

(1974) 11 DEL CK 0020

In the Delhi High Court

Case No : Criminal Writ Appeal No. 37 of 1974

Daya Shankar Kapoor

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-11-1974

Acts Referred:

Citation : (1975) CriLJ 1376 : (1975) ILR Delhi 492(2)

Hon'ble Judges : T.V.R. Tatachari, J;M.R.A Ansari, J

Bench : Division Bench

Advocate : L.M. Sanghvi, N.C. Chawla, Harbans Singh, F.S. Nariman, Harish Chander, G.V.G. Krishnamurti and Jai Singh, for the Appellant;

Judgement

M.R. Ansari, J.

(1) The petitioner Daya Shankar Kapoor has filed this petition under Article 226 of the Constitution for the issue of a writ of habeas corpus or any other suitable order or direction for his release from detention by virtue of an order dated 24th September,1974 issued by the District Magistrate, Delhi, u/s 3(l)(c) read with section 3(2) of the Maintenance of Internal Security Act,1971 (hereinafter referred to as "the Act").

(2) The President of India in exercise of powers under Article 123(1) of the Constitution promulgated the Maintenance of Internal Security (Amendment) Ordinance, 1974 (No. 2 of 1974) to amend the Act. By the said ordinance the following clause was added to section 2 of the Act :-

"(CC)"smuggling" has the same meaning as in clause (39) of section 2 of the Customs Act, 1962 and all its grammatical variations and cognate expressions shall be construed accordingly."

THE following clause was also added to sub-section (1) of section 3 of the Act :-

"(C)If satisfied with respect to any person including a (foreigner) that with a view to preventing him from acting in any manner prejudicial to the conservation of

foreign exchange or with a view to preventing him from-

(I)smuggling goods, or

(II)abetting other persons to smuggle goods, or

(III)dealing in smuggled goods it is necessary so to do, make an order directing that such person be detained."

(3) The order dated 24th September, 1974, by virtue of which the petitioner has been detained reads as follows :-

"WHEREAS,I, V. K. Kapoor, District Magistrate, Delhi, am satisfied that with a view to preventing the person known as Shri Daya Shankar Kapoor son of late Shyam Lal. who is ordinarily a resident of 14/36, Shakti Nagar, Delhi, from smuggling, goods, or. abetting other persons to smuggle goods" or dealing in smuggled goods, it is necessary to make an order directing that the said Shri Daya Shankar Kapoor be detained ;

Now, in, exercise of the powers conferred by clause (c) of sub-section (1) of section 3 .read with Sub-Section (2) of section 3 of the Maintenance of Internal Security Act, 1971 (26 of 1971) I hereby direct that the said Shri Daya Shankar Kapoor be detained."

(4) A further order dated 28th September, 1974, was passed by the District Magistrate containing the following grounds of detention :-

"(I)You are a bullion dealer and have been persistently active in smuggling gold and dealing in smuggled gold for over a decade.

(II)You have been involved in the following specific cases relating to smuggling, abetting of smuggling and dealing in smuggled goods."

THISis followed by the specific cases (a) to (f) which it is not. necessary to reproduce at this stage.

"(III)There is reliable evidence of your having links with other smugglers. The following specific instances were mentioned ."

THIS is followed by specific instances (a) to (e) which again will be stated at the appropriate stage. In paragraph 2 of this order, it was stated -

"I am satisfied with respect to you that with a view to preventing you from continuing to indulge in activities relating to smuggling" it is necessary to detain you."

(5) The petition filed by the petitioner as well as the representation made by the petitioner to the Government which the petitioner wanted to be treated as part of this petition mentioned a number of grounds on which the petitioner's detention was challenged. One of the grounds was that the Ordinance dated 17th September, 1974, by which the Act was amended by adding clause (cc) to

section 2 of the Act and also adding clause (c) to section 3(1) of the Act was ultra virus as the said provision was beyond the legislative competence of Parliament. No arguments were addressed on this point by Dr. Singhvi, learned counsel for the petitioner and Shri N. C. Chawla, his learned junior, stated that he was not pressing this ground. Only the following grounds were pressed before us :-

1.The order of detention was vitiated as the use of the disjunctive in the order of detention showed uncertainty or non-application of the mind by the detaining authority.

2.The grounds of detention were either vague or irrelevant or non-existent or not proximate and did not enable the petitioner to make an effective representation to the Government against his detention .

3.The order of detention was bona fide.

(6) All these contentions were controverted by the respondents through an affidavit sworn by Shri V. K. Kapour, District Magistrate, Delhi ,who had passed the order of detention. It was denied that the use of the disjunctive in the order of detention indicated lack of application of mind or uncertainty on his part. On the other hand, the disjunctive was used after proper application of mind and under the circumstances of the case and in view of the very nature of the activities, the use of the disjunctive was quite proper. It was denied that the grounds were either vague, irrelevant or non-existent or not proximate. It was stated that all the relevant facts were disclosed in the grounds of detention and with regard to facts which were not disclosed, it was claimed that their disclosure was not in the public interest. The allegation of mala fide was also denied.

(7) Arguments were addressed by the learned counsel for the petitioner as well as by the learned Additional Solicitor General who appeared for the respondents on the several contentions mentioned above and judgment was reserved on November 8, 1974. Subsequently on November 18, 1974, learned counsel for the respondents drew our attention to Presidential Order dated 16th November, 1974 issued under Article 359(1) of the constitution and contended that by virtue of this order, further proceedings in the writ petition have to be stayed, as it was no longer open to the petitioner to challenge the detention order on any of the grounds mentioned in the petition. On the other hand, it was contended on behalf of the petitioner that although it was not now open to the petitioner to challenge the detention order as being violative of Articles 21 and 22 of the constitution, still it was open to him to challenge the detention order on other grounds, viz., that it was not in strict conformity with the provisions of the Act, that it bona fide and that it was passed on grounds which were irrelevant or non-existent or not proximate.

(8) The Presidential Order, a copy of which has been filed before us, is in the following terms:-

" IN exercise of the powers conferred by clause (1) of Article 359 of the Constitution President hereby declares that-

(A)the right to move any court with respect to orders of detention which have already been made or which may hereafter be made u/s 3(1) (c) of the Maintenance of Internal Security Act, 1971 as amended by Ordinance II of 1974, for the enforcement of the rights conferred by Article 14, Article 21 and clauses (4), (5), (6) and (7) of Article 22 of the constitution, and

(B)all proceedings pending in any Court for the enforcement of any of the aforesaid rights with respect to order of detention made under the said section 3 (1) (c), shall remain suspended for a period of six months from the date of issue of this Order or the period during which the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 is in force, whichever period expires earlier.

