IN RE : SHRI SHAM LAL

January 18, 1978

[M. H. BEG, C. J., N. L. UNTWALIA AND P. S. KAILASAM, JJ.]

Contempt of Court—News item published in a newspaper criticizing judgment of Supreme Court—Contempt proceedings—If could be initiated.

Per Majority (Untwalia and Kailasam, JJ.)

HELD : The notice issued to the Editor of the Times of India calling upon him to show cause why proceedings under Art. 129 of the Constitution for contempt of the Supreme Court should not be initiated against him in respect of the statements made criticizing the judgment of this Court in *A. D. M. Jabalpur* v. *S. Shukla* (A.I.R. 1976 SC 1207) should be dropped. It is not a fit case where formal proceedings for contempt should be drawn up. [582 A-B]

Beg. C. J. (dissenting)

There cannot be a grosser or clearer case of contempt of court than the implications of this document. [586 C]

1. The obvious suggestion and threat held out to Judges of the Court is that they will be maligned and punished if they could not in future so decide cases as to protect the interests or voice the opinions of whatever political or other sort of group those who have signed the document mentioned in the newpaper may represent. It implies nothing more nor less than blackmail to demoralise upright judges. People who could indulge in it certainly do not represent those who say that law, as found in the Constitution, must always be declared by Judges fearlessly and honestly. [586 A-C]

2. It is a serious matter if persons in the position of those whose names are given in the offending news item containing a vituperative attack upon a particular judgment of this Court are really signatories of the document. The attack is primarily irrational and abusive, even if it is partially based on ignorance and the rest on misconception. [582 E-F]

3. It may be that some people go on making assertions about judgments of this Court without reading or under standing them. But, the way in which this has been going on, as a part of a consistent scheme to malign the Court and its Judges, shows that their intention is to deliberately shake the confidence of the public in this Court. In any case, this would be the result if nothing is done to check such a campaign of vilification. [583 E-F]

4. To blame and abuse the Judges after shutting one's eyes to what may be the shortcomings of his own case or the law, as it exists, may be forgiven in a certain type of litigant blinded by personal feelings. But, if those who purport to act *pro bono publico* to protect the Constitution and the law conduct themselves in this fashion and, if responsible daily newspapers publish what could be regarded, in addition to being defamatory and abusive, as gross contempt of this Court, such people should be reminded of what the law says about it and what their duties are to the Court, to the public and to individuals maligned. [586 C-D]

5. Even if the case could be one in which two views were possible on any question, no newspaper could be allowed to describe one of the two views as a 'misdeed' and suggesting that Judges should have held what they could not honestly believe to be correct in law. It was stated that the Judges who gave such decisions would be ostracised in other countries. Those who drafted the document seemed to be aware of the perils of their irresponsible language. They, therefore, took shelter behind some article in a foreign newspaper presumably based on sources interested in distortion or no better informed and with no better motives than those quoted in the news item. [593 B-C]

A ORIGINAL JURISDICTION

V. M. Tarkunde, P. H. Parekh, (Mrs.) Manju Sharma and *Kailash Vasdev* for the alleged contemner.

(*Miss*) *A. Subhashini* for the Sol. General.

S. K. Jain for the Intervener.

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The following Orders of the Court were delivered :

UNTWALIA & KAILASAM, JJ. Having considered every pros and cons of the matter in regard to the amended notice issued to the editor of the Times of India on the 11th January, 1978, to show cause why 'proceedings for contempt of this Hon'ble Court under Article 129 of C the Constitution should not be initiated against you in respect of the statements made in the aforesaid news item in respect of the habeas corpus case (*A.D.M. Jabalpur* v. *S. Shukla*) and the judgments of this Court in that case', we are of the view that it is not a fit case where a formal proceedings for contempt should be drawn up. We accordingly drop the proceedings.

D BEG, C.J. I am afraid I am unable to concur with the majority view on the case before us which arises out of the publication of a news item in the Times of India newspaper of 7 January, 1978, on which a notice to show cause why proceedings for contempt of Court be not initiated against the Editor of the newspaper was issued. I think that it is a serious matter if persons in the position of those whose names are given in the offending news item as having subscribed to a E document containing a vituperous attack upon a particular judgment of this Court reported in *Additional District Magistrate, Jabalpur* v. *S. Shukla*(1), are really signatories of this document. The attack is primarily irrational and abusive even if it is partially based on ignorance and the rest on misconception. The view of this Court in that case was that the effect of the Presidential Order under Article 359 of the Constitution considered there was to disable High Courts from investi- F gating questions relating to violation of the fundamental rights to personal liberty, protected by Article 21, in proceedings under Article 226 of the Constitution.

