

**(1966) 01 GUJ CK 0002**  
**In the Gujarat High Court**

Haroobhai M. Mehta

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

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**Date of Decision :** 25-01-1966

**Acts Referred:**

Constitution of India, 1950 — Article 12, 14, 14, 21, 22  
Criminal Procedure Code, 1898 (CrPC) — Section 491(l)(b)  
Defence of India Rules, 1962 — Rule 30, 30(1), 30(2), 30(3), 30(4)

**Citation :** (1966) 7 GLR 597

**Hon'ble Judges :** N.M. Miabhoy, J;N.K. Vakil, J

**Bench :** Division Bench

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## Judgement

N.M. Miabhoy, J.—These five petitions are filed under Article 226 of the Constitution of India and Section 491(l)(b) of the Criminal Procedure Code (Act No. V of 1898). Each of the five petitioners was ordered to be detained by a separate order dated December 29, 1964, by the State of Gujarat. The orders are in identical terms. By those orders, the State of Gujarat directed, under Clauses (1) and (4) of Rule 30 of the Defence of India Rules, 1962, (hereafter called "the Rules") that petitioners be detained in the Rajkot Central Prison. The orders stated that the State Government was satisfied in regard to the five petitioners that it was necessary to detain them with a view to preventing them from acting in any manner prejudicial to (i) the defence of India; (ii) the public safety; and (iii) the maintenance of public order. The orders are signed by the fourth respondent. In accordance with these orders, the five petitioners were arrested on December 30, 1964, and, since then, they are under detention under those orders. As required by Rule 30-A of the Rules, the State Government reviewed, within the prescribed time-limit, orders of detentions, and, by its orders, dated June 25, 1965, the State Government decided that the orders of detentions should be continued until further orders. These orders are signed by the fifth respondent on behalf of the State of Gujarat. Petitioners have joined six entities as respondents to their petitions. The first respondent is the Union of India and the second respondent is Mr. Gulzarilal Nanda, Home Minister, Union of

India. These two respondents have appeared before us through their Advocate but they have not filed any affidavit in reply to show cause against petitioners' detentions. The third respondent is the State of Gujarat. The fourth respondent is Mr. F.J. Heredia, Secretary to the Government of Gujarat, Home and Civil Supplies Department (Special), Ahmedabad. The fifth respondent is Mr. G.D. Naik, Under Secretary to the Government of Gujarat. The fourth and the fifth respondents have been joined in the petitions as they have signed the orders of detentions and their continuation respectively. The sixth respondent is the Superintendent Rajkot Central Prison, Rajkot, under whose custody petitioners were at the time when they presented the above petitions. All these respondents have also appeared to show cause in response to rules nisi issued against them. The fourth respondent has filed his affidavit in reply challenging the factual contentions and the legal submissions in the petitions. Petitions raise common questions of law and facts. For this reason, all these petitions were set down for hearing on one and the same day. Some of the questions of law raised in these petitions also happened to be raised in a number of other petitions presented by other detainees. Therefore we decided that we should permit such of the learned Advocates: as appear in those other Petitions to intervene in the present petitions, so that their arguments in support of the common legal submissions might also be heard and those legal submissions might be decided after hearing them. Some of the learned Advocates-intervened accordingly. On behalf of the present petitioners, Mr. Haroobhai M. Mehta petitioner in Special Criminal Application No. 21 of 1965, addressed us ably and fully, both of questions of law and facts. Mr. J.G. Shah was good enough to appear *amicus curiae* in Special Criminal Application No. 25 of 1965, He supported and supplemented, the arguments of Mr. Haroobhai Mehta. Amongst the petitioners, only Mr. Chimambhai Amichand, petitioner in Special Criminal Application No. 23 of 1965, addressed us. His address was confined only to the question as to whether there was or was not justification for the allegations made by the fourth respondent in his affidavit in reply that the pro-Chinese Wing of the communists to -which petitioners belong was anti-national in its attitude. None of the other three petitioners addressed us on any of the topics. They content themselves by stating that they adopted all the arguments which were urged by Mr. Haroobhai Mehta. Mr. Daru and Mr. Shethna appeared as intervening Advocates. They also addressed us arguments on common questions of law.

2. In order to understand and appreciate the points of law raised in the petitions and the legal submissions made thereon, it will be convenient to mention the Constitutional and the legal provisions and instruments in the setting, of which the impugned orders of detention came to be passed. On October 26, 1962, the President of India, having been satisfied that a grave national emergency existed whereby the security of India was threatened by the Chinese aggression, issued a Proclamation declaring an emergency under Article 352 of the Constitution of India. That declaration of emergency was laid before both Houses of Parliament on November 8, 49, 62, and was approved by Rajya Sabha on November 13,

1962, and by Lok Sabha on November 14, 1962. After the Proclamation of Emergency as the Parliament was not in session and as the President was satisfied that circumstances existed which rendered it necessary for him to take immediate action for exercise of powers conferred by Clause (2) of Article 123 of the Constitution of India, he promulgated the Defence of India Ordinance, 1962 (4 of 1962) on the same date on which the Proclamation of Emergency was issued. By Section 3 of the Ordinance, the Central Government was empowered to make such rules as might appear to be necessary or expedient for securing the defence of India and civil defence public safety, maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community, by publishing a notification in the Official Gazette. In exercise of that power, the Central Government promulgated the Defence of India Rules, 1962, by notification in the Official Gazette, Extraordinary, dated November 5, 1962. During the operation of the Proclamation of Emergency, the President issued on November 3, 1962, an Order in exercise of the powers conferred upon him by Article 359. of the Constitution, declaring that "the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under Clause (1) of Article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder. " This Presidential was subsequently amended on November 11, 1962, by introduction of Article 14 in the original Order of November 3, 1962, so that the right to move any Court became suspended not only for the enforcement of the fundamental rights guaranteed under Articles 21 and 22, but also the right guaranteed under Article 14 of the Constitution. In the meantime, the President amended on 3rd November, 1962, the Defence of India Ordinance by the Defence of India (Amendment) Ordinance, 1962. On December 12, 1962, the Parliament enacted the Defence of India Act, (No. 51 of 1962), (hereafter called "the Act"). Section 48 of the Act repealed the Defence of India Ordinance, 1962, and the Defence of India (Amendment) Ordinance, 1962. However, Sub-section (2) of Section 48 of the Act enacted that the rules already made under the Defence of India Ordinance, 1962, as amended by the Defence of India (Amendment) Ordinance, 1962, shall be deemed to have been made under the Act as if the Act had commenced on October 26, 1962. Rule 30 of the Rules empowered the Central Government or the State Government, "if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary so to do", to make, among other orders, an order directing that he be detained. The impugned detention orders have been passed by the State Government in pursuance of this power conferred by Rule

30, Sub-rule (1), Clause (b).

3. Now, the legal submissions common to these and other petitions raised before us are three in number. The first submission which may be described as the main submission is that the Presidential Order of November 3, 1962, as amended by the order of November 11, 1962, is violative of the guarantee against discrimination enshrined in Article 14 and that, therefore, it is void under Article 13 of the Constitution. The second submission is that the detention of all the petitioners is in violation of the fundamental right enshrined in Clause (5) of Article 22 of the Constitution. That clause directs that when a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. It is common ground that, in regard to all the detention orders made under the Rules, no grounds were furnished to the detainees, nor was any opportunity afforded to any of them to make a representation against the orders of detentions. The detainees contend that, in spite of the Presidential Order depriving them of the right to move any Court for the enforcement of the rights conferred by Clause (5) of Article 22, they have a right to approach this Court for the violation of those rights inasmuch as the Presidential Order itself is void as being violative of Article 14 of the Constitution. Thus the second submission consequence of the first submission. The third submission is that if the Presidential Order is valid, petitioners further detention in violation of Clause (5) of Article 22 is invalid and that they are entitled to an of release because they have not been deprived of the rights under (5) in pursuance of the impugned orders of detention, but dehors the same. This contention is based on an interpretation which detainees seek to place upon the latter part of the Presidential Order which imposes a condition precedent for the suspension of the right to move any Court for enforcement of the above fundamental rights. The condition precedent is that the aforesaid fundamental rights must have been deprived of, amongst others, by an order passed under the Ordinance (Act) or tap Rules or an order thereunder. The detainees contention is that the impugned orders of detention do not deprive them of the aforesaid rights, They contend that they have been deprived of those rights outside and dehors the impugned order of detention and that, therefore, they have a right to approach the Court for the enforcement of those rights and the jurisdiction of this Court is not taken away to issue appropriate writs in enforcement of those rights. The other points which are raised by petitioners are as follows:

(1) That the impugned orders were passed without the satisfaction of the State Government.

(2) That they were passed at the behest of the second respondent.

(3) That they were invalid inasmuch as they were made in mala fide exercise of the powers of the Government.

(4) That the continuation of the detention orders was invalid inasmuch as the orders were continued for a purpose which is not covered by the provisions of Rule 30, and

(5) that, in any case, this is a fit case for permitting petitioners to cross-examine the fourth respondent inasmuch as it is the case of petitioners that the detention orders were made on the basis of incorrect facts and that, in view of the fact that petitioners and the fourth respondent were at variance in regard to certain important matters, the only way to elicit the truth in the matter was by cross-examining the fourth respondent.

In addition to this, Mr. J.G. Shah raises the contention that the order of the President made under Article 359 of the Constitution did not survive after the repeal of the Defence of India Ordinance and was not good order under the Act.

4. We may preface the discussion of the first and the main submission by stating that, though the validity of the Presidential Order has been challenged previously in some decisions and the challenge has been negated in those decisions, the validity of the order has never been challenged, according to the assurance given to us by the learned Counsel appearing in these matters, on the ground that it is violative of Article 14 of the Constitution. In *Makhan Singh Vs. State of Punjab* (and connected appeals), the validity of the Presidential Order was challenged on the ground that it sought to give effect to an Ordinance which was void. The argument was that, during the period between October 26, 1962, and November 3, 1962, the validity of the Ordinance could have been challenged on the ground that it contravened Articles 14, 21 and 22 of the Constitution of India inasmuch as, during that period, the Presidential Order was not in existence and so the Ordinance was a still-born piece of legislation. In deciding this contention, Their Lordships assumed that the Presidential Order did not suspend the rights guaranteed by Articles 14, 21 and 22; that it suspended only the enforcement of those rights and that, therefore, the Ordinance was, even on the day on which it was being challenged, void in the eye of law. On these assumptions, Their Lordships decided that, even so, the effect of the Presidential Order was that the invalidity of the Ordinance and the Act could not be tested during the period the Presidential Order Was in operation. The second argument which was rejected by Their Lordships in *Makhan Singh's* case was that the contravention of Articles 14, 21 and 22 (4), (6) and (7) of the Constitution of India in the Ordinance and the Act was so flagrant that it was not open to the President to issue an Order preventing the detainees from challenging the validity of the aforesaid statutory provisions. Their Lordships rejected that argument on the ground that it was arguing in a circle.

5. It will be noticed that, in *Makhan Singh's* case, the validity of the Presidential Order was not challenged on the ground that it itself was violative of Article 14. The learned Advocate General, however, contends that, on the principle enunciated by Their Lordships in the case of *Smt. Somavanti and Others Vs. The State of Punjab and Others*, it is not open to petitioners to raise the aforesaid

contention. In that case, the validity of the Land Acquisition Act (1894) was being challenged by recourse to an argument different from the one on which it was challenged in three earlier decisions of the Supreme Court. The challenge which was negated by the three previous decisions of the Supreme Court was being supported by a new argument to the effect that the protection given to that enactment by Article 31(2) did not extend to other provisions of Part III of the Constitution, such as Article 19(1)(f)- Their Lordships rejected this argument on the ground that the binding effect of a decision did not depend upon whether a particular argument was considered therein or not, provided the point with reference to which the argument was actually advanced had happened to be decided. In regard to the decisions reached in the previous cases, Their Lordships held that the point had been specifically decided in those decisions and consequently Their Lordships refused to reconsider the decisions regarding the validity of the Land Acquisition Act on the basis of the new argument. This principle is not applicable to the facts of the present petitions. The point which is being raised here is different from the one raised in Makhan Singh's case. This is not a case where the same point is being reinforced by a new argument. It is true that, in Makhan Singh's case, the Validity of the Presidential Order was also challenged. But the point which was raised in regard to the Presidential Order was that it sought to give effect to a void Ordinance. The point which is now raised is that the Presidential Order itself is void as being violative of the fundamental guarantee against discrimination.