2.This Order shall extend to the whole of the territory of India."

(9) In *Makhan Singh Vs. State of Punjab* (and connected appeals), , the Supreme Court considered the effect of a Presidential Order issued under Article 359(1) of the Constitution on application filed under Article 226 of the Constitution and section 491(1)(b) of the Code of Criminal Procedure by persons against whom orders of retention had been passed u/s 3 (2) (15) and section 40 of the defense of India Act, 1952 and Rule 30(1) (b) of the defense of India Rules, 1962. In these applications, an order of detention had been challenged on the ground that the order contravened the fundamental rights of the detenus under Articles 14, 21 , and 22(4), (5) and (7) of the Constitution. The Supreme Court observed as follows :- --

" IF a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Art. 359(1) and would, Therefore, be hit by the Presidential Order issued under the said Article. The sweep of Art. 359(1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights."

HAVING laid down the above broad proposition, the Supreme Court proceeded to

consider whether it was open for the detenu to challenge the detention order on the grounds which are not based upon his fundamental rights under Articles 14, 21 and 22 of Constitution and laid down the following rule :-

" IT still remains to consider what are the pleas which are now open to the citizens to take in challenging the legality or the propriety of their detentions either under S. 491 (1) (b) of the Code, or Art. 226(1) of the Constitution. We have already seen that the right to move any court which is suspended by Art. 359(1) and the Presidential Order issued under it is the right for the enforcement of such of the rights conferred by Part Iii as may be mentioned in the order. If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the Order, his right to move any court in that behalf is not suspended, because it is outside Art. 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provision of the Act had been contravened. Such a plea is outside Art. 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order."

THE Supreme Court then proceeded to give certain illustrations of the nature of pleas which would still be open for a detenu to take in spite of the Presidential Order. The first illustration was stated in the following terms :-

" TAKE also a case where the detenu moves the court for a writ of Habeas Corpus on the ground that this detention has been ordered bona fide. It is hardly necessary to emphasise that the exercise of a power bona fide is wholly outside the scopes of the Act conferring the power and can always be successfully challenged. * * * *

** * But if the bona fides are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Art. 359(1) and the Presidential Order. That is another kind of plea which is outside the purview of Art. 359(1)".

The Supreme Court gave a second illustration in the following terms:-

" There's yet another ground on which the validity of the detention may be open to challenge. If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, Therefore, invalid, the plea thus raised by the detenu cannot at the threshold be said to be barred by the Presidential Order. In terms, it is not a plea which is relatable. to the fundamental rights specified in the said Order. It is a plea which is independent of the said rights and its validity must be examined."

A third illustration given was as follows :-

"SECTION 491(1) deals with the power of the High Court to issue directions in the nature of the Habeas Corpus and it covers six categories of cases in which

such a direction can be issued. It is only in regard to that class of cases falling "under S. 491(l)(b) where the legality of the detention is challenged on grounds which fell under Art. 359(1) and the Presidential Order that the bar would operate. In all other cases falling under S. 491 (1) the bar would be inapplicable and proceedings taken on behalf of the detenu will have to be tried in accordance with law."

IN conclusion ,the Supreme Court pointed out that the above illustrations did not exhaust all the pleas which could be taken outside the purview of the Presidential Order. The Supreme Court observed thus-

" WE ought to add that these categories of pleas have been mentioned by us by way of illustration, and so, they should not be read as exhausting all the pleas which do not fall within the purview of the Presidential Order."

(10) In Dr. Ram Manohar Lohia Vs. State of Bihar and Others, , the Supreme Court considered the effect of a Presidential Order under Article 359(1) of the Constitution on an order of detention passed under Rule 30(l)(b) of the defense of India Rules, 1962. Referring to the rule laid down by the Supreme Court in Makhan Singh's case, Hidayatullah, J" observed as follows:-

"IT is there pointed out that, although the right of the detenu to move the Court is taken away that can only be in cases in which the proper detaining authority passes a valid order of detention and the order is made bona fide for the purpose which it professes. It would, Therefore, appear from the latter case that there is an area of enquiry open , before a Court will declare that the detenu has lost his right to move the Court. That area at least embraces an enquiry into whether there is action by a competent authority and in accordance with defense of India Act and the Rules, there under. Such an enquiry may not entitle the Court to go into the merits of the case once it is established that proper action has been taken, for the satisfaction is subjective, but till that appears the Court is bound to enquire into the legality of the detention."

THE learned Judge then proceeded to consider what pleas were barred by the Presidential Order and what pleas were still open to the detenu to take in spite of the Presidential Order. The learned Judge observed thus :-

" IT, therefore ,becomes necessary to inquire what are the rights which are so affected? This can only be found out by looking into the content of the Arts. 21 and 22. * * * * * When the President suspended the operation of Art. 21 he took away from any person dealt with under the terms of his Order, the right to plead in a Court of law that he was deprived of his life and personal liberty otherwise than according to the procedure established by the laws of the country. In other words, he could not invoke the procedure established by ordinary law. But the President did not make lawless actions lawful- He only took away the fundamental right in Art. 21 in respect of a person proceeded against under the defense of India Act or any rule or order made there under. * * *

BUT to be able to say that the right to move the Court for the enforcement of right under Art. 21 is suspended, it is necessary to establish that such person has been deprived of any such right under the defense of India Act or any rule or order made there under, that is to say, under the authority of the Act. The action of the authorities empowered by the defense of India Act is not completely shielded from the scrutiny of courts. The scrutiny with reference to procedure established by laws other than the defense of India Act is, of course, shut out but an enquiry whether the action is J.

JUST as action is limited in its extent, by the power conferred, so also the power to move the Court is curtailed only when there is strict compliance with the defense of India Act and the Rules. The Court will not enquire whether any other law is not followed or breached but the Court will enquire whether the defense of India Act or the Rules have been obeyed or not. That part of the enquiry and consequently the right of a person to move the Court to have that enquiry made, is not affected".

