A

# STATE OF BIHAR

*v.*

# K. K. MISRA & ORS.

*October* 29, 1969

B [J. C. SHAH, J. M. SHELAT, C. A. VAIDIALINGAM, K. S. HEGDE AND A. N. RAY, JJ.]

*Code of Criminal Procedure,* 1898 (*Act 5 of* 1898), *ss.* 144(6)—*Validity—Whether violates sub-cls.* (*b*), (*c*) *and* (*d*) *of cl.* (1) *of Art.* 19 *of the Constitution of India* 1950.

Sub-section (6) of s. 144 of the Code of Criminal Procedure provides
C that no order under s. 144 shall remain in force for more than two months from the making thereof, unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government, by notification in the Official Gazette otherwise directs. The City Magistrate of Jamshedpur passed orders under s. 144(1) against the respondents which were later extended by the State Government of Bihar in exercise of its powers under s. 144(6). In a writ petition filed by the respondents the High Court of Patna struck down the second part of sub-
D s. (6) of s. 144 as being violative of sub-cls. (b), (c) and (d) of cl. (1) of Art. 19 of the Constitution. The State appealed and contended that the only operative orders were those made by the Magistrate and the Government merely extended those orders. Further, since the order of the Government got merged in the orders of the Magistrate, the extended order was open to review under sub-s. (4) of s. 144 and the same was also revisable under s. 435 read with s. 439 of the Code of Criminal
E Procedure.

HELD : *Per* Shelat, Vaidialingam, Hedge and Ray, JJ.—(i) The Magistrate's order is no doubt the basic order. But after the process in the first five sub-sections of s. 144 is completed he becomes *functus officio*. The decision that the circumstances mentioned in sub-s. (6) of s. 144 Criminal Procedure Code continue to exist and the original order should be continued is that of the Government. It is not a case of the Government order getting merged in the Magistrate's order. Rather the
F Magistrate's order is adopted by the Government as its own order. [194 A-C]

The order of the Government is made in the name of the Governor and signed by a Secretary to the Government. It is published in the Official Gazette. It is thus clearly an executive act of the Government coming within Art. 166 of the Constitution. If the direction given under s. 144(6) is intended to merely keep alive a judicial order, the legislature
G would have entrusted that function to a judicial authority as has been done in the case of an order under s. 144(1). [194 E-F]

Section 144(4) says in clearest possible terms that the Magistrate may rescind or alter any order made under that section by himself or any magistrate subordinate to him or by a predecessor in office. It is not possible to bring within the scope of this section the order made by the State Government, for if it was so intended it would have been mentioned
H in the section. [194 G]

From a plain reading of s. 144(6) it is clear that the power conferred on the Government is an independent executive power, not expected to be exercised judicially. It is open to be exercised arbitrarily. The direc-

tions given in the exercise of that power need not be of a temporary nature. The ambit of that power is very large and is uncontrolled. [195 B] A

(ii) The fact that the Legislature is expected to keep a check on governmental actions does not absolve this Court's responsibility. The fundamental rights constitute a protective shield to the citizen as against State actions and the Court cannot desert its duty on the assumption that the other organs of the State would safeguard the fundamental right of the citizens. [195 C-D] B

(iii) In order to be a reasonable restriction within the meaning of Art. 19 of the constitution the same must not be arbitrary or excessive and the procedure and the manner of its imposition must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable. One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed. Further the courts have to see whether it is in excess of the requirement or imposed in an arbitrary manner. C

Although the object of a restriction may be beyond reproach and may very well attract the protection of sub-Arts. 1 to 6 or Art. 19, if the State fails to provide sufficient safeguards against its misuse the operative sections will be rendered invalid. [196 C-F] D

Since section 144(6) gives the power to impose the restrictions contemplated by it to the executive Government and not to a judicial authority and there is no right of representation, appeal or revision given to the aggrieved party against an order which may not be of a temporary nature, it must be held that the said impugned provision is violative of Art. 19(1)(b) (c) and (d) and is not saved by Arts. 19(3) (4) or (5). [196 G] E

*Babulal Parate* v. *State of Maharashtra and Ors.* [1961] 3 S.C.R. 423, referred to.