6. Now the detailed submissions in regard to the Presidential Order are as follows. Petitioners contend that the Presidential Order is "law" within the meaning of Article 13; that the President, when making the Order, is "the State" within the meaning of Articles 12, 13 and 14; that, therefore, in order to be valid, the aforesaid Order must not take away or abridge any of the rights conferred by Part III of the Constitution; that the Order in question deprives them of the right to equal protection of laws; and that the Presidential Order, being violative of Article 14, was void under Clause (2) of Article 13 of the Constitution. In the alternative, petitioners contend that, even if the President is not "the State" within the meaning of Article 12, the President would be "the State" in the general connotation of that term. Still alternatively, they contend that, even if the Presidential Order is not "law" within the meaning of Clause (3) of Article 13, the connotation of the terms "the law" and "the laws" as used in Article 14 is wider than the connotation of the term "law" as used in Clause (3) of Article 13 and the Presidential Order can be "the law" within the meaning of Article 14 and, in that way, the Presidential Order is violative of Article 14 of the Constitution. The learned Advocate General traverses all the aforesaid propositions by contending that the Presidential Order is neither "law" under Clause (3) of Article 13, nor "the law" under Article 14 and that the President is not "the State" within the meaning of Article 12 or of the general connotation of that term. The learned Advocate General submits that the term "law" as used in Clause (3) of Article 13 and Article 14 is confined only to laws in the exercise of

the legislative functions of the State and not to constitutional laws made in the exercise of the constituent power conferred on the Parliament or the President by the Constitution. In the submission of the learned Advocate General, the nature of the power exercised by the President under Article 359 is constituent or, in any way, akin to the constituent power exercised by the Parliament under Article 368 and that, therefore, the Presidential Order does not come within the purview of Article 14 at all. In the alternative, the learned Advocate General contends that the Presidential Order is not violative of Article 14.

7. In order to resolve the aforesaid controversies, it will be better first to ascertain the nature and the content of the power exercised by the President under Article 359. If once this is done, then, it will be easy to consider the other points in dispute between the parties. As we have already indicated, the contention of the learned Advocate General is that the power under that Article is constituent in nature or akin to it. On the other hand, petitioners and the learned Advocates-interveners-contend that the power is essentially legislative in nature.

8. Now, Article 359 occurs in Part XVIII of the Constitution. The heading of that Part is "Emergency Provisions". That Part deals with three kinds of emergencies, viz. (i) national, dealt with by Article 352; (ii) constitutional, dealt with by Article 356; and (iii) financial, dealt with by Article 360. Each of the emergencies has to be declared by a Proclamation. The authority which is given the power to issue the Proclamation is the President. Each of the aforesaid three Articles prescribes the conditions on the satisfaction of which the relevant proclamation is to be issued. The Chapter and, in the case of national emergency, Article 250, also contain provisions as to the consequences of the issue of a proclamation.

9. Article 352 empowers the President to issue a proclamation of emergency if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened whether by war or external aggression or internal disturbance. This proclamation ceases to operate at the expiration of two months unless, before the expiration of that period, it has been approved by resolutions of both Houses of Parliament. The proclamation has to be laid before each House of Parliament. It can be revoked by the President by a subsequent proclamation. Certain consequences follow the issuance of the proclamation. Under Clause (1) of Article 250, Parliament has the power, during the operation of the Proclamation of Emergency, to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. Under Clause (b) of Section 353, Parliament has the power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter; notwithstanding that it is one which is not enumerated in the Union List. Under Clause (a) of Article 353, the executive power of the Union extends to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. Under Article 358, the fundamental rights enumerated in Article 19 become suspended

inasmuch as during the operation of the Proclamation of Emergency, the State, as defined in Part III, has the power to make any law or to take any executive action which is in contravention of the provisions contained in Article 19. Under Article 354, the President acquires the power, during the operation of the Proclamation of Emergency, to give directions by an order that all or any of the provisions of Articles 268 to 279 shall, for such period as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit. Articles 268 to 279 relate to distribution of revenues between the Union and the States. The President also has the power under Article 359, during the operation of a Proclamation of Emergency, to declare by order "that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order". Such an order may extend to the whole or any part of the territory of India and has to be laid before each House of Parliament as soon as may be after it is made.

10. From the aforesaid provisions, it is quite clear that a Proclamation of Emergency has an automatic effect upon the fundamental rights enshrined in Article 19. Those rights become automatically suspended. It is also quite clear that fresh powers come to be conferred upon three limbs of the Union: (1) The President; (2) the Parliament; and (3) the Union Government. Under Article 354, the President acquires the power to modify the provisions contained in Articles 268 to 279. It is quite clear that the exercise of this power will directly impinge upon the above constitutional provisions. The President also acquires a power under Article 359. It will be convenient at this stage to ascertain the content of that power. Essentially, the power is the power to suspend the right to move any Court. This is the only right which can be affected by the exercise of the above Presidential power. The power affects a remedial right. The remedial right which can be affected is in respect of the enforcement of fundamental rights. Though the President has the power to affect remedial rights in respect of all fundamental rights, he has been given the power to select which of the fundamental rights can be so affected. It is to be noticed that the President has no power to suspend the fundamental rights themselves. During the operation of the Proclamation of Emergency, the fundamental rights other than those mentioned in Article 19 remain in tact. But the right which the President can suspend or take away during the prescribed period is only a right to move any Court for the enforcement of those fundamental rights. It will be noticed that the remedial right which can be taken away is not merely the right to approach any particular Court but the right to approach all Courts. Therefore, analysing the provision of Article 359, we get the following results. The President has the power to select fundamental rights in regard to which the right to move any Court can be suspended. If and when the Order is proclaimed, incorporating the rights in regard to which the remedy is taken away, and, if the Presidential Order



takes away the remedy in regard to all the Courts of the land, the rights of the citizen would be affected in the following ways:

(1) The right of the citizen to move the Supreme Court under Article 32 of the Constitution for the enforcement of the selected fundamental rights will become suspended. The right to move the Supreme Court under Article 32 is itself a fundamental right. Therefore, to the extent to which the Presidential Order has the aforesaid effect, the Presidential Order affects a fundamental right. The exercise of the Presidential power will deprive the citizen to enjoy the fundamental right under Article 32 itself during the period of emergency in regard to the enforcement of the fundamental rights selected by the President for treatment.

(2) The exercise of the power will deprive the citizen to move the High Court under Article 226 of the Constitution for the enforcement of the selected fundamental rights. To the extent to which the exercise of the Presidential power has the aforesaid effect, the constitutional right of the citizen to move the High Court under Article 226 will be affected.

(3) The right of the citizen to move any Court for the enforcement of the aforesaid rights in any Court other than the Supreme Court and the High Court will also become suspended. The exercise of the Presidential power will thus affect the ordinary law of the land by depriving the citizen of the right to approach ordinary Courts for obtaining remedies in regard to the enforcement of the fundamental rights.

11. In *Sree Mohan Chowdhury Vs. The Chief Commissioner, Union Territory of Tripura*, Their Lordships have held that the effect of a Presidential Order under Article 359 is that a citizen has no locus standi to enforce the selected fundamental right during the operation of the Presidential Order. In *Makhan Singh's case* (supra), Their Lordships have further held that the Courts concerned would be deprived of their jurisdiction to entertain proceedings pro tanto in regard to the enforcement of the selected fundamental rights.

12. A study of the content of the Presidential power under Article 359 reveals that the power impinges upon the fundamental right embodied in Article 32, the constitutional right embodied in Article 226, and the ordinary law of the land relating to the jurisdiction of ordinary Courts.

13. When the President exercises a power under Article 356, on being satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the President may, by Proclamation (a) assume to himself all or any of the functions of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State, (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; and (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving

effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the State. It will be noticed that, on the issuance of such a Proclamation, the President acquires the executive functions of the State, acquires the power to suspend the provisions of the Constitution and to declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. It will be noticed that the effect of the Proclamation is to impinge upon or affect constitutional provisions. When the President exercises the power of declaring a financial emergency under Article 360, the executive authority of the Union acquires the power of giving directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose. These directions notwithstanding anything contained in the Constitution may include (i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State, (ii) a provision requiring all Money Bills or other Bills to which the provisions of Article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State. It further confers a power upon the President to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts. It will be noticed that, in such financial emergency also, the President has the power of giving directions which will impinge upon constitutional provisions.

14. Now, the broad submission which the learned Advocate General makes is that when we have a power which can impinge upon or affect constitutional provisions and rights, such a power cannot be described as legislative power and the exercise of that power cannot result in making of a law. He submits that such a power is not legislative but constituent. He submits that a constituent power is different from legislative power and that, whereas the exercise of the first power results in making of a "law", challengeable under Article 13, the latter activity, though it results in "law", is not "law", which is challengeable under that Article. He submits that whereas the law, which is the result of the first activity, cannot affect fundamental rights, the law which is the result of the second activity, can do so. The learned Advocate General relies for the latter proposition on two decisions. The first decision in the case of *Sajjan Singh Vs. State of Rajasthan*, Their Lordships have held as under:

Similarly, an amendment of the Constitution which is the subject matter of the power conferred by Article 368, may include modification or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases.

The second case is *Shankari Prasad Singh Deo and others v. The Union of India and Ors.* AIR 1951 SC 458. At page 463, Their Lordships have made the

following observations in regard to the word "law" as used in Article 13:

Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State. " It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the right of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatsoever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other.

After making the aforesaid observations, Their Lordships conclude the passage by the following observations which are relevant to the point in hand:

Having regard to the considerations adverted to above, we are of opinion that, in the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13(2) does not affect amendments made under Article 368.

The learned Advocate General reinforces the argument by contending that, in the context of our Constitution, "law" must be one which must be relatable to one of the subjects mentioned in three Lists appended to Seventh Schedule of the Constitution. He contends that the subjects on which the Presidential power can be exercised whilst exercising the power under, Part XVIII are not subjects mentioned in any of those Lists and that those powers, or, at least, quite a majority of them, can be exercised only by Parliament exercising its constituent power under Article 368 and not by Parliament or any other Legislature

exercising the ordinary legislative powers. The learned Advocate General further contends that when the President is exercising powers under Part XVIII, he cannot be said to be doing so either as the executive head or a limb of the Legislature and that, having regard to the definition of "the State" contained in Article 12, the President, when exercising the above powers, cannot be described as "the State" within the meaning of Part III of the Constitution. On the other hand, Mr. Daru contends that, even though the power exercisable by the President under Article 359 may be his special or individual power, that power must necessarily be exercised by him within the limits of the Constitution and that, by whatever nomenclature the power of the President under the above Article may be described, that power must necessarily be subject to the other provisions of the Constitution, and, unless there is provision, express or implied, in the Constitution itself, the power of the President must be subject to the Fundamental Rights enshrined in Part III of the Constitution, which constitute the main bulwark of the Indian democratic republic. Mr. Daru submits that, therefore, the problem cannot be answered by merely determining the nature of the power of the President, but the problem is of the construction of Article 359, and, if the Article is read with the other Articles of the Constitution, including the provisions contained in Part III, and, if any conflict happens to be noticed between the two sets of provisions, the problem is of the harmonious construction of the various provisions of the Constitution and the Court must undertake a decision as to whether Article 359 is subject to the provisions contained in Part III or vice versa.