Article 21 of the Constitution reads as follows :

> "Article 21—No person shall be deprived of his life or personal liberty except according to procedure established by G law".

It is clear beyond the shadow of doubt that what this Article protects is a right of every person in India, whether he is an Indian citizen or not, to be dealt with in accordance with law whenever a question of depriving him of his life or personal liberty by executive authorities arises. The law on the view adopted in *A. K. Gopalan* v. *The State of* H *Madras*(2), which was not questioned by anybody before us on this

(1) A.I.R. 1976 SC 1207.

(2) [1950] S.C.R. 88.

aspect, was statutory law or "lex" and not "just" so far as preventive detention, the very concept of which seems opposed to normal notions of "jus", is concerned. If the enforcement of rights conferred by Article 21 was suspended, investigation of alleged violations of the statutory protections is in abeyance because the guarantee given by Article 21 is itself that of protection by statutory provision only atleast as regards preventive detention. A

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The majority view, that the right to obtain a release on a writ of Habeas Corpus against Executive authorities was suspended, meant no more than that the use of Articles 32 and 226 only was suspended by the President against these authorities. No question arose at all in that case of depriving anyone of life itself without complying with law. On the other hand, the Attorney General repeatedly said there that criminal and civil laws, in general, and their protections were not suspended at all. Deprivation of life contrary to law was punishable murder or homicide not amounting to murder just as it was before the Presidential Order which made no difference here. Only the use of Article 32 and 226 to enforce specified fundamental rights against Executive authorities was suspended by the order under Article 359. In fact, all the judges of this Court held this. Nevertheless, certain interested persons, with motives which could be presumed to be ulterior and unhealthy, have continued to misrepresent to the public that what the majority of Judges of this Court held was that rights to life and liberty themselves were suspended. No judge had held that. Speaking for myself, I would be certainly shocked to hear that any judge or Court had or could have, in the twentieth century, possibly held that. All I can say to anyone who claims that any Judge of this Court has so held is to ask him to show me anything which could possibly have this meaning. C D E

It may be that some people go on making assertions about judgments of this Court without reading or understanding them. But, the way in which this has been going on, as a part of a consistent scheme to malign the Court and its Judges, shows that their intention is to deliberately shake the confidence of the public in this Court. In any case, this would be the result if nothing is done by anyone to check such a campaign of vilification. F

I will only reproduce here three paragraphs from my very long judgment on the case to show what we had held and what the Attorney General had conceded. I said there :

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> *"Para* 250 : Enforceability, as an attribute of a legal right, and the power of the judicial organs of the State to enforce the right, are exclusively for the State, as the legal instrument of Society, to confer or take away in the legally authorised manner. It follows from these basic premises of our Constitutional jurisprudence that Courts cannot, during a constitutionally enjoined period of suspension of the enforceability of Fundamental Rights through Courts, enforce what may even be a "fundamental right" sought to be protected by Part III of the Constitution. The Attorney General

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A has, very fairly and rightly, repeatedly pointed out that no substantive right, whether declared fundamental or not, except the procedural rights converted into substantive ones by Article 32, could be suspended. Even the enforcement in general, of all such rights is not suspended. Only the enforcement of specified rights through Courts is suspended for the time being.

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Para 251 : The enforceability of a right by a Constitutionally appointed judicial organ has necessarily to depend upon the fulfilment of two conditions : firstly, its recognition by or under the Constitution as a right; and, secondly possession of the power of its enforcement by the judicial organs.
C Now, if a right is established on facts, as a right, it will certainly satisfy the first condition. But if the right is unenforceable, because the power of its enforcement by Courts is constitutionally suspended or inhibited, for the duration of the Emergency, its mere recognition or declaration by Courts, either as a right or as a fundamental right, could not possibly help a petitioner to secure his personal liberty. Article 226
D of the Constitution is not meant for futile and unenforceable declarations of right. The whole purpose of a writ of Habeas Corpus is to enforce a right to personal freedom after the declaration of a detention as illegal when it is so found upon investigation.