*State of Madras* v. *V. G. Rao,* [1952] S.C.R. 597; *Dr. Khare* v. *State of Delhi,* [1950] S.C.R. 519; *State of Madhya Pradesh* v. *Baldeo Prasad,* [1961] 1 S.C.R. 970 and *Virendra* v. *State of Punjab,* [1958] S.C.R. 308, applied. F

*Per* Shah, J. (*dissenting*). Sub-s. (6) of s. 144 does not authorise the State Government to make the order of the Magistrate permanent. It cannot direct it to continue after apprehension of danger or emergency ceases. The validity of a statute conferring power is not open to challenge on the plea that the power may possibly be abused by the authority in which it is vested.

The order, duration of which is extended by declaration of the State, is and continues to remain that of the Magistrate. The source of the authority of the order is derived not from the State Government, but from the Magistrate. It cannot be said that the order of the Magistrate gets merged with that of the Government when its duration is extended. G

Although no provision is made in the Code for a judicial review of the State Government's order under s. 144(6), the said order does not depend on the subjective satisfaction of the Government and is capable of being challenged in a petition under Art. 226 of the Constitution. Further the Magistrate who passed the original order may in consideration of the materials placed before him under s. 144(4) rescind or alter the State Government's order. In the exercise of his judicial functions H

A the Magistrate is independent of the Government and not subordinate to it. The principle applies even in the case of an Executive Magistrate who under the scheme of separation of powers may be responsible to the executive authorities.

The above remedies being available the provision in s. 144(6) cannot be held to be unreasonable on the mere ground that there is no express provision in the Code for redress against the State Government's order.
B Reasonableness of a statutory provision cannot be determined by the application of set formulas : it must be determined on a review of the procedural and substantive provisions of the statute keeping in mind the nature of the right intended to be infringed, underlying purpose of the restriction contemplated to be imposed, gravity of the evil intended to be remedied thereby, object intended to be achieved by the imposition of restriction, and other relevant circumstances. [185 D, G 188 B-D]

C Case-law referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 21 of 1966.

Appeal from the judgment and order dated January 22, 1962 of the Patna High Court in Misc. Judicial Case No. 757 of 1961.

D *D. Goburdhun,* for the appellant.

*M. K. Ramamurthi,* for the respondents.

*B. Sen* and *S. P. Nayar,* for intervener No. 1.

*L. M. Singhvi* and *S. P. Nayar,* for intervener No. 2.

E The Judgment of J. M. SHELAT, C. A. VAIDIALINGAM, K. S. HEGDE and A. N. RAY, JJ. was delivered by HEGDE, J., SHAH, J. delivered a dissenting Opinion.

**Shah, J.**—The High Court of Patna has declared the second part of sub-s. (6) of s. 144 of the Code of Criminal Procedure *ultra vires.* Sub-Section (6) reads :

F

> "No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government, by notification in the Official Gazette, otherwise directs."

G

In the view of the High Court, an order made by the State Government extending the duration of an order under s. 144 imposes an unreasonable restriction on the fundamental freedom of the citizens, because the order of the State Government is not subject to judicial scrutiny and the Code provides no machinery for
H applying for an order of rescission or alteration of the order.

Section 144 is enacted to provide for making temporary orders in urgent cases of nuisance or apprehended danger, where imme-

diate prevention or speedy remedy is desirable. It provides that when a Magistrate competent in that behalf is of the opinion that there is sufficient ground for proceeding under the section, and immediate prevention or speedy remedy is desirable, the Magistrate may make an order in writing against any person or the public generally when frequenting or visiting a particular place, if he considers that his direction is likely to prevent or tends to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. The order must state the material facts of the case and it must be served in the manner provided by s. 134 and may direct a person to abstain from a certain act or to make certain order with certain property in his possession or under his management. In cases of emergency or in cases where the circumstances do not admit of service in due time of a notice upon the person against whom the order is directed, it may be passed *ex parte*. The order remains in force for not more than two months, unless the State Government, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray otherwise directs. The order may be rescinded or altered by a Magistrate on his own motion or on the application of any person aggrieved, if the order is passed by himself or by any Magistrate subordinate to him or by his predecessor in office. In deciding the application made to him the Magistrate must give an opportunity of appearing before him either in person or by pleader and showing cause against the order, and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