15. Although it is useful and even necessary to ascertain the true nature of the powers conferred on the President by Part XVIII, it will not be proper to lump up all the powers together and arrive at a conclusion on an overall consideration of all the powers. The authorities on whom "the powers are conferred by Part XVIII are different and the powers which are conferred on them are not of a uniform nature. The authorities: on whom the powers, are conferred under that Part are the Union, the Parliament and the President. The powers which have been conferred on the first two authorities, the Union and the Parliament, by no stretch, of imagination can be described as constituent. For example, the power "conferred on the Union executive under Clause (a) of Article 353 is undoubtedly" of an executive nature and by no stretch of imagination can be described as either constituent or legislative. There is also no doubt that the power which has been conferred on the Parliament under Clause (b) of Article 353 and that which is derived by it on account of the declaration made by the President under Clause (b) of Article 356 are legislative in nature and would have to pass the test, for example, of Article 13 of the Constitution. The powers which are conferred on the President are also of a varied nature. For example, under Clause (a) of Article 356 the assumption of the functions of the Government of the State and an or any of the powers vested in or exercisable by the Governor is necessarily executive in character. Under the circumstances, in order to answer the problem in hand, the best thing is to concentrate one's attention on the nature of the power contained in Article 359, although, in determining that

nature, one may bear in mind and derive assistance from the other provisions contained in Part XVIII and all the other powers of the President. Approaching the problem in that way, the power conferred on the President under Article 359 is, as we have already pointed out above, a power, which entitles him to modify, during the period of emergency, the fundamental right enshrined in Article 32 and to restrict pro tanto the jurisdiction of the Supreme Court in regard to the enforcement of fundamental rights. The power also entitles the President to modify the constitutional right given, to a citizen under Article 226 of the Constitution to move the High Courts for the enforcement of his fundamental rights and, to that extent affects the jurisdiction of the High Courts. To that extent, during, the period of emergency, the provisions of Articles 32 and 226 certainly come to be affected and modified. It will be noticed that, in regard to the first, power, the Presidential power is coeval to the power of the Parliament, under Article 368 and, in regard to the second power, is superior to the; power of the Parliament under the same Article inasmuch as, whereas the; Order of the President can affect directly the provision of Article 226, that of the Parliament cannot do so unless the affection is ratified by the-Legislatures of a majority of the States. Therefore, in our judgment, the. learned Advocate General is right in contending that the aforesaid two powers of the President cannot be described as ordinary legislative powers At the same time, there is no doubt whatsoever that the extent of the-power is not the same as the extent of the power of the Parliament under-Article 368. Whereas, under Article 368, the Parliament can amend any Part of the Constitution, under Article 359, the power of the President can affect Articles 32 and 226 only and that too, in regard to the enforcement of only those rights which the President selects for being treated under his Order. However, the learned Advocate General submits that the Presidential power is of wider amplitude and that the Presidential Order is potent enough, not only to affect Articles 32 and 226, but all the Articles comprised in Part III of the Constitution. He contends that if any Article is mentioned in the Presidential Order as one in regard to which the citizen is deprived of the remedial right, the effect thereof is to introduce a sort of a proviso to that particular Article to the effect that the right of the citizen to move any Court for the enforcement of the right is correspondingly taken away. In other words, the effect of the contention of the learned Advocate General is that the Presidential Order under Article 359 has the power not only to reach Article 32 and 226 but is potent enough to reach all the Articles under Part III of the Constitution. We are unable to agree with this submission. The language of Article 359 does not leave any doubt that the President, acting thereunder, cannot suspend any of the fundamental rights except the one guaranteed by Article 32. On the language of Article 359, we have no doubt whatsoever that the President has no power whatsoever to take away or abridge or even to suspend any of the other fundamental rights guaranteed by Part III of the Constitution. That being so, although the Presidential Order can, in some respects, do the same thing in the time of emergency in regard to the operation of the whole of Article 32 and a part of Article 226 which the Parliament can do at all times, the Presidential Order

cannot affect the other fundamental rights guaranteed by Part III, which the Parliament can do at all times. Having regard to this difference between the powers of the President and the powers of the Parliament acting under Article 368, it will not be correct to say that the Presidential power under Article 359 of the Constitution is of the same kind as the constituent power of the Parliament under Article 368. Realising the importance of this distinction, the learned Advocate General makes an alternative and a narrower submission. On a concession that the two powers are not the same, he contends that the power of the President under Article 359 is akin to the constituent power of the Parliament under Article 368 of the Constitution. In our judgment, even if there is any affinity in this regard between the two powers, the affinity extends only in regard to a very limited field, the field of Article 32, and a small field from out of Article 226. Therefore, it would not be proper to equate the two powers together in regard to the potentiality of that power to affect or override the fundamental rights guaranteed by Part III, for, in effect, the attempt of the learned Advocate General is to show that an order passed by the President under Article 359 is not subject to the provisions contained in any of the Articles occurring in Part III. Moreover, in determining the nature of the Presidential power under Article 359, one has also to bear in mind that the Presidential power can even reach the right of the citizen to move any other ordinary Court and to affect the jurisdiction of such ordinary Courts in regard to the enforcement of the fundamental rights. As we have already pointed out, that power cannot be described as constituent but ii essentially legislative in character. Therefore, overall study of the nature of the power conferred on the President by Article 359 reveals that it is a motley power—a power which has the potentiality to affect two constitutional provisions and also the ordinary law of the land relating to the remedy of the citizens and jurisdiction of ordinary Courts.

16. If we consider the provisions of Articles 358 and 359 together, the intention of the Constitution-makers as to what should happen to the fundamental rights enshrined in Part III in times of emergency appears to be pretty clear. The Constitution-makers have ordained that, on the Proclamation of Emergency, the restrictions placed on the law-making and the executive authorities by Article 19 shall remain suspended. But, as regards the other fundamental rights, the Constitution-makers, in their wisdom, have not made any provision for such automatic suspension of rights. In fact, reading the two Articles together, there is no doubt whatsoever that, except Article 32, the Constitution-makers did not intend any of the other fundamental rights to be suspended by any means whatsoever and, in regard to Article 32, the Legislature has not provided for any automatic suspension. What the Constitution itself could have done in regard to Article 32 as it did in regard to Article 19 the Constitution-makers, instead, leave it to the President to decide as to whether the fundamental right guaranteed by Article 32 shall or shall not be suspended and if so, in regard to the enforcement of which fundamental rights that right shall be suspended. Both these matters have been left to the discretion of the President. Therefore, from another stand-

point, the President is acting as a delegate of the Constitution-making authorities whilst passing the order under Article 359 in so far as the President suspends the right under Article 32 and also under Article 226. Therefore, the President appears to have been appointed as a constituent delegate and not as a legislative delegate in regard to the aforesaid two matters. Mr. Daru builds up an argument out of this position in favour of his contention. He contends that there is high authority for the proposition that, though a subordinate legislative delegate has the power to legislate; the legislation so made is not actually law, but quasi-law. In support of his contention, he relies upon the observations made by Kania, C.J., in *In re Article 143, Constitution of India and Delhi Laws Act (1962)* etc. AIR 1951 SC 332, at page 344, wherein the learned Chief Justice has made the following observations on the above topic:

The complexity of this question of delegation of power and the consideration of the various decisions in which its application has led to the support or invalidation of Acts has been somewhat aptly put by Schwartz on American Administrative Law. After quoting from *Wayman v. Southend* (1825) 10 Wheat 1, the observations of Marshall C.J., that the line has not been exactly drawn which support those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provision to fill up details, the author points out that the resulting judicial dilemma, when the American Courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the word "delegated power". The authority transferred was, in Justice Holmes' felicitous phrase, "softened by a quasi", and the Courts were thus, able to grant the fact of delegated legislation and still to deny the same.

This result is well put in Prof. Chushman's syllogism.

Major premise: Legislative power cannot be constitutionally delegated by Congress. Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions. Conclusion: Therefore the powers thus delegated are not legislative powers. They are instead administrative or quasi-legislative powers.

On this line of reasoning, Mr. Daru contends that, though the President is a constituent delegate, his activity as such a delegate cannot result in amending the Constitution. In our judgment, the analogy is not apt. In the case of a legislative delegate, the aforesaid problem arises because the Legislature itself being a delegate of the Constitution-making body, cannot delegate its legislative powers to another delegate. But, in the case of the President, it is the Constitution-making authority which has delegated its power to him and, therefore, the aforesaid arguments cannot be brought in aid inasmuch as the President would be directly doing that which the Constitution itself permits him to do. However, having regard to the motley nature of the Presidential power, its limited extent which affects Article 32 and a part of Article 226 only, the

Presidential power cannot be equated with or held akin to the constituent power which the Parliament enjoys under Article 368. The power is limited in character and can only affect one Article and a part of another Article, whereas the constituent power of the Parliament is of full plenitude and can affect the whole or any part of the Constitution. Moreover, the Presidential power also affects the ordinary law of the land relating to the jurisdiction of ordinary Courts. In our judgment, therefore, from the nature and the content of the aforesaid power, it is not possible to say that the Presidential power can violate any of the fundamental rights guaranteed under Part III of the Constitution except Article 32. Thus the Presidential power cannot *proprio vigore* infringe Article 14.

17. There is no doubt that the activity of the President under Article 359 is a legislative activity in the broader sense of that expression and that it results in the making of law. The term "law" has been defined in Clause (3) of Article 13, Law includes, amongst other things, an order, unless the context otherwise requires. The definition in Clause (3) is an inclusive definition and not exhaustive. Even if the Presidential Order is not regarded as law within the meaning of the inclusive definition of "law", there is no doubt that it would be "law" in the sense in which the jurists know it. Salmond in his *Jurisprudence*, Eleventh Edition, defines "law" at page 41 as "the body of principles recognized and applied by the State in the administration of justice. In other words, the law consists of the rules recognized and acted on by Courts of justice". This test is satisfied by the Presidential Order. There is no doubt that, having regard to the fact that the Presidential Order affects two constitutional provisions and the ordinary law of the land relating to jurisdiction of ordinary Courts, the Presidential Order must be regarded as "law" within the meaning of the aforesaid definition. Even if the presidential Order is not regarded to be law in the ordinary sense as being the result of ordinary legislative activity and is given the status of constitutional law, the term "law" must include, as observed by Patanjali Sastri, J. (as he then was) in *Shankari Prasad's case*, in the passage already quoted, constitutional law. In *Shankari Prasad's case*, law made by Parliament under Article 368 was held not to come within the meaning of that term in Article 13 on the ground that harmonious construction required that one should be read as controlled and qualified by the other. Therefore, there is considerable force in the argument of Mr. Daru that the problem which is raised for our decision can be resolved on the principle of harmonious construction in case any conflict is found between Article 13 and the provisions contained in Part III of the Constitution which includes Article 14.

18. Before we undertake that task, we propose to deal with the controversy as to whether the President is or is not "the State" within the meaning of Part III. Article 12 defines the expression "the State." for the purposes of that Part. It says that, unless the context otherwise requires, "the State" includes the Government and Parliament of India. Though the expression "Government of India" has been used in some Articles of the Constitution, that expression has not been defined anywhere. Article 367, however, applies, unless the context



otherwise requires, the General Clauses Act, 1897, for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Therefore, petitioners and the other Advocates place reliance upon the General Clauses Act, 1897. That Act does not define "Government of India" but it defines "Central Government", In Section 3, Sub-section (8), "Central Government" is defined, when used in post-constitutional legislation, to mean as the President. Therefore, petitioners argue, that President means the Central Government. Two objections, however, are raised by the learned Advocate General. The first objection is that, although the Central Government means the President, the converse thereof, namely, that the President, is the Central Government or the Government of India, cannot be true. The learned Advocate General places reliance for this proposition on *The State of Bombay Vs. Purushottam Jog Naik*, . In that case, Their Lordships were considering whether the term "Governor" is included in the expression "State Government", Their Lordships held in the case that though the term "State Government" appearing in an enactment means the Governor of the State, there is no provision of law which equates the term Governor with the State Government of which he happens to be the head. Their Lordships further pointed out that, on the contrary, the Constitution invests Governor with certain functions and powers which are separate from those of his Government The first objection of the learned Advocate General is borne out by the above authority and must be regarded as valid.

19. Secondly, the learned Advocate General contends that the power which the President enjoys under Article 359 is not the executive power of the Union and, that being so, the President cannot be regarded as the State. There is some force in the argument of the learned Advocate General that the power enjoyed by the President under Article 359 is not the executive power of the Union. There is high authority for this proposition in the case of *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, Their Lordships have pointed out that there is a number of powers conferred on the President by the Constitution which are his special or individual powers and that, therefore, these powers cannot be delegated by the President to others. There is no doubt whatsoever that the power under Article 359 is not a power which can be delegated by the President to other functionaries. If that power is regarded as the executive power of the Union vesting in the President under Article 53, then, the Parliament would have, under Clause (3) thereof, the power of conferring that function of the President on authorities other than the President. There is also force in the argument of the learned Advocate General that the power which the President enjoys under Article 359 is executive power, although it is not the executive power of the Union and that, therefore, the President cannot be regarded as functioning as a legislative authority as he does when, for example, he exercises the power under Article 123 of promulgating Ordinances. The learned Advocate General concedes that when the President promulgates an Ordinance under Article 123, he is the State within the meaning of Article 12 on the ground that the President comes

within the expression "Parliament" used in that Article. He concedes that, if it were not so, we would have the unusual and absurd result that whereas the law made by Parliament would be subject to the fundamental rights guaranteed in Part III, an Ordinance would not be so subject. In Jayantilal's case (*supra*), Their Lordships point out that it is now well settled that the functions which do not fall within the field legislative or judicial, fall in the residuary class and must be regarded as executive. Therefore, when the President is exercising the power under Article 359, he is exercising his own but nonetheless an executive power. However, this does not mean that the above activity does not result in making of law. Whether an executive activity results in making of law or not depends upon the impact of the activity on the law of the land.

