

(2001) 01 BOM CK 0028

In the Bombay High Court

Case No : Criminal Writ Petition No's. 1063, 1064, 1103, 1117, 1423 of 2000

Shri Vinod Vithal Rane

APPELLANT

Vs

Shri R.H. Mendonca and Others

RESPONDENT

Date of Decision : 25-01-2001

Acts Referred:

Bombay Police Act, 1951 — Section 56
Constitution of India, 1950 — Article 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 107, 109, 110, 149, 151
Explosive Substances Act, 1908 — Section 2
Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 — Section 3(1), 5
National Security Act, 1980 — Section 17
Penal Code, 1860 (IPC) — Section 379, 425

Citation : (2001) BomCR(Cri) 537 : (2001) 2 BOMLR 307 : (2001) 2 MhLj 437

Hon'ble Judges : G.D. Patil, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Shri S.R. Chitnis Amicus Curiae, Mr. U.N. Tripathi, for the Appellant; Shri P. Janardhanan, A.A.G., Mrs. V.K. Tahirramani, P. P. and Ms. Aruna K. Kamath, A. P. P., for the Respondent

Judgement

A. M. Khanwilkar, J.—All these five writ petitions, under Article 226 of the Constitution of India, seek to challenge the respective detention orders passed by Shri R. H. Mendonca, Commissioner of Police, Birhan Mumbai, in exercise of the powers conferred u/s 3(1) of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (hereinafter referred to as the Act 55 of 1981) with a view to prevent the detenus therein from acting in any manner prejudicial to the maintenance of public order.

2. That each of the detenu in the respective writ petition has been detained on the ground that he is a dangerous person of violent character and a weapon wielding desperado indulging in terrorizing activities. The grounds of detention served on each of the detenu mention that they were indulging In criminal

activities and had created a reign of terror in the minds of public in the areas of Geetanagar and areas adjoining thereto within the jurisdiction of Colaba Police Station in Brihan Mumbai, for they were moving armed with deadly weapons such as chopper, knife and sword and did not hesitate to use the same while committing offences such as rioting, assault, extortion, robbery, criminal Intimation and threatening the peace-loving citizens of the aforesaid areas. The grounds of detention specifically mention that the even tempo of life of the citizens in the above areas is badly disturbed as the people in the areas are experiencing a sense of insecurity and are living and carrying on their daily avocation under a constant shadow of fear. The grounds of detention also mention that each of the detenu is a habitual criminal and action taken against him under the normal law of land is found to be ineffective and inadequate to put a stop to his criminal activities which are prejudicial to the maintenance of public order in the said area.

3. The only argument pressed before us in all these writ petitions (grounds 6(n) and (o) of the writ petition) is that the satisfaction recorded in para 5 of the grounds of detention is not based on any valid material; that there is no material on record to show as to whether action under Chapter VIII of the Code of Criminal Procedure, 1973 for keeping peace was initiated against the detenu that there is no material to show that externment proceeding u/s 56 of the Bombay Police Act was ever taken against the detenu. It is contended that in absence of any such action taken under the said laws of land, the Detaining Authority could not have recorded its satisfaction that the normal law of land was ineffective and inadequate to put a stop to the detenu's prejudicial activities. It is thus contended that in absence of the above it would clearly show non-applicable tion of mind on the part of the Detaining Authority, for which reason the detention order is illegal and bad in law. It is further contended that the Detaining Authority having failed to take any action under the provisions of the Criminal Procedure Code and Bombay Police Act, whose impact/ effect is cf lesser evil or minimal with reference to the deprivation of the liberty of a citizen, resorting to an action under detention is not justified. It is further contended that the alleged prejudicial activities of the detenus were confined to the areas under the Colaba Police Station of Bombay; only an action of externment of the detenu from Colaba area or areas adjoining to that area would have been apposite instead of taking action under the preventive law which takes away the liberty of a citizen. It is also contended that there is not even a whisper in the grounds of detention to justify the satisfaction recorded by the Detaining Authority in para 5 of the grounds of detention that action under the normal law of land was ever contemplated by the Detaining Authority before clamping the order of detention and more so when even an action of externment under the Bombay Police Act could have sub served the purpose of preventive action against the detenus on the self same grounds. It is urged on behalf of the Petitioners that externment action under the Bombay Police Act is also a preventive action, as observed by the Apex Court in the case of Pandharinath Rangnekar v. State of Maharashtra.

4. Since the issues raised in these writ petitions, in our view, were quite significant, we thought it appropriate to appoint Shri S. R. Chitnis, Senior Advocate as Amicus Curiae. Shri S. R. Chitnis, advanced arguments mainly in support of grounds 6(n) and (o) articulated in the writ petitions. Arguments of Mr. Chitnis were adopted by Shri U. N. Tripathi, Advocate on record, in all these writ petitions. Moreover, Shri Tripathi suggested that all the writ petitions can be disposed of together because the issue raised is common and that all the five detenus have been detained allegedly being members of the same gang and being involved in the activities which were common to all of them. Shri Tripathi fairly pointed out that besides the points raised in grounds 6(n) and (o) of the writ petitions, no other ground is pressed into service. We may also point out that besides Shri Chitnis and Mr. Tripathi, we had the advantage of the arguments advanced by Shri Shirish Gupte, Senior Advocate, who appeared in one of the writ petition (i.e. W.P. No. 1472 of 2000) which was heard along with these writ petitions, but disposed of by separate judgment and order. While we were hearing the arguments of the Counsel on behalf of the Petitioners, Shri M. R. Kotwal, Advocate, who was following the arguments from the inception, requested the Court to permit him to address the Court. We permitted him to make submissions. The arguments put forward by Shri Kotwal were ad-idem with the stand taken on behalf of the Respondents by the learned Additional Advocate General and the Public Prosecutor appearing before us. We express our gratitude to all the Counsel who appeared before us, particularly Shri Chitnis who agreed to appear as Amicus Curiae, for having made significant contribution to enable this Court to arrive at the view that we have taken in this judgment on the vexed issues raised before us.