This Court in *Babulal Parate* v. *State of Maharashtra and Ors.*(1) held that s. 144 is intended to secure the public weal by preventing disorders, obstructions and annoyances. The powers conferred by it are exercisable by a Magistrate who acts judicially and the restraints permitted by it are of a temporary nature and may be imposed only in an emergency. The Court further held that the restrictions which the section authorises are not beyond the limits prescribed by cls. (2) and (3) of Art. 19 of the Constitution, for the prevention of such activities as are contemplated by the section is in public interest and therefore no less in the interest of public order. The Court observed that the wide power under the section may be exercised only in an emergency and for preventing obstruction, annoyance, or injury etc. as specified therein and those factors necessarily condition the exercise of the power and, therefore, the power is not unlimited or untrammelled, and that the section cannot be struck down simply on the ground

(1) [1961] 3 S.C.R. 423.

A that the Magistrate might possibly abuse his power. Challenge to the validity of s. 144 in its entirety was negatived in ***Babulal Parate's*** case(1). The Court however did not consider the validity of the power vested in the State executive to extend the duration of the order beyond two months, apparently because no argument was advanced at the Bar in that behalf.

B Power conferred upon a Magistrate to make an order under s. 144(1) is subject to the jurisdiction of the High Court under ss. 435 & 439 of the Code of Criminal Procedure. Again an order under sub-s. (4) refusing to rescind or alter any order under the section, may be rectified by the High Court. The Magistrate may pass an order in the conditions prescribed in sub-s. (1) and not C otherwise. The order does not remain in force for a period longer than two months, unless the State Government, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, directs otherwise. The power to "otherwise direct" involves authority to extend the duration of the Magisterial order for the duration of the danger or emergency. Sub-section (6) however does not authorise the State to make the order of the Magistrate D permanent. The State must in "otherwise" directing take into consideration, whether it is a case of danger to human life, health or safety, or of a likelihood of a riot or an affray in respect of which an order has been made by the Magistrate, and whether it is necessary to extend the period beyond two months and then to direct that the order shall remain in force for a period longer than E two months, but not after apprehension of danger or emergency ceases.

It was submitted that in the absence of any statutory restriction on the exercise of the power, the State may abuse the power and continue it in force either permanently or for a period longer than the apprehension of danger or emergency justifies. But the F validity of a statute conferring power is not open to challenge on the plea that the power may possibly be abused by the authority in which it is vested.

The order, duration of which is extended by declaration of the State, is and continues to remain the order of the Magistrate. The source of the authority of the order is derived not from the State G Government, but from the Magistrate. The direction of the State Government only extends its duration. The Code, it is true, provides no machinery for subjecting the direction by the State Government to a judicial scrutiny. The direction under sub-s. (6) does not depend upon the subjective satisfaction of the Government. On appropriate grounds the direction may be challenged in a petition under Art. 226 of the Constitution. Again sub-s. H (4) of s. 144 clearly authorises a Magistrate either on his own motion or on the application of any person aggrieved, to rescind

(1) [1961] 3 S.C.R. 423.

or alter any order made under the section. The order is passed by the Magistrate, and the source of its authority lies in the exercise of the judicial function of the Magistrate even after its duration is extended by the State Government. Therefore under sub-s. (4) notwithstanding that the State Government has made a direction extending the duration of the order beyond two months, the Magistrate would, in my judgment, be competent, on a judicial consideration of the materials placed before him, to rescind or alter the order. It was submitted that a Magistrate exercising power under sub-ss. (1) & (4) of s. 144 of the Code of Criminal Procedure is an authority subordinate to the State Government, and he cannot rescind or alter an order made by the State Government. That argument proceeds upon a misconception of the true nature of the division of powers under our Constitution. Since the ultimate liability for maintaining law and order lies upon the State, the Legislature has provided that the order, if it is to remain in operation for a period exceeding two months, should have the *imprimatur* of the State Government. But on that account the Magistrate does not become an authority subordinate to the State Government. The State Government is the head of the executive and exercises no authority over the judicial functions of the Magistrates. A Magistrate is independent of the State Government and he is entitled, notwithstanding the declaration made by the State Government, if the circumstances justify, to rescind or alter the order.

