

(1975) 12 CAL CK 0034

Calcutta High Court

Case No: Civil Rule No. 13018 (W) of 1975

Bhusan Kumar Talwar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: Dec. 19, 1975

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 20, 21, 22
- Customs Act, 1962 - Section 11B, 11C, 123, 3, 3(1)

Citation: 80 CWN 442

Hon'ble Judges: M.N. Roy, J

Bench: Single Bench

Advocate: S.K. Roy and Bejoy Basanta Koley, for the Appellant; Noni Coomar Chakravartti, Somendra Chandra Bose and Subrata Roy for the Respondent Nos. 1, 4 and 5, Promade Roy and Uma Banerjee for the Respondent No. 3, for the Respondent

Judgement

M.N. Roy, J.

On June 18, 1975, the petitioner obtained this Rule against some alleged threat and intimidation to detain him under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. At the time of issuing the Rule this Court was pleased to restrain the Respondents from enforcing and/or passing any order of detention against the petitioner or from arresting or detaining him under the provisions of the said Act or any order that may be passed under the provisions of any statute having the force of preventive detention against him, in respect of certain seizures as mentioned in Annexures "A" and "D" to the petition. The said adinterim order was initially limited for four weeks and liberty was given to the petitioner to apply for extension of the same on notice to the respondents.

2. By the present application, the petitioner, pursuant to such leave, has prayed for extension of the said adinterim order. The application has been opposed by Respondent Nos. 1, 4, 5 and 3.

3. The petitioner is a partner of Messrs R. P. & Sons which carries on business in sale and purchase of tailoring materials viz., Zip fastner, Polyster Buttons and collar amongst others. On March 20, 1973 there was a search conducted in the shop premises and godown of the said concern by the officers of the Customs and Central Excise Department, who seized 163C dozens of Zip Fastner of different sizes and colour and of foreign origin. There is of course no dispute that such search was conducted in the presence of the petitioner. The petitioner has of course put a defence that the said Messrs R. P. & Sons have a branch at Bombay and the goods in question were sent by the said branch office. It has further been contended by the petitioner that the aforesaid fact was duly intimated to the officers concerned and furthermore such search and seizure was highly illegal and malafide. It has also been contended that on or about March 29, 1975, the petitioner has submitted two invioeces bearing Nos. 323 dated February 1, 1975 and 324 dated March 15, 1975 of the branch office of the said concern at Bombay in support of their defence of legal acquisition of the seized articles and also for the further fact to prove that they were purchased from Messrs Agra Leathearites Ltd. of Bombay against their Bill No. 62/73-74 dated April 9, 1974, and from Messrs Hukum Chand & Co. of Bombay against their Bill No. 2781 B dated August 20, 1974. The petitioner has further contended that he has received informations that the Customs Authorities duly made necessary enquiries from the concerns as mentioned hereinbefore to testify the fact of bonafide acquisition of the seized articles from the concerns as mentioned hereinbefore. He has alleged that by letters dated April 21, 1975, and April 22, 1975, the said Messrs R. P. & Sons duly requested for the release of those seized articles, but the authorities concerned, in their turn, have not replied them. As a result thereof the said concern again addressed a letter on May 9, 1975, but as usual, the same has not been replied to by the addressee. The petitioner has also contended that on May 23, 1975, a representative of the said concern appeared before the Deputy Collector of Central Excise and Customs and requested for the release of the articles in question.

4. It further appears that during the petitioner's temporary absence from Calcutta and more particularly when he has alleged to have gone to Bombay for medical treatment, on or about April 18, 1975, the shoproom and godown of the said concern at Calcutta was again searched by the officers of the Central Excise and Customs, who seized Polyster Buttons with an inventory to the following effect:

One or two Boxes bearing maker of foreign origin and others has clear indication of erasing of foreign marks.

