

**(1997) 09 BOM CK 0043**

**In the Bombay High Court**

**Case No : Criminal Writ Petition No. 856 of 1995**

Deepesh Mahesh Zaveri

APPELLANT

Vs

The Union of India and others

RESPONDENT

**Date of Decision : 12-09-1997**

**Acts Referred:**

Administration of Justice Act, 1960 — Section 14  
Bombay Public Security Measures Act, 1947 — Section 5  
Civil Procedure Code, 1908 (CPC) — Section 11  
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)  
Constitution of India, 1950 — Article 134(1), 141, 22(4), 22(5), 226  
Criminal Procedure Code, 1973 (CrPC) — Section 100, 362, 369, 552  
Defence of India Rules, 1962 — Rule 30(1)  
Foreigners Act, 1946 — Section 3  
Gujarat Prevention of Anti-social Activities Act, 1985 — Section 3(1)

**Citation :** (1998) 5 BomCR 12 : (1998) 1 BOMLR 547 : (1998) 2 MhLj 634

**Hon'ble Judges :** S. Radhakrishnan, J; A.V. Savant, J

**Bench :** Division Bench

**Advocate :** M.R. Kotwal, for the Appellant; R.M. Agrawal and Smt. V.K. Tahilramani, for the Respondent

## Judgement

A.V. Savant, J.—Heard all the learned Counsel; Shri Kolwal for the petitioner, Shri Agrawal for respondents No. 1 & 2 and Smt. Tahilramani for respondents Nos. 3 & 4. The question of law which arises for our consideration in this petition under Article 226 of the Constitution is, whether successive petitions can lie to the High Court under Article 226 seeking to challenge an order of preventive detention after the first petition was dismissed on merits and where no fresh ground or evidence has become available after the decision of the first petition and the ground alleged in the second petition was available to the detenu in the first petition ?

2. This is a one page petition under Article 226 of the Constitution filed by the son of the detenu Mahesh Kantilal Zaveri, who was detained under the order

dated 5th October 1995 passed by the second respondent - detaining authority. Shri K.L. Verma, Joint Secretary (COFEPOSA) to the Government of India, who was specially empowered u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (for short, the COFEPOSA). The order has been passed since the detaining authority was satisfied with respect to the detenu Mahesh Kantilal Zaveri that, with a view to preventing him in future from acting in any manner prejudicial to the augmentation of foreign exchange, it was necessary to make the order detaining him in custody in the Central Prison, Pune. In execution of the said order, the detenu was detained on the 10th October 1995 and since the period of detention was one year, he has been released from detention on 9th October 1996. The only ground of challenge in this petition is that the petitioner's representations dated 6th December and 15th December 1995, addressed to the Advisory Board, were rejected by the Central Government on 25th January 1996. It is, therefore, alleged that there was delay on the part of the Central Government in considering the said representations. In fairness to Shri Kotwal, it must be stated that in view of the affidavit-in-reply filed by Shri K.L. Verma, Joint Secretary, this facet of the contention has not been argued before us and was given up and what has been pressed is the second facet of the only contention raised in para 4(i) of the petition that the said representations were not considered by the detaining authority and there was no communication of the decision by the detaining authority. It may be appropriate to reproduce the said contention as under :--

"4. Being aggrieved by the said order, this petition is filed on fresh grounds which were neither urged nor decided in the said earlier petition. (i) The representations dated 6-12-95 and 15-12-95; which were addressed to the Advisory Board were rejected by the Central Government on 25-1 -96 (Annex-E). The delay in consideration of the said representations by the Central Government and their non-consideration and the non-communication of the reply by the detaining authority also is violative of Art. 22(5)".

Before considering this contention, it is necessary to refer to the preliminary objection raised by Shri Agrawal on behalf of the contesting respondents that, having regard to the dismissal of the first petition, on 24-7-1996, a second petition u/Art. 226 by the same detenu on a ground which was very much available to him at the time of hearing of the first petition is not maintainable. A few relevant facts would be necessary to appreciate the contentions raised before us.

3. In respect of the detention under the order dated 5th October 1995, the same petitioner viz., Deepesh, son of the detenu Mahesh Zaveri had filed Criminal Writ Petition No. 1238 of 1995 on November 20, 1995. That petition was admitted in this Court on November 22, 1995. The Advisory Board Meeting was held on 15th December 1995 and it is stated that opinion was rendered by the Advisory Board on 23rd December 1995. During the pendency of the first petition, the petitioner filed Criminal Application No. 202 of 1996 on 29th January 1996 for leave to

amend which was granted on 31st January 1996 and the ground added was that there was no confirmation of the detention within a period of three months as required by Article 22(4) of the Constitution read with Clause (f) of section 8 of the COFEPOSA which rendered the continued detention illegal. After the said amendment was carried out, Criminal Application No. 923 of 1996 was filed by the petitioner in the first petition on 12th April 1996 for parole. During the pendency of this parole application, the petitioner's Counsel Shri Kotwal wrote to the Deputy Director, Directorate of Enforcement, Bombay Zonal Unit, Bombay, on 18th April 1996 calling upon him to inform the date on which three sets of documents relied upon were sent to the Advisory Board. This information was stated to be necessary to find out whether the Advisory Board had sufficient time to consider the case of the detenu. Copy of this letter was forwarded to Shri Agrawal, Counsel for the respondents. In reply to this letter dated 18th April 1996, Shri K.L. Verma, Joint Secretary, filed his affidavit in the first petition setting out the details and contended that the three sets of documents were forwarded to the Advisory Board well in advance of the scheduled meeting and the Advisory Board had sufficient time to consider the said material and the case of the detenu.

4. Pending Criminal Application No. 923 of 1996, which was filed in this Court for parole on 12th April 1996, the detenu's wife Smt. Anjana Zaveri filed Criminal Writ Petition No. 307 of 1996 in the Delhi High Court for parole. Standing Counsel for the Union of India pointed out to the learned Judges of the Delhi High Court that Criminal Application No. 923 of 1996 filed in the Bombay High Court for parole was coming up for hearing on 10th June 1996. Reliance was placed on the same medical certificate in both, Bombay and Delhi High Courts, Referring to all these facts, the Delhi High Court dismissed the writ petition with the following order :---

"ANJANA M. JHAVERI VS. UOI

24-5-96 : Present: Mr. L.D. Dhir for the Petitioner.

Mr. Madan Lokur for the UOI.

Cri.W. 307/96 :

Learned Standing Counsel of the Union of India has mentioned before us that the son of the detenu has filed Criminal Application No. 923/96 in Cri.W. No. 1238/95 before the High Court of Bombay seeking parole for the detenu which is coming up on 10-6-96, for disposal. In that application reliance is placed on the same medical certificate dated 1-2-1996 which is now relied upon in this petition.

The petition in this Court has been filed by the wife of the detenu by relying upon the same medical certificate.

The petitioner is granted leave to pursue the matter in Bombay High Court. This writ petition is dismissed.

Sd/- Chief Justice Sd/- Dalveer Bhandari, J."

Thereafter, Criminal Application No. 923 of 1996 for parole was heard in this Court on 17th June 1996 and the same was rejected.

5. The first writ petition was finally disposed of on 24th July 1996. Six contentions were raised at the hearing of the said petition by the learned Counsel Shri Karmali. They were as under :--

(i) The detenu was taken in detention on 10-10-1995 and the order of confirmation was issued on 10-1-1996 and was served on the detenu on 13-1-1996. Since the period of three months had elapsed before 10-1-1996, the continued detention was in violation of Clause (4) of Article 22 of the Constitution of India and, therefore, the confirmation was bad in law. This contention has been considered in paragraphs 5 to 15 of the judgement in the first writ petition.

(ii) There was not enough time for the detaining authority to consider the several documents that were placed before him before issuing the order of detention on 5th October 1995 and hence, there was non-application of mind on the part of the detaining authority because of shortage of time. This contention has been considered in para 16 of the judgment.

(iii) The pre-detention representation made by the detenu on the 5th October 1995 to the detaining authority was not considered by the detaining authority and this violated the guarantee enshrined in Clause (5) of Article 22 of the Constitution. This contention has been considered in paragraphs 17 & 18 of the judgment.

(iv) Non-consideration of the prior detention order issued on the 3rd June 1991, which was passed with a view to preventing the detenu from indulging in smuggling activities in respect of which he had obtained an ad-interim stay from the Calcutta High Court on 21st June 1991, which was only operative for a period of one week, after which it was not continued. This contention has been considered in paragraph 19 of the judgment.

(v) The annexure to the letter dated 22nd July 1995 sent by the petitioner to the Deputy Director of Enforcement, Bombay, was not placed before the detaining authority. This contention has been considered in paragraph No. 20 of the judgment.

(vi) Some documents furnished to the detenu alongwith the grounds of detention contained Gujarathi writings and were not intelligible to the detaining authority though they were intelligible to the detenu. For instance, after the word "Ro" in Devanagari script, it was mentioned in brackets in English "cash". The word "Ro" in Devanagari Script was to suggest "Rokad" which means "cash" which was mentioned in English. This contention has been considered in paragraph 21 of the judgment in the first petition.

6. As stated earlier, after a full hearing, this Court, by its judgment and order

dated 24th July 1996, rejected all the six contentions raised by the learned Counsel appearing on behalf of the petitioner and the petition was dismissed. Admittedly, there are no proceedings pending in the Hon'ble Supreme Court, either by way of SLP challenging the judgment and order of this Court delivered on 24th July, 1996 or even by way of a substantive writ petition under Article 32 of the Constitution. What the petitioner did was to wait till 16th August 1996 when he filed a second writ petition viz. the present Writ Petition No. 856 of 1996. Only one contention has been raised in this petition, which we have reproduced above. It consists of two facets; the first facet is the alleged delay on the part of the Central Government in considering the representations dated 6th and 15th December 1995 in respect of the order of detention dated 5-10-1995 and the second facet is the non-consideration and non communication of the reply by the detaining authority in respect of the said representations dated 6th and 12th December 1995. As stated earlier, having regard to the pleadings before us, only the second facet has been pressed in the course of arguments and the first facet has been given up. There was no development between 24th July, 1996 when the judgment in the first petition was delivered and 16th August 1996 when the second petition was filed, excepting, perhaps, the fact that assignments in this Court had changed. The detenu was quite conscious of his rights under Articles 22(4) and 22(5) of the Constitution. This is evident from the contentions which he has raised in the first petition, just summarised above. During the pendency of the first petition, he had applied for leave to amend, which was granted. He had made an application for parole to this Court and during the pendency of the said application, used the same medical certificate for filing a writ petition to the Delhi High Court for the same relief of parole. On 18th April 1996 his Counsel wrote to the Deputy Director, Directorate of Enforcement, calling for some information which was furnished by way of affidavit dated 13th June 1996 filed by Shri Verma in the first petition. The detenu had also filed Criminal Application No. 1658 of 1996 in the first petition on 5th July 1996 for expediting the hearing of the petition. Since, however, the petition was already on Board, this application was rejected on 11th July 1996. The petition itself was finally disposed of on 24th July 1996. As stated earlier, one of the grounds taken in the first petition was that there was non-consideration of the earlier order of detention issued on the 3rd June 1991, which was passed with a view to preventing the detenu from engaging in smuggling activities and the petitioner had moved the High Court, at Calcutta, and had obtained an ad-interim stay on 21st June 1991, which was operative only for a week.