Under the scheme of division of the executive and judicial functions, it is true that power to make an order under s. 144 is generally vested in Executive Magistrates who are in some matters responsible to the executive authorities. But even under the scheme of separation of judicial and executive powers the function of the Magistrates exercising power under s. 144 remains judicial. To assume in deciding a constitutional issue, that in the prevailing administrative set-up, an Executive Magistrate invested with power under s. 144 of the Code of Criminal Procedure may not, on extra-judicial considerations, rescind a direction of the State Government is to overlook the distinction between abuse of power and non-investment of power. If in a given case, the order is made on extra-judicial considerations, it is liable to be set aside by recourse to appropriate remedy. The power to amend or alter the order after its duration is extended by the State Government cannot in my judgment be denied to the Magistrate merely because he is an Executive Magistrate.

In adjudging the reasonableness of the restrictions imposed by the exercise of power on the fundamental rights of the citizens, absence of a provision for judicial review and of machinery for obtaining an order recalling or amending the order made in exercise of that power have to be given due weight : *Virendra* v. *The*

A *State of Punjab and Anr.*(1) But as already pointed out the State Government has to make an order not on any subjective satisfaction. The order is liable to rescission or alteration under sub-s. (4). Validity of an order made by a Magistrate is open to challenge on appropriate ground even after it is extended by the direction of the State Government in a proceeding before the High B Court, for the jurisdiction of the High Courts to examine the validity of the order of the Magistrate is not affected by the extension of the duration of the order by the direction of the executive. Again under sub-s. (4) of s. 144 a proceeding for withdrawal or modification of the order may be initiated even after the State has by direction extended its duration.

C I am unable to hold that the order of the Magistrate gets merged into the direction of the State Government when its duration is extended. In terms, sub-s. (6) provides that the order made by a Magistrate shall not remain in force for more than two months from the making thereof, unless in the classes of cases specified the State Government otherwise directs. Therefore, even after D the period is extended by the direction of the State Government the order continues to remain the order of the Magistrate. The declaration made by the State Government only removes the temporaly limit on its operation prescribed by sub-s. (6).

In *State of Madras* v. *V. G. Row*(2), Patanjali Sastri, C.J., observed that in considering the reasonableness of laws imposing E restrictions on fundamental rights, the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases.

Exercise of power under section 144 is intended to ensure the F maintenance of law and order, and for that purpose the section authorises the Magistrate, exercising judicial power of the State, on being satisfied on sufficient grounds, and where it is necessary that immediate prevention or speedy remedy is desirable, to make an appropriate order. Normally an order made by a Magistrate under sub-s. (1) of s. 144 remains in force so long as it serves G its purpose, but not longer than two months. In case the danger or emergency or apprehension thereof is deep rooted, the State Government is competent by direction to extend the duration of the order. The duty of maintaining law and order ordinarily lies on the executive, but since the making of an order under s. 144 involves serious infringement of the rights of the citizens, exercise of the power is conditioned by a judicial evaluation of the circum- H stances which necessitate it. Whether the order remains operative for its normal duration, or is extended by direction of the execu-

(1) [1958] S.C.R. 308. (2) [1952] S.C.R. 597.

tive, the Magisterial verdict lends sustenance to it. Apprehension that the executive may abuse the power to extend the duration will not, in my judgment, justify the Court in holding that the extension shifts the source of authority of the order, or vitiates the Magisterial evaluation. I cannot accept the abstract standard that every statute in the execution of which fundamental rights of citizens may be infringed will be adjudged unreasonable, if within its framework the statute does not provide machinery for judicial scrutiny or for rescission of the action taken. Nor can I accept the plea that absence of machinery in the Code for approaching the High Court for redress against the direction of the State, and absence of express provision for moving the State for rescission or alteration of the duration constitute a test of unreasonableness. Reasonableness of a statutory provision cannot be determined by the application of a set formula: it must be determined on a review of the procedural and substantive provisions of the statute keeping in mind the nature of the right intended to be infringed, underlying purpose of the restriction contemplated to be imposed, gravity of the evil intended to be remedied thereby, object intended to be achieved by the imposition of restriction, and other relevant circumstances.

