of the Constitution and section 3(3) of the COFEPOSA and as, however, enforcement of the rights Conferred by Article 22 had been suspended by the Presidential Order, the grounds cannot be looked into for any purpose whatsoever. So far as the rights conferred by section 3(3) of the COFEPOSA are concerned, the argument is that after the coming into force

of the Presidential Order, 1975, the enforcement of these rights would also remain in abeyance, as the rights conferred by section 3(3) of the COFEPOSA are in substance the same rights as are conferred by Article 22(5) of the Constitution. For these reasons, it is urged that the judicial review of these orders will have to be confined to the pleas that can be gathered from any invalidity or illegality apparent on the face of the orders. These arguments proceed on the assumption (i) that the grounds were supplied in obedience to the provisions of Article 22(5) and not because of the statutory right contained in section 3(3) of the COFEPOSA, (ii) that section 3(3) of the COFEPOSA becomes inoperative during the period the Presidential Order under Article 359(1) is in force and (iii) that the grounds validly supplied at a time when it was necessary to supply the same cannot be made use of by the detenu for challenging the validity of the satisfaction after the issuance of the Presidential Order, 1975, and the consequential suspension of the rights conferred by Article 22(5). The first two assumptions have a close inter-connection and claim answer to the question whether Article 22(5) necessarily compels the inclusion of the safeguards provided therein in the preventive detention laws; for if it is so, it would necessarily follow that when the enforcement of the rights contained in Article 22(5) is suspended, the corresponding statutory provision in the relevant preventive detention law would also cease to be operative.

(43) In support of the contention that Article 22(5) prescribes the minimum procedure that must be included in any law permitting preventive detention, reliance on behalf of the State is placed on the decision of the Kerala High Court in *Fathima Beebi* v. *K. M. K. Ravindranathan and others* (28). The reasoning adopted *in Fathima Beebi's* case is that as "every statute providing for preventive detention must incorporate in its provisions the safeguards mentioned in Article 22(5), the enumeration of the very same safeguards in the statute does not create in the detenu rights other than those conferred by clause (5) of Article 22 but can only amount to a reflection of the same rights." The final conclusion in this matter was arrived at in the following words :—

> "This power cannot be defeated by a law made under the constitution in compliance with the Constitutional provisions. To hold otherwise would mean that a creature of

(28) 1975 Cr. L. J. 1164.

the Constitution would destroy a part of the Constitution itself. If the right sought to be established is essentially and basically the right under clause (5) of Article 22, the process of the Court would not be available for that purpose during the period of operation of the Presidential Order suspending such right. These same rights cannot be allowed to reappear and reassert themselves masquerading as safeguards provided to the detenu under section 8(1) of the Act."

A careful perusal of the above observations and the ratio of the decision in *Fathima Beebi's* case would clearly highlight that the conclusion is based on the assumption that any law providing for preventive detention is necessarily to contain provisions for safeguards mentioned in Article 22(5), but the basis of this assumption has not been clearly spelled out. The only argument that can be culled out from this judgment is that the contrary view "would defeat and virtually nullify the exercise of the important power conferred on the President by Article 359 (1)." This argument loses sight of the extraordinary nature of the power of the President under Article 359(1) which can be only exercised during the period of emergency as compared to the power of the legislature to amend a statute including any preventive detention law, which can be readily exercised at any time. By accepting the view-point that a law of preventive detention would not be invalid if it did not contain the minimum procedure mentioned in Article 22(5), it would not follow that during the period the Presidential Order under Article 359(1) is in force such a right cannot be taken away. The only implication is that a statutory right has to be withdrawn by necessary amendment of the preventive detention law after an order is made under Article 359(1). In support of this argument, it may be mentioned at this stage that to achieve such an objective section 16-A has been introduced in the MISA and section 12-A in the COFEPOSA. The exact implication of these amendments would be examined a little later, but it would suffice to mention here that the fact that these amendments have been introduced would support the contention that a preventive detention law would not be invalid if it did not contain provisions similar to Article 22(5).