20. Petitioners and the learned intervening Advocates contend that, even if the Presidential power is his individual executive power, the Presidential function under Article 359 must be regarded as the function of the State and the President thus must be equated with the State if it results in making of law. They contend that the President is only the titular head, and in a form of Government, modelled on the British pattern, the President, even whilst exercising aforesaid power, must act in accordance with the advice of his Council of Ministers. In support of this proposition, petitioners and the learned intervening Advocates rely upon the following passage in the judgment delivered by Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab,

In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.... In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part".

21. In our judgment, it is not correct to say that the President is not "the State" within the meaning of Article 12 simply because the function that he exercises is a special function which is not a part of the executive function of the Union. Even if we assume that the President is not bound to take the advice of his Council of Ministers in regard to the discharge of these constitutional functions, even then, it does not necessarily follow that the President is not "the State" within the meaning of Article 12. In the first instance, it is noteworthy that the definition of that expression in Article 12 is only inclusive and not exhaustive. It is also noteworthy that there are a few functions entrusted to the President in regard to which Parliament has the right to make laws. For example, the function entrusted

to the President under Clause (1) of Article 258 can also be performed by Parliament under Clause (2) thereof and the function entrusted to the Union under Article 309 may be performed by the President under the proviso to that Article. If the President were not to be regarded as "the State", then we would have the strange result that, whereas the law passed by Parliament on the same subject would be subject to the provisions contained in Part III of the Constitution, laws or orders made by the President on the same subject would not be so subject. Therefore, the mere fact that the President is not the Government of India for the purpose of Article 359 is not conclusive in the matter. Having regard to the fact that the inclusive definition includes the Government of India and the Parliament in the term "the State", having regard to the nature of the function which the President performs and the impact which that function has on the constitutional law of the land, the President must be regarded as "the State" within the meaning of Part III of the Constitution.

22. That brings us to the question of the true construction of Article 359 as to whether that Article is subject to the provisions contained in Part III or whether the latter are subject to the provisions contained in Article 359. We have no doubt whatsoever that the intention of the Constitution-makers could not have been to permit the President to override the fundamental rights enshrined in Part III or to place the President, whilst exercising the power under Article 359, beyond the pale of restrictions imposed by the provisions contained in Part III. In the first instance, as we have already pointed out, it is crystal clear that, even in emergency, the Constitution-makers did not intend to permit the fundamental rights except those enshrined in Article 19 to be infringed. As we have already pointed out, the only other fundamental right which the Constitution permits to be violated is the right to move the Supreme Court, enshrined in Article 32. That being so, as a matter of construction, there cannot be any doubt that, if the President is to be regarded as "the State" and his order as "the law", then, the Constitution-makers intended both of them to be subject to the provisions contained in Part III. This would be in accordance with the broad spirit which pervades the whole of our Constitution. The part relating to fundamental rights constitutes the bulwark of Indian liberty and the rights enshrined therein are of such supreme importance that, except that they can be amended by Parliament acting under Article 368, ordinarily, they should be regarded as sacrosanct and inviolate. Therefore, unless the result inevitably follows, one would not construe any other provision of the Constitution in such a manner as to override the aforesaid provisions. Not only there are no indications in Article 359 or in any other provision of the Constitution to the effect that the Constitution-makers intended to make the Part relating to the fundamental rights subject to Article 359, but there are indications to the contrary. We have already pointed out that all the fundamental rights embodied in Part III remain inviolate except those enshrined in Article 19 which become automatically suspended and that enshrined in Article 32 which may become suspended by a Presidential Order. One effect of the acceptance of the argument of the learned Advocate General

that the Presidential Order was not subject to the fundamental rights would be that, though the President may select only some of the fundamental rights in regard to the enforcement of which the citizen is deprived of his remedy, the Presidential Order itself can override the other fundamental rights which are not so selected for treatment and that such an infringement will be immune from judicial scrutiny. We cannot brook the thought that the Constitution-makers could have intended such a drastic result.

23. However, we are conscious of the fact that, in the above view, some difficulties may arise and those difficulties may have to be faced some day. One difficulty that may arise may be that a Presidential Order may have to meet the challenge under the very fundamental right in regard to which the President may intend to bar the right of the citizen to move or to bar the jurisdiction of a Court, for, it is obvious that the Presidential Order, if it violates that selected fundamental right, will be void and, therefore, may be ineffective to grant the immunity to legislative acts from judicial scrutiny which the President intends to give. To overcome such a difficulty, the President may have first to frame a valid order which is not violative of the fundamental right he intends to reach and if he intends that his own order, like the other laws, should also be exempt from judicial scrutiny in regard to the enforcement of fundamental rights, he will have to pass a second order so exempting his previous order. If the President does not do so, then, it is obvious, his order would be chasing a shadow. For example, if the President intends to grant immunity from judicial scrutiny in regard to the fundamental right under Article, 14 to his own order, he would not be able to do so because his order would be void from the very beginning. That might make the Presidential Order unworkable. However, it is not necessary for us to resolve this problem. It may be that the problem may be capable of being resolved on the doctrine of arguing in a circle as it was resolved in another respect by Their Lordships of the Supreme Court in Mohan Chaudhary's case, already referred to. It may be that the problem may be capable of being solved by holding that a Presidential Order itself must receive the same immunity from judicial scrutiny in regard to the same fundamental right in regard to the enforcement of which he has directed the remedial right to be suspended. However, in the present petitions, it is not necessary for us to resolve the problem because, even on the assumption that the problem can be resolved in some of the aforesaid ways, the impugned Presidential Order cannot be granted immunity from judicial scrutiny under Article 14. The impugned Presidential Order operates in a narrow field. The Presidential Order bars the right of the citizen to move a Court only if a condition precedent is satisfied and the condition precedent is that the deprivation of the fundamental right must be either under the Act or the Rules or an order made thereunder. The impugned Presidential Order cannot be said to have been made under any of these three instruments. Under the circumstances, the condition precedent is not satisfied in regard to the impugned Presidential Order and, therefore, the latter is not immune from an attack under Article 14.

24. For the aforesaid reasons, we have come to the conclusion that the

Presidential Order can be challenged under the provision contained in Article 14.

25. The next point for consideration is whether the Presidential Order, in fact, violates Article 14. This part of the submission is based on the last part of the impugned Presidential Order. The Presidential Order says that the right of any person to move any Court for the enforcement of the rights under Articles 14, 21 and 22 shall remain suspended " if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder". As already stated, u/s 48 of the Act, the Act becomes substituted for the Ordinance and, in Mohan Chowdhury's case, it has been held that that is the effect of Section 48 of the Act. Therefore, it is quite clear that the Presidential Order applies only to detainees detained under the Act or the Rules or an order made thereunder. It does not apply to detainees detained under any other enactment. The only other enactment which was mentioned to us as being on the statute book is the Preventive Detention Act, 1950 (Act No. IV of 1950). Thus, it is quite clear that whereas the impugned Presidential Order applies to detainees detained under the Act or the Rules or an order made thereunder, it does not apply to the detainees detained under the Preventive Detention Act, 1950. The argument is that all detainees detained, whether under the Act, the Rules or the Orders made thereunder and under the Preventive Detention Act form one class and that, though they form one class, yet one of the two groups has been selected for hostile treatment. The argument is that the two groups of detainees under the two enactments and the subordinate instrument of one of them, are similarly situated, and yet, the group of detainees under the Act and its subordinate instruments are selected for hostile treatment.

26. The principles relating to the subject of discrimination are now well-known and are no longer in dispute between the parties. In *Budhan Choudhry and Others Vs. The State of Bihar*, the principles have been thus stated:

While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute In question.

27. Before we undertake a detailed discussion of the challenge under Article 14, it will be convenient to mention two broad grounds on which the learned Advocate General repels the challenge. He contends that the argument is based on the assumption that there are two parallel pieces of legislation which are discriminatory of each other. Firstly, the learned Advocate General contends that, even if this assumption is correct, even then, the Presidential Order cannot be violative of Article 14 because, *ex hypothesi*, it is the two parallel pieces of legislation which discriminates between the two groups of detainees and not the Presidential Order. The learned Advocate General contends that, so far as the

Presidential Order is concerned, it treats all the detainees under the Act, the Rules and the order equally and no discrimination is made in regard to the detainees under these instruments. There is considerable force in this argument of the learned Advocate General. Secondly, the learned Advocate General contends that, on the facts of the present petitions, petitioners-detenues cannot be said to be similarly situated as the detainees who may be detained under the Preventive Detention Act. As already mentioned, petitioners have been detained on the ground that it is necessary to prevent them from doing acts prejudicial to (i) defence of India; (ii) public safety; and (iii) maintenance of public order. The argument of the learned Advocate General is that, whereas petitioners could have been detained under the Preventive Detention Act to defeat their actions prejudicial to defence of India and maintenance of public order, petitioners could not have been detained under the Preventive Detention Act to prevent them from acting prejudicially against public safety. It appears that, under the Rules, action can be taken under the Preventive Detention Act to secure five objectives. Comparing the two pieces of legislation, it appears that four of the aforesaid objectives are common to both the Act and Rules and the Preventive Detention Act. The argument of the learned Advocate General is that, even on the assumption that detainees detained on the ground of the four common objectives may be regarded to form the class, it cannot be said that persons who are detained to secure the other-objectives can be regarded as belonging to the class of detainees under the Preventive Detention Act inasmuch as, ex hypothesi, persons detained to secure the other four objectives, which, are not included in the Preventive Detention Act, could never have been detained under the latter Act. Petitioners and the learned intervening Advocates, however, try to get over this difficulty by arguing that, in law, there is no distinction between "public safety" and "public order" and that they are interchangeable terms. In support of this, petitioners rely upon two decisions. The first is the case of *The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia*, In this case, Their Lordships were considering the concept of the word "Public order" as used in Article 19(2). Their Lordships after noticing the observations made by *Romesh Thappar Vs. The State of Madras*, in connection with the expression "public order", the observations made by *The State of Bihar Vs. Shailabala Devi*, and certain American and English decisions on those words, conclude at page 639 regarding the same concept as used in Article (2) as follows:

But in India under Article 19(2) this wide concept of "public order" is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other, "public order" is therefore something which is

demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that "public order" is synonymous with public peace, safety and tranquillity.

The second decision is the case of Chandra Sheikhar Prasad Singh Vs. The State of Bihar, In that case, Their Lordships were considering the expression "public order" as used in Sub-section (1) of Section 3 of Preventive Detention Act, 1950. The conclusion which Their Lordships reached on the case of Nek Mohammad and Others Vs. The Province of Bihar, , was that "public order" must be taken in a comprehensive sense so as to include "public safety" in its relation to the maintenance of public order and that maintenance of public order involves consideration of public safety. In our judgment, the interpretation of the words "public order" as used in Article 19(2) of the Constitution and Preventive Detention Act, 1950, cannot be of much assistance because, as the first decision shows, the interpretation was based on the history of the amendment of Clause (2) of Article 19 and the juxtaposition, of that word with a number of other words which in Their Lordships' judgment were inclusive in the expression "public order" in its comprehensive sense, and the interpretation of the same expression in the second case was based upon the use of the words "public order" alone without being any other words denoting the same or similar connotation. In the present petitions, the words "public order" and "public safety" have been used in juxtaposition with each other by the Legislature. It is in the light of this juxtaposition that the meaning of the expressions "public order" and "public safety" must be ascertained. The ordinary presumption would be that the Legislature is not guilty of tautology. Though the expression "public order", if it stands by itself alone and, in certain context, may include "public safety, " it does not follow that, when these two expressions are used side by side with each other, and they seem to have been liberally so used in a number of sections of the Act and the Rules, the two must carry the same connotation and must be interchangeable. Situations may easily be contemplated which would be included in the concept of "public order" but would not be included in the concept of "public safety" and vice versa. For example, if a person does any act in connection with an arsenic or a magazine, situated in a thickly populated locality, or does any act which is prejudicial to the general health of a community, the act may be regarded as against "public safety", but not necessarily against "public order", though, in a given situation, the two may overlap. Under the circumstances, we are not prepared to hold in the context in which the two expressions have been used and specially because the two expressions have been used in juxtaposition with each other that they have necessarily the same and interchangeable meaning. In our judgment, the two grounds on which the learned Advocate General repels the contention in regard to hostile treatment are sound and deserve to be upheld.