Those remarks, the petitioner has of course contended to be absolutely false and he has further contended that the said search and seizure to be absolutely illegal and unauthorised. He has further contended that the said Zip fastners and Polyster Buttons, not being notified goods u/s 11B of the Customs Act and furthermore those articles not being covered by section 123 of the said Act, the entire action was

illegal and void and furthermore in that view of the matter no onus lay upon him to prove the legal importation of the articles in question.

5. In justification of his claim for anticipatory writ, the petitioner has contended that because of the facts as stated hereinbefore and in the circumstances that the Customs Officers are moving about in the neighbourhood of his residence and also in view of the fact that they are coming to his house for the purpose of finding out his where about and openly declaring that the time is not too far when he would be arrested under the provisions of the said Act and holding out threat for such action, there is every chance of his illegal arrest under the said Act. He has further contended that because of such threat, his fundamental rights have been affected. Apart from such contentions the petitioner has also challenged the bonafides and validity of the proclamation declaring the State of emergency under Article 352(1) of the Constitution of India and the existence thereof. He has also raised a challenge against the Presidential order dated November 16, 1974 passed under Article 359(1) of the Constitution of India suspending the enforcement of Fundamental rights.

6. The prayers in the petition, on which the Rule has been issued on the above mentioned submissions, would be of relevant consideration and as such those relevant prayer on which the Rule has been issued, are quoted hereunder:

(a) Declaration that the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 52 of 1974) is ultra vires the Constitution of India and/or that Section 3(1) (c) of the Act is also ultra vires the Constitution.

(b) Declaration that the order issued by the President of India on December 23, 1974 under Article 359 of the Constitution of India is ultra vires the Constitution and is invalid, void and of no effect.

(c) A writ in the nature of Mandamus be issued calling upon the Respondents and each of them not to give effect to and/or to recall, withdraw and/or revoke --

(i) the proclamation of Emergency dated 3rd December, 1971.

(ii) the Order dated December 23, 1974 passed by the President of India.

(d) A writ of in the nature of Mandamus do issue directing the Respondents and each one of them not to give any effect to the purported order of detention against the petitioner allegedly passed or to be passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and not to take any step or further steps against the petitioner for his preventive detention under the said Act 52 of 1974 or any other law for the time being in or any other law for the time being in force.

(e) A writ in the nature of Mandamus do issue directing the Respondents and each one of them to withdraw, recall and/or revoke the purported order of detention of the Conservation of Foreign Exchange and the Prevention of Anti-Smuggling

Activities Act, 1974.

(f) A rule do issue out of and under the seal of this Hon^{ble} Court asking Respondents to show cause why a writ in the nature of Certiorari should not go directing production before this Court all records and proceedings relating to the purported order of detention passed or to be passed against the petitioner under the said Act of 52 of 1974 so that conscionable justice may be done by quashing and setting aside the same.

and the limited interim order, the extension whereof is being sought for now was in the following terms :

There will be an interim order of injunction restraining the Respondents and/or their subordinates and servants and each one of them from enforcing and/or passing any order of detention against the petitioner or from arresting or detaining him under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (Act 52 of 1974) or any order that may be passed under the provisions of any statute having the force of preventing detention against the petitioner in respect of seizure as shown in Annexures "A" and "D".

7. The said application for extension of the interim order has been opposed by Respondent Nos. 1, 4 and 5 and also by Respondent No. 3 by filing their respective affidavit-in-oppositions.

8. In support of the application for the extension of the interim order, Mr. S. K. Roy, the learned Advocate for the petitioner, apart from the grounds as mentioned hereinbefore, further advanced his arguments on the question of malafide use of power and malafide character of the orders with reference to the statements made in paragraphs 25, 29 and 32 of the main petition and also submitted that the grounds on which the purported seizures of the articles in question have been made, are in fact non-existent and such acts in any event or in any view of the matter were illegal and void as Zip fasteners have not been included in the Schedule by a notification in terms of section 11B of the Customs Act, 1982. Mr. Roy also referred to the statements contained in paragraphs 12, 13 and 14 of the affidavit-in-opposition of Respondent Nos. 1, 4 and 5 and as filed through Shri Sunil Kumar Chowdhury and contended that the statements made therein would without any hesitation prove that the petitioner had nothing to do in the matter and he has been falsely implicated. He further contended that the articles in question not having been found from his custody, in terms of section 123 of the Customs Act, 1962, the onus to prove that they were not smuggled goods did not lay on him. He also submitted that the proper person viz., the Head Office at Bombay, having duly notified the possession and storage of the articles in question in terms of section 11C of the Customs Act, there was also no contravention either of the Act of 1974 or the Customs Act and as such the entire proceeding was initiated in colourable exercise of power.