(44) In arriving at the conclusion that every preventive detention law must incorporate the safeguards mentioned in Article 22(5),

reliance was placed by the Kerala High Court in *Fathima Beebi's case* on the Supreme Court decisions in *Atma Ram, Shridhar Vaidya's case* and *Makhan Singh Tarsikka's case*. It would, therefore, be fruitful to examine these cases from this stand-point.

(45) In *State of Bombay* v. *Atma Ram Shridhar Vaidya* (29), the following observations appear from which support was sought in *Fathima Beebi's case*:—

> "Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be "in accordance with procedure established by law"."

A close scrutiny of these observations would show that what is considered invalid is not the law of preventive detention which does not contain the procedure provided under Article 22(5) but the executive action which does not observe this procedure. If the law which did not contain the minimum procedural safeguards in its provisions was to be considered invalid, it could not be said that the detention would be valid *ab initio*. In that case, from the very start the detention would be under a void order, as the law under which the order is passed would be hit by Article 22(5). This is not, however, what has been said in the above observations. To make the detention illegal the emphasis is on the non-observance of the requirements of Article 22(5). If a preventive detention law does not prescribe the minimum procedure, the law is not void if in spite of this the detenu is furnished the grounds as soon as may be and is given opportunity to make a representation at the earliest. The detention would be only illegal if the rights contained in Article 22(5) are not made available to the detenu. The position would, however, be different if the preventive detention law contains any provision which is contrary to Article 22(5). In that case, that provision would be void because of its conflict with Article 22(5).

(46) As to *Makhan Singh Tarsikka's case*, the question that a preventive detention law must provide some procedure and lay down the minimum requirement of Article 22(4) to (7) was not considered directly. In *Fathima Beebi's case* reliance was placed on the following observations in *Makhan Singh Tarsikka's case*:—

> "As we have already indicated, the only reasonable construction which can be placed upon Article 359(1) is to hold

(29) A.I.R. (1951) S.C. 157.

that the citizen's right to take any legal proceeding for the enforcement of his fundamental rights which have been specified in the Presidential Order is suspended during the prescribed period. It is, in our opinion, plain that the right specified in Article 359(1) includes the relevant right, whether it is statutory, constitutional or Constitutionally guaranteed, and the words 'any court' refer to all courts of competent jurisdiction and naturally include the Supreme Court and the High Courts. If that be so, it would be singularly inappropriate for this Court to entertain an argument which seeks to circumvent these provisions by suggesting that the right of the detenu to challenge the legality of his detention under section 491(1)(b) does not fall within the scope of the said article. The said argument concentrates attention on the mere form of the petition and ignores the substance of the matter altogether. In the context, we think, such a sophisticated approach which leens solely on unrealistic and artificial subtlety is out of the place and is illogical, unreasonable and unsound."

The above observations are of no help to the case of the respondents as in *Makhan Singh Tarsikka's* case the argument that the minimum procedure prescribed by Article 22 must be included in any law permitting preventive detention was not for consideration before the Supreme Court and the above observations were made while dealing with the argument that the right of the detenu to challenge the legality of his detention under section 491(1)(b) of the Criminal Procedure Code does not fall within the scope of Article 359(1).

(47) It would also be fruitful at this stage to consider some observations of the Supreme Court made in *A. K. Gopalan* v. *The State of Madras* (30). While examining the provisions of Article 22 it was noticed that "if the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or Article 22(4) to (7), the Preventive Detention Act must be held valid....." The only inference from these words is that if a procedure is prescribed under a preventive detention law it must not offend the provisions of Article 22(4) to (7) and not that the preventive detention law must contain provisions similar to those

(30) 1950 S.C.R. 88.

contained in Article 22(4) to (7). The matter is further clarified in another part of the judgment where the following observations appear:—

> "There is nothing to prevent the Legislature from providing an elaborate procedure regulating preventive detention, but it is not obliged to do so. If some procedure is provided as envisaged by Article 21 and the *compulsory requirements of Article 22 are obeyed and carried out* nobody can, under our Constitution, as I read it, complain of the law providing for preventive detention (Emphasis supplied)".

