Subhash Popatlal Dave

v.

Union Of India & Anr

(Supreme Court Of India)

Writ Petition (Criminal) No. 137 Of 2011 With Writ Petition (Criminal) No. 35, 138, 142, 220 & 249 Of 2011 & Writ Petition (Criminal) No. 11 & 14 Of 2012 With S.L.P.(Crl.) No. 1909 & 1938 Of 2011 & S.L.P.(Crl.) No. 2442 & 2091-2092 Of 2012 | 10-07-2012

ALTAMAS KABIR, J.

1. These Special Leave Petitions and Writ Petitions are all directed against orders of preventive detention at the pre-execution stage. During the course of hearing, it was submitted on behalf of some of the Petitioners that the decision rendered in Addl. Secretary, Govt. of India vs. Alka Subhash Gadia [(1992) Supp. (1) SCC 496] that a preventive detention order could be challenged at the pre-execution stage on the five grounds enumerated in the judgment, was no longer good law on account of the subsequent enactment of the Right to Information Act, 2005, hereinafter referred to as the "R.T.I. Act", which came into force on 15th June, 2005. A connected question which was raised was whether the aforesaid decision in Alka Subhash Gadia's case (supra) was per incuriam, since it did not have the occasion to notice subsequent decisions on the same question. Another question which was raised was whether the five instances indicated in Alka Subhash Gadia's case (supra), under which a detention order could be challenged at the pre-execution stage, was exhaustive or whether they were only illustrative.

2. Since a decision on the points raised could effectively decide the matters without going into factual details, it was decided to decide the said questions as preliminary issues, before going into the matters on merit.

3. Appearing on behalf of some of the Petitioners, Mr. Mukul Rohatgi, learned Senior Advocate, urged that the five exceptions laid down in Alka Subhash Gadia's case (supra) were not exhaustive, but only illustrative, as was held by this Court in Deepak Bajaj vs. State of Maharashtra [(2008) 16 SCC 14]. Mr. Rohatgi submitted that it was well settled that the power of judicial review vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution, is part of the basic structure of the Constitution and it was inconceivable that such power of judicial review could be restricted by amending the Constitution or by a judicial pronouncement.

4. Mr. Rohatgi contended that since Article 32 was included in Part III of the Constitution and was in itself a fundamental right, the exercise of jurisdiction thereunder by this Court

could not be affected and/or restricted by the decision rendered in Alka Subhash Gadia's case (supra). Learned counsel urged that it was also inconceivable that by a judicial pronouncement, the jurisdiction of this Court to interfere with detention orders at a pre-execution stage only could be restricted to the five exceptions mentioned in Alka Subhash Gadia's case (supra) only, for all times to come.

5. Tracing the history of the powers exercised by this Court under Article 32 of the Constitution, Mr. Rohatgi firstly referred to the decision rendered by this Court in the case of Romesh Thappar vs. State of Madras [(1950) SCR 594], wherein it was observed that Article 32 provides a guaranteed remedy for the enforcement of the rights under Part III of the Constitution and this remedial right has itself been made a fundamental right by being included in Part III. Mr. Rohatgi then referred to the decision of this Court in D.A.V. College vs. State of Punjab [(1972) 2 SCC 269], wherein in paragraph 44, this Court observed that it was immaterial as to whether any fundamental right has been threatened or violated. So long as a prima facie case of such threat and violation was made out, a petition under Article 32 has to be entertained.