9. Mr. Noni Coomar Chakravartti, appearing for Respondent Nos. 1, 4 and 5, apart from urging on merits raised preliminary points regarding the jurisdiction of the Court to entertain the petition and to make any determination on the same. He submitted that violation of Foreign Exchange Regulation and Smuggling Activities, were having increasingly deleterious effect on the national economy and having regard to the fact that smuggling activities of the considerable magnitude are clandestinely organised and carried on, the Parliament duly passed the said Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for effective prevention of such activities by providing for detention of persons concerned in such activities. He submitted that prior to that, an ordinance known as Ordinance No. 11 of 1974 was promulgated by which the Maintenance of Internal Security Act of 1971 was suitably amended in order to empower the appropriate authorities to pass detention order on being satisfied about the prejudicial activities of the concerned persons against conservation of foreign exchange and/or with the view to preventing the concerned persons from smuggling goods or abetting other persons of smuggling goods or dealing with such goods. He referred to the petition and submitted that the challenge as thrown therein against the provisions of the said Act of 1974 and the concerned Presidential order under Article 359(1) of the Constitution of India cannot in any event be open to scrutiny and judicial review in view of the recent amendments of the Constitution of India relating to the declaration of emergency. He further submitted that in view of the Constitutional 39th Amendment, the provisions of the said Act of 1974, which has also been included in the 9th Schedule of the Constitution of India, cannot also be scrutinised and furthermore the provisions of the same cannot be declared void on the ground that either the said or any of its provisions are inconsistent with or takes away, curtails or abridges any of the rights as conferred or guaranteed by any of the provisions of Part III of the Constitution of India. Mr. Chakravartti further submitted that the petitioner not having submitted to the order or having suffered the same, would not be entitled to invoke this extraordinary jurisdiction of this Court. In short he wanted to submit that such anticipatory order, as has been issued in the instant case should not have been made. In support of his contentions Mr. Chakravartti relied on the judgment of a Division Bench of the Andhra Pradesh High Court in the case of Chinnamalla Reddi, since published in Volume XX (April - June, 1974) issue of the Indian Police Journal. In that case on a complaint made by some employees of the society that 100 bags of rice were sold in the black market, the Civil Supplies Officers and the Divisional Co-operative Officer visited the Society, seized the records and made an enquiry. A warrant was issued against the said Shri Reddi for his detention under the Maintenance of Internal Security Act. As the said Shri Reddi was absconding, the Magistrate concerned passed an order for his appearance. The said Shri Reddi sought a writ of Mandamus from the High Court declaring the order to be void and illegal. The matter was referred before the Division Bench by Obul Reddi J since he was of the view that the petition as filed was not maintainable, the same was filed to circumvent the provisions of Maintenance of Internal Security Act

and the proper course for the petitioner was to surrender himself, and if so advised to file a petition for Habeas Corpus and as his views seemed to be in conflict with that of another Single Judge, who issued the Rule. The Division Bench consisting of Alladi Kuppaswami and Thota Lakshmiah JJ held that a person on whom an order of detention was sought to be served under the Maintenance of Internal Security Act and who was absconding was not entitled to question that order, by way of a writ of Mandamus. The proper course for him was to surrender himself and file a writ of Habeas Corpus. It was further held that the Court was not justified in exercising its jurisdiction under Article 226 of the Constitution of India. In his separate but concurring judgment Lakshmiah J has observed that he who sought relief from the Court under Article 226 must conform to the law. But he who had chosen to defy the law by absconding was not entitled to relief under that Article. On the analogy of the case Mr. Chakravarti wanted to supplement his submissions that no Rule should either have been issued or the petition entertained as admittedly the petitioner has not been served with an order and in fact he is avoiding such service or is absconding.