5. As aforesaid, the only question pressed on behalf of the Petitioners/ detenus is that the Detaining Authority has mechanically recorded his subjective satisfaction in para 5 of the grounds of the detention that the normal law of land is found to be in-effective and inadequate to stop the criminal activities of the detenu which were prejudicial to the maintenance of the public order in the areas in question. According to the Petitioners, the normal law of land, besides the trial by a competent Court for the alleged offences committed by the detenu, would also include preventive action envisaged by the provisions of the Criminal Procedure Code as well as under the provisions of the Bombay Police Act. It is submitted that the authorities were under an obligation to take recourse to the said actions, being of lesser evil; and. the authorities having failed to take recourse to the said action, which are part of the normal law of land, clearly trampled upon the right to liberty of the detenus guaranteed under the Constitution by directly exercising power under M.P.D.A. Act, which, undoubtedly has had grave consequences of absolutely restricting the right or power of locomotion of the detenus. According to the Petitioners, detention under M.P.D.A. ought to have been resorted to as the last resort against the detenu, even assuming that the grounds on which the action is based were germane to the purpose of such action. This submission is based on the premise that in an action under the provisions of the Criminal

Procedure Code the length of detention to prevent the detenu from indulging in the criminal activity is for a lesser period, while in an action of externment under the provisions of the Bombay Police Act the purpose of preventing the detenu from indulging in any criminal activity is achieved and at the same time it does not absolutely restrict the right or power of locomotion of the detenu ;inasmuch as in the later case the detenu is removed only from particular areas and would be free to carry on his avocation as a free and law abiding citizen in other part of the State. According to the Petitioners, in each of the matter on hand, the alleged activities of the detenus are admittedly restricted to the locality of Geetanagar, Navy Nagar, Colaba in the jurisdiction of Colaba Police Station in Brihan Mumbai. To buttress this submission, the learned Counsel for the Petitioners have placed reliance on the legislative history to contend that the law relating to the preventive action u/s 151 of the Criminal Procedure Code as well as Section 56(bb) of the Bombay Police Act was specifically brought into existence by the Maharashtra Prevention of Communal, Anti-Social and Other Dangerous Activities Act, 1980 (Act 7 of 1981). The said Act, according to the Petitioner was brought into existence in addition to the provisions of preventive detention which were in force at the relevant time. It is further contended that it is significant to note that the Maharashtra Prevention of Dangerous Activities of Slumlords. Bootleggers. Drug Offenders Act. 1981 [Act 55 of 1981), which came to be enacted subsequently, merely excludes the operation of the National Security Act, 1980, by virtue of Section 17 of the said Act, but does not specifically exclude the provisions of the Act 7 of 1981. Besides, the Act 55 of 1981, when introduced, did not provide for detention of dangerous persons, but that category was included in the said Act only by way of Maharashtra Amendment Act 29 of 1996. The Petitioners, therefore, contend that action under the Act 55 of 1981 (M.P.D.A.) is only in addition to the preventive action under the provisions of the Criminal Procedure Code and the Bombay Police Act and hence It was incumbent upon the Detaining Authority to first rule out the possibility of the sufficiency or insufficiency of action against the detenu under the said provisions and only thereafter proceed to issue order of detention under the Act 55 of 1981. The learned Counsel has taken us through the statements of objects and reasons for enacting the respective enactment as well as with regard to the necessity of the amendment of 1996 to the said Act 55 of 1981 (M.P.D.A.) to contend that the power u/s 3 of the Act 55 of 1981 should be exercised only when action under other provisions, which arc unquestionably normal laws of land, are resorted to in the first place or else the subjective satisfaction recorded by the Detaining Authority that the normal law of land has become ineffective or inadequate would not be genuine. According to the Petitioners, for the purpose of taking preventive action, the Detaining Authority could have preferred to take action under three different laws. Therefore, it was incumbent upon the Detaining Authority to take action under Act 55 of 1981 only in minimal and exceptional case so that the action could stand the test of judicial scrutiny. In all other situations the subjective satisfaction recorded by the authorities would not be genuine and would suffer from the vice of non-application of mind and at any

rate being unjust, unreasonable and unfair.

6. Shri Gupte, learned Senior Advocate adopted the submission of Shri Chitnis only in part. According to him, the Act 55 of 1981 is a special enactment and applies only in respect of the specified persons mentioned therein. He submits that every offender is not a specified person, as defined under the Act 55 of 1981, but every specified person is necessarily an offender. According to him the provisions of Act 55 of 1981 would apply to special situations, whereas the provisions of the Bombay Police Act or the Code of Criminal Procedure do not over-lap with the provisions of Act 55 of 1981. Shri Gupte contends that it is wholly unnecessary for the Detaining Authority to record subjective satisfaction that the normal law of land has become ineffective or inadequate inasmuch as the Act 55 of 1981 is attracted only in special situation. In other words, in his view, the sine qua non for invoking the powers under the Act 55 of 1981 is that the normal law of land has failed or has become inadequate or Ineffective to prevent the specified persons in the said Act from indulging in criminal activity which would tend to prejudicially affect the maintenance of the public order. He submits that the very nature of definition of the specified persons under the Act 55 of 1981 would indicate that they are not ordinary persons but special persons to be dealt with in special manner. Inasmuch as, the said Act applies only to Slumlords, Bootleggers, Drug Offenders and Dangerous Persons, who are menace to the even tempo of the Society. He, therefore, submits that it is not necessary for the Detaining Authority to record satisfaction that the normal law of land has become ineffective or inadequate, but once the Detaining Authority records such a satisfaction in the grounds of detention then the same will have to be justified by pointing out from the grounds that there was some material before the Detaining Authority to that effect and further that such material should have been made available to the detenu along with the grounds of detention to enable the detenu to make an effective representation.