In my view, the appeal must be allowed and the order passed by the High Court set aside.

**Hegde, J.**—In a proceeding under Art. 226 of the Constitution initiated by the respondents the High Court of Patna struck down the second part of sub-s. (6) of s. 144, Criminal Procedure Code as being violative of sub-cls. (b), (c) and (d) of cl. (1) of Art. 19 of the Constitution. The State of Bihar after obtaining a certificate from the High Court under Art. 132(1) of the Constitution has brought this appeal.

The respondents are not represented in this Court. This Court by its order dated April 7, 1969 appointed Mr. Ramamurthi, a senior Advocate of this Court as an *amicus curiae* to assist the Court at the hearing of the appeal. The Union of India has intervened and it was represented before us by Mr. B. Sen. As the question involved in this case directly concerns a legislation by the central legislature, notice to Attorney General was also given and the Attorney General was represented by Dr. Singhvi.

The only question that arises for decision in this appeal is whether the second part of sub-s. (6) of s. 144, Criminal Procedure Code namely the words "unless, in cases of danger to human life, health or safety, or a likelihood of a riot or any affray, the (State Government) by notification in the Official Gazette, otherwise directs" are liable to be struck down as being violative of any of the clauses in Art. 19(1) of the Constitution.

A The facts leading to the present proceedings are as follows :

It appears that there was dispute between two sections of workers in the Tata Workers Union, Jamshedpur. In that connection Shri K. N. Mishra, City Magistrate, Jamshedpur passed an order against respondent Verma under sub-s. (1) of s. 144, Criminal Procedure Code on May 21, 1961. He followed up that order by another order against respondents, K. K. Mishra, Sadhu Singh, P. C. Joshi and M. N. Govende on June 20, 1961. Thereafter the State Government of Bihar passed an order under sub-s. (6) of s.144, Criminal Procedure Code and notified the same in the Bihar Official Gazette on July 18, 1961. It is the validity of this notification that is in issue in this case. That notification reads :

"NOTIFICATION

The 18th July, 1961.

No. 8255 C. Whereas the following orders have been made under the provision of section 144, Code of Criminal Procedure, 1898 (V of 1898) by Shri K. N. Mishra, City Magistrate, Jamshedpur :—

1. To

Shri R. L. Verma,

Jamshedpur.

Whereas it has been made to appear to me that the President, Tata Workers' Union, Jamshedpur, has informed you regarding the adoption of the resolution of ratification of no-confidence motion against you in the General Body meeting of T.W. Union on 17th May 1961, and you received the letter on 18th May, 1961 and still you have not refrained from attending the Office of Tata Workers' Union, situated at K. Road, Jamshedpur, and I am satisfied that your going to the office of Tata Workers' Union, may lead to a serious breach of the peace, the prevention of which is immediately necessary.

I, K. N. Mishra, City Magistrate, Jamshedpur, specially empowered under section 144, Criminal Procedure Code, therefore, hereby restrain you from going to the office of the Tata Workers' Union, situated at K. Road, Bistupur, Jamshedpur, for a period of 60 (sixty) days, with effect from today. You are also called upon to show cause by 25th May, 1961, at 6-30 a.m. as to why this order under section 144, Criminal Procedure Code, should not be made absolute against you.

Given under my hand and seal of the Court, this the 21st day of May 1961. A

Sd. K. N. Mishra
City Magistrate Jamshedpur 21-5-1961.

2. To B

(1) Shri Kamla Kant Mishra, (2) Shri Sadhu Singh (3) Shri P. C. Joshi and (4) Shri M. N. Govende, all of Tata Workers' Union.