7. It is in these peculiar facts that Shri Agrawal has contended that, in the first place, this is no longer a Habeas Corpus petition since the detenu has already been released on 9-10-1996. He then contends that having regard to the conduct of the detenu in the past, it is absolutely clear that he is a knowledgeable person, who is conscious of his rights and has agitated them at every stage before all the authorities concerned. He did not hesitate to approach either the Calcutta High Court or the Delhi High Court or this Court whenever he thought it

was necessary. He had taken care to ensure that an amendment application was made; information was sought and steps were taken to expedite the hearing of the first petition. The amendment carried out in the first petition shows that the detenu was alert at every stage viz. issuance of the order of detention, its service, the order of confirmation being issued on 10-1-1996 and service thereof on 13-1-1996, which was stated to be beyond the period of three months permissible under Article 22(4) of the Constitution. In these facts, Shri Agrawal contends that nothing further had transpired between the decision on the first petition on 24th July 1996 and the filing of the second petition on 16th August 1996 and no fresh evidence or material forms the basis of the sole contention urged before us. We will consider the law on the subject as settled by the Hon"ble Supreme Court.

8. As far back as in 1952, the question arose before the Constitution Bench of the Apex Court headed by Patanjali Sastri, C.J., in *Godavari Parulekar Vs. State of Bombay and Others*, . The judgment of the Court was delivered by Vivan Bose, J. The petition was under Article 32 of the Constitution. The petitioner Godavari, wife of Shamrao Parulekar, was detained on 16-10-1951 under the Preventive Detention Act, 1950, as amended in 1951. The order of detention was confirmed on 4th January 1952, but the period was not specified. The petitioner's contention was that as no period was specified, the order had expired on 31st March 1952 because of the amending Act of 1951. The contention was rejected on merits. In para 8 of the judgment, at page 53, the Court observed as under :-

"8. As regards the first point, the "ratio decidendi in - *Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others*, , applies here. In that case, detentions were divided into those which had already been considered by an Advisory Board and those which had not. This was upheld. The dividing line here is different, namely a certain date, but the principle is the same and its reasonableness is apparent from a consideration of the various amendments which have been made from time to time".

Then, in para 13 of the judgment, the Court dealt with the petitioner's endeavour to have her application re-opened on merits contending again that the grounds of detention were vague for which she relied upon the decision delivered in her husband Shamrao Parulekar's case. The Apex Court did not permit her to do so on the ground that her petition had already been rejected on merits and she was only allowed to appear on constitutional points. We find it convenient to reproduce para 13 of the judgment as under :---

"13. The petitioner endeavoured to have her application reopened on the merits contending again that the grounds of detention are vague. She relies on *Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others*, , where another detenu was released by an other Bench of this Court in circumstances which, according to her, are very similar. We are unable to allow this as her petition has already been rejected on the merits. She was only allowed to appear on constitutional points. We understand that in the other

petition this fact was not brought to the notice of the Court".

In the result, the application was dismissed.

9. In *Daryao and Others Vs. The State of U.P. and Others*, , the Constitution Bench was considering the question of applicability of the rule of res judicata contained in the provisions of section 11 of the CPC while dealing with a petition to the Apex Court under Article 32 of the Constitution after a petition to the High Court under Article 226 was dismissed. The issue related to civil rights of the parties, who claimed to be the tenants of certain lands under the U.P Tenancy Act 1939 and in an appeal by the respondents to the Board of Revenue u/s 267 of the said Act, the Board had allowed the appeal of the respondents and dismissed the petitioners' suit with respect to some of the lands in dispute. The petitioners had earlier moved the High Court under Article 226 for issue of a Writ of Certiorari, which petition was dismissed by the High Court on 29th March, 1955. Thereafter, the petitioners moved the Apex Court on 14th March 1956 under Article 32. In para 16 of the judgment, at page 1464 of the Report, the Court observed that in exercising its jurisdiction under Article 226, the High Court may sometimes refuse to issue an appropriate writ or order on the ground that the party applying for the writ is guilty of laches and in that sense the issue of a high prerogative writ may reasonably be treated as a matter of discretion. The Court then distinguished the right granted to a citizen to move the Apex Court under Article 32. By virtue of Article 32(1), such a right itself is a fundamental right and ordinarily the Apex Court may have to issue an appropriate writ or order provided it is shown that the petitioner has a fundamental right which has been illegally or unconstitutionally contravened. The Court then referred to some English decisions in para 17 of its judgment on the question of habeas corpus applications being repeatedly entertained, but did not express any opinion on the said question. In para 19 of the judgment, the Constitution Bench held that if writ petition filed by a party under Article 226 was considered on merits as a contested matter and was dismissed, the decision thus pronounced would continue to bind the parties unless it was otherwise modified or reversed in appeal or by other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move the Apex Court even under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. These observations have been made while dealing with a petition under Article 32 held to be not maintainable after the High Court had decided a petition under Article 226, despite the difference in the approach to the remedy available under the two provisions as indicated in para 16 of the judgment earlier.

10. In *P.L. Lakhanpal Vs. Union of India (UOI) and Others*, , the Constitution Bench headed by K. Subba Rao, C.J., was considering the question of a second petition under Article 32 challenging the detention under the Defence of India Rules, 1962. The petitioner was detained under the order dated 10th December 1965. He filed a petition under Article 32 on 24th December 1965 raising certain

contentions. Though the petition was dismissed on 19-4-1966 P.L. Lakhanpal Vs. Union of India (UOI), , on 11th June 1966 the Central Government passed an order continuing the said detention under Rule 30-A(9). A second petition was filed. Some disparities in the two orders viz. the first dated 10th December 1965 and the second dated 11th June 1966 were apparent and the second petition was filed raising certain contentions. The Apex Court considered the contentions on merits and observed that in respect of such of the contentions which concerned the original order of detention, they could not be re-agitated since they were disposed of by the earlier decision. In para 3 of the judgment at page 910 of the report, it was held that the petitioner could not be permitted to re-agitate the same questions, it not being his case that any new circumstances had arisen justifying their re-agitation. In para 11 of the judgment, the Court observed that since some of the contentions were rejected by the Court in the earlier petition, they could not be re-agitated. The reasons given by the petitioner in support of some of the contentions were, in substance, the same as those urged in the earlier petition and which were rejected by the Court. After saying so, the Court rejected the petition.

11. In Ghulam Sarwar Vs. Union of India (UOI) and Others, the Court was dealing with a case where a petition under Article 226 of the Constitution for habeas corpus was dismissed by the Punjab High Court on merits. The habeas corpus petition related to the validity of the order of detention of petitioner u/s 3 of the Foreigners Act, 1946. After the petition was dismissed by the Punjab High Court, a fresh petition was filed under Article 32 and the question arose as to whether a petition can lie under Article 32. In para 8 of the judgement, at page 1337 of the report, the Constitution Bench headed by K. Subba Rao, C.J., dealt with the Law in England, as reflected in the two decisions in (Re Hastings (No. 2)), 1958 (3) AN ER 625 and (Re Hastings (No. 3)), 1959 (1) All ER 698. The Court then referred to the present law in England viz. section 14 of the Administration of Justice Act, 1960, and then in para 9 of the judgment at page 1338 observed as under :--

"(9) But coming to India, so far as the High Courts are concerned, the same principle accepted by the English Court will equally apply, as the High Court functions in Divisions not in benches. When it functions as a Division, it speaks for the entire Court, and therefore, it cannot set aside the order made in a writ of habeas corpus earlier by another Division Bench. But this principle will not apply to different Court. The High Courts of Allahabad, Bombay, Madras, Nagpur and Patna and East Punjab have accepted this view, though the Calcutta High Court took the view that successive applications of habeas corpus could be filed".

It is evident from the above ratio that as far as the High Court in India are concerned, the position would be the same as accepted by the English Court viz. a successive petition cannot be filed to the same High Court. This is because when the High Court functions as a division, it speaks for the entire Court and it, therefore, cannot set aside the order made by it in a writ of habeas corpus in an



earlier petition. This was the view taken consistently by the High Courts of Allahabad, Bombay, Madras, Nagpur, Patna and East Punjab, though the Calcutta High Court had taken the view that successive applications for habeas corpus could be filed to the same High Court. The Apex Court then added that unlike the position in England, a person could, however, approach the Apex Court under Article 32 after he had approached the High Court under Article 226 since obviously the right under Article 32 itself is a fundamental right. Any restraint on the power of the Apex Court under Article 32 would be contrary to the wide sweep of the constitutional protection given by Article 32(1) of the Constitution where the Apex Court can protect the right of a person illegally detained. It was in these peculiar facts that qua the maintainability of a petition under Article 32 to the Apex Court, it was said that dismissal of a prior petition under Article 226 would not operate as *res judicata*. Similar opinion was expressed by Bachawat, J., in his separate but concurring judgment that dismissal of an earlier petition by the High Court cannot affect the petitioner's fundamental right to move the Apex Court under Article 32.

