Additional Secretary to the Government of India and Others

Vs

Smt Alka Subhash Gadia and Another

Criminal Appeal Nos. 440-441 of 1989

(A.M. Ahmadi, P.B. Sawant, S.C. Agarwal JJ)

20.12.1990

JUDGMENT

SAWANT, J. –

1. These appeals are directed against the orders dated June 27 and June 30, 1989 passed by the Bombay High Court in Criminal Writ Petition No. 489 of 1989 and Criminal Application No. 1347 of 1989 respectively. An order of detention was passed on December 13, 1985 against respondent 1's husband, Subhash Chander Gadia under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as the "COFEPOSA"). He could not, however, be served with the said order as he was absconding. Hence a declaration was made that he was a person who fell within the category mentioned in Section 2(b) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as the "SAFEMA"). Thereafter, a notice dated March 31, 1987 was issued to him under sub-section (1) of Section 6 of the SAFEMA to show cause as to why the properties mentioned in the schedule to the said notice should not be forfeited to the Central Government for reasons recorded in the accompaniment. A copy of the notice along with the schedule of the properties and the copy of the reasons for forfeiture of the property was also sent to respondent 1 by letter of February 27, 1989.

2. Respondent 1 filed the aforesaid writ petition in the High Court challenging the detention order of December 13, 1985 as well as the show cause notice of March 31, 1987. The High Court by its impugned decision held that the writ petition was maintainable for challenging the detention order even though the detenu was not served with the order and he had thus not surrendered to the authorities. The High Court further directed that the detention order, the grounds of detention, and the documents relied upon for passing the detention order be furnished to the detenu and that they should also be produced before the court. The High Court also directed the authorities to supply the said documents to the counsel for respondent 1. The said order was passed on June 27, 1989 and the authorities were directed to furnish the documents to respondent 1 by 5.30 p.m. on June 29, 1989. Thereafter, the matter was directed to stand over till July 3, 1989 to enable respondent 1 to consider whether any amendment to the writ petition was required. The Court also directed that the matter be posted for further direction on June 30, 1989.

3. The Assistant Director of Enforcement filed an affidavit on June 29, 1989 stating that under Article 22(5) of the Constitution, the grounds of detention have to be given to the person when he is detained. Since even the constitutional mandate did not go further than that, the detaining authority could not be compelled to furnish the documents to anybody else other than the detenu after he is detained. The authority also showed its willingness to produce the documents for the perusal of the High Court without showing them first to respondent 1.

4. The matter came up before the learned Judges on June 30, 1989. The learned Judges found that no application was made for any extension in time to carry out the orders of the Court nor was any statement made that it was difficult to comply with the order. The learned Judges, therefore, held that the officers were guilty of contempt of court and directed the matter to be listed on July 3, 1989 to take appropriate action for contempt of court. It is at that stage that the special leave petitions giving rise to the present appeals were filed before this Court. This Court issued notice on the special leave petitions and granted stay of the High Court's direction, pending the notice. By another order of July 21, 1989, this court admitted the special leave petitions and directed the appeals to be listed in the last week of August 1989. By their order of April 5, 1990, the two learned Judges of this Court directed that since the appeals involved questions of great public interest and importance, they should be referred to a bench of three Judges. That is how the matter has come before us.

5. The neat question of law that falls for consideration is whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it. As a corollary to this question, the incidental question that has to be answered is whether the detenu or the petitioner on his behalf, as the case may be, is entitled to the detention order and the grounds on which the detention order is made before the detenu submits to the order.

6. These questions may arise for consideration also when an order forfeiting the property as a consequence of the detention order as in the present case, is passed, and when the detention order is incidentally challenged to question the validity of the order of forfeiture of the property.

7. The questions have assumed much importance because relying upon some judgments of this Court and of some of the High Courts, writ petitions are filed as a matter of course to challenge the detention orders and to obtain interim reliefs restraining the authorities from enforcing them without surrendering to them, thus frustrating the orders and defeating he very purpose of the detention law. According to the learned Additional Solicitor-General appearing for the appellant-detaining authority, the number of such petitions has grown in volume recently and when, as in the present case, the authorities insist on the detenus first submitting to the order they are faced with the contempt action. It has, therefore, become necessary to review the law on the subject.