10. Apart from that case, on the question of Court's power to grant or extend the adinterim order of injunction specially in the peculiar facts of these type of cases. Mr. Chakravarti first relied on the case of Murari Mohan Dutta vs. Union of India & Ors., 1975 (1) C.L.J. 532. In that case at the time of issuing the Rule an adinterim order of injunction was granted restraining the Respondent Nos. 2-4 from passing any order of detention u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 on the strength of searches and seizures dated January 17 and 18, 1975. At the time of hearing an application for vacating the interim order, a preliminary objection was raised by the petitioner in the Rule about the locus standi of the Union of India to make and maintain the said application inasmuch as the interim order was directed only against Respondent Nos. 2-4. It has been held in that case that the said Act of 1974 is a Central Act which has been enacted to provide for preventive detention in certain cases for the purpose of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters concerned therewith. The said Act is preventive and not punitive. Section 3 of the same confers power upon the Central Government, the State Government and the officers of both of them, specially empowered, for the purpose of the said section, to make orders detaining certain persons and as such having regard to the materials disclosed it was contended that the application was maintainable at the instance of the Union of India. It has also been held in that case that having regard to the vague nature of the allegations of apprehension as made in the writ petition, the petitioner was not entitled to get any interim order of injunction as asked for as the same would have the effect of preventing the Respondents concerned from exercising powers conferred upon them by the Statute in question. It has also been held that since no detention has, in fact, been made and as the materials disclosed in the affidavits do not even show

that the Respondents had finally made up their mind to detain the petitioner by making an order u/s 3, there could be no question of any apprehension or infringement of petitioner's legal right, which can only be infringed when an order of detention is made illegally and malafide. Thereafter, Mr. Chakravartti relied on the case of Krishna Kumar Modi vs. Union of India & Ors., 1975 (2) C.L.J. 156. In that case an interim order of injunction was granted for a limited period restraining the Respondents from making any order of detention or from arresting or detaining the petitioner under Act 52 of 1974. It was averred in that case that an order of detention had already been passed before the issue of the Rule but the same could not be served on the petitioner as he was avoiding service of the same. In an application for vacating the said interim order, it was contended that after passing the order of detention, the petitioner cannot get any relief unless the said order is challenged before the appropriate forum. It was also contended that the petitioner was not entitled as a matter of right to any interim order unless he could prima facie establish that he was bound to succeed. It was also submitted in that case that the petitioner was neither entitled to get any extension of the interim order nor he was entitled to get any interim order in the form in which the same was obtained. It has been held in that case that since an order of detention had been made long before the issue of the Rule and the interim order, the petitioner was not entitled to any relief without challenging the order of detention. It has, of course been held further that the petitioner could challenge the purported threat of his legal or fundamental rights in a writ proceeding when the said threat is illegal and without jurisdiction and when there is no order made at the time of moving the Court against such purported threat. Since the detention order was not challenged in view of the facts as mentioned above, the interim order was vacated.

11. Mr. Chakravartti has further submitted that in the instant case also the order of detention has been duly passed by the detaining authority on April 4, 1975 i.e. long before the issue of the Rule and as the petitioner is absconding he could not be apprehended earlier. He further contended that the petitioner has obtained the Rule by suppressing the said material fact and as such also he is not entitled to get any relief in the instant case. He further submitted that there is no dispute about the Parliament's legislative competence to enact the said Act 52 of 1974 and Shri B. Mukhopadhyaya, Home Secretary, Government of West Bengal, Respondent No. 3 has been validly empowered to pass the order of detention u/s 3(1) of the said Act. For this purpose, reference was made to Government of West Bengal, Home Department Notification No. 21846-H.S.-18th December 1974, as published in the Extraordinary issues of the Calcutta Gazette, which is to the following effects :

In exercise of the power conferred by sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), the Governor is pleased hereby to specially empower the Secretary to the Government of West Bengal, Home Department, for the purposes of the said section.

