

(1975) 09 DEL CK 0021

In the Delhi High Court

Case No : Criminal Writ Appeal No. 121 of 1975

Bharti Nayyar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-09-1975

Acts Referred:

Citation : (1977) ILR Delhi 23 : (1977) RLR 312

Hon'ble Judges : S.I. Rangarajan, J;R.N. Aggarwal, J

Bench : Division Bench

Advocate : V.M. Tarkunde, Soli J. Sorabjee, B.R. Aggarwal, Janendra Lal, P.P. Khambatte, A.B. Saharia, G.V.G. Krishnamurthy, V.B. Saharya and K.B. Soni, for the Appellant;

Judgement

S. Rangarajan, J.

(1) This petition under Article 226 of the Constitution is by the wife of Shri Kuldip Nayyar (hereafter referred to as the detenu) for quashing the order of detention dated 24-7-1975 passed against him by the third respondent (Shri P. Ghosh, Additional District Magistrate, Delhi) in exercise of the powers conferred upon him under clause (b) of sub-section (2) of section 3 of the Maintenance of Internal Security Act No. 26 of 1971 (hereafter referred to as the MISA) read with the Delhi Administration Notification No. F. 2/69/75-Home (P. II) dated 3-7-1975 detaining him under clause (a) (ii) of sub-section (1) of section 3 of the MISA. On the same date Shri Ghosh also passed an order of declaration, as required by section 16 (a) (3) of the Misa ; the same was inserted by section 5 of the Maintenance of Internal Security (Amendment) Ordinance, 1975 (replaced by an Act later) to the effect that the said detention was necessary for dealing effectively with the Emergency proclaimed by the President under Article 352(1) of the Constitution on 25-6-1975.

(2) It is stated in the petition that the detenu was arrested on the morning of 24-7-1975 from his residence under the orders of the third respondent dated 24-7-1975 (copies of which are Annexures A and B to the petition). In view of

the declaration no grounds of detention were served upon the detenu.

(3) The petitioner being unaware of the reasons for the detention certain facts alone have been mentioned in the petition; they concern the detenu's background with a view to showing that he is not a person who could be genuinely apprehended to be one who would or was even likely to act in a manner "prejudicial to the maintenance of public order". He has always been a peaceful citizen of India; never been a member of any political party, never participated in any political demonstration and had not even done a single act which could possibly lead any reasonable man to infer that he was likely to act in any manner prejudicial to the maintenance of public order. For this reason it is asserted that the third respondent could not have been so satisfied concerning the detention and was in fact not so satisfied. The act of the third respondent in ordering the detention of the detenu is, Therefore, said to be one falling totally outside the scope of section 3 of the Misa and has been described as mala fide. In terms of what the Supreme Court, explained in *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, a distinction has to be made between "the maintenance of public order" (which means prevention of disorder of a grave nature or one which affects the community or the public at large) and what might lead to a "disturbance of law and order".

(4) The facts which have been stated concerning the detenu are that he is a leading writer and journalist with a world-wide reputation as "a courageous and unbiased journalist". He had joined the Government of India, Ministry of Information as an Information Officer in 1952. He worked as a Public Relations Officer of the late Shri G. B. Pant, the then Home Minister, from the years 1957 to 1961; he had also worked as a Public Relations Officer for a brief period in 1963 with Pt. Jawaharlal Nehru; he was also attached to the late Shri Lal Bahadur Shastri, the then Home Minister, as a Public Relations Officer from 1961 to 1964. He became the General Manager of the United News of India in 1964, popularly known as U.N.I., which has won acclaim as a respectable and creditable organisation of journalism; it is claimed that the detenu made positive contribution to the development of the U.N.I. He was with the "Statesman" till February 1975 and subsequently joined the "Indian Express" as its Editor, where he is still employed". He has been a dedicated journalist with no affiliations with any political party. He has been a member of the Press Council of India since October 1970 to which position he was appointed by the Speaker, Shri Dhillon. The detenu was also a member of the Telephone Advisory Committee, a member of the Senate of the Punjabi University and adviser to the Department of Journalism of the Bangalore University. He was nominated as Member of Press Accreditation Committee by the Press Information Bureau and was elected as Secretary General, I.N.E.C. for one term. He was appointed by the Government of India to the Interview Board of the Union Public Service Commission to recruit Junior Administrative Officers. He is a firm believer in secularism ; he was the first to suggest that a dialogue should take place between Sheikh Abdullah and the Prime Minister of India if the conditions in Kashmir were to be normalised. He

had taken special interest in communal harmony ; he has been of the view that it is necessary to remove any misapprehension in the minds of Muslims about their future in this country in order that they may develop a sense of Indian citizenship. His impartiality in this respect could be judged from the young Imam of Jama Masjid, during the recent dispute between the Imam and the Government of India, stating that he was willing to accept the detenu as the only non-Muslim arbitrator among the three persons to be nominated. He has been a Jury of the Durga Ratnam Award Committee. Apart from scores of articles he has written three books: (1) Between the Lines, (2) Indian in Critical Years and (3) India After Nehru, which are stated to have been greatly appreciated in India and abroad ; these works would show that the detenu was interested only in reporting significant events in an objective manner, not supporting or opposing any political party or leader. He has been the Indian Correspondent of "Times" of London, "Spectator, London" and "Washington Evening Star" since 1967 and has been writing articles for the foreign papers. Even after the declaration of emergency in June 1975 the detenu is said to have written articles presenting the facts objectively and without bias: an assertion is also made concerning them that by no stretch of imagination it should be inferred from them that they were likely to create public disorder; no objection was in fact taken to the publication of these stories and articles. Despite the absence of pre-censorship to such writing for foreign papers the detenu had always exercised self-restraint. The articles written by the detenu in the Indian Express in his own name were not objected to by the Censors.

(5) On the 16th of July 1975 the detenu wrote to the Prime Minister expressing his faith in democracy and drawing her attention to the undesirability of imposing pre-censorship. His letter as well as the reply thereto by the Prime Minister's Information Adviser, dated July 21, 1975, have not only been set out in the petition but copies of the same have also been enclosed as Annexures C and D to the petition. It will be seen, on a perusal of them, that the Press Council is stated to have reprimanded the "Organiser" for the irresponsible article written against the Prime Minister, though the announcement of the judgment, by that body, had got unfortunately delayed (since announced) ; he pointed out to the Prime Minister that leading newspapers had criticized "J.P." (Jayaprakash Narayan) in respect of his call to the Armed Forces. The detenu protested against the imposition of censorship on the ground that if the press were to publish only the handouts and information given by the Government there would be none to pinpoint lapses, deficiencies or mistakes. He also quoted Pt. Jawaharlal Nehru's words to the All India Newspaper Editors' conference on December 3, 1950 : "even if the Government dislikes the liberties taken by the press and considers them dangerous, it is wrong to interfere with the freedom of the press". He ended by saying "the type of censorship which has been imposed today will kill initiative, free inquiry and ultimately free thinking. I am sure you do not want that to happen....." The reply of the Prime Minister's Information Adviser informed the detenu that the censorship was introduced because certain

newspapers had become part and parcel of the opposition front and not because of any personal or governmental hypersensitiveness. When those parties had to be prevented from carrying out their plans to disrupt national life the principal organs of propaganda had also naturally to be restrained from stirring up trouble. Restrictions of the press had already contributed to the situation coming under control. In times of national Emergency it was necessary to abridge personal freedom temporarily. The press as a whole had been remarkably ineffective in implementing abuse of press freedom. Regarding the Press Council and a few newspapers which had been cited by the detenu as instances, the question was posed "would you say their action has had impact?" The Prime Minister thought that not all of the newspapers had taken their decisions with responsibility or even respect for the facts.