E *Para* 254 : In this country, the procedure for deprivation as well as enforcement of a right to personal freedom is governed partly by the Constitution and partly by ordinary statutes. Both fall within the purview of 'procedure'. Article 21 of the Constitution guarantees, though the guarantee is negatively framed, that 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. If an enforcement of this negatively framed
F right is suspended, a deprivation contrary to the prescribed procedure is not legalised. The suspension of enforcement does not either authorise or direct any authority to violate the procedure. It has to be clearly understood that what is suspended is really the procedure for the enforcement of a right which could be said to flow from the infringment of a statutory
G procedure. If the enforcement of a right to be free, resulting derivatively from both the Constitutional and statutory provisions, based on an infraction of the procedure, which is statutory in cases of preventive detention, is suspended, it seems to me to be impossible to lay down that it becomes enforceable when that part of the procedure which is mandatory is violated but remains unenforceable so long as the
H part of the procedure infringed is directory. Such a view would, in my opinion, introduce a distinction which is neither warranted by the language of Article 359 of the Constitution nor by that of the Presidential Orders of 1975. If the claim

to assert the right is one based on violation of procedure, the degree of violation may affect the question whether the right to be free is established at all, but it should not, logically speaking, affect the result where the enforcement of the right, even in a case in which it has become apparent, is suspended". A

It has been made absolutely clear in the passages cited above that no fundamental right itself was suspended by a Presidential Order under Article 359. What was held to have been suspended was the power of the Court itself to enforce the widely conferred right of personal liberty under Article 21 by resorting to Articles 32 and 226 against Executive authorities. On this aspect of the case—that the power of the Court to enforce fundamental constitutional rights was suspended—Khanna, J., stated as one of the conclusions of his judgment : B C

"A Presidential Order under Article 359(1) can suspend during the period of emergency only the right to move any Court for enforcement of the fundamental rights mentioned in the Order."

This could only mean that the power of the Court to enforce specified fundamental rights was suspended. In the course of the judgment, Khanna J., expressed the view (para 15) : D

"The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a Court, the Court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency." E

Therefore, it could be said that this statement of the position by Khanna J. himself was, roughly speaking, an expression of a unanimously held view of all the Judges. Indeed, in the passages, quoted already from my judgment, the effect is shown to be less drastic for the citizen than it is given in the last quoted passage. I have repeatedly pointed out in my judgment that it is not so much the right of the citizen to move the court as the power of the court to enforce fundamenal rights which is, in substance, temporarily suspended. F

Neither the validity of the Presidential Order nor of the Constitutional amendment, by which this Court's very jurisdiction to entertain the question of validity of the Presidential Order "on any ground" was declared to be non-existent, was questioned by any counsel before this Court either for conflict with the basic structure of the Constitution or for mala fides of any sort (legal or factual). Yet, without questioning the validity of the Presidential Order or even the Constitutional amendment barring judicial scrutiny of grounds of its validity, this Court was expected, to judge from the tenor of the attacks made upon the judgment of this Court, without indicating where the Court's reasoning went wrong, to hold that the emergency itself was unconstitutional. G H

A Even Mr. Justice Khanna did not hold that because no materials were placed and no grounds urged before the Court to enable it to hold that the declaration of Emergency was itself invalid. The obvious suggestion and threat held out to Judges of the Court is that they will be maligned and punished if they could not in future so decide cases as to protect the interests or voice the opinions of whatever political or other sort of group those who have signed the document mentioned in the B newspaper may represent. No more insidious a danger to judicial independence could exist. It implies nothing more nor less than blackmail to demoralise upright Judges. People who could indulge in it certainly do not represent those who say that law, as found in the Constitution, must be always declared by Judges fearlessly and honestly. I cannot conceive of a grosser or clearer case of contempt of Court than the implications of this document, if we were to think about them, would C constitute.

To blame and abuse the Judge after shutting one's eyes to what may be the shortcomings of his own case or the law, as it exists, may be even forgiven in a certain type of litigant blinded by personal feelings. But, if those who purport to act *pro bono publico* to protect the Constitution and the law conduct themselves in this fashion, and, if respon- D sible daily newspapers publish what could be regarded, in addition to being defamatory and abusive, as gross contempts of this Court, one wonders whether time has not come to remind such people of what the law says about it and what their duties are to the Court, to the public, and to the individuals maligned.