(11) In *Durgadas Shirali Vs. union of india (UOI) and Others.*, , an order of detention passed under Rule 30(1) (b) of the defense of India Rules, 1962 was challenged before the Supreme Court by an application under Article 32 of the Constitution. The detention order was challenged on the ground that the District Magistrate had not applied his mind to the specific activities of the petitioner and there was complete absence of the material before the District Magistrate to suggest that the conduct of the detenu would be prejudicial to the defense of India and Civil defense, India's relations with foreign powers, public safety and the maintenance of the public order and that Therefore, the order of detention was bona fide and illegal. It was also contended that one of the ground mentioned in the order of detention was not a relevant ground. These contentions were considered by the Supreme Court in the light of a Presidential Order is under Article 359 of the Constitution whereby the fundamental rights under Articles 14, 19, 21 and 22 of the Constitution had been suspended. Reiterating the rule laid down by the Supreme Court in *Makhan Singh's* case, it was held that :-

"If the petitioner seeks to challenge the validity of the Ordinance, rule or order made there under on any ground other than the contravention of Arts. 14, 21 and 22, the Presidential Order cannot come into operation. * * * * * But a petitioner can challenge the validity of the Ordinance, rule or order made there under on a ground other than those covered by Art. 358 or the Presidential Order issued under Art. 359(1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of his right to move an appropriate Court for a writ of habeas corpus on the ground that his [detention has been ordered mala fide. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view."

(12) The last decision to which it is necessary to refer is the case of Jaichand Lall Sethia Vs. State of West Bengal and Others, . Reiterating the rule laid down in the earlier decisions in Makhan Singh's case as well as Durgadas Chirali's case, the Supreme Court stated the position in the following terms :-

" IT was held by this Court that the scope of Art. 359(1) and the Presidential Order issued under it is wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce fundamental rights under Arts. 14, 19, 21 and 22. It was pointed out that during the pendency of the Presidential Order the validity of the Ordinance or any rule or order made there under cannot be questioned on the ground that it contravenes Arts. 14, 21 and 22. But this limitation cannot preclude a citizen from challenging the validity of the Ordinance or any rule or order made there under on any other ground. If the appellant seeks to challenge the validity of the Ordinance, rule or order made there under on any ground other than the contravention of Arts. 14, 21 and 22, the Presidential Order cannot come into operation- * * * But the appellant can challenge the validity of the order on a ground other than those covered by Art. 358, or the Presidential Order issued under Art. 359(1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of the right to move an appropriate Court for a writ of Habeas Corpus on the ground that his detention has been ordered bona fide. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view. It may be stated in this context that a bona fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In other words, the power conferred by the statute has been utilised for some indirect purpose not connected with the object of the statute or the mischief it seeks to remedy."

(13) The position, Therefore, is that by virtue of the Presidential Order, the petitioner is debarred from challenging the order of detention on the ground of violation of his fundamental rights under Articles 14, 21 and 22(4), (5), (6) and (7) of the Constitution. [But the petitioner is not precluded from challenging the order of detention on the ground that it is in violation of the mandatory provisions of the Act itself or on the ground that it was bona fide. The Presidential Order Therefore, does not warrant the stay of further proceedings and does not stand in the way of this Court examining the validity of the order of detention within the narrow field indicated above.

(14) Whether the order of detention has been made on the subjective satisfaction of the District Magistrate as required by section 3(1)(c) of the Act is a question which falls well within the ambit of the present enquiry even after the

passing of the Presidential Order, because this question has nothing to do with Articles 14, 21 and 22(4), (5), (6) and (7) of the Constitution. If the order of detention was made without the subjective satisfaction of the District Magistrate, then it is not an order in accordance with section 3(1) (c) of the Act and the order is liable to be quashed by this Court on that ground.

(15) It is the contention of the petitioner that the use of the disjunctive in the order of detention indicates that it was not based on the subjective satisfaction of the District Magistrate inasmuch as it shows uncertainty and lack of application of mind by the District Magistrate. The order of detention has already been reproduced and for the present purpose, it is sufficient to notice that according to this order, the District Magistrate was satisfied that it was necessary to make an order directing the detention of the petitioner with a view to preventing him from smuggling goods or abetting other persons to smuggle goods or dealing in smuggled goods. In elaboration of the said contention, it is urged on behalf of the petitioner that the word "smuggling" appearing in the order of detention has a special meaning, namely, the meaning given to it by clause (cc) of section 2 of the Act, that the word "smuggling" does not include the act of abetting other persons to smuggle goods or the act of dealing in smuggled goods and that the three activities, namely, smuggling goods, abetting other persons to smuggle goods and dealing in smuggled goods, were three distinct activities. The use of the disjunctive after each of these three distinct activities, it is contended shows that the District Magistrate was not certain in his mind as regards the activity from which the petitioner was being prevented and that, Therefore, it shows that the District Magistrate had not really applied his mind before passing the order of detention against the petitioner. The reply of the learned Additional Solicitor General to this contention is two-fold, namely,-

(I)that smuggling goods, abetting other persons to smuggle goods and dealing in smuggled goods are not distinct activities but are necessary concomitants of each other and that, Therefore, the use of the disjunctive was quite proper and did not show either uncertainty or lack of application of the mind on the part of the District Magistrate ; and

(II)that even if it is assumed that they were three distinct activities, the grounds of detention showed that the District Magistrate had used the word "or" not as a disjunctive but as a conjunctive.

Before we proceed to consider the above contentions, we shall state the legal position by referring to some of the decisions cited by the learned counsel for the petitioner as well as by the learned Additional Solicitor General.

(16) In the case of Ram Manohar Lohia, already referred to, the order passed under Rule 30(1) (b) of the defense of India Rules, 1962 stated that the District Magistrate was satisfied that Ram Manohar Lohia should be detained "with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order". Rule 30(1) (b) of the defense of India

Rules under which the order of detention was passed was in these terms :-

" THE Central Government or the state Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defense of India and civil defense, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary to do so, may make an order-(a) * * * * (b) directing that he be detained."

the order of detention was challenged on the ground that the order was not in terms of the rule, because the rule did not justify the detention of a person to prevent him from acting in a manner prejudicial to the maintenance of law and order while the order directed detention for such purpose. The rule provided for an order of detention being made to prevent acts prejudicial to the maintenance of public order, but according to the contention, public order and law and order were not the same thing and, Therefore, an order of detention to prevent acts prejudicial to law and order would not be justified by the rule. Upholding this contention, Sarkar, J., observed as follows : -

" WHAT the Magistrate making the order exactly had in mind by the use of the words law and order, we do not know. Indeed, we are not entitled to know that for it is well settled that Courts cannot enquire into the grounds on which the Government thought that it was satisfied that it was necessary to make an order of detention. Courts are only entitled to look at the face of the order."