(6) The inference sought to be drawn in the petition was that the views expressed by the detenu in the aforesaid letter to the Prime Minister had "led" to the impugned order having been passed against him. A further assertion was made that there was nothing wrong in expressing the detenu's views in favor of freedom of expression, and that too in a personal letter to the Prime Minister, and that no inference could possibly be drawn from the said letter that the detenu was likely to act in a manner prejudicial to the maintenance of public order.

(7) The petitioner alleged that the third respondent had obviously acted in obedience to the orders received from the higher authorities in making the order of detention. The background of the detenu's peaceful and democratic way of life and the position occupied by him as Editor of one of the leading dailies in the country could not make it possible for the third respondent to act on his own initiative and responsibility in making the order of detention; he was himself not satisfied about the necessity of detaining the detenu but acted on instructions from above. The order, Therefore, was clearly mala fide, invalid and illegal.

(8) It is necessary to notice what the detaining authority had to say in his affidavit dated 11-8-1975 on behalf of the Delhi Administration filed in reply to the notice to show-cause why a rule nisi be not issued. It is asserted that the third respondent did not act mala fide but that he acted on the material contained in a report which he had before him regarding the "specific activities" of the detenu. The activities were such as to prejudicially affect the maintenance of public order and were calculated to undermine the efforts of the Government in dealing effectively with the Emergency. The third respondent only knew that the detenu was the author of the three books mentioned in the petition; in other words, he did not even know about the detenu being a journalist and the other facts concerning him which have been set out in the petition. He was not even aware of the exchange of letters between the Prime Minister and the detenu; he came to know of them for the first time only after receiving a copy of this petition with the annexures. It was specifically denied that the detention was ordered as a result of the communication between the detenu and the Prime

Minister. The order of detention and declaration were made bona fide; the third respondent was personally satisfied about the necessity to do so with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order and in order to deal effectively with the Emergency. These orders were not made in obedience to anything ordered from any higher authority. It has been made sufficiently clear in the said affidavit that the report regarding the activities of the detenu constituted the information and material, on which the third respondent was satisfied, concerning the necessity for detention ; the third respondent considered it was against public interest to disclose such information and material. The assertion was, however, made that such material as he had before him was sufficient to arrive at the requisite satisfaction u/s 3. The Lt. Governor (Administrator) had reviewed the declaration made by the third respondent and confirmed the same within fifteen days as required.

(9) In the rejoinder dated 18-8-1975, filed to the said reply, by the wife of the detenu, it was mentioned that the averments of the third respondent in his affidavit concerning the contents of the said report themselves showed that the third respondent had applied a standard different from the one provided by section 3(1)(a) of the MISA. The point made out in the rejoinder is that the distinction between "maintenance of public order" and "maintenance of mere law and order" had been ignored resulting in the detaining authority taking into account an irrelevant ground that the likelihood of breach of law and order itself was enough to detain whereas the requirement in law was one relating to the maintenance of public order. A comment was made that the detaining authority had not even cared to acquaint himself with the background of the detenu without which he could not be genuinely satisfied. The order of detention had been made in a casual manner without considering the relevant facts pertaining to his occupation and background even apart from his having taken an irrelevant ground into account. It was pointed out that nothing had been said in the affidavit of the third respondent showing that in any of the articles written by him as a journalist there was anything prejudicial to the maintenance of public order; per contra, the third respondent was not even aware of them. Hence the possibility of the third respondent being satisfied from such sources regarding the necessity for detaining him stands ruled out. It was further pointed out that it was obligatory for the respondents to place such material before this Court to enable the Court to ascertain whether there was any genuine satisfaction on the part of the third respondent on the basis of relevant facts. The comment is that the omission to place before the Court such material shows that the impugned order was mala fide and was one made outside the purview of the MISA.

(10) After hearing Shri V. M. Tarkunde, learned counsel for the petitioner as well as the learned Solicitor General for the first respondents at some length this petition was admitted and an additional reply if any, was directed to be filed. An affidavit dated 26-8-75 was filed by the Special Secretary (Home), Delhi Administration (Smt. Shailaja Chandra) in opposition to this petition stating that she had personally dealt with the file relating to the detenu at all relevant times

and that the Lt. Governor, Delhi after considering the report of the detaining authority and the material on the record reviewed and confirmed the declaration under sub-section (3) of section 16A of the MISA. A report in respect of detention had also been made on 2-8-1975 to the Central Government as required by sub-section (3) of section 3 as modified by sub-section (7) of section 16A of the MISA.

(11) Regarding the review and confirmation by the Lt. Governor it was stated in the petitioner's affidavit dated 28-8-1975 that the confirmation by the Lt. Governor cannot and does not cure the invalidity of the order of detention. In fact what is challenged in this petition is the order of detention passed u/s 3 of the Misa (Annexure A), but not the declaration u/s 16A(5) or the confirmation by the Lt. Governor, by way of review of the declaration.

(12) An application dated 25-8-1975 (Cr. Misc. 935 of 1975) u/s 482 Cr. P.C. was filed on behalf of respondents 2 and 3 to decide, as a preliminary issue, the question of burden of proof and the question whether the law contemplates the production of materials before the Court. It was asserted in that petition that the fact of the detenu being a journalist and not belonging to any political party did not cast upon the authorities a burden to produce the materials before the Court, having regard to the confidential nature of the activities of such individuals like the detenu and without serious prejudice to the efforts to cope with the existing emergency. In reply to the said petition the petitioner filed an affidavit dated 28-8-1975 contending as follows: Section 582 Cr. P.C. could not be applied to a petition for Habeas Corpus under Article 226 of the Constitution and, if allowed, it would result in the hearing of the petition in two stages and delay the disposal of the petition. The respondents ought to take a definite stand and could not be permitted to shift their stand to suit their convenience. Petitions for Habeas Corpus have to be disposed of expeditiously. The present application was a device to prevent the Court from ascertaining whether any relevant material was available to the respondents on which the impugned order of detention would have been made. If the respondents fail to show genuine satisfaction about the need to detain the order should be quashed. This is the only issue in the case. Therefore, there could be no question of a preliminary issue having to be decided earlier and any other issue being decided later by the Court. If the respondents had any material on the basis on which the third respondent acted it was for them to produce the said material. They could, if they were so advised, apply for privilege u/s 124 Cr. P.C. in which event the Court would be able to decide the claim of privilege after seeing such material; the respondents should have no objection to give the Court inspection of the material.

