CRIMINAL WRIT

Before Eric Weston, C.J. and Kapur, J.

BAKSHI INDERJIT SINGH,—*Petitioner.*

versus

1952

THE STATE OF DELHI AND OTHERS,—*Respondents.*

April 9

Criminal Writ No. 21 of 1952

United Provinces Goondas Act I of 1932 (as modified and extended to the State of Delhi)—Whether ultra vires *of the Constitution—Constitution of India Articles 19 and 22—Reasonableness of restrictions—Test—Externment or banishment, whether akin to preventive detention.*

Held, that the United Provinces Goondas Act, as modified and extended to the State of Delhi is *ultra vires* of the Constitution, being in violation of the fundamental rights set out in Article 19 (i), clauses (d) and (e), and not being saved by clause (5) of that Article.

Held, further, that on the matter of reasonableness of restrictions allowed to be imposed under clause 5 of Article 19 of the Constitution of India, both the substantive and the procedural aspects of the impugned restrictive law should be examined.

Held, further, that so far as the proviso to clause (2) of section 5 of the United Provinces Goondas Act makes representation of the arrested person by a legal practitioner of his choice a matter of discretion with the advising Judges, this proviso must be held to infringe the fundamental right given by Article 22 (i) of the Constitution and this infringement is not saved by clause (3) of that Article.

Held, also, that it may perhaps be accepted that externment or banishment is something akin to preventive detention. It is a precautionary measure ; its object is not to punish but to prevent ; it is not imposed on criminal conviction ; its justification is suspicion or reasonable probability. The fact remains, however, that externment or banishment is not detention. Detention means that the person detained is at liberty to go nowhere. A person externed from Delhi may go anywhere he likes in the rest of India.

State of Madras v. *V. G. Row* (1), decided by Supreme Court on the 31st March 1952, relied upon.

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(1) Case No. 90 of 1951, Supreme Court.

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Petition under Articles 226 and 227 of the Constitution of India, praying that this Hon'ble Court be pleased to order that the records and proceedings relating to the above case be removed from Respondents Nos. 3 and 4 to this Hon'ble Court by issue of a Writ of Certiorari *and that the proceedings pending against the said Rawel Singh be quashed. This Hon'ble Court may further be pleased to issue a Writ of Prohibition restraining the respondents from proceeding further in the matter. Such other and further directions, orders and writs as in the circumstances of the case may appear fit and proper to this Hon'ble Court may also be issued.*

H. D. HARDY, for Petitioner.

BISHEN NARAIN, for Respondent.

JUDGMENT.

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WESTON, C. J. These matters arise from action taken against one Rawel Singh, son of Bakhshi Awtar Singh, under the United Provinces Goondas Act, 1932, as modified and extended to the State of Delhi by notification, dated the 10th November 1937, made under section 7 of the Delhi Laws Act, 1912. On the 21st of March 1952, Rawel Singh was arrested in pursuance of a warrant issued by the Home Secretary to the Chief Commissioner under section 4 of this Act to which I shall refer hereafter as the Act. Rawel Singh was not produced before the Deputy Commissioner but was produced before the Additional District Magistrate who refused to grant bail on the ground that he had no authority to do so. A bail application was presented to the Deputy Commissioner on the 22nd of March 1952, consideration of which, we are told, was adjourned, and only on the 28th of March after rule in the present matter had issued was he released on bail. It is claimed that the detention of Rawel Singh after his arrest was illegal and also that all further proceedings under the Goondas Act are also illegal as the Act is void, being in contravention of Articles 19 and 22 of the Constitution.

It is necessary at this stage to describe the material provisions of the Act. Section 2 contains a definition of ' goonda ' as including " a hooligan, bully, rogue or a *badmash* ". Section 3 provides for a report by the

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District Magistrate to the Chief Commissioner if the District Magistrate considers that a person or a body of persons should be dealt with under the provisions of the Act. Clause (1) of section 4 provides that on receipt of such report the Chief Commissioner may make an order for the issue of a warrant for the arrest of the person against whom the report has been made. Clause (2) of the section provides that the warrant shall be in a form to be prescribed and shall contain a statement of the heads of the charges made against the person to be arrested, and the warrant shall also contain a requirement to the person arrested to make such submission as he may wish to the advising Judges appointed under section 5, by such date as is stated in the warrant. Clause (3) of section 4 gives the Deputy Commissioner certain powers of a District Magistrate for enforcing the attendance of the person against whom the warrant is issued, and provides that the warrant issued under the section shall be deemed to be a warrant issued by the District Magistrate for the arrest of such person to answer a charge in respect of a bailable offence committed by him. Section 5(1) provides that after issue of the warrant the Chief Commissioner shall send the report of the District Magistrate with all material facts and circumstances in his possession relevant to the report to a body of two advising Judges, one of whom is to be the District and Sessions Judge of Delhi. Clause (2) of this section provides the procedure to be followed by this body of Judges and may be reproduced in full.