8. In order to answer the questions set out above, it is necessary to examine the relevant provisions of the Constitution which permit preventive detention of an individual. After the decision of this Court in Rustom Cavasjee Cooper v. Union of India [(1970) 1 SCC 248 : (1970) 3 SCR 530 : AIR 1970 SC 564] which is otherwise known as the Bank Nationalisation case and in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : (1978) 2 SCR 621 : air 1978 sc 597], it is now well settled (if ever there was any doubt) that the fundamental rights under Chapter III of the Constitution are to be read as a part of an integrated scheme. They are not exclusive of each other but operate, and are, subject to each other. The action complained of must satisfy the tests of all the said rights so far as they are applicable to individual cases. It is not enough, that it satisfies the requirements of any one of them. In particular, it is well settled that Article 22(5) is not the sole repository of the detenu's rights. His rights are also governed by the other fundamental rights particularly those enshrined in Articles 14, 19 and 21. Article 14 guarantees to all persons equality before the law and equal protection of the laws. Articles 19, 20 21 and 22 are grouped under the broad heading "Right of Freedom". Article 19 is breached if any citizen is deprived whether, temporarily or permanently, of any of the rights which are mentioned therein. Although Article 19 confers freedoms mentioned therein only on citizens, neither Article 14 nor Articles 20, 21 and 22 are confined to the protection of freedoms of citizens only. They extend the relevant freedoms even to non-citizens. The freedoms given to the citizen by Article 19 are, as if, further sought to be guaranteed by Articles 20, 21 and

22 in particular. Hence while examining action resulting in the deprivation of the liberty of any person, the limitations on such action imposed by the other fundamental rights where and to the extent applicable have to be borne in mind.

9. We are not concerned in the present case directly with Article 20 but with Articles 21 and 22. Article 21 has two parts. The first part states that no person shall be deprived of his life or personal liberty. The second part enacts an exception to the first part by stating that if a person is to be deprived of his life and liberty, it will be done strictly according to procedure established by law. By "law" or by "procedure" is of course, meant validly enacted law and procedure. There are many facets of Article 21 but their discussions need not detain us here. The permission given to the State by Article 21 to deprive a person of his liberty according to procedure established by law is expressly controlled by Article 22 in cases both of punitive and preventive detention. In case of detention other than preventive detention, the provisions of its sub-clauses (1) and (2) apply whereas in case of preventive detention, the provisions of its sub-clauses (4) to (7) come into play. Sub-clause (1) states that when a person is arrested, he shall be informed, as soon as may be, of the grounds of his arrest and that he shall be given the right to consult and be defended by a legal practitioner of his choice. The second safeguard provided for the person is that he shall be produced before the nearest magistrate within a period of 24 hours of his arrest. These two safeguards are not available to a person who for the time being is an enemy alien or who is arrested or detained under a preventive detention law. Needless to say that even this arrest and detention has to be according to a valid procedure established by a valid law.

10. As regards the person who is detained under preventive detention law, as stated above, it is the safeguards contained in sub-clauses (4) to (7) of Article 22 which are an exception to sub-clauses (1) and (2) thereof, which come into play. Sub-clause (4) states that the preventive detention law shall not provide for the detention of a person for a period longer than three months without his having to be produced before the magistrate as is the requirement of sub-clause (2). However, if he is to be detained beyond the period of three months, it can be done so, only if the Advisory Board mentioned therein reports before the said period of three months, that there is, in its opinion, sufficient cause for such detention. If further states that even if the Advisory Board so reports, the person cannot be detained beyond the maximum period prescribed in the laws of detention. The sub-clause also lays down that the law of detention must be a law passed by the Parliament laying down both (a) the maximum period for which a person may be detained without obtaining the opinion of the Advisory Board, (b) the maximum total period for which a person may be detained preventively and (c) the procedure to be followed by the Advisory Board in an inquiry before it. If the law so enacted provides for detention of a person for longer than three months without obtaining the opinion of the Advisory Board then the law must further specify both the circumstances under which and the class or classes of cases in which the person may be so detained preventively.

11. The provisions of Articles 21 and 22 read together, therefore, make it clear that a person can be deprived of his life or personal liberty according to procedure established by law, and if the law made for the purpose is valid, the person who is deprived of his life or liberty has to challenge his arrest or detention, as the case may be, according to the provisions of the law under which he is arrested or detained. This proposition is valid both for punitive and preventive detention. The difference between them is made by the limitations placed by sub-clauses (1) and (2) on the one hand and sub-clauses (4) to (7) on the other of Article 22, to which we have already referred above. What is necessary to remember for our purpose is that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it, are valid.

12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention - punitive or preventive - is shown to have been made under the law so made for the purpose. This is to point out the limitations which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decisions have evolved them over a period of years taking into consideration other nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order or decision complained of, the need to balance the rights and interest of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought etc. To illustrate these limitations : (i) in the exercise of their discretionary jurisdiction the High Court and the Supreme court do not, as courts of appeal or revision, correct mere errors of law or of facts; (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to the by-passed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which, the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice or any constitutional provision; (v) the Court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the action is taken is not the person against whom the order is directed; or (b) where the authority has exceeded its powers or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose; (vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merits and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief; (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material which the authority properly could not, or by omitting to consider matter which it ought to have, the Court interferes with the resultant order; (viii) In proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded.