Whereas the officer in charge of Bistupur P.S. has submitted a report that there is serious apprehension of breach of peace in respect of the Tata Workers' Union Office and the same still continues. C

And whereas I am satisfied that a serious apprehension of breach of peace still exists due to rivalry between two rival groups of the Tata Workers' Union and the same (breach of peace) cannot otherwise be prevented unless these four members of the O.P. are prohibited from entering into the office and compound of the Tata Workers' Union at 'K' Road Bistupur, for a further period of 30 (thirty) days, I, K. N. Mishra, City Magistrate, Jamshedpur, specially empowered under section 144, Criminal Procedure Code do hereby prohibit Shri Kamla Kant Mishra, Shri Sadhu Singh, Shri P. C. Joshi and Shri M. N. Govende from entering into the office and compound of the Tata Workers' Union situated at 'K' Road, Bistupur, for a further period of 30 (thirty) days with effect from today, the 20th June 1961, and also call upon you to show cause why this order under section 144, Criminal Procedure Code, should not be made absolute against you—Cause, if any be on 29th June, 1961, at 6-30 a.m. D E F

Given under my hand and the seal of the Court this 20th day of June, 1961.

Sd. K. N. Mishra, G
City Magistrate, Jamshedpur,
20-6-1961.

And whereas the above orders expire on the 19th July, 1961, and whereas the Governor of Bihar is satisfied that the conditions which rendered these orders necessary still exist and that there is apprehension that they may continue to exist for a longer time and that it is necessary that these orders should be extended for H

A a further period beyond the present date of their expiry in the interest of the safety of the life of the inhabitants of the town of Jamshedpur and in order to avoid the risk of riotor affray.

Now, therefore, in exercise of the powers conferred
B by sub-section (6) of the Section 144 of the said Code, the Governor of Bihar is pleased to direct that the above orders will continue to remain in force for a period of four months, with effect from the date of publication of this notification in the Bihar Gazette, unless previously withdrawn by a notification in the said Gazette.

C By Order of the Governor of Bihar,
M. Sinha,
Deputy Secretary to Government."

At this stage we may mention that the validity of the orders made by the City Magistrate, Jamshedpur on May 21, 1961 and June 20, 1961 was not challenged in the present proceedings.
D Nor was the validity of any portion of s. 144, other than mentioned earlier was assailed. The validity of parts of s. 144 other than that impugned in the present proceedings has been upheld by this Court in *Babulal Parate* v. *State of Maharashtra and Ors.*(1).

In order to consider the validity of the impugned part of s. 144,
E Criminal Procedure Code, it is necessary to have before us the entire section. That section reads thus :

"(1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate (not being a magistrate of the third class) specially empowered by
F the (State Government) or the Chief Presidency Magistrate or the District Magistrate to act under this section (there is sufficient ground for proceeding under this section and) immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the
G manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human
H life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(1) [1961] 3 S.C.R. 423.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed, *ex-parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, (either on his own motion or on the application of any person aggrieved) rescind, or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing case against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

(6) No order under this section shall remain in force for more than two months from the making thereof, unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the (State Government) by notification in the Official Gazette, otherwise directs."

It may be noted that orders under sub-ss. (1), (2), (3), (4) and (5) of s. 144 can only be passed by superior Magistrates.

This Court in *Babulal Parate's* case(1) sustained the validity of an order made by a Magistrate under s. 144(1) because of the various safeguards provided in the section. It may be seen that an order made by a Magistrate under s. 144(1), Criminal Procedure Code is open to be revised on the basis of any representation made by the aggrieved party and is also revisable by the High Court. An analysis of the section shows that an order under that provision is subject to the following safeguards :

(1) It has to be made by a superior Magistrate;

(2) While making the order the Magistrate has to act judicially;

(3) The order will be in operation for a short period —an order of a temporary nature;

(4) An opportunity is given to the aggrieved party of showing cause against that order;

(5) Reasons have to be recorded by the Magistrate for rejecting an application under s. 144(4) and

(1) [1961] 3S.C.R. 423

A

(6) The order of the Magistrate being a judicial order, it can be challenged in revision before the High Court under s. 435 read with s. 439, Criminal Procedure Code.