The emphasis is again on the obeying of the requirements of Article 22 and not on providing the safeguards in the preventive detention law itself. The following remarks of Das, J. in *A. K. Gopalan's* case have of necessity, therefore, to be read in the above context:—

> "In my judgment as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in article 22(4) to (7). There is no limitation as regards the substantive law. Therefore, a preventive detention law which provides some procedure and complies with the requirements of article 22(4) to (7) must be held to be a good law, however odious it may appear to the Court to be."

The above observations were considered in *Smt. Manekben's* case and it was opined as follows:—

> "In our opinion these observations have been read by the learned counsel out of context. These observations were not meant to lay down the proposition that the safeguards contemplated by clause (5) of Article 22 have to be incorporated verbatim, as was done by section 8(1) of the MISA, but that some procedure is provided which complies with the requirements of Article 22(5)."

In fact, in an earlier part of the judgment Das, J. made the following observations which support the view that the safeguards contemplated by clause (5) of Article 22 need not be incorporated in the preventive detention law as long as the requirements of Article 22(5) were carried out:—

> "There is nothing to prevent the legislature from providing an elborate procedure regulating preventive detention

but it is not obliged to do so. If some procedure is provided as envisaged by Article 21 and the compulsory requirements of Article 22 are obeyed and carried out nobody can, under our Constitution, as I read it, complain of the law providing for preventive detention."

(48) No other case of the Supreme Court has been cited before us which could provide guidance in respect of the matter under consideration and it would, therefore, be appropriate to refer to the provisions of Article 22 to see whether there is any indication in this, supporting the view taken in *Fathima Beebi's* case. Clauses (1) and (2) of Article 22 are not attracted in the case of preventive detention as specifically stated by clause (3). So far as clause (4) is concerned, it lays down that a law of preventive detention which provides for detention for a period longer than three months should have a provision for the constitution of an advisory board. It is clearly indicative of what the law of preventive detention must provide for in case the detention is for a period of more than three months. There is, however, no such indication in Article 22(5). All that Article 22(5) provides is the obligation placed on the detaining authority and the corresponding right of the detenu. There is no requirement in this provision that similar safeguards should also be incorporated in any law providing for preventive detention. Having, therefore, regard to the language of Article 22(5) and the ratio of the decisions in *Atma Ram Shridhar Vaidya's* case and *A. K. Gopalan's* case, I am of the view that if a law of preventive detention does not contain a provision similar to Article 22(5) the law would not be invalid on that ground and only the detention order would be struck down in case the Constitutional safeguards provided in Article 22(5) are not followed. The same view was taken by the Delhi High Court in *Daya Shankar Kapoor* v. *Union of India and others* (31).

(49) This brings us to the second leg of the argument. If the validity of a law of preventive detention cannot be challenged for the reason that it does not contain a provision similar to Article 22(5), it would necessarily follow that if such a law does contain a provision requiring that a detenu be supplied grounds of detention and should be afforded earliest opportunity of making a representation, such a statutory right would be *de hors* the provision of Article 22(5) and its contravention would render the order

(31) 1975 Cr. L.J. 1376.

illegal unless such a law itself provides to the contrary. It would further emerge that, in spite of the Presidential Order under Article 359 suspending the enforcement of the rights under Articles 14, 19, 21 and 22, the statutory rights under preventive detention law would ordinarily remain intact. In *Makhan* Singh *Tarsikka's* case it was observed that "where a detenu has been detained in violation of the mandatory provisions of the Act it would be open to the detenu to contend that his detention is illegal for the reasons that the mandatory provisions of the Act have been contravened (para 35)." In *Fathima Beebi's* case the view taken was that these observations relate to matters other than those covered by Article 22(5) of the Constitution, but we are unable to find any indication in this passage supporting such an interpretation. Ansari, J., who spoke for the Bench in *Daya Shankar Kapoor's* case, accepted this reasoning in the following words:—