2. This order shall come into force on the 19th day of December, 1974

and it was further contended by Mr. Chakravartti that in view of the admitted position as depicted above, the Rule is not only not maintainable but the same should not have been issued at all and that too after the notification of 23rd December, 1974 read with notifications dated 3rd June 1962, 16th November 1974, 26th June 1975 and 27th June 1975. The said notifications are quoted hereunder for ready reference :

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 declared 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 Oct., 1962, is in force, if such person has been deprived of any such right under the defence of India Ordinance, 1962 (4 of 1962) or any rule of order made there under.

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

V. VISHANATHAN, Secy.

16th November, 1974.

In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that --

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

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

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

New Delhi, the 23rd December, 1974.

G. S. R. 694(E) -- In exercise of the powers conferred by clause (i) of article 359 of the Constitution, the President hereby declare that --

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

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said Act or any other action (including the making of any declaration under the said section 9) taken or omitted to be taken in respect of detention under such orders, Shall remain suspended for a period of six months from the date of issue of this orders or the period during which the Proclamation of Emergency issued under clause (1) of article 352 of the Constitution on the 3rd December, 1971 is in force, whichever period expires earlier.

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

No. II/16011/14/74-S & P (D. II)

N. K. Mukherji, Secy.

TO BE PUBLISHED IN THE GAZETTE OF INDIA EXTRAORDINARY

PART II, SECTION 3, SUB-SECTION -- (i)

No. II/16013/1/75-S & P (D. II)

GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS

NEW DELHI-110001,

Dated 26th June 75.

NOTIFICATION

G.S.R. 353(E). The following Proclamation of Emergency by the President of India, dated the 25th June, 1975, is published for general information :

"PROCLAMATION OF EMERGENCY"

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

Sd/- F. A. Ahmed

President

New Delhi,

the 25th June, 1975

New Delhi

the 26th June, 1975

Sd/- S. L. Khurana

Secretary.

PUBLISHED IN THE GAZETTE OF INDIA EXTRAORDINARY PART II, SECTION 3,
SUB-SECTION

(i) No. 11/16013/75-S & P (D. II)

GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS

New Delhi,

the 27th June, 1975

ORDER

G.S.R. 361(E). In exercise of the powers conferred by clause (i) of article 359 of the Constitution the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by article 14, article 21 and article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

2. This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

3. This order shall be in addition to and not in derogation of any order made before the date of this order under clause (1) article 359 of the Constitution.

Sd/- S. K. Khurana,

Secretary.

12. The effect of the above notifications have been considered on practically the self same arguments by P. K. Banerjee J in his judgment (unreported) the judgment of the appellate Bench (Mitra C.J. and S. K. Datta, J) an appeal from the judgment of the P. K. Banerjee, J has been reported in 80 C.W.N. 312 dated 24th November 1975 in Civil Rule No. 14(W) of 1975 Dhikubhai Gokuldas Vora vs. Union of India & Ors. In that case an application was made for vacating the interim order which was passed at the time of the issue of the Rule. The adinterim order in that case was more or

less in the same terms as in this case. Apart from other contentions, against the prayers in the said application, it was contended by the petitioner in that Rule that since the said petition on which the Rule was issued, was framed on the basis that the said Act 52 of 1974 is ultra vires of Articles 14, 20, 21 and 22 of the Constitution of India, which Articles are suspended, the matter cannot be heard at the present moment and the more so as the Government notification is explicit on that aspect. It appears that His Lordship after following another judgment of Sabayaschi Mukherji J in Civil Rule No. 3684(W) of 1973, has adjourned the said application sine die holding interalia amongst others that in view of the notification dated 27th June 1975, no decision can be made on the points as raised during the pendency of the emergency. It may further be mentioned that while making the said order, His Lordship has also considered the cases of [Makhan Singh Vs. State of Punjab \(and connected appeals\)](#), ; Ram Manohar vs. State of Bihar, AIR 1960 S.C. 740; [Jaichand Lall Sethia Vs. State of West Bengal and Others](#), ; and [State of Madhya Pradesh Vs. Bhailal Bhai and Others](#), .