It was urged by Mr. Ramamurthi that whereas the legislature B had provided adequate safeguards in respect of orders made by Magistrates, it has failed to provide for any safeguard in respect of orders made by the State Government under the second part of sub-s. (6) of s. 144, Criminal Procedure Code; before making an order under that provision, the State Government is not required to make any inquiry; no opportunity is given to the aggrieved party to show cause against the order; the order made by the C State Government need not be of a temporary nature and the order of the State Government is neither appealable nor revisable. Hence according to him the restriction imposed on the fundamental rights guaranteed to the respondents under Art. 19(1)(b)(c)(d) *viz.*, to assemble peaceably without arms, to form associations or unions and to move about freely throughout India, is an unreasonable D restriction.

The State has not been consistent in its stand. Before the High Court, in its grounds of appeal filed as well as in the initial stage of the arguments of Mr. Goburdan learned counsel for the State of Bihar and Dr. Singhvi, the stand taken was that the order made by the State Government is an administrative order and as E such is not amenable to any judicial review. But after some discussion and after obviously realising the untenability of their contention, they drastically changed their stand and contended that the only operative orders are those made by the Magistrate, the Government merely extended the duration of those orders; the order of the Government got merged in the orders of the Magistrate; F the extended order is open to review under sub-s. (4) of s. 144, Criminal Procedure Code and the same is revisable under s. 435 read with s. 439, Criminal Procedure Code.

We shall now proceed to consider whether there is any basis for the new line of argument advanced in this Court. We have earlier seen the scheme of s. 144, Criminal Procedure Code. Its G first sub-section empowers the appropriate Magistrate to make any order contemplated therein. The second sub-section confers power on the Magistrate to pass the *ex-parte* order under certain circumstances. The third sub-section sets out the person against whom the order made by the Magistrate can be directed. The fourth sub-section provides for the review of the order by the H Magistrate who made the order or his successor in office or by his superior either *suo moto* or on the representation made by the aggrieved party. The fifth sub-section lays down the procedure to be adopted by the concerned Magistrate to deal with the repre-

sentation received. The first part of the sixth sub-section fixes the period during which the order made by a Magistrate would be in operation. Once the process set out above comes to an end the Magistrate has no further function. Thereafter it is clear he becomes *functus officio* in relation to the order made by him. The power conferred on the Government under the second part of the sixth sub-section is an independent power. Before issuing any direction under that sub-section, the Government has to examine afresh whether the danger to human life, health or safety or a likelihood of a riot or an affray continues and if it continues how long the original order made by the Magistrate should be kept alive. It is true that the basic order is the Magistrate's order but the decision that the circumstances mentioned in sub-s. (6) of s. 144, Criminal Procedure Code continue to exist and the original order should be continued for a certain period of time or indefinitely is that of the Government. It is not a case of the Government order getting merged in the Magistrate's order. It is rather the converse. The Magistrate's order is adopted by the Government as its own order. Once the Government notifies its direction, the responsibility for the continuance of the original order is that of the Government. It may be noted that the direction given by the Government has to be notified in the Official Gazette. We have earlier seen that the order with which we are concerned in this case was made in the name of the Governor and signed by a Secretary to the Government. That is the usual procedure adopted in issuing directions under s. 144(6). From all these, it is clear that the direction in question is an executive act of the State Government coming within Art. 166 of the Constitution. If the direction given under s. 144(6) is intended to merely keep alive a judicial order, the legislature would have entrusted that function to a judicial authority as has been done in the case of an order under s. 144(1), Criminal Procedure Code. Further it is least likely that the legislature would have prescribed that such a direction should be notified in the Official Gazette. If we bear in mind our legislative practice, it is difficult to accept the contention that the legislature had conferred upon the Magistrate power to review the directions given by the Government. Section 144(4) says in clearest possible terms that the Magistrate may rescind or alter any order made under that section by himself or any magistrate subordinate to him or by a predecessor in office. It is not possible to bring within the scope of this section the order made by the State Government. If the legislature intended to bring within the scope of this sub-section direction (which really means order) given by the State Government, it would have stated so particularly when it specifically referred to the order made by the Magistrate's predecessor in office or that made by a subordinate Magistrate. The scheme of the section, the language employed therein and our legislative practice militate against the new line of defence adopted

A B C D E F G H

A on behalf of the State of Bihar, Union of India and the Attorney-General in this Court.

