A

DR. RAM MANOHAR LOHIA

v.

STATE OF BIHAR AND OTHERS

September 7, 1965

B [A. K. SARKAR, M. HIDAYATULLAH, RAGHUBAR DAYAL, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Defence of India Rules, 1962, r. 30(1)(b)—"Public order" and "law and order", difference between—Scope of rule.

Constitution of India, 1950, Art. 359(1)—President's Order suspending rights under Arts. 21 and 22—Right to move Supreme Court under Art. 32—Effect on.

C

Rule 30(1)(b) of the Defence of India Rules, 1962, provided that a State Government might, if it was satisfied with respect to a person that with a view to preventing him from acting in a manner prejudicial, *inter alia* to "public safety and maintenance of public order" it is necessary to do so, order him to be detained. A District Magistrate to whom the power of the Government of the State of Bihar had been delegated under s. 40(2) of the Defence of India Act, 1962, ordered the detention of the

D petitioner under the rule.

The order stated that the District Magistrate was satisfied, that with a view to prevent the petitioner from acting in any manner prejudicial to the "public safety and the maintenance of law and order," it was necessary to detain him. Prior to the making of the order the District Magistrate had, however, recorded a note stating that having read the report of the Police Superintendent that the petitioner's being at large was

E prejudicial to "public safety and maintenance of public order", he was satisfied that the petitioner should be detained under the rule. The petitioner moved this Court under Art. 32 of the Constitution for a writ of *habeas corpus* directing his release from detention, contending that : (i) though an order of detention to prevent acts prejudicial to *public order* may be justifiable an order to prevent acts prejudicial to law and order would not be justified by the rule; (ii) the order mentioned a notification which did not contain the necessary delegation; (iii) the District Magis-

F trate acted beyond his jurisdiction by considering the danger not only in his district but in the entire State; and (iv) all the conditions mentioned in the rule must be cumulatively applied before the order of detention could be made. The respondent-State raised a preliminary objection, that the President of India had made an Order under Art. 359(1) that the right of a person to move any court for the enforcement of the rights conferred by Arts. 21 and 22 shall remain suspended for the period during which the proclamation of emergency under Art. 352 was in force, if

G such person had been deprived of any such rights under the Defence of India Act or any rule made thereunder, and that therefore, this Court was prevented from entertaining the petition.

HELD : (*Per* Full Court) : (i) The petition was maintainable.

Per Sarkar, J. : The order of the President does not form a bar to all applications for release from detention under the Act or the Rules. Where a person was detained in violation of the mandatory provisions of the

H Defence of India Act his right to move the Court was not suspended. Since the petitioner contended that the order of detention was not justified by the Act or Rules and was therefore against the provisions of the Act, the petitioner was entitled to be heard. [716 G; 717 A-B]

Per Hidayatullah and Bachawat, JJ. : The net result of the President's Order is to stop all claims to enforce rights arising from laws other than the Defence of India Act and the Rules, and the provisions of Art. 22 at variance with the Defence of India Act and the Rules are of no avail. But the deprivation must be in good faith under the Defence of India Act or any rule or order made *thereunder*. The President's Order does not say that even if a person is proceeded against in breach of the Defence of India Act or the Rules or *mala fide* he cannot move the Court to complain that the Act and the Rules under colour of which some action was taken, do not warrant it. It follows, therefore, that this Court acting under Art. 32 on a petition for the issue of a writ of *habeas corpus* must not allow breaches of the Defence of India Act or the Rules to go unquestioned, as Art. 359 and the President's Order were not intended to condone an illegitimate enforcement of the Defence of India Act. [731 B, E, F; 733 B-C]

Per Raghubar Dayal, J. : This Court can investigate whether the District Magistrate exercised the power under r. 30 honestly and *bona fide*, or not, that is, whether he ordered detention on being satisfied as required by r. 30. [748 H]

Per Mudholkar, J. : Before an entry into the portals of this Court could be denied to a detenu, he must be shown an order under r. 30(1) of the Defence of India Rules made by a competent authority stating that it was satisfied that the detenu was likely to indulge in activities which would be prejudicial to one or more of the matters referred to in the rule. If the detenu contends that the order, though it purports to be under r. 30(1), was not competently made, this Court has the duty to enquire into the matter. Upon an examination of the order, if the Court finds that it was not competently made or was ambiguous, it must exercise its powers under Art. 32, entertain the petition thereunder and make an appropriate order. [755 H; 756 A-B]

Makhan Singh v. *State of Punjab*, [1964] 4 S.C.R. 797 followed.

(ii) *Per* Sarkar, Hidayatullah, Mudholkar and Bachawat JJ. : The petitioner should be set at liberty.

Per Sarkar J. : The order detaining the petitioner would not be in terms of the rule unless it could be said that the expression "law and order" means the same thing as "public order". What was meant by maintenance of public order was the prevention of disorder of a grave nature, a disorder which the authorities thought was necessary to prevent in view of the emergent situation created by external aggression; whereas, the expression "maintenance of law and order" may mean prevention of disorder of comparatively lesser gravity and of local significance only. [718 B, D, E]

Courts are only entitled to look at the face of the order, because the satisfiction which justifies the order under the rule is the subjective satisfaction of the detaining authority. If on its face an order of detention is in terms of the rule, ordinarily, a court is bound to stay its hands and uphold the order. When an order is on the face of it not in terms of the rule, a court cannot enter into an investigation whether the order of detention was in fact in terms of the rule. So the State cannot be heard to say of prove that an order was in fact made to prevent acts prejudicial to public order though the order does not say so. It is not a case where the order is only evidence of the detention having been made under the rule. The order is conclusive as to the state of the mind of the person who made it and no evidence is admissible to prove that state of mind. Extraneous evidence such as the note made by the District Magistrate was not admissible to prove that the rule had been complied with. [718 G-H; 718 B-D; 720 G; 722 B-C]

A This is not taking too technical a view, but is a matter of substance. If a man can be deprived of his liberty under a rule by the simple process of the making of an order, he can only be so deprived if the order is in terms of the rule. If for the purpose of justifying the detention such compliance by itself is enough, a non-compliance must have a contrary effect. A mere reference in the detention order to the rule is not sufficient to show that by "law and order" what was meant was public order". [719 F-G; 720 A-C]

B The order no doubt mentions another ground of detention, namely, the prevention of acts prejudicial to public safety, and in so far as it did so, it was clearly within the rule. But the order has notwithstanding this, to be held illegal, though it mentioned a ground on which a legal order of detention could have been based, because, it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of his C subjective satisfaction. [722 E; G-H]

Shibban Lal Saksena v. *State of U.P.* [1954] S.C.R. 418, followed.

Per Hidayatullah and Bachawat, JJ. : The satisfaction of the detaining authority cannot be subjected to objective tests and courts are not to exercise appellate powers over such authorities and an order proper on its face, passed by a competent authority in good faith, would be a complete D answer to a petition for a writ of *habeas corpus*. But when from the order itself circumstances appear which raise a doubt whether the officer concerned had not misconceived his own powers, there is need to pause and enquire. The enquiry then is, not with a view to investigate the sufficiency of the materials but into the officer's notions of his power. If the order passed by him showed that he thought his powers were more extensive than they actually were, the order might fail to be a good order. No doubt, what matters is the substance; but the form discloses the approach E of the detaining authority to the serious question and the error in the form raises the enquiry about the substance. When the liberty of the citizen is put within the reach of authority and the scrutiny by courts is barred, the action must comply not only with the substantive requirements of law but also with those forms which alone can indicate that the substance has been complied with. [739 H; 740 B-C, E; 741 C; F]

F The District Magistrate acted to "maintain law and order" and his order could not be read differently even if there was an affidavit the other way. If he thought in terms of "public order" he should have said so in his order, or explained how the error arose. A mere reference to his earlier note was not sufficient and the two expressions cannot be reconciled by raising an air of similitude between them. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next G representing "public order" and the smallest representing "security of State". An act may affect "law and order" but not "public order," just as an act may affect "public order" but not "security of the State". Therefore, by using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules. [740 E-F, H; 746 B-E; 747 D, E]

H The order on its face shows two reasons, but it was not certain that the District Magistrate was influenced by one consideration and not both, because, it was not open to the Court to enquire into the material on which the District Magistrate acted, or to examine the reasons to see whether his action fell within the other topic, namely, public safety. [746 F-G]

Per Mudholkar J. : The use of the expression "maintenance of law and order" in the impugned order makes it ambiguous on its face and therefore the order must be held to be bad. No doubt the order also refers to public safety. But then the questions arise : What is it that weighed with the District Magistrate, the apprehension regarding public safety or an apprehension regarding maintenance of law and order ? Was the apprehension entertained by the District Magistrate that the petitioner, if left at large, was likely to do something which will imperil the maintenance of public order generally, or was it that he apprehended that the petitioner's activities may cause disturbances in a particular locality ? His order, which was the only material which could be considered, gave no indication on those questions. The expression "law and order" does not find any place in the rule and is not synonymous with "public order". "Law and order" is a comprehensive expression in which would be included not merely public order but matters such as public peace, tranquillity, orderliness in a locality or a local area and perhaps other matters. [756 H; 757 A, C, D, F] A B C

Per Raghubar Dayal J. (dissenting) : The District Magistrate made the impugned order on his being satisfied that it was necessary to do so with a view to prevent the petitioner from acting in a manner prejudicial to public safety and maintenance of public order. The impugned order was therefore valid and consequently, the petitioner could not move this Court for the enforcement of his rights under Arts. 21 and 22 in view of the President's Order under Art. 359(1). [755 B-C] D

The detaining authority is free to establish that any defect in the detention order is of form only and not of substance, it being satisfied of the necessity to detain the person for a purpose mentioned in r. 30, though the purpose has been inaccurately stated in the detention order. The existence of satisfaction does not depend on what is stated in the order and can be established by the District Magistrate by his affidavit. His omission to refer to "maintenance of public order" does not mean that he was not so satisfied, especially when his note refers to the petitioner being at large to be prejudicial to public safety and the maintenance of public order. The petitioner's affidavit and rejoinder show that the District Magistrate was satisfied of the necessity of detaining the petitioner to prevent him from acting in a manner prejudicial to the public order, because of the setting of events that happened on that date. "Maintenance of law and order" may be an expression of wider import than "public order", but in the context in which it was used in the detention order and in view of its use generally, it should be construed to mean maintenance of law and order in regard to maintenance of public tranquillity. [749 C-D; 750 C-D; 751 C, F-G] E F

Sodhi Shamsher Singh v. *State of Pepsu*, A.I.R. 1954 S.C. 276, referred to.