28. However, in deference to the detailed arguments which were advanced by the petitioners and the learned counsel, we propose to consider the other grounds of petitioners and the learned intervening Advocates. The contention

that the two groups of detainees form one class is not correct. A comparison of the two enactments reveals that the objectives to secure which the detention can be ordered under the two enactments, though common in four respects, are different in regard to five respects. Four of the objectives mentioned in the Act do not find a place in the Preventive Detention Act and one objective which is mentioned in the latter Act is not found in the former enactment. Secondly, the authorities are not common. Some of the authorities who can act under the Preventive Detention Act cannot act under the Act and the Rules. For example, the Additional District Magistrate can act under the Preventive Detention Act but not under the Act. Thirdly, the circumstances or the times under which the authorities would be acting under the two enactments would be different. The person detained under the Act would be detained because his activities have a relation to the emergency proclaimed by the President, whereas the person detained under the Preventive Detention Act would be detained because his activities have a relation to normal conditions having no connections with the emergency. Mr. Daru, however, makes the following contention to get over the situation arising out of the aforesaid differences. Mr. Daru prefaces his argument by contending that, under both the pieces of legislation, the authority is not required to state when detaining a person the law under which he is detained. Therefore, Mr. Daru contends that if a person happens to be detained under an order passed by a competent authority, he would not be able to know whether he is detained under the Act or the Preventive Detention Act. He submits that, this being so, if the action of the authority concerned is challenged, he will be in a position to make a selection at the time of the challenge whether he was acting under the one or the other piece of legislation. According to Mr. Daru, one vital difference between the two pieces of legislation is that if no grounds for detention are furnished or no opportunity is given for explanation within a reasonable period of time, then the detenu will have a right to immediate release if he happens to be detained under the Preventive Detention Act; but if he happens to be detained under the Act, he will not be able to move the Court for the relief of release on account of the Presidential Order. There is no merit in any of these contentions. In the first instance, even if the order of detention does not specify the legislation under which the authority is acting, the source of the exercise of the power can always be ascertained with reference to the papers made at the time when the detention is ordered. Even if one assumes that this cannot be so ascertained, it is probable that a Court of Law may then presume that the person concerned was detained under that piece of legislation which was more favourable to him for obtaining his release. But the fact that the law permits the authority not to mention the source of his power cannot make any difference in regard to the classification of the two kinds of detentions. Secondly, there is a vital difference between a detention under the Preventive Detention Act and that under the Act. It is not in dispute that under Clause (5) of Article 22 of the Constitution, a detenu under the Preventive Detention Act has a right to get the grounds and an opportunity to explain. As we shall presently show, a detenu under the Act has also the same right. But there is a further difference



between the two classes of detenues. A detenu under the Preventive Detention Act has also the same two rights under the Preventive Detention Act itself, whereas a detenu under the Act has no such statutory right. Therefore, in case of a breach of the aforesaid two obligations of furnishing grounds and affording an opportunity for explanation, a detenu under the Preventive Detention Act will have a right to challenge his detention. Such a plea would be one of the permissible pleas in spite of the Presidential Order as indicated in Makhan Singh's case (*supra*). But there being no such statutory provision under the Act, the detenu under the Act will have no such rights. Therefore, the two groups of detenues will not constitute one class. Thus there is a classification and a differentia. Ultimately Mr. Daru was driven to the position that the two groups of detenues did constitute two classes and that there was a differentia. But he submits that, though there is a differentia between the two classes, the differentia is not intelligible. We are unable to agree with this submission. The points which we have already indicated furnish differentia which are intelligible. But both petitioners and Mr. Daru vehemently contend that the differentia had no rational relationship to the object sought to be achieved by the Presidential Order. In our judgment, having regard to the proclamation of emergency and the object underlying the Act and the Rules and the object underlying the enactment of Article 359, there is no doubt whatsoever that the objective of the Presidential Order is to see that executive or other action which is taken by the authorities concerned during the period of emergency must be screened from judicial scrutiny so that the national security may not get jeopardised, which, as the Article presumes, is likely to happen, if, during emergent times, persons are permitted to move Courts for the enforcement of fundamental rights. The classification made of the two groups; of detenues can be justified on the latter ground and, that being so, there is a reasonable relationship existing between the differentiae and the objectives. Therefore, the first submission of petitioners and the learned intervening Advocates must be rejected.

29. At this stage, it will be convenient to deal with the additional submission made by Advocate Mr. J.G. Shah. That submission is that the Presidential Order does not survive after the repeal of the Ordinance by Section 48 of the Act. The Presidential Order, as already stated, applies in terms only when the fundamental rights selected by the President happen to be deprived under the Ordinance or the Rules or an order made thereunder. The Ordinance was repealed by Section 48 of the Act. Mr. Shah contends that the Ordinance is not saved by Sub-section (1) of Section 8 of the General Clauses Act, 1897. He concedes that in Mohan Chowdhury's case (*supra*), Their Lordships of the Supreme Court decided that the order was so saved by Section 8, Sub-section (1) of the General Clauses Act, 1897. The relevant part of that subsection is as follows:

8(1). Where x x x x x any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification Any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention

appears, be construed as references to the provision so re-enacted.

The question which was raised for Their Lordships' decision in Mohan Chowdhury's case was that the Presidential Order was no instrument within the meaning of the latter part of the aforesaid sub-section, That contention was negatived by Their Lordships and they held that the Presidential Order was an instrument within the meaning of Sub-section (1) of Section 8 aforesaid. Mr. Shah, however, challenges the efficacy of the Presidential Order on a different ground by contending that the Ordinance is not an enactment within the meaning of Section 8, Sub-section (1) of the General Clauses Act, 1897. He submits that in order that reference to the Ordinance in the Presidential Order may be construed as a reference to the Act, one condition precedent has got to be satisfied and that condition precedent is that the Ordinance, that is, the repealed Ordinance, must be a former enactment within the meaning of the first part of Section 8, Sub-section (1) of the General Clauses Act, 1897. Mr. Shah's contention is that the Ordinance is not an enactment within the meaning of that Sub-section and, consequently, the reference to the Ordinance in the Presidential Order cannot be read as a reference to the Act. Therefore, the short question which arises for determination is whether the Ordinance is an enactment within the meaning of Section 8, Sub-section (1). Now the term "enactment" has been defined in Section 3, Clause (19) of the General Clauses Act, 1897, as including a Regulation and a "Regulation" has been defined in Section 3, Clause (50) of the same Act as meaning a Regulation made by the President under Article 240 of the Constitution and shall include a Regulation made by the President under Article 243 thereof and a Regulation made by the Central Government under the Government of India Act, 1870, of the Government of India Act, 1915, or the Government of India Act, 1935. Mr. Shah's contention is that an Ordinance issued by the President under Article 123 of the Constitution is not included in the definition of the word "Regulation" as given in Section 3, Clause (50). Mr. Shah is right. From this, Mr. Shah contends that, therefore, an Ordinance is not an enactment. However, we cannot agree with this submission. It will be noticed that the definition of the word "enactment" in Section 5, Clause (19) is not exhaustive but is inclusive and, therefore, the matter is not concluded merely by the fact that an Ordinance is not included in the above definition. The relevant provisions of the Constitution show that the President is a limb of the Indian Legislature the Parliament. Article 79 enacts that the Parliament shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People. Article 123 enacts that the President may promulgate such Ordinances as the circumstances appear to him to require. This power can be exercised by the President only when both the Houses of Parliament are not in sessions and circumstances exist which necessitate the President to take immediate action. Clause (2) Article 123 enacts that an Ordinance so promulgated shall have the same force and effect as an Act of Parliament. The same clause further enacts that the Ordinance shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if

before the expiration of that period resolutions disapproving it are passed by both Houses, then it shall cease to operate from the passing of the second of those resolutions. These provisions make it clear that an Ordinance performs the same functions as an Act of Parliament and the President is empowered to perform that function because the Parliament is not in session to perform that function. Having regard to these provisions, there cannot be any doubt that an Ordinance stands on the same footing as an Act of Parliament and, consequently, an Ordinance should be held to be an enactment within the meaning of Section 8, Sub-section (2) of the General Clauses Act.

30. The next two submissions may be considered together as they are interlinked. These submissions are based upon the provisions contained in Clause (5) of Article 22. In order to understand the contentions raised by petitioners and the learned intervening Advocates, it will be Convenient first to read Article 22. That Article consists of seven clauses, The first three clauses do not apply to the facts of the present case and need not be read. Clause (3) states in express terms that the provisions in Clauses (1) and (2) do not apply to any person who is arrested or detained under any law providing for preventive detention. Petitioners in the present petitions having been arrested and detained under a law providing for preventive detention, Clauses (1) and (2) are not applicable to their case. Then comes Clause (4) which enjoins that no law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless the conditions mentioned in Sub-clauses (a) and (b) are satisfied. The first condition is that an Advisory Board must opine, before the expiration of the period of three months, that there was sufficient cause for the detention of the person concerned. The second condition is that such person must be detained in accordance with the provisions of any law made by Parliament under Sub-clauses (a) and (b) of Clause (7). Sub-clause (a) of Clause (7) empowers Parliament to prescribe the circumstances under which a person may be detained for a longer period than three months without obtaining the opinion of the Advisory Board. It is common ground that the Rules have prescribed a provision for review of the detention order by a reviewing authority consisting of persons other than those qualified to constitute an Advisory Board for a period longer than three months. This is so done by Rule 30-A. This provision may be supported under Sub-clause (a) of Clause (7) of Article 22 of Constitution. Neither petitioners nor any of the learned intervening Advocates challenge the vires of the Act or the Rules. They also do not raise any question regarding the substitution of the machinery of reviewing authority for the Advisory Board. Therefore, Clause (4) of Article 22 need not detain us any further. Then comes Clause (5) which, may be quoted in full. It is as follows:

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

Then comes Clause (6) which authorizes the detaining authority not to disclose facts "which such authority considers to be against the public interest to disclose". Reading Clause (5), it is quite clear that it imposes two duties on the detaining authority and confers two corresponding rights on the detenu. Having regard to the fact that these rights are conferred by Part III, it is also equally clear that the rights conferred are fundamental rights. The first fundamental right enshrined in Clause (5) is the right to receive from the detaining authority the grounds on which the detention order has been made. The second fundamental right is the right to have the earliest opportunity of making a representation against the detention order. Contrasting the provisions contained in Clause (4) with those in Clause (5), it is quite clear that the obligations imposed upon the detaining authority in Clause (5) are not required to be embodied in any law. Clause (5) itself gives the aforesaid two directions to the detaining authority. That being so, the two duties are to be carried out by the detaining authority, whether, those two duties happen to be repeated in the law relating to preventive detention or not. The effect of Clause (5) is that that clause must be taken to be incorporated in every piece of preventive detention legislation which empowers any authority to pass a preventive detention order. As already pointed out by us, the provision contained in Clause (5) is incorporated in the Preventive Detention Act. It is, however, common ground that the aforesaid two obligations or rights have not been incorporated either in the Act or in the Rules. In spite of this, we have no doubt whatsoever that a detenu under the Act and the Rules has the two aforesaid fundamental rights and the detaining authority is bound by the above provision to communicate the grounds of detention to the detenu and to afford him the earliest opportunity of making a representation. It is common ground that the State Government has not carried out the aforesaid two obligations embodied in Clause (5) in regard to the five petitioners. Therefore, there is no doubt whatsoever that the aforesaid two fundamental rights enshrined in Clause (5) have been violated so far as petitioners are concerned. The contention of the learned Advocate General, however, is that, though these fundamental rights may have been violated, petitioners are not entitled to make any grievance in regard to that violation in this Court. The learned Advocate General justifies this immunity from judicial scrutiny on the basis of the Presidential Order. Petitioners and the learned intervening Advocates resist this contention of the learned Advocate General on a number of grounds. Firstly, they resist it on the ground that the Presidential Order is void as being violative of Article 14 of the Constitution. That contention has already been rejected by us and, therefore, the above contention of petitioners and the learned intervening Advocates must necessarily stand rejected. The second ground on which petitioners and the learned intervening Advocates resist the contention of the learned Advocate General is that, even if the Presidential Order is valid, the failure on the part of the detaining authority to carry out the aforesaid two obligations cannot be justified on the basis thereof. This contention is valid in as much as the Presidential Order itself does not exonerate; the detaining authority from its obligations under Clause (5) and does