7. The learned Additional Advocate General firstly submitted that the field of jurisdiction of each enactment Is separate and not coextensive nor they are alternative. According to him the Act 55 of 1981 is a piece of legislation, which specially deals with specific type of persons; and, is enacted with a view to prevent those persons from engaging in criminal activities which would prejudicially affect the maintenance of the public order. He contends that although Section 151 of the Criminal Procedure Code and section 56 of the Bombay Police Act came to be amended by Act 7 of 1981, but the scope of the said enactment is very restricted and far too general. According to him, although Section 17 of the Act 55 of 1981 has only excluded the application of National Security Act to the specified persons, but that ipso facto cannot mean that the amended provisions of the Criminal Procedure Code or the Bombay Police Act would govern the field with regard to the specified persons mentioned in the Act 55 of 1981. The learned Additional Advocate General has placed reliance on the decisions of the Apex Court as well as of our High Court to contend that action u/ s 151 of the Criminal Procedure Code or Section 56 of the Bombay Police Act and

preventive detention under the provisions of the Act 55 of 1981 are absolutely incomparable situations. The learned Additional Advocate General contends that the amendment of 1996, whereby one more category of specified person came to be included in the Act 55 of 1981, being Dangerous Persons, on account of repeal of TADA Act, as the said category of persons were incapable of being dealt with under the normal law of land. According to him the subsequent introduction of M.C.O.C.A. 1999; though contains *pari materia* provisions of TADA repealed Act, in no way would affect the application of Act 55 of 1981 to the persons encompassed within the definition of Dangerous Persons under the said Act. He contends that the amendment of 1996, whereby the category of "Dangerous Persons" came to be included should be construed as permanent legislation and subsequent enactment of M.C.O.C.A. Act would not make any difference to the application of the Act 55 of 1981 to the said category of persons, albeit covered under M.C.O.C.A. Act. He contends that the field of operation of M.C.O.C.A. Act is not coextensive or alternative to the Act 55 of 1981 but the Act of 55 of 1981 would apply whenever the authority is subjectively satisfied that it was essential to detain the specified person to prevent him from indulging in any criminal activities that would prejudicially affect the maintenance of the public order. It is further argued on behalf of the Respondents that once the power is exercised under the said Act it presupposes that the Detaining Authority was subjectively satisfied that normal laws of land had become ineffective or inadequate for which reason it was necessary to detain the specified person under the said Act. In such a situation, it is contended that, even if the Detaining Authority records in the grounds of detention that the normal law of land has become ineffective or inadequate, such observation would be wholly superfluous. It is, therefore, contended that it is unnecessary for the Detaining Authority to refer to any material in the grounds or to furnish such material to the detenu. This submission is made on the premise that the Respondents are justified in their first submission that the Act 55 of 1981 is a special enactment and intended to deal with special persons. It is also contended that assuming that the Detaining Authority was under an obligation to justify the subjective satisfaction recorded that the normal law of land has become ineffective or inadequate, then it is open to the Detaining Authority to indicate the material, which would be in the nature of particulars, either in the grounds of detention or by way of affidavit that would be filed before the Court. It is contended that the affidavits filed before this Court in the present matters specifically assert that the Detaining Authority was aware that the provisions of preventive action under the Criminal Procedure or the Bombay Police Act would be inadequate and ineffective and there is no reason to doubt the explanation so offered on affidavit.

8. Having regard to the rival submissions, we would first proceed to examine the contention as to whether it is imperative for the Detaining Authority to first explore the possibility of sufficiency or Insufficiency of invoking the preventive action under the provisions of the Criminal Procedure Code or the Bombay Police Act. This question, in our view, is no more *res integra*. It is not necessary for us

to multiply the various decisions referred by both the sides, for, in our view, the question is clearly covered by the decision of the Apex Court in *Borjahan Gorey v. State of West Bengal*. In the said judgment, the Apex Court, in para 3 thereof, has reproduced the very contention raised before us and has negated the same. The argument advanced before the Apex Court on behalf of the detenu was that the grounds on the basis of which the Impugned detention order has been made disclosed facts which would squarely come within the purview of sections 109 and 110 of the Criminal Procedure Code and therefore the Petitioner should have been properly proceeded under those Sections than u/s 3 of the Maintenance of National Security Act, 1971. In para 4 of the decision, the Apex Court, considered the said question and has observed thus :-