REFERRING to another ground on which the order of detention was passed, namely, to prevent the petitioner from acting in any manner prejudicial to public safety, Sarkar, J., observed that this ground was clearly within the rule and without more, the Court could have accepted an order made on that ground as a perfectly legal order. But when the detention order mentioned two grounds one of which was in terms of the rule while the other was not, such an order would be a bad order, the reason being that it could not be said , what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order. The order had, Therefore, to be held illegal though it mentioned a ground on which a legal order of detention could have been based.

(17) In the same case, Hidayatullah, J., brought out the distinction between the expressions "Law and order", "public order" and "security of the State". He observed thus-

" IT will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State". "Law and order" also comprehends disorders of less gravity than those affecting "Public order". One has to "imagine three concentric circles. Law and order represents the largest circle within which is the next circle

representing public order and the smallest circle represents security of State. It is then easy to see that" an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the defense of India Rules."

(18) In Jagannath Misra Vs. State of Orissa, , the following order had been passed against the petitioner under Rule 30(1) (b) of the defense of India Rules:-

" WHEREAS the State Government is satisfied that with a view to preventing Shri Jagannath Misra * * * from acting in any manner prejudicial to the defense of India and civil defense, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India or the efficient conduct of military operations, it is necessary so to do, the Governor of Orissa in exercise of the powers conferred by R. 30(1) (b) of the defense of India Rules, 1962 is pleased to direct that the said Shri Jagannath Misra shall be detained until further orders."

The Supreme Court pointed out that the order of detention referred to six out of the seven possible grounds on which a person could be detained u/s 3 (2) (15) of the defense of India Act and held that the fact that the detention order referred to as many as six out of the seven possible grounds on which a person could be detained showed casualness in passing the order of detention and also showed that the mind of the authority concerned was really not applied to the question of the detention of the petitioner in that case. The Supreme Court also made the following, observations which are opposite to the case before us :-

" THERE is another aspect of the order which leads to the same conclusion and unmistakably shows casualness in the making of the order. Where a number of grounds are the basis of a detention order, we would expect the various grounds to be joined by the conjunctive "and" and the use of the disjunctive "or" in such a case makes no sense. In the present order however we find that the disjunctive "or" has been used, showing that the order is more or less a copy of S. 3(2) (15) without any application of the mind of the authority concerned to the grounds which apply in the present case."

The order of detention in that case was, Therefore, quashed.

(19) The principles enunciated in the two cases mentioned above were applied by the Supreme Court in a case under the Act, namely: Kishori Mohan Bera Vs. The State of West Bengal, . In that case, the order of detention directed the detention of the petitioner "with a view to preventing him from acting in a manner prejudicial to the maintenance of the public order or security of the State". The Supreme Court held that the detention order was had on account of the use of the disjunctive in the order and gave the following reasons :-

" THE satisfaction of the District Magistrate was on the disjunctive and not conjunctive grounds, which means that he was not certain whether he had

reached his subjective satisfaction as to the necessity of exercising his power of detention on the ground of danger to the public order or danger to the security of the State. If he felt the necessity to detain the petitioner from the activities described by him in the grounds of detention on the ground that those activities affected or were likely to affect both the public order and the security of the State he would, no doubt, have used the conjunctive "and" and not the disjunctive "or" in his order. But, as the order stands, it would appear that he was either not certain whether the alleged activities of the petitioner endangered public order or the security of the State, or he did not seriously apply his mind on the question whether the said alleged activities fell under one head or the other and sincerely reproduced in the language of S. 3(1)(a)(ii). When such equivocal language is used in an order and the detenu is not told whether his alleged activities set out in the grounds of detention fell under one head or the other, or both, it is not difficult to appreciate that a detenu might find it hard to make an adequate representation to Government and the Advisory Board."

Again,-

"It is, therefore, clear that before the authority invokes its power under S. 3, it must satisfy itself and must expressly say in its order that the activities of the person concerned were such that they endangered or were likely to endanger either the security of the State or public order or both. If the activities are of such potentiality or impact so as to affect both, then, the conjunctive "and" and not the disjunctive "or" would be the appropriate word. There is, therefore, considerable force in the argument that the language in which the impugned order is couched demonstrates an element of casualness with which it was made."

(20) In *Jagdish Prasad Vs. The State of Bihar and Another*, the order of detention stated that the District Magistrate was satisfied that "with a view to preventing Shri Jagdish Prasad from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it was necessary to make an order that he be detained". It was contended that the alleged activities mentioned in the grounds of detention only supported one of the grounds mentioned in the detention order, namely, the maintenance of supplies and did not support the other grounds namely, the maintenance of services essential to the community and that the mention of both these grounds in the detention order showed that the District Magistrate had not applied his mind to the order passed by him. This contention was repelled by the Supreme Court and it was held that the facts alleged in the grounds of detention communicated to the person concerned affected not only the maintenance of supplies but also the maintenance of services essential to the community and that the use of the word "and" as conjunctive in the order of detention was quite proper. While so holding, the Supreme Court, however, made the following observations which are relied upon by the learned counsel for the

petitioner:-

" HAD the authority used one or other of the grounds in the alternative, such for example as "public order" or "security of State" or "maintenance of supplies", it would have failed in law. He has to be firm and clear and not doubtful about why he is detaining the man. "Either or" ill fits into Section 3. Not so, when it is cumulative. A man may be detained on grounds A and B but not A or B. Here, the cumulative, not the alternative is the tenor of the order. Had it been otherwise due care would stand negated and the order would fall."