Even if the expression "maintenance of law and order" in the impugned order be not construed as referring to "maintenance of public order" the impugned order cannot be said to be invalid in view of its being made with a double objective, that is, with the object of preventing the petitioner from acting prejudicially to the public safety and the maintenance of law and order. His satisfaction with respect to any of the purposes mentioned in r. 30(1) which would justify his ordering the detention of a person is sufficient for the validity of the order. There is no room for considering that he might not have passed the order merely with one object in view, the object being to prevent him from acting prejudicially to public safety. It is not a case where his satisfaction was based on two grounds one of which is irrelevant or non-existent. There does not appear to be any reason why the District Magistrate would not have passed the order of G H

A detention against the petitioner on the satisfaction that it was necessary to prevent him from acting prejudicially to public safety. [752 H; 753 B-D; 754 A-B]

(iii) *Per* Sarkar, Hidayatullah, Raghubar Dayal and Bachawat, JJ. : The delegation was valid.

Per Sarkar J. : In spite of the mistake in the order as to the Notification delegating the power, evidence could be given to show that the delegation B had in fact been made, because, the mistake did not vitiate the order. To admit such evidence would not be going behind the face of the order, because, what is necessary to appear on the face of the order is the satisfaction of the Authority of the necessity for detention for any of the reasons mentioned in r. 30(1)(b), and not his authority to make the order. [721 D, F-G]

Per Hidayatullah, Raghubar Dayal and Bachawat JJ. : There was only C a clerical error in mentioning the wrong notification and being a venial fault did not vitiate the order of detention. Also, s. 40(2) does not require the imposition of any conditions but only permits it. [737 F; 738 A; 741 G; 748 D]

(iv) *Per* Hidayatullah, Raghubar Dayal and Bachawat, JJ. : There was nothing wrong in the District Magistrate taking a broad view of the petitioner's activities so as to weigh the possible harm if he was not detained. Such a viewing of the activities of a person before passing the order D against him does not necessarily spell out extra-territoriality, but is really designed to assess properly the potentiality of danger which is the main object of the rule to prevent. [737 G-H; 748 D]

(v) *Per* Hidayatullah, Raghubar Dayal, Mudholkar and Bachawat, JJ. : It is not necessary that the appropriate authority should entertain an apprehension that the person to be detained is likely to participate in every one of the activities referred to in the rule. [739 F; 748 D; 756 F]

E

ORIGINAL JURISDICTION : Writ Petition No. 79 of 1965.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

The petitioner appeared *in person.*

F *A. V. Viswanatha Sastri* and *S. P. Varma,* for the respondents.

Sarkar J., Hidayatullah J. (on behalf of himself and Bachawat J.) and Mudholkar J. delivered separate concurring Judgments. Raghubar Dayal J. delivered a dissenting Opinion.

Sarkar, J. Dr. Ram Manohar Lohia, a member of the Lok G Sabha, has moved the Court under Art. 32 of the Constitution for a writ of *habeas corpus* directing his release from detention under an order passed by the District Magistrate of Patna. The order was purported to have been made under r. 30(1)(b) of the Defence of India Rules, 1962.

Dr. Lohia, who argued his case in person, based his claim to H be released on a number of grounds. I do not propose to deal with all these grounds for I have come to the conclusion that he is entitled to be released on one of them and to the discussion of

that ground alone I will confine my judgment. With regard to his other grounds I will content myself only with the observation that as at present advised, I have not been impressed by them.

The order of detention runs thus: "Whereas I, J. N. Sahu, District Magistrate, Patna, am satisfied.....that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order, it is necessary to make an order that he be detained. Now, therefore, in exercise of the powers conferred by clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962 read with Notification No. 180/CW..... I hereby direct that.....Dr. Ram Manohar Lohia be arrested..... and detained in the Central Jail Hazaribagh, until further orders." Now the point made by Dr. Lohia is that this order is not in terms of the rule under which it purports to have been made and, therefore, furnishes no legal justification for detention. The reason why it is said that the order is not in terms of the rule is that the rule does not justify the detention of a person to prevent him from acting in a manner prejudicial to the maintenance of law and order while the order directs detention for such purpose. It is admitted that the rule provides for an order of detention being made to prevent acts prejudicial to the maintenance of public order, but it is said that public order and law and order are not the same thing, and, therefore, though an order of detention to prevent acts prejudicial to public order might be justifiable, a similar order to prevent acts prejudicial to law and order would not be justified by the rule. It seems to me that this contention is well founded.

Before proceeding to state my reasons for this view, I have to dispose of an argument in bar advanced by the respondent State. That argument is that the petitioner has, in view of a certain order of the President to which I will presently refer, no right to move the Court under Art. 32 for his release. It is said that we cannot, therefore, hear Dr. Lohia's application at all. To appreciate this contention, certain facts have to be stated and I proceed to do so at once.

Article 352 of the Constitution gives the President of India a power to declare by Proclamation that a grave emergency exists whereby the security of India is threatened *inter alia* by external aggression. On October 26, 1962, the President issued a Proclamation under this article that such an emergency existed. This presumably was done in view of China's attack on the north eastern frontiers of India in September 1962. On the same day as the

A Proclamation was made, the President passed the Defence of India Ordinance and rules were then made thereunder on November 5, 1962. The Ordinance was later, on December 12, 1962, replaced by the Defence of India Act, 1962 which however continued in force the rules made under the Ordinance. On November 3, 1962, the President made an order under Art. 359(1) which he was
B entitled to do, declaring "that the right of any person to move any court for the enforcement of the rights conferred by article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation.....is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 or any rule or order made thereunder."
C There is no doubt that the reference in this Order to the "Defence of India Ordinance, 1962" must, after that Ordinance was replaced by the Act, as earlier stated, be understood as a reference to the Act : see *Mohan Chowdhury* v. *The Chief Commissioner, Tripura*(1). I should now state that the Proclamation is still
D in force.

It is not in dispute that the present petition has been made for the enforcement of Dr. Lohia's right to personal liberty under Arts. 21 and 22. These articles in substance—and it should suffice for the present purpose to say no more—give people a certain personal
E liberty. It is said by the respondent State that the President's Order under Art. 359(1) altogether prevents us from entertaining Dr. Lohia's petition and, therefore, it should be thrown out at once. This would no doubt, subject to certain exceptions to which a reference is not necessary for the purposes of the present judgment, be correct if the Order of November 3, 1962 took away
F all rights to personal liberty under Arts. 21 and 22. But this, the Order does not do. It deprives a person of his right to move a court for the enforcement of a right to such personal liberty only when he has been deprived of it by the Defence of India Act—it is not necessary to refer to the Ordinance any more as it has been replaced by the Act—or any rule or order made thereunder. If
G he has not been so deprived, the Order does not take away his right to move a court. Thus if a person is detained under the Preventive Detention Act, 1950, his right to move the Court for enforcement of his rights under Arts. 21 and 22 remains intact. That is not a case in which his right to do so can be said to have been taken away by the President's Order. This Court has in
H fact heard applications under Art. 32 challenging a detention under

(1) [1964] 3 S.C.R. 442.

that Act : see *Rameshwar Shaw* v. *District Magistrate of Burdwan*(1). If any person says, as Dr. Lohia does, that he has been deprived of his personal liberty by an order not made under the Act or the Rules, there is nothing in the President's Order under Art. 359(1) to deprive him of his right to move the Court under Art. 32. The Court must examine his contention and decide whether he has been detained under the Act or the Rules and can only throw out his petition when it finds that he was so detained, but not before then. If it finds that he was not so detained, it must proceed to hear his petition on its merits. The right under Art. 32 is one of the fundamental rights that the Constitution has guaranteed to all persons and it cannot be taken away except by the methods as provided in the Constitution, one of which is by an order made under Art. 359. The contention that an order under that article has not taken away the constitutional right to personal liberty must be examined.

Mr. Verma said that *Smith* v. *East Elloe Rural District Council*(2) supported the contention of the respondent State. I do not think so. That case turned on an entirely different statute. That statute provided a method of challenging a certain order by which property was compulsorily purchased and stated that it could not be questioned in any other way at all. It was there held that an action to set aside the order even on the ground of having been made *mala fide*, did not lie as under the provision no action was maintainable for the purpose. That case is of no assistance in deciding the question in what circumstance a right to move the court has been taken away by the entirely different provisions that we have to consider. Here only a right to move a court in certain circumstances has been taken away and the question is, has the court been moved on the present occasion in one of those circumstances ? The President's Order does not bar an enquiry into that question. Apart from the fact that the reasoning on which the English case is based, has no application here, we have clear observations in judgments of this Court which show that the Order of the President does not form a bar to all applications for release from detention under the Act or the Rules. I will refer only to one of them. In *Makhan Singh* v. *The State of Punjab*(3) it was said, "If in challenging the validity of his 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" and by way of illustration of this proposition, a case where a

(1) [1964] 4 S.C.R. 921. (2) [1956] L.R. A.C. 736.
(3) [1964] 4 S.C.R. 797.

A person was detained in violation of the mandatory provisions of the Defence of India Act was mentioned. That is the present case as the petitioner contends that the order of detention is not justified by the Act or Rules and hence is against its provisions. The petitioner is entitled to be heard and the present contention of the respondent State must be held to be ill founded and must fail.

B

I now proceed to consider the merits of Dr. Lohia's contention that the Order detaining him had not been made under the Defence of India Rules. I here pause to observe that if it was not so made, there is no other justification for his detention; none is indeed advanced. He would then be entitled to his release.

C

I have already stated that the Proclamation of Emergency was made as the security of India was threatened by external aggression. That Proclamation of emergency was the justification for the Act. The Act in fact recited the Proclamation in its preamble. Section 3 of the Act gave the Central Government power to
D make rules providing for the detention of persons without trial for various reasons there mentioned. Rule 30(1)(b) under which the order of detention of Dr. Lohia was made was framed under s. 3 and is in these terms : "The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner
E prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary to do so, may make an order—(a) .....
F (b) directing that he be detained." As I have said earlier, the order was made by the District Magistrate, Patna, to whom the power of the Government of the State of Bihar in this regard had been duly delegated under s. 40(2) of the Act.

Under this rule a Government can make an order of detention
G against a person if it is satisfied that it is necessary to do so to prevent him from acting in a manner prejudicial, among other things, to public safety and the maintenance of public order. The detention order in this case is based on the ground that it was necessary to make it to prevent Dr. Lohia from acting in any manner prejudicial to public safety and the maintenance of law
H and order. I will, in discussing the contention of Dr. Lohia, proceed on the basis as if the order directing detention was only for preventing him from acting in a manner prejudicial to the

maintenance of law and order. I will consider what effect the inclusion in the order of detention of a reference to the necessity for maintaining public safety has, later. The question is whether an order could be made legally under the rule for preventing disturbance of law and order. The rule does not say so. The order, therefore, would not be in terms of the rule unless it could be said that the expression "law and order" means the same thing as "public order" which occurs in the rule. Could that then be said? I find no reason to think so. Many of the things mentioned in the rule may in a general sense be referable to the necessity for maintaining law and order. But the rule advisedly does not use that expression.