> "Even if a law of preventive detention does not contain a provision such as section 8(1) of the Act, a person detained under such a law can still invoke Article 22(5) and claim that the grounds of detention should be communicated to him and that he should be afforded the earliest opportunity of making a representation against the order. There is, therefore, considerable force in the contention of the learned counsel for the petitioner that section 8(1) of the Act is an independent statutory provision *de hors* Article 22(5) of the Constitution, and that it is a mandatory provision of the Act and any order of detention which is in contravention of this mandatory provision is illegal."

Clauses (2) and (7) of Article 22 indirectly indicate the correctness of the above interpretation. Section 61 of the Criminal Procedure Code, 1898 (section 57 of the Criminal Procedure Code, 1973) provides that no police officer shall detain in custody a person arrested without warrant for a longer period then what is reasonable, but not exceeding twenty-four hours excluding the time taken for the journey from the place of arrest to the Magistrate's Court. Section 167 of the Code also provides that if the investigation cannot be completed within twenty-four hours the accused shall be forwarded to the nearest Judicial Magistrate. His further detention is then to be ordered by the Magistrate concerned. Article 22(2) contains a similar provision, according to which a person arrested has to be produced before a Magistrate within twenty-four hours excluding the time spent on the journey from the place of the arrest to the nearest Magistrate. The detention beyond the

period of twenty-four hours can only be authorised by a Magistrate. It would, therefore, follow that the right contained in sections 57 and 167 of the Code is essentially and basically the right contained in clause (2) of Article 22. If the view taken in *Fathima Beebi's* case is accepted as correct, it would imply that when the operation of Article 22 is suspended, the rights of the accused under section 167 of the Criminal Procedure Code would also be held in abeyance during the period the Presidential Order is in force. Similarly, it could be argued that, even if a law of preventive detention provides a maximum period for which a person could be detained, an order of detention providing a longer period could not be challenged, as the provision prescribing the maximum period was introduced because of clause (7) of Article 22 of the Constitution, the operation of which has been suspended by the Presidential Order. Such an extreme position was not taken before us and even otherwise such a view would be in direct conflict with the ratio of the decisions in *Makhan Singh Tarsikka's* case and *Durgadas Shrali* v. *Union of India and another* (32).

(50) On behalf of the State it has, however, been contended that even if it be accepted that section 8(1) of the MISA contained an independent right *de hors* Article 22 of the Constitution and was regarded as a mandatory provision of the Act, section 3(3) of the COFEPOSA cannot be placed on the same pedestal as there are indications in this statutory provision that it is not to remain in operation after the Presidential Order has been promulgated. While carrying the argument forward it is highlighted that the words "for the purposes of clause (5) of Article 22 of the Constitution" with which sub-section (3) of section 3 of the COFEPOSA opens are clearly indicative of the intention of the legislature that this sub-section is not to remain in force if the rights contained in Article 22(5) are suspended. It is further urged that this provision only fixes the period during which, if the grounds are supplied it would be presumed that they have been communicated "as soon as may be after the detention". Support for this argument was sought from the following observations of the Madhya Pradesh High Court in *Haji Ibrahim* v. *The State of Madhya Pradesh and another* (33)—

> "The said sub-section opens with the words 'for the purposes of clause (5) of Article 22 of the Constitution'. These words

(32) A.I.R. 1966 S.C. 1078.