(21) In an unreported judgment of the Supreme Court in Writ Petition Nu.278 of 1974 (Binod Bihari Mahato v. The State of Bihar and others) delivered on 1-10-1974(6), the rule laid down in the case of Kishori Mohan Bera Vs. The State of West Bengal,) was re-affirmed and it was held that if the order of detention purported to be based on the satisfaction of the detaining authority that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of public order or security of the State, it would clearly be an invalid order. The satisfaction of the detaining authority in such a case would be on disjunctive and not conjunctive grounds and that would mean that the detaining authority was not certain whether it had reached its subjective satisfaction as to the necessity of exercising the power of detention on the ground of danger to public order or danger to the security of the State. If the detaining authority felt that it was necessary to detain the petitioner on the ground that his activities affected or were likely to affect both public order and the security of the State, it would use the conjunctive "and" and not the disjunctive "or" in reciting its satisfaction. Where, however, the disjunctive "or" is used instead of the conjunctive "and", it would mean that the detaining authority was either not certain whether the alleged activities of the petitioner endangered public order or the security of the State, or it did not seriously apply its mind to the question whether such activities fell under one head or the other and merely reproduced mechanically the language of section 3(1)(a)(ii).

The use of the disjunctive in an order of detention was, however, held to be permissible in cases where the statute itself contained a comprehensive definition of a particular expression. In Ananta Mukhi alias Ananta Hari Vs. The State of West Bengal, , the detention order stated that the District Magistrate was satisfied that the person concerned should be detained "with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order". This order was passed under sub-section (1) read with sub-section (3) of section 3 of the West Bengal (Prevention of Violent Activities) Act, 1970. Sub-section (1) of section 3 of the said Act read as follows:-

" THE State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order, it is necessary so to do, make an order directing that such person be detained."

SUB-SECTION(2) of section 3 contained a definition of the expression "acting in any manner prejudicial to the security of the State or the maintenance of public order" employed in sub-section (1) and enumerated in clauses (a) to (e) diverse acts as falling within the said expression. Khanna, J., delivering the majority judgment of the Court, observed as follows :-

" WE have reproduced sub-section (2) of section 3 of the Act earlier and it would appear there from that a comprehensive definition has been given of the expression "acting in any manner prejudicial to the security of the State or the maintenance of public order". The definition shows that the whole thing has been clubbed together and no separate definitions have been given, one in respect of "acting in any manner prejudicial to the security of the State" and another in respect of "acting in any manner prejudicial to the maintenance of public order". The "various acts which have been specified in the different clauses of sub-section (2) of section 3 fall within the compendious expression "acting in any manner prejudicial to the security of the State or the maintenance of public order", and it would not, in our opinion, introduce an infirmity in the detention order if it is stated therein that it is necessary to detain a detenu with a view to prevent him from acting in any manner prejudicial to the security of the State or the maintenance of the public order."

THE learned Judge distinguished the earlier judgment of the Supreme Court in Jagannath Misra's case as well as Rani Manohar Lohia's case in the following terms :-

"IT would follow from the above that though all activities prejudicial to the security of the State and those which are prejudicial to the maintenance of public order are not identical, because of close nexus between maintenance of public order and security of State, there is bound to be some overlapping. As the expressions "acts prejudicial to the maintenance of public order" and "acts prejudicial to the security of the State" have not been separately defined but have been put together in the same definition with the disjunctive "or" in between them, the use of the word "or" in the detention order would not, in our opinion, so adversely affect the said order as may justify the quashing of that order."

THE learned Judge then referred to the following observations of the Supreme Court in Shyamal Mondal Vs. The State of West Bengal, as fortifying the conclusions reached by him :-

" IT will be seen that the Act itself furnishes a dictionary meaning for that expressions and a perusal of cls. (a) to (c) clearly shows that any of the matters "referred to therein will be both "prejudicial to the security of the State or the maintenance of public order" ".

(22) The position of law that emerges from the decisions cited above is that unless the statute itself defines a particular expression by use of the disjunctive, as in the case of Anania Mukhi v. State of West Bengal(7), the use of the

disjunctive in an order of detention passed under a statute which does not so define the expression vitiates the order of detention. We have, Therefore, to examine the order of detention in the present case in the light of the decisions cited above.

(23) The Act itself contains a definition of the word "smuggling" in clause (cc) of section 2 of the Act as under:- " "smuggling" has the same meaning as in clause (39) of section 2 of the Customs Act, 1962 (52 of 1962), and all its grammatical variations and cognate expressions shall be construed accordingly."

SECTION 3(I)(c) of the Act reads-

"(1)The Central Government or the State Government may,-

(C)if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to the conservation of foreign exchange or with a view to preventing him from-

(I)smuggling goods, or

(II)abetting other persons to smuggle goods, or

(III)dealing in smuggled goods, it is necessary so to do, make an order directing that such person be detained."

In view of the definition of the word "smuggling" in clause (cc) of section 2 of the Act, the word "smuggling" in sub-clause (1) of "clause (c) of sub-section (3) of section 3 has to be constructed as having the same meaning as the word "smuggling" defined in clause (cc) of section 2 of the Act. Clause (39) of section 2 of the Customs Act defines "smuggling" as follows :-

"SMUGGLING" INrelation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or section 113."

SECTION 111 of the Customs Act enumerates the several circumstances under which goods which are brought from a place outside India shall be liable to confiscation. Similarly, section 113 of the Customs Act enumerates the several circumstances under which goods which are attempted to be exported are liable to be confiscated. Therefore, reading section 2(39) and sections 111 and 113 of the Customs Act together, "smuggling" means an act or omission by a person who brings goods from a place outside India or attempts to export goods outside India under any of the circumstances mentioned in sections 111 or 113 the Customs Act. The definition of smuggling is, Therefore, restricted to an act or omission which renders the goods liable to confiscation. The definition of smuggling does not include in its scope acts which can be properly described as dealing in smuggled goods. The distinction is brought out by sections 112 and 114 of the Customs Act. Section 112 says that any person-

"(A)who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, or abets the

doing or omission of such an act, or

(B)who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which "he knows or has reason to believe are liable to confiscation u/s 111."

SHALL be liable to a penalty. Similarly, section 114 provides for the levy of a penalty on any person who abets the doing or omission of an act which would render the goods liable to confiscation u/s 113. Section 112. therefore. brings out the distinction between a person who smuggles goods and a person who abets the smuggling of goods or a person who deals in smuggled goods, and makes each one of them separately liable to penalty. In other words, smuggling of goods, abetting other persons to smuggle goods and dealing in smuggled goods are treated as being distinct and separate. If the Legislature intended to include the acts of abetment of smuggling and dealing in smuggled goods in the definition of smuggling, then section 2(39) of the Customs Act would have defined "smuggling" in the following terms:-

""SMUGGLING" (INrelation to any goods) means any act or omission by a person which will render such person liable to penalty under sections 112 or 114."