13. These limitations are not only equally observed by the High Court and the Supreme Court while exercising their writ jurisdiction in preventive detention matters, but in view of the object for which the detention law is enacted and is permitted by the Constitution to be enacted, the courts are more circumspect in observing them while exercising their said extraordinary equitable and discretionary

power in these cases. While explaining the nature of the detention law and of the orders passed under it and the scope of the powers of the Court in these matters, this Court has often emphasised the distinction between the existence of its wide powers and the propriety and desirability of using them.

14. In the Keshav Singh, Re [(1965) 1 SCR 413 : AIR 1965 SC 745] which arose out of the dispute as to the constitutional relationship between the High Court and the Uttar Pradesh State legislature, this Court pointed out that when a citizen moves the Court and complains that his fundamental right under Article 21 is contravened, it would plainly be the duty of the Court to examine the merits of the said contention and that inevitably raises the question as to whether the personal liberty of the citizen has been taken away according to the procedure established by law. The Court held that the power of the High Court under Article 226 and the authority of this Court under Article 32 are not subject to any exceptions. Therefore, it cannot be contended that a citizen cannot move the High Court or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights.

15. In Dwarkanath, Hindu Undivided Family v. ITO [(1965) 3 SCR 536 : AIR 1966 SC 81 : 57 ITR 349] while dealing with the nature and scope of power under Article 226, this Court observed that though the High Court under that article has a wide power to reach injustice wherever it is found, it does not mean that the High Court can function arbitrarily under it. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels.

16. State of Bihar v. Rambalak Singh "Balak" [AIR 1966 SC 1441 : (1996) 3 SCR 344 : 1966 Cri LJ 1076] was a case dealing with the question whether the High Court had under Article 226 jurisdiction to release a detenu on bail pending the final disposal of the petition. There detenu in that case was detained under Rule 30 of the Defence of India Rules. The Court observed that if on proof of certain conditions or grounds it is open to the High Court to set aside the order of detention and direct the release of the detenu, it would not be possible to hold that in a proper case, the High Court had no jurisdiction to make an interim order giving the detenu the relief which the High Court would be entitled to give him to the end of the proceeding. The Court referred to is earlier decision in Keshav Singh, Re [(1965) 1 SCR 413 : AIR 1965 SC 745] and pointed out that the general principle on which the observations of this Court were based in that case would apply as much to the habeas corpus proceedings commenced on behalf of the detenu detained under Rule 30 of the Defence of India Rules as to any other habeas corpus proceeding. According to the court, the interim relief which can be granted in habeas corpus proceeding must no doubt be in aid of and auxiliary to the main relief. The Court added that it is true that in dealing with the question as to whether interim bail should be granted to the detenu, the court would naturally take into account the special objects which are desired to be achieved by orders of detention passed under Rule 30 but, stated the Court, "We are dealing with the bare question of jurisdiction and are not concerned with the propriety or the reasonableness of any given order. Considering the question as a bare question of jurisdiction, we are reluctant to hold that the jurisdiction of the High Court to pass interim auxiliary orders under Article 226 of the Constitution can be said to have been taken away by necessary implication when the High Court is dealing with habeas corpus petitions in relation to orders of detention passed under Rule 30 of the Rules". The Court then dealt with the contention that the order of bail in detention proceedings would not be interim, but would be final and, therefore, that fact distinguished cases of preventive detention under detention law from other cases of habeas corpus petitions. Negativing the said contention the Court held : (SCR pp. 349-351)

"(9) This argument also is not well founded. It is obvious that when the High Court releases a detenu on bail pending the final disposal of his habeas corpus petition, the High Court will no doubt taken all the relevant facts into account and it is only if and when the High Court is satisfied that prima facie, there is something patently illegal in the order of detention that an order for bail would be passed. The jurisdiction of the High Court to pass an interim order does not depend upon the nature of the order, but upon its authority to give interim relief to a party which is auxiliary to the main relief to which the party would be entitled if it succeeds in its petition. Therefore, considered as a mere proposition of law, we see no reason to accept the argument of the learned Advocate-General that the principle enunciated by this Court in the Special Reference [(1965) 1 SCR 413 : AIR 1965 SC 745] has no application to habeas corpus petitions filed under Article 226 in relation to orders of detention passed under Rule 30 of the Rules.