The preventive detention provided by the Act is apparently designed to deal urgently and effectively with the more serious situation, inter alia, affecting the security of India and the maintenance of public order as contemplated by Section 3 of the Act. The liability of the detenu also to be tried for commission of an offence or to be proceeded against under Chapter VIII of the Code of Criminal Procedure which deals with prevention of less serious disturbances and requires execution of bonds on the basis of the acts disclosed in the grounds do not in any way as a matter of law affect or Impinge upon the full operation of the Act. The reason is obvious. Judicial trial for punishing the accused for the commission of an offence "as also" preventive security proceedings in a Criminal Court against a person merely for keeping the peace or for good behaviour under Chapter VIII of the Code of Criminal Procedure, we may appropriately point out, is a jurisdiction distinct from that of detention under the Act, which has in view, the object of preventing the detenu from acting in any manner prejudicial inter alia to the security of the State for maintenance of public order. The fields of these two jurisdictions are not coextensive nor are they alternative. The jurisdiction under the Act may be invoked, when the available evidence does not come up to the standard of Judicial proof but it otherwise cogent enough to give rise to suspicion in the mind of the authority concerned that there is a reasonable likelihood of repetition of past conduct which would be prejudicial inter alia to the security of the State or the maintenance of public order or even when the witness may be frightened or scared of coming to Court and deposing about past acts on which the opinion of the authority concerned is based. This jurisdiction is sometimes called the jurisdiction of suspicion founded on past incidents and depending on subjective satisfaction. The jurisdiction for trial or for preventive proceedings under Chapter VIII. Code of Criminal Procedure cannot be successfully Invoked in such a situation. In other words a case under the Code of Criminal Procedure whether punitive or preventive depends on the proof of objective facts which have already taken place whereas a case under the Act providing for preventive detention depends on the subjective satisfaction of the authorities concerned of the likelihood of the person to be detained to act in future in a manner similar to the one seen from his past acts. The authorities mentioned in Section 3(2) which include the District Magistrate are, in our view,

best suited to decide whether it is necessary to proceed under the Act which decision rests on their subjective satisfaction. The grounds of detention relate to the past acts on which the opinion as to the likelihood of the repetition of such or similar acts is based and those grounds are furnished to the detenu to inform him as to how and why the subjective satisfaction has been arrived at so as to enable him to represent against them. The fact, therefore, that a prosecution under the Code could also have been launched is not a valid ground for saying that it precludes the authority from acting under the Act. This contention is thus devoid of merit. We have discussed this aspect somewhat elaborately so as to eliminate any misunderstanding of the true import of our decision and to exclude the possibility of any impression that the Act vests in the authority power to select one or the other course dealing with the same or exactly similar situation."

The above decision has been followed by the Apex Court in *In Mohd. Subrati @ Mohd. Karim v. State of West Bengal*. Similar contention was advanced before the Apex Court in the said decision, as is evident from para 3 thereof. The Apex Court repelled the same by following the principle enunciated in *Borjahan Gorey's case* [supra]. It would be useful to advert to the relevant portions from paras 3 to 8, which are reproduced thus :-

"3. The only submission passed by Shri Jagmohan, the learned Counsel appearing as *amicus curiae* in support of the writ petition, in assailing the order of detention is that, according to the return itself, two cases for theft of copper wires u/s 379 of the I. P. C. were registered against the petitioner and others at the Asansol Police Station (Case No. 16 dated 6th January, 1972 and Case No. 20 dated 12th January, 1972), but as the witnesses examined u/s 161 of the Cr. P. C. were reluctant to depose against the petitioner and his associates for fear of danger to their lives, the Investigating Officer submitted as true, his final report suspecting the petitioner and his associates. The order of detention was for this reason described by Shri Khanna as *mala fide* and, therefore, liable to be quashed. According to the learned counsel in such cases criminal trial is the only course open to the State and no order of detention is legally competent. The counsel added that if the criminal trial fails or the case is not launched because it is liable to fail, the State has to remain content with the result. It cannot deprive the suspected person of his liberty under the Act. We are unable to accept this contention.

4

The emergent requirement for such a law would be obvious from the fact that before its enactment it had been considered necessary to promulgate the Maintenance of Internal Security Ordinance, 1971 which was replaced by the present Act. u/s 3(1) of the Act. the Central Government or the State Government may, if satisfied with respect to any person, that with a view to preventing him from acting in any manner prejudicial to, *inter alia*, the security of the State or the maintenance of supplies and services essential to the community, it is necessary to do so, make an order directing that such person be

detained. Sub-section (2) of this section authorises District Magistrates and certain other officers, if satisfied as above to exercise the power conferred by sub-section (1). It is quite clear that this section carries out the statutory purpose of preventive detention and it was nothing to do with trial and punishment of persons for commission of offences. Indeed, it is precisely because the existing law providing, for the punishment of persons accused of commission of offences and, for prevention of offences, is not found adequate for dealing with the situation for effectively preventing, in the interest of national security etc. the commission of prejudicial acts in future, that the provisions of this Act were enacted and are intended to be utilised. If, therefore, for any reason it is not possible to successfully try and secure the conviction and imprisonment of the persons concerned for their past activities, which amount to an offence, but which are also relevant for the satisfaction of the Detaining Authority for considering it necessary that a detention order u/s 3 be made for preventing such persons from acting in a prejudicial manner as contemplated by that section, then, the Act would indisputably be attracted and a detention order can appropriately be made. The detention order in such a case cannot be challenged on the ground that the person ordered to be detained was liable to be tried for the commission of the offence or offences founded on his conduct, on the basis of which, the detention order has been made or that proceedings under Chapter VII Cr. P. C. could be initiated against him. The object, scheme and language of the Act is clearly against the petitioner's submission. The Act creates in the authorities concerned a new jurisdiction to make orders for preventive detention on their subjective satisfaction of grounds of suspicion of commission in future of acts prejudicial to the community in general. This jurisdiction is different from that of judicial trial in Courts for offences and of judicial orders for prevention of offences. Even unsuccessful Judicial trial or proceeding would, therefore, not operate as a bar to a detention order, or render it malafide. The matter is also not *res integra*.