(13) The question of onus and when it shifts cannot, it seems to us, be decided piece-meal or in stages; such a course would at least cause delay in disposal of this case, a delay which ought to be avoided to the extent possible; moreover, the questions of onus and its discharge have to be decided on a full conspectus of all the facts and circumstances.

(14) When a rule nisi is issued by the Court the State has, to make a "good" return in the language of Lord Maugham in *Greenc v. Secretary of State for Home Affairs* 1941 (3) All E.R. 388 (2). Our Supreme Court has pointed out on several occasions that when in an Habeas Corpus petition a rule nisi is issued it is incumbent upon the State to satisfy the Court that the liberty of the detenu has been taken away strictly in accordance with law and after due compliance with the Constitutional requirement under Article 22(5); Article 22. among some others, having been suspended during the emergency which has been declared by a Presidential Ordinance strict compliance with law alone remains. It would be sufficient to refer to the following four decisions of the Supreme Court, among others, on this aspect : (1) *Dulal Roy Vs. The District Magistrate, Burdwan and Others*, (3). (2) *Mohd. Alam Vs. State of West Bengal*, . (3) *Lal Kamal Das Vs. The State of West Bengal*, . (4) *Sk. Serajul Vs. State of West Bengal*, .

(15) The importance of the last mentioned case consists in the fact that V. R. Krishna Iyer, J., who spoke for the Court, said that it was the duty of the State to have explained the delay in its return, despite the absence of reference in the petition to such delay or any challenge on that ground. The obvious principle behind this is that the State has to make a "good" return when a rule nisi is issued in a Habeas Corpus petition under Article 226 of the Constitution.

(16) It may be noted that the old section 491 Cr. P.C. having been dropped from the new Code Article 226 of the Constitution alone will now be applicable to such cases. If an order is challenged on the ground that it is not one under the relevant statute, the Misa in this case, and sufficient circumstances are placed before the Court in support of such a view, it will be for the State to make a "good" return setting at rest "substantial and disquieting doubts" [adopting the language of Donovan L.J. in the case of *Soblen* (1962) All E.R. 641 (7) which the Court entertains concerning either the validity or the bonaftdes of the order of detention. An "answer" may be "called for" in such circumstances; if that answer is withheld, or if furnished is found unsatisfactory, the order challenged ought not to be upheld; otherwise, there would be virtually no protection against an illegal order which had been "clothed with the garments of legality" simply for the sake of appearances, discovery also having been resisted on the ground of privilege. A similar approach was adopted by Pickford, L.T. and Warrington, L.J. in *The King v. Supdt. of Chicwick Police Station Ex parte Sacksteder*, [(1918) 1 K.B. 578 (8)]. Pickford, L.J. said :

"It seems to me that one has to scrutinize the matter carefully for this reason. This legislation had not in view a case of this kind when it was passed. It had in view simply the deportation from this country of aliens whom the Secretary of State thought it was not right to allow to remain here; it had not in view the purpose of carrying out an agreement between this country and an allied country, by which this country agreed to place subjects of that allied country of military age within its jurisdiction. I wish to guard myself against being supposed to say there are no circumstances in which the Court can go behind an order for

detention valid on the face of it. In this case I do not think there are any grounds for doing so."

Warrington L. J. said :

"Then can the Court in this case go behind the order which is a legal order, for arrest ? I am far from saying that there may not be cases in which that can be done. If, for example, the order, though on the face of it a valid order, was a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. In the first case I am far from saying that the Court could not go behind the apparently valid order and say that it was no order at all. In the second case I am far from saying that the Court might not find means of preventing the subsequent illegal act from being done. But in the present case there is nothing of that sort."

(17) It seems rewarding to study *Chester v. Bateson* 1920 1 K.B. 82.9 (9) though that was a case arising in a somewhat different context. The defense of the Realm Regulations (Reg 2A) had provided that "'no person shall, without the consent of the Minister of Munitions take . . any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling house" in which a munition worker is living, and which is situate in an area declared by order of the Minister of Munitions to be a "special area". This was held to be not authorised by section 1 sub-s. 1 of the defense of the Realm Consolidation Act, 1914 and, Therefore, invalid. Darling, J. said that an "extreme disability" of this kind, even during the emergency of World War I, can be inflicted only by direct enactment of the legislature itself. After referring to some instances where Parliament has deprived certain person of the ordinary right of citizens resort to the Kings Courts for the righting of alleged wrongs, certain observations were made which are of relevance here. Darling J. observed:

"I allow that in stress of war we may rightly be obliged, as we should be ready, to forego much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them. Should we hold that the permit of a departmental official is a necessary condition precedent for a subject of the realm who would demand justice at the seat of judgment the people would be in that unhappy condition indicated, but not anticipated, by Montesquieu, in *De l'Esprit des Lois* . . ."

etc. (pp 834-35). Avery J. concurring, stated as follows :

"IN my opinion there is not to be found in the statute anything to authorise or justify a regulation having that result . . ."

(p. 836).

(18) He quoted from the dissentient opinion of Lord Shaw of Dunfermline in *Rex v. Halliday* 1917 A.C. 287 (10) to the following effect:

"In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government, and therein of grave constitutional and public danger."

(p. 837) Sankey J. also concurred observing as follows :

"I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act."

(p. 838)

(19) What has to be the nature of the allegations in an application challenging detention during an emergency has been the subject matter of some discussion in *Liversidge v. Anderson* 1941 (3) All E.R. 338(11). There was no challenge regarding the bona fide of the Home Secretary who had made the orders of detention: the Home Secretary had given an assurance that he would personally look into every case of detention made under the defense of the Realm Act. during World War II; there would be a report to Parliament about it every month. The Home Secretary had expressed satisfaction in that case that the detenu had hostile associations. In the very nature of things public interest would not permit such grounds being disclosed; the detenu had himself conceded that the order was made in good faith. What was argued was that it was not enough for the Home Secretary to think that there were grounds to detain but that those grounds must exist as a fact; on this point Lord Atkin dissented from the majority and adopted a construction of the relevant Regulation (18 B) different from that adopted by the majority. This dissent was explained in powerful terms by Lord Atkin in *Liversidge* alone, it being unnecessary to repeat it in *Greene*. This dissent has been accepted as representing the correct legal position in later decisions in England and by our Supreme Court.