Although there was no difference of opinion at all between the E Judges of this Court in *Shukla's* case that the Presidential Order under Article 359 of the Constitution did suspend enforcement of fundamental rights including the right to personal liberty—a right which had been given a very comprehensive meaning and scope by a series of decisions of this Court from *Gopalan's* case through *Satwant Singh's*(1) and *Kharak Singh's*(2) cases upto *Golak Nath's* cases—yet, there was a difference of opinion between the majority opinions of Judges of this F Court and the view of Khanna J. on the question whether any statutory rights remained, apart from the fundamental right to personal liberty, which could still be enforced during the emergency, and, if so, how. Mr. Justice Khanna said that there were such "statutory" rights which could be enforced. But, the majority of Judges of this Court could not see how even a distinction between the fundamental rights to personal liberty and a statutory right to personal liberty could possibly G help a detenu in preventive detention when the fundamental right to personal liberty protected by Article 21 itself guaranteed protection by "law" and this "law", according to *Gopalan's* case, was 'lex' or only statutory law where 'preventive detention' was involved as it was in the *Habeas Corpus* cases. If the enforcement of that protection of personal liberty by statutory law was specifically suspended by the Presidential Order how did any right of enforcement of the statutory protec- H tion to personal freedom still remain active? To say that it did

(1) [1967] (3) S.C.R. 525.
(2) [1964] (1) S.C.R. 332.

seem an obvious contradiction to the majority. Moreover, the distinction made by Khanna J. lost all its importance when the majority confined the suspension of enforcement only to what could be done under Articles 226 and 32 of the Constitution. As is clear from the passages cited above from my judgment in *Shukla's* case, the Attorney General had conceded that the statutory protections surrounding life and liberty, outside Articles 226 and 32 of the Constitution, were not suspended at all and could be enforced. This meant that everyone, whether an officer or a dignitary of State, such as a Minister, could be prosecuted for murder or for illegal and malicious confinement of anybody just like any ordinary alleged offender. The kind of evidence which could not be given in proceedings under either Article 32 or Article 226 could be put forth in other types of legal proceedings.

One wonders whether it is an exhibition of dishonesty or of real inability to understand what this Court had clearly and actually held when some people go on suggesting that this Court could and did hold that the Executive authorities could do whatever they might like to do to destroy life and liberty but Courts will give no relief or redress, due to the Emergency, even if cases falling outside the area of "preventive detention", where release through writs of *Habeas Corpus* was suspended, were brought before them. In any case, such assertions are gross distortions of what this Court actually held in *Shukla's* case (supra).

In *Shukla's* case (supra), I pointed out that, although, for reasons which were outside the purview of judicial scrutiny, Courts had been deprived of the power to test preventive detentions by applying norms of "judicial justice", yet, the duties of the Executive were not diminished but were enhanced on that account so that the Executive must see that the detenu gets justice at its hands. I said there(1) (at p. 1315) :

> "It appears to me that it does not follow from a removal of the normal judicial superintendence, even over questions of vires, of detention orders, which may require going into facts behind the returns, that there is no Rule of Law during the emergency or that the principles of *ultra vires* are not to be applied at all by any authority except when, on the face of the return itself, it is demonstrated in a Court of Law that the detention does not even purport to be in exercise of the executive power or authority or is patently outside the law authorising detention. It seems to me that the intention behind emergency provisions and of the Act is that, although such executive action as is not susceptible to judicial appraisement, should not be subjected to it, yet, it should be honestly supervised and controlled by the hierarchy of executive authorities themselves. It enhances the powers and, therefore, the responsibilities of the Executive."

It is surprising that even passages indicating that, although, judges expressing the majority view in *Shukla's* case (supra) did not like

(1) A.I.R. 1976 S.C. 1315.

A measures of preventive detention without trial even during an Emergency, yet, they were bound by the Constitution and the law to perform the unpleasant duty to declare what the law was and not to run away from it, are cited sometimes to indicate that judges, for some reason, are partial to repressive laws. In fact, I quoted a long passage from Erskine May's History of England to show the plight of persons detained on suspicion. The suggested inference was that such powers, B unless duly supervised, are bound to be misused. It was impossible for the Court to do anything more than to warn the Executive of the dangers of arrogating unto itself so great a share of power over the person of the individual citizen.