5. Indeed, while dealing with the Defence of India Rules which also empowered the Government of India to make orders of preventive detention this Court in *Sahib Singh Dugal v. Union of India*, repelled a similar contention in the following words :

"The next contention on behalf of the petitioners is that the order is mala fide. The reason for this contention is that it was originally intended to prosecute the petitioners u/s 3 of the Official Secrets Act and when the authorities were unable to get sufficient evidence to obtain a conviction they decided to drop the criminal proceedings and to order the detention of the petitioners. This by itself is not sufficient to lead to the inference that the action of the Detaining Authority was malafide. It may very well be that the executive authorities felt that it was not possible to obtain a conviction for a particular offence under the Official Secrets Act, at the same time they might reasonably come to the conclusion that the activities of the petitioners which had been watched for over two years before the order of detention was passed were of such a nature as to justify the order of

detention. We cannot infer merely from the fact that the authorities decided to drop the case under the Official Secrets Act and thereafter to order the detention of the petitioners under the Rules that the order of detention was mala fide. As we have already said, it may not be possible to obtain a conviction for a particular offence; but the authorities may still be justified in ordering detention of a person in view of his past activities which will be of a wider range than the mere proof of a particular offence in a Court of Law. We are not therefore prepared to hold that the orders of detention in these cases were mala fide."

This decision was followed by this Court in *Mohd. Salim Khan v. C. C. Base*. A similar view was also taken by this Court in *Borjahan Gorey v. State of West Bengal*, where it was observed).

6. The grievance that the petitioner ought to have been proceeded against in a Court of law and that the Investigating agency did not put him on a regular trial for want of evidence can thus be no bar to his detention. If the Detaining Authority under the Act is satisfied that it is necessary to make the order of preventive detention on the grounds contemplated by the Act.

7. The grounds on the basis of which the petitioner has been detained are clear, relevant and germane to the object and purpose for which preventive detention is authorised by the Act.

8. No doubt, the right to personal liberty of an individual is jealously protected by our Constitution but this liberty is not absolute and is not to be understood to amount to licence to indulge in activities which wrongfully and unjustly deprive the community or the society of essential services and supplies. The right of the society as a whole is, from its very nature, of such greater importance than that of an individual. In case of conflict between the two rights, the individual's right is subjected by our Constitution to reasonable restrictions in the larger interests of the society."

9. The Respondents have also relied on the decision of the Division Bench of this Court in *Shahaji Vishnu Lokhande v. M.P. Mirgali*, wherein this Court has held that the arrest u/s 151 of the Code of Criminal Procedure Code is neither punitive nor can it be equated with the preventive detention. This Court has already taken the view that such an arrest is made only to prevent the commission of cognizable offences and it would not be correct to say that arrest to prevent the commission of cognizable offence will amount to preventive detention as understood by Article 22 of the Constitution of India. It would be apposite to reproduce the conclusion reached by this Court that :

"Section 151 of the Code is part of Chapter XI which deals with preventive action of the police- Section 149 lays down that every Police Officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence. The power to arrest is conferred by Section 151 to prevent the commission of cognizable offences. Such an arrest is neither punitive nor can it be equated with preventive detention. It is an arrest

made to prevent the commission of cognizable offences. In support of his contention, Shri Rane has placed reliance upon the decision of the Supreme Court in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (Supra) wherein distinction between "punitive detention" and "preventive detention" is made clear. However, in *Madhu Limaye's* case, the Supreme Court has also recognized a third category of detention. The area and field covered by preventive detention and this category of detention are clearly different and distinct and cannot be confused with each other. Therefore, it will not be correct to say that an arrest to prevent the commission of a cognizable offence u/s 151 of the Code of Criminal Procedure, which is merely a preventive action of the police, will amount to preventive detention as understood by Article 22 or Entry 3 of List III of the Seventh Schedule."

10. Having regard to the law enunciated in the abovesaid decisions, in our view, the question raised on behalf of the Petitioners that it was incumbent upon the Detaining Authority to take recourse to preventive action under the provisions of the Criminal Procedure Code or the Bombay Police Act is only stated to be rejected. The principle enunciated by the Apex Court in the aforesaid decisions, as well as by this Court, which has been reproduced above, is that the law relating to preventive action under the Criminal Procedure Code is not coextensive or alternative to the preventive detention. There is no material distinction between the provisions of the Maintenance of Security Act, which the Apex Court considered in the above decision, and the provisions of Act 55 of 1981. The purpose and intent of both the enactments is more or less similar, namely, to the extent of detaining a person with a view to prevent him from acting in any manner prejudicial to the maintenance of the public order. The preventive action under the provisions of the Criminal Procedure Code, as observed by the Apex Court, as well as by this Court, stand on a totally different footing and cannot be equated with the preventive detention under the Act 55 of 1981. In our view, similar position would emerge while considering the provisions of Section 56 of the Bombay Police Act. No doubt the Apex Court in *Pandharinath Rangnekar v. State of Maharashtra*, has observed that Section 56 of Bombay Police Act can be Invoked, if and only if, the authority concerned is satisfied that witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property. The Apex Court has further observed In para 9 of the said decision that there is brand of lawless element in society which is impossible to bring to book by established method of judicial trial because in such trials there can be no conviction without legal evidence. And legal evidence is impossible to obtain, because out of fear of reprisals witnesses are unwilling to depose in public. The Apex Court in the above judgment, while referring to the decision of *Hari Khemu Gawali v. The Deputy Commissioner of Police, Bombay and Anr.* in which Justice Sinha speaking for the majority, observed :

"The grounds available to an examinee had necessarily to be very limited in their scope because if evidence were available which could be adduced in public, such

a person could be dealt with under the preventive sections of the Code of Criminal Procedure, for example, u/s 107 or Section 110. But the special provisions now under examination proceed on the basis that the person dealt with under any of the Section 55, 56 or 57 is of such a character as not to permit the ordinary laws of the land being put in motion in the ordinary way, namely, of examining witnesses in open Court who should be cross-examined by the party against whom they were deposing. The provisions we are now examining are plainly intended to be used in special case requiring special treatment, that is, case which cannot be dealt with under the preventive sections of the Code of Criminal Procedure."