(20) Before noticing those decisions it may be rewarding to notice that Goddard L. J. had himself said in *Greene*, in the Court of Appeal 1941 (3) All E.R. 104, that it was plainly not enough for a detenu to say to the Court that he did not know why he was interned and to deny that he had done anything wrong; such a petition, did not require any answer, because the order of detention, in proper form, itself provided the answer. After referring to the observations of Lord Wrenbury in *R v. Halliday Ex parte Zadig* 1917 A.C. 260 (12) and some other cases Goddard L. J. observed as follows:

"I am of opinion that, where, on the return an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done."

The view of Goddard L.J. had been approved by Lord Maugham in the two companion cases.

(21) The above construction of Lord Atkin has been adopted even in England in the case of statutes employing similar expressions. It would be well to refer to

yet another opinion of Lord Denning M.R. while interpreting section 14(1) of the Restrictive Trade Practices Act of 1956 in Registrar of Trading v. W. M. Smith, 1969 (3) All E.R. 1065 (13):

"On this point, I cannot agree with the judge 1968 3 All E.R. 721 (14). Before an order for examination is made, there must in fact be reasonable cause to believe that a restrictive agreement has been made. Section 14(1) starts with the words : If the Registrar has reasonable cause to believe that any person . . . may be party to" a restrictive agreement. That does not make the registrar the judge of the matter. The words are not : ". . . if the Registrar thinks he has reasonable cause to believe". They are : If (he) has reasonable cause", i.e., in fact. I know that a subjective interpretation was given to similar words in Liversidge v. Anderson 1941 3 All E.R. 338, but it has been shown to be erroneous by Lord Radcliffe in Nakkuda Ali v. M.P. de S. Jayaratne 1951 A.C. 66."

(22) Lord Radcliffe had ever earlier, in Nakkudda v. Jayaratne 1951 A.C. 66 (15), preferred the view of Lord Atkin to that of the majority in those two companion cases ; the Home Secretary it was stated, had to honestly suppose that there was reasonable cause ; in other words, there should in fact be reasonable cause. Lord Denning M.R. had, in the passage extracted!, referred to this. Liversidge and Greene have been considered in R. v. Brixton Prison GC"(-")- nor, Ex parte Ashok & Ors. 1969 (2) A.E.R. 347 (16) where Lord Parker C.J., despite the appellant being a person who would have to be deported, still quashed the order of deportation because to enable him to be deported, would , had in law. While Lord Parker C.J., with whom Blain, J. concurred thought Goddard L.J.'s observations were approved by Lord Maugham (1941 (3) All E.R. 394) Ashworth J. in his dissent, thought he was in good company with the applicant's counsel in that case who thought Goddard L.J. was in error. Lord Parker C.J. did, however, consider certain passages in the two companion cases which seemed to negative the view formed by Lord Parker C.J. but he found it necessary to consider those passages in the context in which they appeared. Pointing out that there was no challenge in those cases with regard to the conditions precedent on which jurisdiction depended he observed (with reference to Gi'eeic) that "the only possible challenge could have been an allegation .of bad faith on the part of the Secretary of State and this was disclaimed." Once this is understood, every observation made in Liversedge and Greene would fall into place.

(23) It is needless to be detained by further English decisions, Liversedge has been the subject of many learned articles by Laal scholars, ft may be sufficient to cite "Liversidge v. Ander:".).". c.n rctro..pcctivc" by R.P. V. Hlicston 1970 (86) Law QR 33 (17).

(24) In various contexts our Supreme Court has said that it is not sufficient for the authority exercising statutory powers to merely say that it held a certain opinion or was satisfied, without the grounds or material on the basis of which it held that opinion existing objectively as a fact. Among the decisions of the Supreme Court it may be sufficient on this aspect to cite The Barium Chemicals

Ltd. and Another Vs. The Company Law Board and Others, and Sk. Serajul Vs. State of West Bengal, . The decisions, among others, in Dulal Roy(3), Mohd Alam, (4) L. K. Das (5) and Serajul (6), holding that a mere assertion by the detaining authority in the return to a rule nisi it had material on which he was satisfied is not enough, have been already referred to.

(25) The Supreme Court has also specifically approved the observations of Goddard L.J. Ramaswami, J" speaking for the Supreme Court, in Jaichand Lall Sethia Vs. State of West Bengal and Others, observed as follows on p. 486 :

"Even though the order as drawn up recites that the State Government was satisfied, the accuracy of that recital can be challenged in Court to a limited extent. The accuracy can be challenged in two ways either by proving that the State Government never applied its mind to the matter or that the authorities of the State Government acted mala fide. In a normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing that the necessary condition was fulfilled."

(26) Challenges on the ground of mala fides and/or the Lie; being not according to law have Therefore, to be investigated by courts. Mala fides has to be understood as not merely mala fides in fact but, as Lord Haldane explained in the passage which has now become a classic in Shearer v. Shirley 1914 A.C. 808 (20), mala fides in law also. If the law is not properly conceived or there is a reasonable probability of such misconception having led to the order it would be a case of mala fides in law; even non-application of mind. or omission to consider relevant material, as much as having regard to irrelevant material would be cases of mala fide exercise of such power to detain any one. V. R. Krishna Iyer, J" speaking for the Supreme Court, in Bhut Nath Mete Vs. The State of West Bengal, quoted with approval the above observations of Lord Haldane, which is to the following effect, as drawing the line "neatly":

"Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, Therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sence innocently."

If the petitioner succeeds in making out a prima facie case the burden would shift to the respondents to show that the detention was one under the MISA. This is of course subject to the further question raised whether, by reason of the concerned legislation and the Ordinances, there is an area, of "non reviewability even at the threshold". The question, in other words, is whether the concept of "non-reviewability as a threshold determination" has application in this case or is one to be rejected ?

(27) Both the eminent counsel who appeared for the respondents, one before

and the other after admission, appeared to be in difficulties, even concerning their every approach to this case. The Solicitor General suggested at the earlier stage that the impugned order could be challenged only in a rare case, such as for example, when it was contended/shown that it was a case of mistaken identity. When he was asked how, when the grounds of the order were not only not supplied to the detenu but not stated even to the Court and the material before the detaining authority, or even its contents broadly were not made available to the Court, any detenu could bring out that there was a case of even a mistaken identity, he obviously felt some difficulty in being able to bring himself to say that in such a case there could be any effective review by the Court, and, Therefore, stated he would take the stand that there could be no review by the Court in the case of any order of detention. The Writ Petition was admitted because a question of this importance was raised. After the Writ Petition was admitted and while Shri P. P. Khambatte was arguing the case for the respondents he contended during the earlier stages of his argument that mala fides (though he confined it to one in fact alone) was the only exception to non-reviewability by Court of such orders in view perhaps of there being an abundance of dicta, English and India, to this effect; but as the arguments progressed he felt obliged to go back even on that view and suggest that only if an order was fraudulently made and the order bore on its face the stamp of such fraud the same could not be reviewed by courts. If this is also something which should be very difficult to show. or would not normally be the case, this argument also may be taken in substance to be that no order of detention, even one not being supported by law or even against it. could be judicially reviewed under Article 226 of the Constitution. This aspect will be discussed all title later.