6. Various other judgments were also referred to by Mr. Rohatgi, of which it will be worthwhile to refer to the decision of this Court in Haradhan Saha vs. State of West Bengal [(1975) 3 SCC 198], Olga Tellis & Ors. vs. Bombay Municipal Corporation [(1985) 3 SCC 545] and K.K. Kochunni vs. State of Madras [(1959) Supp. (2) SCR 316]. All these judgments have held that judicial review of administrative action, even when fundamental rights are threatened, is permitted on grounds of relevance, reasonableness, necessity, delay, casualness and for infringement of Articles 14, 19 and 21. In fact, it was in K.K. Kochunni's case (supra) that it was observed by the Constitution Bench that the right to enforce a fundamental right conferred by the Constitution was itself a fundamental right guaranteed by Article 32 of the Constitution and this Court could not refuse to entertain a petition under that Article simply because the Petitioner had/might have any other alternative legal remedy. The said position was further reiterated by another Constitution Bench in Haradhan Saha's case (supra), while dealing with a case involving preventive detention. It was observed that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it again. It was also observed that there could be no parallel between prosecution in a Court of law and a detention order under the Act. While one is punitive, the other is preventive. Also referring to the decision of this Court in Francis Coralie Mullin vs. W.C. Khambra [(1980) 2 SCC 275], Mr. Rohatgi referred to the observations made in paragraph 5 of the judgment to the effect that the role of the Court in cases of preventive detention has to be one of eternal vigilance as no freedom is higher than personal freedom and no duty higher than to maintain it unimpaired. Furthermore, the Court's writ is the ultimate insurance against illegal detention and a detenu was, therefore, entitled to question the detention order even at the pre-execution stage, as was held in Alka Subhash Gadia's case (supra), on grounds other than those set out therein.

7. In support of his submission that circumstances had substantially changed on account of the advent of information technology, Mr. Rohatgi submitted that this Court had occasion to consider the challenge against orders of preventive detention on grounds outside those indicated in Alka Subhash Gadia's case (supra), wherein this Court had intervened and quashed the orders of detention on grounds, other than those indicated in Alka Subhash Gadia's case (supra).

8. In this connection, Mr. Rohatgi firstly referred to the decision of this Court in Rajinder Arora vs. Union of India [(2006) 4 SCC 796], wherein this Court had held that the delay in passing of a detention order, without any explanation for such delay, was sufficient ground to set aside the detention order made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Of course, it must be said that while quashing the detention order, Their Lordships related the facts of the said case with grounds 3 and 4 of the decision in Alka Subhash Gadia's case (supra). Reference was thereafter made by Mr. Rohatgi to a Three-Judge Bench decision of this Court, in which two of us (Altamas Kabir and J. Chelameswar, JJ) were parties, in the case of Yumman Ongbi Lembi Leima vs. State of Manipur [(2012) 2 SCC 176], in which the detention order was quashed, inter alia, on the ground that there was no proximate and live link between the activities of the detenu and the detention order. In the said matter, facts relating to the arrest of the detenu and subsequent release on bail more than 12 years before the offence in respect of which detention orders had been passed, were held to be irrelevant and/or improper for justification of an order of detention. Mr. Rohatgi pointed out that it was also held therein that mere apprehension that the detenu was likely to be released on bail, whereafter he would indulge in further prejudicial activities, was not sufficient to justify the detention order in the absence of any other ground.

9. The next decision referred to by Mr. Rohatgi was delivered by a Bench of three Judges of this Court in Rekha vs. State of Tamil Nadu [(2011) 5 SCC 244], wherein while disagreeing with some of the observations made in Haradhan Saha's case (supra), the Hon'ble Judges went on to hold that though in Haradhan Saha's case it had been held that the authorities could take recourse to both criminal proceedings and also preventive detention, it did not mean that such would be the law in all cases, even though in the view of the Court the criminal proceedings were sufficient to deal with the offences.

10. Having completed his submissions with regard to the exhaustive and/or illustrative nature of the five exceptions set out in Alka Subhash Gadia's case (supra), Mr. Rohatgi then turned his focus on the provisions of the R.T.I. Act under which, according to learned counsel, a detenu was entitled to receive a copy of the grounds of detention even though he had not been actually apprehended and detained pursuant to such detention order. Mr. Rohatgi submitted that in the cases of Choith Nanikram Harchandai and Suresh Hotwani, the grounds of detention had been provided to the detenu under the provisions of Section 3 of the aforesaid Act. Learned counsel submitted that the only prohibition to the grant of information has been set out in Section 8(h) and Section 24 of the said Act. Section 8(h) of the R.T.I. Act prohibits

the disclosure of information which could impede the process of investigation or the apprehension and prosecution of offenders. Mr. Rohatgi submitted that it is obvious that the said provisions were confined to persons who are offenders and not detenus under a preventive detention law, who could not under the detention order be said to be an offender. Mr. Rohatgi urged that the only other restriction was under Section 24, wherein certain security and intelligence agencies of the Government have been exempted from the provisions of the Act. Learned counsel urged that under the first proviso to Section 24, information relating to human rights cannot be denied to the person seeking information since human rights had been defined in Section 2(e) of the Protection of Human Rights Act as being rights relating to life, liberty, equality and dignity, guaranteed by the Constitution. Mr. Rohatgi contended that the illegal detention would also amount to violation of human rights.