> "(2) The advising Judges shall consider in camera the report and the other facts and circumstances, if any, adduced before them by the Chief Commissioner; and any representation submitted to them by the person against whom the report has been made within the time fixed by section 4 or such further time as they may allow, and shall call for such further information, if any, and may examine such witnesses, if any, as shall appear to them to be necessary to enable them to tender

their advice on the report. They shall also give to the person against whom the report has been made, if he so desires, an opportunity of appearing in person before them to offer his explanation and may, at the instance of that person, require the attendance of any other person, whose statement may support that explanation. The Judges shall have discretion to record any evidence in the absence of the person against whom the report has been made and in this case the substance of such evidence shall be communicated to him before he is given an opportunity of offering his explanation under this subsection :

Provided that—

(a) nothing in this section shall be deemed to entitle the person whose case is before the advising Judges to be represented before them by pleader, nor shall the Chief Commissioner be so entitled ;

(b) the advising Judges shall not disclose to the person in question any name the communication of which might endanger the safety of any individual ; and

(c) the advising Judges shall not be bound to observe the rules of evidence and shall not permit the putting of any question which may endanger the safety of any individual."

Clause (3) of the section is not material. Clause (4) provides for a report by the advising Judges. Clause (5) provides that if the person whose case is under consideration claims that both he and his father were born in the State of Delhi or that he is a member of a family which has definitely settled in Delhi State and is himself so settled, the advising Judges shall give him an opportunity of establishing his claim and shall also give the District Magistrate an opportunity of rebutting it, and at the time of submitting their report shall record their opinion as to whether such person has

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established his claim. Section 6(1) of the Act provides that on receipt of the report of the advising Judges the Chief Commissioner, if satisfied that the person against whom the report has been made should be removed elsewhere, may by an order reciting the conclusions of the advising Judges, as reported by those Judges, direct the person to leave the State of Delhi within such time by such route or routes, and for such period as may be stated in the order. The proviso to section 6(1) provides that if the Chief Commissioner is satisfied that the person and his father were born in the State of Delhi or that he is a member of a family which has definitely settled in the State of Delhi and is himself so settled, the period of banishment shall not exceed five years. Clause (2) of the section provides for finality of the order of the Chief Commissioner. Section 8 provides for certain matters for identification of the person against whom an order under section 6 has been made. Sections 7, 9 and 10 make penal, and provide penalties for breaches of orders made.

It is clear from clause (3) of section 4 that the warrant issued under that section is a bailable warrant. Rawel Singh was entitled to bail as soon as he was produced following his arrest, and his detention in custody until the 28th of March 1952 was illegal if, as is averred, there was no consideration of his application for bail during this period. As, however, bail has been allowed, this matter does not call for a corrective order.

The main question before us is the validity of the Act in face of provisions of the Constitution. Sub-clauses (d) and (e) of clause (1) of Article 19 of the Constitution ensure to all citizens the rights to move freely throughout the territory of India and to reside and settle in any part of the territory of India, and there can be no doubt that the impugned Act is an infringement of the rights so ensured. Clause (5) of Article 19 provides that nothing in sub-clauses (d) and (e) of clause (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable

restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. It is not suggested before us that the restrictions for which the Act provides are not made in the interests of the general public. The question therefore is whether they are reasonable.

By the latest decision of the Supreme Court given on the 31st of March 1952 *State of Madras* v. *V. G. Row* (1), it has been laid down that on the matter of reasonableness, both the substantive and the procedural aspects of the impugned restrictive law should be examined. It was said—

> "This Court had occasion in Dr. *Khare's case* (2) to define the scope of the judicial review under clause (5) of Article 19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that 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. The nature of the

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(2) 1950 S. C. R. 519.

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right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of reasonability and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

The first proviso to clause (2) of section 5 of the Act provides that nothing in the section shall be deemed to entitle the person whose case is before the advising Judges to be represented before them by Pleader, nor shall the Chief Commissioner be so entitled. Clause (1) of Article 22 of the Constitution reads—

> "22. (1) No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

Clause (3) of this Article, however, provides that nothing in clause (1) shall apply to any person who is arrested or detained under any law providing for preventive detention. It is suggested on behalf of the State that the Goondas Act is a law providing for preventive detention. Clause (3) obviously must

be construed strictly, for it provides an exception when a fundamental right created by clause (1) of that Article is not available to the person arrested. In *Goplan's case* (1) it was said by Mr. Justice Mukherjea at page 249—

> "There is no authoritative definition of the term 'Preventive Detention' in Indian law, though as description of a topic of legislation it occurred in the Legislative Lists of the Government of India Act, 1935, and has been used in Item 9 of List I and Item 3 of List III in the Seventh Schedule to the Constitution. The expression has its origin in the language used by Judges or the Law Lords in England while explaining the nature of detention under Regulation 14(B) of the Defence of Realm Consolidation Act, 1914, passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency regulations made during the last world war. The word 'preventive' is used in contradistinction to the word 'punitive'. To quote the words of Lord Finlay in *Rex* v. *Halliday* (2), it is not a punitive but a precautionary measure'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence.
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> The detention of a man even as a precautionary measure certainly deprives him of his personal liberty, and as Article 21 guarantees

(1) 1950 S. C. R. 88.
(2) 1917 A. C. 260 at p. 269.