(10) Having thus rejected the main argument urged by the learned Advocate-General we must hasten to emphasise the fact that though we have no hesitation in affirming the jurisdiction of the High Court in granting interim relief by way of bail to a detenu who has been detained under Rule 30 of the Rules, there are certain inexorable considerations which are relevant to proceedings of this character and which inevitably circumscribe the exercise of the jurisdiction of the High Court to pass interim orders granting bail to the detenu. There is no doubt that the facts on which the subjective satisfaction of the detaining authority is based, are not justiciable, and so, it is not open to the High Court to enquire whether the impugned order of detention is justified on facts or not. The jurisdiction of the high Court to grant relief to the detenu in such proceedings is very narrow and very limited. That being so, if the High Court takes the view that prima facie the allegations made in the writ petition disclose a serious defect in the order of detention which would justify the release of the detenu, the wiser and the more sensible and reasonable course to adopt would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay. Take the case where mala fides are alleged in respect of an order of detention. It is difficult, if not impossible, for the Court to come to any conclusion, even prima facie, about the mala fide alleged, unless a return is filed by the State. Just as it is not unlikely that the High Courts may come across cases where orders of detention are passed mala fide, it is also not unlikely that allegations of mala fides are made light heartedly or without justification; and so, judicial approach necessarily postulates that no conclusion can be reached, even prima facie, as to mala fides unless the State is given a chance to file its return and state its case in respect of the said allegations, and this emphasises the fact that even in regard to a challenge to the validity of an order of detention on the ground that it is passed mala fide, it would not be safe, sound or reasonable to make an interim order on the prima facie provisional conclusion that there may be some substance in the allegations of mala fides. What is true about mala fides is equally true about other infirmities on which an order of detention may be challenged by the detenu. That is why the limitation on the jurisdiction of the Court to grant relief to the detenus who have been detained under Rule 30 of the Rules, inevitably introduces a corresponding limitation on the power of the Court to grant interim bail.

(11) In dealing with writ petitions of this character, the Court has naturally to bear in mind the object which is intended to be served by the orders of detention. It is no

doubt true that a detenu is detained without a trial; and so, the courts would inevitably be anxious to protect the individual liberty of the citizen on grounds which are justiciable and within the limits of their jurisdiction. But in upholding the claim for individual liberty within the limits permitted by law, it would be unwise to ignore the object which the orders of detention are intended to serve. An unwise decision granting bail to a detenu in such proceedings. We are free to confess that we have not come across cases where bail has been granted in habeas corpus proceedings directed against orders of detention under Rule 30 of the Rules, and we apprehend that the reluctance of the courts to pass orders of bail in such proceedings is obviously based on the fact that they are fully conscious of the difficulties - legal and constitutional, and of the other risks involved in making such orders. Attempts are always made by the courts to deal with such applications expeditiously; and in actual practice, it would be very difficult to come across a case where without a full enquiry and trial of the grounds on which the order of detention is challenged by the detenu, it would be reasonably possible or permissible to the Court to grant bail on prima facie conclusion reached by it at an earlier stage of the proceedings.

(12) If an order of bail is made by the Court without a full trial of the issues involved merely on prima facie opinion formed by the High Court, the said order would be open to the challenge that it is the result of improper exercise of jurisdiction. It is essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. Improper exercise of jurisdiction in such matters must necessarily be avoided by the courts in dealing with applications of this character. Therefore, on the point raised by the learned Advocate-General in the present appeal, our conclusion is that in dealing with habeas corpus petitions under Article 226 of the Constitution where orders of detention passed under Rule 30 of the Rules are challenged, the High Court has jurisdiction to grant bail, but the exercise of the said jurisdiction is inevitably circumscribed by the considerations which are special to such proceedings and which have relevance to the object which is intended to be served by orders of detention properly and validly passed under the said Rules."

17. Explaining the nature of preventive detention, this Court in Khudiram Das v. State of W.B. stated as follows : (SCC pp. 90-91, para 8)

"..... The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that person should be prevented from doing something which, if left free and unfettered it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.... This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of clause (1) of sub-section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially

> matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety of sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power."

18. The court thereafter spelt out some of the circumstances under which the detention order though passed on the basis of subjective satisfaction can be challenged. We have referred to those circumstances in paragraph 12(vii) above.

19. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi [(1981) 1 SCC 608 : 1981 SCC (Cri) 212] while dealing with the detention law, this Court held that the law of preventive detention has to pass the test not only of Article 22 but also of Article 21. Having regard to the distinctive character of preventive detention as apart from punitive detention, the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal. Any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily would be within the inhibition of Article 21. So also every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

20. In Poonam Lata (Smt) v. M.L. Wadhawan [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : (1987) 2 SCR 1123] this Court held that the period for which the detenu is on parole is liable to be excluded from the total period for which the detenu is detained. Parole brings the detenu out of confinement from the place and the detention as contemplated by the act is interrupted until the detenu is put back into custody. The running of the period recommences then and the total period of one year has to be counted by putting the different periods of actual detention together. The Court further held that whether it be under Article 226 or 32 of the Constitution, the Court has no jurisdiction either under the Act or under the general principles or law or in exercise of its extraordinary jurisdiction to deal with the duration of the period of detention either by abridging or enlarging it. The only power that is available to it is to quash the order in case it is found to be illegal. It would not, therefore, be open to the Court to reduce the period of detention by admitting the detenu on parole.