11. Mr. Rohatgi submitted that the Right to Information Act was not in existence, when decisions were rendered by this Court in Alka Subhash Gadia's case (supra) as also in the case of Sayed Taher Bawamiya vs. Joint Secretary, Government of India [(2000) 8 SCC 630] and in the case of Union of India vs. Atam Prakash & Anr. [2009) 1 SCC 585], in which it was held that the grounds of challenge to a detention order at the pre-execution stage could only be confined to the five exceptions set out in Alka Subhash Gadia's case (supra).

12. Mr. Rohatgi submitted that having regard to the various circumstances which this Court had no occasion to consider in Alka Subhash Gadia's case (supra), it cannot be accepted that the challenge to preventive detention order at the pre-execution stage could not be made on any other ground other than the five exceptions mentioned in Alka Subhash Gadia's case (supra). Mr. Rohatgi urged that besides the above, the right of a detenu to information relating to the grounds of detention under Section 3 of the Right to Information Act, 2005, was also a circumstance which could not be taken into consideration by the Hon'ble Judges while deciding Alka Subhash Gadia's case (supra). Accordingly, in the changed circumstances, it cannot be held that apart from the five exceptions mentioned in Alka Subhash Gadia's case (supra), a detenu could not be denied the grounds of detention on the basis of which he was to be detained at the pre-execution stage.

13. In addition to the submissions made by Mr. Rohatgi, submissions were also advanced by Mr. Ravindra Keshavrao Adsure, Advocate, appearing for some of the Petitioners in these matters. In fact, Mr. Adsure is appearing in the lead matter, namely, Writ Petition (Crl.) No.137 of 2011, filed by Subhash Popatlal Dave, in which the detention order made against one Haresh Kalyandas Bhavsar on 18th August, 1997, was challenged. Mr. Adsure attempted to convince this Court that the decisions cited in Alka Subhash Gadia's case (supra) and Sayed Taher Bawamiya's case (supra), were per incuriam, since the Hon'ble Judges did not have the opportunity to consider the effects of the enactment of the Right to Information Act in 2005. Mr. Adsure made special mention of the Writ Petitions filed by Choith Nanikram Harchandai (Writ Petition (Crl) No.88 of 2010) and Suresh Hotwani & Anr. (Writ Petition (Crl) No.35 of 2011), wherein the detention orders and grounds had been provided under the R.T.I. Act, 2005, before the same were executed. Following the same line of arguments

advanced by Mr. Rohatgi, Mr. Adsure also laid stress on the observations made in Alka Subhash Gadia's case (supra) (paragraph 12) where other than the five exceptions ultimately culled out in paragraph 30 of the judgment, various other situations entertaining a petition for quashing of detention order have also been indicated. Mr. Adsure also referred to the decisions of this Court in (i) Alpesh Navinchandra Shah vs. State of Maharashtra [(2007) 2 SCC 777]; (ii) State of Maharashtra vs. Bhaurao Punjabrao Gawande [(2008) 3 SCC 613]; and (iii) Rekha vs. State of Tamil Nadu [(2011) 5 SCC 244], wherein the detention orders were set aside on the ground that the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to punish him for something done in the remote past. Mr. Adsure contended that the very concept of preventive detention is to prevent a person from indulging in activities which were prejudicial to the State and society. However, there would have to be a nexus between the detention order and the alleged offence in respect whereof he was to be detained and in the absence of a live link between the two, the detention order could not be defended.

14. On the same lines, Mr. Adsure referred to the decision in Rekha's case (supra), wherein this Court had held that when the ordinary criminal law of the land is able to deal with a situation, then recourse to preventive detention law will be illegal. Mr. Adsure urged that the orders of detention which violated the aforesaid principles could not, therefore, be sustained and could also be challenged at the pre-execution stage.