It is true that this Court held that preventive detention was practically removed from judicial supervision during an Emergency. The C common statement of a conclusion at the end of the judgments in the *Habeas Corpus* cases, based on the majority view but signed by all the Judges, including Khanna J., was perhaps misleading as it gave the impression that no petition at all would lie under either Article 226 or 32 to assert the right of personal liberty because the *locus standi* of the citizen was suspended. Had a review petition been filed before us D I would have certainly made it clear that the Statement of a conclusion reached by the majority did not accurately set out atleast my conclusion which is found at the end of my judgment. It seems to me that the majority conclusion is rather loosely and vaguely expressed at the end of our judgments. A legitimate criticism could, therefore, be that this Court should draft and state its majority conclusions better. However, a reading of all the judgments would have revealed that what was really E meant by stating the conclusion as it was done was nothing more than that the power of Courts under article 226 to afford relief was suspended but the power to entertain petitions was not suspended. The term *'locus standi'*, with regard to what was suspended, was used because of a similar use of it in previous judgments of this Court. Speaking for myself, I made it quite clear that I did not understand those judgments as laying down anything more than that the power of the Court to F afford relief was suspended so that hearings of cases could be resumed after the suspension was lifted. And, the practice followed by this Court, during the Emergency, was also to suspend proceedings or to keep them in cold storage, so as to revive them later, but not to dismiss them outright for want of *'locus standi'* of petitioners.

Some people have said that an exception should have been made in G cases of mala fide detentions falling outside the statutory and emergency provisions. I may quote here the exact words used by me with regard to allegations of 'malice in fact' which, even apart from emergency provisions, are not generally triable in summary inquiries into causes of detention upon *Habeas Corpus* petitions but left to suits or other proceedings for false imprisonment. I held that this right was intact even during the emergency. I said there :

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> "As regards the issue of 'malice in fact', as I have already pointed out, it cannot be tried at all in a *Habeas Corpus* proceeding although it may be possible to try it in a regular

suit the object of which is not to enforce a right to personal freedom but only to obtain damages for a wrong done which is not protected by the terms of Section 16 of the Act. The possibility of such a suit should be another deterrent against dishonest use of these powers of detaining officers."

Some people mention the English decision of the House of Lords in *Liversidge* v. *Anderson*(1) to support the view that an issue of "malice in fact" should have been left open by the Supreme Court for decisions by the Courts. This assumes that the majority in *Shukla's* case did not leave that course open for suits for damages for false imprisonment just as was the position in *Liversidge's* case where, although, there was nothing equivalent to Section 16A(9) of the Act, which could prevent English Courts from going into the grounds, yet, the House of Lords held, practically as a matter of public policy, that the mere belief or satisfaction of the Secretary of State was enough and could not be challenged and he could not be asked to give particulars for his belief. In fact, the British Courts have gone much further than we did. The view of the best legal circles in England was, I have heard, that the majority view in *Shukla's* case is absolutely correct because it accords with principles on which law relating to emergencies in even the most democratic countries is based. According to those principles the Constitution says to the Judicature on matters covered by Emergency provisions : "Hands off ! The executive knows more and understands better what is to be done here. You are not judges of these matters." That is evident also from what our Constitution says. The judges cannot be held responsible for what the Constitution contains. That is the responsibility of those who made it. Others have the power to change it. The judges can only declare what the Constitution contains and what its meaning and effects are. Beyond that come the function of the lawmakers who can set right the law if it is defective or wanting in any respect.

The constitutional position regarding Emergency provisions and the principle underlying them were well stated by Khanna J. in *Shukla's* case (supra) as follows (para 201) :

"No one can deny the power of the State to assume vast powers of detention in the interest of the security of the State. It may indeed be necessary to do so to meet the peril facing the nation. The considerations of security of the State must have a primacy and be kept in the forefront compared to which the interests of the individuals can only take a secondary place. The motto has to be "who lives, if the country dies". Extraordinary powers are always assumed by the government in all countries in times of emergency because of the extraordinary nature of the emergency. The exercise of the power of detention, it is well settled, depends upon the subjective satisfaction of the detaining authority and the courts can neither act as courts of appeal over the decisions of the detaining authority nor can they substitute their own opinion for that of the authority regarding the necessity of detention."