13. On the question whether the adinterim order should be continued or not, a reference to another Bench decision of this Court in the case of Bisandeo Sarma vs. State of West Bengal, 1975 (2) C.L.J. 359 would be relevant. In that case in an appeal from an order refusing to grant adinterim stay of the operation of an order of detention under the Maintenance of Internal Security Act 1971, it has been held by Sankar Prasad Mitra, C.J. and Arun Kumar Janah J. that the impugned order of detention has got to be examined in due course in order to determine whether it has been rightly and validly made or not. It has further been held that the Court has got to be satisfied whether the impugned order was made for collateral reasons or not. So it has been further held that at this stage, it would not be proper to express any opinion in respect of the same. On the aforesaid basis it has been held that pending such determination by the Court, the order of detention should remain stayed. Their Lordships of course made it clear that such stay should not be unconditional and in fact a conditional stay order was made.

14. In addition to the preliminary points as indicated hereinbefore, on merits, Mr. Chakravartti submitted that the jurisdiction conferred by said Act 52 of 1974 on the authorities concerned is a jurisdiction of suspicion and in fact on the admitted position of the instant case there was valid and bonafide reasons to exercise such jurisdiction and when such jurisdiction has been duly exercised, no interference should be made in the instant case and the more so when the said Act 52 of 1974 is designed to deal urgently and effectively with the more serious situations, interalia, affecting the security and stability of the country. In support of the above submissions Mr. Chakravartti relied on the case of [Borjahan Gorey Vs. The State of West Bengal](#), where it has been held that merely because a detinue is liable to be tried in a criminal court for the commission of an offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Criminal Procedure Code, would not by itself debar the Government from taking

action for his detention under the Maintenance of Internal Security Act. It has further been held that the object and purpose of bringing the said Act on the statute book clearly shows that in view of the prevailing situation in the country, the need was and felt for urgent and effective preventive action in the interest of national security. Such finding was of course made in view of the circumstances prevailing and the developments across the border in July, 1971. Be that as it may, such action was required to be taken and the said decision to be made in a stage of emergency, which is still continuing. Thereafter, relying on the determination in the case of [Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal](#), Mr. Chakravarti contended that if the conduct of the person viz., the petitioner in this case, satisfied the authorities concerned in that he is acting in a manner prejudicial to the maintenance of supplies and services essential to the community and if such authority on such satisfaction considers it necessary on that ground to detain him with a view to preventing him from repeating such acts, then the order of detention would be justified and not justiciable. He also submitted with reference to the case of [Bhut Nath Mete Vs. The State of West Bengal](#), that the question whether the continuance of the proclamation of emergency issued by the President is valid or not is also not justiciable in a Court of law and lastly on the analogy of the reasons as given in the case of [Haradhan Saha Vs. The State of West Bengal and Others](#), wherein the Supreme Court has held that the provisions of Maintenance of Internal Security Act to be not violative of Articles 14, 19, 21 and 22 of the Constitution of India, Mr. Chakravarti submitted that the provisions of the said Act 52 of 1974 are also not violative of those Articles and the more so when the basic and underlying principle of both the said statutes are the same. These apart Mr. Chakravarti submitted that section 123 of the Customs Act, 1962 has no application in the instant case and as such the arguments as made on behalf of the petitioner are neither substantial nor tenable.