11. Placing strong reliance on this observations. Shri Chitnis. Amicus Curiae, vehemently submits that the provisions of the Bombay Police Act are also intended to be used in special cases requiring special treatment; and, therefore, even if the provisions of the Code of Criminal Procedure were not to be treated as being equated with action of preventive detention under Act 55 of 1981, however, action u/s 56 of the Bombay Police Act was sufficient and would ensure same purpose and rigours of preventive detention of the Act 55 of 1981. According to him, since the activities of the detenus were restricted to the locality falling under the jurisdiction of one Police Station, even though the activities were of serious nature, there was no reason for the Detaining Authority not to take recourse to preventive action u/s 56 of the Bombay Police Act to remove the detenus far away from the said areas which would have achieved the same purpose of preventing them from indulging in any activities that would prejudicially affect the maintenance of public order. The learned Counsel placed emphasis on the provisions of section 56(bb) of the Bombay Police Act to contend that the said provisions would cover the specified persons particularly the category of "Dangerous Persons". This argument in the first blush seemed to be attractive, but on close examination of the provisions of the Bombay Police Act it would be seen that maintenance of public order envisaged by clause (bb) of Section 56 is one which is defined in the Maharashtra Act 7 of 1981. Definition of acting in any manner prejudicial to the maintenance of the public order envisaged in Act 7 of 1981 reads thus :

"2. Definitions -

In this Act. unless the context otherwise requires, -

"acting in any manner prejudicial to the maintenance of public order" means -

propagating, promoting, or attempting to create, or otherwise functioning in such a manner as to create, feelings of enmity or hatred or disharmony on grounds of religion, race, caste, community or language of any persons or class of persons:

(ii) making preparations for using, or attempting to use, or using, or instigating, inciting or otherwise abetting the use of any lethal weapons (including firearms and explosives, inflammable or corrosive substances), where such preparations, using, attempting, instigating, inciting or abetting, disturbs, or is likely to disturb

public order:

(iii) attempting to commit, or committing, or instigating, inciting or otherwise abetting the commission of mischief within the meaning of section 425 of the Indian Penal Code in respect of public property or means of public transportation, where the commission of such mischief disturbs, or is likely to disturb, public order;

(iv) committing offences punishable with death or Imprisonment for life or imprisonment for a term extending to seven years or more, where the commission of such offences disturbs, or is likely to disturb, public order.

Explanation - In this clause -

(A) "firearms" shall have the same meaning as in the Arms Act, 1959;

(B) "explosive substances" shall have the same meaning as in the Explosive Substances Act. 1908;

(C) "public properly" means any property owned or controlled by the Government or by a Corporation owned or controlled by the Government or by a society financed wholly or substantially by the Government;

(b) "detention order" means an order made u/s 3:

(c) "detenu" means a person detained under a detention order."

Now if the said definition is compared with the definition of the same expression in Act 55 of 1981 (M.P.D.A.). there is qualitative and perceptible difference between the two. The definition of the same expression in Act 55 of 1981 reads thus :-

"2. In this Act, unless the context otherwise requires -

(a) "acting in manner prejudicial to the maintenance of public order" means" any

(i) in the case of a slumlord, when he is engaged, or is making preparations for engaging, in any of his activities as a slumlord, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(ii) in the case of a bootlegger, when he is engaged, or is making preparations for engaging, in any of his activities as a bootlegger, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(iii) in the case of a drug-offender, when he is engaged, or is making preparations for engaging, in any of his activities as a drug-offender, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(iv) in the case of a dangerous person, when he is engaged, or is making preparation for engaging, in any of his activities as a dangerous person, which affect adversely, or are likely to affect adversely, the maintenance of public order.

Explanation - For the purpose of this clause (a), public order shall be deemed to have been affected adversely, or shall be deemed likely to be affected adversely infer alia, if any of the activities of any of the persons referred to in this clause directly or indirectly, is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity, among the general public or any section thereof, or a grave or widespread danger to life or public health;" (emphasis supplied)

12. Besides the aforesaid provision it would be apposite to examine the definition of specified persons as appearing in Section 2(b), (b1), 2(e) and 2(f) which read thus :

"(b) "bootlegger" means a person, who distills, manufactures, stores, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other Intoxicant In contravention of any provisions of the Bombay Prohibition Act, 1949 and the rules and orders made thereunder or of any other law for the time being in force or who knowingly expends or applies any money or supplies any animals, vehicle, vessel or other conveyance or any receptacles or any other materials whatsoever in furtherance or support of the doing any of the above mentioned things by or through any other person, or who abets in any other manner the doing of any such thing;

2(b-1) "dangerous person" means, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959.