(1) [1942] A.C. 204.

A Even in times when there was no declaration of Emergency and no amendments had been made in the law so as to deprive courts of power to look into the grounds of detention, claims for relief on grounds of either "malice in fact" or "malice in law" could be judged only by looking at the grounds of detention in proceedings under either Article 32 or 226. But, as the majority of Judges in *Shukla's* case pointed out, Section 16A, sub-section (9) was added during the emergency so B that its validity could not be questioned for violation of fundamental rights because Article 358 of the Constitution, which is absolutely clear on the point, made such a course impossible. Section 16A(9), therefore, also deprived Courts of powers to find out how detention was for a collateral purpose or suffered from even what is called "malice in law". Hence, there was no alternative before the Court except to say that, due to insurmountable obstacles placed by constitutional provi- C sions and statutory law made during the emergency declared and protected by constitutional provisions, a High Court could not investigate the legality of a detention under Article 226 or 32 of the Constitution in such a way as to enforce a fundamental right against an executive authority empowered to pass and actually passing a *prima facie* valid detention order. But, that did not bar other legal proceedings mentioned by me specifically in *Shukla's* case (supra) which were still D open to persons aggrieved even by *prima facie* valid detention orders, although what could be done under Article 32 or 226 in normal times could not be achieved by other proceedings.

Indeed, I pointed out in *Shukla's* case (supra) that, although High Courts were disabled by section 16A(9) of the Maintenance of Internal E Security Act, which was added during the emergency, from calling for and examining grounds of detention, yet, if, upon the face of an order of detention, it appeared that it was defective for some reason, or, on the return filed in reply to a petition, it appeared that there could be or was no detention order, such as the one required by Statute, a writ of *Habeas Corpus* could be issued to release the detenu as if he was in private detention and not in "purported" detention of an executive F authority,—even "purported" orders were protected by statute. I indicated how the writ of *Habeas Corpus* lies not only against executive authorities but also against private individuals. Hence if a detention was, on the face of the detention order, without a further investigation which could not, obviously, take place without grounds, utterly illegal detention, ordered by an officer with no authority to order it, would be on par with a detention by a private individual against whom a writ of G *Habeas Corpus* would go. In fact, this was the only way in which what Mr. Justice Khanna seemed to have had in view when he spoke of statutory rights against actions outside the Act and the emergency provisions could be enforced despite the Presidential Orders of 1975 and statutory amendments. The suspension operated only against purported action of executive authorities. The fundamental rights were also guaranteed against acts of authorities which were parts of H "the State". Those laws which recognise and protect the rights of the individual to be free from illegal confinement, from assault, and from murder, could, on the very concessions made by the Attorney General, be invoked by the aggrieved citizen even during the period of emer-

gency against private persons. Such rights are not given against executive authorities, as such, but against all wrongdoers, whoever they may be, operating outside the protected area. Therefore, whenever it was evident, on the face of the "return" to a notice by the Court, that a detaining officer was acting outside the protected field, release could be ordered. This is what I specifically held. And, there seemed nothing in the views expressed by other learned Judges contrary to what I said on this aspect.

With regard to the power of High Courts to issue writs of *Habeas Corpus* even in cases of alleged preventive detention by officers of State I specifically said there (at p. 1311) :

> "Detentions which not only do not but could not possibly have any apparent, ostensible, or purported executive authority of the State whatsoever to back them, could be equated with those by private persons. The suspension of enforcement of specified fundamental rights operates only to protect infringements of rights by the State and its authorised agents, acting or purporting to act in official capacities which they could and do hold. A claim to an order of release from such a patently illegal detention, which is not by the State or on its behalf, could be enforced even during the current Emergency. But, there is no such case before us."

With regard to one of the cases cited before us, *State of Madhya Pradesh* v. *Thakur Bharat Singh*(1), it was pointed out that Shah J., had upheld the view that, although, the validity of a provision empowering preventive detention enacted during the emergency could not be challenged due to Article 358, yet, if it was made before the declaration of emergency, it could be so challenged and declared void. Commenting on this case, the majority view, expressed by me, was (at p. 1312) :

> "I do not think that there is any such case before us. It seems to me to be possible to distinguish the case on the ground that it was a case of patent voidness of the order passed so that the principle of legality, which is not suspended, could be affirmed even apart from enforcement of a specified fundamental right, I think it was placed on such a footing by Shah J., speaking for this Court."