21. In the latest decision of two learned Judges of this Court reported in S.M.D. Kiran Pasha v. Government of A.P. [(1990) 1 SCC 328 : 1990 SCC (Cri) 110 : JT (1989) 4 SC 366], the facts were that the appellant sensing a move to detain him under the provisions of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, filed a writ petition in the Andhra Pradesh High

Court alleging that the successive actions initiated against him were a part of a political vendetta. The learned Single Judge made an interim direction to the respondent authorities not to take the appellant into preventive custody for a period of 15 days on the basis of the cases which were already registered against him. This order was made on June 6, 1988. It, however, appears that on June 10, 1988 the appellant was served with the detention order dated June 3, 1988 as well as the grounds of detention, and was taken into custody and detained in Secunderabad Jail but was released after four days. The grounds of detention ranged the period from November 23, 1974 to May 7, 1988. On June 25, 1988, the appellant filed a miscellaneous application in his writ petition stating, inter alia, that although the interim direction was issued in his writ petition, the detention order dated June 3, 1988 was served on him on June 10, 1988 and assailed therein the grounds of detention as vague, stale etc. and prayed for a declaration that the detention order was illegal. No specific order was passed on this miscellaneous application. The learned Single Judge referred the matter to the Division Bench, and the bench dismissed the writ petition observing that as an order of detention was made even before the writ petition was filed, the prayer in the writ petition had become infructuous and there were no extraordinary or special reasons to depart from the normal rule, namely, that in such cases the detenu should first surrender and move for a writ of habeas corpus. Setting aside this order of the Division bench of the High Court, this Court held that the writ petition was maintainable even though the detenu had not submitted to the order of detention. It is not necessary to refer to this decision on the merits of the detention order.

22. On behalf of the respondents our attention was also invited to three orders of this Court. The first order is of April 7, 1986 passed in Criminal Miscellaneous Petition No. 899 of 1986 in Criminal Writ Petition No. 1584 of 1985. By this order this Court held that since the period for which the order of detention was made had expired, the order could no longer be enforced. In this case, earlier while admitting the writ petition challenging the detention order, the Court had restrained the respondent-District Magistrate from arresting the petitioner. In Writ Petition No. 526 of 1986, on September 16, 1986, this Court had directed that the petitioner should not be arrested until further orders. In Writ Petition No. 3380 of 1982, similarly, on January 7, 1983 this Court had directed that the petitioner should not be arrested under the detention order subject to the petitioner executing a personal bond in the sum of Rs 25,000 and also surrendering his passport to the Registrar of this Court within 24 hours. The contention on behalf of the respondents on the basis of these three orders was that they show that this Court had in fact interfered with the detention orders before the detenus had submitted to them.

23. We may now refer to the decision of various High Courts on this point. The first of these cases is an unreported decision dated July 8, 1980 of a division Bench of the Bombay High Court in Special Civil Application No. 2752 of 1975 with Criminal Revision Application No. 23 of 1980, the which one of us (Sawant, J.) was a party. In that case one of the preliminary contentions was that the writ petition was not maintainable since it was premature inasmuch as the detention order had not yet been served on the petitioner and he was not arrested under the same. Dealing with this contention, the High Court there held that a detention order is executable the moment it is passed. Hence, a person who is likely to be affected by such order has a right to approach the Court the moment he learns about it since he is sought to be deprived of his liberty by the said order. It may happen that an order is passed without there being a statute to support it or without complying with the provisions of the statute, if any. The order may also be passed against a wrong person or for a wrong purpose. To insist in such cases that the person against whom the order is passed must first submit to the same and lose his valuable liberty before approaching the Court is, according to the Court, to insist upon an unreasonable condition. The Court further held that the fundamental rights granted by the Constitution particularly by Articles 14, 19 and 21 conferred on the person likely to

be affected by such order an implicit right to approach the Court at any time and the Court cannot refuse relief to such person by insisting that he first surrender his liberty. To the same effect are the views expressed by the High Courts in other cases later, viz., Jayantilal Bhagwandas Shah v. State of Maharashtra [(1981) Cri LJ 767 : (1981) 83 Bom LR 190 : 1981 Mah LJ 487] decided by Bombay High Court; Sh. Abdul Aziz Mohammad v. Union of India [1984 Cri LJ 1307 : 1984 Raj LR 298]; Omar Ahmed Ebrahim Noormani v. Union of India [1984 Cri LJ 1915 : (1984) 2 Crimes 528] both decided by Delhi High Court; Yogesh Shantilal Choksi v. Home Secretary, Government of Kerala [1983 Cri LJ 393 : ILR (1982) 2 Ker 277] decided by Kerala High Court and Simmi v. State of U.P. [1985 All LJ 598 : (1985) 2 All Cri LR 589] decided by Allahabad High Court.