(28) The learned Solicitor General, who appeared for the respondents, before admission, not only stated, with his characteristics fairness, that he might have to go so far as to contend that judicial power of review was completely barred in such cases but also that the kind of public interest, which was referred to in the reply of the detaining authority (para 16) as standing in the way of disclosing such information and material before him was not the kind of privilege he could raise u/s 124 of the Evidence Act. Obviously, even such a claim of privilege could not be put forward except by filing a detailed affidavit claiming privilege. This not having been done Shri P. P. Khamballe, Senior Advocate, who appeared for the respondents later, could only urge that in the present case also there is a kind of public interest against disclosure of such material as was referred to by the Supreme Court in *The State of U.P. Vs. Raj Narain and Others*, . A. N. Ray, C.J. observed with reference to the Prime Minister's Blue Book containing regulations for security of the Prime Minister that it is a kind of document concerning which the courts should proprio motu rule that there was public interest against disclosure. There had been an affidavit from the concerned Secretary in that case claiming privilege and actual evidence before the Court had been given by the concerned official that the Blue Book was a document relating to the affairs of the State and was not to be disclosed. The Chief Justice had indicated the "well

established practice" in our country in this regard (para 42); such a practice has not been followed in the present case. The present material has not been shown to be one of such a description. The said material not having been placed before the Court for its inspection or even the procedure In this respect not being followed the Court is hardly in a position to uphold any claim of privilege under the Evidence Act.

(29) Shri P. P. Khambatte, Therefore, sought to support the claim of privilege on three other grounds, namely, ".hat he need not disclose the material which the detaining authority Lad before him because (.1) of Article 22(6) of the Constitution, (2) of section 8(2) of the Misa (as un-amended) and (3) of section 16(a) 5 of the Misa (as now amended). It is clear that none of these apply. Article 22(6) of the Constitution only enables the detaining authority not to disclose facts against public interest in the context of Article 22(5) requiring such grounds to be disclosed; section 8(2) of the Misa is a similar provision in the context of section 8(1) providing for grounds to be disclosed to persons affected by the order. Now that Article 22 has been suspended as a whole the respondents cannot obviously rely on any portion of it; sections 8 to 12 of the Misa also not apply during the emergency (by reason of section 16(A)(6)(ii) saying that section 8 to 12 of the Misa do not apply to detentions made under the Act; section 8(2) of that Act cannot be relied upon by the respondents for this purpose. The reference to section 16(A) seems altogether unavailing for it deals with what is to happen while reviewing such an order by the appropriate government or other officer.

(30) The following passages from Willis (Constitutional Law, 1936 Ed.) explain the importance of judicial review in the context of personal liberty and equal protection of laws. After referring to *Plymouth Coal Co. v. Pennsylvania* 1914 232 U.S. 531 (23) he says that "perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by those on whom it is conferred" (p. 586) he also says : "For this reason there is need for judicial review to see whether or not power delegated has been exercised arbitrarily" (p. 587). This is because, as he explain in a different context, "liberty, contrary to the popular notion, is a creature of the law instead of something which is destroyed by law. In order to create liberty it is necessary to impose restraints upon the lawless acts of many individuals who would destroy more liberty than law could possibly destroy" (p. 568). This is the avowed justification of the present state of emergency. It is one this thing to say that the possibility of mistaken action cannot be ruled out but quite another to go so far as to say that even in a case of mistaken or misdirected action taken to detain it is outside the purview of the judicial process, to whatever limited extent it may be available. The obvious consequence of the latter would be to allow law to destroy liberty, whereas its true role is to uphold liberty. As Justice Jackson (dissenting) stated it so tersely but so well: "The choice is not between order and liberty. It is between liberty withdrew and anarchy without either" (*Terminiollo v. Chicago*, 1949 3371 U.S. 1

(24).

(31) The ship of State could run into rough weather. When it does it may have to take note of several political factors which may not even be within the reach of the judicial power. Prof. Carl. J. Frienderick explain this idea in Constitutional Government and Democracy (Revised First Indian Edition 1966, pp. 595-596) :

"Constitutional dictatorship, on the surface a contradiction in terms, is the final test of constitutionalism. For a Government which cannot meet emergencies is bound to fall sooner or later. There is not object in arguing against such emergency powers on the ground that they endanger the constitutional morale, and hence the maintenance of the constitutional order. Of course they do. Any suspension of legal norms, no matter how temporary, raises doubts concerning their validity. But after all, what docs an emergency mean if not that the constitutional order is threatened ? Imminent invasion and civil war are only the most blatant final stages of such a danger. No one in his right mind can argue that their emergence should not be forestalled. How are we to get effective, vigorous government action, and yet limit the power of governmental bodies so as to forestall the rise of despotic concentration of power ? Logically it is a paradox, but practically it has been done. The task requires all the wisdom man can muster. The prize in his greatest achievement : freedom."

The administrative-process (executive action) will during such an emergency have its sway but only subject to the limits set by the law. Even in that situation the administrator in whom such vast powers are vested during such dire situations, is not authorised to dispense with all the care (and circumspection) he can or is required to take ; that is why bona fide actions are protected even as those which are mala fide, which expression obviously includes those "that are misdirected or open to serious doubt as not having been properly directed according to law, will not be protected.

(32) The Constitution of the United States provides (Art. I section 9, clause 2) that "The privilege of the writ of Habeas Corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require it". The "implication of this language is that the suspension of the privilege of the writ does not deprive the courts of the right to issue it. It furnishes merely a legal ground for a refusal to obey it" (Ex parte Vallandigham, I Wall 243). The suspension of the writ of Habeas Corpus does not actually operate to authorise illegal arrests : those making such arrests would be liable civilly and criminally (Willoughby, Constitutional Law of United States, 1938 Edn. pages 676 and 677).

(33) There has been a further controversy in the United States, into which it is needless to enter about in whom this power of suspension vests-with Congress or the President? Abraham Lincoln, who has been acclaimed as one of the world"s greatest democrates, ironically enough had to exercise this power of suspending Habeas Corpus during the American Civil War. We may perhaps draw comfort, if we can, from the historical example which Prof. J. G. Randall explains

so lucidly in his work "Constitutional Problems under Lincoln" (Revised 1951 Edn. page 521) :

"(N)o undue advantage was taken of the emergency to force arbitrary rule upon the country or to promote personal ends. A comparison with the European examples shows that Lincoln's Government lacked many of the earmarks of dictatorial rule".

(34) There has been no suspension of the writ of Habeas Corpus (Article 226) in India. Personal liberty is sought to be regulated by law.