Therefore, definition of smuggling in clause (cc) of section 2 of the Act docs not, in our view, include the act of abetting other persons to smuggle goods or the act of dealing in smuggled goods.

(24) That the Legislature has construed the act of smuggling goods, the act of abetting other persons to smuggle goods or the act of dealing in smuggled goods as three distinct activities can be inferred also from the language of clause (c) of sub-section (1) of section 3 of the Act. If the Legislature had intended to include the act of abetment or the act of dealing in smuggled goods in the word "smuggling", then there was no need for it to have put these three activities under dies tinct heads. It would have been sufficient if the Legislature had stopped short with stating ground (i) "smuggling goods" as a sufficient ground for passing an order of detention. It was not necessary for the Legislature to have added sub-clauses (ii) and (iii) to clause (c). It cannot be presumed that sub-clauses (ii) and (iii) were redundant.

(25) Section 16A of the Act also clarifies the position. Section 16A(1) reads-

"(1)Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention has been made under this Act may be detained without obtaining the opinion of the Advisory Board for a period longer than three months but not exceeding one year from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting other person to smuggle goods, and the Central Government has reason to believe that such person-

(I)smuggles or is likely to smuggle goods, or

(II)abets or is likely

In this section, one significant fact to be noticed is that smuggling goods and abetment of other persons to smuggle goods are mentioned separately as being distinct activities. The other significant fact is that in this section there is no reference to the act of dealing in smuggled goods. In other words, dealing in smuggled goods is taken outside the purview of section 16A of the Act, the only reasonable conclusion that can be drawn is that the Legislature has not treated the act of dealing in smuggled goods as being included in the act of smuggling goods and that the Legislature has treated the three kinds of activities mentioned in sub-clauses (i), (ii) and (iii) of clause (c) of sub-section (1) of section 3 of the Act as being distinct activities.

(26) The mention of all these three activities in the detention order, namely ,smuggling goods, abetment of other persons to smuggle goods and dealing in smuggled goods, must be understood as having reference to three separate and distinct activities and not to activities which overlap one another or as meaning the same thing. The rule laid down by the Supreme Court in *Ananta Mukhi alias Ananta Hari Vs. The State of West Bengal*, cannot, Therefore, apply to the order of detention in the present case and it must be held on the authority of the other cases cited that the use of the disjunctive in the order of detention showed that the District Magistrate was uncertain regarding the nature of the activity from which he wanted the petitioner to present or that the District Magistrate had not properly applied his mind before passing the detention order.

(27) In order to support his alternative contention, namely, that" or "has been used as a conjunctive in the detention order, the learned Additional Solicitor General has referred to the grounds of detention .Ground No (i) states that the petitioner was a bullion dealer and that he had been persistently active in smuggling gold and dealing in smuggled gold for over a decade. Ground No. (ii) states that the petitioner had been involved in the specific cases set out therein relating to smuggling, abetting of smuggling and dealing in smuggled goods. Reference is also made to paragraph 2 of the grounds of detention in which it is stated that the District Magistrate was satisfied that with a view to preventing the petitioner from continuing to indulge in "activities relating to smuggling" it was necessary to detain him. On the basis of these grounds, it is contended that what the District Magistrate had in his mind at the time of the passing of the order was that the petitioner was likely to indulge in all the activities mentioned in the order, namely, smuggling, abetting other persons So "muggle goods and dealing in smuggled goods. We are unable to accept this contention. What is stated in grounds Nos. (i) and (ii) of the grounds of detention relate to the past conduct of the petitioner. Merely because the petitioner is alleged to have been dealing in the past in all the three kinds of activities, it does not follow that the District Magistrate wanted to prevent the petitioner from indulging in all the three kinds of activities. Further, in the affidavit filed by the District Magistrate,

he does not state that he used the word "or" in the detention order as a conjunctive. What is stated in the affidavit is-

" THE smuggling activities have to be understood in their generic sense and are activities which are inter-connected with each other. The activities involve smuggling as such, abetting of other persons to smuggle goods as well as dealing in smuggled goods, as would be clear from a perusal of the grounds of detention served upon him. It is, Therefore, wrong to suggest that merely because of the use of disjunctive "or" in the order of detention, an inference can be drawn that there has been no application of the mind.

SMUGGLING activities involving smuggling, abetment of smuggling and dealing with smuggled goods are necessary concomitants of each other and one cannot exist independently of another."

" NEARLY or remotely, they are connected with each other and stating them in the order of detention joined with "or" cannot given rise to the inference that I did not apply my mind to the facts.

IN any case, I reiterate that I fully applied my mind to the relevant material before issuing the order of detention. I am further advised to submit that the ratio of the judgments cited in this paragraph has no application to the facts of this case."

IT is exactly this kind of Explanation that was considered by the Supreme Court in Kishori Mohan Bera's case and rejected with the following observations:-

" IF he felt the necessity to detain the petitioner from the activities described by him in the grounds of detention on the ground that those activities affected or were likely to affect both the public order and the security of the state he would, no doubt have used the conjunctive "and" and not the disjunctive "or" in his order."

(28) We have, Therefore, to hold that by the use of the disjunctive in the order of detention, the District Magistrate was not certain whether he was detaining the petitioner in order to prevent him from smuggling goods or from abetting other persons to smuggle goods or from dealing in smuggled goods, and that without applying his mind, he had merely mechanically reproduced the language of section 3(1) (c) of the Act. This uncertainty and lack of application of mind cannot amount to the subjective satisfaction of the District Magistrate as is required u/s 3(1) (c) of the Act. The order of detention, Therefore, has been passed by the District Magistrate without his Subjective satisfaction and as such. it is not an order in accordance with section 3 (1) (c) of the Act. The detention order is, Therefore, an illegal order and is liable to be quashed on this ground.

(29) The petitioner has also challenged the validity of the order of detention on the ground that the grounds of detention are either vague or irrelevant or non-existent or showed bona fides on the part of the detaining authority. The learned counsel for the petitioner has contented firstly that the grounds of detention are

not in strict conformity with the provisions of section 8(1) of the Act and secondly, that as the order of detention is based upon such grounds, it is not an order based upon the subjective satisfaction of the District Magistrate and is, Therefore, not a valid order u/s 3(l)(c), of the Act.