(33) 1975 Cr. L.J. 1438.

clearly indicate that the provisions of the sub-section are attracted only so long as it is open to the detenu to challenge his detention on the ground that clause (5) of Article 22 of the Constitution has been violated. The sub-section would be inapplicable where the right of the detenu to challenge his order of detention on this ground in a court of law has been suspended by a Presidential Order as in the present case. Thus, the provision contained in sub-section (3) of section 3 of the Act cannot be treated as a mandate of the Act itself. It is a provision which merely supplements the fundamental right guaranteed by clause (5) of Article 22 of the Constitution. It does not confer any independent right on the detenu."

The argument appears to be attractive and would have commanded acceptance but for the doubt expressed by the legislature itself. From the fact that the COFEPOSA has been amended by the introduction of section 12-A (by Act No. 35 of 1975) it can be inferred that the legislature proceeded on the assumption that the rights contained in section 3(3) of the COFEPOSA were independent rights and would not be affected by a Presidential Order under Article 359(1) of the Constitution and that to suspend these rights an independent provision had to be made in the COFEPOSA itself.

(51) Section 12-A of the COFEPOSA may now be examined in the light of the above reasoning. Sub-section (1) of section 12-A relates to the period during which this provision is to remain in force while sub-section (2) provides that at the time of making an order of detention under this Act the appropriate authority shall consider whether the detention of such person was necessary for dealing effectively with the emergency and, if so satisfied, the Government or the officer concerned may make a declaration to that effect and communicate a copy of the declaration to the person concerned. The necessity of continuing the detention is then to be reconsidered within four months of the first declaration as provided in sub-section (3). Every such reconsideration has to be made at intervals not exceeding four months. According to sub-section (4), in making any consideration, review or reconsideration the Government or officer may act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned. To a detenu in whose case a declaration has been made the

grounds on which the order of detention has been passed need not be disclosed during the period the declaration is in force and this period is not to be taken into account for the purposes of section 3(3). This period is also not to be taken into account for the purpose of clauses (b) and (c) of section 8 and sub-section (1), sub-section 2(i) and sub-section (3) of section 9. Clauses (b) and (c) of section 8 relate to the period within which the appropriate Government is to make a reference to the advisory board and the advisory board is to submit its report. These provisions were introduced for the purposes of Article 22 of the Constitution.

(52) A close scrutiny of section 12-A would bring out that though the declaration under sub-section (2) is to be issued only if the detaining authority is satisfied that it is necessary for dealing effectively with the emergency, the effect of such a declaration is to take away from the detenu the right to know about the grounds on which the order of detention has been passed or to ask for facts and material which were the basis of the grounds and to deprive him of the right of making a representation. These rights were based not only on Article 22(5) of the Constitution but also on section 3(3) of the COFEPOSA and section 8 of the MISA. If the rights contained in section 3(3) of the COFEPOSA and section 8 of the MISA were to fall in abeyance as soon as a Presidential Order under Article 359(1) suspending the enforcement of the rights under Article 22(5) is made, there was no occasion for introducing a provision which would take away these rights only in a limited situation. Sub-sections (4), (5) and (6) of section 12-A would only come into operation if a declaration under sub-section (2) of section 12-A is made, which in turn could only be made if the detaining authority is satisfied that it is necessary to detain a person for effectively dealing with the emergency. In cases where such a satisfaction is not there or there are no grounds on which such a satisfaction could be had, a declaration would not be made. The necessary implication would, therefore, be that in that situation the rights under sub-section 3(3) of the COFEPOSA and section 8 of the MISA would remain intact in spite of the Presidential Order under Article 359(1). It may be mentioned at this stage that sub-sections (4), (5) and (6) of section 12-A of the COFEPOSA and the corresponding provision of the MISA [sub-sections (5), (6) and (7) of section 16-A of