(35) If freedom from arbitrary or illegal arrests and prevention of exploitation of it for personal ends has to be made possible, it can be only by resort to the judicial power in order to keep administrative discretion in this respect "structured, confined and checked", in the insightful language of Prof. K. C. Davis "Discretionary Justice". It has been so aptly said by John P. Roche, "Judicial Self-Restraint". American Political Science Review, Vol. 49, p. 772 (Sep., 1955) that the judicial power and self-restraint are but "two sides of the same coin"; in fact they mutually support, do not destroy, each other. But is self-abnegation is allowed to masquerade as self-restraint that may also amount to allowing self-restraint to destroy the judicial power. It is this needed and delicate balance that has to be sought by the exercise of judicial power. It is in the light of such ideas, which we regard as basic to the functioning of the rule of law in our democracy, that we have endeavored to understand the relevant constitutional and legislative provisions made during this emergency.

(36) On 27-6-1975 the President had issued a declaration under Article 359(1) of the Constitution that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, 21 and 22 of the Constitution and all proceedings pending in any court for the enforcement of the afore-mentioned rights shall remain suspended for the period during which the proclamations of emergency made under clause (1) of Article 352 of the Constitution on the 3rd of December 1971 and on the 25th of June 1975 are both in force. The maintenance of Internal Security (Amendment) Ordinance (4) of 1975 (hereafter referred to as the Misa Ordinance), which was proclaimed on 29th June, 1975, made certain amendments to the Misa, the relevant portions of which will be discussed presently. The 38th Constitution Amendment of 1975 introduced clause (1A) in Article 359 of the Constitution as follows :

"(1A)While an order made clause (1) mentioning any of the rights conferred by Part Iii is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provision contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Section 3(1) of the Misa reads :

"3.Power to make orders detaining certain persons.-(1) The Central Government or the State Government may,- (a) if satisfied with respect of any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to- (i) the defense of India, the relations of India with foreign powers, or the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community, or (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained."

(37) It is not disputed that the Additional District Magistrate (third respondent) was one who could pass such an order under the MISA. By reason of section 16A which had been brought on the statute book by Misa Ordinance (with effect from 29-6-1975) making an order of detention under the Misa against a person (like the petitioner) after the commencement of the Misa Ordinance (29-6-1975) which reads:- "16A(1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest. (2) The case of every person against whom an order of detention was made on or after the 25th day of June, 1975 but before the commencement of the Maintenance of Internal Security (Amendment) Ordinance 1975, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned. (3) When making an order of detention under this Act against any person after the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under" this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or, as the case may be, the State Government or the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned: Provided that where such

declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days. (4) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the persons is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration. (5) In making any review, consideration of reconsideration under sub-section (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned. (6) It shall not be necessary- (a) to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period within which his case may be reviewed under that sub-section and where, on such review, a declaration has been made in respect of such person under that sub-section, also during the period when such declaration is in force ; (b) to disclose to any person detained under a detention order to which the provisions of sub-section (3) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and accordingly, such periods shall not be taken into account for the purpose of section 8. (7) In the case of every person detained under a detention order to which the provisions of sub-section (2) or subsection (3) apply, and in respect of whom a declaration has been made there under, the period during which such declaration is in force shall not be taken into account for the purpose of computing the periods mentioned in section 10 or section 11.". Section 18 of the Misa reads as follows :

"18.Exclusion of common law or natural law rights, .if any.-No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any."

Shri V. M. Tarkunde submitted that in this case he was not challenging the declaration u/s 16A, or the confirmation of the same by the Lt. Governor; he was not challenging the validity of the Misa Amendment Ordinance later Act or the 38th Amendment. However, he ably mounted his entire attack on the impugned order on the ground that despite the onus being on him to show that it was bad-an onus which had been rendered even more difficult by the non-supply of grounds-he had discharged the same and that the respondents not having made a "good return" the order of detention itself has been shown to be bad and the further declaration and confirmation of that review would also fall with it.

(38) Shri V. M. Tarkunde explained that he was challenging the order of detention on the ground that it is not a lawful order passed under the Misa and that there is nothing in Article 359(1)(A) of the Constitution, even as amended, which can permit a detention of the petitioner otherwise than according to law. There is very little difficulty concerning Article 359(1)(A) because all that it says is that while an order made under Article 359(1) is in operation nothing in Part Iii would restrict the power of the State to make any law or to take executive action which but for the provisions contained in that Part it would be competent for any legislature or executive to make or to take. Article 359(1), without the recent amendment, would have enabled the legislature or the executive of any State, as defined in Part Iii, only to suspend enforcement of the rights conferred by Part Iii vis-a-vis Article 19 (with which alone Article 358 deals). The effect of this new amendment by adding clause I (A) to Article 359 is that not merely Article 19 but the other rights conferred by Part Iii could also be suspended. Shah, J. (as he then was), speaking for the Supreme Court, in *State of Madhya Pradesh v. Bharat Singh* AIR S.C. 1170 (25) held that in respect of acts done to the prejudice of the respondent after the declaration of emergency (October 20, 1962) under Article 352 of the Constitution no immunity from the process of the Court could be claimed under Article 358 of the Constitution since the order was not supported by any valid legislation. The observations of Mukherjea, C.J. in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, which were relied upon as enabling the State to issue executive orders without legislation, were explained as having been made in the context of distribution of powers between the Centre and State, and the order in that case not having operated to the prejudice of any citizen. The same approach was reiterated by Shah, J. in *The District Collector of Hyderabad and Others Vs. Ibrahim and Co., etc.*, . The following portion of the head-note makes this point clear :

"But the executive order immune from attack under Article 358 is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken."

(39) The 38th Amendment, inserting Article 359(1A) into the Constitution, has only this effect, namely, that in addition to rights under Article 19, already provided for as per Article 358. the other rights also enshrined in Part Iii cannot, during the subsistence of the emergency, invalidate legislative or Executive action; but this does not dispense with the need to justify executive action in an emergency by a valid law. The respondents cannot, Therefore, derive any assistance in this respect from the 38th Amendment. The legislature must be taken to have been, and indeed appears to have been, aware of this position when in its wisdom section 18 of the Misa provided that natural law rights and common law rights also, in addition to the rights under Part Iii of the Constitution, which had been dealt with in the aforesaid manner, would be put an end to by reason of orders passed under the MISA.

(40) The right to personal liberty is indisputably a common law right (see Willis, pages 646-648, for a detailed summary of the position in this respect in England). The common law of England, which had been adopted in this country before the Constitution came into force, continued to have validity, except in so far as it came into conflict with the express provisions in the Constitution vide *Director of Rationing and Distribution Vs. The Corporation of Calcutta and Others*, .

(41) A Division Bench of this Court consisting of Prakash Narain and Ansari, JJ. have held in *Smt. Manekben v. Union of India* (Cr. Writ I of 1975, decided on 18th April, 1975) (29) that "the Executive has no absolute power to deprive a person of personal liberty". As we have said, the Executive has to comply with the norms of law providing for detention without trial. Some decisions of the Supreme Court, the Federal Court and other High Courts have been referred to therein; we have chosen to specially mention the above two decisions where this question has been specifically dealt with, in the view they were not noticed in *Smt. Manekben*. Reference was, however made therein to the observation of Hidayatullah, J. (as he then was) in *Ram Manohar Lohia's case* (not *Makkan Singh v. State of Punjab*, AIR 1964 S.C. 380 (30), as incorrectly noticed that the President (when he issued the Ordinance of 1962) "did not make lawless actions lawful."