12. In *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, , the first petition of the detenu in respect of his detention under the COFEPOSA was dismissed by the Apex Court by an order dated, 9th May 1980. The Court, however, was to announce the reasons for the order later after the summer vacation. In the meanwhile, on 21st July 1980, the petitioner filed additional grounds and on the 30th July 1980 the Court took the view that the petitioner could, if so advised, file fresh petition on those additional grounds. The Court then announced the reasons on 4th August 1980 in support of the order that it had passed on 9th May 1980. That is how, pursuant to the liberty granted to the petitioner on July 30, 1980 by the Apex Court itself, a second petition was filed under Article 32. There is no doubt in our mind at all that apart from the high pedestal on which Article 32 is placed, the Apex Court itself while dismissing the first petition had granted liberty to the detenu to raise additional grounds in a subsequent petition. That, in our view, is a clear distinguishing feature of *Lallubhai's* case, decided by two learned Judges, which has to be borne in mind. The Apex Court then referred to the English decisions in *Hastings'* cases and the fact that no second writ petition would lie in England to the same High Court even for a writ of habeas corpus unless fresh evidence was adduced in support of the application as provided in sub-section (2) of section 14 of the Administration of Justice Act, 1960. In Para 7 of the judgment, the Court referred to the Full Bench decision of the Punjab High Court in *Ram Kumar Pearay Lal Vs. District Magistrate*, , to which we will make a brief reference after we deal with the Apex Court decisions. Suffice it to say that the view expressed by the Full Bench of the Punjab High Court is that no second writ petition for habeas corpus can lie to the same High Court on a ground on which a petition had already been dismissed. However, a second petition will lie (i) when a fresh and new ground of attack against the legality of detention has arisen after the decision of the first petition, or (ii) where, for some exceptional reason, the ground had been omitted in the

earlier petition. In such appropriate circumstances, the High Court will hear, the second petition on such ground for ends of justice. The Apex Court then referred to Daryao's case in paragraphs 8 and 9, which related to civil matters. In para 10, the Court referred to Ghulam Sarvar's case and then in para 13, at page 731 the Court concluded by saying that the application of the doctrine of constructive res judicata is confined to civil action and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition under Article 32 on fresh ground which was not taken in the earlier petition for the same relief. The Apex Court then dealt with the fresh grounds which were taken in the second petition before it. It is of some significance to note that out of the three grounds, two grounds were not available to the detenu when the first petition was heard and decided. It is true that the third ground was available to the petitioner earlier. It was in these peculiar facts that dealing with the second petition under Article 32 the Apex Court allowed the second petition as a result of all the three contentions raised in the second petition being upheld on merits. As stated earlier, the Apex Court itself had granted liberty to the petitioner to file a second petition under Article 32.

13. In *Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others*, , an earlier petition under Article. 226 to the High Court of Gujarat was dismissed on 25th November 1980 in respect of the order of detention passed on 9th September 1980 u/s 3 of the COFEPOSA. A SLP against the decision of the Gujarat High Court as also a substantive petition under Article 32 was filed to the Apex Court. The question arose whether a petition under Article 32 can lie. Relying upon its earlier decision, the Court held that the doctrine of finality of judgment or the principle of res judicata would be wholly inapplicable to cases where the two fora have separate and independent jurisdiction like the High Court under Article 226 and the Apex Court under Article 32. The Court held in para 10 of the judgment, at page 1624 of the report that the remedy under Article 226 was a discretionary jurisdiction, whereas the jurisdiction to grant relief in a petition under Article 32 was guaranteed by the Constitution itself and the Apex Court had no discretion in the matter when a violation of a fundamental right was pointed out by the detenu. It was in these facts that the Court entertained the petition under Article 32 on the ground that its power under Article 32 cannot be whittled down by the principle of res judicata by reason of an earlier petition under Article 226 being dismissed by the Gujarat High Court.

14. In *Sunil Dutt Vs. Union of India (UOI) and Others*, , the Court reiterated the position in respect of a second petition to the Apex Court under Article 32 complaining of illegal detention under order passed on 11th July 1980 under the COFEPOSA. The first petition was dismissed on 24th September 1980. Thereafter, a representation was made by the detenu in January 1981, through his wife, to the detaining authority, which was rejected on 25th April 1981. In the meanwhile, a second petition was filed under Article 32 on 3rd April 1981 and two grounds were raised, viz. (i) non-supply of all the documents which were

relied upon or referred to in the grounds of detention; and (ii) unexplained delay of more than four months in the matter of consideration of the representation made through his wife after the first petition was dismissed. The Court upheld the first contention of the petitioner, which had resulted in violation of Article 22(5) of the Constitution and allowed the petition.

15. While elaborating his preliminary objection, Shri Agrawal invited our attention to the very vigilant outlook of the detenu in this case, as reflected by the steps taken by him from time to time in his first petition in this Court, as also in Delhi High Court. We have narrated the same in paras 3 and 4 above. The detenu had also approached the Calcutta High Court in respect of an earlier order of detention. He is not a poor litigant but has been very well advised at every stage of the proceedings, says Shri Agrawal. He, therefore, relies heavily on the observations of the Apex Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, . Sabyasachi Mukherji, J., (as His Lordship then was) observed in para 62 of the judgment at page 696 of the report "that there is no rule of law that commonsense should be put in cold storage while considering the constitutional provisions for safeguards against misuse of powers by authorities though these constitutional provision should be strictly construed". This was a case where the detenu was complaining of lack of his knowledge of English which allegedly resulted in failure in communicating the grounds of detention where the detenu pleaded that he did not know any other language, except Gujarathi. The Apex Court said that the Court is not a place where one can sell all tales and the detaining authority had come to the conclusion that the detenu knew both Hindi and English and the Hindi translation of the grounds was subsequently furnished to him on 30th June 1984 though the detenu was detained under the order of detention dated 19th June 1984.

16. Shri Agrawal also placed reliance on the observations of the Apex Court in *Attorney General for India and Others Vs. Amratlal Prajivandas and Others*, to contend that a person who did not choose to challenge the order of detention or challenged it unsuccessfully cannot be allowed to challenge it when it is sought to be made the basis for applying SAFEMA to him. Relying upon the observations in paras 39 and 40 of the Constitution Bench decision of 9 learned Judges of the Apex Court, he contended that only one challenge was permissible to the order of detention in the High Court by way of a petition under Article 226 and no repeated challenge in the High Court by successive petitions under Article 226 should be permitted, particularly when the ground now sought to be raised was very much available to the detenu at the time of hearing of the first petition. We will deal with the preliminary objection in the light of the decisions of the Apex Court on the subject.

17. All the above mentioned decisions of the Apex Court make one thing clear viz. that when the detenu was in custody, a second petition under Article 32 may be maintainable in the Apex Court having regard to the high pedestal on which a petition under Article 32 is placed by virtue of Clause (1) of Article 32 of the

Constitution, which reads as under :--

32. Remedies for enforcement of rights conferred on this part - (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."

This has been emphasised by the Apex Court in para 16 of its judgment in Daryao's case at page 1464 of Daryao and Others Vs. The State of U.P. and Others, , and reiterated in para 10 of the judgment, at page 1624, in Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, . Thus, it is clear to us that granting relief to a petitioner under Article 226 is a matter of discretion. However, right to move the Apex Court under Article 32 is a matter of fundamental right of the detenu and in a second petition under Article 32, as compared to a second petition under Article 226, once the Court finds that there is violation of fundamental right, the detenu stands on a higher footing. However, in a later judgment of the Apex Court even in respect of successive petitions to the Apex Court under Article 32, we find a departure and the view expressed is that though the principle of res judicata or constructive res judicata cannot be made applicable to a case of preventive detention while dealing with successive petitions under Article 32, yet there should be some finality in these matters.

18. In Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, , the detenu was detained u/s 3(1) of the Gujarat Prevention of Antisocial Activities Act, 1985 by an order of detention dated 10th May 1989 passed by the Commissioner of Police, Surat City. The detenu had earlier filed Writ Petition No. 302 of 1989 under Article 32, which was dismissed on September 29, 1989. A second petition was filed for the same relief, but on the basis of some grounds which, according to the petitioner, were not urged in the first petition. It was contended that the petitioner was not an enlightened person and was not conversant with his constitutional rights and, earlier, he was not aware of the existence of some relevant documents which were not furnished to him despite a request made in that behalf and this amounted to violation of Article 22(5). The Apex Court referred to the merits of the contentions while rejecting the grievance of violation of the right under Article 22(5) and observed in para 12, at page 483 as under :---

"We may also point out that though the principle of res judicata or constructive res judicata cannot be made applicable to a case of detention yet there should be some finality. The petitioner having failed in his earlier attempts has now again come forward with the present petition with a highly belated plea that some documents, though he made a request, have not been supplied. This request, as we find from the records, was made after this Court dismissed the Habeas Corpus Petition No. 302 of 1989. He, however, justifies the filing of the present petition on a plea that he was unaware of the existence of these documents. But as noted above his petition itself shows that he was aware of all these documents. Therefore, we do not see any bona fides in this plea of his. Under these circumstances, we are unable to say that the refusal to supply the

documents requested by him amounts to violation of Article 22(5)".

19. We have already mentioned at the outset, that the petitioner has been released on 9th October 1996 and, therefore, this has ceased to be a petition or a writ of habeas corpus. Further, there is a distinction in the approach while dealing with successive petitions under Article 32 to the Apex Court as against successive petitions to the High Court under Article 226. This is clear from the above mentioned pronouncements of the Apex Court. The last judgment in Abdul Sattar's case indicates a change in thinking on the ground of public policy of having some finality to the proceedings. As stated by the Apex Court in Prakash Chandra Mehta's case, there is no rule of law that commonsense should be kept in cold storage while considering the constitutional provisions for safeguards against misuse of powers by the authorities, though these constitutional provisions should be strictly construed. We are dealing with a detenu, who in respect of the earlier order of his detention dated 3rd June 1991, had approached the Calcutta High Court and had obtained a temporary stay. In respect of the present order of detention dated 5th October 1995 he had earlier filed Criminal Writ Petition No. 1238 of 1995 in this Court. In that, he had taken steps for amendment of the petition; for seeking information from the concerned authorities and also for seeking parole. He had approached this Court and the Delhi High Court on the basis of the same material for parole. He had applied for the matter being expeditiously disposed of and within three weeks of the decision on the first petition he has filed a second petition on the ground which was very much available to him at the time of hearing of the first petition.