not permit that authority to infringe the fundamental rights of petitioners embodied therein. We have also discussed this aspect of the matter in a previous part of this judgment and, for the reasons given therein, we must uphold as valid this part of the contention of petitioners and the learned intervening Advocates. Therefore, the constitutional position as regards the rights of petitioners under Clause (5) appears to us to be crystal clear. In spite of the fact that the Act and the Rules do not specifically say anything regarding the aforesaid two fundamental rights, the constitutional position is that the detaining authority must honour those two fundamental rights. In view of the aforesaid discussion, there is no doubt whatsoever that those two fundamental rights have been broken. But the question for consideration is as to whether petitioners have a right to move this Court for the enforcement of those rights. This question does not directly arise in the petitions. It does not so arise because petitioners have not asked for a writ for compelling the detaining authority to discharge the aforesaid obligations and to honour petitioners' aforesaid fundamental rights. Petitioners refer to the breach of the aforesaid fundamental rights, not for the purpose of enforcing those rights in this Court, but for a different purpose. They refer to the breach of those rights for contending that their detentions, after the period prescribed by Clause (5) for the discharge of those obligations had expired, were illegal and, therefore, they refer to the breach of those rights to lay a foundation for the further contention that the detentions being illegal, this Court should issue a writ or an order of habeas corpus under either Article 226 or Section 491 of the Criminal Procedure Code. Now the contention of the learned Advocate General is that petitioners are precluded from moving this Court for such release on the basis of the infringement of the aforesaid rights on account of the existence of the Presidential Order. Petitioners and the learned intervening Advocates resist this contention of the learned Advocate General on the ground that this Court is not deprived of its jurisdiction of granting the aforesaid writ or order on the basis that their detentions are illegal because the grant of the writ or order would not come within the mischief of the Presidential Order. The question for consideration is as to whether this contention of petitioners and the learned intervening Advocates is correct. For this purpose, it is necessary to turn back to the contents of the Presidential Order. The first part of the Presidential Order declares the suspension of the remedial right for the enforcement of among others, the fundamental right under Article 22 of the Constitution. Now, inasmuch as petitioners do not ask for a writ for the enforcement of the fundamental rights embodied in Clause (5) of Article 22, the first part of the Presidential Order is, in terms, not applicable. But contends the learned Advocate General that, in order that the Presidential Order may be applicable, it is not necessary that there should be a direct prayer for the enforcement of the aforesaid fundamental right or any of the rights mentioned in the Presidential Order. The contention is that the prohibition against the remedial right incorporated in the Presidential Order will, all the same, be attracted if the benefit of the right has to be invoked in order to obtain the relief sought for by petitioners. We are not disposed to agree with this contention. The Presidential

Order having the effect of deprivation of the jurisdiction of Courts must be strictly construed specially when the rights in respect of which the jurisdiction is being deprived are fundamental rights. The second ground on which petitioners and the learned intervening Advocates resist the contention of the learned Advocate General is that the second and the, latter, part of the Presidential Order, which embodies the condition precedent for the application of the Presidential Order, is not satisfied on the facts of the present case. That second part enacts that in order that the remedial right of citizens may stand suspended, it is necessary that the fundamental rights of the citizen concerned must have been deprived under the Defence of India Ordinance (Act) or any Rule or Order made thereunder. The Presidential Order is not an absolute one. It is a conditional order and the remedial right will be batted during the period of emergency only if the fundamental rights are deprived under any of the aforesaid three instruments. In this connection, it is important to notice that the condition precedent is not that the detention must be under all or any of those three instruments. The condition precedent is that the deprivation of the rights must have taken place under those or any of the instruments. Therefore, in order that the argument of the learned Advocate General may be upheld, what is to be found is whether the fundamental rights in question have been deprived under any of those three instruments. There is no doubt whatsoever that there is no provision either in the Act or in the Rule taking away the fundamental rights embodied in Clause (5) of Article 22 of the Constitution. Such was not the contention of the learned Advocate General. Therefore, we have to turn to the detention order. There is nothing in that order either which deprives petitioners of the fundamental rights embodied in Clause (5) of Article 22. But contends the learned Advocate General that it would be fatuous to make the aforesaid enquiry. He submits that if the fundamental rights themselves do not stand suspended, it is hardly probable that a solemn enactment of Parliament or Rules made thereunder or even an order passed by an officer would think of infringing the fundamental rights. We cannot uphold the submission of the learned Advocate General. The assumption underlying the Presidential Order is that, in an emergency, either the Act or the Rule or the order may infringe the fundamental rights. The learned Advocate General says that the aforesaid three instruments might not dare to do it consciously and what the Presidential Order aims at is only an unconscious violation of the aforesaid fundamental rights, the idea underlying the Presidential Order being to prevent such unconscious violation of rights from judicial scrutiny. We do not think, the learned Advocate General is right in making the aforesaid assumption specially in view of the express language of the Presidential Order which is based on the footing that the fundamental, rights may be infringed under any of the aforesaid three instruments. But contends the learned Advocate General that the condition precedent is not that the fundamental rights must be deprived by any of the aforesaid three instruments. He contends that the key words is "under" and that if the fundamental rights happen to be broken under all or any of the aforesaid three instruments, the jurisdiction of the Court to enforce those rights would be

barred. The learned Advocate General does not contend, that the rights had been deprived of under the Act or the Rules; but he contends that the fundamental rights under Clause (5) of Article 22 have been deprived of under the detention orders. Therefore, the crucial question for consideration is whether, on the facts of the present petitions, it can be stated that petitioners have been deprived of the rights embodied in Clause (5) of Article 22 under the detention orders. In the first instance, we do not find anything in the detention orders which would permit us to hold that, either expressly or by accessory implication, those orders deprive petitioners of the fundamental rights under Clause (5) of Article 22. But contends the learned Advocate General that if once the orders of detention are passed and the detaining authority does not carry out its obligations under Clause (5), then the failure to carry out the obligations must, be attributed to the orders of detention. In deciding this contention, we, must bear two important things in mind. Firstly, Clause (5) does not directly deal with the making of a detention order. The power of the detaining authority to pass a detention order is not derived under Clause (5). That power is derived by the detaining authority under the law relating to preventive detention. Secondly, Clause (5) does not impose a duty to carry out, the aforesaid two obligations simultaneously with the making of the order. There is bound to be a time-lag between the making of the order and the carrying out of the obligations. In fact, the obligations are to be carried out, after the, person concerned has been, detained under the detention order. The mere fact that the time-limit between the two operations has been enjoined by Clause (5) to be as short as possible does not, in any way, affect the fact that the detention order is the exercise of a power under the law of the land and the aforesaid two obligations are duties imposed upon the detaining authority by the Constitution. Therefore, the breach of the provisions of Clause (5) would not arise by reason of the, making of the order but would arise on account of the fact that, at a later stage, the detaining authority fails to, carry out the obligations. In order that the deprivation of the, fundamental rights embodied in Clause (5) or any of the other fundamental rights may be stated to be under the detention order, the deprivation, must be relatable to the detention order itself and when there, is no such relationship, between the two, deprivation, of the fundamental right cannot be stated to be under the Order. The word, "under" has been used both in the Constitution and a number of statutes. That word came up for interpretation before Their Lordships of the Madras High Court in G. Narayanaswami Naidu Vs. C. Krishnamurthi and Another, as used in Article 191, Clause (1), Sub-clause (e) of the Constitution of India. The expression which Their Lordships had to construe in that case was "disqualified by or under any law made by Parliament"., Ayyangar, J., delivering the judgment of the Court made the following observations at pages 359 and 360 with which, with great respect, we entirely agree.

... a disqualification imposed "by" a law made by Parliament and one imposed "under" a law made by Parliament would appear to admit of no doubt. Nor is that distinction far to seek. A disqualification would be imposed, "by" a law made by

Parliament when the Parliamentary statute directly enacts the disqualification or imposes a prohibition upon certain persons to stand for election.

The words "under a law" would in our judgment signify those cases where the disqualification is not to be found in the Parliamentary statute itself but is imposed by virtue of powers enabling this to be done; in other words, where it is imposed by a law made by a subordinate law-making authority.

Then Their Lordships give a few illustrations to bring out the meaning of the word "under" and One of the illustrations which is given by the learned Judge is that of a company which is incorporated by an Act of Parliament and that of a company which is incorporated in exercise of a power conferred by an Act of Parliament. In our judgment, applying this particular test to the question in hand, there cannot be any doubt whatsoever that the deprivation of the fundamental rights embodied in Clause (5) of Article 22 of the Constitution of India cannot be stated to have been done under the orders of the detaining authority so far as the present petitions are concerned. The deprivation of those rights is the result of an action de hors those orders and, consequently, if any question arises for the enforcement of those particular rights, the Presidential Order would not apply in terms.

31. However, in our judgment, the aforesaid discussion cannot lead to the grant of a writ or order of habeas corpus. It cannot do so because, as we have already said, petitioners have not approached this Court, for a writ of mandamus calling upon the detaining authority to furnish them with grounds of detention or to furnish them with an opportunity of making a representation against the orders of detention. Nor can petitioners get the orders of detentions quashed on the ground that the aforesaid obligations had not been carried out by the detaining authority. The orders of detention having been made under the Act and the Rules, the vires of which has not been challenged in the present petitions, they must be regarded to be valid at their inception and the orders being valid, petitioners can lawfully be arrested and detained under them. The only grievance which petitioners can make is that their further detentions, after the prescribed time, without the aforesaid two obligations being carried out, were illegal. The question for consideration is whether the reliefs prayed for by petitioners could be granted on the ground that their further detentions were illegal. Now, there is clear authority for the proposition that a detention in violation of the fundamental rights embodied in Clause (5) of Article 22 of the Constitution is illegal. Their Lordships of the Supreme Court decided this to be so in *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, . But, as held in the said case of *Dr. Ram Krishan Bhardwaj*, such detention, though not violative of a provision contained in Article 22, will be in violation of the fundamental right embodied in Article 21 as being detention against the procedure established by law. Therefore, the question for consideration is whether the violation of this fundamental right under Article 21 of the Constitution of India is subject to judicial scrutiny. Petitioners contention is that, it is. The learned Advocate



General contends that the deprivation of, the fundamental right under Article 21 comes within the mischief of Presidential Order, That raises the same problem which we have considered with: reference to the deprivation of the rights embodied in Article 22. The question for consideration is whether such illegal continuation of detention, violative of Article 21, is or is not, under the detention orders. If it is so, then the violation of Article 21 would come within the mischief of the Presidential Order; otherwise not. If once we hold that the detention orders are valid and that petitioners were arrested and detained under those valid orders, then it must also follow that: the further detention of petitioners is also under those orders. The authority of the arresting and the detaining authority was the original detention Orders on the basis of which petitioners were arrested and detained. Petitioners further detention, after their fundamental rights under Article 22, Clause (5) are violated, will still be under the detention orders. If the detaining authority or the persons holding petitioners under custody refuse to release petitioners in spite of the fact that their further detention is illegal, it is quite clear that their justification for doing so is the original orders of detentions. Therefore, in our judgment, after the detentions became illegal, the further detention of petitioners, that is, the deprivation of their right under Article 21, is under the detention orders themselves. That being so, in our judgment, such illegal detentions are directly under the Rules and, that being so, the deprivation of the right, under Article 21, which petitioners complain of, is directly under the detention orders passed under the Rules, and, consequently, the enforcement of that right by petitioners in this Court is barred by the Presidential Order.

32. Therefore, for the aforesaid reasons, we record the findings that the Presidential Order is not immune, under the circumstances of the present case, from attack on the basis of Article 14; that that Presidential Order is, in fact, not violative of that Article; that the detaining authority was bound under Clause (5) of Article 22 to give grounds for petitioners' detention and to afford petitioners an opportunity to offer an explanation in regard to them, unless the detaining authority took refuge under the power given to it under Clause (6); that petitioners' detentions, after the expiration of the time for giving the grounds and the opportunity, are illegal, and thus petitioners have been deprived of the right embodied in Article 21, but that petitioners have no right to move this Court for the enforcement of that right, because of the Presidential Order, and for the same reason, the jurisdiction of this Court is barred to give any relief to petitioners, arising out of the illegal detention.