the MISA) can only come into operation if not only there is a proclamation of emergency under Article 352 but there is also a Presidential Order under Article 359(1) suspending Articles 14, 19, 21 and 22, as otherwise these provisions would be hit by Articles 21 and 22. By accepting that section 3(3) of the COFEPOSA and section 8 of the MISA would get suspended whenever a Presidential Order under Article 359(1) suspending the enforcement of the rights under Articles 14, 19, 21 and 22 is made, the redundancy of sections 12-A of the COFEPOSA and section 16-A of the MISA becomes apparent. It is a well settled rule of construction that effect must be given to every provision of a statute and that such a construction should be adopted which would give meaning to every word in a statute unless there is good reason to the contrary. In *R.* v. *Bishop of Oxford* (34), it was said to be "a known rule of interpretation of statutes that such a sense is to be made upon the whole as that no clause, sentence or word shall prove surplus, void or insignificant if by any other construction they may also be made useful and pertinent." Adopting this rule of interpretation, it can be reasonably concluded that section 12-A of the COFEPOSA and section 16-A of the MISA were introduced in order to take away the rights under section 3(3) of the former and section 8 of the latter, which otherwise would have been operative in spite of the Presidential Order under Article 359(1).

(53) The third limb of the argument of Mr. Tiwana that the grounds validly supplied to the detenu at a time when it was necessary to supply the same cannot be made use of by the detenu after the issuance of the Presidential Order, 1975, would fall to the ground in view of the conclusion that the statutory right under section 3(3) of the COFEPOSA is *de hors* the provision of Article 22(5) and remains effective in spite of the Presidential Order of June, 1975. Subject to the limitation imposed by section 5-A of the COFEPOSA these grounds would be available to the detenu for raising such of the pleas as are available in the face of the Presidential Order of June, 1975, as, no declaration having been made under section 12-A, it would be incumbent on the detaining authority to supply the grounds in terms of section 3(3) of the COFEPOSA. To this extent the argument of Mr. Sibal succeeds.

(34) (1879) 4 Q.B.D. 245.

(54) As a result of the entire discussion made above, the following conclusions emerge :—

(1) The only conditions necessary for the applicability of Article 359 are that there ought to be a proclamation under Article 352 and a declaration by the President suspending the enforcement of any of the rights contained in Part III of the Constitution. Therefore, even though the grounds mentioned in section 3 of the COFEPOSA relate to smuggling and the conservation and augmentation of foreign exchange, the provisions of the COFEPOSA would be covered by a Presidential Order under Article 359(1).

(2) In the case of a detenu who was first detained under the MISA and on the revocation of that order was then detained under the COFEPOSA, the period of detention suffered by a detenu under section 3 of the MISA as amended by Ordinance No. 11 of 1974 cannot be taken into account for determining the date on which an order of detention passed under the COFEPOSA would expire even though the provisions of the MISA introduced by Ordinance No. 11 of 1974 were the same as some of the provisions of the COFEPOSA and even though the same grounds of detention were made the basis of the order under the COFEPOSA as were the grounds under the MISA.

(3) Section 5 of the COFEPOSA would be applicable to the cases of the detenus where the challenge to the detention has been posed after the introduction of section 5-A and it is of no consequence as to when the order of detention was made. The applicability of this provision is not restricted to the orders of detention which were to be passed after the insertion of this provision and, therefore, if the order of detention can be justified on the basis of even one ground, the order cannot be held to be invalid.

(4) In spite of the Presidential Orders made on November 16, 1974, and December 23, 1974, under clause (1) of Article 359 the right of a detenu to challenge his detention was

not barred at the threshold and it would be open to him to raise the following among other permissible pleas :—

(i) That the challenge to the detention is outside Article 359(1) and the Presidential Order.

(ii) That the detention is in violation of any independent mandatory provision of the Act under which the detention order is passed.

(iii) That the order of detention has been passed in the exercise of powers *mala fide*.

(iv) That the operative provisions of the law under which he is detained suffer from the vice of excessive delegation.

(v) That the order has been passed by a delegate outside the authority conferred on him or that the power to pass the order has been exercised inconsistently with the conditions prescribed in that behalf.