20. A perusal of the judgment in the first writ petition, will show that the matter was extensively argued and as many as six contentions were raised including contentions based on the alleged violation of the right guaranteed by Clause (4) and (5) of Article 22 of the Constitution. The detenu was vigilant enough to agitate the violation of Article 22(5) even in respect of his pre-detention representation in the sense that a representation dated 5th October, 1995 was made to the detaining authority whereas the order of detention dated 5th October, 1995 was served on the detenu on 10th October, 1995. Article 22(5) provides for the earliest opportunity of making a representation against the order of detention. No order was served on the detenu when he made the representation dated 5th October, 1995. Shri Kotwal for the petitioner pointed out that on 5th October, 1995, a representation was made to the detaining authority on the basis of the information received by the detenu that the proposal for his detention was under consideration. These contentions have been negatived in the judgment delivered on 24th July, 1996 and on 16th August 1996, without pointing out any fresh evidence in the nature of a fact or development taking place after the decision in the first petition, or without pleading any exceptional circumstances for failure to raise the ground earlier in the first petition the contention has been raised that there was delay on the part of the Central Government in considering the representations dated 6th and 15th December, 1995 and that there was non consideration of the representation by

the detaining authority which had not communicated its decision. In our view, a second petition for the writ of habeas corpus at the instance of a detenu, who is in custody, would lie to the High Court under Article 226 when (i) fresh and new ground of attack against the legality of the detention or custody has arisen after the decision on the first petition and (ii) where for some exceptional reason, the ground has been omitted in an earlier petition. In either of these two circumstances, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. It is also clear to us that in the second case mentioned above it is only the ground which existed at the time of earlier petition and which was omitted for some exceptional reason that will be considered in the second petition but the second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same. We will presently demonstrate that this appears to be the consistent view taken in a number of decisions in England and India.

21. In *Re Hastings* (No. 2) reported at 1958(3) AN England Law Reports 625, the applicant Edward Thomas Hastings had moved for a writ of habeas corpus against the respondent the Governor of Liverpool Gaol in respect of a sentence for four years" corrective training. The ground of application was that no valid sentence had been passed on the applicant. The second application was made by the applicant to a Divisional Court of Queens Bench Division for the issue of writ of habeas corpus and was made on the same ground and on the same evidence as the previous application which was refused (See 1958 (1) All ER 707. The Judges constituting the Divisional Court to which the second application was made were different from those who constituted the Divisional Court to whom the previous application had been made on 7th March, 1958 and the question arose whether the second Court had jurisdiction and was bound to hear the second application for writ of habeas corpus. In his judgment Lord Parker, C.J., observed as under on page 635 of the report.

"We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different Judges of the Queen's Bench Division. Nor are there to be found any dicta in support of the making of such an application unless it be in *Ex p. Chapple* (4) 20 T.L.R. 932, in which DENNING, L.J., said (*ibid.*, at page 936): "The only remedy of the subject is to go before another Divisional Court or another Judge....." It may be that he was referring to a Divisional Court of another division, but if he meant a Divisional Court of the Queen's Bench Division consisting of different Judges we think that he was wrong.

We hold, therefore, that the applicant having already once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard again by another Divisional Court of the same division."

The above view expressed by Lord Parker, C.J., was retired in *Re Hastings* (No. 3) reported at 1959 (1) All ER 698. Hastings whose application for writ of habeas corpus directed to the Governor of Liverpool Gaol had been refused by two

Divisional Courts of Queens Bench Division comprising of different Judges, made a like application on the same ground to the Divisional Court of Chancery Division. It was held that the applicant had no right to go from division to division or Judge to Judge of a High Court of Justice applying for writ of habeas corpus and once the proper Court, according to the rules, a Divisional Court of Queen's Bench Division, whose order was the order of the High Court of Justice, had decided the application, the matter was ended; therefore, the Divisional Court of the Chancery Division had no jurisdiction to entertain the application.

22. Since the writ of Habeas Corpus had its origin in England, we may mention here that in England the law has been codified now and section 14 of the Administration of Justice Act, 1960, provides as under :--

"14(1) On a criminal application for habeas corpus an order for the release of the person restrained shall be refused only by a Divisional Court of the Queen's Bench Division, whether (he application is made in the first instance to such a Court or to a Single Judge in accordance with rules of Court.

(2) Notwithstanding anything in any enactment or rule of law, where a criminal or civil application for habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect of that person on the same grounds, whether to the same Court or Judge or to any other Court or Judge, unless fresh evidence is adduced in support of the application: and no such application shall in any case be made to the Lord Chancellor.

(3) In every case where the person by or in respect of whom an application for habeas corpus in made is restrained as a person liable, or treated by virtue of any enactment as liable, to be detained in pursuance of an order or direction under Part V of the Mental Health Act, 1959 (otherwise than by virtue of paragraph (e) or paragraph (f) of sub-section (2) of section seventy-three of that Act), the application shall be deemed for the purposes of this section and of any appeal in the proceedings to constitute a criminal cause or matter".

The provisions contained in sub-section (2) of section 14 of the Administration of Justice Act, 1960 make is absolutely clear that notwithstanding anything in any enactment or rule of law, where a criminal or civil application for habeas corpus has been made by or in respect of any person no such application shall again be made by or in respect of that person on the same grounds, whether to the same Court or Judge on to any other Court or Judge, unless fresh evidence is adduced in support of the application; and no such application shall in any case be made to the Lord Chancellor.

23. In this behalf it is relevant to bear in mind the meaning of the words "fresh evidence" as given ins The Law Lexicon 1997 Edition page 762. Fresh evidence has been understood to mean that which must have the quality of newness, or the feature of having become newly available and obtainable. This has been said with reference to the provisions of the National Insurance (Industrial Injuries) Act, 1946. "Fresh Evidence" must mean "fresh" in relation to whatever were the

immediately preceding relevant proceedings." A decision of the High Court in the sense contrary to and inconsistent with that originally arrived at by the justices was "fresh evidence" within the meaning of this section. So also was the discovery by the husband five years after a maintenance order, of the wife's adultery ten years before the maintenance order *Newman v. Newman*, 1957 (3) All ER 698. "Fresh evidence" for the purpose of the application to vary or discharge an order under the Guardianship of Infants Act, 1925 means evidence which could not reasonably have been made available at the time of former hearing. Bearing mind the above position u/s 14(2) of the Administration of Justice Act, 1960 and the approach in the English decisions, we will refer to some of the High Court decisions on the question.

24. In *Malhari R. Chikate v. Emperor*, Special Bench of Chagla, Ag. C.J., Rajadhyaksha, J., and Gajendragadkar J., (as High Lordship then was) AIR 1948 Bom 326, this Court was dealing with the case of a detenu Malhari Chikate who was detained on 5th June 1947 under a detention order issued u/s 2(1)(a) of the Bombay Public Security Measures Act, 1947. He applied to the High Court for an order in the nature of habeas corpus. The application was heard by the Division Bench of Rajadhyaksha and Jahagirdar, JJ., and was rejected on 9th October, 1947. On 5th November, 1947 one Bhaiyaji Kulkarni, friend of the detenu, applied for release of the detenu u/s 491 of the Code of Criminal Procedure, 1898. In para 3 of the judgment, this Court expressed its anxiety to see that nothing was done which would impair or curtail the liberty but clearly laid down that the Common Law Practice of English Courts permitting successive identical applications for writ of habeas corpus to be made to the Judges, one after another, of the High Court of Justice, was not applicable in case of applications u/s 491 of the Code of Criminal Procedure, 1898. The learned Chief Justice referred to the view taken by Allahabad and Lahore High Courts and in para 4 of the judgment agreed with the said view. We are bound by this judgment of the Special Bench of three learned Judges of this Court.

25. In *Re: Prahlad Krishna Kurne*, , the Full Bench of this Court presided over by Chagla, C.J., Gajendragadkar and Dixit, JJ., had occasion to consider the question under Article 226. The earlier decision in Malhari's case (supra) was before the coming into force of the Constitution and was u/s 491 of the CR.P.C. 1898. In Prahlad Kurne's case. Chief Justice Chagla referred to the right of the detenu to file successive petitions to the High Court under Article 226 for issue of writ of habeas corpus. An application was made u/s 491 of the 1898 Code by the petitioner earlier which was dismissed by Dixit and Shah, JJ., on 12th June, 1950. The second application was made for review of that order which came before the Full Bench. It was fairly conceded that in view of the earlier Special Bench decision in Malhari's case, AIR 1948 Bom 326 an application for review would not lie but it was the right of the applicant to make an application for writ of habeas corpus under Article 226 and it was contended that in view of that right, the detenue was entitled to be heard by Judges other than the Judges who had made the earlier order. The Full Bench considered the question in the light of



the constitutional provisions and powers of the High Court to issue the writ in the nature of habeas corpus. A reference was then made to the Statement of Law in Halsbury Volume IX page 727 para 1239 and it was held that the right to which Halsbury gave recognition was the right, not to approach every Judge of a Court, but to approach every Court and every Tribunal. There is no right to approach the same Court or the same Tribunal. In para 4 of the judgment, the Full Bench examined the decision of Privy Council in *Eshugbayi Eleko v. Government of Nigeria*, 1988 A C 459: AIR 1928 PC. 300 of the judgment, the Full Bench categorically held that the High Court acts through a Judge or Judges nominated by the Chief justice for that purpose, but the judgment that the Bench ultimately pronounces was not the judgment of that Division Bench but was a judgment of the High Court. Division Bench acts on behalf of the High Court and, therefore, the decision which it gives is the decision of the High Court. It was held that even under Article 226 it was only the High Court which can issue a writ for the enforcement of the fundamental rights. Jurisdiction was conferred upon the High Court as such and not upon any Judge or Judges of that Court and, therefore, when the Division Bench of this Court is hearing the application under Article 226, it is hearing that application as the High Court and its ultimate decision is not the decision of the Division Bench but it is the decision of the High Court. It was, therefore, held that when earlier Bench of Dixit and Shah, JJ., rejected the previous application of the detenu u/s 491 of the 1898 Code on 12th June. 1950, it was the decision of the High Court and the question was whether it was open to the applicant to approach any other Judge of the High Court for the similar purpose notwithstanding the decision of the High Court to the contrary. In para 6 of the judgment, the learned Chief Justice observed that the effect of the argument of the applicant was that the decision of the High Court on an application for a writ for the enforcement of the fundamental rights under Article 226 was subject to review by the High Court. However, it was pointed out that no Court had inherent power of review since the power of review, like the power of appeal, must be conferred by statute. Since no such power of review was conferred by Code of Criminal Procedure and since there was nothing in Article 226 to hold that the Constitution had conferred such powers upon the High Court, this Court rejected the second petition filed by the petitioner. It was pointed out by the petitioner that such approach on the part of the High Court may result in violation of individual's liberty and fundamental right guaranteed to the citizen under the Constitution. The Full Bench observed that it was not as if the Constitution had provided for no other remedy since the citizen had independent right to approach the Apex Court under Article 32 apart from his right to file appeal against the order of High Court refusing to enforce his fundamental right. In the result the Full Bench held that the second application was incompetent in law and was, therefore, rejected. This is the second Full Bench decision of this Court headed by Chagla, C.J., and is binding on us.