(42) The question whether Article 359(1) enlarged the sphere Of executive action beyond what had been authorised by the law was emphatically held in the negative in *Makkan Singh* also. In *Emperor v. Shiva Nath Bannerji* AIR 1943 F.C. 156 (31) the Federal Court, even before the Constitution, repelled the argument that the Court had no jurisdiction to investigate the validity of a detention order. It was pointed out that the recitals in the detention order placed a difficult burden (which may be said to have now increased by the grounds not being supplied to the detenu) to produce admissible evidence sufficient to establish a prima facie case that the recital .is not accurate. In *Ram Manohar Lohia's case* it was held that despite the Presidential Order, the order of detention, which was held to be bad even ex facie, was not one made under the defense of India Act or Rules. In *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, , which was also not noticed in *Smt. Manekben*, Gajendragadkar, CJ. speaking for the Supreme Court, repelled the contention that a petition under Article 32 of the Constitution challenging an order purporting to be made under the defense of India Rules, was one not made under the Act/Rules, was not maintainable.

(43) The upshot of all these cases is that what is unlawful activity will not become lawful merely because an order of detention is passed in any given case by executive action alone i.e. without legislative support. It must stand the test of lawfulness, of the same having to be passed under some valid provision or law and in strict compliance with it, in cases where such challenge seems permissible. The passing of such an order is a case of conditional exercise of power; if it is

shown that the conditions subject to which alone such a power could be exercised are not fulfilled then it will not be a case of an order passed under any valid law and will be struck down. No further reliance can be placed, in this respect, on Article 359(1)(A) as inserted by the 38th Constitutional Amendment. The contention of Mr. Khambatte that the principle laid down in *Smt. Manekben*, which is binding on us, does not apply by reason of section 18 of the Misa and the 38th Amendment, does not seem to have force. There can thus be no finality in respect of these orders of detention. They are not outside the pale of review under Article 226 of the Constitution altogether.

(44) It is needless to refer to the innumerable authorities, both Indian and English, which have held uniformly that the mere expression in a statute that an order made under the statute is final will not prevent review by the ordinary courts of the land when the challenge made is that the impugned order is not made under the Act concerned and even in cases where a suit is barred there could be a challenge in respect of jurisdiction and legality, under Article 226. Denning L.T. had discussed the question from the angle of certiorari in *Regina v. Medical Appeal Tribunal Ex parte Gilmore* 1957 I.Q.B. 575 (33) and has also sketched the development of law from the days of Coke (pp 583 to 586) ; he has also referred, among other decisions, to *Rex v. Plowright* 1686 3 Mod 94 (34) where stress was laid on some statutes also laying down that "no certiorari would lie." He has also noticed that modern statutes never take away, in express words, the right to certiorari without substituting an(r) analogous remedy (P. 586). He quoted Lord Denman, C.J. (in *Reg v. Cheltenham Commissioner* 1841 1 Q.B. 467 (35) ; "The statute (which gave finality to certain orders of a tribunal) does not affect our right and duty to see justice executed."

(45) In a bid to show that there was a complete bar of the exercise of judicial power (under Article 226) with reference to orders passed under the Misa, irrespective of whether they fall inside or outside the Act, Shri Khambatte relied upon certain observations of Viscount Simonds in *Smith v. East Elloe Rural District Council and others* 1956 (1) All E.R. 854 (36). The validity of a compulsory purchase order was in question on the ground that it was made in "bad faith" and "wrongfully". Viscount Simonds, speaking for the majority, did not countenance the argument that an order in bad faith was outside the Act because the concerned provision (para 16 of Schedule 1 of the Acquisition of Land (Authorisation Procedure) Act, 1946) which gave finality to such orders did not postulate only lawful orders or those made in good faith. Lords Reid and Somerville of Harrow dissented. In the subsequent case of *Anisminic, Ltd. v. The Foreign Compensation Commission*, 1969 (1) All E.R. 208 (37) the majority did not agree with this view. Lord Reid, who was in a minority in *Smith*, was in a majority in *Anisminic*. This decision has been acclaimed by several legal scholars as an important landmark. It has also met with the approval of our Supreme Court in several decision. Mathew J., speaking for the Supreme Court, applied the extended meaning of jurisdiction, adopted in *Anisminic*, to include even grave errors of law, in addition to only errors pertaining to limitation and *resjudicata*

(as previously recognised) in cases coming u/s 115 of the Code of Civil Procedure(Shri M.L. Sethi Vs. Shri R.P. Kapur, . Smith was not followed by our Supreme Court even before Anisminic; the Supreme Court said that it was not prepared to go as far as the holding in Smith. Mudholkar, J. spoke for the majority in the above manner in Smt. Somavanti and Others Vs. The State of Punjab and Others, . On the merits the petitions, which were filed under Article 32 were dismissed. Subba Rao, J. (as he then was) dissented and wanted those petitions to be allowed on the merits. In the result Smith was not followed. No argument can, Therefore, proceed before us contrary to what was held in Anisminic and the view expressed by the Supreme Court following Anisminic. It seems to us that the inspiration for Shri Khambatte's argument, that even mala fide orders of detention cannot be challenged, except when there the order itself prima facie shows fraud even contrary to his own earlier submissions before us, probably came from Smith. As soon as Smith was cited it was pointed out by us to Shri Khambatte that it had been disapproved by Anisminic (Lord Reid having referred to Smith as a very unsatisfactory case). At that stage Shri Khambatte preferred to address his further arguments to us based on Smith, if necessary, on the following day. When Shri Khambatte, later on, still referred to Smith the other side drew our attention to Somavanti on this aspect. In this light Shri Khambatte could not proceed further with this contention before us.

(46) It seems futile, Therefore, to contend that any order of detention under the Misa is beyond challenge under Article 226; it will be so only if the same is one passed under it.

(47) The next question for consideration is whether the petitioner has made out that the impugned order is not one under the Act. The initial burden has always been on the detenu, or on his behalf, to show that it is liable to be quashed. The above discussion of the relevant cases shows that this burden is not discharged by his merely saying that he does not know why he was detained. This burden, which has been always regarded as at least somewhat difficult to discharge, seems to have only become even more difficult by reason of the non-supply of grounds once the declaration u/s 16A of the Misa is made.

(48) It is necessary at this stage to deal with the argument of Shri Khambatte that the considerations which are open to the detaining authority u/s 16A would also be open to him while making up his mind to detain a person u/s 3 of the MISA. On a careful consideration of this argument it seems to be without force, as we shall explain later.