33. The next two submissions of petitioners may be considered together as they are interrelated. They are based on the proposition that the detention orders must be preceded by a satisfaction of the detaining authority concerned that, with a certain view mentioned in Rule 30, it was necessary to detain petitioners. There is no doubt that the satisfaction of the authority concerned is the condition precedent for the making of the detention orders. Petitioners contend that this condition precedent has not been satisfied. Firstly, they contend that the State

Government was acting at the behest of second respondent and, secondly, that, in fact, the relevant authority which could act on behalf of the State Government was not satisfied as aforesaid. It is common ground that petitioners are members of the communist party. Petitioners aver that, in the last days of December 1964, about a thousand members of this party were detained a little more than a month before the general elections in Kerala. Petitioners allege that this action was taken by the Union Government because that Government felt that the Markist Communist Party was likely to win the elections in Kerala, a result which the Union Government did not like, as that Government was composed of Congress members, petitioners say that they were also arrested in the last days of December, in execution of the aforesaid plan conceived by second respondent. In support of this, petitioners rely upon speeches made by second respondent in the Union Parliament and elsewhere that he was responsible for the detention of the members of the communist party and a promise made by second respondent that he would satisfy that no injustice was done to any of the persons so detained. Petitioners also rely upon a speech delivered by Shri Shastri, the late Prime Minister, in London. Petitioners contend that though the aforesaid allegations have been made by them and in support thereof they have filed their affidavits, second respondent has not filed any affidavit in reply. Therefore, petitioners contend that their aforesaid allegations must be taken to be true and their aforesaid point must be taken to have been established. However, the State of Gujarat has appeared in the cases and fourth respondent has filed affidavits in support of petitioners' detention. We will consider, just in a moment, the criticisms advanced by petitioners against the verification clause in fourth respondent's affidavit in one of the petitions. In his affidavit, fourth respondent states that the case against each of the petitioners was separately considered in the light of the materials available and it was on the basis of those materials and the satisfaction arrived at by the State Government that the detention orders were passed. Now, in our judgment, although the failure of second respondent to file an affidavit in reply is a circumstance to be taken into account, much weight cannot be attached to the allegations of petitioners in that behalf. Petitioners themselves cannot have any knowledge and do not claim to have any knowledge that second respondent had given orders for their detention to the third respondent the State of Gujarat. At best, the allegation to that effect is a surmise. Moreover, the statements of second respondent on which petitioners rely are all in general terms and there is no guarantee that those statements refer to the detentions of the present petitioners. It is true that, on a subject of this nature, petitioners cannot be expected to bring direct evidence. Their evidence is bound to be circumstantial and all proper allowances must be made for the fact that they are totally in the dark especially because they have not been furnished with the grounds for their detentions. But, the facts disclosed in the affidavit of fourth respondent are all particular facts and refer to the five petitioners. In the face of that affidavit, it would not be proper to draw inferences which petitioners seek to draw from the statements attributed to second respondent and speech of Shri Shastri, the late Prime Minister. Those inferences

do not necessarily follow in connection with the detention of petitioners. Having regard to the fact that an emergency is in existence and that the power vests in the Union Executive under Article 353 of the Constitution of India to give directions to the State Government as to the manner in which that power is to be exercised, it is possible that the Union Government may have posted the third respondent with the general situation prevailing in the country in regard to which they may have information. But, from the aforesaid facts, in our judgment, it is too much to say that the detention orders in the present petitions were passed at the instance or at the behest of the Union Government and that the State Government had not applied its mind specially when the orders of detention themselves recite that it was that Government which was satisfied.

34. Even so, petitioners contend that, in fact, there was no satisfaction of the State Government itself. From the affidavit of fourth respondent, it appears that under the Gujarat Government Rules of Business, the topic of defence of India has been allotted to Hon"ble the Chief Minister and the other topics in regard to which petitioners have been arrested have been allotted to Hon"ble the Home Minister. Petitioners, therefore, contend that, before the orders of detention can legally be passed, Hon"ble the Chief Minister should have been satisfied on the topic of the defence of India and Hon"ble the Home Minister on the other topics. Petitioners contend that, therefore, it was necessary for those two Hon"ble Ministers to file affidavits and, in the absence of such affidavits, the Court must act on the basis that there was no satisfaction recorded by those two officers. The necessity for filing affidavits of those two Hon"ble Ministers is further emphasised on the ground that fourth respondent, who has filed the affidavit, was not in charge of the portfolio which dealt with the topic of the defence of India and that, therefore, he cannot have any personal knowledge as to the opinion formed by Hon"ble the Chief Minister. Even in regard to his own portfolio which deals with the other topics, petitioners contend that the affidavit of fourth respondent is not sufficient inasmuch as he cannot have any knowledge about the satisfaction of Hon"ble the Home Minister and his affidavit does not disclose that he had seen any endorsement on the record that Hon"ble the Home Minister was so satisfied. They draw attention to the fact that fourth respondent states in his affidavit that the aforesaid two Ministers were satisfied about the necessity to detain petitioners and that thereafter orders of detention were passed. They emphasise the fact that fourth respondent does not say that he was informed by the aforesaid two Ministers that they were so satisfied.

35. Now the correct approach to a question of the aforesaid kind has been indicated by this Court in *Ismailbhai Gafoorbhai Vora v. V.R. Parthsarthy the District Magistrate, Kaira*, and Anr. 6 G.L.R. 382. The learned Chief Justice in delivering the judgment of the Court has made the following observations:

The presumption is that in exercising the power of detention, the authority had acted regularly, i. e., that before making any such order, he had satisfied himself on the materials placed before him that it was necessary to detain the individual

named in the order with a view to preventing him from acting in a manner prejudicial to the public order or public safety. Such a presumption, no doubt, is a rebuttable presumption. But if the petitioner desires to rebut such a presumption, the onus is upon him to show that the order of detention made against him, although on its face it appears to be a valid order, is not in fact what it purports to be and in consequence, his detention is unlawful.

Approaching the question in the aforesaid manner, we are not satisfied that the record discloses that there was no satisfaction of the two Ministers aforesaid. The learned Advocate General states that he had brought all the files relating to all the five petitioners and that he was prepared to show from the files that there were endorsements of both the aforesaid, Ministers authorizing detentions and that the orders of detention were passed thereafter. However, we did not think it necessary to look into the record and we do not, therefore, say anything further on that point. It would not be proper to read the affidavit of fourth respondent in the strict manner in which petitioners want us to read the same. The substance of fourth respondent's affidavit is that the two Ministers were satisfied and the orders were passed after such satisfaction. There is no reason to disbelieve this part of the affidavit of fourth respondent. In any case, the burden is upon petitioners. The record on the aforesaid subject is not such that it can be stated with confidence that the burden has been discharged by petitioners.

36. The next contention of petitioners on the same topic is that, under the law, the satisfaction must not be of the two Ministers, aforesaid but it must be that of the Governor. This contention is based upon Article 154 of the Constitution which says that the executive power of the State shall vest in the Governor. It is, therefore, contended that when Rule 30 of the Rules states that the State Government can take action thereunder, really, it is only the Governor who can take action and not the Ministers. There is no merit in this contention. Article 154 states further that the executive power of the State shall be exercised by the Governor "either directly or through officers subordinate to him in accordance with this Constitution". Moreover, Clause (3) of Article 166 of the Constitution empowers the Government to make rules, for the convenient transaction of the business of the Government or the State and for the allocation among Ministers of the said business. As already indicated, the Governor has made Rules for the conduct of the business of the Government of the State and the affidavit of fourth respondent shows that orders were passed in accordance with those rules. In *Godavari Shamrao Parulekar Vs. State of Maharashtra and Others*, Their Lordships of the Supreme Court upheld a detention order passed in the same way as it has been passed in the present cases. In a case under Rule 26 of the Defence of India Rules, 1939, in AIR 1945 156 (Privy Council) Their Lordships of the Privy Council made the following observations on the same topic in relation to the Government of India Act, 1935, which, in our judgment, are apposite and applicable to the conduct of the governmental business under our Constitution:

The Governor need not be personally satisfied as to the matters set out in Rule

26, Section 2 (5) is merely supplementary, and affords no ground for excluding the ordinary methods by which the Provincial Government's executive business is authorised to be carried on by Chap. 2 of Part 3, Government of India Act, 1935. Matters as those which fell to be dealt with by the Governor under Rule 26, can be dealt with him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chap. 2 of Part 3 of the Act of 1935, and, in particular, under the provisions of Section 49 and the Rules of business made u/s 59.

37. Another point which is raised by petitioners is that the orders of detentions are signed not in the name and by the order of the Governor, but in the name and by the order of the Government of Gujarat. It is contended by them that such an order cannot be taken as properly authenticated as required by Clause (2) of Article 166 and, therefore, it is open for the petitioners to challenge the validity of the detention orders on the ground that they were not made by the Governor. In our judgment, this contention is covered by a direct authority. The same point was raised in *Purushottam Jog Naik's* case, already referred to, and rejected.

38. The next contention of petitioners is that the record discloses that the satisfaction of the Government was in regard to the Left Wing or the pro-Chinese Wing of the Communist Party and not against petitioners. It is contended that, in order to justify an action under Rule 30 of the Rules, the detaining authority must be satisfied against the conduct of the individual proposed to be detained and not against a party. The submission of petitioners that action under Rule 30 can be taken only if the detaining authority is satisfied against the conduct of the individual proposed to be detained, is not disputed by the learned Advocate General. This follows from the language of Rule 30 itself which requires that the detaining authority should be satisfied, "with respect to any particular person". It is true that, in the affidavit of fourth respondent, it is averred that petitioners are active members of the Leftist Communist Party of India; that one of them is the Secretary of the Rajkot District Committee; and that the pro-Chinese attitude of the Leftist faction of the C.P.I. (Communist Party of India) posed and poses a threat to national security and the defence of India. It is further averred that "there was also material with the third respondent to show that the Leftist faction of the C.P.I. was actively engaged in preparation for a violent revolution to overthrow the constitutional Government in the country by taking advantage of public discontent in the country and in the State of Gujarat due to the scarcity of food-stuffs and the rise in prices of all commodities; To achieve this object, the Leftist Communist Party of India was organizing agitations and campaigns all over the State, called "Ahmedabad Bandh" and "Ghera Dalo", which posed a grave threat to the public order. The campaign of "Ghera Dalo" consisted, inter alia, of encircling godowns containing food-stuffs and edible oil belonging to the Government and that of looting the contents thereof for free distribution amongst the public. " Basing their argument upon this part of the affidavit, petitioners contend that the proper action for the State Government was not to

take action against the individual members of the party on the aforesaid grounds but that the proper action was to baa the party under Rule 32 of the Rules, It is contended that, where an action can be taken against a party under Rule 32, an action under Rule 30 against an individual member thereof, is not justified. In our judgment, it is not necessary to record any decision on this aspect of the matter. Even assuming that the aforesaid proposition for which petitioners contend is correct, it is not true to say that action has been taken against petitioners only because they are, as members wedded to that Party. The affidavit of fourth respondent has brought out individual facts and activities against each of the petitioners and the aforesaid part of the affidavit, extracted above, only constitutes the general background in the light of which the individual activities of the petitioners have been reviewed. In our judgment, therefore, there is no substance in this contention of petitioners also.

39. The next contention of petitioners is that the impugned orders of detention were passed in mala fide exercise of the powers of the Government. Their contention is that they have been ordered to be detained not with a view to secure the objectives mentioned in Rule 30, but with a view to suppress the pro-Chinese Wing of the Communist Party, In support of this contention, petitioners rely upon the same circumstances which we have mentioned whilst dealing with their contention that the orders of detention were made at the behest of second respondent. Before we deal with the facts on which petitioners support this contention, it will be convenient to dispose of two preliminary points in connection with the aforesaid plea.

40. Firstly, petitioners say that their plea of mala fides has not been denied from proper quarters and, therefore, it must be taken to have been established. Petitioners advert to the fact that neither second respondent against whom allegations have been made, nor Hon"ble the Chief Minister or Hon"ble the Home Minister have filed affidavits controverting the aforesaid allegation of petitioners. Petitioners submit that whenever there is a plea of mala fides in detention matters and the plea is supported by the affidavit of detenues, such a plea can be countered only by the affidavit or affidavits of the detaining authority and no other. They supplement this argument by stating that the allegations which they have-made are of a political nature and that those allegations cannot properly be dealt with or countered by persons in charge of administration like fourth respondent but that they can only be countered by politicians. In support of the aforesaid general proposition, petitioners rely upon the observations made by Their Lordships of the Supreme Court in Section S. Pratap Singh Vs. The State of Punjab, In that case, Their Lordships pointed out that as allegations of a personal character were made against the Chief Minister, there were only two ways in which they could be repelled, either by showing that the allegations were irrelevant, or, if they were relevant, then, "the allegations could be countered by documentary or affidavit evidence which would show their falsity. In the absence of such evidence, they could be disproved only by the party against Whom the allegations were made denying the same on oath". The second case on which

reliance is placed is the case of C.S. Rowjee and Others Vs. Andhra Pradesh State Road Transport Corporation, In that case also, allegations of a personal character were made against a Minister of the State of Andhra Pradesh. In regard to the necessity for making affidavit by the Minister concerned, Their Lordships observed at page 970 as follows:

In this task which is thus cast on the Courts, it would conduce to a more satisfactory disposal and consideration of them, if those against whom allegations are made came forward to place before the Court either their denials or their version of the matter, so that the Court may be in a position to judge as to whether the onus that lies upon those who make allegation of mala fides on the part of authorities of the status of those with which this appeal is concerned, have discharged their burden of proving it. In the absence of such affidavits or of materials placed before the Court by these authorities, the Court is left to judge of the veracity of the allegations merely on tests of probability with nothing more substantial by way of answer.