26. In *Satish Gopal Gurha and another v. Rex*, AIR 1949 All 147, Full Bench presided over by Malik, C.J., Raghubar Dayal and Wanchoo, JJ., was dealing with

the case of two detenus who were detained u/s 3 of the U.P. Maintenance of Public Order (Temporary) Act, 1947. In either case, the period of detention was six months. Both the detenus filed Criminal Applications u/s 491 of the 1898 Code which came up for hearing before Wanchoo, J., who dismissed the same on 11th May 1948. The only point urged before Wanchoo, J., was that the order of detention was illegal as the authority detaining the applicants could have passed the order of detention for a period of 15 days only and no more. On the 8th June 1948, fresh application was filed on behalf of two detenus and the point urged in the second application was that the grounds and particulars that were supplied to the detenus u/s 5 of the Act were vague and as such, the detention of the applicants was illegal. The Full Bench has mentioned that the grounds and particulars had been supplied to the detenus long before the date when they had moved the first application u/s 491 of the Code and they could have also urged, if they so desired, that point before the Court in the first application which was disposed of on 11th May 1948. Since the second application also came up before Wanchoo, J., on 20th July 1948, he referred the question to a larger Bench as to whether the second application can be heard in the circumstances mentioned above. Reliance was placed by the applicants on the old rule of English common law that successive applications for a writ of habeas corpus could be made to different Judges of the same Court. We have already indicated in para 22 above that this position in England has undergone a change after the enactment of the Administration of Justice Act, 1960. Before the Full Bench of the Allahabad High Court, it was contended that just as bail applications could be moved successively as the circumstances alter, an application for a writ of habeas corpus can also be moved on fresh grounds. Rejecting the contention, it was held that in the case of an application u/s 491 of the Code, the Court has to determine whether the detention order is legal and once the Court has pronounced on the legality of the detention order, section 369 of the 1898 Code barred the reconsideration of the same matter. If an order is held to be valid, the Court, after it has signed its judgment, has no power, save & otherwise provided by the 1898 Code or by any other law for the time being in force, to alter or review the same, except to correct a clerical error. The Full Bench, however, clarified that it may be that the detention order is valid on a particular date and on that finding an application u/s 491 of the Code is dismissed by the Court; but something may transpire later, as a result of which the further detention of the person may become invalid. In such a case, he may have a right to move the second application u/s 491 of the Code. The Full Bench, therefore, concluded by holding that it was not open to a detenu to move an application which would amount to an application for review of the previous order on the ground that the Court had wrongly decided that the order of detention was valid when on that day, on grounds that were not brought to the notice of the Court, the order of detention was really invalid. These conclusions are to be found in para 5 of the judgment, at pages 147-148 of the Report. It is true that this is a pre-constitution decision and is, therefore, confined to the consideration of the provisions of section 491 of the 1898 Code.

27. In *P. Ramakrishna Sastry Vs. C.T.S. Raganayakulu and Another*, , the question as to whether successive applications to seek the same relief, either u/s 491 of the old Code or under Article 226 could be maintained, was considered by the Madras High Court and it was categorically held that both, u/s 491 of the Code as also under Article 226 of the Constitution, the power to issue writ in the nature of habeas corpus was vested only in the High Court and in view of the dismissal of the first application u/s 491 having regard to the provisions of section 369 of the old Code, the finality of such a decision was indefeasible and could not be destroyed either by permitting an application by way of a review of the order or by way of a second application praying for the same relief which, in essence, though in a disguised form, is the one intended to obtain the cancellation of the previous order. Section 369 of the 1898 Code contained the provision which is similar to the provision contained in section 362 of the 1973 Code. Section 362 of the 1973 Code of Criminal Procedure reads as under :---

"362. Court not to alter judgment---Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same, except to correct a clerical or arithmetical error."

In the Madras case, the petitioner had filed an application u/s 491 of the old Code for the issue of a writ of habeas corpus for the custody of his minor daughter Kum Girija, who was kidnapped by the respondents from his lawful custody. That application was dismissed by a Division Bench of the Madras High Court on 1st May 1961 on the ground that the petitioner had an alternate remedy u/s 100 and 552 of the Code of Criminal Procedure, 1898. The petitioner then filed another application praying for a similar relief of habeas corpus reiterating his contention that his daughter was minor and was improperly detained by the respondents. It was held on merits that the medical reports showed that the daughter was not a minor and hence the application for a writ of habeas corpus was dismissed. The third petition was filed for a writ of habeas corpus reiterating his case that his daughter was a minor. The Court held that it had no jurisdiction to alter its earlier findings on the age of the girl. The petition was then withdrawn and dismissed by the Court on 23rd August 1961. Then, the fourth petition was filed again praying for the same relief of habeas corpus for the custody of his daughter. The conclusions which are mentioned at the beginning of this para are to be found in para 8 of the judgment. In para 9, the Madras High Court referred to the Full Bench decision of this Court in *Emperor v. Malhari Chitake*, AIR 1948 Bom 326, which we have discussed in para 24 above. A reference is also made to the Full Bench decision of the Allahabad High Court (*supra* in para 26) in para 10 of the judgment. The old English law and the decision in the Nigerian case *Eshugbayi Elekov. Government of Nigeria*, has been discussed in para 12 onwards and in para 15, at pages 358 and 359, it has been observed that under Article 226 it is the High Court which exercises the jurisdiction for issuance of writ of habeas corpus and an order of dismissal of a writ petition by a Division Bench is an order of dismissal by the High Court and

cannot be reviewed either under the provisions of the Code of Criminal Procedure in view of the bar imposed by section 369 or under any provision of law. It was, therefore, held to be inconceivable that a second application seeking the same relief which was asked for unsuccessfully in the first application could be maintained. Any decision in the second application could really amount to a review or cancellation of a prior decision. The Madras High Court then referred to the second Full Bench decision of the Bombay High Court in *In Re: Prahlad Krishna Kurne*, and quoted the observations of Chief Justice Chagla, with approval. After quoting the observations of Chief Justice Chagla, the Madras High Court referred to the observations of Vivian Bose, J., in *Godavari Parulekar Vs. State of Bombay and Others*, , which we have discussed in para 8 above. The observations clearly show that a second application for a writ of habeas corpus will not lie after the dismissal of the first application. In the end, the Madras High Court observed that courts must jealously guard the liberty of a citizen, and it is the duty of the Court to protect such liberty and safeguard it from being encroached upon or trampled down either by a private individual or by the Executive Government. But this is not to say that a defeated litigant can, in the name of liberty and under the slogan of fundamental right, file petition after petition to the same High Court in the hope of succeeding eventually at some time before some Judge. This is nothing but a Sisyphean task and the learned Judges deprecated and condemned such practice. We are in respectful agreement with these observations. There is no doubt, in our mind, as has happened in the case before the Madras High Court that, at times, detenus prefer to file repeated applications in the hope of succeeding eventually at some time before some Judge, may be before different Benches of the same High Court. We are afraid, permitting such a practice would encourage forum shopping also.

28. In *Ram Kumar Pearay Lal Vs. District Magistrate*, , a Full Bench of Five learned Judges (Meher Singh, A.N. Grover, D.K. Mahajan, H.R. Khanna and S.K. Kapur, JJ.) was dealing with the question of second petition under Article 226 for writ of habeas corpus by the detenu who was detained under Rule 30(1)(b) of the Defence of India Rules, 1962. The District Magistrate had, by his order dated 25th July, 1964, detained the detenu with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. On December 28, 1964 one Babu, claiming to be partner in business and pairokar of the detenu, moved an application on behalf of the detenu u/s 491 of the 1898 Code. The application was dismissed on 8th January, 1965. Two contentions were urged namely (i) that the order of detention was mala fide and (ii) that the detenu, not being in custody on 6th August, 1964, when the detention order was reviewed under Rule 30-A, there was no valid review according to that rule. The learned Judge who heard the earlier petition had negated both the contentions. The second petition was filed by one Ramkuwar, claiming to be a friend of the detenu, for the writ in the nature of habeas corpus under Article 226 read with section 491 of the 1898 Code. Both the petitions were filed through a Counsel, as is the

case before us. It was contended that the order of detention was mala fide and that the provisions of Rule 30 were grossly abused for purposes extraneous to Rule 30 of Defence of India Rules, 1962. It was contended that the detenu had never been arrested for any act involving violence and his detention was mala fide in law. It was further stated that since this matter was not raised in the previous petition and was not specifically placed before the learned Judge nor considered by him, the second petition was maintainable. On a reference, the Full Bench concluded as under in para 8, at page 57 of A.I.R.:--

The conclusion then is that no second petition for a writ of habeas corpus on the same ground, on which a previous similar petition has been refused by this Court, lies in this Court, for in the words of Lord Chief Justice Parker, the petitioner is met with the objection "You have been heard once: we cannot enter into this matter again". There is no difficulty, that it after the decision of the first petition, a new and a fresh ground becomes available which invalidates and renders illegal the detention or custody a second petition, on a good ground, for writ of habeas corpus will lie, although it challenges the legality of the same detention or custody as was challenged in the first petition. The basis for that is that the ground on which the challenge is made in the second petition did not exist at the time of the decision of the first petition and on its basis the legality and validity of detention or custody could not be impugned."