15. Appearing on behalf of the Union of India, learned Additional Solicitor General, Mr. P.P. Malhotra, contended in response to the first point raised, that the grounds for intervention at the pre-detention stage, as indicated in Alka Subhash Gadia's case (supra), are exhaustive and not illustrative, and had been so held in subsequent decisions of this Court, and in particular, the decision of a Three-Judge Bench in the case of Sayed Taher Bawamiya (supra). The learned ASG contended that in the said case it had also been sought to be argued that the exceptions in Alka Subhash Gadia's case (supra) were not exhaustive, but merely illustrative, but the Three-Judge Bench had rejected such contention upon holding that in Alka Subhash Gadia's case (supra), it is only in the five types of instances indicated, that the Courts may exercise its discretion and jurisdiction under Article 226 and 32 of the Constitution at the pre-execution stage. The learned ASG laid stress on the observations made in paragraph 7 of the judgment wherein the learned Judges had observed that in Alka Subhash Gadia's case (supra) it was only in the five types of instances that the Courts could exercise its discretion and jurisdiction at the pre-execution stage. Reference was also made to another Three-Judge Bench decision of this Court in Naresh Kumar Goyal vs. Union of India [(2005) 8 SCC 276], wherein it was, inter alia, observed that 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 other 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.

16. The learned ASG also referred to the decision of this Court in Union of India vs. Parasmal Rampuria [(1998) 8 SCC 402], wherein this Court directed the detenu to surrender

and thereafter to make a representation challenging the detention order, which could be examined on merits. The entire focus of the submissions made by the learned ASG was centered around the decision in Sayed Taher Bawamiya's case (supra) and he tried to make a distinction between the same and the decision in Deepak Bajaj's case (supra), which the learned ASG pointed out, was a decision of two Judges of this Court. Even with regard to the decision in Rajinder Arora's case (supra), the learned ASG pointed out that the decision was based on ground nos.3 and 4 of the decision in Alka Subhash Gadia's case (supra).

17. As to the decision in Rekha's case (supra), the learned ASG pointed out that this was not a case of pre-detention, but a criminal appeal in which the orders of detention had been challenged. The learned ASG submitted that since the challenge was not at the pre-execution stage, the judgment in Rekha's case was not relevant in deciding the issue involved in this case.

18. As to the other decisions cited on behalf of the Petitioners, such as in Romesh Thappar's case (supra) and in K.K. Kochunni's case (supra), the learned ASG submitted that the said decisions relate to the width and scope of Articles 19 and 21 of the Constitution and there was no challenge therein that the decision in Alka Subhash Gadia's case (supra) was erroneous.

19. On the second point relating to applicability of the R.T.I. Act, 2005, the learned ASG submitted that while the Preamble to the Act stipulates that it had been passed to promote transparency and accountability in the working of every public authority, certain restrictions had been imposed on divulging certain information as indicated in Section 8 of the Act. Referring to clause (a) of Section 8 of the aforesaid Act, the learned ASG submitted that it had been stipulated that notwithstanding anything contained in the Act, there would be no obligation to any citizen to give information, disclosure of which would prejudicially affect the economic interest of the State, relations with foreign States or such information which would impede the process of investigation or the apprehension or prosecution of offenders. The learned ASG also pointed out that there was no obligation to provide information which relates to personal information, the disclosure of which has no relationship to any public activity or interest. While referring to Section 24 of the Act, the learned ASG submitted that it guaranteed exemption to the agencies mentioned in the 2nd Schedule and the Central Economic Intelligence Bureau was one of them. Therefore, if a proposed detenu or his representative made an application for disclosure of grounds of detention, he would not be entitled to the same on the aforesaid grounds.