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to every man, be he a citizen or a foreigner, that he shall not be deprived of his life and personal liberty, except in accordance with the procedure established by law, the requirements of Article 21 would certainly have to be complied with, to make preventive detention valid in law * * * "

It may perhaps be accepted that externment or banishment is something akin to preventive detention. It is a precautionary measure; its object is not to punish but to prevent; it is not imposed on criminal conviction; its justification is suspicion or reasonable probability. The fact remains, however, that externment or banishment is not detention. Detention means that the person detained is at liberty to go nowhere. A person externed from Delhi may go anywhere he likes in the rest of India. It is true that the proviso set out above to clause (2) of section 5 of the Goondas Act is not an absolute bar to the person arrested under the Act being represented by a legal practitioner of his choice. But so far as this proviso makes such representation a matter of discretion with the advising Judges, this proviso must be held to infringe the fundamental right given by Article 22(1) of the Constitution, and in my opinion this infringement is not saved by clause (3) of that Article.

Apart from this, Article 22(1) gives the right to a person arrested "to be defended by" a legal practitioner of his choice, and it was urged by Mr Hardy for the applicant that the procedure of section 5 of the Goondas Act negatives the right of a person arrested to be defended in the manner in which "being defended" is generally understood and is therefore unreasonable. He points to the fact that the only right given by the section is of making a representation or personal explanation. The person proceeded against has no right to be present when witnesses are examined, he has no right to cross-examine them and he has no absolute right even to call witnesses of his own. All this, according to Mr Hardy, is a travesty of

the right to defend himself as the right is generally understood, and he claims, employing a phrase frequently used, that it is contrary to natural justice.

I am prepared to accept that there is nothing sacrosanct in the procedure provided by the Code of Criminal Procedure. This Code has been amended from time to time and may well be amended in future. Absolute conformity with a procedure laid down in that Code in my opinion would not be essential to the right to be defended laid down in Article 22(1). There are, however, in the Code certain principles laying down the nature of the defence which is open to a person against whom criminal proceedings are being taken which have stood for a very long time and which may well be taken to furnish a general standard of reasonableness when the nature of the right of defence allowed in an impugned Act is to be considered. It is not out of place to consider that in the Code of Criminal Procedure itself certain preventive measures find place. I refer, of course, to the provision in Chapter VIII of that Code for requiring security for good behaviour in the case of habitual criminals, proceedings which in many parts of India are known as Badmash proceedings and might equally well be known as Goondas proceedings. In proceedings under Chapter VIII of the Code the person affected is not denied the right to cross-examine witnesses called against him and he is entitled as of right to call witnesses on his own behalf. The argument that a special and secret form of procedure in the manner laid down by section 5 of the impugned Act is necessary in Delhi is not impressive. The reluctance of witnesses to come forward and testify against *badmashes* in my experience is more marked in rural than in urban areas, and the possibility of reprisals against witnesses is also more likely in rural than in urban areas. When therefore, in a general procedure against persons of the character of *goondas* the Legislature has laid down the mode of defence to be that which is open to a person charged with a criminal offence, substantial

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ground must be shown for drastic departure from this mode of defence in particular cases or areas. I can find no reason to justify the exceptional procedure laid down by section 5 of the impugned Act for the State of Delhi. In my opinion the procedure cannot be justified on the basis of reasonableness, and clause (5) of Article 19 of the Constitution cannot be brought in aid of the procedural nature of the impugned Act. This, I think, is enough to dispose of the case before us, for if section 5 is to be omitted the whole Act must fail. Section 6 which provides for the order of removal becomes inoperative for no order of removal could be made under that section.

In this view of the matter it is not necessary to consider whether the maximum period of externment from Delhi contemplated by the Act, namely five years in the case of what I may call a resident of Delhi and life in other cases are in themselves reasonable periods.

I would hold, therefore, that the United Provinces Goondas Act, 1932, as modified and extended to the State of Delhi is *ultra vires* of the Constitution, being in violation, of the fundamental rights set out in Article 19(1) clauses (d) and (e), and not being saved by clause (5) of that same Article. I would, therefore, make the rule absolute in these matters and issue directions cancelling the bail bonds of Rawel Singh and directing that no further action be taken against him under the impugned Act.

KAPUR, J. I agree.