24. It is also necessary to remember in this connection that judicial review of legislation or of any order passed by the administrative authorities is a part of the basic structure of the Constitution as is held in Minerva Mills Ltd. v. Union of India [(1980) 3 SCC 625 : (1981) 1 SCR 206] and hence no order passed under any law including of preventive detention is above judicial scrutiny. The same view is reiterated in S.P. Sampath Kumar v. Union of India [(1987) 1 SCC 124 : (1987) 2 ATC 82] and P. Sambamurthy v. State of A.P. [(1987) 1 SCC 362 : (1987) 2 ATC 502]. But the Court has also stated in these cases that the Parliament can certainly, without in any way violating the basic structure of the Constitution, set up an alternative institutional mechanism or authority for judicial review, if necessary, even by amending the relevant provisions of the Constitution.

25. It is against the background of this position in law that we have to examine the contentions raised on behalf of the parties before us. It was contended by Shri Sibal, learned Additional Solicitor-General, on behalf of the appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down by it. In this respect, there is no distinction between the orders passed under the detention law and those passed under other laws. Hence, the High Court under Article 226 and this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass the machinery provided by the law. In this connection, it was emphasised by him that unlike the order passed under other laws, the detention order if stayed or not allowed to be executed, will be frustrated and the very object of the detention law would be defeated. He, therefore, urged that the detention order should in no case be allowed to be challenged before it is executed and the detenu is taken in custody. Secondly, it was submitted by him that the detention jurisdiction being essentially a suspicion jurisdiction, the concept of complete justice is alien to detention law. The liberty guaranteed by Article 21 of the Constitution is subject to the provisions of Article 22 and, therefore, in a detention matter the provisions of the two articles cannot be separated. So long as the detention law is intra vires the Constitution and it states that the detenu shall be informed of the grounds of his detention only after he loses his liberty, the detenu cannot, by resort to Article 226, bypass the provisions of that law or invite the High Court to do so and secure the grounds before submitting to the order. Thirdly, it was urged that the detention law in question has not taken away the judicial review of the order passed under it. It is only the stage at which the order should be reviewed which is by implication postponed and the courts have done so by a self-regulated procedure consistent with the object of the law. The judicial review under the detention law has to be post-decisional firstly because it makes no distinction between a citizen and a non-citizen and secondly it is enacted to confer emergent or police powers on the State which are necessary to safeguard the interests of the general public, public order and security of the State. It was also contended in this behalf that the law by itself does not place any restriction on the writ jurisdiction of the Court. The restriction exercised by the Court is of its own making and such an internal restraint is not inconsistent with the basic structure of the Constitution.

26. As against this Shri Jain, appearing for the respondent contended, firstly, that Article 22 is an additional protection of liberty which is guaranteed by Articles 14, 19 and 21 of the Constitution. An individual has an absolute right to liberty and, therefore, the burden is on the State to satisfy that the deprivation of the liberty is necessary in the interests of the general public, security of the State, public order etc. before apprising him of the grounds of his arrest. His second contention which was the extension of the first, was that since the State has to satisfy that the deprivation of the liberty of the person is so necessary, it must place all its cards before the Court before his arrest, particularly when he approaches the Court making a grievance against the order. In this connection, he contended that the extent of the right to life and liberty under Article 21 of the Constitution has been expanded by this Court to include not only the right to live but also the right to live with dignity, and it is affected the moment the person loses his liberty before knowing the reasons for the same or having an opportunity to challenge them. This is particularly so when the facts on the basis of which the arrest is sought to be made are within the exclusive knowledge of the State. The third contention was that, as has been held by this Court, a person can be deprived of his life and liberty only under a valid law which lays down a fair procedure for deprivation of the liberty of the individual. The State cannot be said to have adopted a fair procedure for arrest of a person when it refuses to disclose the facts on the basis of which it proposes to arrest him. His last contention was that judicial review being a part of the basic structure of the Constitution the power of the High Court under Article 226 of the Constitution cannot be circumscribed in any way by any law including detention law. The detention order, therefore, can be challenged at any stage, and the artificial distinction between pre-decisional and post-decisional challenge is inconsistent with and alien to the wide powers conferred under Articles 226 and 32 of the Constitution.