20. The learned ASG submitted that the decision rendered by the Bombay High Court in dismissing the Writ Petitions filed by Suresh Hotwani and Nitesh Ashok Sadarangani did not require any interference by this Court. The learned ASG lastly submitted that the provisions in the Constitution for detention are provided in Article 22 which sets out the provisions regarding protection against arrest and detention in certain cases. The learned ASG laid

special stress on clause (b) of sub-clause (3), which indicates that nothing in clauses (1) and (2) would apply to any person who is arrested or detained under any law providing for preventive detention. Regarding sub-clause (5) of the aforesaid Article, the learned ASG submitted that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order is under an obligation to communicate to such person the grounds on which the order has been made, as quickly as possible, in order to afford him the earliest opportunity of making a representation against such order. The learned ASG submitted that detention or arrest was a pre-condition for service of the grounds of detention and it is only after such detention or arrest that a detenu could ask for a copy of the grounds of detention. The learned ASG submitted that the constitutional provisions would have an overriding effect over the Right to Information Act, and, accordingly, the submissions made both by Mr. Rohtagi and Mr. Adsure with regard to the right of a detenu to ask for grounds of detention under the R.T.I. Act was without any substance and was liable to be rejected. The learned ASG submitted that both the grounds raised on behalf of the Petitioners, as preliminary grounds, were not valid and were liable to be rejected.

21. On the other question as to whether the R.T.I. Act applies in cases of preventive detention, we are unable to accept the submissions made by Mr. Rohatgi. Article 22 of the Constitution provides for protection against arrest and detention in certain cases. Clauses (1) and (2) of Article 22 set out the manner in which a person arrested is to be dealt with and clause (1) makes it clear that no person who is arrested is to be detained in custody without being informed, as soon as may be, of the grounds for such arrest. Clause (2) provides that such a person who is arrested and detained in custody has to be produced before a Magistrate within a period of 24 hours of such arrest. However, an exception is made by clause (3), which provides that nothing in clauses (1) and (2) shall apply, amongst others, to any person who is arrested or detained under any law providing for preventive detention. Clause (4) thereafter sets out that no law providing for preventive detention shall authorize such detention for more than three months without following the procedure subsequently set out. What is relevant for our consideration while deciding the above mentioned question is clause (5) of Article 22 which is extracted hereinbelow :-

"(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

22. It may immediately be noticed from the opening words of clause (5) that the grounds on which the person is detained is to be communicated to him when the person has actually been detained. (emphasis supplied) If one were to read clauses (1) to (6) of Article 22 as a whole, it is more than obvious that the scheme envisaged therein provides for the protection of a person arrested in connection with an offence by providing for his production before the

Magistrate within 24 hours of his arrest and also to avail the services of a lawyer, but an exception has been carved out in relation to detention effected under preventive detention laws. A detenu is not required to be treated in the same manner as a person arrested in connection with the commission of an alleged offence. On the other hand, preventive detention laws provide for the detention of a person with the intention of preventing him from committing similar offences in the future, at least for a period of one year. Section 3 of the R.T.I. Act, 2005, provides that subject to the provisions of the Act, all citizens would have the right to information. Section 8, however, makes an exemption from disclosure of information. While setting out the instances in which there would be no obligation to give any citizen information in the situations enumerated in Sub-Section (1), Sub-Section (2) provides that notwithstanding anything in the Official Secrets Act, 1923, nor any of the exemptions permissible in accordance with Sub-Section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. There are two instances, which one can think of among the exemptions identified in Sub-Section (1), of which one is the exemption indicated in clause (a) of Sub-Section (1), which reads as follows :-

"8(1). Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) to (i) xxx xxx xxx

j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

23. Even under Sub-Section (1) of Section 8 of the above Act, the legislature made an exception to the disclosure of information which could be contrary to the interests of the nation, subject to the provision that such information may also be allowed to be accessed in the public interest, which overweighed the personal interests of the citizen. Not much discourse is required with regard to the primacy of the provisions of the Constitution, vis-à-

vis the enactments of the legislature. It is also not necessary to emphasise the fact that the provisions of the Constitution will prevail over any enactment of the legislature, which itself is a creature of the Constitution. Since clause (5) of Article 22 provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the R.T.I. Act, 2005, cannot be applied to cases relating to preventive detention at the pre-execution stage. In other words, Section 3 of the R.T.I. Act has to give way to the provisions of Clause (5) of Article 22 of the Constitution. Even the provisions relating to production of an arrested or detained person, contained in clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law.