Similarly, all previous cases of this Court were distinguished by references to the differently framed Presidential Orders and statutory provisions which were applicable to their facts, but, the changed wording of the emergency orders of 1975 and amendments of the Maintenance of Internal Security Act intended to oust the power of Courts to make orders of release even in cases of "purported" detention made Courts quite powerless to act under Article 226. Hence, there was no use in saying that nine High Courts had taken some other view. The various High Courts had, upto the stage when cases were brought up

(1) [1967] (2) S.C.R. 454.

A here, merely repeated what this Court had held in other circumstances with reference to other laws. Most of them had not decided the question of validity of section 16A(9) of the Act by the time the cases came up before this Court at an intermediate stage.

If the minority view of Khanna J. had prevailed, some more time would have been spent in the High Courts upon further enquiries which B could not proceed far for want of grounds of detention, but, the writ petitions would have been ultimately dismissed in all those cases where there were *prima facie* valid detention orders as there seemed to be in all cases which came up before this Court. And, in those cases where there were no such *prima facie* valid detention orders, the detenus could be released even upon the reasoning of the majority if the view, as explained above, and, in greater detail in my judgment on *Shukla's* case C contained the true ratio of the majority decision.

The enquiries made by the High Courts could not be more than very superficial if grounds of detention could not be sent for and persued by them because section 16A(9) introduced by Act No. XIV of 1976 was valid. Most of the High Courts had not ruled upon the validity of this provision. One of the grounds on which this Court had D entertained the appeals by the State authorities at an intermediate stage was that, in view of Section 16A(9) of the Act, further enquiry may not be called for in the High Courts if the provision was valid. Khanna J., thought that the question of validity of this provision should be decided by this Court only after all the High Courts had determined it. The majority acted on the assumption that, after entertaining the appeals and hearing very full and long arguments on it, there was a E duty cast on this Court to give a decision on this matter also.

Speaking for myself, I do not think that any other conclusion except the one which the majority really reached in those cases before sending them back to the High Courts for disposal according to law, was legally or constitutionally possible on the materials placed and arguments advanced before us. This was that the enforcement of the right to F personal liberty, by the issue of writs of *Habeas Corpus,* against *prima facie* valid detention orders of executive authorities of the State, was suspended during the emergency. Facts of each case were not before this Court as no facts could be placed before it at that state. And, grounds of detention—the main legal weapon of attack upon detention orders—could not be there at all at any stage before the High Courts due to Section 16A(9) of the Act. On the last mentioned question, G four Judges of this Court decided that the Constitutional validity of the provisions could not be challenged during the emergency whereas one learned Judge (Khanna J.) held that all the High Courts should first decide that matter themselves so that it could come up before us again at a later appellate stage. Postponing decision of this Court on this question after hearing such full arguments was neither necessary nor helpful to detenus. The majority acted on the assumption that to H postpone decision on what was so clearly covered by Article 358 could only prolong the agony of those who wanted justice according to law. And, if this question was decided against the detenus and "enforcement" of the fundamental right to personal freedom as protected by

statutory provisions, was suspended what was there before the Courts to enforce under article 226 and how was it to be done? Those who live in the world of law as it exists and not in one of romantic dreams could only give the answers which the majority of judges gave in *Shukla's* case (supra). A

Even if *Shukla's* case (supra) could be one in which two views were possible on any question, I do not think that any newspaper could be allowed to describe one of the two views in the way in which signatories of the document cited in the news item have chosen to do it by calling it a "misdeed" and suggesting that Judges should have held what they could not honestly believe to be correct in law. The signatories are also reported to have said that Judges who gave such decisions would be "obstracised" in other countries. Those who drafted the document seemed to be aware of the perils of their irresponsible language. They, therefore, took shelter behind some article in a foreign newspaper presumably based on sources interested in distortion or no better informed and with no better motives than those of the signatories of the document quoted in the news item before us. However, as two of my learned brethren are of the view that we should ignore even such news items and not proceed further, I can do no more than to state the reasons for my dissent before signing a common order dropping these proceedings. B C D

ORDER

In view of the majority opinion, the proceedings for contempt against the editor of the Times of India are dropped.

P.B.R. *Proceedings dropped.*