The Full Bench then answered the question referred to it saying that no second petition for writ of habeas corpus lies to the same Court on a ground on which similar petition had already been dismissed by that Court. It was, however, stated that the second petition will lie if (i) a fresh and new ground of attack against the legality of detention or custody has arisen after the decision on the first petition and (ii) where for some exceptional reason, a ground had been omitted in an earlier petition. In such a situation the Court will hear the second petition on such a ground for ends of justice. It was further clarified that in the second category mentioned above, it is only a ground which existed at the time of earlier petition and was omitted from it, that will be considered but merely because an argument was missed at the time of hearing of the earlier petition in support of the ground, that will not justify entertainment of the second petition. In other words, the Full Bench said that, the second petition for writ of habeas corpus will not be competent on the same ground merely because additional argument is available to urge with regard to the same. In our view, this Full Bench decision also makes it absolutely clear that no second petition for a writ of habeas corpus can lie to the High Court under Article 226 on the same ground on which the previous similar petition has been dismissed by the Court. The only two exceptional circumstances when the second petition would be permissible are (i) where a fresh and new ground of attack against the legality of detention or custody has arisen after the decision of the first petition or (ii) where for some exceptional reason a ground has been omitted in the earlier petition.

29. We may mention at this stage that the only ground urged in the second

petition before us is not something which is a fresh and new ground of attack which has arisen after the decision of the first petition. Since the representations made by the petitioner as far back as on 6th and 15th December, 1995 were not decided before the 24th July, 1996, by which date, a period of as many as 7 months had already expired, the petitioner could have very well complained in the first petition itself about the failure on the part of the detaining authority to consider the said representations and not communicating the reply to the detenu. As stated earlier, Shri Kotwal has given up the first part of the contention regarding the alleged delay on the part of the Central Government in considering the said representations which were rejected by the Central Government on 25-1-1996. In view of the affidavit filed before us, the delay between the receipt of the representations dated 6th and 15th December, 1995 and their rejection on 25th January, 1996 has been satisfactorily explained by the concerned authorities. Shri Kotwal's submission was only about the failure on the part of the detaining authority to consider the representations dated 6th and 15th December, 1995. Having regard to the vigilant attitude adopted by the detenu, at every stage of the proceedings, we have no doubt whatsoever that this ground was very much available to the detenu and could have been raised in the first petition which was decided as late as on 24th July, 1996. By that time more than 7 months had elapsed between making of the said representations and absence of any decision thereon. As far as the second contingency pointed out by the Full Bench of the Punjab High Court, namely, where for some exceptional reason the ground has been omitted in the earlier petition, we must hasten to add that no such circumstance has been pleaded in the one page petition which was filed on 16th August, 1996 as soon as the assignments had changed. No attempt was even made before us by the learned Counsel to offer any explanation for failure to raise the contention in the earlier petition which was so elaborately argued and decided on 24th July, 1996. A perusal of the judgment in the earlier petition shows that the matter was argued threadbare.

30. Similar view has been taken by the Full Bench of Calcutta High Court in *Ram Narayan Gupta Vs. District Magistrate and Others*, . This was a case where Ram Narayan Gupta was detained under the order dated 7th April, 1972 passed u/s 3(2) of the Maintenance of Internal Security Act, 1971. He was arrested on 13th April, 1972. On 23rd May, 1972 he obtained a Rule from the Calcutta High Court u/s 491 of the 1898 Code but the rule was discharged by the Division Bench on 3rd August, 1972. On 25th August, 1972 the son of the detenu, namely, Chunilal Gupta obtained another rule from the Calcutta High Court u/s 491 of the 1898 Code relating to the same order of detention dated 7th April, 1972. Question arose whether the second application for writ of habeas corpus was maintainable under Article 226 or u/s 491 of the Code to the same High Court. Full Bench of the Calcutta High Court considered the decisions of the Apex Court in (i) *P.L. Lakhanpal Vs. Union of India (UOI) and Others*, , and (ii) *Ghulam Sarwar's case A.I. R. 1962 S.C. 1335*, to which we have made a reference in paras 10 & 11 above. The Full Bench also referred to the Full Bench decision of this Court in *In*

Re: Prahlad Krishna Kurne, and the Full Bench decision of Punjab High Court in Ram Kumar Pearay Lal Vs. District Magistrate, and came to the conclusion that successive applications for issue of writ or order in the nature of habeas corpus either under Article 226 or u/s 491 of the 1898 Code could not lie in the same High Court except in certain exceptional circumstances namely (i) when events have arisen subsequent to the passing of the first decision and (ii) when the facts and material were in existence at the time of first application, but were not available to the detenu. Full Bench of the Calcutta High Court agreed with the view expressed by the Full Bench of this Court that the jurisdiction to issue writs is conferred upon the High Court as such and not upon any Judge or Judges of the Court and, therefore, when the Division Bench of this Court heard the first petition under Article 226 it heard that petition as a High Court and its ultimate decision is not their decision but the decision of the High Court as such.

31. We must then make a reference to Division Bench decision of the Gujarat High Court in Ratilal Devabhai Navik Vs. State of Gujarat and Another, where, upon consideration of several decisions on the point, to some of which we have made a reference above, the Gujarat High Court held that under Article 226 the citizen had no right to present successive writ petitions of habeas corpus to different Judges of the same High Court. Such successive writ petitions are not permissible on the same grounds which have been urged, agitated and decided in the earlier petition. It was held that the second application for writ of habeas corpus would not be competent before the same High Court even on fresh facts. This was a case where the detenu was detained under an order issued by the State Government on 18th March, 1983 in exercise of the powers u/s 3(1) of COFEPOSA. He was supplied the grounds in Gujarathi as well as in English. The wife of the detenu filed earlier petition for writ of habeas corpus challenging the order of detention. The said petition was dismissed by a Division Bench of Gujarat High Court by its judgment and order dated 21st July, 1983. The second petition was, however, filed by the detenu on grounds which he claimed to be fresh grounds. The grounds were (i) denial by the Advisory Board of the assistance of a lawyer at the time of hearing of his representation before the Board, (ii) non supply of material documents namely log book maintained on Board the Vessel "Krishnaprasad" which was a fishing trawler and (iii) refusal to summon witnesses and permitting their cross-examination. On the question as to whether successive writ petitions for writ of habeas corpus were competent before the same High Court, even on the fresh grounds, assuming that the grounds were fresh, the Gujarat High Court considered the judgments of the Apex Court and several High Courts including the Full Bench judgments of this Court in Malhan Chikate's case (supra) and Pralhad Kurne's case (supra). A reference was also made to English and American decisions and it was held that the second application for writ of habeas corpus would not be competent before the same High Court even on fresh grounds. This conclusion is to be found at the end of para 17 of the judgment at page 103 of the report. On the second question as to whether the grounds pressed before the Court in the second

petition could be said to be fresh grounds or were merely different facets of the same arguments namely denial of adequate opportunity of making a representation, it was held that fresh grounds would mean those facts and circumstances which, though in existence at the time of first application, were not available or known to the petitioner or had arisen subsequent to the dismissal of the first application. The three grounds alleged before it were held not to be fresh grounds at all. After expressing this view, the Gujarat High Court concluded in para 25 of the report that even assuming that the Court's jurisdiction can be invoked again by fresh application for a writ of habeas corpus, it was not a case where the grounds which were pressed into service could be said to be fresh grounds which would justify exercise of jurisdiction and in the result the petition was dismissed.

32. The above decisions of the Apex Court, commencing with the case of Godavari Parulekar Vs. State of Bombay and Others, and ending with Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, leave no doubt in our minds that it is against public policy to permit repeated petitions being filed for the same relief. Even in respect of petitions under Article 32, the Apex Court has expressed its reservations in the first case of Mrs. Godavari Parutekar and categorically refused to entertain the second petition under Article. 32 for a writ of habeas corpus in Abdul Sattar's case. It is true that in Ghulam Sarwar's case AIR 1962 S.C 1335, a petition under Article 32 was entertained by the Apex Court after the petition under Article 226 was dismissed by the High Court. But, as we have already indicated above, the Constitution Bench has categorically indicated in para 9 of the judgment in Ghulam Sarwar's case, at page 1337 of the Report, that when the High Court functions as a Division, it speaks for the entire Court and it cannot set aside the order made in a petition for habeas corpus earlier by another Division Bench. While holding that dismissal of a petition under Article 226 by the High Court would not bar the maintainability of a petition under Article 32 by the Apex Court, in our view, it has been clearly held in Ghulam Sarwar's case that the High Court cannot entertain repeated petitions for a writ of habeas corpus under Article 226 on the same set of facts where grounds were available to the detenu at the time of decision of the earlier petition. In P.L. Lakhanpal Vs. Union of India (UOI) and Others, another Constitution Bench headed by K. Subba Rao, C.J., took the view that the earlier petition having been dismissed, the contentions which were raised earlier could not be permitted to be re-agitated since it was not the case of the petitioner that any new circumstance had arisen justifying their re-agitation. In Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, in the peculiar facts and circumstances mentioned in para 12 above, the Apex Court had itself earlier permitted a second petition under Article 32 being filed. This liberty was granted after the order was pronounced before the Summer Vacation and before the reasons were announced after the reopening of the Court. As indicated earlier, we are concerned with the maintainability of a second petition under Article 226 in the High Court on a ground which was very much available to the detenu at



the time of the decision of the first petition and no fresh fact has arisen after the decision of the first petition on 24th July 1996. No exceptional circumstance is averred, much less pointed out, to show why the contention now sought to be raised was not raised earlier.

33. In *Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others*, the Apex Court was dealing with a petition under Article 32 after the dismissal of a petition under Article 226 by the High Court and the Apex has clearly ruled regarding the discretionary powers of the High Court under Article 226 and the higher pedestal on which Article 32 was placed making it a fundamental right by virtue of Clause (1) of Article 32. This distinction is clear from the observations in para 10 of the judgment, at page 1264 of the Report. The ratio of these decisions of the Apex Court clearly binds us. It is clear to us that a petition under Article 32 to the Apex Court stands on a higher pedestal than a petition under Article 226 to the High Court. This itself marks the distinction in the approach to a petition under Article 32 either after the dismissal of a petition by the High Court under Article 226 or even after the dismissal of a prior petition under Article 32. This again must be viewed in the light of the observations of the Apex Court in *Godavari Parulekar Vs. State of Bombay and Others*, and in the last decision in *Abdul Sattar's case*, 1991(1) S.C.C. 480. Even in matters of successive petitions under Article 32, the principle of finality would suggest that successive petitions on the same set of facts and on grounds which were available to the detenu at the time when the first petition was decided should not be entertained unless there are exceptional circumstances. However, we must confine our decision to the maintainability of a second petition under Article 226 of the Constitution.