15. At this stage and for the purpose of determining the application, the Court is not required to go into the merits of the case but is required to find out whether there is a prima facie case apart from balance of convenience which would enable the petitioner to have the order of injunction or the extension thereof. Since elaborate arguments were advanced at the Bar on the facts of the case and on the question of jurisdiction, I have noted them in extenso. If the petitioner has a prima facie case then on the question, whether there should be an extension of the interim order, the tests as laid down in the case of *Bisandeo Sarma vs. State of West Bengal* (supra) should be applied. The effect of that determination in my view is that if and when a Rule has been issued, and which gives rise to divergent contentions, the validity of them will have to be determined. Here in the instant case the petitioner has submitted that the purported action would be taken against him for collateral reasons and purposes. Thus the Court will have to ascertain whether and how far the petitioner has succeeded in establishing such collateral reasons or purposes and if it is found that he has really been able to establish such reasons then there would

be no other way but to direct the extension of the interim order even without going into or entering into the question of other challenges of the petitioner against the validity of the said Act 52 of 1974 or the contentions, both on merits and preliminary issues, as raised by the Respondents. The challenge of the petitioner or his allegations for the anticipatory writ is mainly based on allegations of malafide as mentioned in paragraphs 25, 29 and 32 of the main petition. But unfortunately those paragraphs have been affirmed by the petitioner as his "submissions". Thus there is no definite or specific averment relating to those allegations in the petition and that apart those allegations are not only vague but are indefinite. The allegations of malafide in the instant case are of such nature that nobody can place any reliance on them or to act on the basis thereof. Thus, I am of the view that the case as sought to be made out for the issue of an anticipatory order, has not been established and the more so when the petitioner has not been able to make out a case on the basis of such allegations of malafide, he has also no prima facie case and as such he has no case for an order of injunction and consequently he will not also be entitled to an extension of the same. He, who has no prima facie case in the Rule, would not be entitled to an order of injunction in aid of the same and to the extension thereof. I however make it clear that if the petitioner could have satisfied me about the existence of a prima facie case then I would have, perhaps in respectful agreement with the determination of Sabayasachi Mukharji, J. in Civil Rule No. 3684 (W) of 1973 and that of P.K. Banerjee J. in Civil Rule No. 14 (W) of 1975, adjourned the hearing of this application or at least following the determination in the case of Bisandeo Sarma vs. State of West Bengal (supra), granted an extension of the interim order of injunction, on terms.

16. Following the determinations in the case of [State of Madhya Pradesh Vs. Bhailal Bhai and Others](#), I am of the view that if a person succeeds in establishing that either his fundamental or any right is going to be infringed or even threatened, the Court can direct the Government or other statutory authority not to take the action as complained of or contemplated and in fact in such a case an application under Article 226 of the Constitution of India would be maintainable. In the instant case however no such consideration would arise or is required as I am of the view that no prima facie case has been made out or established.

17. The power to grant injunction should be very cautiously exercised and that too on clear and satisfactory grounds. For the purpose of obtaining an injunction the petitioner was required to show or prove a fair prima facie case in support of his rights as claimed, an actual or threatened violation of that right which would cause irreparable or at least serious damage and furthermore his conduct was such as not to disentitle him to the assistance of the Court and such conduct should also be fair and honest and apart from that he was required to prove that there is greater convenience in granting than refusing the relief and above all he was also required to prove that no equally efficacious relief was obtainable by any other usual mode of proceeding. The order of injunction being a severe remedy should not also be

granted except upon a clear prima facie case and upon positive averments of the equities on which the application for the relief is based. The petitioner in the instant case was not required to make out a clear legal title, but he was required to satisfy the Court that he has a fair question to raise as to the existence of his legal right and there are no substantial grounds for doubting the existence of such right. I have found earlier that the petitioner has not been able to satisfy the Court that he has a prima facie case and in addition to that I also find that he has not been able to satisfy the tests as mentioned above and as such also I find that he is not entitled to the reliefs as prayed for in this application.

18. The view which I have taken would not require me to enter any further into the other contentions, which however I have noted in extenso in this judgment and as raised in this proceeding. As such, without deciding those points on merits, I dismiss this application. But there would be no order for costs. In view of the above no order is required to be passed on the application dated 6th September, 1975, for" vacating the interim order, as filed by the Respondent No. 3 and as such the same is also disposed of without any order as to costs.