(vi) That the grounds of detention supplied to the detenu are irrelevant and there is no real and proximate connection of the grounds with the object which the legislature had in view and that the grounds on which the subjective satisfaction is based are such that no rational human being can consider those grounds to be connected with the fact in respect of which the satisfaction is sought to be reached.

(5) No change has been introduced in the rights of the detenu by the Presidential Order dated June 27, 1975, and clause (1A) of Article 359 and in spite of these the right of a detenu to challenge his detention is not barred and the High Court has jurisdiction under Article 226 to consider the legality of his detention to the limited extent it is permissible.

(6) Except in cases covered by section 16-A of the MISA, the subjective satisfaction of the detaining authority, in spite of the Presidential Order and the amendment of Article 359(1) is not immune from judicial scrutiny though the area of interference is limited within which the validity of the subjective satisfaction can be reviewed.

(7) In spite of the Presidential Order of June, 1975, an order of detention is open to scrutiny on the grounds mentioned in sub-para (4) of para 54 and that the life or liberty of a person cannot be taken away without reference to any law. The suspension of the enforcement of the rights under Articles 21 and 22 does not absolve the State from showing that its action is lawful.

(8) It is not possible to hold that the Order of the President under Article 359(1) was intended for the purpose of authorising such patently illegal action of depriving a person of his life or liberty even without reference to any law on the footing that such a right does not exist independently of Articles 14, 19, 21 and 22. An executive action can be challenged on the ground that it is not in conformity with the provisions of the enactment under which it is made or that it is not referrable to any law.

(9) A preventive detention law is not invalid merely because it does not incorporate in its provisions the safeguards mentioned in Article 22(5), but the executive action would be invalid if the safeguards are not observed and complied with except if saved otherwise by an appropriate Presidential Order under Article 359.

(10) Unless there is indication to the contrary in the preventive detention law itself, if such a law contains a provision requiring that the detenu should be supplied grounds of detention and should be afforded earliest opportunity of making a representation, such a statutory right would be *de hors* the provisions of Article 22(5) and its contravention would render the order illegal. Section 8 of the

MISA is such a provision and the statutory right contained in this is *de hors* the provisions of Article 22(5). This statutory right does not get suspended in spite of the Presidential Order under Article 359(1). This provision is, however, subject to the limitation contained in section 16-A of this Act and the rights contained in section 8 remain in abeyance as long as the declaration under section 16-A is effective.

(11) In spite of the expression "For the purpose of clause (5) of Article 22 of the Constitution" occurring in section 3(3), the right contained in this provision is not suspended by a Presidential Order under Article 359 including the Presidential Order dated June 27, 1975, as introduction of section 12-A in the COFEPOSA shows that the legislative intent was to keep the right under section 3(3) alive except in those cases where a declaration under section 12-A is made.

(12) If there is no declaration under section 12-A of the COFEPOSA in respect of a detenu, in spite of the issuance of the Presidential Order dated June 27, 1975, the grounds of detention supplied to him can be made use of for the purpose of showing that the satisfaction could not have been validly arrived at on the basis of these grounds or for challenging the detention on pleas which are outside the scope of the Presidential Order and fall within the limited "area of reviewability" available to the detenu.

(13) The right to move the High Court under Article 226 of the Constitution of India is not barred by the Presidential Order under Article 359(1) where the challenge is posed to the law of preventive detention on the strength of any other fundamental rights not covered by the Presidential Order.

(55) It now survives for determination as to whether in each of these cases any relief can be granted to the detenus on the basis of the grounds supplied to them. The legal position in this respect having been cleared, the examination of the grounds in each case is left to be decided by the Bench which had referred the cases to

us and it would be for that Bench either to go into the grounds itself or to send these petitions to a Single Bench in the light of the conclusions referred to above. This reference is consequently disposed of as such.

K. S. K.

H.C.

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