27. The preventive detention law by its very nature has always posed a challenge before the courts in a democratic society such as ours to reconcile the liberty of the individual with the allegedly threatened interests of the society and the security of the State particularly during times of peace. It is as much a deprivation of liberty of an individual as the punitive detention. Worse still, unlike the latter, it is resorted to prevent the possible misconduct in future, though the prognosis of the conduct is based on the past record of the individual under our detention law as it exists is all the more aggravated because the authority entrusted with the power to detain is not directly accountable to the legislature and the people.

28. It is to prevent the possible abuse of this draconian measure that the legislature has taken care to provide certain salutary safeguards such as (i) the obligation to furnish to the detenu the grounds of detention ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention, (ii) the right to make representation against the order of detention, (iii) the constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court, (iv) the reference of the case of the detenu to the Advisory Bard within five weeks of the date of detention, (v) the hearing of the detenu by the Advisory Board in person and the submission by the board of its report to the government within 11 weeks from the date of detention, (vi) the obligation of the government to revoke the detention order if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the person concerned, (vii) the provision of the maximum period for which a person can be detained and (viii) revocation of the detention order by the government on the representation of the detenu in independently of the recommendation of the Advisory Board, etc. In addition, the detenu or anyone on his behalf has a right to move the High Court and the Supreme Court by way of a habeas corpus petition challenging the detention on various grounds which are already pointed out above while discussing the various authorities. It must further be appreciated that the validity of the Act in question being permitted to be enacted by

the Constitution, has also been upheld by this Court with all its present provisions as they stand. Howsoever, repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peacetime has been incorporated in the Constitution by the framers of the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one's own notions about the dimensions of individual liberty, one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution-makers. We must also not lose sight of the fact that over the years, by and large, the judiciary has interpreted the Act and the orders made thereunder strictly so as to give to the detenu the benefit of every unexplained error of omission and commission and has either struck down the order itself or has held its further operation illegal.

29. The whole thrust of the first three contentions advanced by Shri Jain for the respondent is not only directed against the impugned order but also against the provisions of the Act and the Constitution. His contention that since the individual has an absolute right to liberty, the burden is on the State to satisfy that it is necessary to deprive the individual of his liberty before apprising him of the grounds of his detention, is clearly against the relevant provisions of Article 22 of the Constitution. The right to liberty protected by Article 21 has been limited by Article 22 which permits arrest for punitive and preventive detention, provided the safeguards mentioned therein are observed. The provisions of Article 22(3)(b) permit the arrest or detention of a person under any law providing for preventive detention without complying with the provisions of sub-clauses (1) and (2) of Article 22 which require that no person who is arrested shall be detained in custody, among other things, without being informed "as soon as may be" of the grounds of such arrest and that he shall not be denied the right to consult and to be defended by a legal practitioner. He shall also be required to be produced before the nearest magistrate within twenty-four hours of his arrest. Although sub-clause (5) of Article 22 also requires that the person detained under a preventive detention law would be communicated the grounds of his detention "as soon as may be", it also does not specify the maximum period within which the grounds are to be so communicated. In other words, the provisions of the Constitution permit the legislature to make a law under which a person may be arrested and detained without first communicating to him the grounds of his arrest. The provisions of Section 3(3) of the present Act which are made for the purpose of Article 22(5) of the Constitution provide that ordinarily the grounds of arrest shall be communicated within the maximum period of 5 days, and in exceptional circumstances and for reasons to be recorded in writing they shall be communicated within a period of 15 days from the date of the detention. These provisions of the Act have not been faulted on any account. In the face, therefore, of the clear provisions of the Constitution and of the valid Act, it is not open to contend that the provisions of Articles 14, 19 and 21 of the Constitution prevent a person being deprived of his liberty without first apprising him of the grounds of his arrest. For this very reason, it is also not open to contend that since the State has all the facts in its possession which require the arrest and detention of the person, it must first disclose the said facts before depriving him of his liberty. Since the provisions of Article 22 of the Constitution pointed out above and of the Act made thereunder permit the State to arrest and detain a person without first disclosing the grounds, even though they are in its possession before or at the time of his arrest, this argument is not tenable in law. It must further be remembered that though the provisions of the Constitution and the law enacted for the purpose enable the State or its delegate the detaining authority to detain a person without first disclosing the grounds of detention they do not preclude them from serving the grounds of detention on the detenu long with the order of detention. In fact very often they do so. But Shri Jain's argument goes still further and requires that the order of detention and the grounds of detention should be served on the

proposed detenu in advance to enable him to challenge them in a court of law before submitting to the order. In advancing this contention, Shri Jain not only wants to secure to the proposed detenu the right to seek the judicial review of the detention order even before it is executed but also to enable him thereby to by-pass the procedure laid down by the law to challenge it after it is executed. To that extent this contention requires the court to go a step further and to do something more than what it does or would do while entertaining grievances against orders passed under other laws. The justification advanced to claim this superior right is that under the detention law what is infringed is the liberty of the individual and no individual should be required to surrender it without a prior right to challenge the order in question. As has been elaborately discussed above, however vital and sacred the liberty of the individual, for reasons which need not be discussed over again here, the responsible framers of the Constitution although fully conscious of its implications have made a provision for making a law which may deprive an individual of his liberty without first disclosing to him the grounds of such deprivation. It is not, therefore, possible for us to accept the three contentions.