(30) The first contention of the learned counsel for the petitioner is based upon section 8(1) of the Act which reads-

" WHEN a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government."

ACCORDING to the learned counsel, the grounds of detention should be of such a nature as would enable the petitioner to make an effective representation to the Government and that when the grounds are either vague or irrelevant or non-existent, he would be deprived of the opportunity of making an effective representation given to him u/s 8(1) of the Act. In support of this contention, the learned counsel seeks to invoke the principles enunciated by the Supreme Court on the scope of Article 22(5) of the Constitution which is couched in language similar to the language in section 8(1) of the Act. According to the learned counsel, the Presidential Order only precludes the petitioner from seeking the aid of Article 22(5) of the Constitution, but does not preclude him from seeking the aid of section 8(1) of the Act which is independent of Article 22(5) and which is not hit by the Presidential Order. The learned counsel for the respondents, however, contends that section 8(1) of the Act has been incorporated in the Act only by reason of the mandate under Article 22(5) of the Constitution and when the petitioner seeks to invoke the aid of section 8(1) of the Act, he is, in substance, invoking the aid of Article 22(5) which has been suspended by the Presidential Order. According to the learned counsel, invoking the aid of section 8(1) of the Act would have the effect of nullifying the ban imposed by the Presidential Order.

31. Article 22(4) and (5) reads as under-

"(4)No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(A)an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

PROVIDED that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament

under sub-clause (b) of clause (7); or

(B) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(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."

It would, therefore, appear that Article 22(4) only lays down that a law providing for preventive detention for a longer period than three months should provide for the constitution of an Advisory Board. Article 22(4) does not specifically require that a law providing for preventive detention should also contain provisions for communicating the grounds of detention to the detenu or to afford him the earliest opportunity of making a representation against the order. It is Art. 22(5) that refers to the communication of grounds of detention to the detenu. But, it has to be noted that it refers to the same only as what the detaining authority should do and not as what a law of preventive detention should provide. Article 22(5) does not require that a law providing for preventive detention should also contain provisions for communicating the grounds of detention to the detenu or to afford him the earliest opportunity of making a representation against the order. It is, therefore, doubtful whether it can be said that section 8(1) has been introduced in the Act by the mandate of Article 22(5) of the Constitution. Even if a law of preventive detention does not contain a provision such as section 8(1) of the Act, a person detained under such a law can still invoke Article 22(5) and claim that the grounds of detention should be communicated to him and that he should be afforded the earliest opportunity of making a representation against the order. There is, therefore, considerable force in the contention of the learned counsel for the petitioner that section 8(1) of the Act is an independent statutory provision dehors Article 22(5) of the Constitution, and that it is a mandatory provision of the Act and any order of detention which is in contravention of this mandatory provision is illegal. However, for the purpose of this petition, we do not consider it necessary to decide this point, as the grounds of detention in the petitioner's case may be examined on the basis of the alternative contention advanced by the learned counsel for the petitioner, namely, that the grounds of detention being vague or irrelevant or non-existent or bona fide, the order of detention based upon such grounds does not truly reflect the satisfaction of the detaining authority as required u/s 3(1) (c) of the Act and, therefore, the order of detention was illegal.

(32) The first ground mentioned in the grounds of detention is as follows:-

" YOU are a bullion dealer and have been persistently active in smuggling gold and dealing in smuggled gold for over a decade."

ON the face of it. this ground is vague and devoid of all particulars. We are not

considering the vagueness in this ground as affecting the ability of the petitioner to make an effective representation within the meaning of Article 22(5) of the Constitution; but we are considering the said vagueness in so far as it has a bearing on the satisfaction of the detaining authority within the meaning of section 3 (1) (c) of the Act. Thus, the question for consideration is whether the relevant facts and particulars were taken into consideration by the District Magistrate at the time of passing the detention order and whether the same formed the basis of his satisfaction. In his reply affidavit, the District Magistrate has stated as follows :-

" I fully applied my mind and considered all relevant material relating to the petitioner before the order of detention was made."

AT another place, it is stated that-

" I had carefully gone through all the material facts on record on which the grounds of detention are based, and had found the same to be relevant and sufficient to be satis-fied that the petitioner needs to be detained in order to prevent him from indulging in smuggling activities and that there was sufficient material before me to come to the conclusion that this precaution was needed to be taken".

AT yet another place it is stated that-

" I had before me all relevant material with regard to the activities of the petitioner * * *

AT yet another place, it is stated that-

" THE grounds furnished to the petitioner are detailed and specific and give the date and place of the said activities names of the parties, quantity and description of goods involved and the part played by the petitioner in each of the cases, is shut out".

Finally, is stated as follows :-

" THE grounds are based upon the entire dossier relating to the activities of the petitioner and sufficient details thereof have been set out in the grounds of detention and I did not consider it in the public interest to reveal any more facts or details".

(33) If these statements are read as an Explanation to ground No. (i). it can only mean either that all the facts and particulars which had been taken into consideration by the District Magistrate with regard to ground No. (i) were only those which have been mentioned in this ground or that the facts and particulars which were considered by the District Magistrate but which were not mentioned in this ground were of such a nature that he did not consider it in the public interest to mention them in the ground. If the facts and particulars considered by the District Magistrate were only those that have been stated in this ground, it is obvious that he had no material at all before him for coming to the conclusion

that the petitioner was a bullion dealer and that he had been persistently active in smuggling gold and dealing in smuggled gold for over a decade. This ground was, Therefore, non-existent. In any case. it would show that in passing the order of detention on this ground, the District Magistrate had really not applied his mind. If, on the other hand, it is assumed that the District Magistrate had taken into consideration certain facts and particulars in respect of this ground but did not consider it in the public interest to disclose them. the question that arises is whether the privilege claimed by the District Magistrate is bona fide or whether it is mala fide.

(34) In this connection the distinction between malice in fact and malice in law has to be borne in mind and the distinction between the two has been pointed out by Viscount Haldane, L.C., in *Shearer v. Shields*, 1914 A. C. 808, in the following words :-

" 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 sense innocently."