34. While appreciating the ratio of the above mentioned decisions of the Apex Court as a binding precedent, we must bear in mind the law laid down under Article 141 of the Constitution dealing with decisions of later Benches following a larger Bench decision where it has been categorically held that a latter Bench of lesser number of Judges cannot be construed to have said anything at variance with an earlier larger Bench decision of the Apex Court. *Mrs. Godavari Parulekar's case* was decided by the Constitution Bench headed by Patanjali Sastri, C.J.; *Lakhanpal Patel case* was decided by a Constitution Bench headed by K. Subba Rao, C.J., and *Ghulam Sarwar's case* was also decided by another Constitution Bench headed by K. Subba Rao, C.J. It is, therefore, clear to us that any observations in *Lallubhai Patel's case* decided by a Bench of two learned Judges where, while dismissing the first petition, liberty was granted by the Apex Court itself to file a second petition must be read in the light of the ratio laid down by the earlier three Constitution Bench decisions of the Apex Court. We can do no better than to quote the observations of the Supreme Court in para 13 of the judgment in *N. Meera Rani Vs. Government of Tamil Nadu and Another*, :--

"13. We may now refer to the decisions on the basis of which this point is to be decided. The starting point is the decision of a Constitution Bench in *Rameshwar Shaw v. District Magistrate, Burdwan*. All subsequent decisions which are cited

have to be read in the light of this Constitution Bench decision since they are decisions by benches comprised of lesser number of Judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench in Rameshwar Shaw case".

The law has been further declared in para 21, at page 434, which reads as under :-

"21. A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in Rameshwar Shaw case. The conclusion about validity of the detention order in each case was reached on the facts of the particular case and the observations made in each of them have to be read in the context in which they were made. None of the observations made in the subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw case for the obvious reason that all subsequent decisions were by benches comprised of lesser number of Judges. We have dealt with this matter at some length because an attempt has been made for some time to construe some of the recent decisions as modifying the principle enunciated by the Constitution Bench in Rameshwar Shaw case".

35. It appears to us that in no subsequent judgment of the Apex Court has any reservation been expressed even by a Bench of lesser number of Judges as far as the proposition of law laid down in Mrs. Godavari Parulekar's case, Lakhanppal's case and Ghulam Sarwar's case is concerned. On the contrary, the recent decision in Abdul Sattar's case (supra) is clearly consistent with the view expressed by the three Constitution Bench decisions in the above mentioned cases. Recently, in the case of Union of India v. Dhanvanti Devi, A.I.R.1996 S.C.W. 4020, the Apex Court has reiterated the principles regarding a binding precedent. In para 9 of the judgment, it is laid down that every decision contains three basic postulates, viz. (i) finding of material facts direct and inferential; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the binding effect of the above. The Apex Court reiterated that the judgment is only an authority for what it actually decides and it is not everything said by a Judge while giving a judgement that constitutes a precedent. The enunciation of the reason or the principle on which a question before the Court has been decided, is alone binding as a precedent.

36. Bearing in mind these observations and the law laid down by the Apex Court in a series of decisions referred to above and the Full Bench decisions of this Court and decisions of other High Courts, we will consider the decisions of this Court where at the instance of a detenu who was still in custody, a second petition for habeas corpus was entertained under Article 226. As indicated earlier, the present petition is no longer a petition for a writ of habeas corpus since the detenu has been released on 9-10-1996 and all the cases on which Shri Kotwal has placed reliance are cases, where, admittedly, the detenu was in detention and the second petition was very much a petition for a writ of habeas corpus under Article 226. At the time of delivery of the judgment, the detenu was very

much in custody and, therefore, the approach was different, as is usually the case in a habeas corpus petition.

37. In *Jeihamal Kapurchand Kothari v. Union of India and others*, 1986 Criminal Law Journal pg. 1645, the detenu was detained u/s 3 of the COFEPOSA. His first petition was dismissed on 18th December 1984 and he filed a second petition on grounds which were not raised in the first petition. In view of the observations of the Apex Court in *Lallubhai Patel's* case, the Counsel appearing for the respondents Union of India and State Government fairly conceded that the second petition covering different range of grounds was not barred. This is clear from the observations in para 1 of the judgment of this Court at pages 1646 and 1647. Admittedly, the detenu was in custody. Question of maintainability of a second petition under Article 226 by a detenu, who has been released and who wants to raise a contention which was available to him earlier at the time of decision of the first petition was not raised and decided in this case. In *Keshavrao Jagatrao Bhosale v. The State of Maharashtra and others*. Writ Petition No. 1112/1985, decided on 12th August 1986, this Court was dealing with the case of a detenu who was in custody and who had raised a new ground, which was not available to the detenu earlier. The question of maintainability of a second petition under Article 226 at the instance of a detenu, who has been released from detention and who wanted to raise a contention which was available to him earlier at the time of the decision of the first petition was not raised and decided by this Court. In *Padinhara Molle Beeran Ahmed's* case, Criminal Writ Petition No. 27 of 1986 decided on 19th June, 1986 - this Court proceeded on the footing that the issue as to whether a second petition under Article 226 was maintainable on a new ground raised in the second petition was concluded by the decision of the Apex Court in *Lallubhai Patel's* case and, therefore, entertained the second petition.

38. In *Kochu Krishnan Shashidharan's* case, 1987 Cri.L.J. 1441, a Division Bench of this Court considered the law on the subject and observed at the end of para 13 as under : "In our opinion, the petitioner can maintain the second writ petition under Article 226 of the Constitution challenging the validity of the declaration issued u/s 9(1) of the Act by the Union of India being a fresh ground." We have already indicated that a fresh ground would, in our view mean a ground which has arisen subsequent to the decision of the first petition. This view is also consistent with the law in England as evident from sub-section (2) of section 14 of the Administration of Justice Act, 1960 where it is provided that the second application for issuance of the writ of habeas corpus will not lie to the same Court or Judge unless fresh evidence was adduced in support of the application. The Division Bench in *Kochu Krishnan Shashidharan's* case - (Kurdukar, J., as His Lordship then was) after laying down the above proposition allowed the petition on merits. With respect, we do not think that ratio of the decision in *Kochu Krishnan's* case can apply to the facts of the case before us where --- the detenu has already been released and no fresh facts have been alleged and what has been alleged is a ground which was very much available to

the detenu at the time of hearing of the first petition in July, 1996. In Ashok Kumar Jatia's case, Cri.Writ Petition No. 173 of 1987 decided on 7th July, 1987, this Court had dismissed the first petition under Article 226 and the second petition was entertained. It was not disputed before the Division Bench in Ashok Kumar Jatia's case that the point which formed the bedrock of the petition was not put forth in the earlier proceedings either before the High Court or before the Apex Court in a petition under Article 32 as also in a special leave petition.

39. In Abdul Kadar Ibne Mohammed Hussain, Criminal Writ Petition No. 1223 of 1987 decided on 9th March, 1988, the second petition was entertained under Article 226 since the ground which was urged in the second petition was not taken in the earlier petition. This ground was treated as a fresh ground, as is obvious from the observations at the end of para 3 of the judgment. In Khadadad Habib Memon v. R.C. Iyer and others. Criminal Writ Petition No. 503 of 1988 decided on 1st July, 1988 the second petition challenging the detention under the COFEPOSA was entertained under Article 226. In para 3 of the judgment, relying upon the observations in Lallubhai Patel's case, it was submitted that a fresh petition to challenge the order of detention was maintainable provided there are fresh grounds available to the detenu which were not taken in the earlier petition. In Prabhakar Mahadeo Pokale v. Union of India and others. Criminal Writ Petition No. 26 of 1989 decided on 19th September, 1989, the second petition under Article 226 was entertained on a ground different than the one which was available in the first petition. The question about the maintainability of a second petition under Article 226 in the light of the judgments of the Apex Court, which we have discussed above, has not been discussed. In Rajesh Kumar s/o Kumarbhai Ghodia v. A.K. Databyal and others. Criminal Writ Petition No. 1195 of 1989 decided on 20th December, 1989, the second petition under Article 226 was entertained by this Court challenging the detention under the COFEPOSA. The first petition was dismissed on 6th September, 1989. Relying upon the observations in Lallubhai Patel's case and Kirit Kumar's case, it was held in para 15 of the judgment that High Court in exercise of its jurisdiction under Article 226 can entertain a second petition based on fresh grounds. This again was a case of a detenu who was in custody unlike the case before us where the detenue is free and where no fresh ground is alleged.

40. In Areemparambil Pappu v. L. Hmingliana Secretary & another, Cri. Writ Petition No. 130 of 1989 decided on 15th February, 1990 this Court referred to Lallubhai Patel's case and held that the grounds raised in the second petition were fresh grounds. In Mohammed Iqbal Dawood v. A.K. Batabyal and others, Cri. Writ Petition No. 623 of 1990 decided on 6th November, 1990, the second petition was held maintainable under Article 226 since it was admitted before the Court that the contention raised was not available to the detenu at the time the earlier petition was decided. It was a fresh ground arisen after the decision of the first petition which was permitted to be raised. We are in respectful agreement with the view expressed by the Division Bench.

41. In *Smt. Deepa Ramesh Pai Vs. The Union of India and others*, , the second petition was held maintainable under Article. 226 on fresh grounds. It was not disputed that the grounds were fresh grounds, as stated in para 6 of the judgment. In *Mangilal Nathamalji Jain v. The Union of India and others*, Criminal Writ Petition No. 1383 of 1991 decided on 7th February, 1992 the second petition was held maintainable under Article 226 since the ground which was placed before the subsequent Bench was not placed before the earlier Division Bench. With respect, however, the issue of maintainability of the second petition under Article 226 in the light of the law laid down by the Apex Court had not been raised nor is it decided in the said judgment. In *Balkrishna @ Balya Laxminarayan Soudekarv. S.K. Bapat and others*, Criminal Writ Petition No. 534 of 1993 decided on 10th September, 1993 relying upon *Lallubhai's* case it was observed that the second petition for writ of habeas corpus on fresh grounds which were not taken in the earlier petition was maintainable.