(e) "drug-offender" means a person, who manufacture, stocks, imports, exports, sells or distributes any drug or cultivates any plant or does any other thing in contravention of any provisions of the Drugs and Cosmetics Act, 1940 or the Dangerous Drugs Act, 1930 or the rules and orders made under either Act or of in contravention of any other law for the time being in force, or who knowingly expends or applies any money in furtherance or support of the doing of any of the abovementioned things by or through any other person, or who abets in any other manner the doing of any such thing;

(f) "slumlord" means a person, who illegally takes possession of any lands [whether belonging to Government, local authority or any other person) or enters into or creates illegal tenancies or leave and licence agreements or any other agreements in respect of such lands, or who constructs unauthorized structures thereon for sale or hire, or gives such lands to any persons on rental or leave and licence basis for construction, or use and occupation of unauthorized structures, or who knowingly gives financial aid to any persons for taking illegal possession of such lands, or for construction of unauthorized structures thereon, or who collects or attempts to collect from any occupiers of such lands rent, compensation or other charges by criminal intimidations, or who evicts or attempts evict any such occupiers by force without resorting to the lawful

procedure, or who abets in any manner the doing of any of the abovementioned things";

13. As observed earlier, the Act 55 of 1981, being a special enactment, will have to be preferred while dealing with the specified persons, for the same has been enacted with a view to prevent such class of persons from indulging in any activities so as to prejudicially affect the maintenance of public order. No doubt section 56(bb) would also apply to special persons; and is intended to take special action, but once a person qualifies the definition of a specified person under the Act 55 of 1981, then, inevitably, in the larger public interest, the said person will have to be dealt with in accordance with the provisions of Act 55 of 1981 and in no other manner provided the Detaining Authority records satisfaction regarding the necessity to detain that person to prevent him from indulging in any activity which would tend to prejudicially affect the maintenance of public order. The Act 55 of 1981 is a special enactment for preventive detention of the said persons and for matters connected therewith. If we were to take any other view that would only negate the object and purpose of the enactment of the Act 55 of 1981. While construing the Act 55 of 1981, we have no doubt that the rule of purposive construction of the Statute will have to be borne in mind. Further, if the contention advanced by the Petitioners were to be accepted, in our view, it would give rise to avoidable uncertainty and friction in the system which the statute purports to regulate. It would be apposite to refer to the classic observations of Lord Shaw in the case of *Shannon Realities Ltd. v. St. Michel (Ville De)*, which reads thus :

"Where words of a statute are clear, they must, of course, be followed but in their Lordship's opinion, where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system".

We have no hesitation in observing that no Court can stultify the provisions of a special enactment or render the same otiose by an interpretative process, unless the enactment deserves to be struck down on the ground of legislative incompetence. The legislative competence to enact Act 55 of 1981 has already been tested by this Court (See 1981 (84) Bom. L. R. 13 - Shivaji Chavan's case). The said question is no more *res integra*. In this view of the matter it is not possible to countenance the challenge to the order of detention in question on the ground that the Detaining Authority before recording subjective satisfaction that the normal law of land has become ineffective or inadequate has failed to explore the possibility of invoking the provisions of either the Criminal Procedure Code or section 56 of the Bombay Police Act. We have no hesitation in concluding that the Act 55 of 1981 is a special enactment intended to deal with special situation and specified persons in the said Act in a special manner. *A fortiori*, once a person fulfills the requirements of the definition of a specified

person under the Act 55 of 1981 It is not open to the Detaining Authority to exercise the authority arbitrarily to select one or the other course even while dealing with same or exactly similar situation. We would reach at this conclusion on the basis of observations of the Apex Court in the decision of Borjahan Gorey's case (supra).

14. Accordingly, we have no other option but to reject the petitioners' contention in ground Nos. 6(n) and 6(o) that there was no material on record to show as to whether Chapter VIII of the Code of Criminal Procedure Code for keeping peace were initiated against the detenu or that there was no material to show that externment proceedings u/s 56 of the Bombay Police Act were taken against the detenu. Merely because such action had not been initiated against the detenu before taking recourse to the preventive detention under the Act 55 of 1981, that by itself would not affect the subjective satisfaction recorded by the Detaining Authority that normal law of land has become ineffective and inadequate. As observed above, once the person fulfills the requirement of the definition of a specified person under the Act 55 of 1981, then it would presuppose that the normal law of land has become ineffective or inadequate qua that person and that there is no other option but to take recourse to the powers under Act 55 of 1981. In our view, non-mentioning of action taken under Criminal Procedure Code or Bombay Police Act in the grounds of detention, ipso facto, would not render the detention order bad or illegal. It is wholly irrelevant whether the Detaining Authority took any preventive action under the said provisions before resorting to preventive detention under the Act 55 of 1981, for such situation would clearly run counter to the observations of the Apex Court in Borjahan Gorey's case.

15. Now coming to the other facet of argument advanced on behalf of the detenus that the Detaining Authority having recorded its subjective satisfaction in para 5 of the grounds of detention that normal law of land has become ineffective or inadequate, the Detaining Authority should justify the same from the grounds of detention or on affidavit, it is well settled that it is enough for the Detaining Authority to record awareness about such a situation and it would be open to the Detaining Authority to supplement the particulars on affidavit. In the present case, there is no dispute that in para 5 of the grounds of detention the Detaining Authority has recorded subjective satisfaction that normal law of land has become Ineffective and inadequate against the detenus. This would indicate that the Detaining Authority was cautious and aware about this position while recording his subjective satisfaction. The detenus at no point of time insisted for particulars about this aspect of the matter from the Detaining Authority and therefore it was not open for them to agitate before this Court on that count. Nevertheless, when the point was raised, the Detaining Authority has filed affidavit and specifically placed on record that he had considered the fact that invocation of the provisions of the Criminal Procedure Code or Section 56 of the Bombay Police Act would be wholly inadequate and ineffective qua the detenus. There is no reason to doubt the correctness of this assertion. The Court cannot

sit over the subjective satisfaction recorded by the Detaining Authority. There is no material on record to rebut the said fact. In the circumstances, even this question raised on behalf of the detenus that subjective satisfaction recorded by the Detaining Authority is not genuine cannot be entertained. In our view, the subjective satisfaction once recorded by the Detaining Authority cannot be lightly interfered with by the Court. In any case, by virtue of provisions of Section 5A of the Act, even assuming that the subjective satisfaction recorded by the Detaining Authority that normal law of land is inadequate or ineffective - is a ground of detention, as contended on behalf of the detenus, even then the impugned order cannot be quashed and set aside.