It is commonplace that words in a statutory provision take their meaning from the context in which they are used. The context in the present case is the emergent situation created by external aggression. It would, therefore, be legitimate to hold that by maintenance of public order what was meant was prevention of disorder of a grave nature, a disorder which the authorities thought was necessary to prevent in view of the emergent situation. It is conceivable that the expression "maintenance of law and order" occurring in the detention order may not have been used in the sense of prevention of disorder of a grave nature. The expression may mean prevention of disorder of comparatively lesser gravity and of local significance only. To take an illustration, if people indulging in the Hindu religious festivity of Holi become rowdy, prevention of that disturbance may be called the maintenance of law and order. Such maintenance of law and order was obviously not in the contemplation of the Rules.

What the Magistrate making the order exactly had in mind, by the use of the words law and order, we do not know. Indeed, we are not entitled to know that for it is well-settled that courts cannot enquire into the grounds on which the Government thought that it was 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. 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 satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that is so,—and that indeed is what the respondent State contends,—it seems to me that when an order is on the face of it not in terms of the rule, a court cannot equally enter into an investigation whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule. In other words, in such a case the State cannot be heard to say or prove that the order was in fact made, for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so. To allow that to be done would be to uphold a detention without a proper order. The rule does not envisage such a situation. The statements in the affidavit used in the present case by the respondent State are, therefore, of no avail for establishing that the order of detention is in terms of the rule. The detention was not under the affidavit but under the order. It is of some significance to point out that the affidavit sworn by the District Magistrate who made the order of detention does not say that by the use of the expression law and order he meant public order.

It was said that this was too technical a view of the matter; there was no charm in words used. I am not persuaded by this argument. The question is of substance. If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a court is prevented from going. I am not complaining of that. Circumstances may make it necessary. But it would be legitimate to require in such cases strict observance of the rules. If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu. It is certainly more than doubtful whether law and order means the same as public order. I am not impressed by the argument that the

reference in the detention order to r. 30(1)(b) shows that by law and order what was meant was public order. That is a most mischievous way of approaching the question. If that were right, a reference to the rule in the order might equally justify all other errors in it. Indeed it might with almost equal justification then be said that a reference to the rule and an order of detention would be enough. That being so, the only course open to us is to hold that the rules have not been strictly observed. If for the purpose of justifying the detention such compliance by itself is enough, a non-compliance must have a contrary effect.

Carltona Ltd. v. *Commissioners of Works*(1) is an interesting case to which reference may be made in this connection. It turned on a statutory Regulation empowering a specified authority to take possession of land for the purposes mentioned in it in various terms but which terms did not include the expression "national interest". Under this Regulation possession of certain premises of the Carltona Company was taken after serving a notice on it that that was being done "in the national interest". It was contended by the Carltona Company that it had been illegally deprived of the possession of its premises because the notice showed that that possession was not being taken in terms of the Regulation. This contention failed as it was held that the giving of the notice was not a pre-requisite to the exercise of the powers under the Regulation and that the notice was no more than a notification that the authorities were exercising the powers. It was said that the notice was useful only as evidence of the state of the mind of the writer and, that being so, other evidence was admissible to establish the fact that the possession of the premises was being taken for the reasons mentioned in the Regulation. Our case is entirely different. It is not a case of a notice. Under r. 30(1)(b) a person can be detained only by an order and there is no doubt that the order of detention has to be in writing. It is not a case where the order is only evidence of the detention having been made under the rule. It is the only warrant for the detention. The order further is conclusive as to the state of the mind of the person who made it; no evidence is admissible to prove that state of mind. It seems to me that if the *Carltona* case was concerned with an order which alone resulted in the dispossession, the decision in that case might well have been otherwise. I would here remind, to prevent any possible misconception, that I am not considering a case where

(1) [1943] 2 All E.R. 560.

A the order is challenged on the ground of *mala fides* or other similar grounds to which I have earlier referred.

Before leaving this aspect of the case, it is necessary to refer to two other things. The first is a mistake appearing in the order of detention on which some argument was based by Dr. B Lohia for quashing the order. It will be remembered that the order mentioned a certain Notification No. 180/CW. The Notification intended to be mentioned however was one No. 1115/CW and the Notification No. 180/CW had been mentioned by mistake. It was under Notification No. 1115/CW that the power of the State Government to make an order of detention was C delegated to the District Magistrate under the provisions of s. 40(2) of the Act to which I have earlier referred. The reference to the notification was to indicate the delegation of power. The Notification actually mentioned in the order did not, however, contain the necessary delegation. The result was that the order did not show on its face that the District Magistrate who had D made it had the necessary authority to do so. This mistake however did not vitiate the order at all. Nothing in the rules requires that an order of detention should state that the authority making it has the power to do so. It may be that an order made by an authority to whom the Government's power has not been delegated, is a nullity and the order can be challenged on that E ground. This may be one of the cases where an order good on its face may nonetheless be illegal. When the power of the person making the order is challenged, the only fact to be proved is that the power to make the order had been duly delegated to him. That can be proved by the necessary evidence, that is, by the production of the order of delegation. That would be a F case somewhat like the *Carltona* case. In spite of the mistake in the order as to the Notification delegating the power, evidence can be given to show that the delegation had in fact been made. To admit such evidence would not be going behind the face of the order because what is necessary to appear on the face of the order is the satisfaction of the authority of the necessity for the G detention for any of the reasons mentioned in r. 30(1)(b) and not the authority of the maker of the order.

The second thing to which I wish to refer is that it appeared from the affidavit sworn by the District Magistrate that prior to the making of the order, he had recorded a note which ran H in these words : "Perused the report of the Senior S. P. Patna for detention of Dr. Ram Manohar Lohia, M.P. under rule 30(1)(b) of the Defence of India Rules, on the ground that his being at

large is prejudicial to the public safety and maintenance of public order. From the report of the Sr. S. P., Patna, I am satisfied that Dr. Ram Manohar Lohia, M.P. aforesaid be detained under rule 30(1)(b) of the Defence of India Rules. Accordingly, I order that Dr. Ram Manohar Lohia be detained....." I am unable to see that this note is of any assistance to the respondent State in this case. It is not the order of detention. The respondent State does not say that it is. I have earlier stated that extraneous evidence is not admissible to prove that the rule has been complied with though the order of detention does not show that. Indeed, this note does not even say that the District Magistrate was satisfied that it was necessary to make an order of detention to prevent Dr. Lohia from acting in a manner prejudicial to the maintenance of public order. It only says that the Superintendent of Police reported that he was so satisfied. The satisfaction of the Superintendent of Police would provide no warrant for the detention or the order; with it we have nothing to do.

For these reasons, in my view, the detention order if it had been based only on the ground of prevention of acts prejudicial to the maintenance of law and order, it would not have been in terms of r. 30(1)(b) and would not have justified the detention. As I have earlier pointed out, however, it also mentions as another ground for detention, the prevention of acts prejudicial to public safety. In so far as it does so, it is clearly within the rule. Without more, we have to accept an order made on that ground as a perfectly legal order. The result then is that the detention order mentions two grounds one of which is in terms of the rule while the other is not. What then is the effect of that? Does it cure the illegality in the order that I have earlier noticed? This question is clearly settled by authorities. In *Shibban Lal Saksena* v. *The State of Uttar Pradesh*(1) it was held that such an order would be a bad order. the reason being that it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order. The order has, therefore, to be held illegal though it mentioned a ground on which a legal order of detention could have been based. I should also point out that the District Magistrate has not said in his affidavit that he would have been satisfied of the necessity of the detention order only

(1) [1954] S.C.R. 418.

A for the reason that it was necessary to detain Dr. Lohia to prevent him from acting in a manner prejudicial to public safety.

In the result, in my view, the detention order is not under the Rules. The detention of Dr. Lohia under that order is not legal and cannot be justified. He is entitled to be set at liberty
B and I would order accordingly.

Hidayatullah, J. Dr. Ram Manohar Lohia, M.P., has filed this petition under Art. 32 of the Constitution asking for a writ of *habeas corpus* for release from detention ordered by the District Magistrate, Patna, under Rule 30(1)(b) of the Defence of India Rules, 1962. He was arrested at Patna on the night between 9th
C and 10th August, 1965. As it will be necessary to refer to the terms of the order served on him it is reproduced here :

"ORDER

No. 3912 C. Dated, Patna, the 9th August 1965

D Whereas I, J. N. Sahu, District Magistrate, Patna, am satisfied with respect to the person known as Dr. Ram Manohar Lohia, Circuit House, Patna, that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order, it is necessary to make an order that he be
E detained.

Now, therefore, in exercise of the powers conferred by clause (b) of sub-clause (i) of rule 30 of the Defence of India Rules, 1962, read with Notification No. 180/ CW, dated the 20th March, 1964, of the Government of
F Bihar, Political (Special) Department, I hereby direct that the said Dr. Ram Manohar Lohia be arrested by the police wherever found and detained in the Central Jail, Hazaribagh, until further orders.

Sd/- J. N. Sahu,
9-8-1965
District Magistrate, Patna.
Sd/- Ram Manohar Lohia.
10th August—1.40."

Dr. Lohia was lodged in the Hazaribagh Central Jail at 3-30 p.m.
H on August 10, 1965. He sent a letter in Hindi together with an affidavit sworn in the jail to the Chief Justice, which was received on August 13, 1965, in the Registry of this Court. Although the petition was somewhat irregular, this Court issued a rule and as

no objection has been taken on the ground of form we say nothing more about it. A

In his affidavit Dr. Lohia stated that he was arrested at midnight on August 9, 1965 and was told that it was on charges of arson but later was served with the order of detention and that in this way his arrest for a substantive offence was turned into preventive detention. He further stated that the order of detention showed that he was to be detained in Bankipur Jail but the name of the Jail was scored out and "Central Jail, Hazaribagh" was substituted which led him to conclude that typed orders of detention were kept ready and that the District Magistrate did not exercise his mind in each individual case. He contended that his detention under Rule 30(1)(b) was illegal because, according to him, that rule dealt with prejudicial activities in relation to the defence of India and civil defence and not with maintenance of law and order of a purely local character. He alleged that the arrest was *mala fide* and malicious; that it was made to prevent him from participating in the House of the People which was to go into Session from August 16 and particularly to keep him away from the debate on the Kutch issue. He further alleged that he had only addressed a very large gathering in Patna and had disclosed certain things about the Bihar Government which incensed that Government and caused them to retaliate in this manner and that detention was made to prevent further disclosures by him. B C D E

In answer to Dr. Lohia's affidavit two affidavits were filed on behalf of the respondents. One affidavit, filed by the District Magistrate, Patna, denied that there was any malice or *mala fides* in the arrest of Dr. Lohia. The District Magistrate stated that he had received a report from the Senior Superintendent of Police, Patna, in regard to the conduct and activities of Dr. Lohia and after considering the report he had ordered Dr. Lohia's detention to prevent him from acting in any manner prejudicial to the public safety and maintenance of public order. He stated further that he was fully satisfied that the forces of disorder "which were sought to be let loose if not properly controlled would envelop the whole of the State of Bihar and possibly might spread in other parts of the country which would necessarily affect the problem of external defence as well in more ways than one". He said that the report of the Senior Superintendent of Police, Patna, contained facts which he considered sufficient for taking the said action but he could not disclose the contents of that report in the public interest. He sought to correct, what he called, a slip in the order passed by him, by stating that notification No. 11155C, dated 11th August F G H

A 1964, was meant instead of the notification mentioned there. He stated further that as the disturbance was on a very large scale it was thought expedient to keep ready typed copies of detention orders and to make necessary alterations in them to suit individual cases, at the time of the actual issuance of the orders, and that it was because of this that the words "Central Jail Hazaribagh" were B substituted for "Bankipur Jail". He denied that he had not considered the necessity of detention in each individual case. He repudiated the charge that the arrest was made at the instance of Government and affirmed that the action was taken on his own responsibility and in the discharge of his duty as District Magistrate and not in consultation with the Central or the State Governments. C He denied that the arrest and detention were the result of anger on the part of any or a desire to prevent Dr. Lohia from circulating any damaging information about Government. The District Magistrate produced an order which, he said, was recorded before the order of detention. As we shall refer to that order later it is reproduced here : D

"9.8.65.