30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not

passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any order ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

31. Lastly, it is always open for the detenu or anyone on his behalf to challenge the detention order by way of habeas corpus petition on any of the grounds available to him. It is not, therefore, correct to say that no judicial review of the detention order is available. In the view we are taking which applies also to the cases under other laws, the stage at which the judicial review is made by the Court only stands deferred till after the order is executed. A ground on which a detention order is challenged which requires investigation and cannot be adjudicated without hearing the other side and without proper material, has necessarily to await decision till the final hearing. In such cases the operation of the order of detention by its very nature cannot be stayed pending the final outcome. The only proper course in such cases is to hear the petition as expeditiously as possible.

32. This still leaves open the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can be challenged at its pre-execution stage on the limited grounds available. In view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make any provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the grounds thereof in advance. Secondly, when the order and the grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the courts, as pointed out earlier, have power even to grant bail to the detenu pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited grounds stated above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the courts have exercised their powers at the pre-execution stage, though such cases have been rare. This only emphasises the fact that the courts have powers to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well settled principles.

33. To the extent that the decision of this Court in S.M.D. Kiran Pasha v. Government of A.P. [(1990) 1 SCC 328 : 1990 SCC (Cri) 110 : JT (1989) 4 SC 366] and the decisions of all the High Courts are contrary to or inconsistent with the view taken by us above, they will be deemed to have been disapproved and overruled.

34. In the present case, admittedly the proposed detenu is absconding and has been evading the service of the detention order. Respondent 1 who is his wife has sought to challenge the said order

because the show-cause notice under sub-section (1) of Section 6 of the SAFEMA is issued to him, a copy of which is also sent to her. Thus the assistance of the High Court under Article 226 of the Constitution is sought by respondent 1 on behalf of the detenu to secure the order of detention with a view to defend the proceedings under the SAFEMA. In other words, the proposed detenu is trying to secure the order of detention indirectly without submitting to it. What is further, he is also trying to secure the grounds of detention as well as the documents supporting them which he cannot get unless he submits to the order of the detention. No prima facie case is made out either before the High Court or before us for challenging the order of detention which would impel the Court to interfere with it at this pre-execution stage. Unfortunately, the High Court disregarding the law on the subject and the long settled principles on which alone it can interfere with the detention order at this stage has directed the authorities not only to furnish to the detenu the order of detention but also the grounds of detention and the documents relied upon for passing the detention order. The relevant portion of the order passed by the High Court in that behalf on June 27, 1989 speaks for itself :

> "It is undoubtedly true that detailed grounds of challenge are already to be found in the CrWP. However, the returns filed are always not very satisfactory and in many cases we have found that only half truth is indicated in the return. It would, therefore, be undesirable to decide the challenge to the detention under the COFEPOSA Act merely on the basis of the affidavits. In our opinion, the challenge is required to be precisely formulated and has to be properly scrutinised. The formulation and the scrutiny require that the order and the grounds of detention and the supporting documents considered by the detaining authority be furnished to the detenu as well as produced before the Court.
>
> We have ascertained from the learned counsel representing respondents 1 to 3 that the orders and the grounds of detention as well as supporting documents are available with the department in Bombay. We accordingly direct that copies of the same will be prepared and one copy of the same will be furnished to the petitioner's advocate on record by 5.30 p.m. on Thursday, i.e., June 29, 1989. We propose to stand over the matter till Monday, July 3, 1989 to enable the petitioner to consider as to whether any amendment of the writ petition is required. If any amendments are sought, sufficient time will have to be given to the respondents to file their return, although we must express our amazement once again that in a writ petition admitted on May 22, 1989 and made returnable within 8 weeks instructions to file return have been belatedly given after 4 weeks and that too also without the main brief."

35. As has been pointed out at the outset, after this order, the appellants took the plea that although they were willing to produce the order of detention and the grounds of detention for the perusal of the Court, they cannot furnish them to respondent 1, unless, as required by the Act, the detenu first submits to the impugned order. The High Court thereupon issued the contempt notice by its order dated June 30, 1989. For the reasons discussed above, we are of the view that both the orders of the High Court directing the appellants to furnish to the detenu or to respondent 1 or her counsel the order of detention, the grounds of detention and the documents supporting them as well as the contempt notice of June 30, 1989 are clearly illegal and unjustified and they are hereby quashed. Both the appeals are accordingly allowed.

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