Section 5A of the Act reads as under :-

"5A. Where a person has been detained in pursuance of an order of detention u/s 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly -

(a) Such order shall not be deemed to be invalid or inoperative merely because one or some of the ground is or are -

(i) Vague,

(ii) non-existent,

(iii) Not relevant

(iv) Not connected or nor proximately connected with such person, or

(v) Invalid for any other reason whatsoever,

and it is not, therefore, possible to hold that the State Government or an officer mentioned In sub-section (2) of section 3 making such order would have been satisfied as provided in section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) The State Government or such officer making the order of detention shall be deemed to have made the order of detention under the said section 3 after being satisfied as provided in that section with reference to the remaining ground or grounds."

Section 5A postulates that the order shall not be deemed to be Invalid or inoperative merely because of the specified infirmity in one or some of the grounds. Admittedly, in the present matter the other grounds on which the detention order has been passed against the detenus have not been challenged before us. In other words, the other grounds of detention have gone unchallenged. A fortiori, even if we were to accept the argument advanced on behalf of the detenus that the subjective satisfaction recorded by the Detaining Authority is invalid and bad, even then the detention order cannot be quashed and set aside by virtue of provisions of Section 5A of the Act. Taking any view of the matter the challenge to the detention order in all these cases would fail.

Accordingly, in our view, it is wholly unnecessary to burden our judgment with all other shades of arguments advanced on behalf of the detenus, for the present petitions would any way fail as the detention order will be deemed to have been made separately on each of the grounds and which have not been challenged.

16. In all fairness to Shri S. R. Chitnis, learned Amicus Curiae we may point out that he propagated a view, which at one stage we thought was a possible view, but for the authoritative pronouncement of the Apex Court on the point in issue. Since we have rested our judgment mainly on the decision of the Apex Court on the main issue, we think it unnecessary to address ourselves to all shades of arguments advanced before us. We have therefore not even highlighted the various decision relied upon by Shri Chitnis, for we thought that it would be inapposite to answer all other question posed before us. Nevertheless, we would only mention the citations of the said decisions referred to by Shri Chitnis, to complete the record. The said decision are :-

- (1) Pandharinath Rangnekar v. State of Maharashtra, & Anr.
- (2) Gurbachan Singh v. State of Punjab,
- (3) Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others,
- (4) Balu Dombé v. D. M. Pandharpur.
- (5) A. K. Roy v. U. O. I.
- (6) Francis Coralie Mullin v. U. T. of Delhi,
- (7) Sampat Prakash v. State of J & K.,
- (8) Prabhu Dayal Deorah v. D. M. Kamrup.
- (9) Rashid Miya v. Police Commissioner.
- (10) Shahaji Vishnu Lokhande Vs. M.P. Mirgali,
- (11) Mushtaq Shaikh v. State of Guj.
- (12) Kundanbhai Shaikh v. District Magistrate, Ahmedabad.
- (13) Abhay Shridhar Ambulkar v. S. V. Bhavé, Commissioner of Police and others.
- (14) Gurdial Singh v. State of Punjab.
- (15) Binod Singh v. D. M. Dhanbad.
- (16) Sadhu Roy v. State of W. B.
- (17) Jagannath Misra v. State of Orissa.
- (18) Dulal Roy v. The District Magistrate Burdwan and Ors.
- (19) Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority.

(20) Chautala Workers Co-operative Transport Society Ltd. and Another Vs. State of Punjab and Others,

(21) Raj Kumar Singh v. State of Bihar.

(22) Khudiram Das v. State of W. B.

(23) Sunil Fulchand Shah v. U. O. I.

(24) Gopalan Chary v. State of Kerala.

On the other hand Shri Gupte, learned Senior Advocate placed reliance on the decision of the Apex Court in Ajay Dixit Vs. State of U.P. and Others, whereas, Shri Kotwal referred to the decision reported in Mohammad Ali Vs. Sri Ram Swarup and Others, and Haradhan Saha Vs. The State of West Bengal and Others, . The learned Addl. Advocate General and the Public Prosecutor appearing for the Respondents relied upon the following decisions.

1. Borjahan Gorey v. State of W. B.

2. Mohd. Subrati @ Mohd. Karim v. State of W. B.

3. Giani Bakshish Singh v. G. O. I.

4. Shivaji Chavan v. Sharwari.

5. Smt. Dagadibai Anand Jadhav Vs. Shri S.C. Malhotra, Commissioner of Police and others,

6. Lawrence Joachim Joseph D'Souza v. State of Bombay.

7. Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal,

8. Haradhan Saha v. State of West Bengal.

9. Biru Mahato v. D. M. Dhanbad.

10. Hawabi Sayed Arif Sayed Hanif v. L. H. Himingliana,

11. Khudiram Das Vs. The State of West Bengal and Others,

12. Naresh Chandra Gangli v. State of W. B.,

13. S. C. Jain v. State of Haryana & Anr.,

14. Life Insurance Corporation of India Vs. D.J. Bahadur and Others,

Besides citing the abovesaid decisions across the Bar, the learned Public Prosecutor has made over four compilations of decisions to counter the submissions advanced on behalf of the Petitioners. However, we do not wish to lengthen this judgment by mentioning all these decisions, for we have already referred to the clinching ones in the foregoing paragraphs of this judgment.

For the aforesaid reasons all the five writ petitions would fail and are thus dismissed.

Rule stands discharged.