Perused the report of the Senior S.P., Patna, for detention of Dr. Ram Manohar Lohia, M.P., under rule 30(1)(b) of the Defence of India Rules, on the ground that his being at large is prejudicial to the public safety E and maintenance of public order. From the report of the Sr. S.P., Patna, I am satisfied that Dr. Ram Manohar Lohia, M.P., aforesaid be detained under rule 30(1)(b) of the Defence of India Rules. Accordingly, I order that Dr. Ram Manohar Lohia be detained under rule 30(1)(b) of the Defence of India Rules read with Notification No. 180/CW dated 20.3.64 in the Hazaribagh Central Jail until further orders. F

Send four copies of the warrant of arrest to the Sr. S.P., Patna, for immediate compliance. He should return two copies of it after service on the detenu.

G

Sd/- J. N. Sahu,

District Magistrate, Patna".

The second affidavit was sworn by Rajpati Singh, Police Inspector attached to the Kotwali Police Station, Patna. He stated in his H affidavit that the order was served on Dr. Lohia at 1-40 A.M. on August 10, 1965 and not at midnight. He denied that Dr. Lohia was arrested earlier or that at the time of his arrest, he was informed

that the arrest was for an offence or offences of arson. He admitted, however, that he had told him that cases of arson and loot had taken place. He affirmed that there was no charge of arson against Dr. Lohia. A

Dr. Lohia filed a rejoinder affidavit and in that affidavit he stated that the internal evidence furnished by the order taken with the counter affidavits disclosed that his arrest and detention were patently illegal. He pointed out that while Rule 30(1)(b) provided that detention could be made for the maintenance of public order, the order stated that Dr. Lohia was arrested for maintenance of law and order. He characterised the counter affidavits as full of lies and narrated other facts intending to show that there was a conspiracy to seal his mouth so that disclosures against the Bihar Government might not be made. This represents the material on which the present petition is based or opposed. B C

The petition was argued by Dr. Lohia in person though he was receiving assistance in constructing his arguments. His contentions are that he is not being detained under the Defence of India Rules but arbitrarily; that even if he is being detained under the said Rules the law has been flagrantly violated; that the order passed against him is *mala fide;* and that the District Magistrate did not exercise the delegated power but went outside it in various ways rendering detention illegal. D E

On behalf of the State a preliminary objection is raised that the application itself is incompetent and that by the operation of Art. 359 read with the President's Order issued under that Article on November 3, 1962, Dr. Lohia's right to move the Supreme Court under Art. 32 of the Constitution is taken away during the period of emergency proclaimed under Art. 352 as long as the President's Order continues. On merits it is contended on behalf of the State of Bihar that the petition, if not barred, does not make out a case against the legality of the detention; that this Court cannot consider the question of good faith and that the only enquiry open to this Court is whether there is or is not an order under Rule 30(1)(b) of the Defence of India Rules 1962. If this Court finds that there is such an order the enquiry is closed because the petition must then be considered as incompetent. The State Government admits that the words of Rule 30(1)(b) and s. 3 of the Defence of India Act were not used in the order of detention but contends that maintenance of public order and maintenance of law and order do not indicate different things and that the area covered by maintenance of law and order is the same if not smaller than the area covered by the expression maintenance of public F G H

A order. We shall go into the last contention more elaborately after dealing with the preliminary objection.

Questions about the right of persons detained under the Defence of India Rules to move the Court have come up frequently before this Court and many of the arguments which are raised here B have already been considered in a series of cases. For example, it has been ruled in *Mohan Choudhury* v. *Chief Commissioner, Tripura*(1) that the right of any person detained under the Defence of India Rules to move any court for the enforcement of his rights conferred by Arts. 21 and 22 of the Constitution remains suspended in view of the President's Order of November 3, 1962. It has C also been ruled that such a person cannot raise the question that the Defence of India Act or the Rules are not valid because, if allowed to do so, that would mean that the petitioner's right to move the court is intact. Other questions arising from detentions under the Defence of India Rules were further considered in *Makhan Singh* v. *The State of Punjab*(2). It is there pointed out D that, although the right of the detenu to move the Court is taken away that can only be in cases in which the proper detaining authority passes a valid order of detention and the order is made *bona fide* for the purpose which it professes. It would, therefore, appear from the latter case that there is an area of enquiry open before a court will declare that the detenu has lost his right to E move the court. That area at least embraces an enquiry into whether there is action by a competent authority and in accordance with Defence of India Act and the Rules thereunder. Such an enquiry may not entitle the court to go into the merits of the case once it is established that proper action has been taken, for the satisfaction is subjective, but till that appears the court is bound F to enquire into the legality of the detention. It was contended that *Makhan Singh's*(2) case arose under Art. 226 and that what is stated there applies only to petitions under that article. This is a misapprehension. The ruling made no difference between the Art. 32 and Art. 226 in the matter of the bar created by Art. 359 and the President's Order. What is stated there applies to petitions for the enforcement of Fundamental Rights whether by way of Art. 32 or Art. 226.

G Mr. Verma appearing for the State of Bihar, however, contends that the area of the enquiry cannot embrace anything more than finding out whether there is an order of detention or not and the moment such an order, good on its face, is produced all enquiry into good faith, sufficiency of the reasons or the legality or illegality

H (1) [1964] 3 S.C.R. 442. (2) [1964] 4 S.C.R. 797.

of the action comes to an end, for to go into such matters is tantamount to allowing the petitioner to move the court which the President's Order does not permit. He contends that the courts' power to issue a writ of *habeas corpus* in such cases is taken away as completely as if cl. (2) of Art. 32 made no mention of the writ of *habeas corpus*. According to him, an order under Rule 30(1)(b) proper on its face, must put an end to enquiry of any kind. In view of this objection it is necessary to state the exact result of the President's Order for this has not been laid down in any earlier decision of this Court.

The President declared a state of grave emergency by issuing a Proclamation under Art. 352 on October 26, 1962. This Proclamation of Emergency gave rise to certain extraordinary powers which are to be found in Part XVIII of the Constitution, entitled Emergency Provisions. Article 358 suspended the provisions of Art. 19 during the Emergency and Art. 359 permitted the suspension of the enforcement of the rights conferred by Part III. That article reads :

> "359. Suspension of the enforcement of the rights conferred by Part III during emergencies :
>
> (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.
>
> (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
>
> (3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

The President issued an order on November 3, 1962. The Order reads :

A "ORDER

New Delhi, the 3rd November, 1962.

G.S.R. 1454.—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 article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of article 352 thereof on the 26th October, 1962, is in force, 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.

No. F. 4/62-Poll(Spl.)

V. VISWANATHAN, Secy."

As a result of the above Order the right of any person to move any court for the rights conferred by Arts. 21 and 22 of the Constitution remains suspended, if such person is deprived of any such rights under the Defence of India Ordinance 1962 (now the Defence of India Act, 1962) or any rule or order made thereunder. No doubt, as the article under which the President's Order was passed and also that Order say, the right to move the court is taken away but that is in respect of a right conferred on any person by Arts. 21 and 22 and provided such person is deprived of the right under the Defence of India Ordinance (now the Act) or any rule or order made thereunder. Two things stand forth. The first is that only the enforcement in a court of law of rights conferred by Arts. 21 and 22 is suspended and the second is that the deprivation must be under the Defence of India Ordinance (now the Act) or any rule or order made *thereunder*. The word "thereunder" shows that the authority of the Defence of India Act must be made out in each case whether the deprivation is by rule or order.

It, therefore, becomes necessary to inquire what are the rights which are so affected? This can only be found out by looking into the content of the Arts. 21 and 22. Article 21 lays down that no person is to be deprived of his life or personal liberty except according to procedure established by law. This article thinks in terms of the ordinary laws which govern our society when there is no declaration of emergency and which are enacted subject to the provisions of the Constitution including the Chapter on Fundamental Rights but other than those made under the powers

conferred by the Emergency Provisions in Part XVIII. When the President suspended the operation of Art. 21 he took away from any person dealt with under the terms of his Order, the right to plead in a court of law that he was being deprived of his life and personal liberty otherwise than according to the procedure established by the laws of the country. In other words, he could not invoke the procedure established by ordinary law. But the President did not make lawless actions lawful. He only took away the fundamental right in Art. 21 in respect of a person proceeded against under the Defence of India Act or any rule or order made thereunder. Thus a person so proceeded could not claim to be tried under the ordinary law or bring an action under the ordinary law. But to be able to say that the right to move the court for the enforcement of rights under Art. 21 is suspended, it is necessary to establish that such person has been deprived of any such right under the Defence of India Act or any rule or order made *thereunder,* that is to say, under the authority of the Act. The action of the authorities empowered by the Defence of India Act is not completely shielded from the scrutiny of courts. The scrutiny with reference to procedure established by laws other than the Defence of India Act is, of course, shut out but an enquiry whether the action is justified under the Defence of India Act itself is not shut out. Thus the State Government or the District Magistrate cannot add a clause of their own to the Defence of India Act or even the Rules and take action under that clause. Just as action is limited in its extent, by the power conferred, so also the power to move the court is curtailed only when there is strict compliance with the Defence of India Act and the Rules. The Court will not enquire whether any other law is not followed or breached but the Court will enquire whether the Defence of India Act or the Rules have been obeyed or not. That part of the enquiry and consequently the right of a person to move the court to have that enquiry made, is not affected.