However, in our judgment, the aforesaid observations have no application to the facts of the present case. It is important to bear in mind that, in the aforesaid two cases, allegations of a personal character were made against Ministers concerned. This is not a case of that type. In substance, allegation of mala fides is based on the ground that the action of this Government was motivated by a desire to suppress a political party rather than to secure the objectives mentioned in Rule 30 of the Rules. The affidavit of fourth respondent on this subject in regard to the materials which the Government had against each of the petitioners is a sufficient answer on the record of the case to permit this Court to take the view that affidavits of the Ministers concerned were not necessary to be filed. In *The State of Bombay v. Purushottam Jog Naik* 1952 3 S.C. 674 Their Lordships of the Supreme Court observed that it was not necessary in every case to call the Minister in charge and that if the Secretary or any other person has the requisite means of knowledge and his affidavit is believed, that would be enough. In our judgment, having regard to the materials which have been disclosed in the affidavit of fourth respondent, which show that action was taken, not only because petitioners were members of the communist party, but because of the individual actions and the active part which they were taking in the objectives alleged in the affidavit, these facts being those which would ordinarily come to the knowledge of fourth respondent, who is the Home Secretary, it cannot be stated that the allegation of mala fides on the above score had not come to be properly denied.

41. The second preliminary point concerns only petitioner Haroobhai Mehta. It is based upon the verification clause made by fourth respondent in his affidavit in reply. That affidavit consists of fifteen paragraphs. In the verification clause, fourth respondent has stated that what is stated in paragraphs 1 to 9 is true to his personal knowledge and belief and he has not said anything in regard to the rest of the paragraphs. Now the, allegations regarding mala fides have been

dealt with by fourth respondent in paragraphs 9 to 12. Therefore, Haroobhai Mehta's contention is that, in so far as fourth respondent has dealt with the question of mala fides in paragraphs 10 to 12, no weight can be attached to the averments made therein. The aforesaid defect in the verification clause of the affidavit of fourth respondent was disclosed during the course of the arguments. It was sought to be rectified by a farther affidavit dated December 7, 1915 of the fourth respondent. Fourth respondent avers that the verification clause remained incomplete "due to accidental and bona fide mistakes". In that further affidavit, fourth respondent states that what is stated to paragraphs 10 to 15 is also true to his personal knowledge. Haroobhai Mehta very strongly objects to the verification clause being amended as aforesaid. However, we are satisfied that the omission in the verification clause was due to either inadvertence or bona fide mistake. In the first instance, we notice that the verification clause in the affidavits filed in the other four petitions is complete and the affidavits filed by fourth respondent in those four other petitions in regard to the question of mala fides are exactly in the same terms as the averments made by him in the affidavit in Haroobhai Mehta's petition. In the second instance, it is not probable that, if paragraphs 10 to 14 were not true to fourth respondent's knowledge, he should not have stated as to on what basis the other paragraphs were deposed to by him. Thirdly, the affidavit itself begins by stating that fourth respondent was deposing "on solemn affirmation as hereunder", which would mean that the whole affidavit was on solemn affirmation.

42. That brings us to the allegations regarding mala fides. Petitioners try to support their allegation on two or three facts appearing on record, Firstly, they rely upon the facts that petitioners were arrested during the short period of 29th and 30th December 1964 and that, on the same day a large number of members of the pro-Chinese Wing of the Communist Party were arrested too. It is common ground that two of the persons arrested have subsequently been released by the Government. The cases of these two released detenues were reviewed in the ordinary course and they were informed that their detentions were continued, but, all of a sudden, a few days thereafter, they were ordered to be released. Petitioners' contention is that these two persons were so released because they gave an undertaking that they would dissociate themselves from the Communist Party. They submit that this is good evidence in support of their allegation that the detaining authority was out to suppress that They point out that nothing could have reasonably happened within a days after their orders of detention had been continued which could induce the Government to release them unless their allegation that those persons had given an undertaking to the aforesaid effect was true. Fourth respondent, however, has denied that those persons were released because they had given any such undertaking. Petitioners say that, though fourth respondent has denied this, he has not denied that such an undertaking was given by those two persons. In support of this allegation, petitioners say that a press communique was issued by the State Government to that effect on or about 1st July 1965. Fourth respondent, however, denies that



any such press communication was issued. Petitioners rely upon publication of reports by four papers in regard to the release of the two persons and say that these press reports do mention that an undertaking of the aforesaid kind was given by those two persons and in one or two of them, reference is made to the fact that the reports were published on the basis of a press communique. Petitioners further rely upon the fact that one Y.H. Godil and Haroobhai Mehta himself had given undertakings to the State Government that they would not do anything prejudicial to the defence of India and other objectives, but that such an undertaking was not accepted from them and their detentions were continued. We have given our careful thought to what petitioners have to say on the aforesaid topic. In the first instance, there is a controversy between the parties whether the aforesaid two persons had or had not given any undertaking. If there was any press communique on this subject, petitioners could have either produced the same or called upon the respondents to do so. We cannot accept reference to any such alleged press communique in news items in papers as good evidence on the subject. Having regard to the fact that the burden is on petitioners and having regard to the fact that the fourth respondent's affidavit discloses that the detention orders were based on the individual activities and proclivities of petitioners, the burden cannot be stated to be discharged by the aforesaid evidence on which petitioners rely, the facts in regard to which are being denied by respondents.

43. In fact, Haroobhai Mehta, realising that the aforesaid materials may not be sufficient for establishing the plea of mala fides, stated to us that, because of that realisation, he was pressing the application for cross-examination of the fourth respondent. We propose to deal with that prayer just in a moment.

44. The next contention of petitioners is that, in any case, their continued detention after June 26, 1965, was illegal. Petitioners' cases, as already stated, were reviewed under Rule 30-A, Sub-rule (9) of the Rules by the third respondent on that date and their detentions were continued. The aforesaid plea of petitioners is based on two grounds. Firstly, they say that the order of review was mechanical. This submission is based on the fact that the aforesaid two persons whose detention had been ordered to be continued happened to be released by the Government four days later. Petitioners contend that this is evidence of the fact that the original review in regard to those two detainees was not proper. We do not think we can agree with this line of reasoning. In the first instance, there is nothing to show that nothing has happened during the four days after the detention of the aforesaid two persons were continued which could have induced the Government to release those two detainees. In the second instance, even if there is any merit in the suggestion, it can only mean that the review of the orders in regard to the two detainees was improper or mechanical. But it cannot establish their plea that the review in their own cases was improper or mechanical. The plea is further based on that part of the affidavit of fourth respondent wherein he has averred that the State Government decided that the continuance of detention of petitioners is necessary in the interest of the defence

of India, public safety and maintenance of public order. Petitioners' contention is that the expressions "defence of India", "public safety" and "public order" are narrower than the expression "in the interest of the same objectives. They contend that a review must be based on the same grounds on which the original orders of detention are passed and the affidavit of fourth respondent discloses that their detentions were continued, not because their activities were held to be prejudicial to the defence of India, public safety and maintenance of public order, but they were continued "in the interest of those objectives. In rapport of the aforesaid plea, petitioners rely upon the observations of Their Lordships of the Supreme Court in two cases. In *Ramji Lal Modi Vs. The State of U.P.*, Their Lordships have observed that a law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order. In *Virendra Vs. The State of Punjab and Another*, , Their Lordships have observed that the expression "in the interest of makes the ambit of the protection very wide, for a law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil and yet it may have been enacted "in the interests of the public order or the general public as the case may be. In our judgment, the aforesaid two cases have no application to the facts of the present case. The expressions "defence of India", "public safety", and "maintenance of public order" do not stand alone in Rule 30 of the Rules. Action taken under Rule 30 is preventive action and it is taken because the authority concerned is satisfied that it is necessary to do so in order to prevent the proposed detainee "from acting in any manner prejudicial to" the aforesaid objectives. Therefore, action is taken under Rule 30 of the Rules not directly because the aforesaid objectives are prejudiced but it is taken in anticipation of the acts which are likely to be prejudicial to those objectives. If it is stated that under such circumstances action is taken in the interests of the aforesaid objectives, it cannot be said that such expression would not come within the aforesaid expression "from acting in any manner prejudicial to" the defence of India. But petitioners in this regard place reliance upon the case of *A.K. Gopalan v. The District Magistrate Malabar and Anr.* AIR 1949 Mad 596, at page 604, to point out that a similar view was taken in that case in a case arising under the Preventive Detention Act wherein the relevant provision is exactly in the same terms as in Rule 30. However, with great respect, we cannot agree with the latter decision. That decision does not take into account the phrase "with a view to preventing him from acting in any manner prejudicial to the defence of India". Therefore, this contention also deserves to be rejected.

45. Lastly, petitioners make a very strong plea that they should be permitted to cross-examine fourth respondent on the ground that some of the facts which are necessary to establish their plea of mala fides have been denied by fourth respondent and are in controversy. They point out that some of the facts averred by fourth respondent are not quite accurate. Firstly, they contend that it is averred by fourth respondent that 8 campaign for "Ahmedabad Bandh" was started by petitioners' party, They point out that they belong to Rajkot and it is

not possible that they would be concerned with any movement for "Ahmedabad Bandh". Further, they point out that the aforesaid campaign was started in August 1964 and yet none of them was arrested for a number of months thereafter. Secondly, they contend that there is a controversy between the parties relating to the fact that the aforesaid two other detenues were not released on their giving an undertaking to sever their connection with the communist party and whether a press communique to that effect was or was not issued. They also point out that the party is alleged to have started a campaign for looting Government godowns, stocked with edible oil, but they have deposed that, at the relevant time, there was no oil in any Government godown. Petitioners say that, having regard to the handicap from which they suffer and as the burden lies on them to prove mala fides, in the interests of justice, they should be permitted to cross-examine fourth respondent on the aforesaid points. Now, in the first instance, so far as the allegation regarding "Ahmedabad Bandh" is concerned, although an allegation is made by fourth respondent that that was one of the programmes of the Communist Party, the affidavit does not make any allegation that any of the petitioners had participated in that campaign. The participation which is alleged is in regard to the programme of "Ghera Dalo". In the second instance, as we have already stated, the question of a press communique could have been easily proved by production of a copy of the press communique or calling upon respondents to produce the same. As regards the presence of oil, fourth respondent does not say in specific terms that there was oil in Government godowns. All that he says is that the campaign was started by petitioners' party to loot godowns, stocked with edible oil and food-stuffs. In support of their aforesaid plea, petitioners have relied upon AIR 1945 156 (Privy Council) Parkash Chandra Vs. Union of India and Another, and Mohd. Ikram Hussain Vs. State of U.P. and Others, . There is no doubt whatsoever that this Court has power to direct any person filing an affidavit to come up for cross-examination. That power is not in dispute. In fact, the rules of this Court provide that in proper cases oral evidence may be taken. But, at the same time, it is also a fact that such a power is rarely exercised and unless the Court is convinced that, in the interests of justice, such a course is necessary, the Court would not ordinarily in writ petitions enter into controversies of such types and undertake to decide them. None of the aforesaid points on which there is a controversy is of so much consequence as should induce us to order the cross-examination of the fourth respondent. In this connection, we may mention the decision in Digvijaysinhji Hamirsinhji v. H.K. Oza and Anr. 6 G.L.R. 632 a case under the Preventive Detention Act (IV of 1950)-wherein this Court has taken the view at page 637 that since the satisfaction is that of the appropriate authority and not of the Court, it must follow that the Court will not enter into the question whether the materials placed before the authority upon which its satisfaction is founded are true or false.

For the aforesaid reasons, the petitions must fall and must be dismissed.