42. In all these Division Bench decisions mentioned above, as indicated earlier, the detenu was in custody. In some cases, the grounds were fresh in the sense that they had subsequently arisen after the decision of the first petition or the grounds were not available at the time of the decision of the first petition. We are dealing with a case where a detenu has admittedly been released and there is neither any fresh fact or ground nor any exceptional circumstances pleaded which prevented the detenu from raising the contention in the first petition. We do not think, with respect, that the ratio of the decisions in *Lallubhai Patel's* case can apply to the precise question that is raised before us. The Apex Court itself had granted liberty to file a second petition under Article 32 while deciding the first petition under Article 32 in *Lallubhai's* case. We have no reservations in holding that if a ground becomes available as a result of circumstances arising after the decision of the first petition, or where for some exceptional reasons, a ground had been omitted in the earlier petition, the High Court should, in appropriate circumstances, hear the second petition for ends of justice. However, we do not think that a second petition under Article 226 will be competent on the same ground as was available at the time of hearing of the earlier petition merely because of an additional facet of the contention or additional argument qua a particular contention is available to urge in the second petition.

43. We agree that the courts must jealously guard the liberty of the citizen and it is the duty of the Court to protect such liberty and safeguard it from being encroached upon or trampled down either by private individual or by executive Government. However, such an approach does not mean that defeated litigant can, in the name of liberty and under the slogan of fundamental rights file petition after petition in the same High Court in the hope of succeeding eventually at some time before some Judge or before another Bench of the same High Court. In this behalf, we must bear in mind the observations of the Apex Court in *Prakash Chandra Mehta's* case (supra) that there is no rule of law that common sense should be kept in cold storage while considering constitutional provisions for safeguards against misuse of powers by authorities

though these constitutional provisions should be strictly construed. Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, . The Constitution Bench decisions of the Apex Court in (i) Mrs. Godavari Parulekar's case para 8 above, (ii) P.N. Lakhanpat's case (para 10 above), and (iii) Ghulam Samar's case (para 11 above) leave no doubt in our minds that a second petition under Article 226 to the High Court on the same facts without any fresh ground being made out as indicated above, is not maintainable.

44. In addition to the law settled by the Apex Court, in our view, the decisions of the Full Benches of this Court leave no doubt in our mind that what we have indicated above is the correct legal position. It is true that Malhari Chikate's case decided by the Full Bench of Chagla, Ag. C.J., Rajadhyaksha, J., and Gajendragadkar, J., (as His Lordship then was) AIR 1948 Bom 326 was before the Constitution came into force but the second Full Bench decision of Chagla, C.J., Gajendragadkar and Dixit, JJ., in In Re: Prahlad Krishna Kurne, leaves no doubt whatsoever that the old rule of English law of entertaining repeated petitions for issuance of writ of habeas corpus was not applicable in India and neither u/s 491 of the old Cr.P.C. nor under Article 226 successive petitions could be entertained in the High Court on the same set of facts. This was clearly held to amount to a review of the earlier decision of the High Court which was wholly impermissible in the scheme of the provisions of the Code of Criminal Procedure and even under Article 226 of the Constitution. The decisions of the Apex Court in (i) Mrs. Godavari Parulekar's case; (ii) P.L. Lakhanpal's case and (iii) Ghulam Sarwar's case are decisions of the Constitution Benches. They clearly indicate that a second petition on the same ground would not be maintainable to the High Court under Article 226 on the same set of facts as were available at the time of decision of the first petition.

45. The law laid down by the Apex Court in Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, makes a clear distinction between the discretionary jurisdiction under Article 226 and the fundamental right guaranteed under Article 32(1) of the Constitution which must be borne in mind since we are dealing with a second petition to the High Court under Article 226 of and that too at the instance of a detenu who has been released and who has alleged no fresh ground whatsoever nor has he pleaded any exceptional circumstance which prevented him from raising the ground earlier at the time of hearing of the first petition though the same was very much available to him in the facts of the present case. Indeed, the approach of the Apex Court in Godavari Parulekar Vs. State of Bombay and Others, and in Abdul Sattar's case (supra) decided on 24th January, 1990 clearly indicates that even a second petition under Article 32 of the Constitution would not be maintainable on the ground of public policy that there should be finality to the proceedings.

46. In this view of the matter, our conclusions are as under :

i) The petitioner had filed earlier petition to this Court under Article 226 being Cri. Writ Petition No. 1238 of 1995 which was heard on merits and disposed of by

a detailed judgment on 24th July, 1996. The contention which is now sought to be urged before us about the non consideration of his representations dated 6th and 15th December, 1995 by the detaining authority and non communication of the reply was very much available to the detenu at the time when the first petition was heard and disposed of in the month of July, 1996. A period of seven months had elapsed after the making of the said representations and before this Court heard and decided the first petition.

ii) there is no fresh fact or fresh evidence which has become available to the detenu after the decision in the first petition on 24th July, 1996. No exceptional circumstance has been pleaded in this petition, much less was anything argued at the bar to suggest that the petitioner could not raise the contention of non consideration of his representations dated 6th and 15th December, 1995 in the earlier writ petition heard seven months after the making of the said representations.

iii) During the pendency of the earlier writ petition, the petitioner had taken several steps which clearly indicate that he was very much vigilant about his rights. He had filed Cri. Application No. 202 of 1996 in the first writ petition for leave to amend and had urged the contention regarding confirmation not having been made within 3 months as required by Article 22(4) of the Constitution read with section 8(f) of the COFEPOSA. He had then filed Criminal Appling. No. 923 of 1996 for parole in this Court on 12th April, 1996. On 18th April, 1996 the petitioner's Advocate had sought certain clarification and information from the Deputy Director, Directorate of Enforcement, Bombay regarding the papers being placed before the Advisory Board at the time of consideration of his case by the Advisory Board. On the same set of facts that were urged for parole in this Court, a separate Criminal Writ Petition No. 307 of 1996 was filed in the Delhi High Court seeking parole. Criminal Appling No. 1658 of 1996 was filed on 5th July for getting the first petition disposed of expeditiously.

(iv) The first petition was fully argued on merits. The first contention raised was regarding confirmation of the order of detention not being made within a period of 3 months of the order of detention and hence violative of the provisions of Article 22(4) of the Constitution of India. Second contention was regarding shortage of time at the disposal of the detaining authority for considering the documents that were placed before him before issue of the order of detention on 5th October, 1995, Third contention assumes importance in the light of the contention that is sought to be raised now before us. It was relating to the non consideration of the pre-detention representation made by the detenu on 5th October, 1995 on his coming to know of the fact that a proposal for his detention was made and the order of detention was likely to be issued which was in fact issued on 5th October 1995 itself and was served on him on 10th October, 1995. Even in respect of such a pre-detention representation, the detenu had urged the violation of his right guaranteed under Clause (5) of Article 22 of the Constitution which has no application to the predestination representation. Fourth contention

was that there was no consideration of the prior detention order issued on 3rd June, 1991 preventing the detenu from indulging in smuggling activities. In respect of prior order of detention, the detenu had obtained ad-interim stay from the Calcutta High Court on 21st June, 1991 which had expired after one week. Fifth contention was that certain documents annexed to the letter dated 22nd July 1995 sent by the petitioner to the Deputy Director of Enforcement at Bombay were not placed before the detaining authority. The last contention was regarding some writings in Deonagari script being not intelligible to the detaining authority though they were intelligible to the detenu namely "Ro" in Deonagari script with the word "cash", mentioned in brackets in English; the word "Ro" meant "Rokad" which means "cash".

(v) It is also relevant to note that the representations dated 6th and 15th December, 1995 made by the detenu were considered by the Government of India and were rejected and communication to that effect was issued on 25th January 1996 and was received by the detenu as far back as on 29th January, 1996. This is evident from Annexure E to the present petition. Despite this, however, the detenu did not raise the contention about non consideration of these very representations dated 6th and 15th December, 1995 by the detaining authority till 24th July, 1996 when the earlier petition was disposed of seven months after the representations were made.

(vi) The petitioner did not offer even any oral explanation for the failure on his part to raise this contention in the earlier petition. As indicated earlier, no exceptional circumstances have been pleaded in this one page petition. However, without being technical about the absence of pleadings in a habeas corpus petition, when questioned by us, no explanation was forthcoming since, obviously, there was none available with the detenu as to why the contention about the non consideration of the earlier representations dated 6th and 15th December, 1995 by the detaining authority was not raised in the earlier petition. The ground raised, therefore, is not at all a "fresh ground" and was very much available to the detenu at the time when first petition was heard and decided.

(vii) The petition has ceased to be a petition for issue of a writ in the nature of habeas corpus consequent upon the release of the detenu on 9th October, 1996. The petition is now only for a writ in the nature of writ of certiorari.

(viii) Nothing has happened between 24th July 1996 when the first petition was decided and filing of the present petition on 16th August, 1996 excepting, of course, that the assignment had changed. No new events had occurred and no fresh evidence had become available to the detenu during these 3 weeks to justify his filing the second petition.

47. Under the circumstances, we are of the view that the second petition on the ground, which was very much available to the detenu at the time of hearing of the first petition and in respect of which, no exceptional circumstance has been pleaded for not having raised the contention earlier, can be entertained by this



Court in exercise of its powers under Art. 226 of the Constitution. This petition is now for issuance of a writ in the nature of certiorari and not a petition for issuance of a writ in the nature of habeas corpus. Hence in the light of the three Constitution Bench decisions of the Apex Court and the decision in Abdul Sattar's case referred to above, as also two Full Bench decisions of this Court, we hold that the second petition is not maintainable under Article 226 of the Constitution.

48. Hence, we uphold the preliminary objection raised by Shri Agrawal and hold that the second petition is not maintainable for the reasons indicated above.

49. The petition is accordingly dismissed. Rule is discharged.

50. At this stage Shri Kotwal prays for issuance of a certificate under Article 134(1)(c) read with Article 134-A of the Constitution on the ground that this is a fit case for appeal to the Apex Court. We have decided the limited question about the maintainability of the second writ petition under Article 226 of the Constitution where the detenu has already been released from custody and where no fresh facts are averred nor is any circumstance pointed out which had occurred after the decision of the first petition. We have held that the ground sought to be urged in this petition was very much available to the detenu in July, 1996 when the first petition was decided, but was not raised and no exceptional circumstance has been pleaded either in the petition or orally at the bar. We have decided the issue on the basis of the legal position settled by three Constitution Bench decisions and the last decision in Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, , as also two Full Bench decisions of this Court. We, therefore, do not think that this is a fit case for appeal to the Apex Court. Hence prayer rejected.

51. Petition dismissed.