The President's Order next refers to Art. 22. That Article creates protection against illegal arrest and detention. Clause (1) confers some rights on the person arrested. Clause (2) lays down the procedure which must be followed after an arrest is made. By cl. (3) the first two clauses do not apply to an alien enemy or to a person arrested or detained under any law providing for preventive detention. Clauses (4), (5), (6) and (7) provide for the procedure for dealing with persons arrested or detained under any law providing for preventive detention, and lay down the minimum or compulsory requirements. The provisions of Art. 22 would have applied to arrest and detentions under the Defence of India

A Act also if the President's Order had not taken away from such a person the right to move any court to enforce the protection of Art. 22.

The net result of the President's Order is to stop all claims to enforce rights arising from laws other than the Defence of India
B Act and the Rules and the provisions of Art. 22 at variance with the Defence of India Act and the Rules are of no avail. But the President's Order does not say that even if a person is proceeded against in breach of the Defence of India Act or the Rules he cannot move the court to complain that the Act and the Rules, under colour of which some action is taken, do not warrant it.
C 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
D under Art. 226 of the Constitution but in considering the bar of Art. 359 read with the President's Order, there is no difference between a petition under that article and a petition under Art. 32. It follows, therefore, that this Court acting under Art. 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 Art. 22, but
E 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.

There is, however, another aspect which needs to be mentioned here. That is the question of want of good faith on the part of
F those who take action and whether such a plea can be raised. This topic was dealt with in *Makhan Singh's* case(1). At page 828 the following observation is to be found :—

> "Take also a case where the detenu moves the court for a writ of *Habeas Corpus* on the ground that his detention has been ordered *mala fide.* It is hardly necessary
G to emphasise that the exercise of a power *mala fide* is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is *mala fide* would not be enough; the detenu will have to prove the *mala fides.* But if the *mala fides* are alleged, the detenu
H cannot be precluded from substantiating his plea on the ground of the bar created by Art. 359(1) and the Presi-

(1) [1964] 4 S.C.R. 797.

dential Order. That is another kind of plea which is outside the purview of Art. 359(1)." A

Mr. Verma, however, contends on the authority of *Smith* v. *East Elloe Rural District Cormical & Others*(1) that the validity of the orders under the Defence of India Rules 1962 cannot be challenged on the ground of bad faith when the action is otherwise proper. That case dealt with the Acquisition of Land (Authorization Procedure) Act 1946 (9 & 10 Geo 6 Ch. 49). Paragraph 15(1) of Part IV of Schedule to that Act provided : B

> "If any person aggrieved by a compulsory purchase order desires to question the validity thereof....on the ground that the authorization of a compulsory purchase thereby granted is not empowered to be granted under this Act.....he may, within six weeks from the date on which notice of the confirmation or making of the order.....is first published.....make an application to the High Court.....". C

D

The appellant more than six weeks after the notice had been published brought an action, claiming *inter alia* that the order was made and confirmed wrongfully and in bad faith on the part of the clerk. Paragraph 16 of that Act provided :

> "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order.....shall not .....be questioned in any legal proceeding whatsoever.....". E

The House of Lords (by majority) held that the jurisdiction of the court was ousted in such wise that even questions of bad faith could not be raised. Viscount Simonds regretted that it should be so, but giving effect to the language of paragraph 16, held that even an allegation of bad faith was within the bar of Paragraph 16. Lord Morton of Henryton, Lord Reid and Lord Somervill of Harrow were of opinion that Paragraph 15 gave no such opportunity. Lord Radcliffe dissented. F

The cited case can have no relevance here because the statute provided for ouster of courts' jurisdiction in very different circumstances. Although this Court has already stated that allegations of bad faith can be considered, it may be added that where statutory powers are conferred to take drastic action against the life and liberty of a citizen, those who exercise it may not depart from the purpose. Vast powers in the public interest are granted but under strict conditions. If a person, under colour of exercising G H

(1) [1956] A.C. 736.

A 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 the act, another vitiating circumstance. Courts have always acted
B 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 Art. 359 or the President's Order were intended to condone an illegitimate enforcement of the Defence of India Act.
C

We now proceed to examine the contentions of Dr. Lohia by which he claims to be entitled to have the order of the District Magistrate set aside. It is convenient to begin with the allegation of want of good faith. Dr. Lohia alleges that there was a conspiracy between the Central Government, the State of Bihar, the Senior
D Superintendent of Police and the District Magistrate, Patna, to stifle his disclosures against the Bihar Government, the Chief Minister and others. He also alleges that he was arrested for a substantive offence under the Indian Penal Code but the arrest has been converted into preventive detention to avoid proof in a court of law. He says that he was about to leave Patna and
E if the train was not late he would have gone away and he hints that his detention was made to prevent him from taking part in the Session of Parliament. The District Magistrate and the Inspector of Police deny these allegations. The District Magistrate has given the background of events in which he made the order on his responsibility. On reading the affidavits on both sides, we are
F statisfied that the contentions of Dr. Lohia are ill-founded and that the order of detention was made by the District Magistrate in good faith.

There is no dispute that the District Magistrate was duly authorized to act under Rule 30 of the Defence of India Rules, 1962.
G Dr. Lohia, however, says that the order is in flagrant disregard of the requirements of the Defence of India Act, 1962 and the Rules. For this purpose he bases his argument on three circumstances :

(i) that the District Magistrate acted outside his jurisdiction as created by Notification No. 11155-C dated 11-8-1964 published in the Bihar Gazette
H Extra dated August 11, 1964;

(ii) that the District Magistrate's order is defective because he purports to derive power from notifica-

tion No. 180 of March 20, 1964 which had been rescinded; and

(iii) the District Magistrate purports to act to maintain law and order when he can only act to maintain public order under the Defence of India Act and the Rules thereunder.

We shall now consider these grounds of objection. Before we do so we may read the provisions of the Defence of India Act and the Rules to which reference may be necessary.

The first part of the Defence of India Act we wish to read is the long title and the preamble. They are :

"An Act to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith.

WHEREAS the President has declared by Proclamation under clause (1) of article 352 of the Constitution that a grave emergency exists whereby the security of India is threatened by external aggression;

AND WHEREAS it is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith;

. . . . . ."

We may next read section 3 which confers power to make rules :

"3. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community."

Then by way of illustration and without prejudice to the generality of the powers conferred by sub-s. (1), certain specific things are mentioned for which provision may be made by rules. Clause 15 provides :

A "(15) Notwithstanding anything in any other law for the time being in force,—

(i) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to B detain not being lower in rank than that of a District Magistrate) suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin or of having acted, acting, being about to act or being likely to act in a manner prejudicial to the defence of India and civil defence, the security of the State, the public safety C or interest, the maintenance of public order, India's relations with foreign States, the maintenance of peaceful conditions in any part or area of India or the efficient conduct of military operations, or with respect to whom that authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from D acting in any such prejudicial manner,

(ii) the prohibition of such person from entering or residing or remaining in any area,

(iii) the compelling of such person to reside and remain in any area, or to do or abstain from doing any- E thing, and

(iv) the review of orders of detention passed in pursuance of any rule made under sub-clause (1);"

We need not trouble ourselves with the other clauses. Section 44 F next provides :

"44. Ordinary avocations of life to be interfered with as little as possible.

Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life G and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence."

By virtue of the powers conferred by s. 3 of the Defence of India Ordinance, 1962 (now the Act), the Defence of India Rules H 1962 were framed. Part IV of these Rules is headed "Restriction of Movements and Activities of Persons" and it consists of Rules 25-30, 30-A, 30-B and 31-34. These rules provide for various

subjects such as "Entering enemy territory" (Rule 25), "Entering India" (Rule 26), "Information to be supplied by persons entering India" (Rule 27) or "Leaving India" (Rule 28), "Regulation of Movement of Persons within India" (Rule 29), "Powers of photographing etc. of suspected person" (Rule 31), "Control and winding up of certain organisations" (Rule 32), provisions for "Persons captured as prisoners" (Rule 33) and "Change of name by citizens of India" (Rule 34). We are really not concerned with these rules but the headings are mentioned to consider the argument of Dr. Lohia on No. (1) above. Rule 30 with which we are primarily concerned consists of eight sub-rules. We are concerned only with sub-rule (1). That rule reads :

"30. Restriction of movements of suspected persons, restriction orders and detention orders.—

(1) The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary so to do, may make an order—

(a) . . . . .

(b) directing that he be detained;

. . . . ."

Under s. 40(2) of the Defence of India Act, the State Government may by order direct that the powers conferred by the Rules may be exercised by any officer or authority in such circumstances and under such conditions as may be specified in the direction. A special limitation was indicated in s. 3(15) of the Act, where authority is given for making rules in connection with the apprehension and detention in custody of persons, that the delegation should not be made to an officer below the rank of a District Magistrate.

By virtue of these various powers the State Government issued a notification on March 20, 1964 authorising all District Magistrates to exercise the powers of Government under Rule 30(1)(b).

A That notification was later rescinded by another notification issued on June 5, 1964. A fresh notification (No. 11155-C) was issued on August 11, 1964. This was necessary because of a mistake in the first notification. The new notification reads:

> "No. 11155-C.—In exercise of the powers conferred by sub-section (2) of section (40) the Defence of India Act, 1962 (Act 51 of 1962), the Governor of Bihar is pleased to direct that the powers exercisable by the State Government under clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962, shall be exercised by all District Magistrates within their respective jurisdictions.
>
> By order of the Governor of Bihar
>
> M. K. Mukharji
>
> Secretary to Government".

D Dr. Lohia contends that the District Magistrate in his affidavit says that he apprehended danger not only in his district but in the whole of Bihar State and even outside and hence he has not acted within his jurisdiction. His argument attempts to make out, what we may call, an exercise of extraterritorial jurisdiction on E the part of the District Magistrate. He contends also that the notifications are bad because although the Defence of India Act contemplates the imposition of conditions, none were imposed and no circumstances for the exercise of power were specified. In our judgment, none of these arguments can be accepted.