24. We, therefore, agree with the learned ASG, Mr. P.P. Malhotra, that notwithstanding the provisions of the R.T.I. Act, 2005, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention, notwithstanding the fact that in the cases of Choith Nanikram Harchandai and Suresh Hotwani & Anr., referred to hereinabove, the grounds of detention had been provided to the detenu under the R.T.I. Act, 2005, at the pre-execution stage. The procedure followed under the R.T.I. Act, in respect of the said writ petitions cannot and should not be treated as a precedent in regard to Mr. Rohatgi's contention that under the R.T.I. Act, 2005, a detenu was entitled, in assertion of his human rights, to receive the grounds under which he was to be detained, even before his detention, at the pre-execution stage.

25. As to the second point urged by Mr. Rohtagi as to whether the five exceptions mentioned in Alka Subhash Gadia's case (supra) regarding the right to challenge an order of detention at the pre-execution stage, were exhaustive or not, we are of the view that the matter requires consideration. The decision in Alka Subhash Gadia's case (supra), appears to suggest several things at the same time. The Three-Judge Bench, while considering the challenge to the detention order passed against the detenu, at the pre-execution stage, and upholding the contention that such challenge was maintainable, also sought to limit the scope of the circumstances in which such challenge could be made. However, before arriving at their final conclusion on the said point, the learned Judges also considered the provisions of Articles 19 to 22 relating to fundamental freedoms conferred on citizens and the proposition that the fundamental rights under Chapter III of the Constitution have to be read as a part of an integrated scheme. Their Lordships emphasized that they were not mutually exclusive, but operated, and were subject to each other. Their Lordships held that it was not enough that the detention order must satisfy the tests of all the said rights so far as they were applicable to individual cases. Their Lordships also emphasized in particular that it was 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 of the Constitution and the nature of constitutional rights thereunder. Their Lordships were of the view that read together the Articles indicate 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. Going on to consider

the various decisions rendered by this Court in this regard, Their Lordships in paragraph 5 observed as follows :-

"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."

26. It is in the aforesaid background that Their Lordships while examining the various decisions rendered on the subject, summed up the discussion in paragraph 30 of the judgment, wherein Their Lordships again reiterated that 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. Their Lordships observed that the powers under Article 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive action resulting in civil or criminal consequences. However, the said observations were, thereafter, somewhat whittled down by the subsequent observation that the Courts have over the years evolved certain self-restraints in exercising these powers. Such self-imposed restraints were not confined to the review of the orders passed under detention law only, but they extended to orders passed and decisions made under all laws. It was also observed that in pursuance of such self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person should 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 and that such jurisdiction by its very nature has to be used sparingly and in circumstances where no other efficacious remedy is available. However, having held as above, Their Lordships also observed that all the self- imposed restrictions in respect of detention orders would have to be respected as it would otherwise frustrate the very purpose for which such detention orders are passed for a limited purpose. Consequently, inspite of upholding the jurisdiction of the Court to interfere with such orders even at the pre-execution stage, Their Lordships went on to observe as follows :-

"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 other 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."

27. Nowhere has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the Courts could interfere with an order of detention at the pre-execution stage, with the expression "viz", Their Lordships possibly never intended that the said five examples were to be exclusive. In common usage or parlance the expression "viz" means "in other words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplar and not exclusive. On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of said power. It is only in Sayed Taher Bawamiya's case (supra) that another Three- Judge Bench considered the ratio of the decision of this Court in Alka Subhash Gadia's case (supra) and observed that the Courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon'ble Judges observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in Alka Subhash Gadia's case (supra) had been fulfilled.

28. Their Lordships in paragraph 7 of the judgment held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not exhaustive and that the decision in Alka Subhash Gadia's case (supra) indicated that it is only in the five types of instances indicated in the judgment in Alka Subhash Gadia's case (supra) that the Courts may exercise its discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

29. With due respect to the Hon'ble Judges, we have not been able to read into the judgment in Alka Subhash Gadia's case (supra) any intention on the part of the Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in Sayed Taher Bawamiya's case (supra). As submitted by Mr. Rohatgi, to accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia's case (supra) to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32

of the Constitution. The exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law. Such powers are untrammelled and vested in the superior Courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

30. In such circumstances, while rejecting Mr. Rohatgi's contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case (supra), requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding Alka Subhash Gadia's case (supra). Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

31. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal own 7th August, 2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.