From a plain reading of s. 144(6), Criminal Procedure Code, it is clear that the power conferred on the State Government is an independent power and it is an executive power. It is not expected B to be exercised judicially. It is open to be exercised arbitrarily. The directions given in the exercise of that power need not be of a temporary nature. The ambit of that power is very large and it is uncontrolled.

Dr. Singhvi at one stage urged that the only check on the C exercise of that power by the Government is the searching scrutiny of governmental actions expected from our legislators. We shall assume as Dr. Singhvi wants us to do that the executive actions of the Government are constantly being watched by the legislators. But that does not absolve this Court's responsibility. To quote the felicitous expressions of one of the illustrious former Chief Justices of this Court (Sri Patanjali Sastri) in *State of Madras* v. D *V. G. Row*(1) that as regards the fundamental rights, the Constitution has assigned to this Court the role of a Sentinel on the *quivive*. Proceeding further the learned Chief Justice observed in that case that "while this Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute". It will E be neither fair nor just to this Court or to our Constitution or even to our representatives, if this Court deserts its duty on the assumption that the other organs of the State would safeguard the fundamental rights of the citizens. Dr. Singhvi's contention ignores the very character of the fundamental rights, the basic principles underlying them and the safeguards carefully erected by our F Constitution against the legislative encroachment of the fundamental rights of citizens. Further it is based on an over simplification of the concept of the rule of the majority in a parliamentary democracy. It overlooks the fact that these safeguards are primarily intended to protect the rights of the minority. Dr. Singhvi's contention also overlooks the fact that the fundamental rights constitute a protective shield to the citizens as against State actions. G Therefore there is no point in saying that the legislators would see that those rights are not impugned.

The real question for decision is whether impugned restriction is a reasonable restriction. Unless that restriction can be considered as a reasonable restriction, it does not get the protection of H Sub-Arts. (3), (4) and (5) of Art. 19, which means that restriction is violative of Art. 19(1)(b)(c) and (d).

(1) [1952] S.C.R. 597.

As observed in *Dr. Khare* v. *State of Delhi*(1), and reiterated in *V. G. Rao's* case(2) that in considering reasonableness of laws imposing restrictions on fundamental rights both substantive and procedural aspects of the law should be examined from the point of view of reasonableness and the test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. It is not possible to formulate an effective test which would enable the court to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. In other words in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable.

One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed. No person can be deprived of his liberty without being afforded an opportunity to be heard in defence and that opportunity must be adequate, fair and reasonable. Further the courts have to see whether the restriction is in excess of the requirement or whether it is imposed in an arbitrary manner.

Although the object of a restriction may be beyond reproach and may very well attract the protection of Sub-Arts. 1 to 6 of Art. 19, if the statute fails to provide sufficient safeguards against its misuse the operative sections will be rendered invalid—see *The State of Madhya Pradesh* v. *Baldeo Prasad*(3). A restriction imposed under s. 3(1) of the Punjab Special Powers Act, 1956 was struck down by this Court in *Virendra* v. *State of Punjab*(4) on the ground that the Act did not provide for any time for the operation of an order made thereunder nor for a representation by the aggrieved party.

Now adverting to the restriction impugned in this case, the power to impose the same is conferred on the executive Government and not to any judicial authority. There is no provision to make representation by the aggrieved party against the direction given by the Government; no appeal or revision is provided against that direction and the order made need not be of temporary nature. Hence we agree with the High Court that impugned provision is

(1) [1950] S.C.R. 519.
(2) [1952] S.C.R. 597.
(3) [1961] 1 S.C.R. 970.
(4) [1958] S.C.R. 308.

A violative of Art. 19(1)(b)(c) and (d) and is not saved by Art. 19(3), (4) or (5).

In the result this appeal fails and the same is dismissed.

ORDER

B In accordance with the opinion of the majority the appeal is dismissed.

G.C.