F Section 40(2) of the Act does not require the imposition of any conditions but only permits it. This is apparent from the words "if any" in the sub-section. The only condition that the State Government thought necessary to impose is that the District Magistrates must act within their respective jurisdictions. It cannot be said that this condition was not complied with. Dr. Lohia G was in the Patna District at the time. There was nothing wrong if the District Magistrate took a broad view of his activities so as to weigh the possible harm if he was not detained. Such a viewing of the activities of a person before passing the order against him does not necessarily spell out extraterritoriality in the sense suggested but is really designed to assess properly the potentiality H of danger which is the main object of the rule to prevent. We find nothing wrong with the order on the score of jurisdiction and argument No. (i) stated above must fail. Argument No. (ii) is

not of any substance. There was a clerical error in mentioning the notification and the error did not vitiate the order of detention. A

This brings us to the last contention of Dr. Lohia and that is the most serious of all. He points out that the District Magistrate purports to detain him with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order and argues that the District Magistrate had misunderstood his own powers which were to prevent acts prejudicial to public order and, therefore, the detention is illegal. On the other side, Mr. Verma contends that the Act and the Rules speak of public order which is a concept much wider in content than the concept of law and order and includes the latter, and whatever is done in furtherance of law and order must necessarily be in furtherance of public order. Much debate took place on the meaning of the two expressions. Alternatively, the State of Bihar contends that the order passed by the District Magistrate prior to the issue of the actual order of detention made use of the phrase "maintenance of public order" and the affidavit which the District Magistrate swore in support of the return also uses that phrase and, therefore, the District Magistrate was aware of what his powers were and did exercise them correctly and in accordance with the Defence of India Act and the Rules. We shall now consider the rival contentions. B C D E

The Defence of India Act and the Rules speak of the conditions under which preventive detention under the Act can be ordered. In its long title and the preamble the Defence of India Act speaks of the necessity to provide for special measures to ensure public safety and interest, the defence of India and civil defence. The expressions public safety and interest between them indicate the range of action for maintaining security, peace and tranquillity of India whereas the expressions defence of India and civil defence connote defence of India and its people against aggression from outside and action of persons within the country. These generic terms were used because the Act seeks to provide for a congeries of action of which preventive detention is just a small part. In conferring power to make rules, s. 3 of the Defence of India Act enlarges upon the terms of the preamble by specification of details. It speaks of defence of India and civil defence and public safety without change but it expands the idea of public interest into "maintenance of public order, the efficient conduct of military operations and maintaining of supplies and services essential to the life of the community". Then it mentions by way of illustration in F G H

A cl. (15) of the same section the power of apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate), suspects, on grounds appearing to that authority to be reasonable :—

B

(a) of being of hostile origin; or

(b) of having acted, acting or being about to act or being likely to act in a manner prejudicial to—

(i) the defence of India and civil defence;

C

(ii) the security of the State;

(iii) the public safety or interest;

(iv) the maintenance of public order;

(v) India's relations with foreign states;

D

(vi) the maintenance of peaceful conditions in any part or area of India; or

(vii) the efficient conduct of military operations.

It will thus appear that security of the state, public safety or interest,
E maintenance of public order and the maintenance of peaceful conditions in any part or area of India may be viewed separately even though strictly one clause may have an effect or bearing on another. Then follows rule 30, which repeats the above conditions and permits detention of any person with a view to preventing him from acting in any of the above ways. The argument of Dr. Lohia that
F the conditions are to be cumulatively applied is clearly untenable. It is not necessary to analyse rule 30 which we quoted earlier and which follows the scheme of section 3(15). The question is whether by taking power to prevent Dr. Lohia from acting to the prejudice of "law and order" as against "public order" the District Magistrate went outside his powers.

G

The subject of preventive detention has been discussed almost threadbare and one can hardly venture in any direction without coming face to face with rulings of courts. These cases are now legion. It may be taken as settled that the satisfaction of the detaining authority cannot be subjected to objective tests, that the
H courts are not to exercise appellate powers over such authorities and that an order proper on its face, passed by a competent authority in good faith is a complete answer to a petition such as this.

The rulings in our country adopt this approach as do the English Courts. In England one reason given for the adoption of this approach was that the power was entrusted to the Home Secretary and to the Home Secretary alone. In India courts are ordinarily satisfied on the production of a proper order of detention made in good faith by an authority duly authorised and have not enquired further even though the power is exercised by thousands of officers subordinate to the Central and State Governments as their delegates. When from the order itself circumstances appear which raise a doubt whether the officer concerned had not misconceived his own powers, there is need to pause and enquire. This is more so when the exercise of power is at the lowest level permissible under the Defence of India Act. The enquiry then is not with a view to investigate the sufficiency of the materials but into the officer's notions of his power, for it cannot be conceived for a moment that even if the court did not concern itself about the sufficiency or otherwise of the materials on which action is taken, it would, on proof from the order itself that the officer did not realise the extent of his own powers, not question the action. The order of detention is the authority for detention. That is all which the detenu or the court can see. It discloses how the District Magistrate viewed the activity of the detenu and what the District Magistrate intended to prevent happening. If the order passed by him shows that he thought that his powers were more extensive than they actually were, the order might fail to be a good order.

The District Magistrate here acted to maintain law and order and not public order. There are only two possibilities: (i) that there was a slip in preparing the order, or (ii) that maintenance of law and order was in the mind of the District Magistrate and he thought it meant the same thing as maintenance of public order. As to the first it may be stated at once that the District Magistrate did not specify it as such in his affidavit. He filed an earlier order by him in which he had used the words "public order" and which we have quoted earlier. That order did not refer to his own state of the mind but to the report of the Senior Superintendent of Police. In his affidavit he mentioned "public order" again but did not say that the words "law and order" in his order detaining Dr. Lohia were a slip. He corrected the error about the notification but naively let pass the other, and more material error, without any remark. Before us every effort possible was made to reconcile "public order" with "law and order" as, indeed, by a process of paraphrasing, it is possible to raise an air of similitude between them. Such similitude is possible to raise even between phrases as dissimilar as "for preventing breach of the peace", "in the

A interest of the public", "for protecting the interests of a class of persons", "for administrative reasons" and "for maintaining law and order". We cannot go by similitude. If public order connotes something different from law and order even though there may be some common territory between them then obviously the District Magistrate might have traversed ground not within "public order". B It would then not do to say that the action is referrable to one power rather than the other, just as easily as one reconciles diverse phrases by a gloss. When the liberty of the citizen is put within the reach of authority and the scrutiny from courts is barred, the action must comply not only with the substantive requirements of the law but also with those forms which alone can indicate that C the substance has been complied with. It is, therefore, necessary to examine critically, the order which mentioned "law and order" with a view to ascertaining whether the District Magistrate did not act outside his powers.

Before we do so we find it necessary to deal with an argument D of Mr. Shastri who followed Mr. Verma. He contends that there is no magic in using the formula of the Act and Rules for the language of the Act and the Rules can be quoted mechanically. We regret such an attitude. The President in his Order takes away the fundamental rights under Arts. 21 and 22 from a person provided he has been detained under the Defence of India Act or the E rules made thereunder. The Order is strict against the citizen but it is also strict against the authority. There can be no toleration of a pretence of using the Defence of India Act. The President's Order itself creates protection against things such as arbitrariness, misunderstood powers, mistake of identity by making his order apply only to cases where the detention is under the Act or the F rules thereunder. No doubt, what *matters* is the substance but the form discloses the approach of the detaining authority to the serious question and the error in the form raises the enquiry about the substance. It is not every error in the order which will start such an enquiry. We have paid no attention to the error in the reference to the notification because that may well be a slip, and power and G jurisdiction is referrable to the notification under which they would have validity. The other is not such a veneal fault. It opens the door to enquiry what did the District Magistrate conceive to be his powers ?

In proceeding to discuss this question we may consider a H decision of the Court of Appeal in England in *Carltona Ltd.* v. *Commissioners of Works and Others*(1). Curiously enough it was

1. [1943] 2 All. E.R. 560.

brought to our notice by Dr. Lohia and not by the other side. That case arose under Regulation 51(1) of the Defence (General) Regulations in England during the last World War. The Regulation read :

> "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

There was an order against Carltona Ltd. by the Commissioner of Works requisitioning the factory. The order read :

> "I have to inform you that the department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises occupied by you."

It was objected on behalf of the Company that the mind was not directed to any one of the various heads mentioned in the Regulation which were put in the alternative. Lord Greene, M.R. speaking on behalf of Lord Goddard (then Lord Justice) and Lord du Parcq (then Lord Justice) observed :

> "It was said that it was the duty of the person acting in the capacity of 'a competent authority' to examine the facts of the case and consider under which, if any, of those various heads the matter came, and it is said that the assistant secretary did nothing of the kind. It is to be observed that those heads are not mutually exclusive heads at all. They overlap at every point and many matters will fall under two or more of them, or under all four. I read the evidence as meaning that the assistant secretary, seeing quite clearly that the case with which he was dealing and the need that he wished to satisfy was one which came under the regulation, did not solemnly sit down and ask himself whether it was for the efficient prosecution of the war that this storage was required for maintaining supplies and services essential to the life of the community. He took the view that it was required either for all those purposes, or, at any

A rate, for some of them, and I must confess it seems to me that it would have been a waste of time on the facts of this case for anyone seriously to sit down and ask himself under which particular head the case fell. He regarded it, as I interpret his evidence, as falling under all the heads, and that may very well be having regard to the B facts that these heads overlap in the way that I have mentioned. It seems to me, therefore, that there is no substance in that point, and his evidence makes it quite clear that he did bring his mind to bear on the question whether it appeared to him to be necessary or expedient to requisition this property for the purposes named, or C some of them."

The case is distinguishable on more than one ground. To begin with, it dealt with an entirely different situation and different provision of law. No order in writing specifying satisfaction on any or all of the grounds was required. Detention under Regu- D lation 18-B required an order just as detention under the Defence of India Act. The distinction between action under Regulation 51 and that under Regulation 18-B was noticed by the Court of Appeal in *Point of Ayr Collieries Ltd.* v. *Lloyd-George*(1). It is manifest that when property was requisitioned it would have been a futile exercise to determine whether the act promoted the efficient E prosecution of the war, or the maintaining of supplies and services. But when a person is apprehended and detained it may be necessary to set out with some accuracy what he did or was likely to do within the provisions of Rule 30, to merit the detention. The use of one phrase meaning a different thing in place of that required by the Act would not do, unless the phrase imported F means the same thing as the phrase in the Act. Here the phrase used is maintenance of law and order and we must see how that phrase fits into the Rule which speaks of maintenance of "public order". The words "public order" were considered on some previous occasions in this Court and the observations made there are used to prove that maintenance of public order is the same G thing as maintenance of law and order. We shall refer to some of these observations before we discuss the two phrases in the context of the Defence of India Rules.

Reliance is first placed upon a decision of the Federal Court in *Lakhi Narayan Das* v. *Province of Bihar*(2) where the Court H dealing with item 1 of Provincial List, 7th Schedule in the Government of India Act, 1935 which read—

1. [1943] 2 All. E.R. 546 at 548.

2. [1949] F.C.R. 693 at 704.

"Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power)" A

observed that "Public Order" with which that item began was "a most comprehensive term". Reference is also made to *Ramesh Thapar* v. *State of Madras*(1) where this Court dealing with the same subject matter also observed: B

"....'Public order' is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established.....it must be taken that 'public safety' is used as a part of the wider concept of public order....." C

and referring to Entry 3 in List III (Concurrent List) of the 7th Schedule of the Constitution which includes the "security of a State" and "maintenance of public order" as distinct topics of legislation, observed— D

".....The Constitution thus requires a line to be drawn in the field of public order or tranquillity, marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind." E

Fazl Ali J. took a different view which he had expressed more fully in *Brijbhushan and Another* v. *the State of Delhi*(2) but he also observed that "public safety" had, as a result of a long course of legislative practice, acquired a well recognised meaning and was taken to denote safety or security of the State and that the expression "public order" was wide enough to cover small disturbances of the peace which do not jeopardise the security of the State and paraphrased the words "public order" as public tranquillity." F G

Both the aspects of the matter were again before this Court in *The Superintendent Central Prison, Fatehgarh* v. *Ram Manohar Lohia*(3) when dealing with the wording of clause (2) of Art. 19 as amended by the Constitution (First Amendment) Act, 1951, it H

1. [1950] S.C.R. 593 at 598. 2. [1950] S.C.R. 605.
3. [1960] 2 S.C.R. 821.

A fell to be decided what "public order" meant. Subba Rao J. speaking for the Court referred to all earlier rulings and quoting from them came to the conclusion that "public order" was equated with public peace and safety and said :

> ".....Presumably in an attempt to get over the
> B effect of these two decisions, the expression "public order" was inserted in Art. 19(2) of the Constitution by the Constitution (First Amendment) Act, 1951, with a view to bring in offences involving breach of purely local significance within the scope of Art. 19.....".

Summing up the position as he gathered from the earlier cases, the
C learned Judge observed :

> ".....'Public order" is synonymous with public safety and tranquillity: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife,
> D war, affecting the security of the State;.....".

These observations determine the meaning of the words "public order" in contradistinction to expressions such as "public safety", "security of the State". They were made in different contexts. The first three cases dealt with the meaning in the legislative Lists as to which, it is settled, we must give as large a mean-
E ing as possible. In the last case the meaning of "public order" was given in relation to the necessity for amending the Constitution as a result of the pronouncements of this Court. The context in which the words were used was different, the occasion was different and the object in sight was different.

F We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a
G broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorder or only some ? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in *all* of them. Public order if disturbed, must lead to public
H disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers

to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules.

We do not know the material on which the District Magistrate acted. If we could examine the reasons we may be able to say whether the action can still be said to fall within the other topic public safety. That enquiry is not open to us. If we looked into the matter from that angle we would be acting outside our powers. The order on its face shows two reasons. There is nothing to show that one purpose was considered to be more essential than the other. We are not, therefore, certain that the District Magistrate was influenced by one consideration and not both. The order of detention is a warrant which authorises action. Affidavits hardly improve the order as it is. If there is allegation of bad faith they can be seen to determine the question of good faith. If mistaken identity is alleged we can satisfy ourselves about the identity. But if action is taken to maintain law and order instead of maintaining public order, there is room to think that the powers were misconceived and if there is such a fundamental error then the

A action remains vulnerable. It will not be possible to say that although maintenance of law and order were specified, what was considered was the problem of maintenance of public order. The error is an error of a fundamental character and unlike quoting a wrong notification. It is thus apparent why one error in the order of detention is admitted but not the other, and why with elaborate B arguments it is attempted to establish that "public order" involves elements more numerous than "law and order" where, in fact, the truth is the other way.

It may be mentioned that Dr. Lohia claimed that the satisfaction of the President under Art. 359 is open to scrutiny of the C court. We have not allowed him to argue this point which is now concluded by rulings of this Court.

In our judgment the order of the District Magistrate exceeded his powers. He proposed to act to maintain law and order and the order cannot now be read differently even if there is an affidavit D the other way. We have pondered deeply over this case. The action of the District Magistrate was entirely his own. He was, no doubt, facing a law and order problem but he could deal with such a problem through the ordinary law of the land and not by means of the Defence of India Act and the Rules. His powers were limited to taking action to maintain public order. He could E not run the law and order problems in his District by taking recourse to the provisions for detention under the Defence of India Act. If he thought in terms of "public order" he should have said so in the order or explained how the error arose. He does neither. If the needs of public order demand action a proper order should be passed. The detention must, therefore, be declared to F be outside the Defence of India Act, 1962 and the Rules made thereunder. Dr. Lohia is entitled to be released from custody and we order accordingly.

Raghubar Dayal, J. In this writ petition Dr. Lohia challenges G the validity of the order made by the District Magistrate, Patna, dated August 9, 1965, under cl. (b) of sub-r. (1) of r. 30 of the Defence of India Rules, 1962, hereinafter called the Rules. This order is as follows :

> "Whereas I, J. N. Sahu, District Magistrate, Patna, H am satisfied with respect to the person known as Dr. Ram Manohar Lohia, Circuit House, Patna that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and

order, it is necessary to make an order that he be detained. A

Now, therefore, in the exercise of the powers conferred by clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962 read with Notification No. 180/CW dated the 20th March 1964 of the Govt. of Bihar, Political (Special) Department, I hereby direct that the said Dr. Ram Manohar Lohia be arrested by the police wherever found and detained in the Central Jail Hazaribagh, until further orders." B

If this order is valid, Dr. Lohia cannot move this Court for the enforcement of his rights conferred by arts. 21 and 22 of the Constitution, in view of the Order of the President dated November 3, 1962, in the exercise of powers conferred on him by cl. (1) of art. 359 of the Constitution. C

Dr. Lohia has challenged the validity of this order on several grounds. I agree with the views expressed by Hidayatullah J., about all the contentions except one. That contention is that the appropriate authority is not empowered to order detention with a view to prevent a person from acting in any way prejudicial to the maintenance of law and order. It is urged that though the District Magistrate could order the detention of the petitioner with a view to prevent him from acting in any way prejudical to the public safety and the maintenance of public order, he could not order detention with a view to prevent the petitioner from acting prejudicially to the public safety and maintenance of law and order, as the latter object, being not synonymous with the object of preventing him from acting prejudicial to public order, is outside the purview of the provisions of r. 30(1) of the rules and that, therefore, the entire order is bad. I do not agree with this contention. D E F

Under r. 30(1)(b), the District Magistrate could have made the order of detention with respect to Dr. Lohia if he was satisfied that he be detained with a view to prevent him from acting in any manner prejudicial to public safety or maintenance of public order. Such satisfaction is subjective and not objective. The Court cannot investigate about the adequacy of the reasons which led to his satisfaction. The Court can, however, investigate whether he exercised the power under r. 30 honestly and *bona fide* or not *i.e.*, whether he ordered detention on being satisfied as required by r. 30. What is crucial for the validity of the detention order is such satisfaction and not the form in which the detention order is framed. A detenu can question the validity of the detention order—valid G H

A on its face—on various grounds including that of *mala fides*. The onus will be on him to prove *mala fides*. He can question the validity of the detention order on the same ground when, on its face, it appears to be invalid. In such a case the onus will be on the detaining authority to establish that it was made *bona fide*.

B An order is made *mala fide* when it is not made for the purpose laid down in the Act or the rules and is made for an extraneous purpose. The contention of the petitioner to the effect that the detention order cannot be made on the satisfaction of the detaining authority that it is necessary to prevent him from acting in a manner prejudicial to the maintenance of law and order, in effect, C amounts to the contention that it is made *mala fide*.

The detaining authority is free to establish that any defect in the detention order is of form only and not of substance, it being satisfied of the necessity to detain the person for a purpose mentioned in r. 30 though the purpose has been inaccurately stated in D the detention order. The existence of the satisfaction required by r. 30 does not depend on what is said in the detention order, and can be established by the District Magistrate by his affidavit. We have therefore to examine whether the District Magistrate was really satisfied about the necessity to detain Dr. Lohia with a view to prevent him from acting in a manner prejudicial to public safety E and maintenance of public order.

The impugned order was passed under r. 30(1)(b) of the rules. The District Magistrate decided to detain the appellant with two objects, firstly, to prevent him from acting in any way prejudicial to public safety and, secondly, to prevent him from F acting in any way prejudicial to the maintenance of law and order. The District Magistrate has—even in the absence of any such contention as under discussion and which was raised after the filing of the District Magistrate's affidavit—said that having regard to, *inter alia*, the circumstances which were developing in Patna on August 9, 1965, he was fully satisfied, in view of the report made G by the Senior Superintendent of Police, Patna, in regard to Dr. Lohia's conduct and activities, that it was necessary to direct that he be detained in order to prevent him from acting further in any manner prejudicial to the public safety and maintenance of public order. There is no reason to disbelieve his statement. His original order, set out below, bears out this statement of his in his later H affidavit :

> "Perused the report of the Senior S. P. Patna for detention of Dr. Ram Manohar Lohia, M.P. under rule

30(1)(b) of the Defence of India Rules, on the ground that his being at large is prejudicial to the public safety and maintenance of public order. From the report of the Sr. S. P., Patna, I am satisfied that Dr. Ram Manohar Lohia, M.P., aforesaid, be detained under rule 30(1)(b) of the Defence of India Rules. Accordingly, I order that Dr. Ram Manohar Lohia be detained under rule 30(1)(b) of the Defence of India Rules read with Notification No. 180/CW dated 20-3-64 in the Hazaribagh Central Jail until further orders."

The District Magistrate's omission to repeat in the second sentence where he speaks of his satisfaction that Dr. Lohia be detained with a view to preventing him from acting prejudicially to the public safety and maintenance of public order, does not mean that he was not so satisfied when the earlier sentence makes reference to the report of the Senior Superintendent of Police for detaining Dr. Lohia on the ground of his being at large to be prejudicial to public safety and maintenance of public order.

The District Magistrate referred, in para 3 of his affidavit, to his satisfaction that the forces of disorder which were sought to be let loose, if not properly controlled, would envelop the whole State of Bihar and possibly might spread in other parts of the country which would necessarily affect the problem of external defence as well in more ways than one. The possibilities of such forces of disorder spreading to other parts of the country satisfied him with the necessity of taking immediate action to neutralize those forces. It appears from his statements in paras 6 and 7 of the same affidavit that actual disturbances took place at Patna that day and that he had to operate from the Control Room. In para 9 he states that the action taken against Dr. Lohia was purely for the purpose of maintenance of public peace in the circumstances stated by him earlier.

In his rejoinder affidavit Dr. Lohia states with reference to the alleged forces of disorder referred to by the District Magistrate that even if he was promoting what the executive would call 'forces of disorder', he was doing so not with a view to impair the defences of the country but further to strengthen them, that the various allegations made against him were extraneous to the scope and purpose of the legislative provisions of the proclamations of emergency which had no rational relationship to the circumstances which were developing in Patna on August 9, 1965.

A Even in his original affidavit Dr. Lohia stated in para 6 that :

> "It is also revealing to note that after the events of the 9th August for which responsibility should have been sought to be fixed either through trial or enquiry, on me or Government or anybody else, I addressed a crowd of nearly a lakh for over an hour after seven in the evening."

The setting of the events that appear to have happened at Patna on August 9, 1965 further bear out the statement of the District Magistrate that he was satisfied of the necessity to detain Dr. Lohia in order to prevent him from acting in a manner prejudicial to public order.