(49) In this particular case the ground of detention is the maintenance of public order. The distinction between an act prejudicial to the "maintenance of public order" and "law and order" has been explained at length in Lohia's case Hidayatullah, J. explained this idea in terms of concentric circles-law and order being the outer circle and the maintenance of public order coming within the inner circle. The public order would not be breached unless there is public disorder on a large scale Dr. Ram Manohar Lohia Vs. State of Bihar and Others, .

The same distinction has been explained in the following cases also : A.T.R. 1973 S.C. 295 -Manu Bhusan Roy Prodhan v. State of West Bengal (41). Ram Ranjan Chatterjee Vs. The State of West Bengal, . (42)

(50) The detaining authority has, Therefore, to come to a conclusion that on the basis of the material he has, it is at least "probable", that the detenu would act contrary to the maintenance of public order. The facts, which have not been controverted in this case and which make it somewhat unique, here are (1) that he has never been a member of any political party, (2) that he never participated in any political demonstration, (3) that he has not even committed any ordinary breach of the law, (4) that he has been holding position of great responsibility, (5) that he is a professional Journalist with an international reputation for the objection manner of his reporting, and (5) that the censors had not objected to his publications, even after the emergency, in foreign papers.

(51) We have also to remember, in this context, that the detaining authority did not even know that he was a journalist, except the fact of his being an author of three books, or other facts concerning the background of the detenu; besides the above knowledge the only further material the detaining authority had before him was a report mentioning "specific acts". We have been wholly unable to understand how an assessment was made, or how it can be made, genuinely that it was probable that the detenu would act prejudicially to the maintenance of public order in the sense above explained. We have not even been told what "the specific acts" referred to were in order to be satisfied there was such satisfaction by the detaining authority as required by the law.

(52) It seems probable that the detaining authority made a mistake about the scope of his powers under the MISA. This may even be excusable to start with, but it seemed to us that at least after so much prolonged debate before us if any mistake had been made to the detriment of the detenu by not taking into consideration relevant material or taking into account material which was insufficient in law or by the detaining authority misdirecting himself there should be a candid admission about it. The emergency would be more effectively dealt with in this way than by what has been attempted in this case.

(53) Shri V. M. Tarkunde also urged that what has been prevented by the "censorship", which has been imposed under Rule 48 of the defense of India Rules, by order dated 26-6-1975 by the Government of India does not appear to debar any one from speaking or communicating in writing to another about the censorship itself and that the mere fact that the detenu wrote to the Prime Minister expressing his own views about imposing censorship could not form the basis, in law, of any detention order. But as a fact in this case the detaining authority has said that he was not even aware of the detenu having written to the Prime Minister. This argument need not, Therefore, detain us.

(54) We were hoping, at least after we expressed ourselves clearly against the position contended for that there was a complete bar against judicial scrutiny in

all cases and were commencing, during the hearing, on the absence of any material before us, that either the material, if it was relevant and sufficient, would be forthcoming or that the detenu would be released. Neither of these happened.

(55) Instead, Shri Khambatte contended that the considerations open u/s 16A would enlarge the scope of section 3 of the MISA. We are wholly unable to agree. The grounds of detention have been dealt with u/s 3 and they are the only permissible grounds for detaining a person under the MISA. All that section 16A authorises is that "when making the order" the detaining authority is satisfied that in order to deal effectively with the emergency he should make a declaration there under he may do so. The two legal consequences of such a declaration are : (1) no grounds need be furnished to the detenu; (2) he would not get the benefit of his case being considered by an advisory board. The first would make the onus on the detenu more difficult ; the second deprives him of an opportunity of review by an advisory board. Apart from these two legal consequences, following from the declaration, we fail to see how the declaration would help enlarge the grounds available, for detention u/s 3 of the MISA. While we see no force at all in this submission; it only makes us even more apprehensive, whether in this case the detaining authority had probably misdirected himself in this way also.

(56) We have endeavored to indicate the availability of judicial review and also to indicate at least, broadly, at the same time, the limits subject to which it would be available at some length on account of this question being so important. What we have been at pains to explain is that the rule of law will not permit arbitrary executive action.

(57) In the result the impugned order (copy of which is Annexure A to the petition) is quashed, and the detenu (Shri Kuldip Nayyar) is directed to be set at liberty forthwith. The petition is accepted accordingly. Petition accepted.

(58) P.S. : In this case the judgment was reserved at about 3 P.M. on 10th September, 1975, the hearing of the case having commenced on 1st September.

(59) Shri V. M. Tarkunde, learned counsel for the petitioner, prayed at the conclusion of the hearing that in the event of our agreeing with his submissions we may orally direct the revocation and release of the petitioner and record our reasons for it later. Having regard to the way in which this petition was resisted right till the last moment of the hearing it seemed to us that the respondents might wish to take the matter further; we did not wish, Therefore, to place them under any handicap in this regard by our judgment in writing with full reasons not being made available to them immediately. We only reserved judgment but we observed that we would not really be taking much time for judgment.

(60) After our judgment had been prepared we had directed on 12th September, 1975 that the case be listed for judgment on the 15th September. At that stage on the 12th September itself, when we were about to rise for lunch (at about 1

P.M.) Shri A. B. Saharya, junior counsel for the respondents, mentioned to us, that the detenu in this case had been released and that the order of detention had been revoked, according to the instructions he had received that morning. We could only tell him then, since we wished to consider what we should do further, that the judgment, which had been prepared, had been directed to be listed for pronouncement on the 15th September, 1975. We also added that the action reportedly taken by the respondents was in "tune" with the judgment proposed to be delivered by us.

(61) A written application (Cr. Misc. 1007/75), since filed by Shri Saharya, enclosing a copy of the revocation order dated 11/12th September, 1975 and praying that the same may be placed on record and suitable orders passed thereon, has come up for admission today.

(62) The action taken by the respondents after judgment was reserved in this case does not doubt accord with our view of the case; the respondents were free to take the same kind of action even in the eventuality of our dismissing this petition. This is what happened to Greene after the House of Lords declined to release him (See the article of Hueston, page 15, referred to in our judgment : 1970 (86). LQR 33. Putting it at the minimum level and without even making any endeavor to raise it to the level of any breach of propriety it seems to us that at least after judgment was reserved by us courtesy to Court demanded that we were apprised about the intended action before it was actually taken.

(63) In being persuaded to pronounce the judgment prepared by us even before we knew about this kind of action by the respondents we are pressed by the consideration that in the public law area, which is what any matter pertaining to the issue of a writ of Habeas Corpus under Article 226 of the Constitution is, we are unable to visualise any compromise as such between the parties (it is not so here in fact) even without reference to Court especially after the issue of a rule nisi, which requires to be discharged by the Court. In this view, the judgment which was prepared by us, as explained above, has been pronounced and is signed by us, subject, however, to our recording the fact that an order quashing and giving direction to release the detenu has become unnecessary in these circumstances.