IN *S. Pratap Singh Vs. The State of Punjab*, legal bona fides were defined in the following terms :-

"IN legal parlance ,it would be a case of a fraud on a power, though no corrupt motive or bargain is imputed. In this sense, if it could be shown that an authority exercising a power has taken into account-it may even be bona fide and with the best of intention, as a relevant factor something which it could not properly take into account, in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad."

(35) In *Bhut Nath Mete Vs. The State of West Bengal*, the Supreme Court observed as follows :-

" ABSENCE of bona fides in this context does not mean proof of malice, for an order can be mala fide although the officer is innocent. The important point is that the "satisfaction of the public functionary, though subjective, must be real and rational, not colourable, fanciful mechanical or unrelated to the objects enumerated in section 3(1) of the Act."

IN *Balkrishna Kashinath Khopkar v. The District Magistrate*, ILR 1956 Bom 797 Chagla, C.J., in dealing with the question as to whether a claim of the detaining authority for not disclosing certain facts in the public interest, would be mala fide, observed as under:-

" NOW, in our opinion it is not sufficient for the detaining authority to satisfy the Court that a privilege has been claimed with regard to all facts not disclosed, by

some omnibus averment in the order that other facts than those disclosed have not been disclosed because they are against public interest. If in the petition challenging the order the detenu makes a grievance of the fact that certain specific facts have not been disclosed and which has prevented him from making an effective representation it is incumbent upon the detaining authority to make an affidavit and to deal with each of these facts and to say that a privilege is claimed with regard to these facts. The Court must be in a position to judge that privilege has been bona fide claimed with regard to any particulars the failure to disclose which has led to the prejudice of the detenu."

THE above observations were no doubt made in the context of the provisions of Article 22(6) of the Constitution and it is also true that the Presidential Order has suspended the rights of the citizen under the said Article, but the said suspension affects only the detenu and not the detaining authority who notwithstanding the Presidential Order is still free not to disclose certain facts in public interest. Since a Court can consider the question of bona fides notwithstanding the Presidential Order, it would be open to it to see whether the claim of the detaining authority was mala fide or not and in that context, the observations of Chagla, C.J., extracted above will be relevant.

(36) When the District Magistrate has under grounds Nos. (ii) and (iii) disclosed the facts and particulars which, according to him, showed that the petitioner engaged in smuggling abetting of smuggling and dealing in smuggled goods, we fail to understand the reason why the District Magistrate considered it in the Public interest not to disclose similar facts and particulars in respect of ground No. (1). The claim of privilege in respect of such facts and particulars is, Therefore, clearly mala fide.

(37) Ground No. (ii) states that-

" YOU have been involved in the following specific cases relating to smuggling, abetting of smuggling: and dealing in smuggled goods."

AND instance No. (a) is described as follows:-

" IN September ,1961 during the course of scrutiny of the records of the refinery of M/s. R. K. Chander Bhan and R.K. Chander Bhan Multani it was observed that large Harichand on your behalf and on behalf of one Salig Ram, quantities of gold had been tendered by Ishwar Chand both of M/s. Kapoor Brothers, Billion Merchants, Chandni Chowk, Delhi. In a statement recorded during the course of investigation, it was admitted that the gold had been supplied to you by some persons of Amritsar on the 26th September, 1961 and that you had melted the gold and had mixed some alloy in it so that it could be tendered in the refinery for changing its shape. On that day 1.979,750 gms. of gold was seized in this case,"

THE objection of the petitioner with regard to this ground is twofold, namely,

(I)that the name of the person who had made the admission involving the

petitioner and the date when the said admission was made has not been stated in the ground, and

(II) that a material fact has been suppressed namely, that the gold which was seized had been returned to the petitioner under the orders of the Government.

WE do not see much merit in the first objection in view of the fact that the particulars about the statement involving the petitioner had been furnished to the petitioner in the proceedings before the Customs authorities. Biff the second objection appears to be a valid objection. It is admitted in the affidavit of the District Magistrate that the gold which had been seized has been returned to the petitioner under the orders of the Government, a copy of which has been annexed as annexure "C" to the petition. Yet the seizure of the gold alone, was mentioned in the ground. If the gold had been returned, the seizure of it, winch alone has been mentioned in the ground, is obviously irrelevant. Although the District Magistrate has stated in his affidavit that all relevant material including the order of the Government annexure "C" was before him at the time of passing the detention order, it appears highly doubtful whether in fact the District Magistrate had perused this order or applied his mind to it, as he would not have omitted to mention the return of the gold to the petitioner if he had perused the order of the Government at the time of passing the detention order. The operative portion of the order Annexure C is in the following terms:-

" HAVING regard to all the facts and circumstances of the case, the Central Board of Excise & Customs are pleased to set aside the Collector's order and direct that the gold under absolute confiscation be released to the appellants."

THIS order does. not show that the Government had passed this order by giving benefit of doubt to the petitioner or because of some technical defect in the order of confiscation. It is, Therefore, obvious that while taking into consideration only the fact relating to the confiscation of the gold from the petitioner, the District Magistrate had not taken into consideration the further fact that the gold was returned to the petitioner under the orders of the Government. The fact of the confiscation of the gold from the petitioner was, Therefore, an irrelevant ground and if the order of detention is based upon an irrelevant ground, the order is vitiated.

(38) It is not necessary to examine the other grounds on which the order of detention was passed against the petitioner, because it is now well-settled that if even one of the grounds is irrelevant or non-existent or suffers from the vice of bona fides, the entire order of detention has to be quashed, because it is not open to the Court to substitute its own objective satisfaction in the place of the subjective satisfaction of the detaining authority and "the Court cannot Predicate what the subjective satisfaction of authority would have been on the exclusion of such grounds, vide-

1.Moti Lal Jain v. State of Bihar and others AIR 1968 Sc 509

2. Pushkar Mukherjee and Others Vs. The State of West Bengal, .
3. Kuso Sah Vs. The State of Bihar and Others, .
4. Prabhu Dayal Deorah Vs. The District Magistrate, Kamrup and Others, .
5. Debu Mahato Vs. The State of West Bengal, . And
6. Biram Chand Vs. State of Uttar Pradesh and Others, .

(39) As a result of the above discussion, we hold that the order of detention is illegal and the same is hereby quashed and it is directed that the petitioner shall be released forthwith. The petition is allowed but there shall be no order as to costs.