Further, the expression 'maintenance of law and order' is not used in cl. (1) of r. 30. The corresponding expression used therein is 'maintenance of public order'. The two expressions are not much different. The expression 'public order' has been construed by this Court in a few cases, the latest of them being *The Superintendent, Central Prison, Fatehgarh* v. *Ram Manohar Lohia*(1) wherein it was said at p. 839 :

> "'Public order' is synonymous with public safety and tranquillity: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State."

The expression 'maintenance of law and order' would cover 'maintenance of public safety and tranquillity'. It may be, as urged for the petitioner, an expression of wider import than public order but, in the context in which it is used in the detention order and in view of its use generally, it should be construed to mean maintenance of law and order in regard to the maintenance of public tranquillity. It is not usually used merely with reference to enforcement of law by the agency of the State prosecuting offenders against any of the numerous laws enacted for the purposes of a well-regulated society. Simple and ostensibly minor incidents at times lead to widespread disturbances affecting public safety and tranquillity.

Reference may be made to the case reported as *Sodhi Shamsher Singh* v. *State of Pepsu*(2). In that case certain persons were

1. [1960] 2 C.S.R.821. 2. A.I.R. 1954 S.C. 276.

detained under an order under s. 3(1) of the Preventive Detention Act, 1950, on grounds which, in substance, were that one of them had published certain pamphlets whose circulation, in the opinion of the Government, tended to encourage the Sikhs to resort to acts of lawlessness and plunge the Hindus into a feeling of utter frustration and discouragement and consequently to make them take the law into their hands for the redress of their grievances. Section 3(1) of the Preventive Detention Act, 1950, reads :

"The Central Government or the State Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) ....

(b) ...., make an order directing that such person be detained."

This Court used the expression 'maintenance of law and order' in place of 'maintenance of public order' used in s. 3(1)(a)(ii) at three places in paras 4 and 5 of the judgment. I do not refer to these to show that the Court has construed the expression 'maintenance of public order' as 'maintenance of law and order' but to reinforce my view that the expression 'maintenance of law and order' is generally used for 'maintenance of public safety and tranquillity' which is covered by the expression 'public order'. When this Court used this expression in place of 'maintenance of public order' I cannot conclude, as urged by the petitioner, that the District Magistrate's using the expression 'maintenance of law and order' in place of 'maintenance of public order' is any indication of the fact that he had not applied his mind to the requirements of the provisions of r. 30(1) or had not actually come to the conclusion that it was necessary to detain Dr. Lohia with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

If the expression 'maintenance of law and order' in the impugned order be not construed as referring to 'maintenance of public order' the impugned order cannot be said to be invalid in

A view of it being made with a double objective, *i.e.*, with the object of preventing Dr. Lohia from acting prejudicially to the public safety and from acting prejudicially to the maintenance of law and order. If the District Magistrate was satisfied, as the impugned order and the affidavit of the District Magistrate show that he was satisfied that it was necessary to detain Dr. Lohia B with a view to preventing him from acting prejudicially to public safety, that itself would have justified his passing the impugned order. His satisfaction with respect to any of the purposes mentioned in r. 30 (1) which would justify his ordering the detention of a person is sufficient for the validity of the order. There is no room for considering that he might not have passed the impugned C order merely with one object in view, the object being to prevent Dr. Lohia from acting prejudicially to public safety. The entire circumstances in which the order has been made and which I have referred to earlier, point to that.

The question before us is not really at par with the question D that arose in *Romesh Thappar* v. *State of Madras*(1). In that case the provisions impugned were those of a statute whose language authorised the passing of orders which could be constitutional in certain circumstances and unconstitutional in others. In such a context, it was said that where a law purports to authorize the imposition of restrictions on a fundamental right in language E wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable; so long as the possibility of its being applied for purpoes not sanctioned by the Constitution cannot be ruled out, it must be held F to be wholly unconstitutional and void. It was so held as, otherwise, the orders passed for purposes not sanctioned by the Constitution would have been in accordance with the law held valid. The validity of the orders passed under a valid law—the Defence of India Act and the rules have to be assumed to be valid—de- G pends on their being made by the appropriate authority in accordance with the law empowering it to pass the orders.

The question before us is also not at par with the question which often arises in construing the validity of detention orders passed under the Preventive Detention Act for the reason that some of the grounds for the satisfaction of the appropriate autho- H rity were irrelevant or non-existent. The presence of such grounds raised the question whether the remaining good grounds would

1. [1950] S.C.R. 594.

have led the authority to the requisite subjective satisfaction for ordering detention. In the present case, however, the question is different. The question is whether the District Magistrate would have made the order of detention on his satisfaction merely to the effect that it was necessary to detain Dr. Lohia with a view to prevent him from acting in a manner prejudicial to public safety. It is not that his satisfaction is based on two grounds, one of which is irrelevant or non-existent.

Even in such cases, this Court has held in *Dwarka Das* v. *State of J & K*(1):

> "The principle underlying all these decisions is this. Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid."

As stated earlier, there does not appear to be any reason why the District Magistrate would not have passed the order of detention against Dr. Lohia on his satisfaction that it was necessary to prevent him from acting prejudicially to public safety. On such

1. A.I.R. 1957 S.C. 164, 168.

A satisfaction, it was incumbent on him to pass the order and he must have passed it.

I am therefore of opinion that the District Magistrate made the impugned detention order on his being satisfied that it was necessary to do so with a view to prevent Dr. Lohia from acting B in a manner prejudicial to public safety and maintenance of public order and that the impugned order is valid. Consequently, Dr. Lohia cannot move this Court for the enforcement of his rights under arts. 21 and 22 of the Constitution in view of the President's Order under art. 359(1) of the Constitution. I would dismiss this petition.

C

Mudholkar, J. I agree that the petition of Dr. Ram Manohar Lohia under Art. 32 of the Constitution be granted and would briefly indicate my reasons for granting it.

At the outset I shall consider an objection of Mr. S. P. Varma on behalf of the State as to the tenability of the petition. The objec- D tion is two-fold. In the first place, according to him, in view of the Proclamation made by the President under Art. 359 this Court has no jurisdiction to entertain it. In the second place his contention is that the order of detention made against the petitioner being one under the Defence of India Rules, he cannot challenge the validity of his detention thereunder in any court. In support of E these contentions Mr. Varma relies on the decision of this Court in *Mohan Choudhury* v. *Chief Commissioner, Tripura* (1). In that case this Court has, while holding that the right of a person whose detention has been ordered under the Defence of India Rules to move any court for the enforcement of his rights under Art. 21 F of the Constitution is suspended during the continuance of the emeregency declared by the President by a Proclamation under Art. 352, held that the powers conferred on this Court by Art. 32 of the Constitution are not suspended. It is true that where a person has been detained under the Defence of India Rules he cannot move this Court under Art. 32 for the enforcement of G his right under Art. 21 and so there will be no occasion for this Court to exercise its powers under that article in such a case. But what would be the position in a case where an order for detention purporting to be made under the Defence of India Rules was itself one which was beyond the scope of the Rules? For, before an entry into the portals of this Court can be denied to detenu he H must be shown an order under r. 30(1) of the Defence of India Rules made by a competent authority stating that it is satisfied

1. [1964] 3 S.C.R. 442.

that the detenu is likely to indulge in activities which will be prejudicial to one or more of the matters referred to in the rule. If the detenu contends that the order, though it purports to be under r. 30(1) of the Rules, was not competently made, this Court has the detenu contends that the order. though it purports to be under order if the Court finds that it was not competently made or was ambiguous it must exercise its powers under Art. 32 of the Constitution, entertain his petition thereunder and make an appropriate order.

In this case the District Magistrate, Patna purported to make an order under r. 30(1) of the Defence of India Rules. The State has placed on record copies of two orders : one is said to have been recorded by the District Magistrate on his file and another which was served on Dr. Lohia. We are not concerned with the former because the operative order must be the one served on the detenu. The District Magistrate may well keep the former in the drawer of his table or alter it as often as he likes. It cannot, therefore, be regarded as anything more than a draft order. The order which finally emerged from him and was served on the detenu would thus be the only one which matters. The grounds for detention given in the latter order are that Dr. Lohia's being at large is prejudicial to public safety and maintenance of law and order. Under r. 30(1) an order of detention of a person can be made "with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community". I find it difficult to accept Dr. Lohia's argument that the appropriate authority must entertain an apprehension that the person to be detained is likely to participate in every one of the activities referred to in the rule. To accept it would be, apart from making a departure from the rules of grammar, (for doing which no valid grounds exist), making not only the rule in question but also s. 3 of the Defence of India Act where similar language is used almost ineffective. What has, however, to be considered is his other argument. The question posed by the argument is whether an authority competent to make an order under the aforesaid provision can make such an order on the ground that the authority feels it necessary to prevent a person from acting in any manner prejudicial to the maintenance of law and order. The expression "law and order" does not find any place in the rule and is not synonymous with "public order". It seems to me that "law and order" is a comprehensive expression

A in which would be included not merely public order, but matters such as public peace, tranquillity, orderliness in a locality or a local area and perhaps some other matters. "Public order" is something distinct from order or orderliness in a local area. Under r. 30(1) no power is conferred upon that authority to detain a person on the ground that it is necessary so to do in order to pre-
B vent that person from acting in a manner prejudicial to the maintenance of order in a local area. What is it that the District Magistrate, Patna had in mind when he ordered the detention of the petitioner? Was the apprehension entertained by the District Magistrate that Dr. Lohia, if left at large, was likely to do some-
C thing which will imperil the maintenance of public order generally or was it that he apprehended that Dr. Lohia's activities may cause disturbances in a particular locality? There is thus an ambiguity on the face of the order and, therefore, the order must be held to be bad. No doubt, the order also refers to the apprehension felt by the District Magistrate about Dr. Lohia's acting in a manner
D prejudicial to public safety. But then the question arises, what is it that weighed with the District Magistrate, the apprehension regarding public safety or an apprehension regarding the maintenance of law and order? Again, would the District Magistrate have made the order solely on the ground that he felt apprehension regarding the maintenance of public safety because of the activities
E in which he thought Dr. Lohia might indulge? It could well be that upon the material before him the District Magistrate would have refrained from making an order under r. 30 solely upon the first ground. Or on the other hand he would have made the order solely upon that ground. His order, however, which is the only material on the basis of which we can properly consider the matter
F gives no indication that the District Magistrate would have been prepared to make it only upon the ground relating to public safety. In the circumstances I agree with my brethren Sarkar and Hidayatullah that the order of detention cannot be sustained. I have not referred to any decisions because they have already been dealt with fully in the judgments of my learned brethren. In the result,
G therefore, I allow the petition and direct that Dr. Lohia be set at liberty.

ORDER

In view of the majority opinion, we allow the Petition and order
H that the petitioner be set at liberty.